

IN THE INCOME TAX APPELLATE TRIBUNAL
Mumbai "A" Bench, Mumbai.

Before Shri B.R. Baskaran (AM) & Shri Rahul Chaudhary (JM)

I.T.A. No. 7899/Mum/2019 (A.Y. 2012-13)

M/s. Arshiya Limited 302, Level-3, Ceejay House, F-Block Shiv Sagar Estate Dr. Annie Besant Worli Mumbai-400 018.	Vs.	DCIT, CC-6(4) Room No. 1925 19 th Floor Air India Building Nariman Point Mumbai-400 021.
(Appellant)		(Respondent)

I.T.A. No. 899/Mum/2020 (A.Y. 2010-11)

I.T.A. No. 901/Mum/2020 (A.Y. 2012-13)

DCIT, CC-6(4) Room No. 1925 19 th Floor Air India Building Nariman Point Mumbai-400 021.	Vs.	M/s. Arshiya Limited 302, Level-3, Ceejay House, F-Block Shiv Sagar Estate Dr. Annie Besant Worli Mumbai-400 018.
(Appellant)		(Respondent)

PAN : AAAC2679A

Assessee by	Shri Piyush Chhajed & Shri Sumit Mantri
Department by	Ms. Sanyogita Nagpal
Date of Hearing	31.08.2023
Date of Pronouncement	31.08.2023

O R D E R

Per Bench :-

The Revenue has filed appeals for A.Y. 2010-11 and 2012-13. The assessee has filed the appeal for A.Y. 2012-13. All these appeals are directed against the orders passed by Ld CIT(A)-54, Mumbai. All these appeals were heard together and are being disposed of by this common order.

2. The facts relating to the case are stated in brief. The assessee is engaged in the business of developing Free trade warehousing - Special economic zone, meant for supply chain management, warehousing end to end freight forwarding, rail transportation and is also engaged in software development. The Revenue carried out survey operation under section 133A of the I.T. Act on 20.01.2014. Subsequently search action was carried out under section 132(1) of the Act on 13.6.2014. Subsequent to the search operation the impugned assessments were completed by the Assessing Officer under section 153A read with section 143(3) of the Act.

3. In A.Y. 2010-11, the Assessing Officer had made addition relating to the alleged commission expenses paid to two concerns u/s 69C of the Act and also disallowed interest expenditure under section 36(1)(iii) of the Act. The learned CIT(A) noticed that A.Y. 2010-11 falls under the category of unabated assessment and above said additions are not based on any incriminating material. Further the learned CIT(A) noticed that the own funds available with the assessee was higher than the interest free loan given by the assessee. Accordingly, in the absence of incriminating material, the learned CIT(A) held that the additions made by the Assessing Officer cannot be sustained. In addition to the above, the learned CIT(A) held that the interest disallowance is not called for since the interest free funds available with the assessee was more than the interest free advances given by the assessee. Accordingly he allowed the appeal of the assessee.

4. In A.Y. 2012-13, the Assessing Officer has made the addition of alleged commission expenses under section 69C of the Act and also disallowed a sum of Rs. 2.41 crores under section 14A of the Act. The learned CIT(A) upheld the addition relating to the alleged commission payment. With regard to the disallowance made under section 14A of the Act, the learned CIT(A) directed the Assessing Officer to restrict the disallowance to the amount of

exempt income earned by the assessee which was Rs. 78,890/-. The revenue has filed the appeal challenging the decision rendered by the learned CIT(A) in giving relief in respect of disallowance made under section 14A of the Act. The assessee has filed the appeal challenging the additions confirmed by the learned CIT(A).

5. It is the submission of the assessee that both the years under consideration fall under the category of “unabated/completed” assessment years. It is the case of the assessee that all the additions made by the AO in both the years are not based on any incriminating materials found during the course of search and hence all the additions made in both the years are liable to be deleted.

6. We noticed earlier that the Ld CIT(A) has deleted the additions in AY 2010-11 on the basis of legal contention referred above. However in AY 2012-13, the assessee did not raise this legal contention before Ld CIT(A) and hence the Ld CIT(A) has adjudicated the issues on merits. Before us, the assessee has raised this legal contention in AY 2012-13 also.

7. We shall examine the legal contentions first. We noticed earlier that the search operations were conducted in the hands of the assessee on 13-06-2014. We notice that the original assessment was completed for AY 2010-11 u/s 143(3) of the Act on 19-03-2013, i.e., prior to the date of search. Hence this year would fall under the category of “unabated/completed” assessment year. For AY 2012-13, the assessee had filed return of income on 29.11.2012. No assessment u/s 143(3) has been passed, but the time limit for issuing notice u/s 143(2) has expired prior to the date of search. The Hon’ble Delhi High Court has held in the case of Chintels India Ltd vs. DCIT (2017)(84 taxmann.com 57)(Delhi) has held that the return filed would become final if no notice u/s 143(2) of the Act was issued within the

limitation period prescribed for issuing the same. Accordingly, the AY 2012-13 would also fall under the category of “unabated/completed assessment”.

8. We shall now examine the question as to whether the additions made in these two years are based on any incriminating material found during the course of search or not? The Ld D.R submitted that the assessee was subjected to survey operations on 20-01-2014 and during the course of survey, it was noticed that the assessee has taken accommodation entries from certain parties with regard to land development works and purchase of software. The survey team took Statement from three parties and it was confirmed by them that they were accommodation entries. Out of the three persons, only one has retracted the statement. Since the assessee had capitalised those accommodation bills, the AO has estimated the commission expenses incurred in procuring those bills at Rs.16,16,099/- and Rs.32,36,656/- and added the same in AY 2010-11. Similarly, commission expenses of Rs.6,18,524/- was estimated and assessed in AY 2012-13. The Ld A.R submitted that the survey proceedings should be considered as part of search proceedings and accordingly contended that the statement taken during the course of survey operations should be considered as the incriminating material. Accordingly, the Ld A.R contended that the addition of commission expenses made in both the years should be sustained. With regard to the disallowance made out of interest expenses, the Ld D.R submitted that the books of accounts revealed that the assessee has given interest free advances to the concerns from whom the assessee had taken accommodation entries. Hence the AO has estimated interest disallowance on the amount so given, since the said parties have given only accommodation entries. Accordingly, the Ld D.R submitted that the disallowance of interest expenditure is also based on incriminating material only. With regard to the disallowance made u/s 14A of the Act, the Ld DR submitted that the assessee has not complied with the provisions of the Act in making disallowance and hence the AO has made disallowance in AY

2012-13. She further submitted that the Ld CIT(A) was not justified in restricting the disallowance to the amount of exempt income. In support of her contentions, the Ld D.R placed her reliance on certain case laws. We shall deal with the same later.

9. Learned AR, on the contrary submitted that the survey operation has taken place on 20.1.2014 and the Assessing Officer has not initiated any action on the basis of statement taken during the course of survey operation. He submitted that the Assessing Officer has also taken statement under section 131 of the Act subsequent to the date of survey but prior to the date of search. He submitted that the addition relating to the commission expenses and interest disallowance has been made in the assessments completed under section 153A of the Act. The undisputed fact is that the search officials did not unearth any incriminating material to support the above said additions. The alleged commission expenses assessed by the Assessing Officer in both the years are wholly on estimate made on the basis of presumptions. Learned AR further submitted that the survey operation in the instant case cannot be considered to be the part of search operations since there is a time gap of six months between the two operations. Learned AR contended that the Assessing Officer has made the assessment under section 153A of the Act and further both the years under consideration are unabated assessments and hence the Assessing Officer could have made any addition in these years on the basis of incriminating material only. In support of this contention learned AR placed reliance on the decision rendered by Hon'ble Supreme Court in the case of *Abhishir Buildwell P Ltd.*

10. We heard the rival contentions and perused the record. Learned DR placed reliance on the decision rendered by Hon'ble Supreme Court in the case of *V.S. Ajitkumar* (2018) 93 taxman.com 294, wherein Hon'ble Supreme Court had held that any material or evidence found or collected in survey

operation, which has been conducted simultaneously at the premises of a connected person can be utilised for making the block assessment in respect of an assessee under section 158BD read with section 158BH of the Act. We noticed that the distinguishing feature in the above said case is that the search operation was conducted in the hands of the assessee before the Hon'ble Supreme Court, which required conducting of a survey operation at the premises of the connected person and further, the survey operation has also been conducted simultaneously alongwith the search. Hence, it obvious that the purpose of survey operation was in order to unearth any incriminating material relating to the person who has been subjected to the search. Under these peculiar set of facts, Hon'ble Supreme Court has held that incriminating material found during the survey operations can be used for making block assessment under section 158BD of the Act. On the other hand, in the instant case, the survey operation was conducted in the hands of the assessee in January, 2014 and the search operation was also conducted in the hands of the assessee only in the month of June 2014. During the course of search operation, no incriminating material relating to the two years under consideration was found. The material used by the AO were admittedly certain statements taken during the course of survey operations and subsequent thereto, but prior to search operations.

11. Accordingly, it has to be held that the additions made by the Assessing Officer in both the years under consideration are not based upon any incriminating material found during the course of search operations. Since both the years under consideration fall under the category of “unabated assessment years”, the Assessing Officer could not have made addition in both years in the absence of any incriminating material relating to the same. The above said decision of ours is based upon the decision rendered by Hon'ble Supreme Court in the case of *Abhishir Buildwell P Ltd* (Civil Appeal No.6580 of 2021 dated 24th April, 2023), wherein it was held as under :

“13. For the reasons stated hereinabove, we are in complete agreement with the view taken by the Delhi High Court in the case of Kabul Chawla (supra) and the Gujarat High Court in the case of Saumya Construction (supra) and the decisions of the other High Courts taking the view that no addition can be made in respect of completed assessments in absence of any incriminating material.

14. In view of the above and for the reasons stated above, it is concluded as under:-

i) to iii).....

iv) in case no incriminating material is unearthed during the search, the AO cannot assess or reassess taking into consideration the other material in respect of completed assessments/unabated assessments. Meaning thereby, in respect of completed/unabated assessments, no addition can be made by the AO in absence of any incriminating material found during the course of search under Section 132 or requisition under Section 132A of the Act, 1961. However, the completed/unabated assessments can be re-opened by the AO in exercise of powers under Section 147/148 of the Act, subject to fulfillment of the conditions as envisaged/mentioned under section 147/148 of the Act and those powers are saved.”

Accordingly, the AO could not have made the impugned additions in the assessment completed u/s 153A of the Act, since no incriminating material relating to both the years under consideration was found during the course of search.

12. Learned DR also placed reliance on the decision rendered by Hon'ble Bombay High Court in the case of Dr. Dinesh Jain (2014) (363 ITR 210) in order to contend that the statement taken during the course of survey operation can be the basis for making addition. However, the said contention may not be relevant, in view of our decision rendered earlier on the legal principle that the addition in 153A assessment of an unabated assessment year can be made on the basis of incriminating material only.

13. In view of the above discussion, we are of the view that the additions made by the Assessing Officer in both the years under consideration are liable to be deleted. We order accordingly.

14. In view of the above decision there is no requirement to adjudicate the issues urged on merit.

15. In the result, both the appeals filed by the Revenue are dismissed and appeal of the assessee is allowed.

Order pronounced in on 31.08.2023.

Sd/-
(Rahul Chaudhary)
Judicial Member

Sd/-
(B.R. Baskaran)
Accountant Member

Mumbai.; Dated : 31/08/2023

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai.
6. Guard File.

//True Copy//

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BY ORDER,

(Assistant Registrar)
ITAT, Mumbai