IN THE INCOME TAX APPELLATE TRIBUNAL, MUMBAI BENCH "G", MUMBAI

BEFORE SHRI H. L. KARWA, PRESIDENT AND
SHRI RAJENDRA SINGH, ACCOUNTANT MEMBER

ITA No. 2075/Mum/2010
Assessment Year : 2005-06

Shri Gurinder Singh Bawa 22, Sahib Guru Angad Niwas, Vitthal Nagar Co-op. Soc., N.S. Road No. 11, JVPD Scheme, Juhu, Vile Parle (E), Mumbai-400 049. **PAN NO: AAOPB 9857 E**	Vs.	Dy. Commissioner of Income tax, Central Circle 29, Aayakar Bhavan, Dr. M.K. Road, Mumbai.
(Appellant)		(Respondent)

ITA No. 2669/Mum/2010
Assessment Year : 2005-06

Dy. Commissioner of Income tax, Central Circle 29, Aayakar Bhavan, Dr. M.K. Road, Mumbai.	Vs.	Shri Gurinder Singh Bawa Mumbai-400 049.
(Appellant)		(Respondent)

Appellant by	:	Shri Manish Sanghavi
Respondent by	:	Shri Pavan Ved

Date of hearing	:	08.11.2012
Date of Pronouncement	:	16.11.2012

O R D E R

PER RAJENDRA SINGH, AM:

These cross appeals are directed against the order dated 28.1.2010 of CIT(A) for the assessment year 2005-06. The disputes raised in these appeals relate to legal validity of additions made under section 153A of the Income Tax Act, 1961 as well as merit of additions under section 68 and section 2(22)(e) of the Act.

2. Before we proceed to deal with the issue raised, it will be appropriate to give a brief background of the case. The facts in brief are that the assessee for the assessment year 2005-06 had filed return of income on 18.08.2005 declaring total income of Rs.9,61,000/-. Subsequently, there was a search conducted in case of the assessee and its family members under section 132 of the Act on 5.1.2007. Consequent to the search, assessment proceedings were initiated under section 153A of the Act. The AO during the assessment proceedings for assessment year 2005-06 found that the assessee had credited sum of Rs.93,72,310/- to his capital account with narration receipts towards gifts. Assessee gave details of activity as under:-

i. Premkumar (mother-in-law) - Rs.23,00,000/-
ii. Manjit Singh Chawla (cousin brother) - Rs.20,00,000/-

iii. Joginder Kaur (sister-in-law) - Rs. 21,45,000/-

iv. Avatar Singh Bawa (Uncle) - Rs. 29,27,310/-

2.1 The AO after going through the accounts observed that the amounts shown as gift were outstanding balance of loans taken by the assessee from the above persons. These loans were availed prior to the year 2000 and assessee had transferred these balances on gift account on 31.03.2005. AO further observed that the assessee could not prove that the assessee had received these amounts as genuine gifts. He, therefore, added the same as income under section 68 of the Act. Similarly AO noted that the assessee had received a sum of Rs.1,05,00,000/- as loan from Kaybee Developers Pvt. Ltd. a group concern in which he held 49.9% shareholding. The AO therefore, asked the assessee to explain as to why the amount should not be taken as deemed dividend under section 2(22)(e) of the Act. The assessee explained that the amount received was not loan but was in the nature of current account transaction entered into out of commercial expediency. It was further submitted that there was no accumulated profits, therefore, provisions under section 2(22)(e) were not applicable. The AO did not accept the contentions raised and made addition to the extent of accumulated profit of Rs.43,67,999/- including current year profit as deemed dividend under section 2(22)(e).

3. In appeal CIT(A) confirmed the additions made by AO under section 68 of the Act in relation to the loan taken by the assessee. CIT(A) did not accept the plea that the amount was not loan but a business transaction on commercial expediency. He however accepted that the current year profit could not be taken as accumulated profit and after excluding current year profit, accumulated profit was nil. The addition as deemed dividend has to be limited to accumulated profit and since accumulated profit was nil, CIT(A) deleted the addition made on account of deemed dividend. Aggrieved by the decision of CIT(A) both parties are in appeal. Whereas the assessee has challenged the legal validity of addition made under section 153A in addition to challenging merit of additions under section 68 of the Act, the department has disputed the order of AO deleting addition made under section 2(22)(e) of the Act.

4. We first take up the issue relating to legal validity of addition made under section 153A of the Act because this is a basic issue having a bearing on outcome of the appeal. The assessee had raised the legal dispute before CIT(A). It was submitted that under the provisions of section 153A, in case, there was a search conducted in case of the assessee the AO shall assess or reassess the total income of six assessment years immediately preceding assessment year

relevant to the previous year in which the search was conducted. The section also provides that assessment or reassessment relating to the said six assessment years pending on the date of initiation of search would abate. In the present case, it was pointed out, that assessment had been processed under section 143(1) and no notice under section 143(2) had been issued. Therefore, assessment had become final and was not pending and therefore, there was no question of abatement. In such a case, no addition could be made unless there was some material found during the course of search. Since no material was found during the course of search, no addition could be made legally under section 153A of the Act in cases where assessment was not pending. CIT(A), however, did not accept the contentions raised. It was observed by him that section 153A did not refer to any incriminating document or undisclosed income found. Section 153A is activated once there is search irrespective of the fact whether any incriminating material showing any undisclosed income is found or not. The AO under section153A had power to assess or reassess income. Therefore, even in cases where assessment had been made and were not pending, AO had power to reassess the income. CIT(A) further observed that the concept of undisclosed income based on material found was relevant to the scheme of block assessment which had been done away with and new provisions of

section 153A were introduced. Therefore, whether any undisclosed income is found during search or not the AO had power to assess or reassess total income for six immediate preceding years. CIT(A), therefore, rejected the legal ground raised by the assessee that no addition can be made under section 153A of the Act as no incriminating material was found during the search. Aggrieved by the said decision, the assessee is in appeal before the Tribunal.

5. Before us, Ld. A.R submitted that return filed by assessee had been accepted by AO under section 143(1). Since return was filed on 18.8.2005, notice under section 143(2) could have been issued by 17.8.2006. Since AO had not issued any notice under section 143(2), there was no assessment pending for assessment year 2005-06 on the date of search i.e. 5.1.2007. Since there was no assessment pending, there was no question of abatement and, therefore, in such cases, no addition could be made under section 153A of the Act. The Ld. A.R further submitted that, on merits also, there was no case of addition as loans received by the assessee in the earlier years had been converted into gifts. In this year source of credit relating to gift was thus explained as AO himself mentioned in assessment order that loans were taken prior to the year 2000. Therefore, addition if any could have been considered only in the year of taking the loan. As regards deemed dividend under section 2(22)(e) it was submitted that

CIT(A) had rightly deleted the addition as there were no accumulated profits.

5.1 Ld. DR on the other hand, placed reliance on the order of CIT(A) in relation to legal ground and the ground relating to addition under section 68 of the Act and on the order of AO in relation to addition on account of deemed dividend.

6. We have perused the records and considered the rival contentions carefully. The dispute raised is regarding legal validity of addition made by AO under section 153A of the Act. Under the provisions of section 153A, in all cases, where search is conducted under section 132 of the Act, AO is empowered to assess or reassess total income of six assessment years preceding the assessment year in which search was conducted. The section also provides that assessment or reassessment relating to any assessment year falling within period of six assessment year if pending on the date of initiation of search shall abate. There have been divergent views regarding scope of application of section 153A in cases where no incriminating material was found indicating any undisclosed income. Some of the Tribunal Benches had taken the view that in case no incriminating material was found AO had no jurisdiction to make assessment or reassessment under section 153A while some other Benches held that

jurisdiction under section 153A was automatic to reassess six immediate preceding assessment years irrespective of the fact whether any incriminating material was found or not. Another aspect on which there had been divergent views was whether even if AO had jurisdiction under section 153A, addition can be made in assessment / reassessment only when some incriminating material has been found. All these aspects had been referred to the Special Bench of the Tribunal in case of Alcargo Global Logistics Ltd. and order of Special Bench dated 6.7.2012 has been referred.

6.1 The Special bench in the case of Alcargo Global Logistics Ltd. (supra), has held that provisions of section 153A come into operation if a search or requisition is initiated after 31.5.2003 and on satisfaction of this condition, the AO is under obligation to issue notice to the person requiring him to furnish the return of income for six years immediately preceding the year of search. The Special Bench further held that in case assessment has abated, the AO retains the original jurisdiction as well as jurisdiction under section 153A for which assessment shall be made for each assessment year separately. Thus in case where assessment has abated the AO can make additions in the assessment, even if no incriminating material has been found. But in other cases the Special Bench held that the assessment under section 153A can be made on the basis of incriminating material which

in the context of relevant provisions means books of account and other documents found in the course of search but not produced in the course of original assessment and undisclosed income or property disclosed during the course of search. In the present case, the assessment had been completed under summary scheme under section 143(1) and time limit for issue of notice under section 143(2) had expired on the date of search. Therefore, there was no assessment pending in this case and in such a case there was no question of abatement. Therefore, addition could be made only on the basis of incriminating material found during search.

6.2 In this case, the AO had made assessment on the information/material available in the return of income. The information regarding the gift was available in the return of income as capital account had been credited by the assessee by the amount of gift. Similar was the position in relation to addition under section 2(22)(e). The AO had not referred to any incriminating material found during the search based on which addition had been made. Therefore following the decision of the Special Bench (supra), we hold that the AO had no jurisdiction to make addition under section 153A. The addition made is therefore deleted on this legal ground. On merit also we do not find any case to sustain the addition. The addition made is on account of gift which is nothing but loan taken by the assessee which was

converted into gift during the year. Thus source of gift was loan which the AO himself has admitted had been taken by the assessee in the year prior to 2000. Therefore, addition if any could have been made in the year of loan. Similarly, claim of the assessee and finding of CIT(A) that there was no accumulated profit has not been controverted before us. We agree with CIT(A) that current year profit has to be excluded. Therefore, there is no case for any addition under section 2(22)(e). We, therefore, dismiss the appeal of the revenue and allow the appeal filed by the assessee.

7. In the result, appeal of the assessee is allowed and that by the revenue is dismissed.

Order pronounced in the open court on 16.11.2012.

Sd/-	**Sd/-**
(H.L. KARWA)	**(RAJENDRA SINGH)**
PRESIDENT	ACCOUNTANT MEMBER

Mumbai, Dated: 16.11.2012.
Jv.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT(A) Concerned, Mumbai
The DR " " Bench

True Copy

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.