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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ ITA 356/2024 & CM APPL. 39575/2024 (69 Days Delay in Refiling)

PR. COMMISSIONER OF INCOME TAX (CENTRAL)-2 .....Appellant

Through: Mr. Sanjay Kumar, Ms.Esha, Advs.

versus

ANOOP KUMAR GUPTA .....Respondent

Through: Mr. Aditya Vohra, Adv.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE RAVINDER DUDEJA

O R D E R

% 16.07.2024

CM APPL. 39575/2024 (69 Days Delay in Refiling)

Bearing in mind the disclosures made, the delay of 69 days in refiling the appeal is condoned.

The application shall stand disposed of.

ITA 356/2024

1. Notice. Since the respondents are duly represented by learned counsel, no further steps need be taken.

2. Prima face, we find merit in the challenge which stands raised with Mr. Kumar drawing our attention to the facts which stand recorded in paragraph 24 of the order of the Income Tax Appellate Tribunal [‘**Tribunal**’] dated 05 October 2023 and which would appear to indicate that this was a case of an abated assessment. The aforenoted observations of the Tribunal are reproduced hereinbelow:

> “We find that the assessment for this assessment year was not completed as the time limit to issue any notice u/s 143(2) of the Act was still available to the ld. AO and undoubtedly, as per the

law as existed then, no addition in an assessment order passed u/s 153A of the Act in the case of the assessee was possible on the basis of some alleged incriminating information/ material seized/ statements from / of the alleged entry providers as to no incriminating material in any manner at all depicting bogus LTCG was found during the course of the search in the premises of the assessee or on the strength of any search warrant in the name of the assessee in any premises anywhere. Thus, the only course available to the revenue was to initiate proceedings u/s 153C of the Act as has been held by the *Hon'ble Supreme Court in Vikram Sujitkumar Bhatia vs ITO reported in 149 taxmann.com 123 (SC)*. We find that the *Hon'ble Suprmee Court in the case of Abhisar Buildwell Pvt. Ltd. reported in 149 taxmann.com 399 (SC)* had not overruled / could not at all overrule the special provisions u/s 153C of the Act mandated by the legislature for the purpose. The directions therein by the Hon'ble Apex Court to consider material available with the ld. AO in pending assessments which was gathered by the ld. AO in normal course and not flowing from any search action for which the mandatory recourse is the route provided in section 153C of the Act only and there could be several assessments of the same assessee in addition to the single assessment u/s 153A of the Act for the relevant period on search on him. This is so because the cause of action u/s 153C of the Act can arise upto 10 years when some incriminating information pertaining to the assessee is detected in searches elsewhere at different times which were not accessible to the revenue earlier. The assessment procedures under the two specific situations have, therefore, been categorically mandated by the legislature without any fetters and need to be followed by all the courts including the Hon'ble Supreme Court being a jurisdictional issue as has been held by the *Hon'ble Supreme Court in S S Con Build Pvt Ltd reported in 293 Taxman 491 (SC) dated 4.5.2023* by following the earlier Apex Court judgement in *Kanwar Singh Saini vs High Court of Delhi reported in (2012) 4 SCC 307*. We find that undisputedly section 153C of the Act starts with a **non obstante clause** and both the AOs involved were bound to act as per this provision as term deployed therein is **"shall"**. Accordingly, as per the law, no addition in an assessment order passed u/s 153A of the Act without following the mandatory route of section 153C of the Act in the case of the assessee was possible on the basis of some alleged material seized / statements from / of the alleged entry providers as no incriminating material in any manner at all depicting bogus LTCG was found during the course of search in the premises of the assessee or on the strength of any search warrant in the name of the assessee in any premises anywhere. Thus, the only course available for the revenue was to initiate proceedings u/s 153C of the Act on the assessee whereby the AO of the entry provider was statutorily required, (and not the officers of the investigation unit of the department under

any circumstance on the basis of the seized material) if he was satisfied that the seized material/information from the searched entry provider had some bearing etc. on the determination of the assessable income of the assessee should have proceeded to assess the same by a separate assessment order u/s 153A read with section 153C of the Act. Undisputedly, section 153C of the Act is a non obstante section and a complete code by itself and both the AOs involved were bound to act as per this provision as term deployed therein is **"shall"**. No option was available with the AOs to act otherwise overruling the law at their whims. Therefore, if the material found and seized from an entry provider 'pertains or pertain to, or any information contained therein, relates to the assessee, then the ld. AO of the said entry provider must have initiated the assessment process u/s 153C of the Act. It is in his exclusive domain to be satisfied whether 'pertains or pertains to, or any information contained therein, relates to' or not and the statute in an unambiguous language has not bestowed this power on any authority, which admittedly here has been completely misunderstood to be with the Investigation Unit of the Income-tax department by the ld. AO while completing the assessment."

3. It is in the aforesaid backdrop that learned counsel submits that incriminating material alone would have no role to play. Matter requires consideration.

4. We consequently admit this appeal on the following questions of law:

A. Whether in the circumstances of the case and in law the Tribunal was correct in deleting the addition of INR 21,79,69,083/- by holding that the incriminating material on basis of which the Assessing Officer ['**AO**'] made the addition, was not incriminating in nature even though such material clearly established that the assessee has traded in penny stock during the relevant Financial Year [**'FY'**] and booked bogus Long Term Capital Gains [**'LTCG'**]?

B. Whether in the facts and circumstances of the case and in law the Tribunal erred in holding that the consideration of

denial of exemption under Section 10(38) of the Income Tax Act, 1961 [‘**Act**’] for the LTCG on sale of shares of the penny stock company M/s Mahavir Advanced Remedies Limited [**‘MARL’**] could not be done by the revenue legally in the proceedings under Section 153A on the assessee?

C. Whether in the facts and circumstances of the case and in law the Tribunal was correct in not appreciating the findings of search and post search proceedings as well as the various sworn statements of entry operators whereby it has been established that the assessee had evaded income tax by claiming non-genuine LTCG through a well-planned, synchronized and colourable design?

D. Whether in the facts and circumstances of the case and in law the Tribunal was incorrect in not appreciating that the details of trading in the given scrip of M/s MARL (penny stock) and confronted during the search action did not constitute incriminating material?

E. Whether in the facts and circumstances of the case and in law the Tribunal was incorrect in not appreciating that the incriminating material along with evidences found during the search of M/s MARL (penny stock) was incriminating material for assessment of the beneficiary?

F Whether in the facts and circumstances of the case and in law the Tribunal is incorrect in not appreciating that the assumption of jurisdiction under Section 153A is correct as search was initiated in case of assessee?

5. List again on 04.10.2024.

YASHWANT VARMA, J.

RAVINDER DUDEJA, J.

JULY 16, 2024/neha