

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'C' BENCH
MUMBAI**

**BEFORE: SHRI VIKAS AWASTHY, JUDICIAL MEMBER
&
SHRI M.BALAGANESH, ACCOUNTANT MEMBER**

**ITA No.6253/Mum/2017
(Assessment Year :2012-13)**

M/s. Chinmay Agricultural Housing C/o. Reena Acharekar, 1 st Floor, Prof. J.L. Shirsekar Marg, Govt. Colony, Nr. Chetna College, Next to BKC, Bandra (E) Mumbai – 400 051	Vs.	ITO-21(1)(3) 106, Piramal Chambers Lalbaug, Mumbai – 400 012
PAN/GIR No.AAGFC09736K		
(Appellant)	..	(Respondent)

Assessee by	Shri Tarun Ghia
Revenue by	Ms. Shreekala Pardeshi
Date of Hearing	09/08/2021
Date of Pronouncement	30/08/2021

आदेश / ORDER

PER M. BALAGANESH (A.M.):

This appeal in ITA No.6253/Mum/2017 for A.Y.2012-13 arises out of the order by the Id. Commissioner of Income Tax (Appeals)-33, Mumbai in appeal No.CIT(A)-33/Rg.21/81/2015-16 dated 06/07/2017 (Id. CIT(A) in short) against the order of assessment passed u/s.143(3) of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 30/03/2015 by the Id. Income Tax Officer-21(1)(3), Mumbai (hereinafter referred to as Id. AO).

2. The first issue to be decided in this appeal is as to whether the Id. CIT(A) was justified in upholding the addition made in the sum of Rs.1,27,44,095/- u/s.69B as unexplained investment in the facts and circumstances of the instant case.

3. We have heard rival submissions and perused the materials available on record. We find that assessee is a partnership firm engaged in the business of developer and builder. The partnership firm deed dated 29/04/2010 has been constituted comprising of the following partners:-

1. Shri Prasadam Realtors Pvt. Ltd.,	-	50%
2. M/s. Chinmay Agriculture and Housing Pvt. Ltd.,	-	50%

3.1. The assessee firm filed the return of income for the A.Y.2012-13 on 28/09/2012 declaring total income of Rs.5,17,530/-. The assessee filed copy of audited financial statements for the year ended 31/03/2012 together with the tax audit report with its annexures before the Id. AO. The assessee was asked to produce its financial statements for the year ended 31/03/2011 together with tax audit reports thereon. From the perusal of the financial statements of 31/03/2011 and 31/03/2012, the Id. AO observed that the partner's balance as appearing in the books of the assessee firm as on 31/03/2011 was different from those adopted in the tax audit report in Form 3CD. Accordingly, the Id. AO proceeded to make an addition of Rs.1,27,44,095/- being the difference between closing balance and opening balance as unexplained investment u/s.69B of the Act as under:-

Partner's capital account	Opening balance as on 01/04/2011 as per the audited balance sheet of the assessee for F.Y.2011-12	Closing balance as on 31/03/2011 as shown in "last year column" of Form 3CD, Annexure-I Part-A	Difference added to income
Shri Prasadam Realtors Pvt. Ltd.,	Rs. 1,03,27,043/- (credit)	Rs. 2,32,20,166/- (credit)	Rs. 1,28,93,123/-
M/s. Chinmay Agriculture and Housing Pvt. Ltd.,	Rs.19,20,944/- (credit)	Rs.17,71,916/- (credit)	(-) Rs.1,49,028/-
Total	Rs.1,22,47,987/-	Rs.2,49,92,082/-	Rs.1,27,44,095/-

3.2. This addition apparently was made by the Id. AO on the basis of Form 3CD Annexure I Part A of the assessee showing total closing capital of last year i.e. on 31/03/2011 at Rs.2,49,92,082/-. This figure was compared with the audited financial statement of F.Y.2011-12 of the partners wherein last year column for 31/03/2011 showed cumulative figure of Rs.1,22,47,987/- thereby resulting in the difference of Rs.1,27,44,095/- which was sought to be added by the Id. AO. The assessee submitted earlier year's detailed reconciliation statement, bank statement of Chinmay Agriculture and Housing Pvt. Ltd, bank statement of Shri Prasadam Realtors Pvt. Ltd., explaining the difference.

3.3. Before the Id. CIT(A), the assessee raised a preliminary objection that the Id. AO erred in making the addition u/s.69B towards unexplained investment by approaching the entire issue in wrong direction in as much as the addition was made for difference in opening balance of partners capital which are reflected in the liability side of the balance sheet and not asset side. Hence, there cannot be any investment which, remain unexplained, thereby enabling the Id. AO to make any addition towards unexplained investments. It was also pointed out that difference in opening balance, if

any, was pertaining to earlier financial year and hence, no addition could be made for the year under consideration. Without prejudice to this legal argument, the assessee also submitted that :-

(i) During the year under assessment, there is no difference for any transaction occurred/happened during the current financial year and it was accepted by the AO.

(ii) As per settled law, only an unexplained investment found "during the year" could be added and in our case during the year, there was no unexplained investment.

(iii) If assessing officer want to disallow any amount then he has to go to earlier year and verify earlier year's transaction and pass order in earlier year and not current year.

(iv) Opening balance difference has got nothing to do with current year's transaction.

(v) The assessing officer has ignored reconciliation statement and full evidences like bank account of Chinmay Agriculture and Housing Pvt Ltd and Shri Prasadam Roaltors Pvt Ltd and other persons which clearly shows that all payments made between assessee and partners were reflecting in bank accounts of each other. This evidence was ignored totally.

(vi) Chinmay Agriculture and Housing Pvt Ltd & Shri Prasadam Realtors Pvt Ltd are partners of the assessee firm and all the payments are reflected in bank accounts of both the persons. There is no gain to assessee by showing incorrect opening balance.

(vii) Ledger accounts of both the entities were submitted which was totally ignored by the AO.

(viii) All evidences like bank statements, ledger account showing confirmation was totally ignored by the AO.

(ix) Reconciliation statement submitted for difference was not rejected by the AO nor any deficiency was pointed out by the AO. Both the partners are unrelated persons and they will not accept any wrong opening balance in their capital account because based on these opening balances, their dues shall be determined.

(x) Had the assessee taken wrong opening balance and rectified the wrong opening balance in the current year by way of journal entries, then assessing officer would not have disallowed, however effect would be same, i.e. to ascertain correct opening balance.

3.4. It was also submitted before the Id. CIT(A) that the assessee had submitted to Id. AO, the audited balance sheet of Chinmay Agriculture and Housing Pvt. Ltd., and Shri Prasadam Realtors Pvt. Ltd., for F.Y.2011-12 which is showing correct opening balance of Rs.18,34,296/- and Rs.1,04,13,691/- respectively totaling to Rs.1,22,47,987/-. The same is also matching with the opening balance of assessee's firm towards partners capital account as on 01/04/2011 as per the books of accounts of the assessee. The assessee sought to explain the same in the following manner:-

A. IN THE BOOKS OF CHINMAY AGRICULTURE & HOUSING (ASSEESSEE)			
S. No.	Particulars	Opening Balance as on 01.04.2011	Closing Balance as on 31/03/2012
1	Shri Prasadam Realtors Pvt. Ltd., (1 st Partners of Assessee)	1,04,13,691.20 Credit Balance	1,13,06,385.54 Credit Balance
2	Chinmay Agriculture & Housing Pvt. Ltd. (2 nd Partners of Assessee)	19,20,943.70 Credit Balance	19,39,774.04 Credit Balance
B. IN THE BOOKS OF SHRI PRASADAM REALTORS PVT. LTD.,			
S. No.	Particulars	Opening Balance as on 01.04.2011	Closing Balance as on 31/03/2012
1.	Investment in Partnership firm – Chinmay Agriculture & Housing	1,04,13,691.20 Debit Balance	1,13,06,385.54 Debit Balance
C. IN THE BOOKS OF CHINMAY AGRICULTRE & HOUSING PVT. LTD			
1.	Investment in Partnership firm – Chinmay Agriculture & Housing	19,20,943.70 Debit Balance	19,39,774.04 Debit Balance

3.5. The Id. CIT(A) also sought for remand report from the Id. AO and upheld the action of the Id. AO by observing that assessee has only reiterated the facts that assessee presented before the Id. AO. The Id. CIT(A) also observed that how the figures of last year closing balance and the current year opening balance in the capital account of the assessee firm could be rectified without altering the other figures of the balance sheet of A.Y.2011-12 and A.Y.2012-13. The Id. CIT(A) also observed that no reconciliation statement or justifiable reason has been presented before him for changes or otherwise in the alteration of figures of the balance sheet. With these observations, he upheld the action of the Id. AO.

3.6. At the outset, we find that there is absolutely no mistake in the financial statements of the assessee i.e. audited balance sheet for the year ended 31/03/2012. The mistake apparently had happened only in the tax audit report filed for the A.Y.2012-13 wherein the opening balance of partner's capital account had been wrongly reported by the tax Auditor.

There is absolutely no mistake or discrepancies in the balance sheet of the assessee firm for the year ended 31/03/2012. In fact the opening balance of partner's capital account as on 01/04/2011 and closing balance of partner's capital account as on 31/03/2012 matched paise to paise with the corresponding investment made by the respective partners in the assessee firm. This fact is very much evident from the aforesaid table. We find that an affidavit dated 18/06/2021 has been filed by the Tax Auditor before us in the non-judicial stamp paper duly notarised wherein the Tax Auditor had categorically stated as under:-

“1.2. During the course of assessment, Ld. AO observed that the figures of partners' capital balances in the balance sheet of preceding year F. Y. 2011-12 were at a mismatch vis a vis the figures of preceding year mentioned in Annexure I, Part B of the tax audit report of the preceding year.

1.3. The mismatch had arisen due to following reason:

For the preceding F. Y. 2010-11 the balance sheet of the assessee was initially completed but then was revised.

The mistake happened in preparing the tax audit report. As a tax auditor while writing the figures in the preceding year column, I committed an error by writing figures from the original balance sheet rather than from the revised balance sheet

1.4. Thus, it is only due to my mistake that the mismatch arose and after my rectification of the relevant Annexure, there is now no mismatch.

1.5. During the course of remand from Ld. CIT-A to Id. AO, I had submitted revised Annexure I, Part B of the tax audit report to Ld. AO. However, Ld. AO did not record the same in the remand report nor did he take cognisance of the same. So I mentioned before Ld. CIT-A that revised Annexure to tax audit was submitted. However, Ld. CIT-A in his finding only mentioned that I had claimed that revised Annexure was submitted. Ld. CIT-A also did not take cognisance of the same

1.6. Thus, both the lower authorities neither have recorded my filing of the revised Annexure I, Part B of the tax audit report nor they have considered the same while passing their respective orders.

1.7. I had submitted before both the Id. authorities, the reconciliation statement showing the entries due to which the above impugned mismatch had-'arisen and due to which the balance sheet of the preceding year

was revised. Ld. Assessing Officer has reproduced relevant portion of my letter at para 6.2 of assessment order that such reconciliation statement was submitted but Ld AO has not recorded in his own finding that such reconciliation statement was submitted by me nor he has considered the said reconciliation statement Similarly, Ld. CIT-A has recorded my contention that the reconciliation statement was produced by me but has not recorded in his own finding that such reconciliation statement was submitted by me nor he has considered the said reconciliation statement.

2. I THEREFORE NOW SPECIFICALLY STATE ON AFFIDAVIT AS FOLLOWS:

A. The mismatch in the figures of partners' capital balances in the preceding year balance sheet vis a vis in the tax audit report in the column of preceding year as referred above was due to my mistake as a tax auditor cum chartered accountant. Thereafter, I have revised the relevant Annexure I, Part B of the tax audit report and thereby have corrected the mistake.

B. I had submitted revised Annexure 1, Part B of the tax audit report to Ld. AO during the course of remand process. However, both Id. AO as well as Ld. CIT-A have not receded in their finding nor they have considered at all the said revised Annexure.

C I had submitted before both the Id. authorities, the reconciliation statement showing by which entries the mismatch had arisen and the balance sheet was revised. However, as both the Id. authorities did not consider the same, therefore, I am once again submitting the same before Hon'ble ITAT and would pray for its due consideration so that the justice is done on merits.

3. I have made this affidavit with an intention that due to my mistake the assessee should not suffer and that the above referred revised Annexure I and the reconciliation statement filed by me should be considered while deciding the appeal.

4. I hereby state that whatever I have stated hereinabove is true and correct and if anything turns out to be untrue and incorrect, then I shall be personally liable for the consequences thereof and I will indemnify anyone who may suffer because of my this affidavit”

3.7. We find that aforesaid view of the Chartered Accountant confirms the fact that no new evidences were submitted in the said affidavit and also confirm the fact that assessee had sought to rectify its legitimate mistake by providing necessary reconciliation statement and also driving home the point that there is absolutely no discrepancy for the purpose of determination of

income of the assessee. We find that reconciliation statement submitted by the assessee before the lower authorities had been conveniently ignored by both the lower authorities, which had prompted the Chartered Accountant to file an affidavit before us. As stated supra, we would like to reiterate that there is absolutely no mistake in the financial statements of the assessee firm. The mistake had crept only in the tax audit report while reporting the opening balance figure which fact is also reasoned out in the affidavit of the Tax Auditor. The contents of the affidavit had not been controverted by the Revenue before us. All the transactions connected with the partner's capital account during the year had been duly supported with entries in the bank statements, bills, vouchers and supporting evidences. The corresponding investment reflected in the balance sheet of the partners are duly tallying with the partner's capital account reflected in the books of the assessee firm. In any case, no discrepancy had been pointed out by the revenue with regard to transactions that had happened during the year. The Id. AO had admitted the fact that the discrepancy had happened in earlier year. While it is so, there is absolutely no case for the Revenue to make any addition towards unexplained investment during the year. It is not in dispute that the transactions during the year did not contain any discrepancies. All the transactions during the year remain properly explained by supporting documents. Admittedly, partner's capital account is reflected in the liability side of the balance sheet, for which, even if there is any discrepancy, there cannot be any addition towards unexplained investment in the hands of the assessee firm u/s.69B as made by the lower authorities. Hence, we have no hesitation to delete the addition made on account of unexplained investment u/s.69B in the sum of Rs.1,27,44,095/- in the facts of the instant case. Accordingly, the ground Nos. 1a to 1c raised by the assessee are allowed.

4. The ground No.2 raised by the assessee is with regard to disallowance of expenditure of Rs.3,39,000/- u/s.40(a)(ia) of the Act.

4.1. We have heard rival submissions and perused the material available on record. The Id. AO observed that the assessee had deducted tax at 1% on payment of Rs.16,50,000/- made to M/s.Revitt Engineering and had claimed the balance amount of Rs.3,39,000/- being purchase of sand was covered by sale of goods Act and hence, no TDS provisions would be applicable for the same. Since, there was no proper explanation in this respect, the Id. AO treated the assessee as assessee in default u/s.194C of the Act and disallowed proportionate amount of Rs.9,16,667/- u/s.40(a)(ia) of the Act. During the assessment proceedings after verification, the Id. AO reported that the argument of the assessee for not deducting tax for Rs.3,39,000/- by stating that the same is for purchase of sand cannot be accepted, as M/s. Revitt Engineering was not dealer in sand and that the bill is raised by them for the RCC work and sand is not the only material used for this work. The Id. CIT(A) observed that assessee could not explain as to how the TDS will not be deducted on Rs.3,39,000/- when M/s. Revitt Engineering is not dealer in sand. Accordingly, the Id. CIT(A) made disallowance of Rs.3,39,000/- u/s.40(a)(ia) of the Act. Ultimately, we find that this disallowance was made for short deduction of tax at source. We find that the Hon'ble Calcutta High Court in the case of CIT vs. S.K. Tekriwal reported in 361 ITR 432 had held that the provisions of Section 40(a)(ia) of the Act could not be made applicable for short deduction of tax at source. In the instant case before us, admittedly, the assessee had deducted tax @1% of total payments made to M/s. Revitt Engineering. The case of the revenue seems to be that tax should have been deducted at higher rate u/s.194C of the Act, for which disallowance u/s.40(a)(ia) of the Act was made. Hence, respectfully following the decision of the Hon'ble Calcutta High Court referred to supra, we direct the Id. AO to delete the disallowance u/s.40(a)(ia) of the Act in the facts and circumstances of the instant case. Accordingly, the ground No.2 raised by the assessee is allowed.

5. The ground No.3 raised by the assessee is general in nature and does not require any specific adjudication.

6. In the result, appeal of the assessee is allowed.

Order pronounced on 30/08/2021 by way of proper mentioning in the notice board.

Sd/-
(VIKAS AWASTHY)
JUDICIAL MEMBER

Sd/-
(M.BALAGANESH)
ACCOUNTANT MEMBER

Mumbai; Dated 30/08/2021
KARUNA, *sr.ps*

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai