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

BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No.274/M/2021
Assessment Year: 2013-14

Late Shri Sawarmal Hisaria, (through L/H. Shri Sandeep Hisaria), 74/80, 3rd Floor, Souri Building, Babu Genu Road, Kalbadevi, Mumbai – 400 002 **PAN: AAAPH8346L**	Vs.	Dy. CIT, Circle-2(4), Room No.802, 8th Floor, Pratishtha Bhavan, Old CGO Building Annexe, M.K. Road, Mumbai - 400020
(Appellant)		(Respondent)

Present for:
Assessee by : Shri Dharmesh Shah, A.R.
Revenue by : Shri Anil Kumar Das, D.R.

Date of Hearing : 20 . 01 . 2022
Date of Pronouncement : 05 . 04 . 2022

O R D E R

Per : Kuldip Singh, Judicial Member:

The appellant, Late Shri Sawarmal Hisaria (hereinafter referred to as 'the assessee') by filing the present appeal, sought to set aside the impugned order dated 12.02.2021 passed by Commissioner of Income Tax (Appeals)-48, Mumbai [hereinafter referred to as the CIT(A)] qua the assessment year 2013-14 on the grounds inter alia that :-

"1. The Ld. CIT(A) has erred in law and in facts in confirming the additions made by the Assessing Officer without any incriminating evidence found at the time of search.

2. The Ld. CIT(A) has erred in law and in facts in confirming the addition of Rs.25,50,000/- on account of additional income offered in the application filed u/s. 245D(1) of the Act before the Hon'ble Income Tax Settlement Commission.

3. The appellant craves leave to add to, alter, amend and/or delete in all the foregoing grounds of appeal."

2. Briefly stated facts necessary for adjudication of the controversy at hand are : the assessee is into the business of trading of shares and commodities, carried out in the name and style of M/s. P.R. Enterprises being a proprietary concern. The assessee is also a partner in a firm namely M/s. H.K. Enterprises. During the year under assessment the assessee has earned income from profits and gains from business or profession and income from other sources and filed return of income on 27.09.2013 declaring total income of Rs.32,82,420/-, which was subjected to scrutiny. Subsequently, the assessee filed an application before Hon'ble Income Tax Settlement Commission (ITSC) for A.Y. 2012-13 to 2018-19 on 27.12.2019 by disclosing following income:

A.Y.	*Adhoc Disallowance of Business expenses*	*Further adhoc disallowance of expenses*	*Total Additional Income*
2012-13	*25,00,000*	*50,000*	*25,50,000*
2013-14	*25,00,000*	*50,000*	*25,50,000*

2014-15	*25,00,000*	*1,17,620*	*26,17,620*
2015-16	*25,00,000*	*50,000*	*25,50,000*
2016-17	*25,00,000*	*50,000*	*25,50,000*
2017-18	*25,00,000*		*25,00,000*
2018-19	*25,00,000*		*25,00,000*
TOTAL	***1,7500,000***	***3,17,620***	***1,78,17,620***

3. The aforesaid application filed by the assessee has been rejected by the ITSC on the ground that conditions under section 245C(1) were not fulfilled and the matter was returned to the Assessing Officer (AO).

4. Subsequently, a search and seizure operation was conducted on Hisaria Group under section 132 of the Income Tax Act, 1961 (for short 'the Act') on 16.11.2017. The assessee is also one of the flagship concerns of Hisaria Group. Apart from assessing the total income offered by the assessee during the year under consideration, AO also made an addition of Rs.25,50,000/- on account of additional income offered by the assessee before ITSC and thereby framed the assessment at the total income of Rs.58,32,420/- under section 153A read with section 143(3) of the Act.

5. Assessee carried the matter before the Ld. CIT(A) by way of filing the appeal who has upheld the addition made by the AO by dismissing the appeal of the assessee. Feeling aggrieved with the impugned order passed by the Ld. CIT(A) the assessee has come up before the Tribunal by way of filing the present appeal.

6. We have heard the Ld. Authorised Representatives of the parties to the appeal, perused the orders passed by the Ld. Lower Revenue Authorities and documents available on record in the light of the facts and circumstances of the case and law applicable thereto.

7. Undisputedly, the AO has framed assessment under section 153A read with section 143(3) of the Act as unabated assessment on the basis of search and seizure operation carried out at the Hisaria Group on 16.11.2017 of which the assessee is one of the major concerns. It is also not in dispute that during the assessment proceedings pending before the AO the assessee has exercised its option under section 245D(1) by moving an application before ITSC, Mumbai by offering additional income from A.Y. 2012-13 to 2018-19 as per detail given in preceding para no.2. It is also not in dispute that apart from the addition made by the AO during the year under consideration to the tune of Rs.25,50,000/- being the

additional income suo-moto declared by the assessee, no other addition has been made by the AO during the year under consideration. It is also not in dispute that during search operation "no incriminating material" has been unearthed/seized qua the year under consideration. It is also not in dispute that the AO has made the addition on the basis of admission of the assessee qua the additional income of Rs.25,50,000/- made before the ITSC by virtue of his application dated 27.12.2019 filed under section 245C of the Act.

8. Challenging the impugned order passed by the Ld. CIT(A), the Ld. A.R. for the assessee contended inter alia; that since "no incriminating material" has been found or seized qua the addition made by the AO the same is not sustainable in the eyes of law; that the assessee has made disclosure before the ITSC purely on ad-hoc basis just to buy peace of mind and to avoid litigation and relied upon the decision rendered by Hon'ble Bombay High Court in case of CIT vs. Continental Warehousing Corporation (Nhava Sheva) Ltd. and Anr. reported in 374 ITR 645, decision rendered by Hon'ble Delhi High Court in case of CIT vs. Kabul Chawla reported in 380 ITR 573 and the decision rendered by co-ordinate Bench of the Tribunal in case of DCIT vs. Shivali Mahajan and vice-versa along with others (ITA No.5585/Del/2015 and CO

No.447/Del/2015 dated 19.03.2019 & Anantnadh Constructions and Farms (P.) Ltd. vs. DCIT (166 ITD 83).

9. However, on the other hand, the Ld. D.R. for the Revenue to repel the argument addressed by the Ld. A.R. for the assessee, relied upon the order passed by the Ld. CIT(A) and contended that the AO was well within his right to use the material brought before the ITSC by the assessee under section 245HA(3) of the Act.

10. In the backdrop of the aforementioned facts and circumstances of the case and argument addressed by the Ld. A.Rs for the parties to the appeal the sole question arises for determination in this case is:

> ***"As to whether the Ld. CIT(A) has erred in law and facts in confirming the addition of Rs.25,50,500/- made by the AO on account of additional income offered by the assessee in his application filed before ITSC while framing assessment under section 153A read with section 143(3) of the Act when undisputedly "no incriminating material" has been found or seized during the search operation conducted on Hisaria Group on 16.11.2017?"***

11. We have perused the order passed by co-ordinate Bench of the Tribunal in case of Anantnadh Constructions and Farms (P.) Ltd. (supra) with the assistance of Ld. A.Rs for the parties to the

dispute, which is on identical issues and has been decided in favour of the assessee by holding that after reopening of the assessment order no addition can be made on the basis of income suo-moto offered by the assessee before the ITSC when settlement got aborted for one reason or the other mentioned in section 245HA(1) by returning following findings:

> ***"13. We find that assessee has made declaration and filed some information before Settlement Commission admitted under section 245D of the Act and it can be used only for limited purpose for settlement of tax dispute and passing an order under section 245D(4) of the Income Tax Act and not for other purpose. The assessee has made a disclosure and such disclosure ultimately ended in settlement order under section 245D(4) of the Act. The disclosure came to the possession of AO. The fact that the disclosure made under section 245D(1) of the Act even if constructed as if no order under section 245D(4) has been passed it will not give a license to the AO to use the confidential information disclosed in an annexure to the application of the Settlement Commission. If the application is treated as not admitted under 245D(1) of the Act, then the provisions are clear that confidential information can never be passed on to the AO nor can it be used in evidence against the assessee. Section 245D(4) has clearly held that admission of assessee's application under section 245(1) was incorrect. We find that any confidential information disclosed in annexure to the settlement application before Income Tax Settlement Commission can never be the basis to make the addition. We find that in the instant case, the AO has reopened the assessment under section 147. Thereafter, AO has not brought any evidence or made any inquiry that assessee has earned additional income of Rs.5 lakhs as brokerage income. In the instant case, after reopening the assessment order, the***

AO had not made any inquiry and not examined the material which was before him that how this income was declared by the assessee and addition has been made simply relying upon the declaration made in the application before the Settlement Commission under section 245D. The AO was in possession of the paper relating to the income but in absence of any material no addition can be made. The Hon'ble Gujarat High Court in the case of Commissioner vs. Maruti Fabrics 47 Taxmann.com 297 has held that whatever material is produced along with application by the assessee before Settlement Commission or result of inquiry held or evidence recorded by the Settlement Commission in course of proceedings before it can be used by the adjudicating authority as if same had been produced before such Central Excise Officer. Once application or proceedings before Settlement Commission fails, Central Excise Officer is required to adjudicate entire proceedings and show cause notice and Hon'ble Gujarat High Court has held as under:

> ***"Considering sub-section (2) of section 32L of the Act, in a case where an order is passed by the Settlement Commission under sub-section (1) of section 32L and thereafter adjudicating authority is required to adjudicate the case, the Central Excise Officer shall be entitled to use all the materials and other information produced by the assessee before the Settlement Commission or the result of inquiry held or evidence recorded by the Settlement Commission in the course of the proceedings before it as if such materials, information, inquiry and evidence have been produced before such Central Excise Officer or held or recorded by him in the course of the proceedings before him on fair reading of sub-section (2) of Section 32L of the Act whatever is admitted by the assessee while submitting the application before the Settlement Commission submitted under Section 32E(1) of the Act straightway cannot be said to be admission on behalf of the assessing accepting the liability. Whatever the material is produced alongwith the application and/or any material and/or other information produced by the assessee before the Settlement Commission or the result of the inquiry held or evidence recorded by the Settlement Commission in the course of the proceedings before it can be used by the adjudicating authority as if***

such materials, information, inquiry and evidence has been produced before such Central Excise Officer, while adjudicating the show cause notice and the proceedings. If the contention on behalf of the appellant is accepted, in that case, there is no question of further adjudication by the Central Excise Officer with respect to the amount admitted by the assessee while submitting the application before the Settlement Commission submitted under Section 32E(1) of the Act. Once the application or proceedings before the Settlement Commission fails, the Central Excise Officer is required to adjudicate the entire proceedings and show cause notice. Under the circumstances, so far as proposed question of law No.1 is concerned, the present Tax Appeals deserve to be dismissed and are, accordingly, dismissed by answering the proposed question of law No.1 against the Revenue."

14. Respectfully following the same, we hold that Hon'ble Gujarat High Court's judgment in the case of Maruti Fabrics pertains to Central Excise but if we compare central excise under section 32E of the Central Excise Act this section is parallel to section 245C of the Income Tax Act. One primary condition mentioned in section 32E for filing central excise settlement petition is "a show cause notice for recovery of duty issued by Central Excise Officer has been received". In Income Tax Act section 245C requires some pendency of proceedings. The Central Excise application is allowed or rejected vide order under section 32F(1). This section is parallel to section 245D(1). Section 32L gives the powers and procedure of Central Excise Settlement Commission. This section is similar to section 245F of the Income Tax Act. Section 32L gives the powers of the Settlement Commission to send the case back to the Central Excise Officer. Section 32L reads as under:

"32L(1) The Settlement Commission may, if it is of opinion that any person who made an application for settlement under section 32E has not co-operated with the Settlement Commission in the proceedings before it, send the case back to the Central Excise Officer having jurisdiction who shall thereupon dispose of the case in accordance with provisions of the Act as if no application under section 32E had been made.

32L(2) For the purpose of sub-section (1), the Central Excise Officer shall be entitled to use all the materials and other information produced by the assessee before the Settlement Commission in the course of the proceedings before it as if such materials, information, inquiry and evidence had been produced before such Central Excise Officer or held or recorded by him in the course of the proceedings before him."

15. We find that section 245HA(1) of the income Tax Act lists several circumstances in which the case before the Settlement Commission would abate; whereas in section 32L(1) non - cooperation of the petitioner is the only ground. The Central Excise Officer derives its power its power to assess such abated proceeding vide section 32L(2) of the Central Excise Act. This is identical to powers vested with an AO under section 245HA(2) and 245HA(3) under the Income Tax Act. It is therefore very clear that the provisions of Central Excise Settlement Commission and that for Income Tax settlement Commission are identical. Therefore, the judgment of Hon'ble Gujarat High Court in the case of Maruti Fabrics although pertaining to Central Excise should be applied to cases abated under section 245HA of the Income Tax Act also.

16. Therefore, we are of the view that the judgment of Hon'ble Gujarat High Court is applicable to the facts of the assessee's case. We find that Hon'ble Gujarat High Court has held that if the petition filed before the Settlement Commission wherein assessee has made declaration but proves that assessee has neither earned such income nor any incriminating material was found during the search relating to undisclosed income then no addition can be made.

17. We have also gone through the judgment of ITAT, Mumbai in the case of Dolat Investment vs. Dy. Commissioner of Income Tax wherein the ITAT has specifically held in para 22 which reads as under:

"22. The first issue is whether the case of the assessee for assessment year 2005-06 was admitted by the Settlement Commission under section 245D(1) of the Act?

On this issue, we have already seen that in the order dated 30-11-2007 under section 245D(4) of the Act, the

Settlement Commission has clearly held that the assessee for assessment year 2005-06 does not satisfy the criteria of offering income on which at least an income-tax payable should exceed Rs. 1 lakh. The Settlement Commission has further held that when admitting the petition of the assessee for assessment year 2005-06, this aspect was overlooked and that they are rectifying the apparent error by excluding assessment year 2005-06 of the assessee from the process of settlement. Thus, the case of the assessee for assessment year 2005-06 cannot be considered to have been admitted for the process of settlement under section 245D(1) of the Act. Consequently, the confidential information disclosed in the Annexure to the Settlement application could not have been used by the Assessing Officer against the assessee to make the impugned addition. Therefore, the addition to the income made by the Assessing Officer in assessment year 2005-06 which is based only on the disclosure made in the Annexure to the Settlement Commission is not valid in law. Consequently, the imposition of penalty on the basis of such invalid addition cannot be sustained. In view of the above conclusion, we do not wish to go into the other alternate argument of the learned counsel for the assessee regarding abatement of proceedings before Settlement Commission and use of confidential information disclosed by the assessee in such proceedings by the Assessing Officer in making assessment."

18. From the above decision of the Tribunal where they have discussed the section 245C(1) and section 245D(i) and 245HA by following observation:

"20. The Finance Act, 2007 made changes to the provisions for settlement of cases contained in Chapter XIX-A of the Income-tax Act 1961. One change involves introduction of a new concept of abatement of proceedings before the Settlement Commission for which provisions has been made in the newly inserted section 245HA relevant portion whereof reads thus :—

"245HA. Abatement of proceeding before Settlement Commission.—(1) where....

(i)an application made under section 245C on or after the 1st day of June, 2007 has been rejected under sub-section (1) of section 245D;

(ii)an application made under section 245C has not been allowed to be proceeded with under sub-section (2A) or further proceeded with under sub-section (2D) of section 245D;

(iii)an application made under section 245C has been declared as invalid under sub-section (2C) of section 245D;

(iv)in respect of any other application made under section 245C, an order under sub-section (4) of section 245D has not been passed within the time or period specified under sub-section (4A) of section 245D, the proceedings before the Settlement Commission shall abate on the specified date.

Specified date would be (i) in respect of an application referred to in sub-section (2A) or sub-section (2D), on or before the 31st day of March, 2008; (ii) in respect of an application made on or after 1st day of June, 2007 within nine months from the end of the month in which the application was made.

(2) Where a proceeding before the Settlement Commission abates, the Assessing Officer or as the case may be any other income-tax authority before whom the proceeding at the time of making the application was pending, shall dispose of the case in accordance with the provisions of this Act as if no application under section 245C had been made.

(3) For the purposes of sub-section (2), the Assessing Officer or as the case may be, other income-tax authority, shall be entitled to use all the material and other information produced by the assessee before the Settlement Commission or the results of the inquiry held or evidence recorded by the Settlement Commission in the course of the proceedings before it, as if such material, information inquiry and evidence had been produced before the Assessing Officer or other income-tax authority or held or recorded by him in the course of the proceedings before him."

21. Thus, when a proceedings before the Settlement Commission abates, it reverts to the income-tax

authority before whom it was pending at the time of making the application for settlement and the income-tax autho-rity has to dispose of the case in accordance with the provisions of the Act as if no application for settlement had been made and for that purpose, it is entitled to use all the material and other information produced by the assessee before the Settlement Commission or the results of the inquiry held or evidence recorded by the Settlement Commission in the course of the proceedings before it."

19. We find from the above proposition of law by Hon'ble Gujarat High Court and Tribunal that simply relying upon the declaration made before the Settlement Commission no addition can be made. In this group case, the search was conducted in the business premises of Lodha Group and subsequent to search action assessee company along with other companies of Lodha Group filed a petition under section 245C(1) of the Act before Settlement Commission. The assessee has offered additional income of Rs.5 lakhs towards the land brokerage income. This offer was made for maintainability of petition before Settlement Commission as stated in clause (i) and clause (ia) of section 245C(1) of the Act. We are of the view that after reopening of the assessment order no addition can be made on the basis of income offered by the assessee before Settlement Commission. We find that no incriminating material was found during the course of search action substantiating that assessee has actually earned undisclosed income. Therefore, just because assessee has offered additional income before Settlement Commission, no addition can be made without basis. Hence, the addition made by the AO and Ld. CIT(A) is deleted."

12. Furthermore, when during the search and seizure operation conducted on the Hisaria Group of which assessee was a partner, on 16.11.2017 "no incriminating material" was found/seized no addition can be made while framing assessment under section 153A read with section 143(3) of the Act as has been held by Hon'ble

Delhi High Court in case of Kabul Chawla (supra) and by the Hon'ble Bombay High Court in case of Continental Warehousing Corporation (Nhava Sheva) Ltd. and Anr. (supra).

13. Identical issue has also been decided by co-ordinate Bench of the Tribunal in case of ACIT vs. Smt. Renu Sehgal in ITA No.837/JP/2018 order dated 19.08.2019 which was decided in favour of the assessee by following the decision rendered by co-ordinate Bench of the Tribunal in Anantnadh Constructions and Farms (P.) Ltd. (supra) and the decision rendered by Hon'ble Gujarat High Court in case of Maruti Fabrics (2014) 47 taxmann.com 298.

14. In view of what has been discussed above and following the decision rendered by the co-ordinate Bench of the Tribunal in cases of Anantnadh Constructions and Farms (P.) Ltd. (supra) & Shivali Mahajan (supra), we are of the considered view that when the proceedings before the ITSC fail on the ground of non fulfilment of conditions laid down under section 245 of the Act by the assessee, AO is required to decide the issue independently and is not permitted to make addition merely on the basis of suo-moto disclosure made by the assessee before the ITSC, which is undisputedly on adhoc basis. More particularly, when "no

incriminating material" was found or seized during the search and seizure operation carried out on the basis of which assessment has been framed, any addition made otherwise is not sustainable.

15. In view of what has been discussed above, we are of the considered view that the Ld. CIT(A) has erred in upholding the addition made by the AO in the absence of any incriminating material, merely on the basis of suo-moto disclosure made by the assessee before the ITSC, as the said proceedings got aborted due to non fulfilment of conditions by the assessee, no addition is sustainable in the eyes of law. So the question framed is decided in favour of the assessee and against the Revenue. Consequently, addition made by the AO and confirmed by the Ld. CIT(A) is ordered to be deleted. Hence, appeal filed by the assessee is hereby allowed.

Order pronounced in the open court on 5th April 2022.

Sd/-	**Sd/-**
(PRASHANT MAHARISHI)	**(KULDIP SINGH)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai, Dated: 05.04.2022.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent

The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.