

IN THE INCOME TAX APPELLATE TRIBUNAL,
DELHI BENCH 'C' NEW DELHI

BEFORE : SHRI I.C. SUDHIR, JUDICIAL MEMBER &
SHRI L.P. SAHU, ACCOUNTANT MEMBER

ITA Nos. 3480 & 3481/Del./2014
Asstt. Years : 2009-10 & 2010-11

M/s. Garima Polymers Pvt. Ltd., vs. A.C.I.T., Central Circle-21
E-4/23, Near Naini Lake, New Delhi.
Model Town, Delhi.
(PAN- AADCG 2595 G).
(Appellant) (Respondent)

Appellant by : Sh. B.L. Gupta, AR
Respondent by : Sh. A.K. Saroha, CIT/DR
Date of hearing : 27.02.2017
Date of pronouncement : 27.03.2017

ORDER

Per L.P. Sahu, Accountant Member:

Both these appeals, pertaining to assessment years 2009-10 and 2010-11, are filed by assessee against the orders of Id. CIT(A) dated 28.03.2014. Since common questions of law and facts are involved in both the appeals, the same are being disposed of by way of this consolidated order for brevity. For the sake of convenience, we first take up the appeal for A.Y. 2009-10.

2. The brief facts of the case are that a search and seizure action u/s. 132 of the Act was carried out in the case of Mukesh Gupta Group on 21.05.2009

and their residential premises at 4439, Gali No. 55, Reharpura, Karol Bagh, New Delhi, when at the residence of Shri Mukesh Gupta, a sale deed dated 18.11.2008 evidencing purchase of property by the assessee through its director Shri Mukesh Gupta was found and seized. On the basis of this document, proceedings u/s. 153C were initiated against the assessee by issuing the notice on 04.07.2011 to file the return of income. In response, the assessee filed the return of income declaring the income of Rs.2,75,247/- stating that there was no business by the assessee in the year under consideration. Thereafter statutory notices u/s. 142(1) and 143(2) along with detailed questionnaire based on the seized documents were issued on 22.09.2011 fixing the date for 28.09.2011, but the same remained unresponded. Subsequently, a show cause notice was issued on 13.12.2011 fixing the date for 16.12.11 which also was not responded to. For this non-compliance, a penalty u/s. 271(1)(b) of the Act was also levied by the AO. The Assessing Officer noticed from the balance sheet and profit and loss account of the assessee that the assessee company had raised the share application of Rs.9,50,000/- and unsecured loan of Rs.1,50,00,000/-, but for want of any supportive evidence, the AO added these sums to the income of the assessee as unexplained. He also added a sum of Rs.29,063/- as unexplained

administrative and financial expenses claimed by assessee. The assessment was accordingly completed u/s. 153C/144 of the Act.

3. The assessee challenged the assessment order in appeal before the Id. CIT(A) both on legal aspect of the case as well as on merits of addition. He challenged the validity of order u/s. 153C having been passed without recording any satisfaction in the case of person searched that certain documents found in the search belong to the assessee. As to the merits of addition of Rs.9,50,000/-, it was submitted on behalf of the assessee that share application money of Rs.3,50,000/- was received from Mrs. Renu Rekhan and Rs.6,00,000/- from Mrs. Nisha Rekhan and both the share applicants are assessed to tax in ward 20(3) and 28(3) respectively. Regarding unsecured loans of Rs.1,50,00,000/-, it was submitted that this amount was raised from the following persons, who are regular assesseees, as under :

(i). Ankit Rekhan	:	Rs.40,00,000/-
(ii). Khitiz Infratech (P) Ltd.	:	Rs.50,00,000/-
(iii). Nitin Rekhan	:	Rs.10,00,000/-
(iv). Gaurav Rekhan	:	Rs.10,00,000/-
(v). Star Techno Soft (P) Ltd.	:	Rs.40,00,000/-

He also made an application u/r. 46A for admission of additional evidences filed before the Id. CIT(A) in the form of confirmation letters of the above

creditors and the share applicants, stating that the assessee was prevented by sufficient cause to file these confirmations before the AO and the AO without providing reasonable opportunity to the assessee, and any independent enquiries with respect thereto, wrongly made the additions. He prayed to the Id. CIT(A) to admit these additional evidences for consideration. The Id. CIT(A), however, confirmed the order of the Assessing Officer vide impugned order, which has been challenged before the Tribunal by means of this appeal, inter alia, on the following grounds :

“On the facts and in the circumstances of the case and in law, the Commissioner of Income Tax (A) was incorrect and unjustified in –

- 1) Dismissing the appeal of the assessee.*
- 2) Passing the Appeal Order without deciding the grounds of appeal relating to illegality of the order passed u/s 153C of the IT Act.*
- 3) Dismissing the appeal even when the Assessing Officer has not acquired valid jurisdiction for action u/s 153C.*
- 4) Dismissing the appeal even without particularly deciding the ground no. 8 of grounds of appeal filed before the CIT(A).*
- 5) Holding that the AO has passed the order u/s 144 correctly.*
- 6) Confirming the addition of Rs. 9, 50,000 and Rs. 1.50 Crores and also Rs. 29,063 without examining the additional evidences filed during the appeal proceedings.*
- 7) Confirming the addition of the amount mentioned in point (6) above even without having the comments of the Assessing Officer on the additional evidences filed during the appeal proceedings.*

8) Without considering the submissions made during the appeal proceedings.

9) Confirming the additions mentioned at point (6) above without examining and also without contradicting the submissions made.

10) Dismissing the appeal without considering the additional evidences filed under rule 46A during appeal proceedings.”

From the above grounds of appeal, following two issues emerge out for adjudication in this appeal:

- (i). Whether the order of the AO is legally valid, having been passed without jurisdiction conferred u/s. 153C of the Act; and
- (ii). Whether the Id. CIT(A) was justified in sustaining the additions of Rs.9,50,000/- and Rs.1.50 crores without admitting and examining the additional evidences filed u/r 46A before her.

4. With respect to first issue, the Id. Counsel for the assessee contended that the order u/s. 153C passed by the AO is without any jurisdiction, as no satisfaction as to the documents belonging to the assessee, has been recorded by the AO of the searched person, which is pre-condition for acquiring the jurisdiction u/s. 153C of the Act over the case of other than person searched, i.e., the assessee here. It was submitted that this issue is squarely covered by the decision of ITAT, Delhi Bench-C, dated 06.12.2016 in own case of assessee for A.Y. 2008-09 (ITA No. 1902/Del./2014), wherein the coordinate Bench on the same facts and same search, has decided the appeal in favour of the

assessee on this legal aspect of the case in view of decision of Hon'ble Supreme Court in the case of M/s. Calcutta Knitwears dated 12.03.2014. The Hon'ble Tribunal in that case has categorically held that the satisfaction note has been recorded by the AO of the assessee and not by the AO of the person searched before handing over the seized papers. In the instant case also, the AO of the assessee has acted on the basis of same satisfaction note, which in view of the above decision of Tribunal, does not confer jurisdiction to the AO to pass any order u/s. 153C in the case of assessee for the year under consideration.

5. Addressing to the second issue, the Id. Counsel for the appellant contends that both the share applicants and all the five creditors are income-tax assesseees having their PAN and their confirmations were filed before the Id. CIT(A) as additional evidences with an application u/r 46A, stating that the assessee was prevented by sufficient cause to file these confirmations before the AO and the AO without providing reasonable opportunity to the assessee, and making any independent enquiries with respect thereto, made the additions. Non-presence of appellant in assessment proceedings has been accepted by the Tribunal due to reasonable cause in the penalty appeal of the assessee u/s. 271(1)(b). In the remand proceedings, the AO has not

commented on the authenticity of the additional evidences. It was also submitted that since these additional evidences go to the root of the matter in the given facts & circumstances of the case, the ld. CIT(A) was not justified in not admitting and considering the evidences so produced before her in support of assessee's claim. He, therefore, urged for deletion of additions confirmed by the ld. CIT(A).

6. Repudiating the submissions of the ld. AR, the learned DR relied on the order of the Assessing Officer and submitted by way of written submissions that the Assessing Officer of both, i.e., the person searched and the assessee, was common and the satisfaction note considered by ITAT in assessee's own case for A.Y. 2008-09 has, in fact, been recorded by the Assessing Officer in the capacity of the Assessing Officer of the searched person and such contention made by the ld. DR in that case by way of written submission (copy placed on record) was not considered by the Tribunal in right perspective. Based on the satisfaction note recorded, the ld. DR elucidated his contentions stating as under :

"i). The Satisfaction Note says, ".....During the pendency of assessment proceedings in the case of Shri Mukesh Gupta for AY 2004-05 to 2010-11(u/s 153A/143(3)), the material seized from the premises of the assessee has been examined....".

ii) Undisputedly, a) seized documents are in the possession of the AO of 'searched person', and b) seized material has been examined in the assessment proceedings of the searched person. Undisputedly, the action of examination is also conducted in the capacity of AO of Searched personfShri Mukesh Gupta).

iii) The Satisfaction Note says, ".....During the pendency of assessment proceedings in the case of Shri Mukesh Gupta for AY 2004-05 to 2010-11(u/s 153A/143(3)), the material seized from the premises of the assessee has been examined....."(emphasis supplied). This language would only be used by the AO of 'Searched person' because the AO of Shri Mukesh Gupta would only refer him(Shri Mukesh Gupta) as 'assessee' as per practice prevalent in the Income-Tax department.

iv) The Satisfaction Note further says, ".....I am satisfied that the part of seized documents belong to persons other than Shri Mukesh Gupta..." Clearly, this language prove that the satisfaction note has been recorded by the AO of searched person (Shri Mukesh Gupta).

v) As per practice prevalent in the income tax department, AO would not write name of his assessee on the order-sheet because the said order-sheet would in any case remain in assessment folder of the assessee. However, in the present case, on the sheet recording 'Satisfaction Note', the name of M/s Garima Polymers Pvt. Ltd. is recorded in the 2nd line from the top which clearly indicate that it is not written by the AO of M/s. Garima Polymers Pvt. Ltd. Since AO of searched person would be required to write such 'Satisfaction Note' in more than one case, therefore, the name of each 'other person' would be indicated on top of the paper to easy reference in future.

v) The Satisfaction Note says, ".....As such proceedings u/s 153C are being initiated..."(emphasis supplied). Since, for initiating proceedings u/s 153, it is the AO of the searched person who initiates first step by recording the satisfaction note, it clearly shows that in the present case, the capacity of the officer recording the 'Satisfaction Note' is of the AO of Shri Mukesh Gupta."

Apart from above, the ld. DR relied on the decisions of Hon'ble jurisdictional High Court in the case of Principal C.I.T. vs. M/s. Super Malls Pvt Ltd., 2016-

TIOL-2953-HC-Del-IT, and CIT vs. M/s. Nau Nidh Overseas Pvt. Ltd., 2017-TIOL-389-HC-Del-IT.

7. On second issue, the ld. DR submitted that the assessee was given sufficient opportunity at the assessment stage, but no evidence in support of its claim was filed and hence, the assessee failed to satisfy any of the exceptions enumerated in rule 46A for admission of additional evidences. The assessee even did not attend the proceedings in compliance to several notices issued.

8. Regarding cancellation of penalty u/s. 271(1)(b) by the Tribunal accepting the illness of Sh. Nitin Rekhan (who looked after the tax affairs of assessee) as reasonable cause, it was submitted that the penalty was levied for non-attendance of assessee on 28.09.2011 and as per medical papers, Shri Nitin Rekhan was hospitalized and discharged on 10.11.2011 and 16.11.2011 respectively and the show cause notice was issued to the assessee in the present proceedings fixing the date of hearing on 16.12.2011. It was also submitted by the ld. DR that the contention of the assessee that Shri Nitin Rekhan, who fell ill, was the only person looking after the tax matters of assessee, is also not tenable for the reason that letter dated 17.08.11 filed

before the AO submitting copies of Returns of income in response to notice u/s. 153C for AY. 2009-10 and 2010-11, was signed by counsel Sh. B.L. Gupta, Form No. 35 by Sh. Ankit Rekhan, submissions dated 19.12.13 before CIT(A) by Sh. B.L. Gupta and the application dated 08.03.14 regarding Rule 46A and Form No. 36 has been signed by Sh. Subhash Rekhan. In the order of the Id. CIT(A), it has been categorically mentioned that Sh. Subhash Rekhan attended alongwith the AR. Thus, the Id. DR urged for sustenance of impugned order.

9. We have considered the rival submissions and have gone through the entire material available on record including the case laws cited by both the parties.

10. Adverting to the first issue regarding validity of order u/s. 153C on the basis of impugned satisfaction note recorded-whether by the AO of assessee or by AO of searched person, we think it appropriate to reproduce the impugned satisfaction note which reads as under :

"Search and seizure action u/s 132 of the I.T. Act was carried out on 21-05-2009 at the residential premises of Shri Mukesh Gupta at House No. 4439, Gali No. 55, Regharpura, Karol Bagh., New Delhi. During the course of pendency of assessment proceedings in the case of Shri Mukesh Gupta for AY 2004-05 to 2010-11 (U/s 153 A/ 143 (3), the material seized from the premises of the assessee has been examined. After examining such seized material, I am satisfied that the part of

seized documents belong to persons other than Shri Mukesh Gupta. The detail of such paper is Ann A-11, Party 1, Page No, 21-29 being sale deed dated 18-11- 2008 for sale of property situated at Plot No. 4, Block No. 17A, WEA, Karol Bagh, New Delhi purchased in the name of M/s. Garima Polymers Pvt. Ltd., through its director Shri Mukesh Gupta for a consideration of Rs.72,50,000/-. These papers belong to M/s. Garima Polymers Pvt. Ltd.

2. The seized papers reveal that property at Plot No. 4, Block No 17A, WEA, Karol Bagh, New Delhi is a building constructed on 234.22 sq. yd. of land. The constructed area is 391.46 sq. mt., the cost of land has been worked out at Rs.21,800/- per sq. mt. which is very low in comparison to the prevailing market rates in the area. Further the fact that Shri Mukesh Gupta has neither been in a position to submit any evidence of the source of investment nor submit details of the other directors (actual owners) Shri Nitin Gupta and Shri Ankit Gupta cause aspersions about the wherewithal of the company.

In view of the facts stated above it is evident that documents belonging to the assessee have been seized from a person covered under search u/s 132 of the I.T. Act, 1961. Hence proceedings u/s 153C are being initiated for AY 2004-05 to 2009-10."

The contention of the assessee has been that this satisfaction note was not recorded in the case of person searched, but in the case of assessee, whereas the contention of the ld. DR is that it was recorded in the case of searched person Shri Mukesh Kumar Gupta. A deep delve into the above satisfaction note reveals that the language used by the AO in para 1 of the above note indicates as if it has been recorded in the case of person searched whereas the language used in last para of the said note shows as if it has been recorded in

the case of assessee. The assessment records of the searched person and that of the assessee are not available before us for examination. Though this issue has been decided by coordinate Bench of ITAT(supra) in favour of assessee, but the contention of the learned DR made before us based on the same satisfaction note, in our opinion, cannot be left unaddressed in the interest of justice. In this context, the decision of Hon'ble jurisdictional High Court in the case of CIT vs. M/s. Super Malls Pvt Ltd. (supra) relied by the ld. DR, having identical facts, is relevant to be taken note of. The facts in that case are noted by Hon'ble High Court as under :

"5. This Court does not propose to advert the facts in detail except to state that the search and seizure operation was carried out in the premises of Shri Tejwant Singh and one Shri Ved Prakash Bharti. A survey too was conducted under Section 133A of the Act in the premises of the assessee. As a consequence of that, notice was issued to the assessee under Section 153C of the Act by the Assessing Officer (AO), who also co-incidentally happened to be the AO of the searched party i.e Tejwant Singh and Ved Prakash Bharti and had issued notice under Section 153A of the Act. The assessments and additions finally made in the block period were the subject matter of an appeal to the CIT(A), which upheld that. In the circumstances, the assessee's appeal to the ITAT, which upheld it at the threshold stating that the satisfaction note recorded under Section 153C of the Act in respect of the assessee i.e., the third party was invalid."

11. Based on these facts, the ld. Counsel in that case candidly conceded that since the AO in both the cases, i.e., that of the searched party and the third party were the same, the question of transmitting or recording a separate note

etc. could not have been insisted upon. In the totality of facts, the Hon'ble jurisdictional High Court has held as under :

“Plainly put, the AO was satisfied that the documents belonged to the assessee in view of what was contained or brought out on a fair reading of their contents. It must not be overlooked that while construing a document, expressions should not be interpreted too literally as if they are, words, carved in stone or in a Statute – as the ITAT did in this case. For these reasons, we are of the opinion that the ITAT should not have allowed the appeal only on this hyper technical ground with regard to the satisfaction note.”

12. In the instant case, it is not the case of the assessee that the documents seized from the premises of searched person did not belong to assessee, rather the said document, i.e., sale deed unequivocally shows the purchase of property mentioned therein, by the assessee. It is also an admitted fact that the AO of searched person and that of the assessee is one and the same. Therefore, in view of the above decision of Hon'ble jurisdictional High Court, and in peculiar facts and circumstances of the present case, the impugned order u/s. 153C of the Act cannot be said to be legally invalid or without jurisdiction. Hence, this issue is decided against the assessee.

13. As regards the second issue, we find that the addition in the instant case has been made for unexplained share application money and unsecured loans. The assessee furnished confirmations of all the share applicants and creditors as additional evidences before the ld. CIT(A). It is no doubt true that the

assessee could not file any evidence before the AO to substantiate its claim for which he has taken a plea of ailment of one of the directors Shri Nitin Rekhan, which was taken as a reasonable cause by the ITAT while deleting the penalty imposed u/s. 271(1)(b) of the Act. The assessment has been completed as per section 144 of the Act. These evidences, in fact, are the primary evidences and go to the root of the issue to examine the claim or to make further enquiry from the share applicants or from the creditors. The contention of the assessee has been that all the above creditors were PAN holders and income-tax assesseees in various wards. In the remand proceedings, the AO has made no comments on the authenticity of these evidences, but commented only on their admissibility u/r. 46A. The additions have also been made without any material unearthed during any enquiry from the creditors. In the totality of all these facts, in our considered opinion, the assessee should be given one more opportunity to substantiate its claim before the AO by laying cogent evidences in support. We accordingly remit the issue back to the Assessing Officer for examining the confirmations of the creditors and to decide the matter afresh after making thorough enquiries as he thinks fit. Needless to say, the assessee shall be given reasonable opportunity of being heard and the assessee is directed to render full cooperation to the AO. Accordingly, the appeal of the assessee is partly allowed for statistical purposes.

14. The facts involved in the appeal for the assessment 2010-11 are also similar to that of appeal for A.Y. 2009-10, except the fact that in this case addition of Rs.1,00,00,000/- was made as unexplained sundry creditors for want of any evidence furnished before the AO in the Assessment proceedings. In this case, the contention of the assessee has been that the above amount was received from Satya Prakash & Bros (P) Ltd., as advance against sale of a property. The assessee furnished copy of sale deed dated 03.05.2010 and the confirmation of the creditor as additional evidence before the Id. CIT(A). Other facts of the case are altogether similar to that of A.Y. 2009-10. Therefore, our decision rendered in appeal for A.Y. 2009-10 would be equally applicable to this appeal also. Accordingly, this appeal of the assessee is also restored to the file of AO on the same line as indicated in appeal for A.Y. 2009-10. As a result, this appeal also deserves to be allowed for statistical purposes.

15. In the result, both the appeals are allowed for statistical purposes.

Order pronounced in the open court on 27.03.2017.

Sd/-
(I.C. SUDHIR)
Judicial Member

Sd/-
(L.P. SAHU)
Accountant Member

Dated : 27.03.2017

*aks/-