

**IN THE INCOME TAX APPELLATE TRIBUNAL
"SMC" Bench, Mumbai**

Before Shri D. Manmohan, Vice President

ITA Nos. 1541 & 1543/Mum/2015
(Assessment Years: 2007-08 & 2009-10)

DCIT, Central Circle - 2(3) Room No. 803, 8th Floor Old CGO Annex Bldg. Mumbai 400020	Vs.	M/s. Empire Mall Pvt. Ltd. 105/106, Provogue House Off New Link Road Andheri (W), Mumbai 400053 PAN - AABCE5637R
Appellant		Respondent

CO Nos. 97 & 99/Mum/2015
(Assessment Years: 2007-08 & 2009-10)

M/s. Empire Mall Pvt. Ltd. 105/106, Provogue House Off New Link Road Andheri (W), Mumbai 400053 PAN - AABCE5637R	Vs.	DCIT, Central Circle - 2(3) Room No. 803, 8th Floor Old CGO Annex Bldg. Mumbai 400020 PAN - AABCE5637R
Appellant		Respondent

Revenue by: Shri A.G. Bhatkar
Assessee by: Shri Rushabh Mehta

Date of Hearing: 30.09.2015
Date of Pronouncement: 12.10.2015

ORDER

Per D. Manmohan, V.P.

These cross appeals are directed against the orders passed by CIT(A)-48, Mumbai and they pertain to assessment years 2007-08 and 2009-10.

2. In the appeals filed by the Revenue it was contended that the CIT(A) was not justified in deleting the disallowance of ₹14,17,804/17,48,744/- (for assessment years 2007-08 and 2009-10 respectively) on account of administrative and other overheads without appreciating the fact that the assessee had not commenced its business in as much

as construction of Mall started and continued upto A.Y. 2010-11 and hence the expenditure, if at all, could have been capitalised as capital work-in-progress and cannot be allowed as revenue expenditure.

3. By way of cross objection assessee contends that the proceedings initiated under section 153C and the orders passed thereof under section 143(3) r.w.s. 153C is bad in law in as much as no incriminating material was found connected to the assessment under consideration and the AO has issued notice without proper recording of satisfaction.

4. I am concerned here with assessment years 2007-08 and 2009-10. A search and seizure action under section 132 was carried out on 20.01.2012 at the office of Provogue India Ltd. and residence of its Directors. The search action was completed on 17.03.2012. It deserves to be noticed that for A.Y. 2007-08 assessee filed its regular return of income under section 139 of the Act on 01.10.2007 declaring loss of ₹13,21,804/- and for A.Y. 2009-10 return of income was filed on 16.09.2009 declaring loss of ₹14,11,167/-. Since no notice was issued under section 143(2) of the Act returns are deemed to have been processed under section 143(1) of the Act and they reached finality on 31.03.2009 and 31.03.2011 respectively; both the dates falling before the search action took place.

5. During the course of search, of the office premises of Provogue India Ltd., loose papers with serial No. 9 to 32 have been found and seized, which are Trial Balances of the following three companies: -

- i. Alliance Mall Developers Co. Pvt. Ltd.
- ii. Hagwood Commercial Developers Pvt. Ltd.
- iii. Empire Mall Pvt. Ltd.

Since the documents belonging to assessee-company have been seized in the search action, satisfaction note for initiating proceedings under section 153C has been recorded and notice under section 153A r.w.s. 153C was issued on 13.08.2013 in response to which the assessee declared nil income. The AO noticed that the assessee

debited huge expenditure in the Profit & Loss Account out of which a portion was shown as preliminary expenditure whereas according to the AO the entire expenditure fall under that category. So he disallowed a sum of ₹14,17,804/- for A.Y. 2007-08 and ₹17,48,744/- for A.Y. 2009-10 on the ground that it is capital expenditure incurred prior to commencement of business.

6. Aggrieved, assessee contended before the CIT(A) that the proceedings under section 143(3) r.w.s. 153C are bad in law. It was also contended that disallowance of administrative and other overhead expenditure is not in accordance with law.

7. It may be noticed that the main plea of the assessee was that for the years under consideration there is no assessment pending as on the date of search and more over there is not even incriminating material found during the course of search which belonged to the assessee. In fact no undisclosed income or property was discovered in the course of search and hence proceedings under section 153C would not have been initiated. The CIT(A) observed that the decisions rendered in the context of section 153A by various courts are equally applicable in the context of the provisions of section 153C of the Act. He relied upon the decision of the Hon'ble Delhi High Court in the case of CIT vs. Anil Kumar Bhatia (82 CHH 113) wherein the court observed that it is mandatory on the part of the AO to initiate proceedings under section 153A of the Act, consequent to the search and seizure action under section 132(1) of the Act; having initiated the proceedings AO is empowered to examine all the material, including the material found during the search and seizure proceedings. In his opinion the action under section 153C is analogous to section 153A. Thus he concluded that there is no infirmity in the action of AO in issuing notice under section 153C of the Act.

8. As regards the contention of the assessee on merits, i.e. no addition/disallowance can be made since the same is not based on any

incriminating material, the learned CIT(A) admitted, in para 5.5 of his order, that the AO has not made any disallowance on the basis of any incriminating material found during the search and also observed that there was no prior assessment order under section 143(3) of the Act. He also observed that when a return is processed under section 143(1) of the Act it is merely a check on accuracy of computation and calculation of taxes due. The claims relating to expenditure and income is not examined and therefore the AO is entitled to examine all aspects by issuing notice under section 153C of the Act. The next contention of the assessee was that the AO was not justified in holding that the business was not set up and commenced. The case of the assessee company was that it had already set up and commissioned its business. Explaining further it was contended that business cannot be a continuous course of activity and it is not necessary that all the activities should be started at the same time. Land was acquired, clearing of plot, levelling and excavation work began in A.Y. 2007-08, consent was obtained from Maharashtra Pollution Control Board and clearance for conversion of land from MIDC was obtained. This is a case of a company which is already formed and commenced its activity of setting up of the Mall. Therefore, the CIT(A) was of the opinion that the expenditure incurred by the assessee is allowable as deduction. He, therefore, set aside the disallowance made by the AO.

9. Aggrieved by the order of deletion of addition, Revenue is in appeal before the Tribunal whereas the assessee challenged, by way of cross objections, the validity of reopening of assessment by issuing notice under section 153C of the Act.

10. At the time of hearing the learned counsel submitted that assessments for the years under consideration have already attained finality before the date of initiation of search and as per the first proviso to section 153C of the Act, no incriminating material has been found during the course of search. Explanation to Section 153A and Explanation 3 to section 147 speak of bringing to tax such income

which has escaped assessment and only when some income escaped assessment then other additions can be sustained. In other words, if no addition is made on the basis of which an assessment is sought to be reopened then other additions/disallowances cannot be sustained. Reference was also made to the amendment to section 153C of the Act wherein it is stated that the AO can proceed against the person other than searched person if he is satisfied that the books of account or documents or assets seized have a bearing on determination of the total income of such other person for the **relevant assessment year or years** referred to in sub-section (a) of section 153A. It was contended that though the amendment was brought into the statute book by Finance Act, 2014, the court have held that the same is curative and clarificatory in nature to make the provisions of section 153C workable and therefore it is retrospective in nature. He also relied upon the latest decision of the Hon'ble Delhi High Court in the case of CIT vs. Kabul Chawla (judgement dated 28.08.2015) wherein the court observed that completed assessments can be interfered with by the AO while making assessment under section 153A only on the basis of some incriminating material unearthed during the course of search proceedings. Similarly the Hon'ble Bombay High Court in the case of CIT vs. Continental Warehousing Corporation (Nhava Sheva) Ltd. 374 ITR 645 held, in the context of provisions of section 153A, that no addition can be made in respect of assessment which have become final if no incriminating material is found during the search. Reliance was also placed upon the decision of the ITAT Cochin (Third Member) in the case of DCIT vs. Royal Cartons Pvt. Ltd. (ITA 472/Coch/2013 dated 16.09.2015) wherein the Third Member observed, in the contest of provisions of section 153C, that in respect of completed assessment or assessments terminated by the operation of law on the basis of regular return filed, the addition has to be made only on the basis of the material found during the course of search operation. This decision was based on another Third Member

decision in the case of *Trishul Hi-Tech Industries vs. DCIT* (2014-TIOL-862-ITAT-KOL) wherein the Bench observed that the provisions of section 153C of the Act was amended to obviate practical difficulties which arose in its interpretation from time to time. When seized material is sent to the Assessing Authority having jurisdiction over the other person the Assessing Authority, receiving such seized material, should not act mechanically without any verification and in fact proceeding mechanically is not the intention of the Legislature. Therefore, in order to eliminate such situation it was made clear that based on incriminating material the AO is competent to issue notice under section 153C only in respect of such assessment years. In other words, where there is no incriminating material found relating to the assessment year the assessment for such year cannot be disturbed. Thus there is a need for assessment year specific information in possession of the AO.

11. It may be noticed that the Revenue relied upon the decision of the Hon'ble Delhi High Court in the case of *SSP Aviation Ltd.* 346 ITR 177 wherein it says that in view of provisions of section 153C satisfaction that is required to be reached by AO having jurisdiction over searched person is that valuable article or books of account seized belong to a person other than searched person and it is not necessary that document seized must show undisclosed income. The decision was rendered on the peculiar facts of that case and the court was concerned with forwarding of documents from the officer who carried out the search to the AO concerned and it is not with regard to the AO who had to issue a notice under section 153C of the Act. On the contrary, in the case of *Hagwood Commercial Developers Pvt. Ltd.* (ITA No. 1305/Mum/2015 dated 22.05.2015), which is one of the parties referred to during the search conducted in the premises of *Provogue (India) Ltd.*, the Bench observed that issuance of notice under section 153C without any incriminating material is not sustainable in law. With regard to the decision of the

Hon'ble Kerala High Court in the case of Dr. K.M. Mehaboob vs. DICT 26 taxmann.com 54 the learned counsel submitted that the decision was rendered in connection with the power of the AO of searched party to record satisfaction and it is not with regard to the AO who has to issue notice under section 153C of the Act. He thus strongly submitted that the notice issued under section 153C is bad in law and consequently the proceedings completed only on the strength of the notice issued also deserves to be quashed.

12. On the other hand, the learned D.R. relied upon the orders passed by the Hon'ble Delhi High Court and Hon'ble High of Kerala to submit that it is not necessary for the AO concerned to examine as to whether the incriminating documents are related to the year under consideration or not and once the assessments are reopened by issuing notice under section 153C of the Act the AO is free to make any addition though the addition may not be with reference to the incriminating documents found during the course of search.

13. I have carefully considered the rival submissions and perused the record. It is not in dispute that the assessments in both the cases have attained finality by operation of law in as much as the assessee filed returns of income before the search and seizure action took place and even the proceedings under section 143(1) of the Act have attained finality before the date of receipt of the files by the AO concerned. Under identical circumstances the ITAT Mumbai "SMC" Bench in the case of Hagwood Commercial Developers Pvt. Ltd observed that the notice issued under section 153C without incriminating material is not sustainable in law. The ITAT Cochin (Third Member) also had an occasion to consider identical issue wherein it was observed that the amendments made to section 153C are clarificatory and retrospective in operation and unless there is incriminating material for each assessment year the AO cannot initiate proceedings under section 153C particularly when the assessment under section 141(1) is deemed to be completed and

attained finality before satisfaction was recorded by the AO. I have also noticed that the decisions relied upon by the learned D.R. are distinguishable on facts in as much as the Hon'ble Delhi High Court and Hon'ble Kerala High Court have not directly dealt with the issue of the powers of AO who has to issue notice under section 153C of the Act but they are concerned with transfer of files from the officer who has conducted the search to the AO who has to issue notice to third party. In other words, the power of the AO, who has to deal with the third party under section 153C, was not the subject matter of consideration in the aforesaid cases, more particularly after the amendment to section 153C of the Act which was considered by the ITAT (Third Member) Kolkata as well Cochin. Having regard to the circumstances of the case I am of the firm view that the order passed under section 143(3) r.w.s. 153C is without jurisdiction and invalid in law in as much as the learned CIT(A) admitted that no incriminating material was found during the course of search concerning the assessment years under consideration in respect of the assessee herein. Since the notice issued under section 153C is held to be not valid, the assessments made thereon have no legs to stand and therefore it is not necessary to deal with the merits of the addition/disallowance.

14. In the result, the appeals filed by the Revenue are treated as dismissed on the ground that it is of academic importance whereas the cross objections filed by the assessee are allowed.

Order pronounced in the open court on 12th October, 2015.

Sd/-
(D. Manmohan)
Vice President

Mumbai, Dated: 12th October, 2015

Copy to:

1. *The Appellant*
2. *The Respondent*
3. *The CIT(A) - 48, Mumbai*
4. *The CIT, Central-I, Mumbai*
5. *The DR, "SMC" Bench, ITAT, Mumbai*

By Order

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*Assistant Registrar
ITAT, Mumbai Benches, Mumbai*