

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

BEFORE SHRI G.S.PANNU, ACCOUNTANT MEMBER
AND
SHRI SANJAY GARG, JUDICIAL MEMBER

ITA No.1640/Mum/2013
(Assessment Year 2004-05)

The Income Tax Officer,
Ward 5(2)(3), Aaykar Bhavan, M.K.Road,
Mumbai 400 020 Appellant

Vs.

M/s. Mangalam Gems Pvt. Ltd,
210, Panchratna, Opera House,
Mumbai -400 004
PAN: AABCM8877F Respondent

C.O. No.91/Mum/13
(Arising out of ITA No.1640/Mum/2013
Assessment Year 2004-05)

M/s. Mangalam Gems Pvt. Ltd,
210, Panchratna, Opera House,
Mumbai -400 004
PAN: AABCM8877F Cross Objector

The Income Tax Officer,
Ward 5(2)(3), Aaykar Bhavan, M.K.Road,
Mumbai 400 020 Appellant in Appeal

Revenue by : Ms. Bharti Singh
Respondent by : S/ShriRakesh Joshi/
Manish Pipara

Date of hearing : 28/10/2016
Date of pronouncement : 27/01/2017

ORDER

PER G.S.PANNU,A.M:

The captioned appeal filed by the Revenue and Cross Objection by the assessee pertaining to assessment year 2004-05 are directed against an order passed by CIT(A)-9, Mumbai dated 26/12/2012, which in turn, arises out of an order passed by the Assessing Officer under section 143(3) r.w.s. 147 of the Income Tax Act, 1961 (in short 'the Act') dated 30/12/2010.

2. The Grounds of appeal raised by the Revenue read as under:-

"1. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in annulling the assessment completed under section 153C of the Income Tax Act, 1961.?"

2. The Appellant prays that the order of the Ld. CIT(A) be set aside and the order of Assessing Officer be restored."

2. First, we may take up the appeal of the Revenue because the Ground raised by the Revenue goes to the root of the matter. In brief, the relevant facts are that the assessee is a company incorporated under the provisions of the Companies Act, 1956 and is, inter-alia, engaged in the business of diamond trading. It transpires that assessee company had entered into certain agreements dated 29/05/2004 with one M/s. Layer Exports Pvt. Ltd. for purchase of flats in the proposed building, namely 'Sea View'. A search action under section 132(1) of the Act was conducted at the residential/business premises of one Bharat Shah Group on 15/03/2008, wherein certain loose papers marked as Annexure -A, consisting of 19 pages were seized. In such loose papers, the Assessing Officer of M/s. Layer Exports Pvt. Ltd., an entity of Bharat Shah Group, noted the recording of transactions relating to the sale of flats by M/s. Layer Exports Pvt. Ltd., to the assessee company. According to the Assessing Officer of M/s. Layer Exports Pvt. Ltd., assessee company had

paid cash of Rs.2, 06,32,051/- to M/s. Layer Exports Pvt. Ltd. and, therefore, he informed the Assessing Officer of the assessee company to take necessary action in this regard. Consequently, the Assessing Officer issued a notice under section 153C of the Act on 09/09/2010 requiring the assessee to file a return of income, thereby initiating proceedings under section 153C r.w.s. 153A of the Act . In the ensuing assessment finalized under section 153C r.w.s. 143(3) of the Act dated 30/12/2010, the Assessing Officer considered a sum of Rs.2,06,32,051/- as unexplained investment made by the assessee in the acquisition of flats. The addition so made by the Assessing Officer was challenged by the assessee in appeal before the CIT(A) on facts and in law. On the point of law, assessee contended that the notice issued under section 153C of the Act was bad in law. Firstly, it was contended that there was no satisfaction recorded prior to the issue of notice under section 153C of the Act; secondly, that a search action in the case of Bharat Shah Group did not reveal any document or material or books of account which belonged to the assessee and, therefore, the initiation of proceedings under section 153C of the Act was bad in law; and thirdly, that search action was conducted on Bharat Shah Group on 15/03/2008, whereas the notice under section 153C was issued on 09/09/2010 i.e. almost after two years and six months, which is beyond a reasonable time, therefore, the same was bad in law. The CIT(A) has since upheld the stand of the assessee and concluded that conditions precedent for issuance of notice under section 153C r.w.s. 153A of the Act are not fulfilled in the present case and, therefore, according to him the consequent assessment u/s 153C of the Act stands nullified. Accordingly, he has annulled the assessment. Against such decision of the CIT(A), Revenue is in appeal before us.

4. In so far as, cross appeal of the assessee is concerned, the same is primarily on the merits of the addition of Rs.2,06,32,051/- made by the Assessing Officer. On this aspect, the CIT(A) has not adjudicated the issue since he annulled the assessment. Be that as it may, in the above background, we have heard the rival counsels and perused the relevant material.

5. The Ld. Departmental Representative has pointed out that information was received from the ACIT, Central Circle-24 & 26, Mumbai, the Assessing Officer in the case of Bharat Shah Group of cases, pointing out that the search had revealed that assessee had paid a sum of rs.2,06,32,051/- to M/s. Layer Exports Pvt. Ltd. as cash money i.e. out of the account books. It was pointed out that on this basis the Assessing Officer recorded his satisfaction for issuance of notice under section 153C of the Act and, therefore, there is no justification for the CIT(A) to say that the requisite conditions for issuance of notice under section 153C of the Act have not been fulfilled.

6. On the other hand, the Ld. Representative for the assessee has defended the order of the CIT(A) by pointing out the following discussion:-

“ 8. Having regard to the facts and circumstances of the case there is no dispute on the facts that the appellant was not searched and the search and seizure proceedings were conducted in the case of Bharat Shah and his group of companies. Therefore, as per the provisions of sec. 153A and 153 of the Act, proceedings can only be initiated by the LAO of the present appellant only after the Assessing Officer of Bharat Shah group of companies records a satisfaction that the seized material pertains to other persons i.e. the present appellant and consequently, he hands over such money, bullion, jewellery or other valuable article or thing or books of account or documents seized to the present LAO. Nowhere in the assessment order under section. 153C of the Act in the case of the present appellant there is any recording of fact that the LAO of Bharat Shah group of case has recorded any satisfaction under section 153C of the Act that money, bullion, jewellery or other valuable article or thing or books of account or documents seized from the premises of Bharat Shah Group actually belonged to the present appellant. As held by various counts of law including Hon’ble ITAT, Bangalore Bench in the case of P.Srinivas Naik V/s ACIT (2009) 117 ITD 201(Bang) has held that the language used in sec. 153C is materially

different from the language used in section 153BD. The expression belonging to the assessee cannots both the complete ownership and limited ownership or interest. However, there should be some limited ownership of interest if it is to be permitted that the assets belongs to the assessee. In the instant case, documents or books of account found during the course of search and seized cannot be termed to be indicating any limited interest of the ownership of the assessee in such books of account or documents.

8.1 Central issue in the present case is, can it be stated that any money, bullion, jewellery or other valuable article or thing or books of account or documents seized from the premises of Shri Bharat Shah or its group of cases during search operations belonged to the present appellant. Secondly, can it be stated that such bullion, jewellery or other valuable article or thing or books of account or documents belonging to the present appellant were handed over to the present appellant before issuing the notice under section 153C of the Act . The LAO has not given any such finding of the fact. No material nor evidences were placed before me, neither by the LAO nor by the appellant to prove that any such money, bullion, jewellery or other valuable article or thing or books of account or documents seized from the premises of Shri Bharat Shah or its group of cases, during search operations belonged to the present appellant. Available decisions on the relevant subject confirm that when the conditions precedent for issuance of notice under section 153C r.w.s 153A are not fulfilled, any action under section. 153C of the Act stands vitiated and the consequent reassessment or assessment under section 153C of the Act stands nullified. Strong reliance is placed on the following decisions:-

- (i) Vijaybhai N. Chandrani vs. Assistant Commissioner of Income Tax, (2013) 333 ITR 436 (Guj) .*
- (ii) Manish Maheshwari vs. Assistant Commissioner of Income Tax & Anr. (2007) 289 ITR 341(SC)*
- (iii) DCIT vs. Unيتد Spirits Ltd., (ITA Nos. 1375 to1378/Bang/2010) (Ays) 2002- 03 to 2005-06 dated 13/1/2012*
- (iv) P. Srinivas Naik vs. Assistant Commissioner of Income Tax (2009) 117 ITD 201(Bom)*
- (v) Meghmani Organics Ltd., vs. Deputy Commissioner of Income Tax, (2010) 6 ITR 360, ITAT, Ahmedabad.*
- vi. Sneh Enterprises vs. Commr. Of Customs (2006) 7 SCC 714.*
- (vii) Satyanarayana v/s. ACIT, Chennai, 50 SOT 168 (Chennai)/ 20 Taxman.com. 56, Chennai.*
- (viii) SSP Aviation Ltd. vs. DCIT, 20 Taxman.com 214 (Delhi) High Court.*
- (ix) CIT v/s. Late J Chandrasekar (HUF)(2011) 338 ITR 61 (Mad)*
- (x) Apex time Pvt. Ltd. v/s. DCT i ITSS(A) No.34/Mu/2008 dated 30/03/2011 (ITAT Ä" Bench Mumbai).*
- (xi) Ingram Micro (India) exports Pvt. Ltd. vs. DDIT(IT). Mumbai (ITA No. 8133/M/2010) dated 21/12/2012 (ITAT L Bench Mumbai).*
- (xii) Deputy Commissioner of Income Tax v/s. Meghani Organics Ltd., ITA No.2086 of 2009 (Gujarat High Court dated 27/4/2011).*

8.2 Having carefully and dispassionately considered all the aforesaid facts and circumstances and also the judicial pronouncements and the relevant provisions of sec. 153C of the Act, I am of the firm view that:-

(i) Satisfaction must be recorded by the Assessing Officer of Bharat Shah or Bharat Shah group of cases that money, bullion, jewellery or other valuable article or thing or books of account or documents seized from the premises of Shri Bharat Shah or its group of cases during the search operations belonged to the present appellant.

(ii) Such books of accounts or the documents or assets seized and belonging to the present appellant were required to be handed over to the present LAO before issuance of notice under section. 153C of the Act in the present case.

8.3 No material nor any evidences were placed before me, neither by the appellant nor by the LAO, to prove that the aforesaid mandatory conditions were fulfilled in the present case. In view of the above and in the light of previously mentioned judicial decisions and in accordance with the provisions of sec.153C of the Act the assessment framed under section 153C of the Act is annulled in this case. Therefore, ground of appeal No.1(2) is allowed.”

7. We have carefully considered the rival submissions. Factually speaking, it is quite clear that the present proceedings have been initiated by the Assessing Officer on the strength of section 153C of the Act. It is also clear that the recourse to section 153C of the Act has been taken by the Assessing Officer based on the search action under section 132(1) of the Act, which had taken place in the case of Bharat Shah Group of cases. Before us, the Ld. Departmental Representative has referred to an information dated 21/12/2009 forwarded by the Assessing Officer of Bharat Shah Group of cases, which reads as under:-

“Sub:- Information in case of Kranti Impex Pvt.(PAN AACCK 3044P)

Search operation under section. 132 was conducted on the premises of Bharat Shah group, in which loose papers 1 to 19, contained in annexure A-1, were seized from 55, Gamdevi 2nd Floor, Panchshil Plaza, Mumbai on 15/03/2008. Copy of which were annexed herewith. These loose papers are systematic records related to actual sales transactions in Legend project promoted by Layer Exports Pvt. Ltd. situated in Walkeshwar, Malabar Hill, Mumbai 400 006. Most of the said papers contains

details of flat numbers, flat size(total sold area), rate per sq. ft. Total consideration bifurcated in cash and cheques, cash to be paid cheques to be paid, details of renegotiation, details of actual cash payment, details of actual cheques payment etc. In these loose papers "sh" represent cash portion i.e. on money or out of books portion and "q" and "chq" represents cheque portion i.w. which is accounted in the books. In this regard, on page no.11, there is recording of transactions related to sales of flats by Layer Exports Pvt. Ltd. to Kranti Impex Pvt. Ltd. (PAN AACCK3044P), who is assessed in your charge. As per the said record, your assessee has paid cash money i.e. out of books money of Rs.2,06,32,051/- to my assessee. You are hereby requested to take necessary action in this regard as per provisions of IT Act, 1961."

Ostensibly, such information reflects that certain loose papers were found in the course of search in the premises of Bharat Shah Group, which inter-alia, contain record of sale transactions of M/s. Layer Exports Pvt. Ltd. The aforesaid information further reveals that in the recording of transaction relating to the sale of flats by M/s. Layer Exports Pvt. Ltd. to the assessee company, it showed that assessee had paid money out of books to the extent of Rs.2,06,32,051/-. On a plain reading of section 153C of the Act, as it stood at the relevant point of time, it is evident that the Assessing Officer of the searched person ought to be satisfied that, inter-alia, any money, bullion, jewellery or valuable article or books of account of documents seized or requisitioned belongs to a person other than the searched person. The phraseology of section 153C of the Act further prescribes that only after such satisfaction, the Assessing Officer of the searched person can hand over such documents to the Assessing Officer having jurisdiction of such other person. Furthermore, the Assessing Officer of such other person can issue a notice to that person to assess or reassess his income under section 153C of the Act only after such handing over from the Assessing Officer of the searched person. Be that as it may, coming to the facts of the present case, at the time of hearing the Ld. Departmental Representative also furnished a note dated 06/09/2010

prepared by the Assessing Officer of the instant assessee, which reads as under:-

“M/s. Layer Exports Pvt. Ltd. is one of the group companies of Bharat Shah, in whose case Search & Seizure action was conducted on 15.03.2008. Information has been received that M/s. Mangalam Gems Pvt. Ltd. an assessee of this charge, has purchased property from Layer Exports Pvt. Ltd. and the payments towards the said property include cash elements also. In this regard copy of seized loose papers 1 to 19 has been forwarded in Annexure A-1 as evidence by the Asstt. CIT, Central Cir.24 & 26, Mumbai, vide letter No.ACIT-24 & 26/information/200910 dated 21.12.2009. The page No.11 of the seized loose paper specifically shows some figures of the transaction details of the assessee without dates, in coded word wherein “Q” represents cheque and “SF” represents cash. The total of such cash part as ascertained by the ACIT 24 & 26. Mumbai on the basis of this loose paper comes to Rs.2,06,32,051/-. Therefore, in view of the information available on record, the undersigned is satisfied that the documents seized relates to the assessee and that the purchase consideration of the properties involves cash elements, and that these are out of the books of the assessee and therefore such portion of income is to be brought to tax. Therefore, the undersigned is satisfied that this is a fit case for invoking the provisions of section 153C of the Income-tax Act and accordingly notice is being issued.”

On the basis of the aforesaid, it is pointed out that the Assessing Officer has recorded the requisite satisfaction contemplated under section 153C of the Act prior to issuance of notice on 09/09/2010.

7.1 In this background, the aspect which is required to be examined is as to whether the CIT(A) is correct in holding that the conditions precedent for issuance of notice under section 153C of the Act have not been fulfilled. At the time of hearing, the Ld. Representative for the assessee had relied upon the judgment of the Hon'ble Delhi High Court in the case of CIT v. Pepsico India Holdings (P.) Ltd., 370 ITR 295(Del). In order to appreciate the legal position enunciated by the Hon'ble Delhi High Court in the case of Pepsico India Holdings (P.) Ltd.(supra), a reference be made to the expression “belongs” or “belong to” contained in section 153C of the Act. Notably, in order to cover the assessee under section 153C of the Act, the Assessing Officer of the searched person must be satisfied that the seized material i.e. money, bullion,

jewellery, or other valuable article or things or books of account or documents does not belong to the person in respect of whom search was conducted. The Hon'ble Delhi High Court explained that in the context of section 153C of the Act, the expression "belongs to" cannot be equated to "relates to" or "refers to". By pointing out an illustration, the Hon'ble Delhi High Court noted that the registered sale deed belongs to the purchaser of the property although it would relate to or refer to the vendor also. According to the Hon'ble Delhi High Court, if purchaser's premises are searched and the registered sale deed is seized, it cannot be said that it "belongs to" the vendor just because his name is mentioned in the document. In the converse, it was noted by the Hon'ble Delhi High Court, that if vendor's premises are searched and copy of the sale deed is seized, it cannot be said that the copy "belongs to" the purchaser just because it refers to him and he holds the original sale deed. In our considered opinion, the aforesaid legal position explained by the Hon'ble Delhi High Court in the context of section 153C of the Act is quite pertinent in the present case also.

7.2 In the present case, the information sent by the Assessing Officer of the searched person to the Assessing Officer of the assessee was based on certain notings on a loose paper found in the premises of Bharat Shah Group of cases. Quite clearly, even the Assessing Officer of the searched person, as manifested by the information sent to the instant Assessing Officer, which we have extracted above, does not conclude much less makes a charge that the loose papers "belong to" the assessee. There is no averment that loose papers do not belong to the searched person. In fact, even the satisfaction note canvassed by the Ld. Departmental Representative before us, which has been extracted above, does not say that the loose paper belong to a person other

than the searched person. At best, the only charge made out is “ *that the documents seized relate to the assessee and that purchase consideration of the properties involve cash element.....*” At this stage, it would be pertinent to go back to the legal position explained by the Hon'ble Delhi High Court in the case of Pepsico India Holdings (P.) Ltd (supra), wherein it is held that the expression “relates to” cannot be equated to the expression “belongs to” which finds a mention in section 153C of the Act. Therefore, considering that Revenue has failed to establish that the documents in question do not belong to the searched person, the question of invoking of section 153C of the Act in the hands of the assessee company merely on the strength that the documents being related to it, cannot be justified.

7.3 Therefore, in view of the aforesaid discussion, we uphold the ultimate conclusion of the CIT(A) annulling the assessment, albeit on the ground that above discussed ingredients of section 153C of the Act have not been satisfied in this case.

8. Since the action of the CIT(A) in annulling the assessment has been affirmed by us, the Cross Objection of the assessee dealing with merits of the addition become academic and is also liable to be dismissed.

9. Resultantly, the appeal of the Revenue and Cross Objection of the assessee are dismissed.

Order pronounced in the open court on 27/01/2017

Sd/-
(SANJAY GARG)
JUDICIAL MEMBER

Sd/-
(G.S. PANNU)
ACCOCUNTANT MEMBER

Mumbai, Dated 27/01/2017
Vm, Sr. PS

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai