

INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D": NEW DELHI
BEFORE SHRI H.S.SIDHU, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 1855/Del/2012
(Assessment Year: 2007-08)

ACIT, Central Circle-2, Room No. 323, 3 rd Floor, ARA Centre, Jhandewalan Extn, New Delhi	Vs.	Vijay Bahal, KA-II, Kavi Nagar, Ghaziabad PAN:AAOPB7876R
(Appellant)		(Respondent)

ITA No. 1855/Del/2012
(Assessment Year: 2007-08)

ACIT, Central Circle-2, Room No. 323, 3 rd Floor, ARA Centre, Jhandewalan Extn, New Delhi	Vs.	Vikram Bahal, C-73, Sector-44, Noida PAN:AAOPB7874P
(Appellant)		(Respondent)

Revenue by :	Shri Vijay Varma, CIT DR
Assessee by:	Shri Pradeep Dinodia, CA
Date of Hearing	23/08/2017
Date of pronouncement	09/11/2017

ORDER

PER PRASHANT MAHARISHI, A. M.

1. These are the appeals filed by the Revenue against the order of the Id CIT (A)-III, New Delhi dated 02.02.2012 wherein the identical grounds have been raised.
2. The revenue has raised the identical grounds of appeal in both the above appeals:-
 - “1. On the facts and in the circumstances of the case, the Id CIT(A) has erred in law and on facts in deleting the addition of Rs. 45000000/- made by the AO on account of undisclosed capital gain on sale of shares of M/s. Bahalsons Properties (P) Ltd.
 2. The order of the Id CIT (A) is erroneous and is not tenable on facts and in law.”
3. The facts in the case of ITA No. 156/Del/2012 for AY 2007-08 in case of Shri Vikram Bahal are noted here. The search and seizure u/s 132 of the Act was carried in “Gopal Zarda” Group of cases on 15.01.2009. Therein certain documents belonging to the assessee were

found. Therefore, notice u/s 153C of the Act was issued to the assessee. In response to which the assessee filed return of income on 28.10.2010 for Rs. 3009836/-. The original return was filed on 31.07.2007. The Id Assessing Officer on those documents which determine undisclosed income of capital gain on sale of shares of M/s. BahalSons Properties Pvt. Ltd was added wherein, assessee's share is to the extent of 33% of unaccounted receipt of Rs. 13.5 crores was determined. On appeal before the Id CIT (A) the addition was deleted with detailed reasoning. Therefore, revenue is in appeal before us.

4. In the hands of Mr. Vijay Bahal identical addition was made which is contested in ITA No. 1855/Del/2012.
5. The third person was Mr. Vinod Bahal in whose case the similar addition was made. The issue in case of Mr. Vinod Bahal came before the coordinate bench which has decided this issue in ITA No. 1857/Del/2012 and CO NO. 208/Del/2012 for AY 2007-08. The coordinate bench has held as under:-

“3. Since the issue raised in the cross objection is legal in nature and goes to the very root of the matter, hence, we prefer to adjudicate upon this issue. The parties were accordingly directed to advance their respective argument in this regard.

4. The Learned AR submitted that similar objections on the validity of notice issued under sec. 153C of the Act and assessment made in furtherance thereto were raised before the Assessing Officer as well as Learned CIT(Appeals) but the assessee could not succeed. He submitted that assessee an individual has sold his total interest (29,875 shares i.e. 13.55% of total shareholding) with Bahai Sons Properties Pvt. Ltd. to Mr. Dinesh Jain vide agreement dated 19.1.2007 for a consideration of Rs. 1,69,35,839 i.e. @ Rs.566.89 per share. The said company was the owner of Hotel Grace Mount at Mussouri. All the other shareholders had also sold their total shareholding against the said agreement dated 19.1.2007 at the same rate against total consideration of Rs.12.5 crores against total shares of the company. The Learned AR submitted that assessee had declared capital gain of Rs. 1,61,20,956 out of which on Rs.50 lacs exemption was claimed under sec. 54EC of the Income-tax Act, 1961. On account of capital, case of assessment year 2007-08 was scrutinized and vide order dated 27.11.2009 assessment under sec. 143(3) of the Act was framed and declared capital gain/income by the assessee was accepted.

4.1 The Learned AR submitted that search and seizure operation under sec. 132 of the Act was earned in the Gopal Zarda Group of cases on 15.1.2009 and during the course of search at the residential premises of Shri Asholc Kumar Aggarwal, director, Gopal Corporation Ltd. and from business premises of Gopal Corporation Ltd., certain documents were seized. Proceedings under sec. 153C read with 153A of the Act were initiated against the assessee. Notice under sec. 153C was issued to the assessee and in response the assessee filed a letter dated 18.10.2010 submitting therein that return of income filed originally under sec. 139(1) may be treated as one filed in response to the said notice. The assessee also filed a copy of the return declaring income of Rs.1,15,53,740. The assessee also demanded copy of letter of handing over material to Assessing Officer, copy of seized material belonging to assessee, copy of statement recorded etc. vide letter dated 19.10.2010. The assessee also raised objection against the issuance of notice under sec. 153C on 11.11.2010 vide his letter dated 9.11.2010. These objections were summarily rejected by the Assessing Officer and the requested copies of documents were not supplied to the assessee. Vide letter dated 8.12.2010, objections were again raised stating further that no 'satisfaction note' etc. was given.

4.2 *The Learned AR contended that following objections were raised during the course of assessment proceedings:*

- a) *No document or material belonging to assessee is found in the search.*
- b) *Neither there is any "satisfaction" nor there is any 'handing over" of seized material in terms of provisions of sec. 153C of the I.T. Act.*
- c) *Neither any material/statement of Sh. Sri Gopal Gupta/satisfaction note etc. as referred in the rejection letter or otherwise, except page Nos. 46-47 of Ann. A-30, is given/shown to assessee nor even replies on the allegations are appreciated/considered.*
- d) *Unsigned computer sheets (pages 46-47) dt. 27.11.08 (total interest transferred on 19.01.07) given to the assessee are vague, not belonging to assessee and nobody hinted about the assessee and about any transaction related to the said company/hotel.*
- e) *Neither Mr. Ashok Agarwal nor Mr. Sri Gopal Gupta have ever entered into the transaction of shares sales or any other transaction and while Mr. Agarwal is a total stranger but Mr. Gupta is remotely known as he acquired some shares from other share holders under the aforesaid agreement dt. 19.01.07.*
- f) *Issue of sale of shares of said company/hotel is already examined and finalized by the order u/s. 143(3) DT. 27.11.09 of ACIT, C-2, Ghaziabad.*

4.3 *The Assessing Officer passed assessment order under sec. 153C/143(3) of the Act making addition of Rs.4.5 crores as undisclosed capital gain on sale of shares of Bahai Sons Properties Pvt. Ltd., being 1/3rd of the total alleged consideration received at Rs.13.5 crores mainly on the basis that Shri Gopal Gupta offered the investment of Rs.25 crores in acquiring the hotel at Mussoroi in December 2008. The Learned AR submitted that none of the papers seized mention or depict the name of the assessee. They are not bearing any handwriting of assessee nor carrying an information about any specific transaction of share sale etc. or even any transaction between any specific parties etc. more specifically with the assessee and of course they were not found with the assessee or from his premises. He submitted that assessee was not even conversant with Mr. Ashok Aggarwal and was having no business or any dealing on any time with Mr. Ashok or with Gopal Infrastructure Pvt. Ltd. or with Shri Gopal Gupta. None of the papers seized are of the assessee or belonging to the assessee. Though there was no reference of any page Nos. 64-73/74-85 during the assessment proceedings but the Assessing Officer mentioned about said pages on page No. 2 of the order. The assessee could collect copies of the said pages and found that they were exclusively belonging to Mr. Vikram Bahai, Vikas Bahai, Madhu Bahai and Gopal Infrastructure Pvt. Ltd. Similarly, pages 8 to 62 of Annexure A2 mentioned on page 6 of the assessment order are like pages 50 to 57 having no relevance and few pages have been repeated from above pages. These pages are not of the assessee or belonging to assessee. The alleged "satisfaction note" supplied during the course of first appellate proceeding, there is reference of page No. 39 to 63 of Annexure-5 of party R-1 but during whole assessment proceedings and even in assessment order, the said pages have not been referred/relied upon by the same Assessing Officer. Despite request, these papers were not supplied to the assessee.*

4.4 *The Learned AR further submitted that the basis of issue of notice under sec. 153C of the Act was stated to be the share sale in the present year and page Nos. 46-47 of Annexure A-30 found during the course of search stated to have been conducted at various persons of Gopal Group. As pr order sheet entry dated 11.11.20101, page Nos. 50 to 58 contends the details of expenses on acquisition/renovation of hotel Grace Mount, Mussorie of Rs.40.36 crores and page Nos. 46 and 47 reflects that Rs. 12.05 crores were booked in the accounts while Rs.13.5 crore was out of accounts and on the basis of said papers, Shri Gopal Gupta had surrendered Rs.25 crores as income. The Learned AR referred page Nos. 6 to 9 of the assessment order wherein relevant extract of the statement of Shri Gopal Gupta have been reproduced in the question and answer form. The Learned AR referred question Nos. 36 and*

37 of the statement of Shri Gopal Gupta. In answer to question No. 36, Mr. Gopal Gupta has stated that the hotel at Mussorie was owned by Bahai Sons Properties Pvt. Ltd. and he along with Mr. Shishir Aggarwal, Dinesh Jain/Lata Jain purchased the shares in Bahai Sons Properties Pvt. Ltd. in January 2007. He stated that all the groups i.e. himself, Shishir Aggarwal and Dinesh Jain/Lata Jain purchased 33.33% from the existing shareholders of Bahai Sons Properties Pvt. Ltd. vide sale purchase agreement dated 19.1.2007. The shares were purchased at the rate of Rs.566.89 per share. He purchased the shares from Mr. Vikram Bahal and his family members whereas Mr. Shishir Aggarwal and Dinesh Jain and Lata Jain purchased the shares from other members. After that by share purchase agreement dated 16.12.2008, Gopal Infrastructure Pvt. Ltd. purchased 66% share holding from Mr. Shishir Aggarwal and Dinesh Jain/Lata Jain in Bahai Sons Properties Pvt. Ltd. at a total consideration of Rs.8,82,00,000 at the rate of Rs. 600 per share. About page No. 46 of Annexure A30 raised in question No. 37 and 38, Shri Gupta stated that it carried the details of expenses incurred in Mussorie Hotel Project till 15.11.2008. At the end, he has stated that in order buy peace of mind and avoid litigation with the Department, he has offered this investment of Rs.25 crores in acquiring hotel Grace Mount in Mussorie in December 2008.

4.5 The Learned AR also referred page No. 183 of the paper book i.e. extracts of relevant statement of Shri Gopal Gupta recorded on 12.6.2009 wherein he has explained as to whom the above stated Rs.25 crores was given. He has repeated same reply that his company GIPL purchased 2/3rd shares in Bahai Sons Properties Pvt. Ltd. from Mr. Shishir Aggarwal (1/3rd and Mr. Dinesh Jain/Lata Jain (1/3rd). He contended further that no satisfaction was recorded in the present case as in the order sheet entry which has been made available at page No. 180 of the paper book, there is no mention of recording of satisfaction and the satisfaction note supplied after completion of the assessment, he is nothing but an afterthought. He placed reliance on the following decisions:

- i) CIT vs. RRJ Securities Ltd. - ITA No. 164/2015 and Ors. - Judgment dated 30.10.2015, also reported in 2015 (11) TMI 19 - Delhi High Court;
- ii) Pepsico India Holding (P) Ltd. vs. ACIT (2015) - 50 taxmann.com 299 (Del.);
- iii) DCIT vs. Qualitron Commodities (P) Ltd. (2015) - 54 Taxman.com 295 (Del.);
- iv) Natural Products Bio-tech Ltd. DCIT (2015) - 53 Taxmann.com 400 (Delhi-Tribunal).

5. The Learned CIT(DR) on the other hand placed reliance on the assessment order and submitted that the documents seized which find reference in the assessment order belonged to the assessee and thus the Assessing Officer was justified in making the addition of Rs.4,50,00,000 in the hands of the assessee on account of undisclosed capital gain on sale of shares of Bahai Sons Properties Pvt. Ltd. The assessment has been framed on the basis of valid notice issued under sec. 153C of the Act.

6. Having gone through the orders of the authorities below, we find that an identical issue on the validity of notice issued under sec. 153C read with 153A of the Act was raised before the Assessing Officer but the assessee could not succeed. The same issue was again raised before the Learned CIT(Appeals) vide ground Nos. 2 to 4 of the first appeal. The assessee had also questioned the validity of addition of Rs.4,50,00,000 in the hands of the assessee before the Learned CIT(Appeals) vide ground Nos. 1 and 5 to 8. The Learned CIT(Appeals) has discussed the cases of the parties including the decisions cited before him on all the issues raised in the above grounds i.e. on the validity of notice issued under sec. 153C/ 153 A of the Act and on the merit of the additions questioned and has allowed the first appeal with the direction to the Assessing Officer to delete the addition in question i.e. 4,50,00,000 made in the hands of the assessee. Thus, by implication, it can be arrived at a conclusion that the Learned CIT(Appeals) has also allowed the appeal in favour of the

assessee on the issue of validity of notice issued under sec. 153C/153A of the Act. In other words, if the Learned CIT(Appeals) was not agreeing with the contention of the assessee on the legal issue regarding the validity of notice issued under sec. 153C/153A of the Act and the assessment framed in furtherance thereto, then the related ground Nos. 2, 3, 4 would have been rejected and thus appeal would have been partly allowed. The Learned CIT(Appeals) has discussed the cases of the parties on the legal issue in detail and had gone through the decisions relied upon in this regard before him but has not given any specific finding, which has resulted in preferring the present cross objection filed by the assessee on that legal issue.

7. We have already discussed the facts of the case regarding date of search, documents found and seized, approach of the Assessing Officer and action of the Learned CIT(Appeals) in the foregoing paragraphs while narrating the submissions of the parties. Similar arguments that none of the documents found and seized belong to assessee, as discussed above in the submissions of the Learned AR was advanced before the Learned CIT(Appeals) in support of the contentions of the assessee that the notice issued under sec. 153C/153A of the Act in absence of such incriminating material belonging to the assessee and that assessment under sec. 143(3) was already framed before the date of search. It was also contended that neither there was any satisfaction recorded nor was there any handing over of seized material in terms of provisions of sec. 153C of the Act. It was contended that neither any material/statement of Shri Gopal Gupta/satisfaction note etc. except page Nos. 46 & 47 of Annexure A-30 was given/shown to the assessee. Page Nos. 46 & 47 of the said annexure, did not belong to the assessee. There was no information in those documents about the assessee and about any transaction related to the said company/hotel. It was contended that neither Mr. Ashok Aggarwal nor Shri Gopal Gupta has ever entered into the transactions of sale or any other transaction and while Mr. Aggarwal is a total stranger but Mr. Gupta is remotely known as he acquired some shares from other shareholders under the agreement dated 19.6.2007. It was reiterated that issue of sale of shares of said company/hotel was already examined and finalized by the assessment order framed under sec. 143(3) on 27.11.2009. It was submitted that page Nos. 50 to 58 contains the details of expenses on acquisition/renovation of hotel Grace Mount, Mussorie of Rs.40.36 crores and page Nos. 46 & 47 reflects that Rs. 12.05 crores were booked in the accounts while Rs.13.05 crores was out of account and on the basis of said papers Shri Gopal Gupta had surrendered Rs.25 crores as income. It was explained that page Nos. 64-73/74-85 were related to assessee's brother and family and other documents (not identified) were relating to expenses on renovation outside accounts. About page Nos. 39 to 63 of Annexure-5 seized from the residence of Shri Ashok Aggarwal being a share purchase agreement dated 16.12.2008, it was observed by the Learned CIT(Appeals) that it did not belong to the assessee as the assessee had exited from the shareholding in Bahai Sons Properties Pvt. Ltd. on 19.1.2007 itself.

8. We find that the Learned CIT(Appeals) has given his finding on the documents seized stated by the A.O. to be belonging to assessee at page Nos. 37 to 43 of the first appellate order that these documents do not belong to the assessee and nor was there any independent corroboration through documentary evidence or through any adverse statement given by Shri Gopal Gupta who in the case had made disclosure of Rs.25 crores on account of investment in acquiring Hotel Grace Mount in December 2008 relevant to assessment year 2009-10, while the assessee had already exited from his shareholding in January 2007 itself. This finding of the Learned CIT(Appeals) has not been specifically rebutted by the Revenue before us.

9. In the case of CIT vs. R.R.J. Securities Ltd. (supra), the Hon'ble High Court of Delhi in answer to question "whether the concluded assessment could be reassessed on the basis of the seized assets/documents?", held that the document seized in that case had no relevance or bearing on the income of the assessee for the relevant assessment year and could not

possibly reflect any undisclosed income, hence, no investigation was necessary. Thus, provisions of sec. 153C, which are to be enabled an investigation in respect of the seized assets, could not be resorted to and that the Assessing Officer had no jurisdiction to make the reassessment under sec. 153C of the Act. Again in the case of Pepsiko India Holdings (P) Ltd. vs. ACIT (supra), the Hon'ble Delhi High Court has been pleased to hold that before provisions of sec. 153C can be invoked, Assessing Officer of searched person must be satisfied that seized material (which includes documents) does not belong to person referred to in section 153 A of the Act. In the case of Natural Products Bio-tech Ltd. vs. DCIT (supra), the Delhi Bench of the ITAT has held that the sine qua non for initiating action under sec. 153C is recording of objective satisfaction by the Assessing Officer that Articles/Documents which are seized or requisition belong to a person other than the person searched.

10. *As discussed hereinabove in die present case, there was no seized material (which includes document) belonging to the assessee and when the assessment under sec. 143(3) accepting the sale consideration per share was already framed, invocation of provisions under sec. 153C of the Act in the present case was not valid. We hold so with this further finding that the assessment framed in furtherance to the such invalid initiation of proceedings under sec. 153C is also invalid and is quashed as void ab initio. The objection No.1 of the cross objection is thus decided and allowed in favour of the assessee. The remaining objection of the cross objection preferred by the assessee and the grounds of the appeal of the Revenue questioning the validity of deletion of addition of Rs.4,50,00,000 made in the hands of the assessee on account of undisclosed capital gain on sale of shares of Bahai Sons Properties Pvt. Ltd., thus do not survive in view of the above findings on objection No.1 of the cross objection. These are accordingly disposed off.*

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11. *In result, cross objection preferred by the assessee is allowed and appeal preferred by the Revenue is dismissed.”*

6. The Id Departmental Representative submitted that in that case coordinate bench has allowed the case of assessee by allowing the cross objection of the assessee holding that there was no seized material belonging to the assessee. He submitted that in the present case in both these appeals of the Revenue as issue of addition of Rs. 4.5 crore, deleted by the CIT (A) is being contested. During the course of search certain documents related to transfer of shares of M/s. Bahal Sons Properties P Ltd by the assessee were seized which reflected transfer price at Rs. 566.89 per share. Another document in respect of purchase of the same shares was seized as per Pg 46 of Annexure A-30, which reflected total cost of acquisition of shares of Bahal Sons Properties Pvt Ltd. in the hands of buyer at Rs. 1179.13 per shares. This value was

determined as the seized documents reflected the total cost of acquisition of 220500 shares at Rs. 26 cores with one component of Rs. 12.5 cores (at Rs. 566.89 per share) and another component of Rs. 13.5 cores. The assessee is claiming the issue to be covered in his favour by the order of the Hon'ble ITAT in ITA No. 1857/Del/2012 and CO No. 208/Del/2012 in the case of a family member of the assessee. In the sand decision the Hon'ble ITAT allowed the cross objection of the assessee holding that invocation of provisions of section 153C was invalid and void abinitio. The revenue's appeal was dismissed on the ground that since proceedings u/s 153C were held to be void abinitio; the Revenue's appeal did not survive. Since the evidence of unaccounted payment was found in this case, it again raised the issue common to that involved in the other cases, for which requested for constitutions of Special Bench has been made, as to whether such addition should be made u/s 153C or the proceedings u/s 148 can be started simultaneously, while proceedings u/s 153C are in progress.

7. The Ld. and authorized representative vehemently submitted that the issue in the present appeal is squarely covered in favour of the assessee in view of the decision of the coordinate bench in case of Sri Vinod bahal. He further submitted that there is no issue of notice under section 148 and therefore the argument made by the Ld. departmental representative is in appropriate in the present case.
8. We have carefully considered the rival contentions and per used the orders of the lower authorities. Brief facts stated even at the cost of repetition are that during the course of search certain documents related to transfer of shares of M/s. Bahal Sons Properties P Ltd by the assessee were seized which reflected transfer price at Rs. 566.89 per share. Another document in respect of purchase of the same shares was seized as per Pg 46 of Annexure A-30, which reflected total cost of acquisition of shares of Bahal Sons Properties Pvt Ltd. in the hands of buyer at Rs. 1179.13 per shares. This value was determined as the seized documents reflected the total cost of acquisition of 220500 shares at Rs. 26 cores with one component of Rs. 12.5 cores (at Rs. 566.89 per share) and another component of Rs. 13.5 cores. The 3 owners of the shares Sh. Vinod Bahal, Sh. Vikram Bahal, and Sh. Vijay Bahal of 33.33 % each. In the hands of Sri Vinod the Bahal, this issue has been examined in detail and the coordinate bench has held that there was no seized material belonging to the assessee and when the assessment under section 143 (3) of the act accepting the sale consideration for sale was already framed, invocation of provisions of section 153C of the act in the present case was not valid. In view of the findings of the coordinate bench, which are binding on us as a matter of judicial precedents, we respectfully following the same, confirm the order of the

Ld. CIT (A) in the present case deleting the above addition of Rs. 4.5 crores in the hands of the assessee.

9. Coming to the argument of the Ld. authorized representative that as the appeal of the revenue in case of Shri Vinod Bahal was dismissed on the ground that since the proceedings under section 153C were held to be void abintio, the revenue's appeal did not survive. The claim of the Ld. CIT (DR) is that in case of Vipul motors private limited in ITA No. 5217 and 5218/del/2013 the coordinate bench has held that when the action has been taken under section 153C of the act the proceedings under section 147 cannot be taken. Further more in case of Rajat Subhra Chateerjee 47 CCH 0135 coordinate bench has held that proceedings under section 147 are worried in respect of evidences found/seized during search. Further, in Westland developers Ltd in ITA No. 1 to 50/Del/2013 for a Y 2006 – 07 the coordinate bench has held that proceedings under section 147 can be initiated even in respect of evidences found/seized during search. In view of this, it was stated that the application has been made before the Hon'ble President to constitute a special bench, which is pending. As per information provided to us by the Ld. CIT (DR), no such special bench has been constituted till now. Be that as it may, in the present case the coordinate bench has only held that proceedings under section 153C of the Income Tax Act does not apply to the facts of the present case as the documents are not belonging to the assessee. We also stick to the same finding given by the coordinate bench. In view of this, the objection raised by the Ld. CIT DR does not require any adjudication from our side.
10. In the result, both the appeals of the revenue are dismissed.
Order pronounced in the open court on 09/11/2017.

-Sd/-

(H.S.SIDHU)
JUDICIAL MEMBER

-Sd/-

(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated: 09/11/2017
A K Keot

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1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi