

**IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN**

Before Shri George George K, JM & Shri Manjunatha G, AM

ITA No.78/Coch/2016 : Asst.Year 2006-2007
ITA No.79/Coch/2016 : Asst.Year 2007-2008
ITA No.80/Coch/2016 : Asst.Year 2008-2009
ITA No.81/Coch/2016 : Asst.Year 2010-2011

M/s.Pentagon Builders 968, N, M.N.S.Avenue P.T.Usha Road, Calicut – 673 001. PAN : AAIFP7272M.	Vs.	Dy.Commissioner of Income-tax Central Circle – 2 Kozhikode.
(Appellant)		(Respondent)

Appellant by : Sri. G.Surendranatha Rao
Respondent by : Sri. A.Dhanaraj, Sr.DR

Date of Hearing : 11.12.2017	Date of Pronouncement : 11.12.2017
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ORDER

Per Manjunatha G, AM

This four appeals by the assessee are directed against common order passed by the CIT(A)-IV, Cochin, dated 04.12.2015 for the assessment years 2006-2007, 2007-2008, 2008-2009 and 2010-2011. Since facts are identical and issues are common, for the sake of convenience, these appeals were heard together and disposed off by this common order.

2. The assessee has raised common grounds of appeal for all the four years. Through these grounds of appeals, the assessee has challenged additions made by the Assessing

Officer towards disallowance of expenditure u/s 40(a)(ia) for failure to deduct tax at source u/s 194C and additional made by the A.O. towards unexplained cash credits in capital account of partners. For the sake of convenience, grounds of appeal raised by the assessee for assessment year 2006-2007 is extracted below:-

“(i) The order of Commissioner of Income Tax (Appeals) is against law and facts.

(ii) The Commissioner (Appeals) should have appreciated that when the payees have included the amount paid in their income and paid tax thereon, the disallowance u/s 40A(ia) will not be applicable. The Commissioner of Income Tax (Appeals) is not justified in confirming disallowance only because of the jurisdictional Kerala High Court decision. The issue whether the disallowance under section 40(a)(ia) is attracted only if the amounts are remaining payable at the end of year or whether it is applicable even for amounts paid during the year has not become final and there are conflicting judgments of various high courts on the said issue.”

3. The assessee also filed petition for admission of additional ground by way of a letter dated 11.05.2016, raising the additional ground of appeal to challenge the validity of assessment order passed by the A.O. u/s 153C on the ground that no additions could be made in cases of assessments which are concluded / unabated as on the date of search in the absence of any seized material. The relevant additional ground raised by the assessee is extracted below:-

“The AO should have appreciated that the appellant has filed the return of income originally on 30.11.2017. The due date for issue of notice u/s 143(2) for selecting the case for scrutiny had already expired before the date of search in the appellant’s case and consequently no addition could be made in such cases other than of matters which arose out of incriminating materials if any seized during search. This is because the return had attained finality and income as per return could be disturbed only if some incriminating materials were unearthed as a result of the search. Hence the additions on account of non deduction of tax under section 40(a)(ia) and unexplained cash credit based on the statements already filed is not in order.”

4. The learned AR for the assessee submitted that the additional ground raised by the assessee challenging the validity of additions made by the A.O. for assessments which are completed / unabated as on the date of search in the absence of seized materials is a legal issue emanating from the orders of the lower authorities. The assessee has not brought out any fresh evidence to support the additions made. Therefore, the additional ground raised may be admitted and adjudicated on merits. On the other hand, the learned Departmental Representative strongly opposed the admission of additional ground raised by the assessee.

5. We have heard the rival submission and considered the material on record. The assessee has raised additional ground challenging the additions made by the A.O. towards disallowance of expenditure u/s 40(a)(ia) for failure to deduct tax at source and unexplained capital introduced in partners

capital account in the assessments framed u/s 143(3) r.w.s. 153C on the ground that the A.O. has made additions to the concluded assessments / unabated without there being any seized material. The assessee further contended that on going through the additions made by the A.O., prima facie it appears that there is no support of any seized materials found as a result of search and all additions are based on regular financial statement filed along with the return of income u/s 139(1). We find that the additional ground raised by the assessee challenging the validity of additions made in assessments framed u/s 153C is a legal issue which emanates from the order of the lower authorities. Therefore, we are of the considered view that the additional ground raised by the assessee requires to be admitted and adjudicated on merits. Hence, we admit the additional ground raised by the assessee and proceeded to dispose off on merits.

6. The brief facts of the case are that the assessee is a partnership firm engaged in the construction and sale of flats. The search action u/s 132 of the Income-tax Act, 1961 was conducted on 31.10.2011 at the residence of Dr.K.M.Ashik in connection with the search of M/s.Kunhitharuvai Memorial Charitable Trust, Calicut. Consequent to the search, survey u/s 133A was conducted on 31.10.2011 at the business premises of the assessee. Thereafter notice u/s 153C was issued. In response to the notice, the assessee has filed return of income. The assessment was completed u/s 143(3) r.w.s. 153C on 29.03.2014 by making additions towards

disallowance of expenditure u/s 40(a)(ia), additions towards cash credit in partners account and disallowance of remuneration paid to partners u/s 40(b) of the Income-tax Act. Aggrieved by the assessment order, the assessee preferred appeal before the CIT(A). Before the CIT(A), the assessee has challenged additions made by the A.O. towards disallowance of expenditure u/s 40(a)(ia) on the ground that the expenditure incurred is actually paid within the end of the financial year, as such no disallowance can be made u/s 40(a)(ia) for failure to deduct tax at source. Insofar as the additions made by the A.O. towards unexplained credit, though the assessee has raised ground challenging additions made by the A.O., filed letter dated 27.11.2015 withdrawing the grounds raised to challenge the additions. As regards disallowance of remuneration to partners, the assessee has submitted that as per Explanation 3 to section 40(b), for the purpose of this clause 'book profit' means the net profit as shown in the profit & loss account for the relevant previous year, computed in the manner laid down in Chapter IVD. Therefore, there is no reason for disallowance of remuneration paid to the partners. The CIT(A) after considering the submission of the assessee, upheld the additions made by the A.O. towards disallowance of expenditure u/s 40(a)(ia) by following the decision of the Hon'ble Kerala High Court in the case of *Thomas George Muthoot v. CIT* [ITA No.278 of 2014]. The CIT(A) confirmed the addition made by the A.O. towards unexplained credits in capital accounts as the assessee has not pressed the ground challenging the addition made by the

A.O. towards unexplained credits. However, the CIT(A) deleted the additions made by the A.O. towards disallowance of remuneration paid to partners on the ground that book profit for the purpose of section 40(b) is net profit of the firm after making all adjustment as provided by section 28 to 44 DB that are required to convert the net profit and loss account into taxable business income. Aggrieved by the CIT(A)'s order, the assessee is in appeal before us.

7. The first issue came up for our consideration in assessee's appeal is the additional ground raised by the assessee challenging the validity of assessment framed u/s 143(3) r.w.s. 153C on the ground that the additions made by the A.O. is not supported by any incriminating material found as a result of search. Therefore, the A.O. was erred in making additions towards disallowance of expenditure u/s 40(a)(ia) and unexplained credits in capital account. The learned AR submitted that on the basis of additions made by the A.O., prima facie it appears that the A.O. has not taken any reference to seized material found as a result of search to make these additions. Therefore, in the absence of any seized material, no addition can be made towards assessments years which are concluded / unabated as on the date of search. The AR further submitted that in this case the search book place on 31.10.2011. The assessments for the assessment year 2006-2007 to 2008-2009 and the time limit for issue of notice u/s 143(2) of the Act was expired before the date of search. As such, the assessments for assessment year 2006-2007 to

2008-2009 have been concluded / unabated. Therefore, no addition can be made to the returned income in the absence of any incriminating materials. In support of his argument, the AR relied upon the following decisions:-

- (i) Sinhgad Technical Educational Society v. ACIT [140 TTJ 233 – ITAT Pune]
- (ii) Sinhgad Technical Education Society v. CIT-III [378 ITR 84 (Bombay)]
- (iii) Sinhgad Technical Education Society v. CIT-III [397 ITR 344 (SC)]
- (iv) CIT (Central) v. Promy Kuriakose (Kerala HC) RP No.715 of 2006 in ITA No.296/2013
- (v) Mr.Eldhose K.Varghese v. DCIT (Central Circle 1) in ITA Nos.261 to 267 – ITAT Cochin.

8. The learned DR, on the other hand, supported the order of the CIT(A). The learned DR further submitted that the assessee has taken up this legal plea in the first time before the Tribunal and the lower authorities did not have an occasion to examine the legal plea of the assessee in the light of the seized material. Therefore, the issue may be set aside to the file of the CIT(A) for fresh adjudication.

9. We have heard both the parties, perused the material available on record and gone through the orders of the authorities below. The A.O. has made the additions towards disallowance of expenditure u/s 40(a)(ia) for failure to deduct tax at source u/s 194C, unexplained credits in partners

capital account and disallowance of remuneration paid to partners u/s 40(b) of the Act. On going through the additions made by the A.O., prima facie it appears that the A.O. has not taken any reference to seized materials as a result of search. We further noticed that the assessments for the assessment year 2006-2007 to 2008-2009 and the date of issue of notice u/s 143(2) for the above three assessment years has been expired before the date of search. Therefore, we are of the view that the assessments for the assessment year 2006-2007 to 2008-2009 have been concluded / unabated as on the date of search. Once the assessments are concluded and become final as on the date of search and the time limit for issue of notice u/s 143(2) has been expired, then the determination of total income in respect of assessment years for which the assessments have been already completed on the date of search, shall not be influenced by the items of income other than those based on the material unearthed during the course of search. This legal proposition is supported by the decision of the Hon'ble Supreme Court in the case of *Sinhgad Technical Education Society v. CIT* [(2017) 397 ITR 344 (SC)], wherein it was observed that as per the provisions of section 153C, incriminating material which was seized had to pertain to the assessment years in question and it is an undisputed fact that the documents which were seized did not establish any co-relation, document-wise, with these four assessment years. Since this requirement u/s 153C is essential for assessment under that provision, it becomes a jurisdictional fact. This reasoning appears to be logical and valid, having

regard to the provisions of section 153C. The jurisdictional High Court of Kerala in the case of *CIT (Central Circle) v. Promy Kuriakose in RP No.750 of 2016 in ITA No.296/2013* dated 29th August, 2016, observed that in the absence of search material, proceedings u/s 153C of the Act cannot be initiated by the Assessing Officer. In yet another case, the coordinate bench of the ITAT in the case of *Shri Eldhose K.Varghese v. DCIT in ITA No.261 to 267/Coch/2016* dated 04.10.2017, had examined similar issue in the light of the decision of the ITAT Mumbai Special Bench in the case of *All Cargo Global Logistics Ltd. v. DCIT [(2012) 137 ITD 287 (SB) (Mum,)]* and after considering various case laws, observed that it is quite significant to denote that in respect of completed or non-pending assessment, the Assessing Officer albeit duty bound to assess or reassess the total income, but if there is scope for additions in such assessment, on the basis of income unearthed during the search, he can make the addition. The sum and substance of the ratio laid down in these case laws is that the A.O. cannot make any addition towards completed / unabated assessment in the absence of any seized materials. In this case the fact with regard to date of search is not disputed. The search took place on 31.10.2011. The date of issue of notice u/s 143(2) for the assessment years 2006-2007 to 2008-2009 was expired before the date of search. Therefore, we are of the view that the assessments for the assessment years 2006-2007 to 2008-2009 have been concluded / unabated as on the date of search and hence the A.O. cannot make any addition towards

returned income in the absence of any seized materials. However, the assessee has taken this legal plea for the first time before the Tribunal and the lower authorities did not had an occasion to examine the issue in the light of seized material, we deem it appropriate to set aside the issue to the file of the CIT(A) to consider additional ground raised by the assessee in the light of our discussions and also in the light of ratio laid down by the Hon'ble Supreme Court in the case of *Sinhgad Technical Education Society (supra)*. Hence, we set aside the assessments for the assessment years 2006-2007 to 2008-2009 to the CIT(A) for fresh adjudication.

10. However, this finding is not applicable for the assessment year 2010-2011 as the assessment for the assessment year 2010-2011 has been abated as on the date of search. Therefore, the A.O. is free to assess or re-assess the total income on the basis of the books of account and incriminating material found as a result of search. Having said so, let us examine the issue raised by the assessee on merits. The assessee has challenged additions made by the A.O. towards disallowance of expenditure u/s 40(a)(ia) for failure to deduct tax at source. We find that the issue is squarely covered in favour of the Revenue by the decision of the jurisdictional High Court in the case of *Thomas George Muthoot v. CIT [ITA No.278 of 2014]*, wherein it was observed that whether disallowance u/s 40(a)(ia) can be made only in respect of payments outstanding at the end of the year has held that the language of section 40(a)(ia) does not warrant

any interference that it gets attracted only where the amount remains payable on the last date of the financial year. The Hon'ble Supreme Court in the case of *Palam Gas Services v. CIT* [(2017) 394 ITR 300 (SC)] held that word payable occurring in section 40(a)(ia) not only covers cases where amount is yet to be paid but also those cases where amount has actually been paid. Therefore, we are of the view that there is no merit in the arguments of the assessee that, no disallowance u/s 40(a)(ia), if amount remain payable at the end of the year. The CIT(A) by following the decision of the jurisdictional High Court confirmed the additions made by the A.O. We do not find any error in the order of the CIT(A), hence we are inclined to upheld the finding of the CIT(A) and reject the ground raised by the assessee.

11. In the result, the appeals filed by the assessee for the assessment years 2006-2007 to 2008-2009 are allowed for statistical purposes and appeal filed by the assessee for assessment year 2010-2011 is dismissed.

Order pronounced on this 11th day of December, 2017.

Sd/-
(George George K.)
JUDICIAL MEMBER

Sd/-
(Manjunatha G.)
ACCOUNTANT MEMBER

Cochin ; Dated : 11th December, 2017.
Devdas*

Copy of the Order forwarded to :

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

By order

(Asstt. Registrar)
ITAT, Cochin