

आयकर अपीलीय अधिकरण, विशाखापटणम पीठ, विशाखापटणम
IN THE INCOME TAX APPELLATE TRIBUNAL,
VISAKHAPATNAM BENCH, VISAKHAPATNAM

श्री वी. दुर्गराव, न्यायिक सदस्य एवं

श्री डि.एस. सुन्दर सिंह, लेखा सदस्य के समक्ष

BEFORE SHRI V. DURGA RAO, JUDICIAL MEMBER &
SHRI D.S. SUNDER SINGH, ACCOUNTANT MEMBER

आयकर अपील सं./I.T.A.No.111&112/Vizag/2015

(निर्धारण वर्ष / Assessment Year: 2008-09 & 2009-10)

M/s. Sri Balaji Builders
Kakinada
[PAN No.ABKFS2908J]

(अपीलार्थी / Appellant)

ACIT, Central Circle
Rajahmundry

(प्रत्यार्थी / Respondent)

अपीलार्थी की ओर से / Appellant by
प्रत्यार्थी की ओर से / Respondent by

: Shri G.V.N. Hari, AR
: Shri Debakumar Sonowal,
DR

सुनवाई की तारीख / Date of hearing

: 03.01.2018

घोषणा की तारीख / Date of Pronouncement

: 10.01.2018

आदेश / ORDER

PER Bench:

These appeals filed by the assessee are directed against order passed by the Commissioner of Income Tax (Appeals) {CIT(A)}, Guntur vide ITA No.444&445/CIT(A)/GNT/10-11 dated 24.2.2014 for the assessment years 2008-09 & 2009-10. Since, the facts are identical and

issues are common, they are clubbed, heard together and disposed-off by way of this common order for the sake of convenience.

ITA 111/Vizag/2015 (A.Y. 2008-09):

2. A search & seizure operation was carried out in the group cases of the assessee on 3.2.2009. Consequently, the A.O. issued notice u/s 153C of the Income Tax Act, 1961 (hereinafter called as 'the Act') and completed the assessment u/s 143(3) r.w.s. 153C of the Act on total income of ₹ 45,53,768/-.

3. The assessee constructed the apartments at Door No.65-2-6/4, Narasanna nagar, Kakinada in 1011 square yards of site taken on development basis from the land lord and as per the agreement the assessee has to construct 34 flats in total built up area of 29600 square feet and to hand over 9 flats with built up area of 8662 sq. feet to the land lord. The assessee would get his share of 20938 square feet. As per the enquiries conducted by the AO from Shri VVS Venugopal who has purchased two flats consisting of 1307 square feet and 630 sq feet has stated that, he had agreed for payment of consideration of Rs.24.50 lacs which works out Rs.1264/ peer sft. Therefore the AO determined the sale price at Rs.1250/- per sft and worked out the realizable value of Rs.2,61,72,500/- for assessee's share of 20938 sft and cost of construction was estimated at Rs.650/- for sft. During the year under

consideration the assessee sold 12 flats with built up area of 14,261 sft and the AO estimated the proportionate sale consideration at Rs.1,78,26,250/- @ 1250 per sft and the cost of construction of the sold flats was estimated at Rs.1,31,04,482/- and arrived at the profit of Rs.47,21,768/- and made the addition of Rs.40,15,931/- being the difference amount.

4. Aggrieved by the order of the CIT(A), the assessee is in appeal before this Tribunal and raised the following grounds against the order of the CIT(A).

1. *Your Appellant submits that in absence of any incriminating material, the assessment under section 143(3) r.w.s 153C is bad in law and the Notice under section 153C is not warranted.*
2. *The CIT(A) erred in law and facts of the case in not accepting the method of accounting followed by your Appellant. Your Appellant has been following project completion method and admitted income accordingly, therefore the addition of Rs. 27,14,240/- may be deleted.*
3. *The CIT(A) ought to have appreciated the fact that there is no difference in sale value per flat and books being not rejected, ought to have accepted the returned income.*
4. *Your Appellant submits that there is no incriminating material seized and income offered under section 132(4) for AY 2009-10 has been admitted, based on post search enquiries or on estimation of sale price per Sq. Yrd, no addition can be made, Your Appellant prays that the addition be deleted.*

5. The Ld. CIT(A) confirmed the addition to the extent of ₹ 27,14,240/-. During the appellate proceedings the Ld. CIT(A) examined the statements recorded from the flat buyers and observed that there was difference in the stated consideration of the buyers and the

consideration admitted by the assessee in the books of accounts. The consideration received varied from Rs. 905/- per sft to Rs.1109/- per sft. After analyzing the information, the Ld CIT(A) worked out the undisclosed consideration at Rs.190/- per sft and accordingly estimated the undisclosed consideration at Rs.27,14,240/- for the area sold during the year and confirmed the addition to the extent of Rs.27,14,240/- and deleted the balance addition.

6. Aggrieved by the order of the Ld.CIT(A) the assessee is in appeal before us. During the appeal hearing, the assessee raised the validity of assessment made u/s 153C r.w.s. 143(3) of the Act in the absence of incriminating material. During the appeal hearing, the Ld. A.R. submitted that the A.O. made the addition entirely on surmises and assumptions and on estimation basis and there was no incriminating material found during the course of search what so ever relating to the assessee for assessment year 2008-09. Hence, the issue of notice u/s 153C of the Act without incriminating material required to be quashed and relied on Hon'ble Supreme Court judgement in the case of CIT Vs. Sinhgad Technical Education Society, [2017] 84 taxmann.com 290 (SC) wherein the Hon'ble Supreme Court upheld the order of the Hon'ble Bombay High Court in quashing the notice u/s 153C of the Act.

7. On the other hand, the Ld. D.R. supported the orders of the lower authorities.

8. We have heard both the parties, perused the materials available on record and gone through the orders of the authorities below. In the assessee's case, the assessment was completed on estimation of income in respect of the flats sold on the basis of the statements recorded from the flat buyers Mr. V.V.S. Venugopal and others u/s 131 of the Act. The AO observed that the books of accounts were not located during the search/ survey proceedings, hence held that the assessee was not maintaining the books of accounts and accordingly initiated the proceedings u/s 153C of the act. However it was contended that the assessee was maintaining the regular books of accounts and the same were duly audited by the qualified accountant and the assessee had filed the return of income as per the books of accounts for the AY 2008-09 on 01/10/2008. The assessee also produced the books of account before the assessing officer which were examined by the AO during the assessment proceedings. The AO has neither made any effort to locate the books of accounts nor recorded the statement from the accountant who audited the books of accounts at the time of survey. Therefore the observation of the AO that the assessee was not maintaining the books of accounts was not based on any basis hence cannot be accepted.

Merely because of the books of accounts could not be traced at the time of survey/search, it cannot be presumed that the books of accounts are not maintained unless all out efforts are made and clear finding is given. Therefore we are of the view that the assessee was maintaining the books of accounts and on the date of survey the department could not locate the books of accounts. From the above discussion it is established that the assessee has maintained the books of accounts. There was no incriminating material found during the course of search in respect of assessment year 2008-09 in the premises of the searched person with regard to the suppression of income or inflation of expenditure. The statement recorded u/s 132(4) of the Act related to the assessment year 2009-10 but not related to the A.Y.2008-09. Now it is settled issue that for initiating the proceedings u/s 153C of the Act, it is incumbent upon the A.O. to have the incriminating material evidencing the undisclosed income. In the assessee's case no such evidence was found during the course of search in the group cases. As per the provisions of section 153C of the Act, it is mandatory to have the satisfaction of the A.O. that money, bullion, jewellery or other valuable article or thing or any books of accounts, documents seized or requisitioned pertains to or relates to the assessee, which means that unless there is an incriminating material belonging to the assessee is

found, the action u/s 153C of the Act is not permissible. In the assessee's case there was no incriminating material found and seized from the premises of the group cases. Therefore, we hold that the notice issued u/s 153C of the Act is not sustainable and accordingly quashed. This view is upheld by the Hon'ble Supreme Court in the case of CIT Vs. Sinhagad Technical Education Society (Supr). Respectfully following the judgement of the Hon'ble Supreme Court, we hold that the notice issued u/s 153C of the Act is unsustainable and accordingly quashed.

9. In the result, the appeal filed by the assessee is allowed.

ITA No.112/Vizag/2015 (A.Y. 2009-10):

10. A search u/s 132 of the Act was conducted in the group cases of the assessee on 3.2.2009. Consequently, the notice u/s 153C of the Act was issued in this case and the assessment was completed u/s 143(3) of the Act on total income of ₹ 16,13,333/-. During the search proceedings u/s 132 of the Act, the assessee had admitted the additional income of ₹ 20 lakhs u/s 132(4) of the Act and accordingly filed the return of income. However, the assessing officer completed the assessment estimating the income. Aggrieved by the order of the A.O., the assessee went on appeal before the CIT(A) and the Ld. CIT(A) sustained the addition of ₹ 10,69,700/- and deleted the balance amount.

11. Aggrieved by the order of the CIT(A), the assessee is in appeal before this Tribunal and the assessee has raised the following grounds against the order of the CIT(A).

1. *Your Appellant submits that in absence of any incriminating material, the assessment under section 143(3) r.w.s 153C is bad in law and the Notice under section 153C is not warranted.*
2. *The CIT(A) ought to have appreciated the fact that your appellant has already admitted Rs. 20,00,000/- during the search and the same has been included in the return of income, therefore there is no need to make additions of Rs. 10,69,700/-.*
3. *The CIT(A) erred in law and facts of the case in not accepting the method of accounting followed by your Appellant. Your Appellant has been following project completion method and admitted income accordingly, therefore the addition of Rs. 10,69,700/- may be deleted.*
4. *The CIT(A) ought to have appreciated the fact that there is no difference in sale value per flat and books being not rejected, ought to have accepted the returned income.*
5. *Your Appellant submits that there is no incriminating material seized and income offered under section 132(4) for AY 2009-10 has been admitted, based on post search enquiries or on estimation of sale price per Sq. Yrd. no addition can be made, Your Appellant prays that the addition be deleted.*

12. During the appeal hearing, the Ld. A.R. of the assessee submitted that the assessee had admitted additional income of ₹ 20 lakhs during the course of search and accordingly filed the return of income which was more than the income estimated by the A.O., hence there is no necessity to the A.O. to re-compute the income by estimation. However, during the appeal hearing, the Ld. A.R. has not pressed the grounds of appeal, therefore, the appeal is dismissed as not pressed.

13. In the result, the appeal filed by the assessee for the A.Y. 2008-09 is allowed and the appeal for the A.Y. 2009-10 is dismissed.

The above order was pronounced in the open court on 10th Jan'18.

Sd/-

(वी. दुर्गाराव)

(V. DURGA RAO)

न्यायिक सदस्य/JUDICIAL MEMBER लेखा सदस्य/ACCOUNTANT MEMBER

विशाखापटणम /Visakhapatnam:

दिनांक /Dated : 10.01.2018

VG/SPS

आदेश की प्रतिलिपि अग्रेषित/Copy of the order forwarded to:-

1. अपीलार्थी / The Appellant – M/s. Sri Balaji Builders, C/o M. Anandam & Co., Chartered Accountants, 7A, Surya Towers, S.P. Road, Secunderabad.
2. प्रत्यार्थी / The Respondent – The ACIT, Central Circle, Rajahmundry
3. आयकर आयुक्त / The CIT, Guntur
4. आयकर आयुक्त (अपील) / The CIT (A), Guntur
5. विभागीय प्रतिनिधि, आय कर अपीलीय अधिकरण, विशाखापटणम / DR, ITAT, Visakhapatnam
6. गार्ड फ़ाईल / Guard file

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आदेशानुसार / BY ORDER

Sr. Private Secretary
ITAT, VISAKHAPATNAM