

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH: 'G': NEW DELHI)**

**BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER
AND
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER**

**ITA No.1507/Del/2014
(ASSESSMENT YEAR-2007-08)**

**ITA No.1508/Del/2014
(ASSESSMENT YEAR-2008-09)**

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| M/s Splendor Landbase Limited Splendor Forum, 5 th Floor, Jasola District Centre, New Delhi- 110025. PAN -AAECA 3986E | Vs. | Asst. Commissioner of Income Tax, Circle-9(1), New Delhi. |
| (Appellant) | | (Respondent) |

**ITA No.3532/Del/2010
(ASSESSMENT YEAR-2007-08)**

**ITA No.3533/Del/2010
(ASSESSMENT YEAR-2008-09)**

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| M/s Splendor Landbase Limited F-38/2, Splendor House Okhla Industries Area, Phase-II, New Delhi-110020. PAN -AAECA 3986E | Vs. | Asst. Commissioner of Income Tax, Circle-9(1), New Delhi. |
| (Appellant) | | (Respondent) |

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| Appellant By | Sh. Anil Kumar Chopra, CA Sh. V.K.Garg, Adv. |
| Respondent by | Sh. S.S. Rana, CIT-DR |
| Date of Hearing | 10.12.2019 |
| Date of Pronouncement | 31.12.2019 |

ORDER

PER SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER:

All these four appeals have been preferred by the assessee. ITA No.3532/Del/2010 challenges the order of the learned Commissioner of Income Tax (Appeals)-XII, New Delhi and pertains to Assessment Year 2007-08. ITA No.3533/Del/2010 challenges the order of the learned CIT (Appeals) - XI, New Delhi for Assessment Year 2008-09. ITA No.1507/Del/2014 and ITA No.1508/Del/2014 are the assessee's appeals against the penalty imposed u/s 271(1)(c) of the Income Tax Act, 1961 (hereinafter called as 'the Act') for the two captioned assessment years . For the sake of convenience all the four appeals were heard together and they are being disposed of through this a common order for the sake of convenience.

2.0 The brief facts of the case are that the assessee is a company engaged in the business of Real Estate Development. On 31st January, 2008 one Sh. Vipin Verma, an employee of the assessee was intercepted by the Police at Rajpura while he was travelling to Amritsar. Rs.1.98 Crores in cash along with an

unsigned photocopied agreement dated 30.09.2006, which was alleged to have been executed between the assessee and one M/s V.M. Reality, were seized from his possession. As per this unsigned photocopied agreement, the assessee company had made payment of Rs.5 Crores to M/s V.M. Reality towards transactions of land and a cash payment of Rs.70 lacs was also alleged to have been made. This agreement was signed by Sh. Hira, the Managing Director of M/s. V.M. Reality and name of one Sh. Hemant Kapoor was mentioned as being the authorized signatory on behalf of the assessee company. However, nobody had signed on behalf of the assessee company. It is the assessee company's contention that Sh. Hemant Kapoor as neither an employee of the company nor he was authorized by the assessee company to enter into any such transaction. Sh. Hemant Kapoor also in his statement recorded categorically stated that he was not aware of any such agreement and the assessee also vehemently denied having entered into any such agreement. Even in the statement recorded of Sh. Vipin Verma, Sh. Vipin Verma never stated that such agreement belonged to the assessee. Subsequently, notice was issued u/s 153C of the

Act and assessment for assessment year 2007-08 was completed, thereafter, at an income of Rs.11,21,82,737/- after making an addition of Rs.70 lacs which was alleged to have been made by the assessee company in cash during the year under consideration to M/s V.M. Reality Pvt. Ltd. out of unexplained sources and in terms of the above said agreement. In assessment year 2008-09, the assessment was completed at an income of Rs.25,14,13,359/- after making an addition of Rs.1.98 crores on account of unverifiable cash credits appearing in the books of accounts of the assessee which as per the Assessing Officer (AO) reflected unsubstantiated credits.

2.1 Penalty u/s 271(1)(c) amounting to Rs.23,56,200/- was imposed for assessment year 2007-08 and a similar penalty of Rs.66,64,680/- was imposed for Assessment Year 2008-09.

2.2 The assessee's appeals against the quantum additions and the penalties were upheld by the learned CIT (Appeals) and the appeals of the assessee were dismissed.

2.3 Aggrieved, the assessee is now before the Tribunal challenging the quantum additions as well as the penalties imposed u/s 271(1)(c) for Assessment Years 2007-08 and 2008-09.

2.4 The respective grounds of appeal raised in the four appeals are as under:

ITA No.3532/Del/2010 for Asst. Year 2007-08

1. *That the entire assessment proceedings are null & void and being without jurisdiction since mandatory requirements of section 153C (1) of I.T. Act 1961(in short 'Act') had not been strictly complied with. The CIT(A) was not justified in rejecting, summarily the legal ground challenging the jurisdiction of the AO u/s 153C of the Act, without examining the relevant facts and material on record and in simply relying on the assessment order.*

2. *That the impugned copy of agreement is not signed on behalf of the assessee and therefore, it has no evidentiary value in the eye of law in view of the judgment of the Hon'ble jurisdictional High Court in the case of CIT v kulwant Rai 291 ITR 36 (Del). Consequently, the alleged agreement could not be treated as a evidence against the assessee. Hence, no addition could be made solely on the basis of the alleged agreement.*

3. *That the presumption raised by the lower authorities against the assessee to the effect that the said agreement belong to assessee is illegal since presumption, if any, can be raised only against Shri Vipin Verma from whose possession the said agreement was taken in to custody by the police as per the provisions of section 292C of the Act which are applicable in the present case. No question was ever asked from Mr Vipin Verma in respect of such document*

and therefore, in the absence of any corroborating evidence, question of holding that this document belongs to assessee does not arise. Consequently, question of making any addition solely on the basis of such document does not arise.

4. Through the onus was on revenue to prove the genuineness of the agreement, the assessee produced the Balance sheet of M/s V.M. Reality by way of additional evidence under Rule 46A which should have been admitted in the interest of justice. The CIT(A) was not justified in refusing to admit the same as additional evidence.

5. On the facts and circumstances of the case and in law, the addition of Rs.70 lakhs is not justified and deleted after the providing an opportunity of being heard to the appellant.

In ITA No.3533/Del/2010 for Asst. Year: 2008-09

1. The entire assessment proceedings are null & void and being without jurisdiction since mandatory requirements of section 153C (1) of I.T. Act 1961(in short 'Act') had not been strictly complied with. The CIT(A) was not justified in rejecting, summarily the legal ground challenging the jurisdiction of the AO u/s 153C of the Act, without examining the relevant facts and material on record and in simply relying on the assessment order.

2. Without prejudice to above ground, the assessment made is without jurisdiction since mandatory requirement of section 153C r/w section 153A of the Act remains to be complied with.

3. Without prejudice to above grounds, the assessment made is without jurisdiction since issue of notice u/s 143(2) of the Act was itself illegal as the mandatory requirement of section 153A itself was not complied with.

4. That the addition of Rs.1.98 crore cannot be made/sustained under the provisions of section 69A of the Act since the money was found to be duly recorded in the books of account. Any asset which is duly recorded in the books of account cannot be the subject matter of addition u/s 69A of the Act. The CIT(A) was also not justified in not adjudicating the legal ground .

5. On merits, the addition made by the Assessing Officer is illegal because:-

A) the inferences that

(i) when cash was found and seized by the police, neither there was any entry in the books nor any voucher was existing. It was later on that the cash credits were arranged and the entries were passed in the books of account in the back dates to create the sufficient balance in the books of accounts on 31.01.2008(para 4.8, page 4)and is paid in cash out of unexplained sources (para 8), are based on conjecture and surmises.

B) That every employee of an assessee is not supposed to know the source of money handed over to him for carrying out the required job and therefore AO was not justified in holding that assessee could not explain the source of cash particularly when no statement of any responsible person was recorded and entries were found duly recorded when the tax officials made enquiries on 2.2.08.

C) It is for the businessman to decide in what manner the business is to be carried on and not for the tax authorities to decide as to how the business is to be carried on. Hence, AO was not justified in observing that there was no necessity for sending the cash to Amritsar for purchasing the property.

D) That no adequate opportunity was provided to assessee for producing the cash creditors since for the first time on 9.12.2009, the assessee was asked to produce them on 14.12.2009. Despite the paucity of time, the assessee did produce two of the creditors on 14.12.09 who were examined by the AO. Both of them admitted that cash payments were made after making withdrawals from books/bank. Rajesh Bhalla as well as Hemant Kapoor had clearly stated in their statements that cash withdrawals were duly recoded in their books of account but the AO arbitrarily rejected their explanations without asking them to produce the relevant books or the bank statements. Such action of AO was not legally justified. Further, no proper opportunity was given to produce the remaining parties. Thus, there was also breach of principles of natural justice.

6. On the facts and circumstances of the case and in law, the addition of Rs.98 crore is not justified. Hence, it is prayed that the impugned assessment be quashed or in the alternative, the necessary relief be allowed after providing an opportunity of being heard to the appellant.

In ITA No.1507/Del/2014 for Asst. Year: 2007-08

“1) That the Hon’ble Commissioner of Income Tax (Appeals) has erred in law as much as on the facts of the case by upholding the findings of the learned Assessing Officer in not keeping in abeyance the penalty under “proviso” to section 275(1A) of the Income Tax Act, 1961 till the disposal of appeal filed by the appellant on quantum additions before the Hon’ble Income Tax Appellate Tribunal, New Delhi.

2) He has also further erred in law in rejecting the request of the appellant to keep the appellate proceedings pending against the impugned penalty appeal filed before

him to avoid multiplicity of legal proceedings and undue harassment to the appellant but the same was arbitrary rejected by him without giving any cogent reasons which is bad in law.

3) That the Hon'ble Commissioner of Income Tax (Appeals) has further erred in law as much as on the facts of the case by upholding the levy of penalty u/sec. 271(1)(c) of the Act by the learned Assessing Officer by not giving any opportunity of being heard to the appellant on receipt of the reply on merits of the case from the appellant, thus the appellant was deprived of an opportunity which not only bad in laws but against the principles of natural justice.

4) That the Hon'ble Commissioner of Income Tax (Appeals) while upholding the penalty of Rs.23,56,200/- has not appreciated that the issue relating to the impugned additions of Rs.70.00 lacs in the declared income of the appellant is subjudice and pending for hearing before the Hon'ble Income Tax Appellate Tribunal, then his finding that "the appellant's Explanation was not only found false but full of malafide" is totally incorrect and is not sustainable in law.

In view of the above grounds, the appellant respectfully pray to the Hon'ble Bench to please delete the unwarranted penalty of Rs.23,56,200/- levied u/sec. 271(1) (c) of the Act by providing an opportunity of being heard to the appellant."

In ITA No.1508/Del/2014 for Asst. Year: 2008-09

“1) That the Hon’ble Commissioner of Income Tax (Appeals) has erred in law as much as on the facts of the case by upholding the findings of the learned Assessing Officer in not keeping in abeyance the penalty under “proviso” to section 275(1A) of the Income Tax Act, 1961 till the disposal of appeal filed by the appellant on quantum additions before the Hon’ble Income Tax Appellate Tribunal, New Delhi.

2) He has also further erred in law in rejecting the request of the appellant to keep the appellate proceedings pending against the impugned penalty appeal filed before him to avoid multiplicity of legal proceedings and undue harassment to the appellant but the same was arbitrary rejected by him without giving any cogent reasons which is bad in law.

3) That the Hon’ble Commissioner of Income Tax (Appeals) has further erred in law as much as on the facts of the case by upholding the levy of penalty u/sec. 271(1)(c) of the Act by the learned Assessing Officer by not giving any opportunity of being heard to the appellant on receipt of the reply on merits of the case from the appellant, thus the appellant was deprived of an opportunity which not only bad in laws but against the principles of natural justice.

That the Hon’ble Commissioner of Income Tax (Appeals) while upholding the penalty of Rs.66,64,680/- has not appreciated that the issue relating to the impugned additions of Rs.1.98 crore in the declared income of the appellant is subjudice and pending for hearing before the

Hon'ble Income Tax Appellate Tribunal, then his finding that "the appellant's Explanation was not only found false but full of malafide" is totally incorrect and is not sustainable in law.

In view of the above grounds, the appellant respectfully pray to the Hon'ble Bench to please delete the unwarranted penalty of Rs.66,64,680/- levied u/sec. 271(l)(c) of the Act by providing an opportunity of being heard to the appellant.

3.0 At the outset, the learned Authorized Representative (AR) submitted that an essential legal ground was being raised by the assessee wherein in ground no. 1 pertaining to assessment year 2007-08 it is the assessee's contention that the assessment framed u/s 153C was without jurisdiction as the statutory notice u/s 153C was issued by the ACIT, Circle-9(1) New Delhi based on the satisfaction note prepared by the ITO, Ward-48(4), New Delhi i.e., AO of the searched persons before the issuance of notice u/s 153A to the searched person. The learned Authorised Representative submitted that no lawful satisfaction was recorded regarding the seized unsigned agreement alleged to have been belonging to the assessee. The learned Authorized Representative submitted that the notice u/s 153C of the Act was issued on 27.11.2008 after receipt

of satisfaction note dated 27.11.2008 from the Assessing Officer of Sh. Vipin Verma and the assessment order u/s 153C was passed on 31.12.2009 after making an addition of Rs.70 lacs towards alleged cash payments for assessment year 2007-08. The learned Authorized Representative (AR) further submitted that notice u/s 153A was issued to Sh. Vipin Verma on 06.01.2009 and the assessment was made u/s 143(3) r.w. sec 153A vide order dated 31.12.2009. The learned Authorized Representative (AR) drew our attention to the copies of the various notices and the assessment orders to demonstrate the dates on which the above said notices and assessment years were passed. The learned AR contended that it is settled law that notice u/s 153C cannot precede notice u/s 153A and, therefore, the notice issued u/s 153C in the case of the assessee company was unlawful making the assessment null and void. The learned AR placed reliance on the judgment of the Hon'ble Apex Court in the case of CIT vs. Calcutta Knitweaves reported in [2014] 43 Taxmann.com 446 (SC) to buttress his argument that satisfaction note could not be prepared prior to the issuance of notice against the searched persons. Reliance was also placed on

CBDT Circular No.24/2015 dated 31.12.2015 wherein the CBDT had clarified that the judgment of the Hon'ble Apex Court laying down the guidelines for assessments u/s 158 BD (in the case of CIT vs. Calcutta Knitwears (supra)) is also be applicable to proceedings u/s 153C. Reliance was also placed on certain other judicial precedents from the Tribunal on the same issue.

3.1 With respect to assessee's appeal for Assessment Year 2008-09, the learned AR submitted that in this year, the assessment year deserved to be quashed on the ground of non-issuance and non-service of the mandatory notice u/s 153C of the Act to the assessee. The Ld. AR submitted that in this case the search was initiated on 31.01.2008 (relevant to assessment year 2008-09) and the AO of the searched person recorded the satisfaction note and handed over the requisite material alleged to be belonging to the assessee to the Assessing Officer of the assessee on 27.11.2008 relevant to Assessment Year 2009-10 and, therefore, in view of the settled legal position, the six years in the case of the assessee will be from the assessment year 2003-04 to Assessment Year 2008-09 and as such assessment year 2008-09 was to be

covered under the provisions of section 153C. Further, the learned AR submitted that it is borne out from the assessment records and the satisfaction note that no notice u/s 153C was issued for assessment year 2008-09 and notices only were issued u/s 143(2) and the that the assessment was based on the original return filed on 17.03.2009. The learned AR placed reliance on the numerous judicial precedents and submitted that in absence of issuance and service of notice u/s 153C, the jurisdiction for framing the impugned assessment was wrongly assumed and, therefore, was unsustainable in law.

3.2 The learned AR submitted that if the legal grounds were to be decided in favour of the assessee, no arguments would be required on the merits of the addition as the grounds pertaining to the same would become academic in nature.

3.3 The learned AR also submitted that the penalty appeals would have a consequential effect.

4.0 In response, the learned CIT-DR placed reliance on the concurrent findings of both the lower authorities. The learned CIT-DR also submitted that the case laws being relied upon by the

assessee were distinguishable on facts and would not squarely cover the case of the assessee. The learned CIT-DR also submitted that there were also judicial precedents wherein it had been held that addition to assessee's income relying on statement recorded during the search operations cannot be deleted without proving the statements to be the incorrect. The learned CIT-DR also submitted that even a statement recorded during the course of survey could be relied upon for the purposes of assessment in absence of any contrary evidence or explanation as to why such statement was to be disbelieved. The learned CIT-DR submitted that the assessee had failed to substantiate with cogent evident that no cash transaction had taken place and in absence of any evidence to the contrary, it could not be held that agreement was not genuine. The learned CIT-DR vehemently argued that the assessee's appeals should be heard on merits also and relief should not be give to the assessee on mere technicalities.

5.0 We have heard the rival submissions and have also perused the material available on record. As far as assessment year 2007-08 is concerned, we have also perused the notice issued u/s

153A of the Act in the case of Sh. Vipin Verma i.e., the searched person from whom the cash was seized. This notice is undisputedly dated 6th January, 2009. We also note that in the case of the assessee, the notice u/s 153C was issued on 27.11.2008 right after the receipt of the satisfaction note dated 27.11.2008 from the Assessing Officer of the searched person i.e., Sh. Vipin Verma. The assessment order was passed on 31.12.2009 in the case of the assessee whereas and in the case of the Sh. Vipin Verma i.e., the searched person the notice u/s 153A was issued on 06.01.2009 and the assessment was completed on 31.12.2009. Thus, admittedly and undisputedly the notice u/s 153C in the case of the assessee was issued prior to the issuance of notice u/s 153A in the case of the searched person. We agree with the contention of the ld. AR that issuance of notice u/s 153C cannot precede issuance of notice u/s 153A. In this regard, the Hon'ble Apex Court has held in CIT vs. Calcutta Knitwears (supra), while adjudicating on the timing of recording of satisfaction note u/s 158BD, that satisfaction note can be prepared at either of the following stages:

- (i) At the time of or along with initiation of proceedings against searched person.
- (ii) During the course of assessment proceedings of searched person
- (iii) Immediately after the completion of assessment proceedings of searched person.

5.1 However, in this case, for assessment year 2007-08, the notice u/s 153C has been issued prior to the issuance of notice u/s 153A to the searched person. The CBDT Circular No.24/2015 dated 31.12.2015 has instructed that guidelines issued by the Hon'ble Apex Court in the case of Calcutta Knitwears (supra) will also be applicable to proceedings u/s 153C and, therefore, we are afraid that the Revenue has no case in terms of the judgment of the Hon'ble Apex Court in the case of CIT vs. Calcutta Knitwears (supra) and the CBDT Circular No.24/2015 dated 31.12.2015. Since, undisputedly, the satisfaction note in the case of the assessee was prepared prior to the issuance of notice to the searched person, the assessment for assessment year 2007-08 becomes null and void because the assumption of jurisdiction u/s 153C is defective. Accordingly, we have no option but to hold that

the assessment framed for assessment year 2007-08 was without jurisdiction and is, therefore, unsustainable in law. The same is hereby quashed.

5.2 In the result, ITA No.3532/Del/2010 stands allowed. Since the quantum appeal of assessee stands allowed for assessment year 2007-08, penalty imposed u/s 271(1) (c) being consequential also stands deleted. Accordingly, ITA No. 1507/Del/2014 also stands allowed.

5.3 Coming to ITA No.3533/Del/2010 pertaining to assessment year 2008-09, we agree with the contention of the learned Authorised Representative that since the seized material alleged to be belonging to the assessee was handed over to the Assessing Officer of the assessee on 27.11.2008, the six years falling within the purview of section 153C would be assessment years 2003-04 to assessment year 2008-09. In view of the settled legal position that the date of initiation of search in the case of the third party should be construed with reference to the date of receiving the requisitioned material by the Assessing Officer having jurisdiction over the person to whom such material relates {as

propounded by the Delhi High Court in the case of Pr Commissioner Of Income Tax vs. Sarwar Agency Pvt. Ltd., reported in [2007] 397 ITR 400 (Delhi)} and duly noting from the records that admittedly and undisputedly no notice u/s 153C was issued in assessee's case for assessment year 2008-09 and only notice u/s 143(2) was issued, it is our considered opinion that the impugned assessment has not been passed in conformity with the provisions of law. We note that the impugned assessment order has been passed u/s 143(3) and no notice u/s 153C has been issued although this year falls within the period of six years when counted from the date of recording of satisfaction note which is deemed date of search. The Assessing Officer should have framed the assessment u/s 153C of the Act for assessment year 2008-09 also and should have at the time of initiating the proceedings against the assessee issued notice u/s 153C of the Act which has not so be done in this case. The issuance of notice u/s 153C is mandatory and is a pre-condition if the case falls within the block period of six years. The assessment order for assessment year 2008-09 is, therefore, unsustainable in

the eyes of law. Accordingly, we are left with no option but to quash the assessment for assessment year 2008-09 also.

5.4 In the result, ITA No.3533/Del/2010 stands allowed.

5.5 Since, we have decided the quantum appeal for assessment year 2008-09 in favour of the assessee and have quashed the assessment, the consequential penalty imposed u/s 271(1)(c) also stands deleted and ITA No.1508/Del/2014 also stands allowed.

6.0 In the final result, all the four appeals of the assessee stands allowed.

Order pronounced in the Open Court on 31/12/2019.

Sd/-

Sd/-

(N.K.BILLAIYA)
ACCOUNTANT MEMBER

(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER

Dated : 31/12/2019

PK/PS

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI