

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "SMC" MUMBAI**

**BEFORE SHRI VIKAS AWASTHY (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 2826/MUM/2018
Assessment Year: 2011-12**

Rajendra Ladakchand Jain,
9th Floor, Novelty Chambers,
M.S. Road, Grant Road,
Mumbai-400007.

Vs. DCIT, Central Circle 1(3), Mumbai
905, Pratishtha Bhavan, 9th Floor,
M.K. Road, Mumbai-400020.

PAN No. AAIPJ2441G
Appellant

Respondent

Assessee by : Mr. Ayush Maheshwari, AR
Revenue by : Mr. Akhtar H. Ansari, DR

Date of Hearing : 16/01/2020
Date of pronouncement : 22/01/2020

ORDER

PER N.K. PRADHAN, A.M.

This is an appeal filed by the assessee. The relevant assessment year is 2011-12. The appeal is directed against the order of the Commissioner of Income Tax (Appeals)-47, Mumbai [in short 'CIT(A)'] and arises out of the assessment completed u/s 153C r.w.s. 143(3) of the Income Tax Act 1961, (the 'Act').

2. The grounds of appeal filed by the assessee read as under:

1. The Ld. CIT(A) has erred in confirming the legality of survey action at residential premises.
2. The Ld. CIT(A) has erred in confirming the legality of action of the AO for issue of notice u/s 153C of the Act.
3. The Ld. CIT(A) has erred in confirming the legality of action of the AO to pass the order against the notice issued u/s 153C of the Act.

4. The Ld. CIT(A) has erred in confirming the proper satisfaction of the AO before issue of notice u/s 153C of the Act.
5. The Ld. CIT(A) has erred in confirming the addition of Rs.6,44,221/-.

3. Briefly stated, the facts of the case are that the assessee filed his return of income for the A.Y. 2011-12 on 23.09.2011 declaring a total income of Rs. 92,380/-. As recorded by the AO, in connection with searches on Bhanwarlal Jain group of cases, one of the concern reportedly managed and controlled by Shri Bhanwarlal Jain and Rajesh Bhanwarlal Jain namely M/s. Nakoda Flour Mills Pvt. Ltd. having registered office at 9th Floor, Novelty Chamber, Mumbai – 400 007 was also covered by the Investigation Wing, Mumbai u/s 133A of the Act. The said premise was found to be inhabited by the assessee Shri Rajendra Ladakchand Jain, who is one of the Directors in M/s. Nakoda Flour Mills Pvt. Ltd., along with Shri Bhanwarlal Jain and Rajesh Bhanwarlal Jain, as other two Directors. Thereafter, the AO issued notice u/s 153C on 21.05.2015 to the assessee. In response to it, the assessee vide letter filed on 16.06.2015 reiterated the total income at Rs. 92,380/-.

4. The issue here is whether notice u/s 153C has been issued by the AO as per the provisions of the Act. The CIT(A) *vide* order dated 27th March, 2018 observed that (i) one blue colored diary was found from the premises of the assessee and the same was impounded during the survey operation; (ii) the diary contains several cash entries which are not recorded in the regular books of accounts of any individual or any of the concerns of the assessee; (iii) there are confessional statements by the assessee on record to the effect that the cash entries recorded in the said seized diary belongs to him; (iv) the AO has categorically mentioned that the search was conducted on Bhanwarlal Jain group, his associates and his concerns and

the blue colored diary was unearthed, as a result of this comprehensive search action of the department on the same day, which also included the Directors of the said M/s. Nakoda Flour Mills Pvt. Ltd.

Therefore, the Ld. CIT(A) confirmed the order of the AO on the ground that the information found in relation to a third party, during the course of search operation can be utilized for initiating action u/s 153C of the Act, against such third party.

5. Before us, the learned counsel for the assessee submits that the survey u/s 133A of the Act was conducted on Nakoda Flour Mills Pvt. Ltd., 9th Floor, Novelty Chambers, Mumbai – 400 007 on 03.10.2013. There was no search. Thus it is stated that notice u/s 153C could not have been issued in the present case. In this regard reliance is placed by him on the decision by the Tribunal in assessee's own case for the AYs 2010-11 and 2012-13.

6. On the other hand the learned departmental representative (DR) relies on the decision of the Hon'ble Madras High Court in the case of *B. Kishore Kumar vs DCIT* in T.C. (A) Nos. 738 to 744 of 2014 and the decision of the Hon'ble Supreme Court in *CIT vs S. Ajit Kumar* in CA No. 10164 of 2010. Also reliance is placed by on the order of the Tribunal in the case of *GMS Technologies Ltd. vs DCIT* (2005) 93 TTJ Delhi 218.

7. We have heard the rival submissions and perused the relevant material available on records. The reasons for our decision are given below:

We may discuss now the case laws relied on by the ld. DR. In the case of *B. Kishore Kumar* (supra) on 29.08.2006, a search was conducted at the premises of the appellant's father, wherein certain loose sheets and notings on telephone diaries pertaining to the assessee were found by the department. On 27th August, 2008, notice u/s 153A r.w.s. 153C was issued

to the appellant for the AYs 2001-02 to 2007-08. In response to these notices, on 14.10.2008, the appellant requested the department to treat the original returns filed by him as his returns in response to the notices issued u/s 153A r.w.s. 153C of the Act.

In *S. Ajit Kumar* (supra) a search was conducted by the department in the premises of the assessee on 17.07.2002 which was concluded on 21.08.2002. On the same date, there was survey in the premises of Elegant Constructions & Interiors Ltd. (ECIL), builder and interior decorator who constructed and decorated the house of the assessee at Valmiki Nagar. The issue in the appeal before the Hon'ble Supreme Court was whether the material found in the course of survey in the premises of the builder could be used in block assessment of the assessee. The Hon'ble Supreme Court held that the power of survey has been provided u/s 133A of the Act; therefore, any material or evidence found / collected in a survey which has been simultaneously made at the premises of a connected person can be utilized while making the block assessment in respect of assessee u/s 158B r.w.s. 158BH of the Act.

In *GMS Technologies Ltd.* (supra), a search and seizure action u/s 132(1) of the Act was conducted by the department in the premises of the assessee. Notice u/s 158BC was issued by the AO. In response to it the assessee filed a return of income disclosing nil income. During the course of assessment proceedings, the AO noted that the assessee has claimed deduction u/s 80IA of the Act. In the assessment order the AO disallowed the claim of deduction made u/s 80IA of the Act. Before the Tribunal, the assessee raised the issue of jurisdiction of the AO in issuing notice u/s 158BC of the Act. The Tribunal observed that –

“As regards, jurisdiction of the ITO is issuing notice under section 158BC of the Act, we do not find any substance in the submissions of the learned counsel. Section 158BC of the Act has used the word ‘AO’. This section requires an AO to issue notice to the searched person requiring him to furnish the return of undisclosed income. Section 158BG of the Act talks of an authority who will pass the assessment order. This section prescribes that an assessment order would not be passed by an officer who was below the rank of Asstt. CIT. In other words, the notice u/s 158BC of the Act for filing the return of undisclosed income could be issued by an officer below the rank of Asstt. CIT but the assessment under Chapter XIV-B has to be made by an officer not below the rank of Asstt. CIT.”

7.1 In the instant case a survey u/s 133A of the Act was conducted on Nakoda Flour Mills Pvt. Ltd., 9th Floor, Novelty Chambers, Mumbai – 400 007 on 03.10.2013 and the statement was recorded u/s 131 of the Act on 03.10.2013. The initial para of the said statement is produced below:

“Statement of Shri Rajendra Ladakchand Jain s/o Shri Ladakchand Jain, aged 58 years, residing at 9th Floor, Novelty Chamber, Mumbai – 400 007, taken on oath on 03.10.2013 at 7.05 pm u/s 131 of the Income Tax Act, 1961 during the course of survey action u/s 133A of the IT Act 1961 in the case of Nakoda Flour Mills Pvt. Ltd., 9th Floor, Novelty Chamber, Mumbai – 7.”

Thus the instant case is distinguishable from the decision in *B. Kishore Kumar* (supra), *S. Ajit Kumar* (supra) and *GMS Technologies Ltd.* (supra) relied on by the ld. DR.

7.2 The same issue arose before the ITAT “D” Bench, Mumbai in assessee’s own case for AYs 2010-11 and 2012-13 (ITA No. 2825 & 2827/Mum/2018). The Tribunal *vide* order dated 26.07.2019 held:

“We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record. We find that our indulgence in the present appeal has been sought by the assessee to adjudicate upon the validity of the assessment framed by the A.O under Sec.153C r.w.s 143(3), dated 31.03.2016. Admittedly, as is discernible from the orders of the lower authorities, the A.O had assumed jurisdiction and framed the assessment under Sec. 153C on the basis of the incriminating material i.e a "blue coloured diary" that was found and

impounded during the course of the survey proceedings conducted under Sec.133A on M/s Nakoda Floor Mills Pvt. Ltd. It is undisputed by the revenue that the aforesaid incriminating document viz. "blue coloured diary", which thereafter had been marked as Annexure A1 - Page 1-31 was found and impounded during the course of the survey proceedings conducted on M/s Nakoda Floor Mills Pvt. Ltd. at 9th Flour, Novelty Chamber, Mumbai. In our considered view, documents found and impounded in the course of the survey action cannot confer jurisdiction on the A.O to frame an assessment under Sec.153C of the Act. As is discernible from a perusal of Sec.153C of the Act, it is only where in a case a search initiated under Sec.132 or books of account, other documents or assets are requisitioned under Sec.132A, that the assessing officer is satisfied that viz. (a) any money, bullion, jewellery or other valuable article or thing, seized or requisitioned, belongs to; or (b) any books of accounts or documents, seized or requisitioned, pertains or pertain to or any information contained therein relates to a person other than the person referred to in Sec.153A, then the books of accounts or documents or assets, seized or requisitioned shall be handed over to the assessing officer having jurisdiction over such other person, and that assessing officer shall proceed against each such 'other person' and issue notice and assess or reassess his income in accordance with the provisions of Sec.153A, and that too if, that assessing officer is satisfied that the books of account or documents or assets seized or requisitioned have a bearing on the determination of the total income of such 'other person' for the relevant assessment year or years referred to in sub-section (1) of Sec. 153A.. Accordingly, in the case before us, as the "blue coloured diary" was neither seized in the course of any search proceedings initiated under Sec.132 nor was requisitioned under Sec. 132A, but was in fact admittedly impounded in the course of the survey proceedings conducted under Sec.133A on M/s Nakoda Floor Mills Pvt. Ltd., therefore, as per the mandate of law, the A.O was divested of assuming jurisdiction and framing of an assessment under Sec.153C r.w.s 143(3) on the basis of the same. We thus being of the considered view that as the A.O had blatantly exceeded his jurisdiction and framed the aforesaid assessment under Sec.153C r.w.s 143(3), dated 31.03.2016, therefore, the same cannot be sustained and is liable to be struck down on the ground of invalid assumption of jurisdiction on his part itself. In the backdrop of our aforesaid observations we quash the assessment framed by the A.O under Sec.153C r.w.s 143(3), dated 31.03.2016

8. Facts being identical, we follow the above order of Co-ordinate Bench and allow the appeal filed by the assessee.

Rajendra Ladakchand Jain
ITA No. 2826/M/2018
AY 2011-12

Order pronounced in the open Court on 22/01/2020.

Sd/-

Sd/-

(VIKAS AWASTHY)
JUDICIAL MEMBER
Mumbai;
Dated: 22/01/2020
Biswajit, Sr. P.S.

(N.K. PRADHAN)
ACCOUNTANT MEMBER

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