

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'G', NEW DELHI

BEFORE SH. PRASHANT MAHARISHI, ACCOUNTANT MEMBER
AND
SH. K. N. CHARY, JUDICIAL MEMBER

ITA No.6305, 5128, 6307 & 2312/DEL/2013

Assessment Year: 2005-06, 2006-07, 2008-09 & 2009-10

Shalimar Town Planners Pvt. Ltd. M-11, Middle Circle, Connaught Circus New Delhi-110001 PAN No. AABCS5851R (APPELLANT)	Vs	ACIT Central Circle – 23 New Delhi (RESPONDENT)
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ITA No.6345/DEL/2013

Assessment Year: 2008-09

ACIT Central Circle – 23 New Delhi (APPELLANT)	Vs	Shalimar Town Planners Pvt. Ltd. M-11, Middle Circle, Connaught Circus New Delhi-110001 PAN No. AABCS5851R (RESPONDENT)
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Appellant by	Sh. Ajay Bhagwani, CA
Respondent by	Shri S. S. Rana, CIT DR

Date of hearing:	06/01/2020
Date of Pronouncement:	30/06/2020

ORDER

PER PRASHANT MAHARISHI, AM:

1. These are the five appeal of one assessee M/s Shalimar Town Planners Private Limited[Assessee or Appellant] for AY 2005-06 to 2009-10 involving some of the similar issues, the parties argued the mater together and therefore those appeals are disposed of by this common order.

ITA No 6305/Del/2013**For AY 2005-06****By Assessee**

2. This appeal is filed by the assessee for AY 2005-06 against the consolidated appellate order of the Id CIT(A)-33, New Delhi [The CIT – A] dated 22.07.2013 for Assessment Years 2005-06, 2007-08 and 2008-09.

3. The assessee has raised the following grounds of appeal:-

- “1. *That the order passed by the Assessing Officer and Commissioner of Income Tax (Appeals)-XXXIII, New Delhi are bad on facts and in law and void ab-initio.*
2. *That on the facts and circumstances of the case and in law, the CIT(A) erred in rejecting the appellant's contention that the assumption of jurisdiction by Assessing Officer for making assessment u/s 153C of the IT Act was bad on facts and in law, thereby rendering the whole assessment also as bad in law and void ab-initio.*
3. *That on the facts and circumstances of the case and in law the CIT(A) erred in upholding the disallowance u/s 40A(3) in respect of which no deduction was claimed by the appellant.*
- 3.1 *That even on merits, the disallowance was not justified.*
4. *That on the facts and circumstance of the case and in law, the CIT(A) erred in confirming the disallowance of Rs.51,000/- paid in respect of a property.*
5. *That on the facts and circumstance of the case and in law, the CIT(A) erred in confirming the addition of Rs. 16,500/- on account of unrealized rent.*
6. *the appellant craves permission to add, amend, alter or vary all or any grounds of appeal on or before the date of hearing of the appeal.”*

4. Brief facts of the case shows that the assessee is a company belonging to BPTP Group. A search was carried out on 15.11.2007 on that group and case of the assessee was covered by issuing notice u/s 153C of the Act on 19.08.2009. Satisfaction note was recorded by the LD AO of the appellant on that date. The assessee filed return of income at Rs. 29330/- on 07.09.2009. The assessment was made u/s 153A read with section 153C of the Act determining total income of the assessee at Rs. 172042/-. The LD AO made following three additions.

- a. Disallowance of value of inventory u/s 40A3) of Rs. 51,000/-
 - b. Addition on account of unrealized rent of Rs. 16500/-
 - c. Disallowance u/s 40A (3) of Rs. 75212/-.
5. The assessee filed an appeal before the Id CIT (A). The assessee argued that there is no incriminating material found during the course of search. It was submitted that for Assessment Year 2005-06, no proceeding were pending on the date of search and therefore, if any addition is to be made as undisclosed income of the assessee, it has to be based on incriminating material found during the course of search. The Id CIT(A) held that Hon'ble Delhi High Court in case of Anil Bhatia has held that addition is not to be restricted to the undisclosed income on the basis of seized documents therefore he rejected the contention of the assessee. With respect to the addition u/s 40A (3) he confirmed the addition on the merits. Similarly he confirmed other additions vide para No. 7.3 and 8.3 of his order. Therefore, aggrieved by the order the assessee is in appeal before us.
6. The Id AR submitted that all the three additions were made by the Id AO and confirmed by the Id CIT (A) are without any reference to any incriminating material found during the course of search. He submitted that on the date of search i.e. 15.11.2007 assessment for Assessment Year 2005-06 was concluded assessment. He therefore, submitted that no addition could have been made in the hands of the assessee in absence of any incriminating material.
7. The Id DR vehemently supported the orders of the lower authorities. He also referred to the para No. 3.4.1 of the Id CIT (A) order wherein he held that 'in the present case the various additions have been made on the basis of seized documents'. He therefore submitted that even otherwise the addition has been made on the basis of seized documents.
8. We have carefully considered the rival contentions and also perused the orders of the lower authorities. The impugned assessment order before us is for Assessment Year 2005-06, the date of search is 15.11.2007. Therefore, on the date of search the assessment for Assessment Year 2005-06 was not pending but a concluded assessment. Therefore, it is settled principle of law that if any addition is required to be made in the concluded assessment pursuant to search, it has to be based on the

incriminating material found during the course of search. Apparently from the orders of the Id CIT (A) and AO we did not find that these additions challenged before us are based on any incriminating material found during the course of search. Further, reference to the orders of the Id CIT(A) in para No. 3.4.1 made by Id DR , where he has held that there are incriminating material found during the course of search, we do not find for this AY 2005-06 that there are any incriminating materials found. This may be for the other years as it is consolidated order passed by Id CIT (A). The addition u/s 40A (3) has been confirmed by him at para 4.6 however, no reference of any incriminating material was made. With respect to the addition on account of inventory which has been dealt with in para No. 7.3 we do not find any reference to the incriminating material. While confirming the addition of Rs. 16500/- vide para No. 8.3 of his order no reference was made to any incriminating material. In view of this we allow ground No. 3, 4 and 5 of the appeal deleting all the additions confirmed by the Id CIT (A).

9. In view of this in substance appeal of the assessee for Assessment Year 2005-06 is allowed.

ITA No.5128/Del/2013 (A.Y. 2006-07)

10. This appeal is filed by the assessee against the order of the Id CIT (A)-33 dated 26.06.2013, wherein, the addition of additional payment amounting to Rs. 6529376/- and disallowance u/s 40A (3) of Rs. 1704250/-were confirmed.
11. The assessee has preferred the following grounds of appeal:-

- “1. *That on the facts and circumstances of the case, the order of the CIT(A) is bad in law and against the facts and circumstances of the case and void ab- initio and it needs to be quashed.*
2. *That on the facts and circumstances of the case and in law, the CIT(A) erred in rejecting the appellant's contention that the assumption of jurisdiction by Assessing Officer for making assessment u/s 153C of the IT Act was bad on facts and in law, thereby rendering the whole assessment also as bad in law and void ab-initio.*
3. *That on the facts and circumstances of the case and in law, the CIT(A) erred in holding to quote, 'that seized documents definitely proved that interest is paid on PDC' in view of the fact that no enquiries were made from any of the alleged recipients of the interest and none was confronted with relevant document(s).*

- 3.1 *That the said finding of the CIT(A) is based on mere surmises and conjectures and without proof and corroboration by independent evidence.*
- 3.2 *That without prejudice on the facts and circumstances of the case and in law, since the appellant had challenged the very factum of any payment of interest on Post Dated Cheques (PDC) the action of CIT(A) in 'recomputing the interest on PDCs after six months from the date of issue of PDCs and to treat it as income of the appellant is also erroneous and is challenged.*
- 4 *That on the facts and circumstances of the case and in law the CIT(A) erred in not accepting the appellant's contention that Additional Payments having not been claimed as deduction by appellant, no disallowance could have been made in the hands of the appellant.*
- 4.1 *That without prejudice the CIT(A) erred in upholding the disallowance of Additional Payments made to the recipients who were not the owners of land and to whom the additional payment was made in cash.*
- 4.2 *That without prejudice the CIT(A) erred in not himself quantifying the addition/disallowance to be made.*
5. *That on facts and circumstances of the case and in law, the CIT(A) erred in confirming the disallowance of Rs. 17,04,250/- made by the Assessing Officer u/s 40A(3) of Income Tax Act.*
- 5.1 *That on the facts and circumstances of the case and in law the CIT(A) erred in upholding the disallowance u/s 40A(3) in respect of which no deduction was claimed by the appellant.*
- 5.2 *That even on merits the disallowance was not justified.*
6. *The appellant craves permission to add, amend, alter or vary all or any grounds of appeal on or before the date of hearing of the appeal."*
12. The assessee at the beginning of the hearing submits that it is contesting the addition confirmed by the Id CIT (A) as per ground No. 4 and 5 of the appeal. Therefore, other than ground No. 4 and 5 all other grounds of the appeal are dismissed.
13. With respect to the facts of the case that search took place at BPTP group on 15.11.2007 and assessee was also served notice u/s 153C of the Act. Consequently, to that return of income filed by the assessee at Rs. 1069550/-. AO made several additions to the returned income. However before us only two additions are contested for the reason that all other additions are deleted by the Id CIT(A).
14. The first addition is with respect to disallowance of additional payment of Rs. 6529376/- and second addition is disallowance u/s 40A(3) of Rs. 1704250/-.
15. On ground no [4] The AR submitted that the issue of additional payment is decided in assessee's own case for Assessment Year 2011-12 and further the identical issue has

also decided by the Hon'ble Delhi High Court in ITA No. 221/2018 dated 14.05.2018 in case of Vashudhara Promoters Ltd wherein, the appeal of the revenue against the order of the ITAT is dismissed.

16. With respect to ground No. [5] being disallowance u/s 40A(3) he submitted that this issue is also covered in favour of the assessee by the several decisions of the coordinate bench of the group concern and leading one being Westland Developers Pvt Ltd in ITA No. 1752/Del/2013 dated 22.08.2014. He therefore, submitted that both the issues are clearly covered in favour of the assessee.
17. The Id DR supported the orders of the lower authorities.
18. We have carefully considered the rival contentions and also perused the orders of the lower authorities.
19. Coming to ground No. 4 with respect to the addition of Rs. 6529376/- made by the Id AO on account of additional payments. Brief facts of the case shows that BPTP group has made additional payment of more than Rs. 45 crores about the vendors of the land over and above the sale consideration mentioned in the sale deed. The above payments were made after the execution of the sale deed without specifying the purpose increasing the cost of the land. In the case of the assessee such payment was found to be of Rs. 6529376/-. As the identical additions have been made in the hands of the all other group concern the Id AO also made the above additions in the hands of the assessee. The matter reached before the Id CIT (A) wherein addition of Rs. 2279376/- was deleted and addition of Rs. 4250000/- was confirmed. Identical issue arose and in assessee's own case for Assessment Year 2010-11, wherein, the coordinate bench deleted addition. The coordinate bench in that year dealt with the above issue as per para No. 8 of that order. The coordinate bench followed the decision of the Hon'ble Delhi High Court in case of Vasundhara Promoters Ltd in ITA No. 211/2018 dated 14.05.2018. That being a binding judicial precedent, respectfully following the decision of the coordinate bench in assessee's own case, we direct the Id AO to delete the addition of Rs. 4250000/- on account of additional payment to the farmers/ land vendors. Accordingly, ground No. 4 of the appeal of the assessee is allowed.
20. Ground No. 5 of the appeal of the assessee is with respect to cash payment made by the assessee for purchase of land disallowed by the Id AO at Rs. 1704250/-. The above

issue is squarely covered in favour of the assessee by the decision of the coordinate bench in Westland Developers Pvt. Ltd in ITA NO. 1752/Del/2014. The deletion of the addition is for the reason that assessee has neither debited the above sum in the profit and loss account and nor claimed in deduction of the above amount. Therefore, the coordinate bench have held that provision of section 40A(3) cannot apply in the above circumstances. In view of overwhelming judicial precedents in favour of the assessee deleting the above addition, respectfully following the same we direct the Id AO to delete the addition/ disallowance u/s 40A(3) of the Act. Accordingly, ground No. 5 of the appeal of the assessee is allowed.

21. In the result appeal of the assessee for Assessment Year 2006-07 is partly allowed.

ITA No. 2312/Del/2013 (A. Y. 2009-10)

22. The assessee has preferred this appeal against the order of the Id CIT(A)-33, New Delhi dated 23.01.2013. The assessee has raised the following grounds of appeal.

23. The facts shows that the assessee filed return of income on 15.09.2009 at Rs. 18390/- as search took place 15.11.2007 of BPTP and assessee is also one of group company, the notice u/s 143(2) was issued to the assessee. The assessment u/s 143(3) was passed on 15.12.2011 wherein, the following two additions were made.

- a. As per 2.6 of the assessment order the Id AO has made an additions of Rs. 8380137/- as unexplained interest expenditure paid to the various vendors of the land through post dated cheque were issued. For example the sale took place on 30.06.2006 and the post dated cheque was issued for Rs. 1 crores to the vendor which was encashed on 15.11.2006. Thus the Id AO was of the view for 8 months the purchase consideration remained unpaid and the assessee has paid interest on this post dated cheque @1.25% per month therefore, he made the addition on interest payment of Rs. 10 lakhs. Identical facts mentioned at para 2.5 of the order he computed the interest of Rs. 8380137/-.
- b. The second addition was of Rs. 5878500/- as per para No. 3.8 of the order with respect to the additional payment made to the farmers over and above the sale consideration price. The Id AO noted that in case of 6 persons the assessee has made additional payment of the above sum over and above the purchase price of

the land. The assessee did not justify the above additional payment, hence, same were added. Against these two additions the assessee preferred appeal before the Id CIT(A). The Id CIT(A) upheld the addition on account of interest however, directed the Id AO to re-compute the interest on post dated cheque after 6 months from the date of issue of post dated cheques. Therefore, according to him no interest is chargeable for the first six months from the date of PDC.

24. He gave the detailed finding as per para No. 5.4 of his order. With respect to the additional payments of Rs. 5878500/- he partly confirmed the addition. Therefore, the assessee is in appeal before us.
25. The assessee raised the additional ground of appeal as under:-

“that on the facts and circumstances of the case and in law, the impugned assessment order dated 15.12.2011 passed by the Id AO u/s 143(3) of the Act, 1961 is bad in law and void ab initio in satisfaction it ought to have been passed u/s 153C of the Act.
26. The assessee submitted that the additional ground is purely legal and goes to the root of the matter and therefore, it should be admitted. It was further submitted that it is jurisdictional issue which can be raised at any time. It was further stated that the coordinate bench in M/s. Satkar Roadlines Pvt. Ltd., New Delhi v. ACIT, New Delhi in 2170/Del/2014 dated 27.04.2016 has admitted the identical ground. He further submitted that the issue is clearly covered by the decision of the Hon'ble Delhi High Court in CIT Vs. Jasjit Singh in ITA No. 337/2015 dated 11.08.2015 and Pr. CIT Vs. Bhupinder Pal Singh Sarna in ITA NO. 772/2015 dated 12.10.2015.
27. The Id DR vehemently objected to the admission of the additional grounds of appeal.
28. We have carefully considered the rival contentions and additional ground raised by the assessee is legal ground and goes to the root of the matter. No further facts are found to be investigated. In identical circumstances the coordinate bench has admitted such ground in another case. Even otherwise jurisdictional ground can be raised at any point of time. In view of this we admitted the additional ground as it is purely legal in nature.
29. On the additional ground the assessee submitted that search took place on 15.11.2007. According to first provision of section 153C(1) this year for which notice ought to have

been issued u/s 153C is starting from Assessment Year 2004-05 to 2009-10. He submitted that assessment for Assessment Year 2009-10 not made u/s 153C but u/s 143(3) and therefore, the assessment order passed by the Id AO is invalid. He vehemently relied on the order of the Hon'ble Delhi High Court that Shri Jasjit Singh. He also supported the same by the order of the Hon'ble Delhi High Court in case of Bhupinder Pal Singh (supra) to clear the controversy. Thus, as he submitted that the order passed by the Id AO u/s 143(3) of the Act is not proper. It should have been passed according to him u/s 153C of the Act.

30. The Id DR submitted that there is no infirmity in the order of the Id CIT(A) in passing the same u/s 143(3) of the Act.
31. We have carefully considered the rival contentions and also perused the orders of the lower authorities. Admittedly in this case the order has been passed by the Id AO u/s 143(3) of the Act. A search took place at BPTP group on 15.11.2007. Additions are also based on the issues framed in search assessment order. In para No. 2.2 of the assessment order there is also reference to incriminating documents seized for the impugned assessment order during the course of search. In para No. 2.3 the Id AO himself dealt with search material in para NO. 2.3.2, the Id AO made the addition after analyzing the search material. Based on this it is clear cut that the Id AO wanted to make the addition in the case of the assessee based on seized material. Now the question that arose is whether the assessment passed by the Id AO u/s 143(3) of the Act is a valid order or it should have been passed the order u/s 153C of the Act as being the assessment pursuant to search.
32. Before answering these question certain facts further need to be noted. On 03.09.2008 notice u/s 153A was issued by the Id AO in case of BPTP Ltd for Assessment Year 2003-04 to 2007-08. This company was incorporated on 11.08.2003 so the effective years were assessment year 2004-05 to 2007-08. No satisfaction note was recorded by the Id AO in the file of BPTP Ltd with respect to the documents belonging to the assessee. For this proposition, the assessee has shown the order sheet of BPTP Ltd as well as letter dated 04.01.2016 of the Id AO, wherein, in response to RTI Query, it was stated that since the Id AO of BPTP Ltd and the assessee was same, therefore, no separate satisfaction was recorded in the file of BPTP Ltd before assuming jurisdiction

in case of assessee u/s 153C of the Act. Further satisfaction was recorded in the case of the assessee on 19.08.2009 by the Id AO which is placed at page No. 17 to 20 of the PB. However, on 19.08.2009 itself, notice u/s 153C of the Act were issued to the assessee for Assessment Years 2005-06, 2006-07 and 2007-08. Admittedly, no notice u/s 153C was issued for Assessment Year 2009-10 and assessment was concluded on 15.12.2011 u/s 143(3) of the Act. In case of Shri Jasjit Singh (supra) the revenue challenged the order of the coordinate bench dated 05.11.2014 wherein, it was held that in case of the assessee the date of receipt of the seized material would be the date of search and six year period would be reckoned from that date. The coordinate bench in that case quashed the assessment framed u/s 143(3) of the Act for Assessment Year 2009-10 where the satisfaction note was recorded and material belonging to the assessee was received on 16.06.2009. The Hon'ble Delhi High Court on appeal upheld the order of the coordinate bench quashing the assessment. In the present case also identical facts are on record. The satisfaction was recorded on 19.08.2009 and assessment for Assessment Year 2009-10 is passed u/s 143(3) of the Act. Therefore, respectfully following the decision of the Hon'ble Delhi High Court for CIT Vs. Jasjit Singh [supra] we quashed the order passed by the Id AO u/s 143(3) of the Act for impugned assessment order. In view of this, additional ground raised by the assessee is allowed.

33. In view of our decision with respect to the additional ground all other grounds of the appeal are academic in nature.
34. In the result appeal of the assessee for Assessment Year 2009-10 is allowed.

ITA No. 6307/Del/2013 (assessee's appeal)

ITA No. 6345/Del/2013 (Revenue's appeal)

(A. Y. 2008-09)

35. These are the cross appeal filed by the assessee as well as Id AO against the order of the consolidated order of Id CIT(A)-33 dated 22.07.2013 for the Assessment Year 2005-06, 2007-08 and 2008-09.
36. In this appeal the assessee has raised the additional grounds of appeal similar to the appeal for Assessment Year 2009-10 as under:-

“that on the facts and circumstances of the case and in the law the impugned assessment order dated 31.12.2009 passed by the Id AO intending to be the assessment order u/s 143(3) of the Act without issuing notice u/s 153C of the Act for that satisfaction note was recorded on 19.08.2009 being explicitly and admittedly position in the assessment order itself reference the impugned year was framed as void ab initio in view of various decisions from jurisdictional high court and coordinate bench on identical facts and circumstances.”

37. Similar arguments as advanced in AY 2009-10 for admission of additional grounds were also raised in this year by both the parties. As we have admitted additional ground as admitted in AY 2009-10 , we also admit additional ground and proceed to adjudicate it.
38. Brief facts of the case shows that assessment orders in this case shows that the assessment order in this case was passed on 31.12.2009 u/s 153C/ 143(3) of the Act. Search took place on 15.11.2007. Section 153C notices were issued to the assessee on 19.08.2009 for Assessment Year 2002-03 to 2007-08. In the present year satisfaction was recorded on 19.08.2009 u/s 153C of the Act. Notice u/s 143(2) was issued on 10.08.2009. Firstly there is no notice issued u/s 153C of the Act for the impugned assessment year. Therefore, presumably, assessment order is passed u/s 153C of the Act. The Id AO did not issue any notice with respect to that section. Only notice issued was 143(2) of the act on 10.08.2009. As the satisfaction note was recorded in case of assessee from 19.08.2009, assessment should have been made u/s 153C of the Act. Therefore, reference to assessment order u/s 143(3) of the Act by issuing notice u/s 143(2) of the Act is also invalid as held by us stating the complete facts in the present appeal order for Assessment Year 2009-10. In view of this, on both the counts, assessment order is invalid and hence, we quash the assessment order passed by the Id AO u/s 153C of the Act read with section 143(3) of the Act dated 31.12.2009. Accordingly, appeal of the assessee for Assessment Year 2008-09 is allowed and consequently , appeal of the Id AO for Assessment Year 2008-09 is dismissed.
39. Accordingly all the five appeals of the same assessee are disposed off by this common order.

40. We also note that this order is passed beyond 90 days after the date of hearing. However respectfully following the order of coordinate bench in [2020] 116 taxmann.com 860 (Mumbai - Trib.), We proceed to pronounce this order.
41. Order pronounced in the open court on 30/06/2020.

-Sd/-
(K. NARASIMHA CHARY)
JUDICIAL MEMBER

-Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

**AJAY KUMAR KEOT **
Date:-30.06.2020

Copy forwarded to:

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

ASSISTANT REGISTRAR
ITAT NEW DELHI