

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'A': NEW DELHI
(Through Video Conferencing)**

**BEFORE,
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER**

**ITA No.3331/Del/2017
(ASSESSMENT YEAR: 2009-10)**

M/s Brahmaputra Holdings (P) Ltd., Brahmaputra House, A-7, NH-8, Mahipalpur Crossing, Mahipalpur, New Delhi-110 037 PAN -AACCB 5616N (Appellant)	Vs.	Dy.CIT, Central Circle-17, New Delhi (Respondent)
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Appellant By	Sh. Gautam Jain, Adv.
Respondent by	Sh. Sanjay Goel, CIT-DR
Date of Hearing	15.06.2020
Date of Pronouncement	31.08.2020

ORDER

PER SUDHANSHU SRIVASTAVA, JM:

This appeal is preferred by the assessee against order dated 27.03.2017 passed by the learned Commissioner of Income Tax (Appeals)-35, New Delhi {CIT(A)} for Assessment Year 2009-10.

2.0 The brief facts of the case are that the assessee is engaged in the business of investment. The original return of income was filed declaring Nil income which was processed u/s 143(1) of the Income Tax Act, 1961 (hereinafter called 'the Act'). Subsequently, search and seizure operation u/s 132 of the Act was conducted in the Brahmaputra Group of cases on 28.09.2010 and various books of accounts and documents including those allegedly belonging to the assessee were found and seized. Satisfaction was allegedly recorded for initiation of proceedings u/s 153C r.w.s 153A of the Act and, thereafter, the statutory notice was issued requiring the assessee to file its return of income. In response thereto, the assessee submitted that the original return filed by the assessee may be treated as having been filed in response to the notice.

2.1 During the course of assessment proceedings, it was noted that the assessee had raised share capital money to the tune from three Kolkata based companies. The assessee was required by the Assessing Officer (AO) to file relevant details and counterfoils for issue of share certificates and copies of share application forms etc. The assessee was also required to produce the Directors of the three

companies for the purpose of verification of the genuineness of the investment as claimed. The Assessing Officer also referred to a report from the Investigation Wing and observed that as per the report these companies were not existing at the given address and/or were merely existing on paper having no office. The Assessing Officer also referred to the statement of Sh. Sampat Sharma, Director in some of the companies of the Brahmaputra Group which was recorded during the course of search proceedings wherein he was said to have stated that he had no idea about how the share capital/share application money was received.

2.2 In response to the queries raised by the Assessing Officer, the assessee again filed the confirmations from the three parties. However, other details and documents as required by the Assessing Officer were not filed. The assessee also did not produce the Directors of the company. The Assessing Officer was, therefore, of the view that the assessee had failed to discharge its onus to prove the identity of the share applicants, their creditworthiness and genuineness of the transactions in respect of the share capital/ share application/ share premium to the tune of Rs.1.30 Crores.

The Assessing Officer held the same to be unexplained and added the same to the income of the assessee under the provisions of Section 68 of the Act.

2.3 Aggrieved, the assessee approached the Ld. First Appellate Authority challenging the addition on legal grounds as well as on the merits of the addition. However, the appeal of the assessee was dismissed by the Ld. First Appellate Authority.

2.4 Aggrieved, the assessee is now before this Tribunal and has challenged the dismissal of its appeal by the Ld. First Appellate Authority by raising the following grounds of appeal:

“1. That both the notice issued u/s 153C of the Act and assessment framed u/s 153C of the Act were without satisfying the statutory preconditions contained in the Act and therefore without jurisdiction.

1.1 That while upholding the assumption of jurisdiction the learned Commissioner of Income Tax (Appeals) has failed to appreciate that since no money, bullion jewellery or other valuable article or thing or books of accounts or documents belonging to the appellant were seized as a result of search on Brahmaputra group., notice issued u/s 153A of the Act was illegal, invalid and unsustainable.

1.2 That finding of the learned Commissioner of Income Tax (Appeals) that “Annexure A23, A-25” as referred by him in the order and, allegedly seized from premises of M/s Brahmaputra

group were belonging to the appellant is misconceived and misplaced.

1.3 That the learned Commissioner of Income Tax (Appeals) has failed to appreciate the judgment of Gujarat High Court in the case of Vijaybhai N. Chandrani vs. ACIT reported in 333 ITR 436 wherein it has been held that, loose papers found as a result of search containing appellant's name cannot be a basis to assume that, such papers belong to the appellant and in absence thereof, condition precedent for issuance of notice is not fulfilled and as such action taken u/s 153C of the Act stands vitiated.

1.4 That the learned Commissioner of Income Tax (Appeals) has failed to appreciate that in absence of any satisfaction having been recorded in the case of searched person, action u/s 153C of the Act was in excess of jurisdiction.

1.5 That the learned Commissioner of Income Tax (Appeals) has also failed to appreciate that documents as seized from the searched person are disclosed documents of assessee company and are not incriminating documents and as such, could not otherwise be made a basis in law or on fact to initiate proceedings under section 153C of the Act.

1.6 That initiation of proceedings u/s 153C of the Act and, framing of assessment u/s 153A/143(3) of the Act is otherwise too bad in law and, without jurisdiction since

- a) there had been no search conducted on the assessee u/s 132(1) of the Act;*
- b) there had been no valid satisfaction not recorded prior to issue of notice, u/s 153C of the Act, as none has been confronted to the appellant company; and*
- c) there had been no money, bullion, jewellery or other valuable or thing or books of accounts or documents was seized and, belonging to assessee from the searched person (other than such books of accounts and, documents*

which were duly disclosed) and in any case, none of it represents incriminating fresh material.

2 That since approval obtained u/s 153D of the Act was a mechanical and, invalid approval having been granted without due application of mind to the facts of the assessee company, order of assessment made u/s 153C/143(3) is invalid and not in accordance with law.

3 That the learned Commissioner of Income Tax (Appeals) has erred both in law and on facts in sustaining an addition made by learned Deputy Commissioner of Income of Rs. 1,30,00,000/- (Rs. 13,00,000/- + Rs. 1,17,00,000) on account of following sums received from the shareholders as share capital and share premium and erroneously held as unexplained cash credits under section 68 of the Act particularly when no incriminating material either in the shape of unexplained cash or investment or document had been detected as a result of search on the appellant company or even gathered in the instant assessment proceedings:

Sr. No.	Name of the Company	No of Shares	Nominal Value of Share (Rs)	Premium Paid (Rs)	Amount (Rs)
i)	Morotex Finance (P) Ltd.	50,000	5,00,000	45,00,000	50,00,000
ii)	Sahej Tie-up (P) Ltd.	30,000	3,00,000	27,00,000	30,00,000
iii)	Vibgyor Vinimay (P) Ltd.	50,000	5,00,000	45,00,000	50,00,000
	Total		13,00,000	1,17,00,000	1,30,00,000

3.1 That while sustaining the aforesaid addition the learned Commissioner of Income Tax (Appeals) has completely overlooked that there was no adverse material brought on record by the learned Assessing Officer to assume that credits by way of share capital represents unexplained cash credit and, burden which lay upon the assessee in terms of section 68 of the Act had not been discharged.

3.2 That the learned Commissioner of Income Tax (Appeals) has failed to appreciate that once the aforesaid share applicant had duly confirmed the investment made, he could not have upheld the addition on arbitrary grounds and that too without bringing any evidence or even alleging that aforesaid credits by way of share capital emanated from the source of funds provided by the appellants company.

3.3 That the learned Commissioner of Income Tax (Appeals) has failed to appreciate that all the shareholders were corporate entities, duly assessed to tax and, had subscribed to share-capital by account payee cheques and supported by necessary documents and therefore, once all such shareholders were identifiable companies, share capital received could not in law or on fact be brought to tax u/s 68 of the Act.

3.4 That the learned Commissioner of Income Tax (Appeals) has failed to appreciate that mere non-compliance of summons by the share applicants or non production of the share applicants during the course of assessment proceedings, could not be a ground to denominate a genuine transaction as an unexplained cash credit under section 68 of the Act.

3.5 That the learned Commissioner of Income Tax (Appeals) has also failed to appreciate that appellants had placed on record voluminous evidences in the shape of audited financial statement, annual returns, orders of assessment of the share applicant to discharge the burden with regard to both genuineness of the transactions and creditworthiness of the share applicants and therefore, there in absence of any whisper to rebut the said evidence, the credits could not arbitrarily be regarded as unexplained cash credit under section 68 of the Act.

4. *That both the authorities below have framed the impugned order without granting sufficient proper opportunity to the appellant company and therefore the same are contrary to principle of natural justice and hence vitiated.*
5. *That the learned Commissioner of Income Tax (Appeals) has erred both in law and on facts in upholding the levy of interest under section 234A, u/s 234B, u/s 234C and u/s 234D of the Act which are not leviable on the facts and circumstances of the case of the appellant company.*

It is therefore, prayed that it be held that both the assessment and, addition made and confirmed are without jurisdiction and therefore along-with interest levied be deleted and appeal of the appellant company be allowed.”

3.0 At the outset, the Ld. Authorized Representative submitted that in ground No.1, the assessee has challenged the validity of the notice issued u/s 153C of the Act and the assessment framed as it was framed without satisfying the statutory pre-conditions contained in the Act and was, therefore, without jurisdiction. The Ld. Authorized Representative submitted that in the instant case, the Assessing Officer in response to an application moved under the Right to Information Act has admitted as under:

“1.1 In this regard this is to state that requisite information of satisfaction note of Brahmaputra Holding Pvt. Ltd. (PAN:AACCB 5616N) for which assessment made

u/s 153C of the Income tax Act for Assessment Year: 2009-10 is not found in our record.

In case, you are not satisfied with the above information you may file an appeal before the Addl. CIT, Central Range-4, Room No. 343, 3rd Floor, E-2, ARA Centre, Jhandewalan Extn. New Delhi-110 055.”

3.1 The Ld. Authorized Representative submitted that this reply is placed on at page 283 of Paper Book - 2 submitted by the assessee. It was submitted that it is apparent that there is no satisfaction note in the case of the assessee and, therefore, the proceedings were altogether invalid. The Ld. Authorized Representative placed reliance on numerous case laws and also Circulars issued by the CBDT to contend that satisfaction note by the Assessing Officer of searched persons is pre-condition and in absence of such satisfaction, the assessment will be null and void. The Ld. Authorized Representative submitted that non-recording of satisfaction by the Assessing Officer of the persons searched is not curable by virtue of provisions of Sec.292BB of the Act. The Ld. Authorized Representative also argued that no incriminating

material in the case of the assessee was found during the course of search as was evident from the plain reading of the assessment order. The Ld. Authorized Representative also submitted that the assessee's case for Assessment Year 2007-08 (also being covered under 153C) had been decided in favour of the assessee by a co-ordinate Bench of the Tribunal vide order dated 29.05.2018 in ITA No.3330/Del/2017. While referring to the order of the ITAT, the Ld. Authorized Representative submitted that in this order, the ITA had discarded the evidentiary value of the statement of Shri Sampat Sharma. The Authorized Representative submitted that in view of the settled precedent in the earlier assessment year in assessee's own case, the appeal for this year also deserved to be allowed.

4.0 In response, the Ld. Sr. Departmental Representative submitted that it is a fact on record that the three investing companies who had allegedly subscribed to the share capital did not exist at the addresses provided and merely existed on paper, having no office. It was submitted that, therefore, it was apparent that the impugned transactions were not genuine and that the

creditworthiness and identity of the companies could not be established. The Ld. Departmental Representative also referred to the statement of Shri Sampat Sharma and submitted that the Director himself had admitted that he had no idea about the source of share capital. The Ld. Sr. DR also referred to the observations of the Ld. CIT (A) on the satisfaction note as contained in page-5 of the impugned order wherein it has been observed that during the search action on Brahmaputra Group of Companies, incriminating documents/material such as Annexure A-23, A-25 belonging to the appellant company were found and seized. It was also submitted that the Ld. CIT (A) has made a specific observation that there was a proper recording of satisfaction note for initiation of action u/s 153C by the Assessing Officer. The Ld. Sr. DR said that, thus, it was evident that the incriminating material was found during the course of search and it was also evident that the satisfaction note had been recorded in the case of the assessee and, therefore, the resultant proceedings were valid. The Ld. Sr. DR submitted that the assessee should be directed to argue the case on merits rather than trying to seek relief by resorting to unsubstantiated legal grounds.

5.0 We have heard the rival submissions and have also perused the material on record. We have also gone through the reply of the Assessing Officer received in response to the application moved under the Right to Information Act by the assessee regarding the recording of satisfaction note. The said reply is being reproduced again for a ready reference:

“1.1 In this regard this is to state that requisite information of satisfaction note of Brahmaputra Holding Pvt. Ltd. (PAN:AACCB 5616N) for which assessment made u/s 153C of the Income tax Act for Assessment Year: 2009-10 is not found in our record.

In case, you are not satisfied with the above information you may file an appeal before the Addl. CIT, Central Range-4, Room No. 343, 3rd Floor, E-2, ARA Centre, Jhandewalan Extn. New Delhi-110 055.”

5.1 Thus, as per the reply to the assessee’s application under the Right to Information Act, it is the Assessing Officer’s statement that the satisfaction note is not found in the records of the Department. However, the said reply does not say as to whether

such satisfaction note was recorded at all or not. This is a question which goes to the very foundation of the assessment framed in the instant case. It is our considered opinion that it will be in the fitness of things, if the issue is restored to the file of the Ld. CIT (A) for ascertaining from the records as to whether the satisfaction note was actually recorded in this case as per the requirement of law or not. The Ld. CIT (A) is directed to adjudicate the appeal as per the settled law after specifically recording his finding on the recording of the satisfaction note. The Ld. CIT (A) shall provide proper opportunity to the assessee to present its case before proceeding to adjudicate the issue as per our directions. We also make it clear that we are not expressing any opinion on the merits of the case at this juncture.

6.0 In the final result, the appeal of the assessee stands allowed for statistical purposes.

Order pronounced on 31/08/2020.

Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Sd/-
(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER

Dated: 31/08/2020

PK/Ps

Copy forwarded to:

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

ASSISTANT REGISTRAR
ITAT NEW DELHI