

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'C' NEW DELHI**

**BEFORE SHRI O.P. KANT, ACCOUNTANT MEMBER
AND
SHRI K.N. CHARY, JUDICIAL MEMBER**

**ITA No. 6447/DEL/2015 (A.Y 2006-07)
(THROUGH VIDEO CONFERENCING)**

ACIT
Cent. Circle 14,
New Delhi.

Vs S.S. Con Build Pvt. Ltd.,
Plot No.1, BG-1 & BG-2
Paschim Puri
New Delhi.
PAN No. AAJCS7477F

(APPELLANT)

(RESPONDENT)

**Appellant by Ms. Sunita Singh, CIT DR
Respondent by Sh. B.K. Dhingra, AR**

**Date of Hearing 18.02.2021
Date of Pronouncement 18.02.2021**

ORDER

PER K. NARASIMHA CHARY, JM.

Challenging the order dated 15/9/2015 in appeal No. 221/15-16 passed by the learned Commissioner of Income Tax (Appeals)-XXVI, New Delhi ("Ld. CIT(A)") in the case of SS Con Build Pvt. Ltd ("the assessee") for the assessment year 2006-07, Revenue filed this appeal.

2. Brief facts of the case as could be culled out from the record are that search operations at the premises of the assessee were conducted on 20/10/2008 and pursuant to the notice issued under section 153A of the

Income Tax Act, 1961 (for short "the Act"), assessee filed return of income declaring nil income, as against which assessment under section 153A/143 (3) of the Act was made at Rs. 7,00,55,940/- by making an addition of Rs. 7 crores under section 68 of the Act and also Rs. 55, 940/- towards unverifiable expenses, by order dated 31/12/2010. Aggrieved by such assessment, assessee preferred appeal before the Ld. CIT(A) and the Ld. CIT(A) after enquiry and also obtaining the remand report from the learned Assessing Officer, held that the claim of the assessee with regard to the addition of 7 crores was unsubstantiated by oral and documentary evidence and therefore the addition under section 68 of the Act was to be upheld. Assessee carried the matter to the Tribunal and argued that the remand report of the learned Assessing Officer basing upon the documents submitted by the assessee was favourable to the assessee, by way of affidavit the payments were confirmed and the Ld. CIT(A) ignored the same. By order dated 31/3/2014, a coordinate Bench of this Tribunal thought it fit to set aside the matter to the file of the learned Assessing Officer to decide the issue afresh by keeping in view the remand report so far as the genuineness of the claimed credit of Rs. 5 crores from Sh. Virendra Bhatia and also verifying the documents relating to M/s AH Holding etc.

3. Pursuant to the orders of the Tribunal, the learned Assessing Officer proceeded with the fresh assessment and by order dated 11/6/2015 he reiterated the additions. Again, assessee preferred appeal before the Ld. CIT(A) and argued that the learned Assessing Officer was not justified to assume jurisdiction under section 153A of the Act in the absence of any

incriminating material of whatsoever nature that was seized during the search proceedings. Assessee further argued that the assessment without proper approval of the Additional CIT as required under section 153D of the Act was also bad.

4. By way of impugned order, Ld. CIT(A) accepted both the contentions of the assessee and allowed the appeal deleting the additions. Aggrieved by such an order Revenue preferred this appeal challenging the findings of the Ld. CIT(A) in respect of both these aspects.

5. It is the submission of the Ld. DR that the order of the Ld. CIT(A) is unsustainable on the ground that without deciding the substantive grounds in respect of the additions as made on merits and without adjudicating all such grounds raised by the assessee, the Ld. CIT(A) decided the matter; that the assessee did not challenge the validity of the proceedings under section 153A of the Act in the first round of litigation and, therefore, the Ld. CIT(A) is not justified in entertaining the same in the second round of litigation that too when the remand was made on the arguments of the assessee that the documents were not properly considered by the authorities below; that the order of the Tribunal setting aside the issue to the file of the learned Assessing Officer on limited issues of further verification only; that the approval under section 153D of the Act was required in the case of original order of assessment, and not required in case of giving effect to the directions of the Tribunal and that since the learned Assessing Officer passed

the order in section 254 of the act no approval under section 153D of the Act was required.

6. Per contra, Ld. AR submitted that in the first round of litigation also the assessee raised the issue relating to the validity of proceedings under section 153A of the Act unearthed during the search and therefore is not open for the Revenue to challenge that issue on the grounds as argued by the Ld. DR. He submitted that inasmuch as there is no denial of the fact that no incriminating material was seized during the search, any addition made is not sustainable and on that ground the findings of the Ld. CIT(A) cannot be disturbed. He further submitted that *Osho Forge Ltd. v. Commissioner of Income-tax, Central Ludhiana* [2018] 93 taxmann.com 369 (Punjab & Haryana) and in *PCIT vs. Sunrise Finlease Pvt. Ltd* in tax appeals numbers 936 and 937 of 2017 on the file of the Hon'ble Gujarat High Court, the Hon'ble courts held that lack of approval under section 153D of the Act would invalidate the assessment or reassessment, as the case may be.

7. We have gone through the record in the light of the submissions made on either side. It could be seen from the order dated 31/3/2014 in ITA No. 2590 /Del/ 2013, appeal preferred by the assessee, the assessee had taken a ground, vide ground No. 3 that the learned Assessing Officer was not justified to ignore the plea that the assessment under section 153A of the Act be restricted to assessment in respect of seized documents and in the absence of any seized documents the assessment framed in section 153A of the Act is bad under law and deserves to be quashed. Such a ground is very much available before the Tribunal in the first round of litigation. It is,

therefore, not open for the Revenue now to contend that the assessee had taken a ground which was not taken in the first round of litigation.

8. No coming to the merits of the case, Ld. CIT(A) categorically observed in his order that there was no incriminating material found during the search operations pertaining to this particular assessment year and, therefore, the AO should not have made any addition under section 153A of the Act. This fact remains unchallenged. In the case of CIT vs. Kabul Chawla, 380 ITR 573 the Hon'ble jurisdictional High Court declared the law on this aspect, which reads thus:-

37. On a conspectus of Section 153A(1) of the Act, read with the provisos thereto, and in the light of the law explained in the aforementioned decisions, the legal position that emerges is as under:

i. Once a search takes place under Section 132 of the Act, notice under Section 153 A (1) will have to be mandatorily issued to the person searched requiring him to file returns for six AYs immediately preceding the previous year relevant to the AY in which the search takes place.

ii. Assessments and reassessments pending on the date of the search shall abate. The total income for such AYs will have to be computed by the AOs as a fresh exercise.

iii. The AO will exercise normal assessment powers in respect of the six years previous to the relevant AY in which the search takes place. The AO has the power to assess and reassess the 'total income' of the aforementioned six years in separate assessment orders for each of the six years. In other words there will be only one assessment order in respect of each of the six AYs "in which both the disclosed and the undisclosed income would be brought to tax".

iv. Although Section 153 A does not say that additions should be strictly made on the basis of evidence found in the course of the search, or other post-search material or information available with the AO which can be related to the evidence

found, it does not mean that the assessment "can be arbitrary or made without any relevance or nexus with the seized material. Obviously an assessment has to be made under this Section only on the basis of seized material."

v. In absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made. The word 'assess' in Section 153 A is relatable to abated proceedings (i.e. those pending on the date of search) and the word 'reassess' to completed assessment proceedings.

vi. Insofar as pending assessments are concerned, the jurisdiction to make the original assessment and the assessment under Section 153A merges into one. Only one assessment shall be made separately for each AY on the basis of the findings of the search and any other material existing or brought on the record of the AO.

vii. Completed assessments can be interfered with by the AO while making the assessment under Section 153 A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment.

9. In view of the admitted position of fact in this case that no incriminatory material was found during the search operations pertaining to this particular assessment year, AO could not have proceeded to frame assessment under section 153A of the Act and on this score we uphold the findings of the Ld. CIT(A) and decline to interfere with the same.

10. In view of our finding on the merits of the case granting relief to the assessee, in a discussion on the aspect of 153D of the Act is academic.

11. In the result, appeal of the Revenue is dismissed.

Order pronounced in the open court on this the 18th day of February 2021 on conclusion of the hearing in virtual mode.

Sd/-

(O.P. KANT)
ACCOUNTANT MEMBER

Dated:18/02/2021

*Kavita Arora

Sd/-

(K.NARASIMHA CHARY)
JUDICIAL MEMBER