



**IN THE INCOME TAX APPELLATE TRIBUNAL
NAGPUR BENCH, NAGPUR**

**BEFORE SHRI P. K. BANSAL, VICE PRESIDENT
AND SHRI AMARJIT SINGH, JUDICIAL MEMBER**

I.T.A. Nos.113 and 114/Nag/2016
Asstt. Yrs.:2010-2011 & 2011-12

A.C.I.T., Central Circle-2(1), Nagpur.	Vs.	Shri Firozkhan W. Pathan, 93, Azad Ward, At Post:Chimur, Distt. Chandrapur. PAN:AURPP 7444 E
(Appellant)		(Respondent)
Appellant by		Shri A. R. Ninave
Respondent by		Shri K. P. Dewani
Date of hearing		20/06/2017
Date of pronouncement		22/06/2017

ORDER

PER P. K. BANSAL, V.P.

Both these appeals have been filed by the Revenue against the common order of CIT(A) dated 18/01/2016 by taking the following common grounds of appeal except change in the figure:

- "(i) *Whether on the facts and in the circumstances of the case, the Id. CIT(A) was right in deleting the addition of Rs.31,82,000/- made on protective basis ?*
- (ii) *Whether on the facts and in the circumstances of the case, the Id. CIT(A) was justified in deleting the addition of Rs.31,82,000/- without appreciating the fact that the assessee has not executed any sub contract work and was only name lender ?*
- (iii) *On the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in ignoring the evidences found in the incriminating diaries which conclusively proved that the cash withdrawals made from the bank*



accounts of the assessee were returned back and credited in the incriminating diaries maintained by Bhangdiya Group.

- (iv) *On the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in holding that sub contract work was executed by the assessee ignoring the fact that the contract amount received from the Bhangdiyas was returned to them as evident from the incriminating diaries and no expenses were incurred for executing the contract.*
- (v) *On the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in thwarting the very purpose of search and seizure provisions of the Act by ignoring seized incriminating documents."*

2. The figure in assessment year 2011-12 be read as Rs.37,48,000/- in place of Rs.31,82,000/-. Since the issues as well as the facts involved in both the appeals are common therefore, both the parties agreed that both the appeals be disposed of by this common order on the basis of facts relating to assessment year 2010-11 and whatever view this Tribunal may take in assessment year 2010-11, the same view may be taken in assessment year 2011-12 also. In brief, the assessment year-wise details, date of filing the return, returned income, assessed income, additions made and the section under which the orders were passed are given as under:

S.No.	AY	Date of filing return	Returned income	Assessed income	Section	Additions disputed
1	2010-11	17.10.2013	428620	3610620	153C	3182000
2	2011-12	17.10.2013	459130	4207130	153C	3748000

3. The facts of the case, in brief, are that a search & seizure action u/s 132 of the I.T. Act, 1961 was carried out in the Bhangdiya Group of cases on 19/07/2011. During the course of search conducted at residential and office premises of Shri Mitesh Bhangdiya, certain incriminating papers



and documents belonging to the assessee Shri Firozkhan W. Pathan were found and seized. Therefore, notice dated 16/07/2013 u/s. 153C of the I.T. Act, 1961 was issued and served on the assessee on 17/07/2013 requesting him to file the return of income within 30 days from the receipt of notice. The assessee however, had filed the returns of income in response to notice u/s 153C for all the years of the block period. Shri Mitesh Gotumal Bhangdiya is the key person of the group. Shri Mitesh Bhangdiya has two sons namely Shri Kirtikumar M. Bhangdiya and Shri Srikant M. Bhangdiya and one daughter Neha. The business of the Bhangdiya group is being looked after by Shri Mitesh Bhangdiya and his two sons. The other key persons associated with the group are Shri Sanjay Rameshchandra Heda, husband of Mitesh Bhangdiya's sister, Smt. Pradnya, resident of Amravati and Smt. Manisha O. Maniyar, widowed sister of Shri Mitesh Bhangdiya who lives with Bhangdiya family. The main business concerns of the group covered under the search action are as under:

1. M/s M.G. Bhangdiya (AERP B 2503 E) (Prop. MGB) converted into a company M/s M.K.S. Constro-venture Pvt. (AAHCM 0383 T) Ltd. from 01/04/2011
2. Mahendra Construction, Prop. Shri Sanjay Heda . (MC) (AADPH 7109J)
3. M/s Mahendra Construction & M.G. Bhangdiya (JV) (AANFM5658B)
4. M/s Kirtikumar M Bhangdiya (Prop. KMB); converted into a company M/s MRS Acme Buildcon Pvt. Ltd. (AAHCM0382R) from 01.04.2011. (AGYPB1659G)
5. M/s R.M. Bhangdiya & Mahendra Construction (JV) (AARFR1820C)
6. M/s Shrikant M Bhangdiya (Prop. SMB) (ATCPB1337J)
7. Mitcon Infraproject Pvt. Ltd. (MIPL) (AAGCM1868H)
8. MITZ Infraproject Pvt. Ltd. (AAGCM3047A)
9. Sakshi Gruh Nirman Pvt. Ltd. (SGNPL) (AAOCS7974G)
10. Balaji Stone Crusher & Infraventure Pvt. Ltd. (AADCB5273C)



The Bhangdiya Group has also entered into joint ventures with various other civil contractors. Some of them are as under:

1. M/s. M.G. Bhangdiya & Hitbhav Engg. (JV) (AAOFM4745L)
2. M/s. M.G. Bhangdiya & S.s. Patil & Co. (JV) (ABIFS3645L)
3. M/s. Darshan Construction (JV) (AAHFD0654N)
4. M/s. M.R. Dhoble & R.M. Bhangdiya (JV) (AAPFM0622B)

The nature of the business of the Bhangdiya group primarily is executing civil contracts. The group works mainly for Government departments like M/s Vidarbha Irrigation Development Corporation and has been engaged in executing various contracts pertaining to the irrigation projects in the state of Maharashtra. During the course of search operations incriminating documents were found and seized from the residential premises of Shri Mitesh Bhangdiya. Item no. 1 to 65 of Annexure-B seized from his residence are the diaries containing ledgers, daily cash books and bank books maintained by the Bhangdiya group. A statement of Shri Mitesh Bhangdiya was recorded on oath on 20.07.2011. In his sworn statement recorded during the course of search action, Shri Mitesh Bhangdiya was confronted with the entries borne out from the seized diaries marked as B-1 to B-65 and to explain the contents of these diaries, Shri Mitesh Bhangdiya in his statement recorded has submitted that the entries in the diaries and the ledger pertain to the business receipts and business expenditure. The Assessing Officer in the assessment order has recorded a finding that as per the item no. 1 to 65 of annexure-B, it is apparent that the amounts withdrawn from the bank accounts of the subcontractors were credited to the daily cash balance of Bhangdiya group which was confirmed by Shri Mitesh G. Bhangdiya in his statement dated 14/09/2011. The Assessing Officer has reproduced the statement of Shri Mitesh Bhangdiya recorded on 14/09/2011 in para 6 of the assessment order. The Assessing



Officer in the assessment order has also recorded a finding that the seized documents being B-1 to B-65 contain entries of all expenses incurred by the Bhangdiya group in cash from F.Y. 2006-07 onwards and expenses incurred through the bank accounts from F.Y. 2009-10 onwards. Thus, the Assessing Officer found that the actual expenses incurred do not match with those shown to have been incurred in the books. The Assessing Officer thus concluded that the books of account of Shri M.G. Bhangdiya maintained for income-tax purpose do not reflect the true business affairs and are not at all reliable. The Assessing Officer has also referred to the statement of Shri Firozkhan W. Pathan, the assessee, recorded on 19/07/2011 during the course of survey conducted at Camp Chimur. The Assessing Officer has reproduced the statement of Shri Firozkhan W. Pathan in the assessment order. The Assessing Officer, on the basis of the statement of Shri Firozkhan W. Pathan, concluded that the bank accounts of the assessee were being handled by Shri M.G. Bhangdiya group. The Assessing Officer has given a summary of all the bank accounts maintained by the assessee in the tabular form to show that the cheques deposited by the Bhangdiya group in the bank accounts of the assessee were subsequently withdrawn in cash which were found credited to daily cash book seized. On this basis the Assessing Officer made the protective addition in the hands of the assessee in each of the assessment year holding that there were no expenses incurred and no contract work was executed by the assessee who, according to the Assessing Officer, is merely a name lender to the Bhangdiya group. The assessee came in appeal before the CIT(A) challenging the notice issued u/s 153C as well as the addition for cash withdrawals from bank on protective basis. The CIT(A) deleted the said addition in all the years.



3.1 At the outset, learned A. R. made an application before us under Rule 27 of the I.T.A.T. Rules in each of the assessment year challenging the validity of the notices issued u/s 153C of the Act as there was no incriminating material belonging to the assessee found in the course of search. It was stated that the assessments in the case of the assessee were framed u/s 153C read with section 143(3) of the Act. The assessee before the CIT(A) raised ground No. 1 and challenged the validity of the notices issued u/s 153C of the Act. The CIT(A) has dismissed the ground challenging the validity of the notices issued u/s 153C and decided all the appeals of the assessee on merit due to which protective addition made in the hands of the assessee stand deleted. Under these facts, the assessee did not file any appeal or the Cross Objections taking the ground as regards to the validity of the notice u/s 153C of the Act. It was contended that there is no incriminating material found and seized for the assessment year 2007-08 to 2011-12 belonging to the assessee in the course of the search at the premises of Shri M.G. Bhangdiya. Attention was drawn towards the satisfaction note which refers to item No. 28 of Annexure-B1. It was submitted that in the case of the assessee no satisfaction of the Assessing Officer of the person searched is recorded before issue of notice u/s 153C. In absence of non recording of the satisfaction by the Assessing Officer of the person searched, the consequent assessment framed is bad in law and the notice issued u/s 153C is bad in law. Reliance was placed in this regard on the decision of ITAT Nagpur Bench in the case of Mansi Commodities Ltd. in I.T.A.Nos. 146 to 148/Nag/2014 in which the Tribunal vide order dated 19/12/2016 held that satisfaction for issuance of notice u/s 153C is to be recorded by the Assessing Officer of the person searched and in the absence thereof the notice issued u/s 153C is bad in law and consequent assessment framed is bad in law.



4. Learned D. R., on the other hand, vehemently relied on the order of the CIT(A) and contended that the assessee has taken ground No. 1 about the validity of the issuance of notice u/s 153C before the CIT(A) but the assessee did not press this ground before the CIT(A). Even no submissions were made for which our attention was drawn towards page No. 21 para 12 of the order of CIT(A). Even otherwise on merit the assessee contended that the diary seized during the course of search contains the name of the assessee from whom the cash has been received noted in the diary. Therefore, it cannot be said that incriminating material belonging to the assessee was not found.

5. We have heard the rival submissions, carefully considered the same along with the orders of the tax authorities below. Coming to the adjudication and admission of ground taken by the assessee about the validity of the notice issued u/s 153C and consequently cancellation of the assessment framed thereupon, we have gone through Rule 27 of the ITAT Rules. We noted that the said Rule read as under:

"The respondent, though he may not have appealed, may support the order appealed against on any of the grounds decided against him."

5.1 On the basis of this Rule, it is apparent that even if the assessee has not filed the appeal against the order of CIT(A), he may support the conclusion of the CIT(A) by taking any ground which has been decided against him. From the facts before us, it is apparent that the assessee has taken the ground regarding the validity of the notice issued u/s 153C before the CIT(A) and also validity of consequent assessment framed thereupon. We noted that CIT(A) under para 12 of its order dismissed the said ground of the assessee as the assessee neither filed any submission nor pressed this ground during the appellate proceedings. Whatever may



be the reason, the fact remains that the ground taken by the assessee about the validity of the notice u/s 153C and also the validity of the consequent assessment framed thereupon stands dismissed by the CIT(A). Therefore, in our opinion, the assessee complied with the condition as stipulated under Rule 27 of the ITAT Rules and the assessee can always raise this ground in view of Rule 27 before the Tribunal. The Tribunal has the power to adjudicate the ground taken under Rule 27. We accordingly admit the said ground.

5.2 Now coming to the submissions made by both the parties on merit on this ground. We have gone through the provisions of section 153C and noted that this section prior to the amendment made by the Finance Act, 2015 with effect from 01/06/2015 states as under:

"Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, where the Assessing Officer is satisfied that any money, bullion, jewellery or other valuable article or thing, or books of account or documents, seized or requisitioned, belongs or belong to a person other than the person referred to in section 153A, then the books of account or documents or assets seized or requisitioned shall be handed over to the Assessing Officer having jurisdiction over such other person."

This section has subsequently been amended by Finance Act, 2015 with effect from 01/06/2015. The amended section reads as under.

"153C Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, where the Assessing Officer is satisfied that –

- (a) Any money, bullion, jewellery or other valuable article or thing, seized or requisitioned, belongs to; or*
- (b) Any books of account 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 section 153A, then, the books of account or documents or assets, seized or requisitioned shall be handed over to the Assessing Officer having jurisdiction over such other person."

The Finance Bill, 2005 in its memorandum explaining the purpose for which this amendment was made reads as under:

"Section 153C of the Act relates to assessment of income of any other person. The existing provisions contained in sub-section (1) of the said section 153C provide that notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, where the Assessing Officer is satisfied that any money, bullion, jewellery or other valuable article or thing or books of account or documents seized or requisitioned belong to any person, other than the person referred to in section 153A, then the books of account 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 such other person notice and assess or reassess income of such other person in accordance with the provisions of section 153A.

Disputes have arisen, as to the interpretation of the words "belongs to" in respect of a document as for instance when a given document seized from a person is a copy of the original document. Accordingly, it is proposed to amend the aforesaid section to provide that notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, where the Assessing Officer is satisfied that any money, bullion, jewellery or other valuable article or thing belongs to, or any books of account or documents seized or requisitioned pertain to, or any information contained therein, relates to, any person, other than the person referred to in section 153A, then the books of account 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 such other

person notice and assess or reassess income of such other person in accordance with the provisions of section 153A."

Subsequently, the CBDT has brought out Circular No. 19 of 2015 dated 27/11/2015 by which explanatory note to the provision of Finance Act, 2015 were discussed. The explanatory note in the circular relating to the amended provision of section 153C read as under:

"39. Assessment of income of a person other than the person in whose case search has been initiated or books of account, other documents or assets have been requisitioned.

39.1 Section 153C of the Income-tax Act relates to assessment of income of any person other than the person in whose case search has been conducted or requisition has been made. The provisions contained in sub-section (1) of the section 153C, before amendment made by the Act, provided that notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153 of the Income-tax Act, where the Assessing Officer is satisfied that any money, bullion, jewellery or other valuable article or thing or books of account or documents seized or requisitioned belong to any person, other than the person referred to in section 153A of the Income-tax Act, then the books of account 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 income of such other person in accordance with the provisions of section 153A.

39.2 Disputes have arisen as to the interpretation of the words "belong to" in respect of a document as for instance when a given document seized from a person is a copy of the original document. Accordingly, section 153C has been amended so as to provide that notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153 of the Income-tax Act, where the Assessing Officer is satisfied that any money, bullion, jewellery or other valuable article or thing belongs to, or any books of account or

documents seized or requisitioned pertain to, or any information contained therein, relates to, any person, other than the person referred to in section 153A of the Income-tax Act, then the books of account 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 income of such other person in accordance with the provisions of section 153A.

39.3 Applicability: *This amendment has taken effect from the 1st day of June, 2015."*

5.3 In view of this, it is apparent that the amended section 153C are not retrospective and are applicable with effect from 01/06/2015 and not prior to that. In the case of the assessee, search as well as notice u/s 153C has been issued prior to 01/06/2015. Since in the case of the assessee action u/s 153C has been taken by issuing the notice dated 16/07/2013 in consequence of the search carried out on 19/07/2011 therefore, the amended provision of section 153C will not apply. As per the provision of section 153C, as was in existence during the impugned period, the condition precedent for issuing notice u/s 153C and assessing or reassessing the income of 'such other person' is that the money, bullion, jewellery or other valuable article or thing, books of account or document seized or requisitioned which belong to such person where documents in question recovered during search proceedings did not belong to the assessee, though there was a reference to the assessee therein, issue of notice to the assessee u/s 153C, in our opinion, cannot be held to be valid. Hon'ble Delhi High Court in the case of Pepsi Foods Pvt. Ltd. vs. ACIT 52 Taxman.com 220 (Del), we noted has also categorically held that before a notice u/s 153C can be issued, the Assessing Officer is required to arrive at a conclusive satisfaction that the document belongs a person other than the searched person. Unless until it is established that the documents



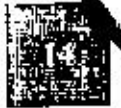
seized did not belong to the searched person, the provision of section 153C did not get attracted. This is not disputed that the notice in the case of the assessee u/s 153C has been issued in consequence of search & seizure action taken u/s 132 in the Bhangdiya Group from whom premises diaries marked B-1 to B-65 were found and seized. These diaries belong to the Bhangdiya Group not to the assessee. Even though the name of the assessee is mentioned in the diary that does not mean that the diary belong to the assessee. It may be said that the diary contains the information regarding the assessee. In our opinion, even the amended provision supports the case of the assessee. The Legislation has amended section 153C with effect from 01/06/2015 and widened the scope u/s 153C by substituting in place of word 'belongs or belong' to word 'pertain or pertain to or any information contained therein'. Now under the amended provision, even if the material seized does not belong to the assessee but it contains the information relating to the assessee, the proceedings initiated u/s 153C will be valid. But this amended provision, as is apparent, is applicable from 01/06/2015. Learned D.R. before us even though vehemently relied on the order of the Assessing Officer but could not adduce any cogent material or evidence which may prove that the diaries found and seized during the course of search in Bhangdiya Group belong to the assessee. Since during the course of search in Bhangdiya Group no material relating to addition made belonging to the assessee was found therefore, the notice issued u/s 153C, in our opinion, cannot be regarded to be valid one. Same view has been taken by Hon'ble Bombay High Court in the case of Bharti Vidyapeeth in ITA No. 923 of 2012 vide its order dated 11/09/2014. This fact also finds support as the Revenue has made the addition in the hands of the assessee in each of the assessment year only on protective basis which proves that the Revenue was also not satisfied with the incriminating material in fact belong to the assessee. On this basis



we set aside the order of CIT(A) and hold that the notice issued u/s 153C is not valid and in consequence thereupon, the assessment made is annulled. Thus, the ground taken by the assessee under Rule 27 is allowed.

6. Now coming to the ground taken by the Revenue. We have heard the rival submissions, carefully considered the same along with the orders of the tax authorities below. We noted that the Assessing Officer has made the addition in each of the assessment year in the case of the assessee on protective basis in respect of the cash being shown as receipt in the diary seized during the course of search in Bhangdiya Group. When the matter went before the CIT(A), the CIT(A) deleted the said addition in all the assessment years by observing as under:

"9.1 Before adjudicating the issue in hand, it would be relevant to briefly discuss the background of additions made in the case of Shri Mitesh G. Bhangdiya & Group concerns on the basis of seized evidences as per Annexure-B-1 to B-65. The Ld. AO has made the total addition of Rs.182.52 Crs in the hands of various concerns of Bhangdiya group in various assessment years falling within the block period on prorata basis for want of proper correlation between the amounts credited to the seized diaries and the withdrawals made from the bank accounts of the sub-contractors. Out of the total addition of Rs.182.52 crores, an addition of Rs.54.40 Crs. has been made on account of entries of withdrawals from the bank account of sub-contractors recorded in the seized diaries in proportion to the cheque payments made to the sub-contractors by various entities of the Bhangdiya group. The various concerns of the Bhangdiya group had made the payments by account payee cheques to the sub-contractors. The Ld. AO after analyzing the bank accounts of 21 sub-contractors out of total more than 100 sub-contractors has arrived at the conclusion that the cash withdrawn from the accounts of the subcontractors has been found deposited on the credit side of the seized diaries marked as Annexure B-1 to B-65 seized from the premises of Shri Mitesh G. Bhangdiya. Thus, the Ld. AO had inferred that the Bhangdiya group by



adopting such modus-operandi had inflated the expenditure by making cheque payments and subsequently withdrawing the cash from the bank accounts of the sub-contractors who, according to the AO, are merely name lenders. The contention of Shri Mitesh Bhangdiya was that the cash withdrawn from the account of the subcontractors which is found reflected in the diaries was kept with Late Shri Gotulalji Bhangdiya, father of Shri Mitesh Bhangdiya by such sub-contractors which was being issued to various sites for the use of subcontractors as per the requirements at the site. Further that the money kept by sub-contractors was returned to them or through any of the intermediaries in the course of handling of cash. The Assessing Officer however, declined to agree with the explanation filed by the appellant and has held that all the 21 sub-contractors examined by him are merely name lenders and the amounts paid to them under the head sub-contracts are bogus payments, therefore, the corresponding receipts by way of withdrawals from the bank accounts of the subcontractors is liable to be added as unaccounted income in the hands of various concerns of Bhangdiya group in various assessment years of the block period in proportion to the cheque payments made by such group concerns.

9.2 In the case of Bhangdiya group, the assessments under section 153A of I.T. Act 1961 have been framed for assessment years 2006-07 to assessment year 2012-13. The nature of activity being execution of government contracts was the same during all the assessment years. In assessment year 2006-07, the nature of work executed for Vidarbha Irrigation Development Corporation remains the same as in the case of assessee for subsequent assessment years. The sub contractors who have executed the works are also similar in the various assessment years.

9.3 The A.O. has observed that the sub contractors in the case of Bhangdiya group are name lenders and bogus. In this regard, it is significant to mention that the sub contractors including the appellant have been assessed by the ACIT, Central Circle-2 (1), Nagpur who is also the A.O. of Bhangdiya group. Notices under section 153C of I.T. Act 1961 were issued to subcontractors and returns were submitted by such sub contractors pursuant to receipt of notice under section



153C of I.T. Act 1961. The assessments have been framed under section 153C of I.T. Act 1961 by the same A.O. wherein the income returned in respect of business income shown arising to such sub-contractors out of receipt received from the Bhangdiya group have been accepted. Thus, the A.O. having accepted the business receipts in the hands of sub-contractors including the appellant for determining the income in the cases of sub-contractors could not have concluded that the payments made by Bhangdiya group to such sub contractors are bogus.

9.4 In view of the huge variance in the income assessed as percentage to receipts by the AO and various infirmities as emanated from the order of the AO, net profit has been estimated @ 16% of gross receipts in the hands of various concerns of the Bhangdiya group in view of the decision of the Hon'ble ITAT, Nagpur Bench, Nagpur in the case of the Bhangdiya group entities in ITA No.268, 269 & 285/Nag/2012 dated 03/04/2013. A survey action was conducted on 17/02/2009 in the Bhangdiya Group of cases, wherein the similar situation as payments to sub-contractors was disputed and doubted by the AO. The survey action comprises AY 2006-07 to AY 2008-09 which are also forming part of the block periods for the search action conducted on the assessee group on 19.07.2011. The Hon'ble ITAT, Nagpur Bench, Nagpur after having considered the similar activity of business and deficiencies in subcontract payments found during the survey action conducted on 17.02.2009 has decided the appeals for AY 2006-07 to 2008-09. The Hon'ble ITAT, Nagpur Bench, Nagpur after considering the impounded material has directed the AO to adopt the net profit @ 12% as against net profit adopted by AO @ 14%.

9.5 In view of the above facts and circumstances and keeping in view of various infirmities and various judicial decisions relied upon by the appellant and to meet ends of justice, to my considered opinion, it was considered fair and reasonable to adopt the net profit @ 16% on the gross receipts of Rs.579 Crs.; being the turnover of the various Bhangdiya group concerns for the block period from AY 2007-08 to AY 2012-13 in the respective years of the block and bring the same to the taxation on the guidelines determined by the Hon. ITAT, Nagpur Bench, Nagpur in ITA No. 268, 269

& 285/Nag/2012 vide order dated 07/03/2013 on the similar activities of business under the similar circumstances. However, in order to cover up the undisclosed investment of Rs. 26 crores in immovable properties and the undisclosed investment in jewellery to the tune of Rs. 2.37 crores, enhanced net profit @ 16% of total turnover was estimated in the appellate orders dated 31/12/2015 in the cases of Bhangdiya group as against net profit of 12% estimated by Hon'ble ITAT, as the issue of undisclosed investment in assets was not there before the Hon'ble ITAT in the survey appeals.

10. Thus, I have considered the submissions made by the appellant and evidence on record. It is seen that the appellant is a sub-contractor and executing work for various business entities belonging to Shri Mitesh Bhangdiya group. The assessee has been regularly assessed to income tax much prior to the date of search on Shri Mitesh Bhangdiya group on 19/07/2011. In the case of assessee notice has been issued u/s 153C of I.T. Act 1961 after there being search on Shri Mitesh Bhagdiya group 19/07/2011 and assessments have been framed for assessment years 2006-07 to 2010-11 & A.Y. 2012-13 in the month of March, 2014.

10.1 It is seen from the assessment order that the A.O. has reproduced the statement recorded u/s 132(4) of Shri Mitesh Bhagdiya and has referred to seized documents inventorized as B-1 to 65. In the case of Shri Mitesh Bhagdiya, the AO has found that the withdrawals made from the bank account of assessee are matching with the credits appearing in the seized documents found at the premises of Shri Mitesh Bhagdiya. The A.O. has concluded that appellant is only name lender of Shri Mitesh Bhagdiya. The A.O. accordingly observed that Shri Mitesh Bhangdiya is the ultimate beneficiary of the bogus contract payment which laundered through appellant and is disallowed and added in the respective assessments framed in Bhangdiya group. The A.O. further observed that the cash withdrawn from the bank is added as income on protective basis as there was no expenses as no contract work was really executed.

10.2 The appellant submitted return declaring income from sub-contract work in his regular return as well as in the return submitted in response to notice issued u/s 153C of I.T. Act



1961. In the return of income assessee has shown income arising out of receipts being amount received from the various business entities of Shri Mitesh Bhagdiya group. The perusal of the assessment order does not indicate any adverse observation with regard to regular books of account on the basis of which income was declared in the return of appellant. It is seen that the profit and loss account and balance sheet submitted along with the return of income have not been discredited in the assessment framed in the case of the appellant. The A.O. in fact has assessed income returned without inviting any adverse observation as to income declared from sub-contract work.

10.3 It is seen that the withdrawals from the bank account are reflected in the books of account on the basis of which income has been returned. The withdrawals from the bank having already been considered for the purpose of determining income at the hands of appellant as shown in the return cannot separately constitute income liable to be assessed in the hands of appellant. The addition made by A.O. is thus unjustified and unsustainable.

10.4 It is further seen that the A.O. has made observation in the assessment order to the effect that in the case of Shri Mitesh Bhagdiya group disallowance has been made for various expenses claimed on account of sub-contract expenses which includes payment to appellant. It is settled proposition of law that the substantive assessment must precede framing of protective assessment. In the facts and circumstances of the case, it is difficult to rationalize how withdrawals from the bank account can constitute assessable income much less on protective basis in the case of the appellant. The A.O. has made disallowance of sub-contract expenses being amount paid to appellant while determining the income of business entities of Shri Mitesh Bhagdiya group. Such payments are already considered for income shown in the return and assessed as business receipt in the hands of the appellant. Addition of such amount again on protective basis defies logic. I do not find any rationale to make such protective assessment of the withdrawals made from bank account of assessee in the hands of assessee himself. The income assessed on protective basis therefore, is held to be unjustified and unsustainable on this count as well.

10.5 The gross receipts in the case of the appellant as well as returned income along with the percentage of income has been tabulated by the appellant for various assessment years and the same is reproduced herein under:

Firozkhan Pathan
TURNOVER, RETURNED INCOME AND ASSESSED INCOME
A.Y. 2010-11 & 2011-12:

Assessment Year	2010-11	2011-12
GROSS RECEIPTS	38,96,521	40,59,687
RETURNED INCOME	4,28,620	4,59,130
% OF GROSS RECEIPTS	11.00%	11.31%
ADDITION U/S 153C	31,82,000	37,48,000
ASSESSED INCOME	36,10,620	42,07,130
% OF GROSS RECEIPTS	92.66%	103.63%

10.6 It is seen from the above that the income returned has been accepted in the case of appellant without inviting any adverse inference and considering the addition made in the hands of assessee, the income assessed as percentage of gross receipt clearly reflected absurdity in the action of the Id. A.O., while determining the income in the hands of assessee. The addition made by Id. A.O. thus, is unsustainable for the aforesaid reason also. Therefore, the protective addition made in the hands of the appellant is directed to be deleted in all the years of the block period."

6.1 We noted that the CIT(A) has given the finding of fact. This is a fact that the substantive addition has been made in the hands of the assessee in respect of the income received by the assessee as sub-contractor in each of the assessment year. The withdrawal made by the assessee from his bank account in which the deposit of the sub-contract receipts has been accepted arises out of the said deposit. Such withdrawal, in our opinion,



by no stretch of imagination can constitute assessable income in the hands of the assessee. The Assessing Officer while determining the taxable income of the business entities of the Bhangdiya Group made the disallowance of sub-contract expenses being the amount paid to the assessee but these payments were already considered in income shown in the return and receipt as business receipt in the hands of the assessee. Addition of such amount again on protective basis in the hands of the assessee does have any leg to stand. We, therefore, do not find any illegality or infirmity in the order of the CIT(A) which warrants our interference. The CIT(A) has rightly deleted the addition in each of the assessment year. We accordingly confirm the order of CIT(A). Thus, the appeal filed by the Revenue in both the assessment years stand dismissed.

7. In the result, both the appeals of the Revenue stand dismissed.

(Order pronounced in the open court on 22/06/2017)


Sd/.
(AMARJIT SINGH)
Judicial Member

Sd/.
(P. K. BANSAL)
Vice President

Dated:22/06/2017
*Singh

Copy of the order forwarded to :

1. The Appellant
2. The Respondent
3. Concerned CIT
4. The CIT(A)
5. D.R.,
6. Guard file


 SE. P. S. TO MEMBER
 IN CHARGE REGISTRAR
 NAGPUR BENCH, NAGPUR.