

**IN THE INCOME TAX APPELLATE TRIBUNAL
[DELHI BENCH "A": NEW DELHI]**

**BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
(Through Video Conferencing)**

ITA No. 5025/Del/2015
(Assessment Year: 2009-10)

ACIT, Circle-22(1), New Delhi	Vs.	Sahyog Infrastructure Pvt. Ltd, C/o. Kapil Goel, Advocate, F- 26/124, Sector-7, Rohini New Delhi PAN: AAICS1124J
(Appellant)		(Respondent)

CO No. 149/Del/2018
(In ITA No. 5025/Del/2015)
(Assessment Year: 2009-10)

Sahyog Infrastructure Pvt. Ltd, C/o. Kapil Goel, Advocate, F- 26/124, Sector-7, Rohini New Delhi PAN: AAICS1124J	Vs.	ACIT, Circle-22(1), New Delhi
(Appellant)		(Respondent)

Assessee by :	Shri Kapil Goel, Advocate;
Department by :	Shri Ajay Kumar, Sr. D.R.;
Date of Hearing	30/07/2021
Date of pronouncement	30/07/2021

ORDER

PER PRASHANT MAHARISHI, A. M.

1. This appeal is filed by the ld. ACIT, Circle 22 (1), New Delhi, against the order passed by the Commissioner of Income Tax (Appeals)-8, New Delhi, dated 25.05.2015 for assessment year 2009-10 raising following grounds of appeal:-

“1. *“On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs. 4,64,00,000/- on account of unexplained income of the assessee u/s 68 of the Income Tax Act, 1961, on the basis of impounded document.”*

2. *“On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs. 13,00,0001- on account of unexplained income in the form of cash receipt, which was admitted by the assessee as its unexplained income.”*

3. *“On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs. 15,00,000/- on account of uncounted receipts of the assessee on the basis of impounded document.”*
4. *“On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs. 16,00,000/- on account of unsecured loan of the assessee, the creditworthiness and genuineness of which was not established.”*
5. *“On the facts and in the circumstances of the case and in law, the Ld CIT(A) erred in deleting the addition of Rs. 59,44,187/- on account of cost of contract (consumed).”*
6. *“On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs. 3,37,068/- on account of establishment expenses.”*
7. *“On the facts and in the circumstances of the case and in law, the Ld. CIT(A) was not correct in deleting the various additions based on the impounded documents and erred in estimating the turnover of the assessee and working out profit @ 5% without any basis.”*

2. The assessee has filed Cross Objection No. 149 (Del) of 2018 in above appeal, raising the following four cross objections:-

1. *That on the facts and in the circumstances of case and in law, the Ld CIT-A erred in sustaining reopening action of Ld AO u/s 148 which is patently based on non application of mind as evident from reasons mentioned in assessment order from pages 1 to3, and merely dumb documents having no evidentiary value, already available to Ld AO at the time of original assessment (date of original order passed u/s 143(3) is 26/12/2011 and date of survey on assessee is 30/07/2009), are made as basis to mechanically reopen the case u/s 148 which reopening deserves to be quashed (without any fresh tangible material).*
2. *That on the facts and in the circumstances of case and in law, the Ld CIT-A erred in sustaining reopening action of Ld AO u/s 148 which is patently based on non application of mind as evident from reasons mentioned in assessment order from pages 1 to3 when it is admitted fact that some documents as mentioned are undated and cannot be held to be of subject AY 2009-10 and at best could be only assessed in survey period AY 2010-11 refer CIT-A finding at page 32 which is sufficient to knock off the entire reopening action.*
3. *That on the facts and in the circumstances of case and in law, the Ld CIT-A erred in sustaining reopening action of Ld AO u/s 148 which is patently based on non application of mind as evident from reasons mentioned in assessment order from pages 1 to 3 as assessee's explanation on records qua stated documents as*

mentioned in reasons itself has not been objectively overruled as per law in reasons recorded.

4. *That on the facts and in the circumstances of case and in law, the Ld CIT-A erred in sustaining reopening action of Ld AO u/s 148 without legally valid service of notice u/s 143(2) which is sufficient to quash the assessment orders passed by Ld AO and Ld CIT-A and restore original assessment order.”*
3. Brief facts of the case shows that assessee originally filed its return of income on 29.09.2009 and the assessment under Section 143(3) of the Income Tax Act, 1961 (the Act) was made by the Id. Assessing Officer on 26th of March, 2013.
4. The case of the assessee was reopened under Section 148 of the Act vide notice dated 25/6/2013, on the basis of survey operation carried out on business premises of assessee along with the search operation on Ramprastha Builders, Assessee is contractor of that company, wherein during survey certain documents were impounded. Survey was conducted on 30/7/2009.
5. Accordingly notice under Section 148 of the Act was issued on 25th of June, 2013. The assessee requested the original return filed to be treated as return in response to this notice. Assessee filed its objection on 14.10.2013 which was disposed of by the Id. Assessing Officer by passing a separate order on 17.12.2013.
6. Thereafter the Id. Assessing Officer passed an assessment order under /section 147 read with Section 143(3) of the Act on 26th of March, 2014 wherein he made an addition on several counts and assessed the total income of the assessee at Rs. 6,31,70,580/-.
7. The assessee aggrieved with the above order challenged the same before the Id. CIT (Appeals) on two counts. The first issue raised was about the legal ground for assuming jurisdiction under Section 147 of the Act and the second issue was with relation to the addition made by the Id. Assessing Officer in the re-assessment proceedings. The Id. CIT (Appeals) upheld the action under Section 147 of the Act confirmed certain disallowances / additions and deleted some. Based on this the appeal of the assessee was partly allowed.
8. Thus, Revenue is aggrieved by the order of the Id. CIT (Appeals) deleting certain additions as per ground Nos. 1 to 7 of the appeal.
9. The assessee is also aggrieved by the order of the Id. CIT (Appeals) in confirming the action of the Id. Assessing Officer under Section 147 of the Act.
10. As the Cross Objections of the assessee goes to the root of the matter, same is dealt with first. The Id. AR submitted that re-opening itself is bad in law, based on the reasons reproduced by the Id. Assessing Officer. He submitted that the re-opening is based on certain documents found from survey of the assessee conducted on

30th July, 2009. Those documents were considered and thereafter regular assessment under Section 143(3) of the Act was passed on 26.03.2013 where no adverse inferences were taken on loose documents. He submitted that as the re-opening has been made on the basis of the survey documents which were available with the AO prior to framing assessment order under Section 143(3) of the Act, those documents were considered by the AO and thereafter regular assessment was framed under Section 143(3) of the Act. He, therefore, submitted that there is lack of fresh tangible material coming in to possession of Id AO after framing of the assessment order and, therefore, the re-opening by the AO is bad in law. He relied upon the decision of the Hon'ble Supreme Court in the case of Kelvinator reported at 320 ITR 561. He further stated that the documents on which reopening is initiated are dumb documents and, therefore, the reasons recorded by the Assessing Officer are without application of mind and, therefore, reopening is bad in law, placing reliance on the decision of the hon'ble Supreme Court in 103 ITR 437.

11. Challenging the objection of the assessee raised under Section 147 of the Act, the Id. DR vehemently supported the order of the Id. CIT (Appeals) para No. 3 onwards. It was submitted that assessee has not fully and truly disclosed particulars of its income at the time of filing the original return as well as during the course of original assessment proceedings. It was stated that appellant himself has accepted cash receipt of the amount which was not declared in the return of income filed by it and this information was obtained during the survey. It was stated that therefore, re-opening is valid.
12. We have carefully considered the rival contentions on the issue of re-opening of the assessment. Briefly stated the fact shows that assessee filed its return of income on 29.09.2009 and assessment under Section 143(3) of the Act was passed on 26th of March, 2013. Prior to that there was survey conducted on the assessee on 30th July, 2009 coupled with a search and seizure operation at the business premises of Ram Prastha Builders Pvt. Ltd. Therefore, it is apparent that there was simultaneous search on Ram Prastha Builders Pvt. Ltd. on 30th July, 2009 and survey on the assessee on the same day. The appellant was working with Ram Prastha Builders Pvt. Ltd. as a Civil Contractor and was having site office at the premises of that company. During the course of survey certain documents were impounded from the office of the assessee. Based on these documents the Id. Assessing Officer examined the assessee during the course of assessment proceedings wherein the assessee submitted the explanation about those documents. Assessee also offered certain income based on these documents.

Consequent to that the assessment of the assessee was completed. Thereafter the ld. Assessing Officer recorded the following reasons for re-opening:-

“ A survey operation was carried out in the case of the assessee and certain documents were impounded. These documents were explained by the assessee during the assessment proceedings for the A.Y. 2010-11. The assessee furnished following reply vide letter dated 26/03/2013 in respect of document impounded vide Annexure A-2 page No.1-8.”

Page No.	Answer / Reply.
1	Working paper.
2	Request letter for release payment
3	Estimation.
4	Does not pertain to us.
5	Does not pertain to us.
6	Does not pertain to us.
7	Does not pertain to us.
8	Does not pertain to us.

The assessee has further filed a letter dated 12/05/2013 stating as under:

"On checking and verification of these documents we have the opinion that we may not be able to give reply of some handwritten documents (Party No. AO8 Annexure No. A-2, Page No. 4&5) being part of the seized documents as their belongingness and their author not clear and not in our knowledge. The civil construction work was discontinued by our company with M/s Ramaprashta Builders P. Ltd. since financial year 2009-10.

As per the seized documents a total sum of Rs. 13 lacs is appearing as being received by some person or its author in cash. Therefore, just to buy a peace of mind and to avoid any future litigation with department, we are considering/treating this unexplainable amount as our civil construction business turnover and offering suo moto tax on this receipt's profit (which may have embedded in receipt) at the rate on which assessment u/s **143(3)** have been completed by the assessing officer as on 26/03/2013 you may kindly record the same and oblige."

A perusal of the annexure A-2 reveals as under:

1. Page No. 2 is account of contractor Subodh Kumar for amount of Rs. 205950/- for F.Y. 2008-09. The assessee has not explained whether the same has been accounted for in the books of accounts and whether TDS has been deducted by the assessee on the amount credited/payment made.

2. Page no. **3** is the undated working of a project out of which the assessee has received Rs. **3,27,16,700/-** and the outstanding amount is Rs. 1,37,00,000/-. The assessee explained this paper as estimation.

3. Page No. 4 is a receipt of Rs. 10,00,000/- dated 30/01/2009. This amount has been admitted to be unexplained turnover by the assessee.

4. Page no. 5 is a receipt of Rs. 3,00,000/- dated 11/12/2008. This amount has been admitted to be unexplainable turnover by the assessee

5. Page No. 6 is a receipt of Rs. 5,00,000/- dated 10/01/2009 issued on behalf of Sahyog Infrastructure Pvt. Ltd. The assessee vide letter dated 26/03/2013 explained these as "Does not pertain to us.

6. Page No. 8 is a receipt of Rs. 10,00,000/- dated 27/12/2008. The assessee vide letter dated 26/03/2013 explained these as "Does not pertain to us.

The assessee itself admitted that the Page 4 & 5 as discussed above represents its unexplainable turnover not offered to tax. Further, in view of the details of the other documents discussed above I have reasons to believe that amounts appearing in the impounded documents in S. No. 1-6 represents income of the assessee for the A.Y. 2009-10 which has escaped assessment. "

8. Based on the above reasons recorded, notice under Section 148 of the act was issued to the assessee on 25th of June, 2013. From the above reasons recorded it is evident that all these documents were available with the ld. Assessing Officer at the time of making original assessment under Section 143(3) of the Act. Assessing Officer asked for the detailed explanation of the assessee on these documents during the course of original assessment. Assessee also submitted its explanation in the original assessment proceedings and based on these documents assessee also surrendered certain income during the course of original assessment. The ld. Assessing Officer accepted the explanation of the assessee, passed the original assessment order under Section 143(3) of the Act. On the basis of the above, it is abundantly clear that the ld. Assessing Officer applied his mind on the same set of documents which were examined by him during the course of original assessment proceedings. Therefore it is evident that there is absence of any tangible material coming into his possession of the LD AO after passing of the original assessment order. It is imperative to re-open the case of the assessee that there has to be fresh tangible material in the possession of the Assessing Officer which was not available during the course of original assessment order. Otherwise the ld. Assessing Officer does not have power to re-open the case of the assessee on same material, when the original assessment was made under Section 143(3) of the Act on the same set of documents. The ld. DR also could not show us that what was the fresh tangible material coming into the possession of the Assessing Officer after completion of the assessment. In view of this, case of the assessee is squarely

covered in its favour by the decision of the Hon'ble Supreme Court in the case of Kelvinator of India (supra). Though Id. CIT (Appeals) also mentioned that the information based on which the case of the assessee is re-opened was found during the course of survey, but he upheld reopening of assessment. In view of this, we hold that the Id. CIT (Appeals) has incorrectly upheld the action of the Id. Assessing Officer in re-opening of the assessment. Therefore, we allow the Cross Objection of the assessee on this score.

10. In view of our finding, we quash the re-assessment proceedings; the appeal of the Id. Assessing Officer becomes infructuous and hence dismissed.
11. In the result, the Cross Objection of the assessee is allowed and the appeal of the Assessing Officer is dismissed.

This order is pronounced on conclusion of hearing on : 30/07/2021.

**Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER**

**Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER**

Dated : 30/07/2021

MEHTA

Copy forwarded to

1. Appellants
2. Respondents
3. CIT
4. CIT (Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi

Date of dictation	30.07.2021
Date on which the typed draft is placed before the dictating member	30.07.2021
Date on which the typed draft is placed before the other member	30.07.2021
Date on which the approved draft comes to the Sr. PS/ PS	30.07.2021
Date on which the fair order is placed before the dictating member for pronouncement	30.07.2021
Date on which the fair order comes back to the Sr. PS/ PS	30.07.2021
Date on which the final order is uploaded on the website of ITAT	30.07.2021
date on which the file goes to the Bench Clerk	30.07.2021
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the order	