

IN THE INCOME TAX APPELLATE TRIBUNAL 'B' BENCH, PUNE

**BEFORE SHRI R.S.SYAL, VP AND
SHRI PARTHA SARATHI CHAUDHURY, JM**

ITA No. 1678/PUN/2016 : A.Y. 2009-10

M/s. Namrata Developers Flora City
592 Raviwar Peth,
Talegaon Dabhade,
Taluka Maval, Pune-410 506
PAN AAAAN 4708 C

Appellant

Vs.

The Dy. Commissioner of Income-tax
CC-2 (1) Pune.

Respondent

ITA No. 1683/PUN/2016 : A.Y. 2009-10

The Asstt. CIT CC-2(1) Pune

Appellant

Vs.

M/s. Namrata Developers Flora City
592 Raviwar Peth,
Talegaon Dabhade,
Taluka Maval, Pune-410 506
PAN AAAAN 4708 C

Respondent

Assessee by : Shri V.L. Jain (through physical)
Department by: Shri Sardar Singh Meena (through physical)

Date of Hearing : 05-04-2022

Date of Pronouncement : 07-04-2022

ORDER

PER PARTHA SARATHI CHAUDHURY, JM :

These cross appeals preferred by the assessee and the Revenue for A.Y. 2009-10 emanates from the order of the Id. CIT(A)-12, Pune, dated 13-05-2016 as per the grounds of appeal on record.

2. In this case, the assessment has been completed. The Id. A.R submitted that there is no incriminating material found for violation of section 80IB(10) of the Income-tax Act, 1961 (hereinafter referred to as "the Act"). That from the facts on record and on perusal of the assessment order, we find that the only disallowance in this year is u/s 80IB(10) of the Act. Though, it is the contention of the assessee that there is no incriminating material for violation of

the said provision of the Act, however, at para 4 of the assessment order, the Id. A.O has specifically made two allegations that (i) during the course of search, it was noticed that the area in respect of certain flats exceeded the eligible limit prescribed u/s 80IB(10) of the Act; and (ii) there were certain multiple allotments as well. That on the basis of these two allegations, the claim of the assessee u/s 80IB(10) of the Act was denied and the disallowance was made. However, we find as per Annexure 'A' which was found during the course of search and which had been placed by the Id. D.R in the paper book submitted that there is no reference to any area in the said Annexure to ascertain whether the eligible limit prescribed u/s 80IB(10) of the Act had been exceeded or not. That, further nothing is there even in the statement recorded u/s 132(4) of the Act, suggesting the finding of any incriminating material and there is no reference at all whether the area in respect of certain flats have exceeded the eligible limits. We also find a letter dated 29-4-2019 from the office of the Dy. CIT Central Circle 2(1), Pune, written to the C.I.T. DR wherein it has been stated that there was shifting of office of the Department from Swargate PMT Building to Bodhi Tower, Salisbury Park, Pune, and while shifting many case records were also shifted to the new office but few old case records are still kept in the old storage space of Swargate office. This was done due to lack of space available with the office of Central Circle 2(1) Pune at the new building. It was further stated that some of the case records pertaining to the case of the assessee are still kept at the old storage space at Swargate and attempts were made to locate the relevant records. The Dy. CIT has therefore, requested for some time to gather this information. The written letter is extracted as follows:

"No. PN/DCIT/CC2(1)/NDFC/2019-20/75

Date: 29-4-2019

To,
The Commissioner of Income-tax (DR),
ITAT-I, Pune.

[Through proper channel]

Sir,

Sub: ITA No. 1676 to 1682 A.Yrs. 2007-08 to 2013-14
ITA No. 1683 to 1687/PN./16/ A.Yrs. 2009-10 to 2013-14
in the case of M/s. Namrata Developers- Flora City
(PAN: AAAAN4708K)-reg ...

REF: Your letter no. PN/CIT(ITAT)-I/NDFC/19-20/38
dated 09.04.2019

Please refer to the above.

02. A search and seizure action u/s 132 of the Act, 1961 was conducted on Namrata Group on 12.02.2013. During the course of search and seizure action on Namrata Group, one of the premises covered was the residence of Shri Deepak Kantilal Shah, Shri Raj Deepak Shah and Ravi Deepak Shah at 46/47, Shail-Deep, Panchvati Colony, Opp. Gajanan Maharaj Mandir, Talegaon Dabhade, Mawal, Pune. From this premise a total of 3 bundles were seized. In bundle no. 2 seized from the abovementioned premise, page no 69 contains a table showing agreement status which contains booking date, unit no, name of the customer, agreement cost, amount received and amount outstanding. (Copy of seized material is enclosed as **Annexure A** for ready reference). In this page names of two customers appear who seem to have purchased two units namely 11 and 12 by the name Ramgulam Sharma and Sandhya Sharma respectively. These two units have been booked on the same date i.e. 14/08/2010. Prima facie they appear to be relatives.

03. On perusal of Index 2, it is clear that Smt. Sandhya Rakesh Sharma is a co-owner in Flat no I-I and owner of Flat no 1-2 as well. Thus the initiation of proceedings u/s 153C of the LT. Act was based on documents seized during the course of search and seizure action.

04. It is to be noted that efforts were made to find the reason recorded on the basis of which notice under section 153C of Income-tax Act, 1961 was issued. In this regards it is stated that the records have been thoroughly searched. The reason recorded is prima facie not found in the records. It is pertinent to mention here that recently the office of central circle 2(1), Pune was shifted from Swargate PMT building to Bodhi Tower, Salisbury Park, Pune. While shifting the office, many case records were also shifted to the new office but few old case records are still kept in the old storage space of Swargate office. This was done due to lack of space available with the office of Central Circle 2(1), Pune-at the new building.

05. It is understood that some of the case records pertaining to this case are still kept at the old storage space at Swargate. Attempts are being

made to locate the relevant records

06. The undersigned humbly requests for some more time to be granted to find out of documents having reason recorded for issuing notice under section 153C of the Income-tax Act, 1961.

*07. In your letter the Ld. CIT also wanted to know if reasons that led to the belief of the A.O. were mentioned in notice issued u/s 153C for A.y.2009-10. In this regard it is intimated that the notice issued u/ s 153C did not mention the reasons recorded by the A.O.(Copy of the notice issued u/s 153C is enclosed as **Annexure B**).*

*08. It IS further informed that the year A.Y.2009-10 was an unabated/completed assessment, where as A.Y. 2010-11 and A.Y.2011-12 were abated assessment and hence for these two A.Y.s the A.O. was not restricted to make additions based exclusively on the incriminating evidence discovered during the course of search action. (The screenshots from ITD database is attached herewith for ready reference as **Annexure C**)*

Inconvenience in this regard is regretted.

Yours faithfully,

Sd/-

(MRUNMAY RAMTEKE)

*Dy. Commissioner of Income-
tax,
Central Circle-2(1), Pune:*

3. We also find another letter dated 24-09-2019 which is the second letter from the Dy. CIT Central Circle 2(1), Pune, wherein he has stated that while shifting the case records from Swargate Building to Bodhi Tower, the sheets of reasons recorded for issuing notice u/s 153C has been lost along with other documents. After exhausting all efforts the office of the Dy. CIT Central 2(1) was not able to find the same. This letter is extracted and made part of this order as follows:

No. PN/DCIT/CC2(1)/NDFC/2019-20/498 Date: 24.09.2019

To
The Commissioner of Income-tax (DR)
ITAT-I, Pune.

[Through proper channel]

Sir,

SUB:- ITA No. 1676 to 1682 A.Yrs. 2007-08 to 2013-14

ITA No. 1683 to 1687 /PN./ 16/ A.Yrs. 2009-10 to 2013-14 in the case of M/s. Namrata Developers- Flora City (PAN: AAAAN4708K)-reg ...

REF: Your letter no. PN/CIT(ITAT)-I/NDFC/19 20/190 dated 04.06.2019

Please refer to the above.

02. In reference to the above, it is respectfully submitted that this office has made all efforts as mentioned in the earlier letter and even thereafter to find the reason recorded on the basis of which notice u/s 153C of the Act was issued. Further while going through case record it is found that due to the old case record the papers tagged in files are loose and probably while shifting case record from MT Swargate Building to Bodhi Tower, the sheets of reason recorded for issuing notice u/s 153C has been lost along with other documents. After exhausting all efforts this office is not able to find the same.

03. On the basis of abovementioned facts, it is submitted that as reason recorded for issuing notice u/s 153C is not traceable, the appeal proceedings can be carry on merits of the case.

Inconvenience in this regard is regretted.

Yours faithfully,

Sd/-

(RAJEEV C. MATHUR)

Dy. Commissioner of Income-tax,
Central Circle-2(1), Pune:"

4. We therefore, find that the disallowance made in respect of sec. 80IB(10) of the Act in case of the assessee as enshrined at para 4 by the Id. A.O whereby he has stated that in respect of some flats, permissible area as per the said provisions of the Act have been exceeded and also that in certain cases there had been multiple allotments, now these allegations do not find any basis in the entire case records. We have perused Annexure 'A' found during the course of search, we have also observed the

statement recorded u/s 132(4) of the Act and also the above mentioned two letters from the Dy. CIT Central Circle 2(1) Pune, and there is no corroboration or basis of the charges framed by the Id. A.O for disallowing the claim u/s 80IB(10) of the Act. Even the Id. D.R at the time of hearing could not produce any material on record or evidence to demonstrate why the disallowance u/s 80IB(10) of the Act should sustain. The Id. D.R also could not demonstrate that in the case of the assessee for this year, where the assessment has been completed whether any incriminating materials were found. In this backdrop, when we peruse the order of the Id. CIT(A) at page 6 para 3.3 as per his reasoning given which is on record finally holds that it is not correct to hold that the additions can only be made on the basis of materials gathered during the search and not on the basis of materials gathered during assessment proceedings u/s 153A of the Act.

5. We find that in assessee's own case, the Tribunal in ITA No. 1676 and 1677/PUN/2016 for A.Y. 2007-08 and 2008-09 dated 12-12-2018 has observed and held as follows:

*"8. We have heard both the parties on this legal issue and perused the orders of Revenue as well as the decisions relied on by the Ld. Counsel for the Assessee. It is an undisputed fact that original assessment constitutes a non-abated assessment as the due date for due date for issuing notice u/s.143(2) and 153C of the Act expired long before the event of search action on the assessee. Further, no specific incriminating evidence was mentioned on the record or in the assessment order by the Assessing Officer. In fact, no addition was made by the Assessing Officer to the income returned by the assessee. There is no reportable discrepancy, was recorded by the Assessing Officer for the year under consideration regarding nature of work and method of accounting followed by the Assessee. Therefore, existence of incriminating evidence suggesting escapement of income does not arise in the instant case. In this case, we also perused the binding judgment in the case of **CIT Vs. Continental Warehousing Corporation reported as 374 ITR 645**. This judgment relates for the proposition that the issue of notice u/s.153C of the Act is 5 ITA Nos. 1676 & 1677/PUN/2016 A.Ys. 2007-08 & 2008-09 invalid in case no incriminating material has brought in by the Assessing Officer at the time of reopening of assessment u/s. 153C of the Act."*

6. There is a categorical finding given that in absence of any incriminating materials no addition can be made in the hands of the assessee. Reverting to the facts of the present case in the entire assessment order, there is no specific incriminating evidence that was mentioned by the Id. A.O. The allegation made by the Id. A.O. in para 4 of his order against the assessee was neither corroborated nor substantiated by any material on record or evidence. Rather from the letters of the Department itself dated 29-4-2019 and another letter dated 24-9-2019, it has been clearly mentioned by the Department that they do not have any basis to support the case of the Id. A.O. The relevant case records are either misplaced or lost. In such a scenario following the same parity of reasoning as held by the Tribunal (supra) for A.Y. 2007-08 and 2008-09, we hold that in this case of completed assessment when there is no incriminating material found by the Id. A.O. and when the basis of disallowance u/s 80IB(10) of the Act has not been substantiated by the Department, the disallowance made u/s 80-IB(10) of the Act therefore, attains the character of nullity and is bad in law. We reverse the order of the Id. CIT(A) and allow the grounds of appeal of the assessee. **In the result, the appeal of the assessee is allowed.**

7. Since we have allowed the appeal of the assessee, the cross appeal filed by the Department becomes redundant. **Hence, the same is dismissed.**

8. In the combined result, **the appeal of the assessee is allowed and the appeal of the Revenue is dismissed.**

Order pronounced in the open Court on this 07th April 2022.

Sd/-
(R.S.SYAL)
VICE PRESIDENT

sd/-
(PARTHA SARATHI CHAUDHURY)
JUDICIAL MEMBER

Pune; Dated : 07th April 2022 .
Ankam

Copy of the Order forwarded to :

1. The Appellant.
2. The Respondent.
3. The Pr. CIT Central, Pune
4. The CIT(A)-12, Pune,
5. The D.R. ITAT 'A' Bench
6. Guard File

BY ORDER,

/// true copy ///

Sr. Private Secretary
ITAT, Pune.

		Date	
1	Draft dictated on	05-04-2022	Sr.PS
2	Draft placed before author	06-04-2022	Sr.PS
3	Draft proposed and placed before the second Member		JM/AM
4	Draft discussed/approved by second Member		AM/JM
5	Approved draft comes to the Sr. PS/PS		Sr.PS
6	Kept for pronouncement on	07-04-2022	Sr.PS
7	Date of uploading of order	07-04-2022	Sr.PS
8	File sent to Bench Clerk	07-04-2022	Sr.PS
9	Date on which the file goes to the Head Clerk		
10	Date on which file goes to the A.R		
11	Date of dispatch of order		