

**IN THE INCOME TAX APPELLATE TRIBUNAL
“B” BENCH, MUMBAI**

**BEFORE SHRI AMIT SHUKLA, JM, &
SHRI S. RIFAUR RAHMAN, AM**

आयकरअपीलसं./ I.T.A. No. 875/Mum/2022
(निर्धारणवर्ष / Assessment Year: 2013-14)

JCIT (OSD), Cen. Cir-1(4), 9 th floor, 902, Pratistha Bhavan, Old CGO Bldg.(Annex), M. K. Road, Mumbai-400 020	बनाम/ Vs.	Nabendu Engineering Pvt. Ltd., 85, Podar Centre, Parel Post Office Lane, Opp. Ambedkar Road, Parel, Mumbai-400 012
स्थायीलेखासं ./जीआइआरसं ./PAN No. AAECN2103N		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थीकीओरसे/ Appellant by	:	Shri Mahesh Akhade, Ld. DR
प्रत्यर्थीकीओरसे/ Respondent by	:	Shri Siddharth Kothari, Ld. AR
सुनवाईकीतारीख/ Date of Hearing	:	15.09.2022
घोषणाकीतारीख / Date of Pronouncement	:	12.12.2022

आदेश / O R D E R

Per Amit Shukla, Judicial Member:

The aforesaid appeal has been filed by the revenue against the impugned order dated 22.02.2022, passed by Ld. CIT(A)-47, Mumbai for the quantum of assessment passed u/s 143(3) r.w.s 153C for AY 2013-14.

2. The revenue has raised the following grounds:-

(i) Whether the Ld. CIT(A) has erred both in law and on facts in deleting the addition Rs. 2,00,00,000/- received by the assessee as share application money and treated as unexplained cash credit by the AO.

(ii) Whether, the Ld. CIT(A) has erred both in law and on facts, in not appreciating that the assessing officer had considered the submissions of the assessee and did not find them to be satisfactory and also has failed to appreciate the findings, details/justification given by the AO in the assessment order with respect to the bogus share application money.

*(iii) Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in not relying upon the decision of Hon'ble Supreme Court of India *NRA Iron & Steel Pvt. Ltd [SLP (Civil) No. 29855 of 2018]* which casts greater onus upon the assessee to prove the genuineness of the transactions related to share application money and failure of which would justify addition.*

3. Before us, Ld. Counsel for the assessee has raised the legal ground under **Rule 27** of ITAT Rules 1963, contending that, before the Ld. CIT (A), assessee has raised legal grounds on the ground that the additions made by the AO are not based on any incriminating material or evidence found during the course os

search relating to the additions made by AO and is beyond the scope of section 153C. He submitted that this issue has been decided against by the Ld. CIT (A) vide para 7 of his order which was raised before vide ground no. 1 to 6 before the Ld. CIT (A).

4. The facts in brief qua the legal issue are that, assessee had filed the return of income u/s 139(1) on 08.09.2013 declaring NIL income. A search and seizure action u/s 132(1) was carried out on various entities of Poddar Institutional group on 09.01.2018. Consequent upon the search, a notice u/s 153C was issued on 21.09.2019 after recording the satisfaction. In response, assessee has filed the return on 23.09.2019 declaring NIL income.

5. From the perusal of the assessment order, it is seen that AO has mentioned certain modus operandi followed by Poddar group for channelizing bogus donations and out of bogus cash generated money has been channelised into the books of accounts of different entities of Poddar group in the form of share capital /share application money. AO further noted that during the year under consideration, Assessee Company had received share capital of sum aggregating Rs. 2 crores from 11 entities. The details of which have

been given at page no. 3 and 4 of the assessment order. Thereafter, AO based on various statements of employees and persons recorded during the search action in the Poddar group, has treated the share capital amount received as bogus and after detail discussion he has made addition of Rs. 2 crores u/s 68 of the Act, holding that assessee was not able to prove the creditworthiness, identity of the subscribers and genuineness of the share application money received.

6. Before the Ld. CIT (A), assessee has raised various legal grounds challenging that addition in respect of share application money was not based on any incriminating material or documents found during the course of search and has no co-relation with the satisfaction note or material referred therein. Thus, the entire addition is without any incriminating material suggesting any undisclosed income.

7. Ld. CIT(A) has held that even though the statements recorded during the course of search in the other group entities which though has been retracted will construe incriminating material enough to proceed against assessee in accordance with the

provision of section 153A of the Act. The relevant observation and findings of Ld. CIT (A) reads as under:-

7. I have carefully considered the facts of the case, submissions of the Appellant, the observations of the AO contained in the assessment order and the other materials on record on this issue. During the course of search & seizure, action, in the present case and other group entities, it was found that donations to the tune of Rs. 96.90 crores was given by M/s. Podar Group of Trust including the assessee trust to various entities namely Delhi Vocational School Society, Cyan Shakti Education Welfare Trust, Nav Chetna Educational Trust, Prabodh Foundation etc. These entities after retaining their commission returned the cash to the assessee group. These facts were clearly stated by Shri Kirtikumar Darshibhai Suba in his statement on oath u/s 131, during the course of survey proceedings u/s 133A carried out simultaneously with the search action. Shri Kirtikumar Darshibhai clearly mentioned that cash was received back by the trustees, Shri N.K. Sodhani, Shri Navin Nishar CA etc. In fact Shri N.K. Sodhani in his statement also very clearly accepted that donations given to the tune of Rs. 96.90 Crores were bogus in nature and were channeled back in Podar Group of entities in the form of cash. These donations have been given by Podar Education and Sports Trust from A.Y. 2011-12 onwards to various trusts and is returned back in the form of cash after deducting their commission. No doubt, these statements were retracted later on, but these statements will form the basis for

*"incriminating material" enough to proceed against the assessee in accordance with provisions of Section 153A of the Income Tax Act. Moreover, during the remand proceedings in the cases of connected Trusts, opportunities of cross examination etc. were given to the respective assessees. Opportunities are also given during the appellate proceedings, hi these circumstances, I don't agree with the contentions of the appellant that there was no incriminating material found and seized against the appellant, opportunities were not given. Accordingly ground nos. 1 to 6 taken by the assessee are **rejected**.*

8. Thereafter on merits, Ld. CIT(A) after following the decision of ITAT Mumbai Bench in the case of a group concern **M/s Hemadri Machines Tools** in ITA No. 714/Mum/2020 dated 09.08.2004 wherein similar issues and facts were involved, he deleted the additions after observing as under:-

8.2 *Considering the fact that Hon'ble ITAT has held the transaction of receipt of share application money (share capital along with share premium) as genuine and issue being the same (by relying upon the statements of same set of employees and CAs, absence of any incriminating material and following same modus-operandi), addition of income amounting to Rs. 2,00,00,000/- as unexplained cash credit within the meaning of section 68 of the ITA.1961 is deleted and the ground of the appellant is allowed.*

9. Before us, Ld. CIT-DR strongly objected to the legal grounds raised by the Ld. Counsel before us, stating that assessee has not filed any cross objection. He further submitted that there was enough material found during the course of search in the case of Poddar entities that the group was involved in channelizing unaccounted money for getting share application money from bogus entities. This is sufficient for assuming the jurisdiction u/s 153C.

10. On the other hand, Ld. Counsel submitted that nowhere during the course of search, any books of account belonging or pertaining to the assessee was found or seized from any of the premises of Poddar group nor there is any such material relating to the assessee has been referred in the assessment order which can be related to the assessee company. In fact, there is no mention about the assessee company at all even by the AO in his assessment order. Thus, without any incriminating material, the addition could not have been made in the assessment which has been already abated at the time of search/recording of satisfaction u/s 153C.

11. We have heard the rival submissions and also perused the relevant findings given in the impugned order and the material referred to before us qua the legal issue raised by the Ld. Counsel before us. We find that this matter was even raised before the AO as well as before the Ld. CIT (A), wherein the detail submissions were made before the AO and the Ld. CIT(A). The following submissions have been made before the Ld. CIT(A) on this issue, which are as under:-

Ground No. 1 & 2

9. It is submitted that in order to invoke the provisions of section 153C, the assessing officer has to be satisfied that any money bullion, jewellery or other valuable article or thing, seized or requisitioned, belongs to; or any books of account or documents, seized or requisitioned, pertains or pertain to, relates to, a person other than the person referred to in section 153A.

10. It is submitted that during the course of search no money, bullion, jewellery or other valuable article or thing or any books of accounts or documents belonging to the appellant were seized from the premises of Podar Group, and hence the provisions of section 153C are not applicable to the facts of the appellant's case.

11. *In the assessment order, the AO has relied upon the following documents seized from the Podar Centre, ChamarBaug, Parel, Mumbai :-*

i. Page 8 of Annexure - A-7

ii. Page 3 of Annexure-11

12. *Apart from the documents mentioned above, the AO has also placed reliance on the File named 'REP¹' retrieved from laptop of Shri Jayesh ZananL It is submitted that the said filed retrieved from the laptop of Shri Jayesh Zanani has not been provided to the appellant and thus, the veracity of such file could not be ascertained by the appellant. Further, in the absence of appellant's comments/explanation regarding the material, it cannot be said that it contained any data which is incriminating in nature and thus, no adverse inference can be drawn in respect of the appellant on the basis of such data.*

13. *It is submitted that the seized material mentioned in para 11 above are placed at page no. 1225-1226 of paper book. On perusal of the said seized material, it is evident that such papers do not contain anything which can be said as incriminating in nature. It contains rough workings, noting and jottings which are not in any manner connected or relating/ pertaining to the appellant. In fact, there is absolutely nothing to indicate or link the appellant with such noting. It does not even contain the name of the appellant to*

establish that the same pertains to the appellant in order to attract the provisions of section 153C of the Act.

14. The AO, in the impugned order has stated that on perusal of above seized material, it is seen that the investor companies i.e., Amazing Suppliers Pvt. Ltd. has received accommodation entries in the form of share premium. However, the AO has not spelt out the contents of the seized material so as to establish that the appellant has indulged in receipt of bogus share premium. In fact, the name of the appellant is nowhere mentioned so as to draw any adverse inferences against him. That being so, the Ld.AO is not enabled to invoke the provisions of section 153C of the Act against the appellant.

15. further, it is submitted that the search took place on 09.01.2018 and as on the date of search the assessment for the assessment year under consideration had attained finality; no assessment or reassessment was pending that could be abated as per the second proviso to sub-section (1) of section 153A.

16. It is therefore stated that in respect of such completed assessment, and when no assessment/reassessment was pending as on the. date of search, no addition/ disallowance could be made in the absence of any incriminating material found during the course of search.

17. *The AO has failed to bring on record any incriminating material in respect of the additions made by the AO and thus, the said additions are liable to be deleted.*

18. *In view of the above, it is submitted that the notice issued u/s 153C is illegal, bad in law and otherwise void for want of jurisdiction and thus, the same is liable to be deleted.*

Ground no. 3:-

19. *It is submitted that in order to invoke the provisions of section 153C, the assessing officer has to be satisfied that any money bullion, jewellery or other valuable article or thing seized or requisitioned, belongs to; or any books of account or documents, seized or requisitioned, pertains or pertain to, relates to, a person other than the person referred to in section 153A. The precondition for initiating the proceedings u/s 153C of the Act is that the Learned Assessing Officer (In short 'Ld. A.O') of the searched person should record a satisfaction that incriminating material relating to other person (other than the searched person) has been found during the course of search.*

20. *However, in the present case, despite being specifically requested to provide the satisfaction note, during the course of assessment proceedings, the AO has failed to provide the same which establishes that he has failed to record any satisfaction before issuing of notice u/s 153C.*

21. *In the case of CIT vs RRJ securities Ltd. reported in 380 JTR 612 (Del), it is having been held by the Hon'ble the Delhi high court that according to section 153C, the AO of the searched party is obligated to examine o if the seized document belonged to another person other than the searched person. At this juncture the AO is not required to ascertain whether the documents reflect undisclosed income. The documents are then transferred to the jurisdictional AO who will record reasons before proceeding under Sec 153C. The Hon'ble court followed the decision in Pepsi Foods Pvt. Ltd. vs. ACIT 367ITR 112 (del.) wherein it has been held that the recording of satisfaction with respect to the documents seized is necessarily the first step towards initiation of proceeding u/s 153C. This is a must even though both the AOs concerned are one and the same person.*

22. *In the case of the appellant there is no evidence that satisfaction as prescribed under law has been recorded. In the absence of such satisfaction, the proceedings initiated by issue of notice u/s 153C is null and void, and consequently the assessment deserves to be quashed.*

12. However, Ld. CIT (A) has dismissed the aforesaid submission in the manner as incorporated above.

13. It is an undisputed fact that return of income for AY 2013-14 was filed on 08.09.2013 and at the time of issuance of notice u/s

153C, i.e., on 21.09.2019, the assessment for AY 2013-14 had attained finality which has to be reckoned as 'unabated assessment' in terms second proviso to section 153A. It is well settled proposition that assessments which had attained finality and are not abated, then additions can be made only when there is any incriminating documents or seized material found during the course of search. In the case of '**other person**' covered u/s 153C, it is *sine qua non* that, *firstly*, any money, bullion, jewellery or other valuable article or things seized or requisition belongs to; **or** *secondly*, any books of account or documents, seized or requisition pertains to or any other information contained therein, relates to a person other than the person who was searched. It has only when such document pertains to or information contained therein relates to the assessee, then only the AO can acquire jurisdiction to frame the assessment u/s 153A r.w.s. 153C. Thus, even in the case of 'other person' covered u/s 153C, the process of assessment has to be done in terms of section 153A and therefore, in case of unabated assessment, the addition can be made only if there is any incriminating document or information pertaining to the assessee which has been found from the possession of the persons searched.

14. Here in this case, Ld. AO in the impugned assessment order has referred to various evidences found during the course of search and survey of Poddar group which he has analyzed by him in detail and the same reads as under:-

20. Evidences in form of documents, computer data etc. were seized/impounded during the course of search and survey operation on Podar Group. They are analyzed in detail as under: -

20.1 It is seen that during the course of Search Proceedings u/s 132 at Podar Centre, Chamar Baug, Parel, Mumbai, Diaries and Loose papers were found from the office of Sh. Jayesh Zanani. In his statement recorded u/s 132(4) of the Act, Sh. Jayesh Zanani has admitted that he used to make the notings of the accommodation entries taken in the Podar Group. The same is explained in the Page wise explanation for **brown colored Sun Signs diary page 1 to 46 Annexure-A7 and brown colored diary Page 1 to 11 A-11** which were found and Seized from the Premise MOI i.e. Podar Centre, Chamar Baug, Parel, Mumbai. On perusal of Page 8 of Annexure -A7 and page 3 of Annexure A-11, it is seen that investor companies i.e. Amazing Suppliers Pvt. Ltd. has received accommodation entries in the form of share premium of Rs. 1.14 crores and its subsequent transfer to various entities as per direction of Shri Ajay Podar and accommodation entries in the form of share premium Rs.1, 15,58,750/- and the payment made for the same as bogus donation was Rs.1,16,22,352/- respectively.

21. It is seen that during the course of Search Proceedings u/s 132 in the case of Jayesh Zanani at Flat No. 1303, Wing-C, Skyline CHS, Shanti Park, Near St. Xavier School, Mira Road, Thane - 401 107, data back-up of laptop were taken from the home of Sh. Jayesh Zanani, In his statement, Sh. Jayesh Zanani has admitted that he used to make the notings of the accommodation entries taken in the Podar Group companies. The same is explained in the data back-up of computer wherein few retrieved deleted files named "REP" date (different file having different dates) marked as MR-11. On perusal of these retrieved deleted file named "REP", it is seen that unaccounted money was being generated in the case of Podar Group. The same was being routed through shell companies and finally received in various concerns of Podar Group in different forms such as share capital, share premium, sale proceeds of penny script investments etc.

22. Further, on perusal of data back-up of laptop, file related to share valuation of Podar group companies being assessed u/s 153C of the Act has been found namely "**share valuation 1**". It is further observed that: -

1. The share valuation of Goodways Realtors of Rs.52.83 is arrived as per working found in the file named "share valuation 1" in the data backup of laptop whereas share has been issue issued to share applicant at huge premium of Rs.45/- per share and 440/- per share.

2. The share valuation of Parel Graphics of Rs.52.89 is arrived as per working found in the file named "share valuation 1" in the data backup of laptop whereas share has been issued to share applicant at huge premium of Rs.440/- per share.

3. The Share Valuation of Podar Media and Entertainment of Rs.7.55 is arrived as per working found in the file named "share valuation 1" in the data back-up of laptop whereas has been share issued to share applicant at face value of Rs. 10/- per share.

4. The share valuation of Goodluck Appreals Pvt. Ltd. of Rs.9.95 is arrived as per working found in the file named "share valuation 1" in the data back-up of laptop whereas share has been issued to share applicant at huge premium of Rs.45/- per share.

5. The Share Valuation of Shreesai Printing Private Limited of Rs.9.95 is arrived as per working found in the file named "share valuation 1" in the data back-up of laptop whereas share has been issued to share applicant at huge premium of Rs.40/- per share.

23. These incriminating materials discredit the arguments of assessee and establishes the fact that share capital and share premium received in assessee's books is an "accommodation entry". Assessee has brought into its books of account unaccounted monies through the medium of share subscription. It is seen that shares of various Podar group companies were issued at huge

premium without justified valuation of the company as found in file named "Share Valuation 1". The existence of these materials show that the share subscriptions were collected as part of a pre-meditated plan. On the basis of the above findings, the transactions have not been proved to be genuine and they were only instruments used by the assessee to mislead the income tax authorities.

23.1 xxx

23.2 The assessee contention that proceedings u/s 153C is bad in law is also found to be not acceptable. The proceedings u/s 153C is valid. Incriminating materials found from searched premises have a bearing on the determination of the total income of assessee. Further, reasons have also been recorded as required under the Income Tax Act, 1961.

15. From the perusal of the aforesaid analysis done by the AO and also the documents referred to before us at the time of hearing, we find that, nowhere any of the seized material or documents relates to the assessee company or can be said to pertaining to the assessee company. Nowhere there is any of the statement which has been incorporated and discussed in detail, wherein the name of the assessee company has been figured. It mostly speaks about that the Poddar group of companies were taking accommodation entries.

Nowhere the AO has pointed out that any of the seized material; or in any of the statement; or there is any whisper in the assessment order that any such information also pertains to the assessee or assessee was also part of any such beneficiary of the accommodation entry scheme. Even in the documents mentioned regarding share valuation of Poddar group which has been discussed at para 22 (supra) there is no mention about the assessee company nor there is any mention about any of the company from whom assessee has received the share application money. The details of the companies with whom the assessee has received the money are as under:-

<i>Sr. No.</i>	<i>Name of the concern from whom Share capital with Premium is received</i>	<i>Face Value Per Share</i>	<i>Total</i>
1	<i>Crown Crops Science P. Ltd.</i>	10	15,00,000
2	<i>Dipankar Steel P. Ltd.</i>	10	15,00,000
3	<i>Kasare Fincap Services P. Ltd.</i>	10	15,00,000
4	<i>Khushi Industries Ltd.</i>	10	15,00,000
5	<i>Kurmi Developer P Ltd</i>	10	15,00,000
6	<i>Nirvana Clothing P Ltd</i>	10	15,00,000
7	<i>Asan Investments & Financial P. Ltd.</i>	10	15,00,000

8	<i>Calculated Infrastructure P . Ltd.</i>	10	35,00,000
9	<i>Shorey Infra Projects P. Ltd.</i>	10	35,00,000
10	<i>Thandeshwar Finin Services P. Ltd.</i>	10	20,00,000
11.	<i>Zeme Real Tech. P. Ltd.</i>	10	5,00,000
	<i>Total</i>		2,00,00,000

16. Had it there been any information or material found during the course of search regarding assessee company or any of the subscriber companies that these are bogus, then AO was justified not only acquiring the jurisdiction u/s 153C, but also making the addition, because that it would have been based on incriminating material or information pertaining to the assessee. The so called page-8 of Annexure A-7 and page 3 of Annexure A-11 as mentioned by the AO, contains information regarding Emerging Supply Pvt. Ltd. who has received accommodation entry in the form of share premium and subsequent to various transfer entities as per the direction of Shri Ajay Podar was sum aggregating to Rs. 1.15 crores. Nowhere has it been brought on record that this money was transferred in the form of share application money or share premium in the case of the assessee company. All these might be incrimination materials, but those incriminating material should

have some reference of the assessee company or something can be inferred in the case of the assessee company, i.e., it pertains to the assessee. The modus operandi unearthed during the course of search in the case of Poddar entities may be relevant for other cases within the group entities wherein there is direct evidence or material which has been discussed in the assessment order as well as in the various statements. But in so far as the assessee is concern, there is no such reference of any such material or neither any information nor it has been discussed in the entire assessment order. It is based on the entire premise that some modus operandi of Podar group for routing through their unaccounted money in the form of share application / share premium in the group entities was unearthed. Based on that, AO has assumed that assessee is also part of the same modus operandi wherein assessee has brought its unaccounted money through the medium of share subscribers. There has to be prima facie material which pertains to the assessee found from the search to rope in the assessee company within the scope of section 153C to make the additions. Ld. AO may have discussed the issue on merits but has failed to take any such documents or information that during the course of search

anything pertains to the assessee was found or the addition which has been made by him flows from such incriminating material or documents or information. He has made reference to various statements recorded during the course of search but nowhere there is any reference of the assessee company which is evident from the perusal of the entire assessment order running into 70 pages.

17. Thus, we hold that in absence of any information pertains to the assessee or any documents found during the course of search of Podar entities, no addition can be made in the case of assessee company specially when the AY 2013-14 had attained finality and was not abated either at the time of search or either at the time of recording of satisfaction. Thus, on this ground the addition made by the AO is quashed on the legal ground raised by the assessee.

18. In so far as revenue appeal, we are not deciding this issue on merits at all nor going through the findings given in the impugned orders, as we have quashed the addition on legal ground, being beyond the scope of assessment us 153C. Accordingly, the revenue appeal is dismissed.

19. In the result, the appeal filed by the revenue stands **dismissed.**

Orders pronounced in the open court on 12th December, 2022.

Sd/-
(S. Rifaur Rahman)
Accountant Member

Sd/-
(Amit Shukla)
Judicial Member

मुंबई Mumbai;दिनांक Dated : 12/12/2022
Sr.PS. Dhananjay

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT- concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायकपंजीकार (Dy./ Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई/ ITAT, Mumbai