

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'H' : NEW DELHI)**

**SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER
and
MS. ASTHA CHANDRA, JUDICIAL MEMBER**

**ITA Nos.1038 & 1039/Del./2022
(ASSESSMENT YEARS : 2012-13 & 2013-14)**

ACIT, Central Circle 2,
Noida. vs. Brys Resorts Pvt. Ltd.,
H-1, Pearl Gateway Tower,
Sector 44,
Noida – 201 301 (Uttar Pradesh).

(PAN : AACCH5468C)

**CO Nos.35 & 36/Del/2023
(in ITA Nos.1038 & 1039/Del./2022)
(ASSESSMENT YEARS : 2012-13 & 2013-14)**

Brys Resorts Pvt. Ltd.,
H-1, Pearl Gateway Tower,
Sector 44,
Noida – 201 301 (Uttar Pradesh). vs. ACIT, Central Circle 2,
Noida.

(PAN : AACCH5468C)

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : Dr. Rakesh Gupta, Advocate
Shri Somil Aggarwal, Advocate
REVENUE BY : Ms. Sapna Bhatia, CIT DR

Date of Hearing : 08.08.2023
Date of Order : 28.08.2023

ORDER

PER SHAMIM YAHYA, ACCOUNTANT MEMBER :

These are appeals by the Revenue and cross objections by the assessee arising out of common order of Id. CIT (A)-4, Kanpur dated 22.11.2021 pertaining to the assessment years 2012-13 & 2013-14.

2. Grounds of appeal raised by the Revenue in Assessment Years 2012-13 & 2013-14 read as under :-

“Assessment Year 2012-13

1. That the DCIT, Central Circle, Noida has illegally assumed jurisdiction to initiate proceedings u/s 153C.
2. That the assessment proceedings are liable to be quashed because the notice u/s 153C was not served upon the assessee.
3. That the assessment proceedings are liable to be quashed because the satisfaction note was not supplied to the assessee.
4. That the assessment proceedings are liable to be quashed because the DCIT, Central Circle, Noida had not established that the assessing officer of the searched party had recorded his satisfaction to the effect that the seized document (on the basis of which proceedings u/s 153C were Initiated In the case of the assessee) did not belong to the searched party, but belonged to the assessee.
5. That on the facts of the case and under the law, the DCIT, Central Circle, Noida has erred in making addition of Rs.2,05,00,000/- u/s 68, on account of Share Capital (Rs.5,00,000/-) and Share Application Money (Rs. 2,00,00,000/-) firstly because there was no incriminating seized document suggesting that such share capital/share application money were non-genuine and secondly because the assessee can prove that such share capital / share application money were genuine.
6. That on the peculiar facts of the case, the assessee deserves to get a chance to explain its case with the help of its books of account & supporting documents, as it was prevented by a reasonable use in not making submissions / explaining its case on any earlier occasion, because the notices stated to be issued by the DCIT, Central Circle, Noida were not reached into the hands of its directors.
7. That on the facts and under the law, the DCIT, Central Circle, Noida had erred in charging interest u/s 234B at Rs.31,92,588/-.

“Assessment Year 2013-14

1. That the DCIT, Central Circle, Noida has illegally assumed jurisdiction to initiate proceedings u/s 153C.
2. That the assessment proceedings are liable to be quashed because the notice u/s 153C was not served upon the assessee.
3. That the assessment proceedings are liable to be quashed because the satisfaction note was not supplied to the assessee.
4. That the assessment proceedings are liable to be quashed because the DCIT, Central Circle, Noida had not established that the assessing officer of the searched party had recorded his satisfaction to the effect that the seized document (on the basis of which proceedings u/s 153C were Initiated In the case of the assessee) did not belong to the searched party, but belonged to the assessee.
5. That on the facts of the case and under the law, the DCIT, Central Circle, Noida has erred in making addition of Rs.6,15,00,000/- u/s 68, on account of Share Capital firstly because there was no incriminating seized document suggesting that such share application money were non-genuine and secondly because the assessee can prove that such share application money were genuine.
6. That on the peculiar facts of the case, the assessee deserves to get a chance to explain its case with the help of its books of account & supporting documents, as it was prevented by a reasonable use in not making submissions / explaining its case on any earlier occasion, because the notices stated to be issued by the DCIT, Central Circle, Noida were not reached into the hands of its directors.
7. That on the facts and under the law, the DCIT, Central Circle, Noida had erred in charging interest u/s 234B at Rs.71,95,377/-.

3. Grounds of cross objections raised by the assessee in Assessment Years 2012-13 & 2013-14 are common, hence we are reproducing the grounds of cross objections for the AY 2012-13 which read as under :-

- “1. That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. AO in passing the impugned assessment order u/s 144/153C and that too without assuming jurisdiction as per law and without complying with the other mandatory conditions as laid down u/s 153C in accordance with law.

2. That in any case and in any view of the matter, action of Ld. CIT(A) in confirming the action of Ld. AO in passing the impugned assessment order u/s 144/153C is illegal, bad in law and against the facts and circumstances of the case and the same is not sustainable on various legal and factual grounds.

3. That in any case and in any view of the matter, satisfaction recorded u/s 153C is not in accordance with law and hence jurisdiction assumed is bad in law.

4. That in any case and in any view of the matter, addition made in the impugned order is beyond jurisdiction and illegal, also for the reason that such order could not have been made since no incriminating material has been found as a result of search.

5. That having regard to the facts and circumstances of the case, Ld. CIT(A) ought to have quashed the impugned assessment order passed by Ld. AO without there being requisite approval in terms of section 153D and in any case approval, if any, is mechanical without application of mind and is no approval in the eyes of law.”

4. Brief facts of the case are that for A.Y. 2012-13, a search and seizure operation u/s 132 of the Act was conducted on 09.10.2013 along with Shubhkamna Buildtech Pvt. Ltd Group of cases. Accordingly, notice u/s 153C of the Income-tax Act, 1961 (for short 'the Act') was issued on 09.09.2014 for filing return of income but the appellant did not comply the same. Later on, notices u/s 143(2) & 142(1) of the Act along with questionnaire were also issued but no compliance was made. Therefore A.O. completed the assessment proceedings ex-parte by making addition of Rs.2,05,00,000/- u/s 68 of IT Act. Aggrieved, assessee appealed before the ld. CIT (A).

4.1 For A.Y. 2013-14, a search and seizure operation u/s 132 of the Act was conducted on 09.10.2013 along with Shubhkamna Buildtech Pvt.

Ltd Group of cases. Accordingly, notice u/s 153C of the Act was issued on 09.09.2014 for filing return of income but the appellant did not comply the same. Later on, notices u/s 143(2) & 142(1) of the Act along with questionnaire were also issued but no compliance was made. Therefore, AO completed the assessment proceedings ex-parte by making addition of Rs.6,15,00,000/-

5. On appeal, Id. CIT (A) deleted the additions on merits.
6. Against the above order, Revenue has filed appeals. Assessee has raised jurisdictional issue in the cross objections. We have heard both the parties and perused the records. We refer to the jurisdictional issue first.
7. The submissions of the Id. Counsel for the assessee in this regard read as under :-

“The only effective issue in present cross objection is against the assumption of jurisdiction u/s 153C.

Similar issue is involved in petition under Rule-27 filed by the respondent assessee.

In this case, search action u/s 132 was conducted on 09.10.2013 at the premises of one M/s Shubh Kamana Buildtech P. Ltd. Group of cases and 'satisfaction note' u/s 153C was issued on 09.09.2014 and thereafter, addition of Rs.2,05,00,000/- was made in the assessment Order on account of share application money received from M/s Amika Financial P. Ltd. Rs. 2 Crore and Mr. Rahul Gaur Rs.5,00,000/-.

'Satisfaction note' recorded by Ld. A.O. which is reproduced at page 25 of Ld. CIT(A)'s Order mentions that as per Annexure A-19 at page 100 seized, shareholding of assessee company are indicated and therefore, in view of this seized document, investigation are required to be conducted and Ld. A.O. was satisfied that it is a fit case for initiating proceedings u/s 153C of the Act.

Page No. 100 of Annexure A-19 is reproduced in the appeal order, which would show that this was related to assessment year 2013-14 only and copy of this seized documents has been reproduced at Page 25 of Ld. CIT(A)'s Order.

Thus, based on this document it can be said that there was nothing seized in respect of the impugned assessment year viz. AY 2012-13 and hence, impugned action u/s 153C by Ld. AO on the assessee is bad in law as held in the cases of:

- CIT vs. Sinhgad Technical Education Society, (2017) 397 ITR 0344 (SC).
- CIT vs. Sinhgad Technical Education Society, (2015) 378 ITR 0084 (Bom).
- Sinhgad Technical Education Society vs. ACIT, (2011) 140 TTJ 0233 (Pune).

It may also please be seen from Annexure A-19 at page 100 that it contains shareholding of the assessee company and therefore, such document per se cannot be said to be incriminating to the assessee. Therefore in absence of such mandatory condition being fulfilled assumption of jurisdiction u/s 153C was not satisfied as held in the following judicial decisions:

- Search and seizure -- Assessment under s. 153 C--Scope--- Where nothing incriminating is found in the course of search relating to any assessment years, the assessments for such years cannot be disturbed---Items of regular assessment cannot be added back in the proceedings under s. 153C when no incriminating documents were found in respect of the disallowed amounts in the search proceedings.----LMJ International Ltd. vs. Dy. CIT, 119 TTJ 214 (Kol)
- Incriminating material vis-a-vis relevant assessment years-Cheque book relating to assessee found during the search operation which is duly recorded in the assessee's books of account and reflected in its return cannot be said to be an incriminating material for the purpose of proceedings under s. 153C and. therefore, disallowances and additions made by the AO under s. 153C solely on the basis thereof are ex facie not sustainable - Asstt. CIT vs. Inlav Marketing (P) Ltd. 167 TTJ 273 (Del)
- Assessment of third person-Search and seizure-Assessment in search cases-Condition precedent - Incriminating material in material seized showing undisclosed income of third person satisfaction that incriminating material belonged to third person must be recorded - No incriminating materials found-Assessment

under section 153C not valid- CIT v. IBC Knowledge Park P. Ltd. 385 ITR 346 (Kar)

- Assessment in search cases-Assessment of third person-Conditions precedent-Incriminating material must be found during search showing undisclosed income of third person-Recording of satisfaction by Assessing Officer having jurisdiction over third person in respect of search conducted that such money, asset or valuables belonged to third person- Absence of incriminating search material-Assessment of third person cannot be made-Income-tax Act, 1961, ss. 132, 132A, 153A, 153C-CIT v. Promy Kuriakose 386 ITR 597 (Ker)
- Search and seizure-Assessment in case of search or requisition-Assessment of third person-Condition precedent=Satisfaction that incriminating material belonged to third person must be recorded-No incriminating material found-Provisions of section 153C cannot be invoked-Order of Appellate Tribunal deleting disallowances of earlier disclosed expenditure proper +Income-tax Act, 1961, ss. 132,1 32A 133A, 153A 1 53C-CIT v. Veerprabhu Marketing Ltd. 388 ITR 574 (CAL)
- Assessment under s. 153C-Validity vis-a-vis absence of incriminating- No evidence was found during the course of search that any money (cash credit) belongs to the assessee-company or to prove that assessee had received any accommodation entry or that cash was given by assessee- company to take any loan or credits-Condition precedent for issuing notice under s. 153C was not satisfied, hence consequent assessment and addition made under s. 68 were liable to be quashed-Nova Iron & Steel Ltd. vs. DCIT, 190 TTJ 499 (Del)

7. Per contra, Id. DR for the Revenue did not offer any comment on jurisdictional aspect.

8. Reading of the above submissions of the Id. Counsel for the assessee makes it clear that in this case, there is no seized incriminating material. List of shareholders by no stretch of imagination can be said to be incriminating material. Hence, jurisdiction assumed is not as per law. The fact that no incriminating material for the year was seized has not

been disputed by the Revenue. Hence, the case laws referred by the Id. Counsel for the assessee as above are fully applicable to the case. Therefore, we allow the ground raised in cross objections. Since we have allowed the cross objections on the jurisdictional aspect, the issues on merits raised by the Revenue are not being dealt with as they are only of academic interest.

9. In the result, the cross objections filed by the assessee are allowed and the appeals filed by the Revenue are dismissed as infructuous.

Order pronounced in the open court on this 28th day of August, 2022.

**Sd/-
(ASTHA CHANDRA)
JUDICIAL MEMBER**

**sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER**

**Dated the 28th day of August, 2022
TS**

Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT (A)-4, Kanpur.
- 5.CIT(ITAT), New Delhi.

**AR, ITAT
NEW DELHI.**