IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN

Before Shri Sanjay Arora, Accountant Member and
Shri Manomohan Das, Judicial Member

ITA No. 494/Coch/2023
& SA No. 104/Coch/2023
(Assessment Year: 2008-09)

K.K. Radhakrishnan PKK Wood Craft Peravoor, Kannur 670673 [PAN:AFDPK8650E]	vs.	Dy. CIT, Central Circle-II Aayakar Bhavan Kozhikode 673001
(Appellant)		(Respondent)

Appellant by:	Shri Pavan Ved, Advocate
Respondent by:	Smt. J.M. Jamuna Devi, Sr. D.R.

Date of Hearing:	16.10.2023
Date of Pronouncement:	12.01.2024

O R D E R

Per: Sanjay Arora, AM

This is an Appeal by Assessee directed against the dismissal of his appeal contesting his assessment u/s. 153C read with section 153A(a) of the Income Tax Act, 1961 (the Act) dated 30.03.2015 for Assessment Year (AY) 2008-09 by the Commissioner of Income Tax (Appeals)-3, Kochi [CIT(A)], vide his order dated 16.06.2023.The assessee has also filed a stay petition, which was listed along with.

2. The appeal raises 5 grounds as under, which we shall take up inseriatim:

‘1.The ld. CIT(A) erred in upholding validity of proceedings u/s. 153C, which was illegal for various reasons.

2. The ld. CIT(A) erred in confirming validity of approval given by ld. JCIT u/s.153D.
3. The ld. CIT(A) erred in confirming the addition of Rs.1,37,50,000 for unexplained investment in property at Bangalore.

4. The ld. CIT(A) erred in confirming the addition of Rs.1,10,000/- for unexplained personal expenses on son's education.

5. The assessee deserves award of cost.'

3. The background facts of the case are that a search u/s. 132(1) of the Act was conducted at the assessee's residence on 26.09.2012 pursuant to a warrant of authorization (WoA) dated 19.09.2012 issued in the case of M/s. K.K. Builders; K.K. Tourist Home; and R.C. Park, the three firms belonging to what is called the K.K. Builders Group, in each of which the assessee is a partner, besides running a proprietary concern in the name of M/s. K.K. Wood Craft. Materials were found thereat and seized, and the additions made in assessment are ostensibly in pursuance thereof. As apparent, while the first two grounds challenge the validity of the impugned assessment, the following two are *qua* the respective additions, and the fifth is a prayer for awarding cost to the Revenue, and not therefore a cause of grievance *per se*, but rather a compensation for the grievance/s caused.

4. <u>Ground #1</u>: The assessee claiming to have been subject to search, argued on that basis that the assessment ought to have been instead u/s. 153A of the Act, so that the impugned assessment is bad in law, and toward which reliance is placed on the decision by the coordinate bench in *Asst. CIT v. Atul Kumar Gupta* [2023] 152 taxmann.com 99 (Del-Trib) (PB 22, pgs. 11-28). The said claim was, however, on a query by the Bench, conceded by Shri Ved, the learned counsel for the assessee, as being made on a presumption; the Panchanama dated 26.09.2012, drawn at the conclusion of the search (PB 1, pgs. 25 to 27), stating in para (A), i.e., 'Warrant in the case of', the name of the assessee. This was so, he explained, as the assessee was not provided with a copy of WoA. He though could not show us any request, post notice u/s. 153A(a) r/ws. 153C of the Act dated 21.06.2013 (PB 1, pg. 28), having been made to the Assessing Officer (AO) for a copy thereof, which we think should have preceded a challenge by the assessee on this ground.

Further, the ld. CIT(A), on this plea being advanced before him, issued a definite finding (at para 30 of his order), stating to have, on a perusal of the record, found that no warrant had been executed in the case of Shri K.K. Radhakrishnan, the assessee-appellant, but only in the case of the firms aforementioned. Raising this plea again before us, i.e., in face of a clear finding by the ld. CIT(A),and without any material/basis, is, in our view, an abuse of the process of law, violating the sanctity of the court proceedings, and seriously undermines the credibility that courts generally attach to the statements made at bar by the learned counsels. That apart, the Revenue has also, in deference to the Bench's directions – on preliminarily hearing the matter, placed on record a paper-book (DPB), at pg. 26 of which is the WoA dated 19.9.2012, to which we were also taken through during hearing. The same is clearly in the case of the three firms afore-referred, validating the findings of the ld. CIT(A).

5.1 The assessee's second contention in this respect is with reference to the satisfaction note, stated as having not been recorded, vitiating the notice u/s. 153A(a) r/ws. 153C of the Act and, in turn, the ensuing the assessment. Reliance is placed on *CIT vs. Singhad Technical Education Society* [2017] 397 ITR 344 (SC) and *Super Malls (P.) Ltd. v. Pr.CIT* [2020]423 ITR 281 (SC).

5.2 This issue was also raised before the ld. CIT(A), who has disposed of the same as under:

> '8. The section mandates that the AO of the searched person should record a finding/satisfaction that any seized asset/document belongs to some other person. *There is no such finding/satisfaction*. Hence the entire proceedings are null and void. [Additional Ground].
>
> 9. The above issue was remanded to the AO and vide report dated 06/12/2021, the AO has given his comments on the same which is reproduced hereunder for ready reference:

"The question of <u>double satisfaction</u> doesn't arise as in the assessee's case, the AO of the searched person and the person against whom the proceedings u/s. 153C were initiated <u>were one and the same</u>. This view has been reiterated by the Hon'ble Delhi High Court in *Ganpati Fincap Services Pvt. Ltd. v. CIT* [2017] 396 ITR 692 [correct: 395 ITR 692]."

The comments of the AO were again forwarded to the appellant for his rebuttal, if any, and the appellant has not given any specific rebuttal on the comments of the AO.

10. I have considered the above issue in the light of the arguments advanced by the appellant and the remand report submitted by the AO. I am not persuaded by the contentions raised by the appellant on this matter, especially in view of the judicial pronouncements in favour of the department. Hence, the ground taken by the appellant is not acceptable and therefore rejected.' (emphasis, ours)

5.3 The adjudication by the ld. CIT(A) is, clearly, wanting; it being *sans* any finding and, besides, does not address the issue raised by the assessee before him, i.e., absence of recording of any finding/satisfaction by the AO that the seized material belongs to the assessee, to enable issue of notice dated 21.06.2013 thereto, even as, we may add, the issue of non-double satisfaction stands also raised by the assessee, which though would become relevant only on it being found that satisfaction has indeed been recorded by the AO of the person searched. Rather, as it would appear to us from the adjudication afore-noted by the ld. CIT(A), there is a tacit admission of absence of any satisfaction note. As clarified in *Singhad Technical Education Society* (supra), satisfaction note (by the AO of the person searched) must disclose the material belonging to the assessee for the AO to assume jurisdiction to assess income u/s. 153A r/ws. 153C of the Act in respect of a person other than the person/s searched, which is precisely what the provision mandates. This, it may be noted, is in conformity with the law as explained earlier in *CIT v. Manish Maheshwari* [2007] 289 ITR 341 (SC). Further, each year being an independent unit of assessment, the jurisdiction, it follows, is to be assumed separately, on the basis of such material, for each year. The legal position stands endorsed in *Super Malls P. Ltd.* (supra), wherein it stands also explained that it shall be a sufficient compliance of law where the satisfaction note is recorded thus without though transmitting the seized material to the AO of the other person, where assessed by the same AO, as in the instant case. *Where, then, is the question of recording the satisfaction again, i.e., by the AO of the other person, in the absence of any transmission of material*? The same confirms – put paying the

assessee's claim in its respect, that double satisfaction is required to be recorded. It does not, however, follow, and we may not, we clarify, be construed as having held of double satisfaction being a condition precedent where the AOs are different; an issue which does not arise in the instant case.

5.4 Coming back to the assessee's claim *qua* non-recording of any satisfaction, the ld. CIT(A) ought to have issued a specific finding in this regard, as he does *qua* WoA. True, the assessee's plea is again without any material, and its challenge ought to have been preceded by a statement as to the absence of satisfaction on record on the basis of inspection thereof or, in the alternative, denial of access thereto, lending support to an adverse inference being drawn. The assessee is within his rights to obtain a copy of the satisfaction note. Raising claims without any basis cannot be countenanced. So, however, the ld. CIT(A) having admitted the assessee's plea, ought to have met the charge. Also, we cannot be unmindful of the fact that the AO's response in this regard, relied upon by the ld. CIT(A), is, as afore-noted, a tacit admission of the absence of a satisfaction note. In the very least, it does not address the assessee's claim. The Revenue has placed on record the seized material in respect of the Villa project at Bangalore (DPB, pgs. 37 to 88), while that *qua* the assessee's son's education is admitted, i.e., the subject matter of Grounds 3 & 4 before us. *The question, however, is if this stands recorded by the AO*? The same, or any of the like, ought to have found place in it's paper-book. The same, however, was in response to a general direction, not specific to the satisfaction note. We therefore do not consider it proper to draw an adverse inference on that basis, particularly considering that we are required to issue a definite finding in the matter. And are, therefore, disinclined to draw any inference from the conduct of the parties when the facts are available on record. Why, the statements u/s. 131 stand recorded only on the basis of the material found in search, with that *qua* the assessee's son's fee, paid cash, being admitted. Further, that a proposal stands made and approved u/s. 153D, again gives rise to the

inference of satisfaction/finding as to material found during search having a bearing on the assessee's income, the jurisdictional fact, being satisfied. The parties in fact ought to have been candid about it, clarifying this jurisdictional aspect upfront.Under the circumstances, we only consider it proper to restore this matter back to the file of the ld. CIT(A) for adjudication afresh per a speaking order in accordance with law and after hearing the parties before him.

5.5 No other contention with regard to Ground 1 was taken before us. Ground 1 of the assessee gets disposed of on the afore-stated terms.

6. Ground 2 relates to the validity of the approval u/s. 153D of the Act, alleged to be without application of mind, vitiating the assessment. No specific argument was raised before us in this respect, even as it was before the ld. CIT(A), who has issued a detailed rebuttal of the assessee's claim, also reproducing from *Chhagan Chandrakant Bhujbal v. ITO* (136 taxmann.com 24 /[2022] 440 ITR 359 (Bom)) at paras 20 to 25/pgs. 11-13 of his order. While agreeing with the assessee's stand in principle, which stands made with reference to the decision, among others, in *Sahara India (Firm) v. CIT* [2008] 300 ITR 403 (SC), the same stand found by him as distinguishable on facts. We find no infirmity therein, nor was any shown to us. The assessee's Ground 2 is accordingly dismissed.

7.1 We, next, consider Grounds 3 & 4, impugning the additions made in assessment on merits, making it though clear that the same shall survive only where the assessee's legal challenge on the basis of satisfaction note fails. Gd. 3 relates to an addition for Rs.137.50 lakhs, being the amount invested in Bangalore Villa project by the assessee during the relevant year, in respect of which, as claimed, seized material stands found during search. The assessee has, in explanation, adduced a copy of the assessee's capital account in M/s. K.K. Builders (PB 2, pg. 9), stating that the investment stands accounted for in the books of the said firm by way of debit to

his capital account therein, so that no adjustment in this regard is called for. And which also explains the non-inclusion of the same in the assessee's cash flow statement, which forms the basis of the addition and its confirmation. It stands further explained that the total investment in the said property is at Rs.249.167 lakhs, of which the assessee's share is ¼, and not ½, as presumed by the Revenue authorities solely on the basis of the statement of the assessee's brother, Shri K.K. Mohandas (also holding ¼ share therein), u/s. 131 of the Act dated 13.12.2012. We, once again, depreciate the assessee's conduct. Why did he not clarify the facts when confronted with the said statement, as indeed of one, Shri M.S. Paramashivappa, one of the promoters of the project, recorded similarly u/s. 131 on 09.10.2012, which emanate only on the basis of questions arising or posed w.r.t. the materials found and seized during search. That is, the said statements have evidentiary value; are relevant; and, further, corroborate the materials found during search. There is no whisper by the assessee of the investment in the said Project, much less exhibiting the source thereof, which it now claims with reference to his capital account in a partnership firm. An evidence to be creditable is to be provided at first instance (*Keshav Mills Co. Ltd. v. CIT* [1965] 56 ITR 365 (SC)).On merits, inasmuch as M/s. K.K. Builders is, as stated, the source from which the assessee has drawn his capital to finance the investment, as one may from his bank account, he therefore ought to have included it in his cash-flow statement; the actual source being the assessee's capital, wherever that may be invested for the time being. Stating that as the reason for not including the same in the assessee's cash-flow statement is grossly misplaced. The claim that no show-cause notice was issued by the AO *qua* the two adjustments made to his returned income, is, again, invalid in the facts and circumstances of the case, for which reference may be made to paras 1 & 2 of the assessment order. The cash-flow statement was specifically called for vide letter dated 01.08.2014, and which stood submitted only on 24.3.2015, aborting any meaningful verification that could be undertaken, and it is, rather, the assessee who should therefore be subject to cost. Sh.

Ved, on being so questioned by the Bench, would point out that the assessee had vide his e-mail dated 13.12.2020 (PB 1, pgs. 52-80), a combined statement for all the years (AYs. 2007-08 to 2012-13), specifically stated, for the current year, of the investment in the Bangalore property being sourced through debits to his capital account in K.K. Builders, praying for it, enclosed along with, being taken on record under r.46A of the Income Tax Rules, 1962 (at pgs. 64-65). There is no reference thereto in the impugned order. Surely, if indeed so, the ld. CIT(A) ought to have first disposed the assessee's application u/r. 46A, or a request for the invocation thereof.

7.2 The question that therefore arises before us is whether the said document, i.e., the assessee's capital account for the relevant previous year in K.K. Builders, ought to be admitted by us, restoring the matter back to the file of the ld. CIT(A) for an adjudication on that basis, upon making, or causing to, such verification as he may deem proper, and a decision on merits, or, in the alternative, restore the matter back to his file for consideration of the assessee's request dated 07.01.2019, stated to be submitted on 13.12.2020.We are under the circumstances inclined to lean in favour of the former, i.e., admit the said evidence, and remit the matter back for a decision on merits to the file of the ld. CIT(A), who shall decide the same upon causing such verification, including by way of calling a remand report from the AO, as he may deem fit, per a speaking order, and in accordance with law. Our reason for the same is three-fold. First, is the paramount consideration of justice. The evidence is compelling, and we are prepared to, in the broader interest of justice, overlook the non-inclusion of the investment in the cash-flow statement, allowing the assessee the benefit of doubt inasmuch as the same would, strictly speaking, stand to be categorized as 'fund-flow statement'. Two, the Revenue has not done itself credit in the matter. Despite being in the possession of the relevant documents – the general power of attorney (GPA) and memorandum of understanding (MoU), on the basis of which inferably the assessee's brother as well as Sh. Paramashivappa were

questioned in the matter, it did not choose to question the assessee, one of the Directors in the developer-company along with his brother, Shri K.K. Mohandas. Why, it does not even question him if the said investment, admitted by his brother, the joint owner, is disclosed. Thirdly, even the ld. CITA ought to have, in appeal, adjudicated after considering the assessee's explanation in the matter, causing enquiry which could not be made by the AO in view of the delayed submission of the cash-flow statement by the assessee, or, in any case, stating reasons, deny admission of additional evidence u/r. 46A, also explaining as to why he did not consider it appropriate to invoke r. 46A(4) of the Rules. His stating that the assessee did not offer any explanation, may, in view of the submissions dated 07.01.2019, furnished on 13/12/2020, not be correct. Nevertheless, in view of his said statement, our adjudication afore-said is subject to the assessee having in fact furnished the same. Though we have no reason to doubt Sh. Ved, where not so, it amounts to a fraud, which vitiates everything.

7.3 We decide accordingly.

8. Ground 4 is *qua* an addition for Rs.1.10 lakhs, on the basis of the receipt dated 20.04.2007 found in search, being the fee receipt of the assessee's son's MBA course. The same is not reflected in the assessee's cash-flow statement, which, further, reflects personal expenses at a nominal amount of Rs.2.10 lakhs, which sum could not therefore be regarded as including the said fee. We find no infirmity in the addition thereof u/s. 69C of the Act. The assessee, in first appeal, has sought to justify low personal expenses on the basis of agricultural income of the joint family. The same, in our view, ought to have found reflection in the cash-flow statement, which is not the case. The addition is accordingly upheld.

9. Ground 5, as afore-noted, speaks of award of cost to the assessee. The same, which would require hearing the parties in the matter, was no pressed during hearing.

The same becomes even otherwise premature in view of the non-adjudication on merits by us. The ground is accordingly dismissed.

10. We may, before parting, clarify that our adjudication *qua* grounds 3 & 4 would apply only in case of the assessment surviving, to that extent, Ground 1, for which the matter stands remitted to the ld. CIT(A) vide para 5.4 of this order. Here we cannot help mentioning that neither side – and unfortunately so, pointed to us during hearing that the MoU and GPA (i.e., the seized material *qua* the villa project placed on record) are both dated 09/6/2008, which date falls in the following year. Where so, it would have impelled us to question the Revenue on the basis for placing the seized material on record for the current year, or in any case cause it to produce the satisfaction note, before proceeding further in the matter. Though a jurisdictional fact could, particularly considering the inchoate nature of the evidences that are found in search, which therefore need to be pieced together, result in assumption of jurisdiction for several years, as indeed the plain language of the statute, which must prevail, suggests, the Hon'ble Courts have per the decisions cited supra made it abundantly clear that the jurisdictional fact is to obtain separately for each year; the taxing statute being liable to be read strictly. Further, the disposal of the instant appeal renders infructuous the assessee's stay petition. We decide accordingly.

11. In the result, the assessee's appeal is disposed on the aforesaid terms, and stay application is dismissed as infructuous.

Order pronounced on January12, 2024 under Rule 34 of The Income Tax (Appellate Tribunal) Rules, 1963

Sd/-	Sd/-
(Manomohan Das)	(Sanjay Arora)
Judicial Member	Accountant Member

Cochin, Dated: January12, 2024

Copy to:

1. The Appellant
2. The Respondent
3. The Pr. CIT concerned
4. The Sr. DR, ITAT, Cochin
5. Guard File

By Order

Assistant Registrar
ITAT, Cochin

n.p.