IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN

Before Shri Sanjay Arora, AM & Shri Manomohan Das, JM

ITA No.920/Coch/2022: Asst.Year:2008-2009
ITA No.921/Coch/2022: Asst.Year:2009-2010

Santhimadom Herbal City Trust, Santhimadom, ThekkeNaluvazhi, North Paravur Ernakulam – 683 513. [PAN: AAGTS8165E]	vs.	The Assistant Commissioner of Income-tax, Central Circle-2 Ernakulam.
(Appellant)		(Respondent)

Appellant by: Sri.Mathew Joseph, CA
Respondent by:Smt.J.M.Jamuna Devi, Sr.DR

Date of Hearing : 16.08.2023		Date of Pronouncement: 14.11.2023

O R D E R

Per Sanjay Arora, AM:

This is a set of two Appeals by the Assessee for two consecutive assessment years (AYs.), i.e., AYs. 2008-2009 and 2009-2010, agitating the Order dated 22.06.2022 by the Commissioner of Income-tax (Appeals)-3, Cochin [CIT(A), or the first appellate authority (FAA)], partly allowing it's appeals contesting it's assessments under section 153C r.w.s. 144 of the Income-tax Act, 1961 (`the Act' hereinafter) for the said years vide separate orders dated 31.07.2014.

2. At the outset, it was observed by the Bench that the appeals, filed on 10.10.2022, are with a delay of 27 days. An affidavit of even date by Dr. V.N. Radhakrishnan, Managing Trustee, explains the reasons leading to the same. The contents of the affidavit, carefully perused, cites reasons personal in nature. The same have not been disputed by the Revenue. Under the circumstances, we, accepting the assessee's application for condonation of delay, admit the instant appeals. Hearing was accordingly proceeded with.

3. The assessee is a private trust formed on 01.01.2007 (02/11/2004, as per the impugned order) with the object of construction of a herbal city, apartments/villas, etc. for the promotion of herbal treatment, herbal tourism, farms, etc. by Dr.V.N.Radhakrishnan (VNR) and his wife, Smt.RamaniRadhakrishnan (RR), and their three children. A search u/s. 132 of the Act was conducted by the Revenue on17.9.2008 at the business premises of the assessee and the residence of VNR. Various land documents were found and seized. Assessments were framed u/s. 153A (VNR, the person searched) and section 153C (assessee) upon analysis of more than 750 land documents seized and bank account statements of the members of this group, including the assessee and VNR. This is the second round before the Tribunal. In the first round, it, vide order dated 10.7.2013 (ITA Nos.223-227/Coch/2013/copy on record), set aside the assessments and restored the matter back to the file of the Assessing Officer (AO); the relevant part of it's order reading as under:-

> "4.1 In the case of V N Radhakrishnan, a similar contention was raised by the department that the assessee has not cooperated with the Assessing Officer. This Tribunal found that the Assessing Officer has given only 2 hearings for producing the documents. The Tribunal further found that the assessee was not given any fair opportunity; therefore, the issue was restored to the file of the Assessing Officer. Since the addition made in the present appeal is connected with the assessment of V N Radhakrishnan, this Tribunal is of the considered opinion that all these three appeals are to be restored to the file of the Assessing Officer for reconsideration in the light of the finding that may be recorded in the case of V N Radhakrishnan. In other words, the finding that may be recorded in the case of Dr.V N Radhakrishnan and Smt. RemaniRadhakrishnan may be relevant for completing the assessment in the case of the present assessee. Therefore, this Tribunal is of the considered opinion that the issue needs reconsideration along with the assessment of V N Radhakrishnanand Smt.Remani Radhakrishnan. Accordingly, the order of the CIT(A) is set aside and the issue is restored back to the file of the Assessing Officer for reconsideration. The Assessing Officer shall consider the issue afresh on the basis of the material that may be produced by the assessee and thereafter decide the issue in accordance with law and after giving reasonable opportunity to the assessee."

As a reading of his orders in the set aside proceedings, reproduced as under in their relevant part, identically worded for both the years, shows, the AO got the cooperation from the assessee in the second round, a complete absence of which had led to the best judgment assessments u/s. 144 in the first, *with even returns of income having not been furnished in response to notices u/s.153A r/w s. 153C*:

> "3……..This time the assessee's authorized representative [hereinafter called AR] Sri.Mathew Joseph, Chartered Accountant, appeared. *Each and every document seized* analyzed, re-classified between various assessment entities and the assessment years. Through this process, all the multiple assessment of the same asset, over the various assesses of the group and years were eliminated. *This exercise was carried out over several days of sitting spread over five months*. Also, credits in the bank accounts analyzed. Based on this analysis, a category-wise statement of investment was prepared and sent to the assessee seeking the sources thereof vide letter dated 16/01/2014. The AR appeared with books of accounts maintained and on detailed verification of these accounts the assessment is concluded as under:" *(emphasis, ours)*

Assessments, which though in view of the non-furnishing of the returns of income, continued to be u/s. 153C r/w s. 144, were accordingly framed, making additions. The principal addition sustained for both the years is u/s.69 for unexplained investments in land. The assessee failing to improve it's case in any manner at the first appellate stage, the same were confirmed. This explains the instant appeals.

4. We have heard the parties, and perused the material on record.

4.1 Before us, the assessee's case was two-fold:

(i) that, while the AO had made the addition u/s.69, the ld.CIT(A) had found it to be u/s.68, i.e., *qua* a credit/s recorded in it's books of account. This is not maintainable.

(ii) Even so, the very fact of the addition made being in respect of entry appearing in the assessee's accounts, implies it being disclosed. How could, then, the same be said to arise out of incriminating material, only which would justify an addition to the returned income in a sec.153A r/ws.153C assessment, as clarified by the Apex Court per it's recent decision in *Pr. CIT v. Abhishar Buildwell* [2023] 454 ITR 212 (SC).

4.2 Our first observation in the matter is that despite pleading denial of proper opportunity to present it's case before the AO, and thus violation of the principles of

natural justice by him in making it's assessments – wholly inconsistent though with the narrative in the assessment order, and which led the Tribunal to restore the matter back to his file for assessment/s afresh, no explanation, much less material/s, stand furnished in the second round by the assessee, whose challenge thereat is principally legal. This is not to in any manner suggest that the set aside did not yield any positive results; the assessments, even as admitted therein, pruned on account of the cooperation extended, representing assessments that ought to have been made in the first instance inasmuch as it is the assessee – who is in the intimate know of it's affairs, should come clean, stating the facts upfront. In view of the opaqueness and non-cooperation, the same asset was subject to assessment in different hands and/or different years for the same assessee. The duplication being removed, there is no challenge to the merits of the additions – essentially evidence based, *per se*, but, as afore-noted, legal, which, again, could well have been in the first round.

4.3 Our second observation is that despite canvassing absence of any incriminating material found or seized during search dated 17/9/2008, the assessee does not assail the assumption of jurisdiction u/s. 153C, which is only on the basis of a satisfaction recorded by the AO of the person searched – in this case, VRN, that *material* having a bearing on the income of the assessee stands found, so that it's income would require being assessed. This material, absence of which is being now contended, is the very basis, the foundation, on which the assessment in case of a person other than the person searched, i.e., u/s.153A r/w s. 153C, rests, which otherwise, a special jurisdiction, is restricted to the person searched. Reference, apart from the clear and unambiguous language of the statute, may in this context be made to the decision in *CIT v. Calcutta Knitwears* [2014] 362 ITR 673 (SC). *This aspect, understandable in view of the materials seized, and even as the matter travelled up to the Tribunal, was not challenged in the first round* and, which, rather, would be the first thing that an assessee, had that been the case, done, i.e., in the normal course of conduct. The decision in *Abhishar Buildwell* (supra) impacts only the assessment of

the person/s searched, with the controversy prior thereto, and which therefore stands resolved since, was *qua* the assessment pursuant to a search/requisition in case of such person. While one view, as by the Hon'ble jurisdictional High Court (*E.N. Gopakumar v. CIT* [2017] 390 ITR 131 (Ker)), was that the same would by itself, without anything more, trigger the jurisdiction to assess, abating all pending assessments, the second, which found favour with the Hon'ble Apex Court, is that it would only be on the strength of materials found during search, and not otherwise. As such, if no incriminating material indicating undisclosed income of the person searched is found in search (or on requisition), no assessment u/s. 153A could ensue. A sec. 153C assessment, which obtains in the instant case, is only on the basis of material found during the search or through requisition, so that the decision in *Abhishar Buildwell* (supra) does not impinge thereon. Reliance thereon is misplaced. Further, in view of non-challenge on the ground of jurisdiction, even in the second round, the assessee's claim of absence of incriminating material, is without merit and, rather, a contradiction in terms.

4.4 Our third observation is the absence of a challenge to the impugned additions in assessment/s, which are stated to be u/s. 69. This assumes relevance as the primary onus for such an addition is on the Revenue inasmuch as it is only on discovery of such an investment that its nature and source is liable to be explained, with an addition ensuing where the same is not found satisfactory. Absence of such challenge to the impugned additions, and at any stage up to this Tribunal in the second round, implies discharge of the primary burden on the Revenue, and indeed a failure to discharge the onus on the assessee toward satisfactorily explaining the same. In other words, there is material with the Revenue toward the impugned investment, and a tacit admission by the assessee of being unable to explain it. *What, then, we wonder, is the assessee's grievance, particularly considering that there is no challenge qua jurisdiction, with the procedural aspects also having been since taken care of*? Sure, we shall, even as obliged to, address the assessee's legal objections on merits. This

is, nevertheless, to place the matter in perspective, emphasizing the absence, apparently though, of any firm basis for challenge, not assumed at any stage earlier.

4.5 Coming to the merits of the assessee's case, it is, both on facts and in law, misconceived. Quite apart from the fact that reference to a wrong section, i.e., assuming so, is immaterial, as long as the authority has the power to sustain the impugned action (*Hukumchand Mills Ltd. v. State of Madhya Pradesh* [1964] 52 ITR 583 (SC); *IshaBeevi v. TRO* [1975] 101 ITR 449 (SC)), the addition in the instant case is, for both the years, only u/s.69. It is the investment in property, found unexplained by the AO, which led to the addition for Rs.17.08 lakh for AY 2008-2009. It was the assessee's case that the same stands financed by VNR, which was found false, with VNR being unable to explain even the source of the properties purchased in his name. For AY 2009-2010, it was the assessee's claim that the source of funds for the purchase of properties is not the credits appearing in the name of VNR. And which led the ld.CIT(A) to direct the AO to verify the availability of cash with the assessee, stated to arise on the sale of properties, so that, where available, no addition would hold (para 5.26 of the impugned order). The fact of the addition being maintained implies a failure on the assessee's part to prove the source of investments, i.e., the very reason for which the addition was made in the first place. For AY 2008-2009 also, the ld.CIT(A) endorsed the AO's finding of the assessee being unable to explain the source of investment made (para 5.21). His statement of the assessee having not proved the credit and the genuineness of the liability is only upon giving due credence to the assessee's claim of the investment being financed by VNR, a claim found to be without any basis. The additions u/s.69 and sec.68, it may be appreciated, are complementary. Where the investment is not recorded in the books of account, sec.69/69B becomes applicable, while, where so, sec.68 gets attracted where the assessee fails to prove the genuineness of the corresponding liability. In either case it is the truth of the assessee's explanation as to the nature of source of the investment or, as the case may be, credit in its respect, that

determines the sustainability or otherwise of the addition. Reference in this regard may be made in the decision *CIT v. Jauharimal Goel* [2008] 296 ITR 263 (All), as indeed to decisions in *CIT v. Radhe Shyam Tibrewal* [1984] 145 ITR 186 (SC); and *Jamna Prasad Kanhaiyalal v. CIT* [1981] 130 ITR 244 (SC). The accounts, it may be appreciated, only form part of the assessee's explanation. It is this that led us to state of the addition for both the years being on account of unexplained investment; its routing through accounts, where so, notwithstanding, which cannot be allowed to be a ruse (see para 4.6). As explained in *CIT v. S. Kamaraj Pandian* [1981] 150 ITR 703 (Mad), the burden on the assessee to establish the identity of the creditor; the capacity of the creditor to advance the loan; and the genuineness of the transactions, is so inspite the entries to that effect in his account books. It is only after he establishes these things, at least *prima facie*, that the onus shifts to the Department.

4.6 Continuing further, the routing of the investment in books of account is only a ruse. No books of account were found maintained at its premises and, accordingly, did not form part of the seized material. And neither is there anything on record to show that the same were in fact being maintained. Much less being produced, there was non-cooperation in the extreme in the assessment proceedings, leading to the assessments being framed u/s.144. Why, no returns were filed even in response to the notices u/s.153C and, despite reminders and extended time being allowed for the purpose. The returns filed on 31.12.2010 are non-est in the eyes of law. In the absence thereof, the entire material found and seized in relation to the assessee, it may be appreciated, becomes incriminating, particularly considering that the transactions in land dealings, huge in number, were in cash. The observation by the AO in the second round, reproduced supra, is also telling inasmuch as, as against material seized in 2008, the books of account produced in 2013, i.e., in the second round, or much later in time, upon collecting the entire data gathered, cannot by any stretch of imagination be regarded as the books of account being maintained in the regular course of its business by the assessee. In this context, it may be clarified that

an addition u/s.68, i.e., even assuming for the sake of argument of it being the correct provision, is misplaced, and for which reference be made to the decisions in *Hukumchand Mills Ltd.* (supra); *Isha Beevi* (supra).

5.1 The only other ground raised per the instant appeals is the date up to which the interest u/s.234A for non-furnishing the returns of income is in law to be charged. While the Revenue has, as claimed, charged it up to 31.07.2014, i.e., the date of the impugned assessment/s, the assessee claims it to be up to 28.12.2010, i.e., the time of first assessment/s. Both have placed reliance on the decision in *Mahesh Investments v. Asst. CIT* [2021] 123 taxmann.com 6 (Kar) [277 Taxman 161].

5.2 Section 234A reads as follows:

> **Interest for defaults in furnishing return of income.**
>
> **234A.** (1) Where the return of income for any assessment year under sub- section (1) or sub-section (4) of section 139, or in response to a notice under sub-section (1) of section 142, is furnished after the due date, or is not furnished, the assessee shall be liable to pay simple interest at the rate of one per cent for every month or part of a month comprised in the period commencing on the date immediately following the due date, and,—
>
> (*a*) where the return is furnished after the due date, ending on the date of furnishing of the return; or
>
> (*b*) *where no return has been furnished, ending on the date of completion of the assessment under section 144*,
>
> on the amount of the tax on the total income as determined under sub-section (1) of section 143, and where a regular assessment is made, on the amount of the tax on the total income determined under regular assessment, as reduced by the amount of,—
>
> (*i*) advance tax, if any, paid;
>
> (*ii*) any tax deducted or collected at source;
>
> (*iia*) any relief of tax allowed under section 89;
>
> (*iii*) any relief of tax allowed under section 90 on account of tax paid in a country outside India;
>
> (*iv*) any relief of tax allowed under section 90A on account of tax paid in a specified territory outside India referred to in that section;
>
> (*v*) any deduction, from the Indian income-tax payable, allowed under section 91, on account of tax paid in a country outside India; and
>
> (*vi*) any tax credit allowed to be set off in accordance with the provisions of section 115JAA or section 115JD.

Explanation 1.—In this section, "due date" means the date specified in sub-section (1) of section 139 as applicable in the case of the assessee.

Explanation 2.—In this sub-section, "tax on total income as determined under sub-section (1) of section 143" shall not include the additional income-tax, if any, payable under section 143.

Explanation 3.—Where, in relation to an assessment year, an assessment is made for the first time under section 147 or section 153A, the assessment so made shall be regarded as a regular assessment for the purposes of this section.

Explanation 4.—[* * *]

(2) The interest payable under sub-section (1) shall be reduced by the interest, if any, paid under section 140A towards the interest chargeable under this section.

(3) Where the return of income for any assessment year, required by a notice under section 148 or section 153A issued after the determination of income under sub-section (1) of section 143 or after the completion of an assessment under sub-section (3) of section 143 or section 144 or section 147, is furnished after the expiry of the time allowed under such notice, or is not furnished, the assessee shall be liable to pay simple interest at the rate of one per cent for every month or part of a month comprised in the period commencing on the day immediately following the expiry of the time allowed as aforesaid, and,—

(*a*) where the return is furnished after the expiry of the time aforesaid, ending on the date of furnishing the return; or

(*b*) where no return has been furnished, ending on the date of completion of the reassessment or recomputation under section 147 or reassessment under section 153A,

on the amount by which the tax on the total income determined on the basis of such reassessment or recomputation exceeds the tax on the total income determined under sub-section (1) of section 143 or on the basis of the earlier assessment aforesaid.

Explanation.—[* * *]

(4) Where as a result of an order under section 154 or section 155 or section 250 or section 254 or section 260 or section 262 or section 263 or section 264 or an order of the Settlement Commission under sub-section (4) of section 245D, the amount of tax on which interest was payable under sub-section (1) or sub-section (3) of this section has been increased *or* reduced, as the case may be, the interest shall be increased or reduced accordingly, and—

(*i*) in a case where the interest is increased, the Assessing Officer shall serve on the assessee a notice of demand in the prescribed form specifying the sum payable, and such notice of demand shall be deemed to be a notice under section 156 and the provisions of this Act shall apply accordingly;

(*ii*) in a case where the interest is reduced, the excess interest paid, if any, shall be refunded.

(5) The provisions of this section shall apply in respect of assessments for the assessment year commencing on the 1st day of April, 1989 and subsequent assessment years. (*emphasis, ours*)

5.3 The primary facts are not in dispute. No return/s was furnished under any provision of the Act, with that on 31.12.2010 being non-est. There has accordingly been no processing of return/s u/s. 143(1), or even assessment/s u/s. 143(3). The assessment/s dated 28/12/2020 is the first assessment/s, which accordingly is to be regarded as the regular assessments referred to in sec. 234A(1)(b). Accordingly, the interest chargeable would be u/s.234A, from 01.8.2007 (01.8.2008) to 28.12.2010.

The amendment to an assessment pursuant to an order, *inter alia*, u/s.254, as in the instant case, only impacts interest u/s. 234A(1) in terms of the principal sum, on variation, downward or upward, in assessed tax. The same would not operate to extend the period for which the interest is charged, which gets crystallized on the completion of regular assessment for the first time. True, the original assessment/s stands set aside, but the same is accompanied by a direction to frame a fresh assessment/s, which thus is in consequence thereof. The order u/s.254(1), it may be noted, has not led to the obliteration of the demand raised earlier, but only in scaling it down, as envisaged u/s.234A(4), and which revision could be upward as well. Whether the said set aside was at the instance of the assessee – who was responsible by its conduct for the same, or the Revenue, is immaterial for the purpose of levy of interest u/s.234A, which is only towards the delayed filing of the return. And which default, and with enough justification, receives closure by law on the completion of the assessment in the first instance. The only thing therefore relevant from the stand point of charge of this interest with reference to the subsequent proceedings is the revision in the assessed tax and, accordingly, the concomitant interest liability. Sec. 234A(4) only contemplates revision in the amount charged or chargeable, even if nil, as where the first assessment yields a nil assessed tax. We, accordingly, for the reasons stated, find no merit in the Revenue's case. As regards the decision in *Mahesh Investments* (supra), the relevant part of which is reproduced at para 5.12 of the impugned order, the same in fact supports the assessee's case.

In sum

6. The assessee stating that no incriminating material was found during search is without basis on facts. Notice u/s.153A r/w s. 153C in case of a person other than the persons searched, as the assessee in the instant case, can only be on the basis of a satisfaction recorded as to the books of account or documents or assets seized or requisitioned have a bearing on the determination of the total income of another person. That is, the jurisdiction to frame an assessment u/s.153A r/ws. 153C, can, as the law always stood and explained, is only on the basis of such material, i.e., incriminating in nature. This jurisdiction has not been assailed at any stage, including before us, i.e., the second round before the Tribunal. The challenge to the satisfaction note, on the basis of which the assumption of jurisdiction could be questioned, is conspicuous by its absence, even as Sri. Mathew, the ld. counsel for the assessee, was specifically queried in its respect during hearing. It is the assessments in case of the person searched, that the Hon'ble Apex Court has in *Abhishar Buildwell* (supra), reading down the provision, held as obtaining only on the strength of incriminating material, which was always the case for an assessment u/s. 153A r/w s. 153C, i.e., in case of a person other than the person searched. In other words, the said decision impacts only an assessment u/s.153A, i.e., in the case of the person searched, and reliance thereon is misplaced *qua* one u/s. 153C, which obtains in the instant case. The assessee is merely trying to take advantage of the said decision, clearly inapplicable in the facts of it's case. No books of account were found maintained during search or even produced during assessment proceedings. In fact, in the absence of the returns filed, as indeed accounts, the entire material found during the seach is liable to be regarded as incriminating. Reference here, with profit, may be drawn to the decision in *CIT v. A.R. Enterprises* [2013] 350 ITR 489 (SC). In appeals arising out of assessments u/s.158BC and 158BD of the Act, the Apex court explained two scenarios contemplated by the Act for income being undisclosed, as:

(a) where the income has clearly not been disclosed, and

(b) where the income would not have been disclosed.

In concluding whether the income would or would not have disclosed, reliance, it explained, is to be placed on the surrounding facts and circumstances of the case. The only manner for disclosing income, it went on to explain, on the part of the assessee, is filing a return as stipulated in the Act. The non-filing of the return by the assessee was thus regarded by it as a fair inference as to the satisfaction of the condition that the income would not have been disclosed.

The controversy regarding the applicabiliy of section 68 or 69 is, again, contrived and, in any case, of no consequence, even as clarified by the courts, as in *Namdev Arora v. CIT* [2016] 389 ITR 434 (P&H), as and when this issue came up before them. No books of account were found during the search, nor indeed presented during the orignal assessment proceedings. That produced in the set aside proceedings in 2013 incorporating the investment in properties, documents in respect of which were found during the search, is, thus, only a ruse so as to bring the additions in their respect in assessment under, as against section 69, under section 68, so as to be able to contend, on that basis, that the investment is recorded in the books. In the absene of any explanation as to the source thereof, the basis of the addition continues to be the unexplained nature and the source of the investment.

The Revenue claiming interest u/s. 234A(1) r.w.s 234A(4) up to the date of assessment in the set aside proceedings, i.e., 31.07.2014, is equally without merit. In absence of furnishing any return of income up to the date of assessment on 28.12.2010, the same is the date of regular assessment, up to which therefore the interest u/s. 234A(1), which is for the delayed filing of return of income, is to extend. This interest is to be on the tax as finally assessed, i.e., as per the assessment dated 31.7.2014 (as may be further modified in appeal, which would therefore only be subsequent to), but that would not operate to extend the date up to which the interest is to be charged. The Revenue's reliance on *Mahesh Investment* (supra) is misplaced.

7. In the result, the assessee's appeals are partly allowed.

Order pronounced on November 14, 2023 under Rule 34 of The Income Tax (Appellate Tribunal) Rules, 1963

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

Cochin; Dated: November 14, 2023
Devadas G*

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

Assistant Registrar
ITAT/Cochin

Note: This is the order dated 14/11/2023, as amended vide corrigendum dated 06/6/2024.

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COCHIN BENCH, COCHIN

Before Shri Sanjay Arora, AM & Shri Manomohan Das, JM

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(Appellant)		(Respondent)

CORRIGENDUM

Order under section 254(1) of the Income Tax Act, 1961 ('the Act') in the captioned appeal was passed on 14.11.2023. It is, however, found that there have occurred certain typing errors and omissions in the said order, which are, therefore, sought to be rectified through this corrigendum order. The same being only a correction of those errors, with no implication on the rationale or the result of the order, do not therefore cause any prejudice to either party. The details are as under:

1. Para 4.5:

(a) The word 'due' be read instead of the word 'the' between the words 'giving the credence', in the sentence beginning with the words 'His statement of the assessee'. (page 6)

(b) 'comma (,)' be read after the word 'transactions' in the sentence beginning with the words 'As explained in *CIT v. S. Kamaraj Pandian*'. (page 7)

2. Para 5.1 (pg. 8):The citation '227 Taxman 161', be read as '277 Taxman 161'

3. Para 5.3

(a) The word 'be' in the sentence 'There has accordingly ……' be read as 'been'. (page 9)

(b) A 'comma (,)' be read after the word 'We' in the second last sentence of the para. (page 10)

4. Para 6:

(a) In the sentence beginning with the words "It is the assessments ….' a coma (,) be read both before and after the words 'reading down the provision'. (page 11)

(b) The word 'a' before the words 's. 153C', in the sentence beginning with the words 'In other words …', be read as 'one u/s. 153C' (page 11)

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

Cochin; Dated: June 06, 2024
Devadas G*

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Assistant Registrar
ITAT/Cochin

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2. At the outset, it was observed by the Bench that the appeals, filed on 10.10.2022, are with a delay of 27 days. An affidavit of even date by Dr. V.N. Radhakrishnan, Managing Trustee, explains the reasons leading to the same. The contents of the affidavit, carefully perused, cites reasons personal in nature. The

same have not been disputed by the Revenue. Under the circumstances, we, accepting the assessee's application for condonation of delay, admit the instant appeals. Hearing was accordingly proceeded with.

3. The assessee is a private trust formed on 01.01.2007 (02/11/2004, as per the impugned order) with the object of construction of a herbal city, apartments/villas, etc. for the promotion of herbal treatment, herbal tourism, farms, etc. by Dr. V. N. Radhakrishnan (VNR) and his wife, Smt. Ramani Radhakrishnan (RR), and their three children. A search u/s. 132 of the Act was conducted by the Revenue on 17.9.2008 at the business premises of the assessee and the residence of VNR. Various land documents were found and seized. Assessments were framed u/s. 153A (VNR, the person searched) and section 153C (assessee) upon analysis of more than 750 land documents seized and bank account statements of the members of this group, including the assessee and VNR. This is the second round before the Tribunal. In the first round, it, vide order dated 10.7.2013 (ITA Nos.223-227/Coch /2013/copy on record), set aside the assessments and restored the matter back to the file of the Assessing Officer (AO); the relevant part of it's order reading as under:-

> "4.1 In the case of V N Radhakrishnan, a similar contention was raised by the department that the assessee has not cooperated with the Assessing Officer. This Tribunal found that the Assessing Officer has given only 2 hearings for producing the documents. The Tribunal further found that the assessee was not given any fair opportunity; therefore, the issue was restored to the file of the Assessing Officer. Since the addition made in the present appeal is connected with the assessment of V N Radhakrishnan, this Tribunal is of the considered opinion that all these three appeals are to be restored to the file of the Assessing Officer for reconsideration in the light of the finding that may be recorded in the case of V N Radhakrishnan. In other words, the finding that may be recorded in the case of Dr. V N Radhakrishnan and Smt. Remani Radhakrishnan may be relevant for completing the assessment in the case of the present assessee. Therefore, this Tribunal is of the considered opinion that the issue needs reconsideration along with the assessment of V N Radhakrishnan and Smt. Remani Radhakrishnan. Accordingly, the order of the CIT(A) is set aside and the issue is restored back to the file of the Assessing Officer for reconsideration. The Assessing Officer shall consider the issue afresh on the basis of the material that may be produced by the assessee and thereafter decide

> the issue in accordance with law and after giving reasonable opportunity to the assessee."

As a reading of his orders in the set aside proceedings, reproduced as under in their relevant part, identically worded for both the years, shows, the AO got the cooperation from the assessee in the second round, a complete absence of which had led to the best judgment assessments u/s. 144 in the first, *with even returns of income having not been furnished in response to notices u/s.153A r/w s. 153C*:

> "3……..This time the assessee's authorized representative [hereinafter called AR] Sri. Mathew Joseph, Chartered Accountant, appeared. *Each and every document seized* analyzed, re-classified between various assessment entities and the assessment years. Through this process, all the multiple assessment of the same asset, over the various assessees of the group and years were eliminated. *This exercise was carried out over several days of sitting spread over five months*. Also, credits in the bank accounts analyzed. Based on this analysis, a category-wise statement of investment was prepared and sent to the assessee seeking the sources thereof vide letter dated 16/01/2014. The AR appeared with books of accounts maintained and on detailed verification of these accounts the assessment is concluded as under:" *(emphasis, ours)*

Assessments, which though in view of the non-furnishing of the returns of income, continued to be u/s. 153C r/w s. 144, were accordingly framed, making additions. The principal addition sustained for both the years is u/s. 69 for unexplained investments in land. The assessee failing to improve it's case in any manner at the first appellate stage, the same were confirmed. This explains the instant appeals.

4. We have heard the parties, and perused the material on record.

4.1 Before us, the assessee's case was two-fold:

(i) that, while the AO had made the addition u/s.69, the ld. CIT(A) had found it to be u/s. 68, i.e., *qua* a credit/s recorded in it's books of account. This is not maintainable.

(ii) Even so, the very fact of the addition made being in respect of entry appearing in the assessee's accounts, implies it being disclosed. How could, then, the same be said to arise out of incriminating material, only which would justify an addition to the returned income in a sec.153A r/w s.153C assessment, as clarified by the Apex Court per it's recent decision in *Pr. CIT v. Abhishar Buildwell* [2023] 454 ITR 212 (SC).

4.2 Our first observation in the matter is that despite pleading denial of proper opportunity to present it's case before the AO, and thus violation of the principles of natural justice by him in making it's assessments – wholly inconsistent though with the narrative in the assessment order, and which led the Tribunal to restore the matter back to his file for assessment/s afresh, no explanation, much less material/s, stand furnished in the second round by the assessee, whose challenge thereat is principally legal. This is not to in any manner suggest that the set aside did not yield any positive results; the assessments, even as admitted therein, pruned on account of the cooperation extended, representing assessments that ought to have been made in the first instance inasmuch as it is the assessee – who is in the intimate know of it's affairs, should come clean, stating the facts upfront. In view of the opaqueness and non-cooperation, the same asset was subject to assessment in different hands and/or different years for the same assessee. The duplication being removed, there is no challenge to the merits of the additions – essentially evidence based, *per se*, but, as afore-noted, legal, which, again, could well have been in the first round.

4.3 Our second observation is that despite canvassing absence of any incriminating material found or seized during search dated 17/9/2008, the assessee does not assail the assumption of jurisdiction u/s. 153C, which is only on the basis of a satisfaction recorded by the AO of the person searched – in this case, VRN, that *material* having a bearing on the income of the assessee stands found, so that it's income would require being assessed. This material, absence of which is being now contended, is the very basis, the foundation, on which the assessment in case of a person other than the person searched, i.e., u/s.153A r/w s. 153C, rests, which otherwise, a special jurisdiction, is restricted to the person searched. Reference, apart from the clear and unambiguous language of the statute, may in this context be made to the decision in *CIT v. Calcutta Knitwears* [2014] 362 ITR 673 (SC). *This aspect, understandable in view of the materials seized, and even as the matter travelled up to the Tribunal, was not challenged in the first round* and, which, rather, would be the

first thing that an assessee, had that been the case, done, i.e., in the normal course of conduct. The decision in *Abhishar Buildwell* (supra) impacts only the assessment of the person/s searched, with the controversy prior thereto, and which therefore stands resolved since, was *qua* the assessment pursuant to a search/requisition in case of such person. While one view, as by the Hon'ble jurisdictional High Court (*E.N. Gopakumar v. CIT* [2017] 390 ITR 131 (Ker)), was that the same would by itself, without anything more, trigger the jurisdiction to assess, abating all pending assessments, the second, which found favour with the Hon'ble Apex Court, is that it would only be on the strength of materials found during search, and not otherwise. As such, if no incriminating material indicating undisclosed income of the person searched is found in search (or on requisition), no assessment u/s. 153A could ensue. A sec. 153C assessment, which obtains in the instant case, is only on the basis of material found during the search or through requisition, so that the decision in *Abhishar Buildwell* (supra) does not impinge thereon. Reliance thereon is misplaced. Further, in view of non-challenge on the ground of jurisdiction, even in the second round, the assessee's claim of absence of incriminating material, is without merit and, rather, a contradiction in terms.

4.4 Our third observation is the absence of a challenge to the impugned additions in assessment/s, which are stated to be u/s. 69. This assumes relevance as the primary onus for such an addition is on the Revenue inasmuch as it is only on discovery of such an investment that its nature and source is liable to be explained, with an addition ensuing where the same is not found satisfactory. Absence of such challenge to the impugned additions, and at any stage up to this Tribunal in the second round, implies discharge of the primary burden on the Revenue, and indeed a failure to discharge the onus on the assessee toward satisfactorily explaining the same. In other words, there is material with the Revenue toward the impugned investment, and a tacit admission by the assessee of being unable to explain it. *What, then, we wonder, is the assessee's grievance, particularly considering that there is no challenge qua*

jurisdiction, with the procedural aspects also having been since taken care of? Sure, we shall, even as obliged to, address the assessee's legal objections on merits. This is, nevertheless, to place the matter in perspective, emphasizing the absence, apparently though, of any firm basis for challenge, not assumed at any stage earlier.

4.5 Coming to the merits of the assessee's case, it is, both on facts and in law, misconceived. Quite apart from the fact that reference to a wrong section, i.e., assuming so, is immaterial, as long as the authority has the power to sustain the impugned action (*Hukumchand Mills Ltd. v. State of Madhya Pradesh* [1964] 52 ITR 583 (SC); *Isha Beevi v. TRO* [1975] 101 ITR 449 (SC)), the addition in the instant case is, for both the years, only u/s.69. It is the investment in property, found unexplained by the AO, which led to the addition for Rs.17.08 lakh for AY 2008-2009. It was the assessee's case that the same stands financed by VNR, which was found false, with VNR being unable to explain even the source of the properties purchased in his name. For AY 2009-2010, it was the assessee's claim that the source of funds for the purchase of properties is not the credits appearing in the name of VNR. And which led the ld. CIT(A) to direct the AO to verify the availability of cash with the assessee, stated to arise on the sale of properties, so that, where available, no addition would hold (para 5.26 of the impugned order). The fact of the addition being maintained implies a failure on the assessee's part to prove the source of investments, i.e., the very reason for which the addition was made in the first place. For AY 2008-2009 also, the ld. CIT(A) endorsed the AO's finding of the assessee being unable to explain the source of investment made (para 5.21). His statement of the assessee having not proved the credit and the genuineness of the liability is only upon giving the credence to the assessee's claim of the investment being financed by VNR, a claim found to be without any basis. The additions u/s.69 and sec.68, it may be appreciated, are complementary. Where the investment is not recorded in the books of account, sec.69/69B becomes applicable, while, where so, sec.68 gets attracted where the assessee fails to prove the genuineness of the

corresponding liability. In either case it is the truth of the assessee's explanation as to the nature of source of the investment or, as the case may be, credit in its respect, that determines the sustainability or otherwise of the addition. Reference in this regard may be made in the decision *CIT v. Jauharimal Goel* [2008] 296 ITR 263 (All), as indeed to decisions in *CIT v. Radhe Shyam Tibrewal* [1984] 145 ITR 186 (SC); and *Jamna Prasad Kanhaiyalal v. CIT* [1981] 130 ITR 244 (SC). The accounts, it may be appreciated, only form part of the assessee's explanation. It is this that led us to state of the addition for both the years being on account of unexplained investment; its routing through accounts, where so, notwithstanding, which cannot be allowed to be a ruse (see para 4.6). As explained in *CIT v. S. Kamaraj Pandian* [1981] 150 ITR 703 (Mad), the burden on the assessee to establish the identity of the creditor; the capacity of the creditor to advance the loan; and the genuineness of the transactions is so in spite the entries to that effect in his account books. It is only after he establishes these things, at least *prima facie*, that the onus shifts to the Department.

4.6 Continuing further, the routing of the investment in books of account is only a ruse. No books of account were found maintained at its premises and, accordingly, did not form part of the seized material. And neither is there anything on record to show that the same were in fact being maintained. Much less being produced, there was non-cooperation in the extreme in the assessment proceedings, leading to the assessments being framed u/s.144. Why, no returns were filed even in response to the notices u/s.153C and, despite reminders and extended time being allowed for the purpose. The returns filed on 31.12.2010 are non-est in the eyes of law. In the absence thereof, the entire material found and seized in relation to the assessee, it may be appreciated, becomes incriminating, particularly considering that the transactions in land dealings, huge in number, were in cash. The observation by the AO in the second round, reproduced supra, is also telling inasmuch as, as against material seized in 2008, the books of account produced in 2013, i.e., in the second round, or much later in time, upon collecting the entire data gathered, cannot by any

stretch of imagination be regarded as the books of account being maintained in the regular course of its business by the assessee. In this context, it may be clarified, that an addition u/s.68, i.e., even assuming for the sake of argument of it being the correct provision, is misplaced, and for which reference be made to the decisions in *Hukumchand Mills Ltd.* (supra); *Isha Beevi* (supra).

5.1 The only other ground raised per the instant appeals is the date up to which the interest u/s.234A for non-furnishing the returns of income is in law to be charged. While the Revenue has, as claimed, charged it up to 31.07.2014, i.e., the date of the impugned assessment/s, the assessee claims it to be up to 28.12.2010, i.e., the time of first assessment/s. Both have placed reliance on the decision in *Mahesh Investments v. Asst. CIT* [2021] 123 taxmann.com 6 (Kar) [227 Taxman 161].

5.2 Section 234A reads as follows:

> **Interest for defaults in furnishing return of income.**
>
> **234A.** (1) Where the return of income for any assessment year under sub- section (1) or sub-section (4) of section 139, or in response to a notice under sub-section (1) of section 142, is furnished after the due date, or is not furnished, the assessee shall be liable to pay simple interest at the rate of one per cent for every month or part of a month comprised in the period commencing on the date immediately following the due date, and,—
>
> (*a*) where the return is furnished after the due date, ending on the date of furnishing of the return; or
>
> (*b*) *where no return has been furnished, ending on the date of completion of the assessment under section 144*,
>
> on the amount of the tax on the total income as determined under sub-section (1) of section 143, and where a regular assessment is made, on the amount of the tax on the total income determined under regular assessment, as reduced by the amount of,—
>
> (*i*) advance tax, if any, paid;
>
> (*ii*) any tax deducted or collected at source;
>
> (*iia*) any relief of tax allowed under section 89;
>
> (*iii*) any relief of tax allowed under section 90 on account of tax paid in a country outside India;
>
> (*iv*) any relief of tax allowed under section 90A on account of tax paid in a specified territory outside India referred to in that section;
>
> (*v*) any deduction, from the Indian income-tax payable, allowed under section 91, on account of tax paid in a country outside India; and

(*vi*) any tax credit allowed to be set off in accordance with the provisions of section 115JAA or section 115JD.

Explanation 1.—In this section, "due date" means the date specified in sub-section (1) of section 139 as applicable in the case of the assessee.

Explanation 2.—In this sub-section, "tax on total income as determined under sub-section (1) of section 143" shall not include the additional income-tax, if any, payable under section 143.

Explanation 3.—Where, in relation to an assessment year, an assessment is made for the first time under section 147 or section 153A, the assessment so made shall be regarded as a regular assessment for the purposes of this section.

Explanation 4.—[* * *]

(2) The interest payable under sub-section (1) shall be reduced by the interest, if any, paid under section 140A towards the interest chargeable under this section.

(3) Where the return of income for any assessment year, required by a notice under section 148 or section 153A issued after the determination of income under sub-section (1) of section 143 or after the completion of an assessment under sub-section (3) of section 143 or section 144 or section 147, is furnished after the expiry of the time allowed under such notice, or is not furnished, the assessee shall be liable to pay simple interest at the rate of one per cent for every month or part of a month comprised in the period commencing on the day immediately following the expiry of the time allowed as aforesaid, and,—

(*a*) where the return is furnished after the expiry of the time aforesaid, ending on the date of furnishing the return; or

(*b*) where no return has been furnished, ending on the date of completion of the reassessment or recomputation under section 147 or reassessment under section 153A,

on the amount by which the tax on the total income determined on the basis of such reassessment or recomputation exceeds the tax on the total income determined under sub-section (1) of section 143 or on the basis of the earlier assessment aforesaid.

Explanation.—[* * *]

(4) Where as a result of an order under section 154 or section 155 or section 250 or section 254 or section 260 or section 262 or section 263 or section 264 or an order of the Settlement Commission under sub-section (4) of section 245D, the amount of tax on which interest was payable under sub-section (1) or sub-section (3) of this section has been increased *or* reduced, as the case may be, the interest shall be increased or reduced accordingly, and—

(*i*) in a case where the interest is increased, the Assessing Officer shall serve on the assessee a notice of demand in the prescribed form specifying the sum payable, and such notice of demand shall be deemed to be a notice under section 156 and the provisions of this Act shall apply accordingly;

(*ii*) in a case where the interest is reduced, the excess interest paid, if any, shall be refunded.

(5) The provisions of this section shall apply in respect of assessments for the assessment year commencing on the 1st day of April, 1989 and subsequent assessment years. (*emphasis, ours*)

5.3 The primary facts are not in dispute. No return/s was furnished under any provision of the Act, with that on 31.12.2010 being non-est. There has accordingly be no processing of return/s u/s.143(1), or even assessment/s u/s.143(3). The assessment/s dated 28/12/2020 is the first assessment/s, which accordingly is to be regarded as the regular assessments referred to in sec.234A(1)(b). Accordingly, the interest chargeable would be u/s.234A, from 01.8.2007 (01.8.2008) to 28.12.2010.

The amendment to an assessment pursuant to an order, inter alia, u/s.254, as in the instant case, only impacts interest u/s.234A(1) in terms of the principal sum, on variation, downward or upward, in assessed tax. The same would not operate to extend the period for which the interest is charged, which gets crystallized on the completion of regular assessment for the first time. True, the original assessment/s stands set aside, but the same is accompanied by a direction to frame a fresh assessment/s, which thus is in consequence thereof. The order u/s.254(1), it may be noted, has not led to the obliteration of the demand raised earlier, but only in scaling it down, as envisaged u/s.234A(4), and which revision could be upward as well. Whether the said set aside was at the instance of the assessee – who was responsible by its conduct for the same, or the Revenue, is immaterial for the purpose of levy of interest u/s.234A, which is only towards the delayed filing of the return. And which default, and with enough justification, receives closure by law on the completion of the assessment in the first instance. The only thing therefore relevant from the stand point of charge of this interest with reference to the subsequent proceedings is the revision in the assessed tax and, accordingly, the concomitant interest liability. Sec.234A(4) only contemplates revision in the amount charged or chargeable, even if nil, as where the first assessment yields a nil assessed tax. We accordingly, for the reasons stated, find no merit in the Revenue's case. As regards the decision in *Mahesh Investments* (supra), the relevant part of which is reproduced at para 5.12 of the impugned order, the same in fact supports the assessee's case.

In sum

6. The assessee stating that no incriminating material was found during search is without basis on facts. Notice u/s.153A r/w s. 153C in case of a person other than the persons searched, as the assessee in the instant case, can only be on the basis of a satisfaction recorded as to the books of account or documents or assets seized or requisitioned have a bearing on the determination of the total income of another person. That is, the jurisdiction to frame an assessment u/s.153A r/w s. 153C, can, as the law always stood and explained, is only on the basis of such material, i.e., incriminating in nature. This jurisdiction has not been assailed at any stage, including before us, i.e., the second round before the Tribunal. The challenge to the satisfaction note, on the basis of which the assumption of jurisdiction could be questioned, is conspicuous by its absence, even as Sri. Mathew, the ld. counsel for the assessee, was specifically queried in its respect during hearing. It is the assessments in case of the person searched, that the Hon'ble Apex Court has in *Abhishar Buildwell* (supra) reading down the provision held as obtaining only on the strength of incriminating material, which was always the case for an assessment u/s. 153A r/w s. 153C, i.e., in case of a person other than the person searched. In other words, the said decision impacts only an assessment u/s.153A, i.e., in the case of the person searched, and reliance thereon is misplaced *qua* a s. 153C, which obtains in the instant case. The assessee is merely trying to take advantage of the said decision, clearly inapplicable in the facts of it's case. No books of account were found maintained during search or even produced during assessment proceedings. In fact, in the absence of the returns filed, as indeed accounts, the entire material found during the seach is laible to be regarded as incriminating. Reference here, with profit, may be drawn to the decision in *CIT v. A.R. Enterprises* [2013] 350 ITR 489 (SC). In appeals arising out of assessments u/s.158BC and 158BD of the Act, the Apex court explained two scenarios contemplated by the Act for income being undisclosed, as:

(a) where the income has clearly not been disclosed, and

(b) where the income would not have been disclosed.

In concluding whether the income would or would not have disclosed, reliance, it explained, is to be placed on the surrounding facts and circumstances of the case. The only manner for disclosing income, it went on to explain, on the part of the assessee, is filing a return as stipulated in the Act. The non-filing of the return by the assessee was thus regarded by it as a fair inference as to the satisfaction of the condition that the income would not have been disclosed.

The controversy regarding the applicabiliy of section 68 or 69 is, again, contrived and, in any case, of no consequence, even as clarified by the courts, as in *Namdev Arora v. CIT* [2016] 389 ITR 434 (P&H), as and when this issue came up before them. No books of account were found during the search, nor indeed presented during the orignal assessment proceedings. That produced in the set aside proceedings in 2013 incorporating the investment in properties, documents in respect of which were found during the search, is, thus, only a ruse so as to bring the additions in their respect in assessment under, as against section 69, under section 68, so as to be able to contend, on that basis, that the investment is recorded in the books. In the absene of any explanation as to the source thereof, the basis of the addition continues to be the unexplained nature and the source of the investment.

The Revenue claiming interest u/s. 234A(1) r.w.s 234A(4) up to the date of assessment in the set aside proceedings, i.e., 31.07.2014, is equally without merit. In absence of furnishing any return of income up to the date of assessment on 28.12.2010, the same is the date of regular assessment, up to which therefore the interest u/s. 234A(1), which is for the delayed filing of return of income, is to extend. This interest is to be on the tax as finally assessed, i.e., as per the assessment dated 31.7.2014 (as may be further modified in appeal, which would therefore only be subsequent to), but that would not operate to extend the date up to which the interest is to be charged. The Revenue's reliance on *Mahesh Investment* (supra) is misplaced.

7. In the result, the assessee's appeals are partly allowed.

Order pronounced on November 14, 2023 under Rule 34 of The Income Tax (Appellate Tribunal) Rules, 1963

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

Cochin; Dated: November 14, 2023
Devadas G*

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

Assistant Registrar
ITAT/Cochin