

आयकर अपीलीय अधिकरण, इन्दौर न्यायपीठ, इन्दौर

**IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE**

**BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER
AND
SHRI MANISH BORAD, ACCOUNTANT MEMBER**

**ITA No.535/Ind/2013
Assessment Year: 2008-09**

M/s. Avalanche Reality Pvt. Ltd. 205, Satya Geeta Apartment, 90/47, Sneh Nagar, Main Road Indore (Appellant)	बनाम/ Vs.	ACIT-3(1) Indore (Revenue)
P.A. No.AAGCA2183B		

Appellant by	Shri Sumit Nema, Sr.Adv. & Shri Ayush Gupta, Adv.
Respondent by	Shri Lal Chand, DR
Date of Hearing:	11.10.2018
Date of Pronouncement:	04.12.2018

आदेश / O R D E R

PER KUL BHARAT, J.M:

Appeal by the assessee is directed against order of the
CIT(A)-7, Mumbai (Concurrent jurisdiction over the charge

of CIT(A)-I Indore) dated 21.3.2013 pertaining to the assessment year 2008-09. The assessee has raised following grounds of appeal:

1. *“That on the facts and in the circumstances of the case, the assessment order as passed by the assessing officer u/s 143(3) r.w.s. 153C of the Income Tax Act is bad in law, illegal and barred by limitation of time.*
2. *That on the facts and in the circumstances of the case, the Ld. CIT(A) erred in confirming the A.O’s action in issuing notice u/s 153C of the Income Tax Act and thereby passing order u/s 153C r.w.s. 143(3) of the Income Tax Act without properly appreciating the facts of the case and submissions made before him.*

WITHOUT PREJUDICIE TO THE ABOVE

3. *That on the facts and in the circumstances of the case, the Ld. CIT(A) also erred in maintaining addition of Rs.68926888/- as made by the Assessing Officer on account of Project at Satellite Hills without properly appreciating the facts of the case and submission made before him.*
4. *The assessee reserves its right to add, alter, modify or amend the grounds of appeal as and when required.”*

2. The facts giving rise to the present appeal are that a search and seizure operation u/s 132 of the Income Tax Act, 1961 (hereinafter called as ‘the Act’) were conducted at the various premises, persons and concerns commonly known as “Satellite Hills” on 19.11.2009. The search operation was initiated in the case of M/s. M/s. Phoenix

Devcons Pvt. Ltd. and others on 19.11.2009. It is alleged by the A.O. that during the search operation, various documents/loose papers were seized from the premises of M/s. Phoenix Devcons Pvt. Ltd., 434-Orbit Mall, Indore belonging to M/s. Avalanche Reality Pvt. Ltd. It is also recorded that copies of documents related to the assessee and on the basis of which satisfaction was recorded for issuing notice u/s 153C of the Act were supplied. The A.O. therefore made two additions of Rs.6,89,26,888/- treating as own money and disallowance of Rs.15,16,961/- by invoking the provisions of section 40A(3) of the Act.

3. Aggrieved by this, the assessee preferred an appeal before Ld. CIT(A), who after considering the submissions, partly allowed the appeal. Thereby the Ld. CIT(A) sustained the addition of Rs.6,89,26,888/- and deleted the addition of Rs.16,25,964/-. The Ld. CIT(A) also rejected

the objection of the assessee that no satisfaction was recorded by the assessee of the searched person.

4. Aggrieved by this, the assessee is in present appeal. Ground No.1 & 2 of the assessee's appeal are against initiation of provisions u/s 153C of the Act in the absence of the satisfaction recorded by the A.O. of the searched person. Ld. Counsel for the assessee submitted that the Tribunal has directed the revenue to furnish copy of the satisfaction recorded by the A.O. of the searched person. It is stated that there is no ambiguity under the provisions of law. It is mandated by the law that satisfaction of the A.O. of the searched person is a sine qua non for issuance of notice u/s 153C of the Act. It is submitted that ex facie action of the A.O. is contrary to the mandate of law and assessment so framed deserves to be quashed. Ld. Counsel for the assessee has relied upon various case laws. Ld. Senior Counsel placed reliance on the judgement of

Hon'ble jurisdictional High Court rendered in the case of CIT Vs. Mechmen 11-C (2015) 60 taxmann.com 484 (M.P.).

Ld. Senior Counsel submitted that admittedly no satisfaction was recorded by the A.O. in the case of searched person. He submitted that the revenue has miserably failed to produce and place on record the requisite satisfaction note recorded in the case of the searched person. He submitted that law is well settled that jurisdiction in the case of the other person the assessee herein u/s 153C of the Act could be exercised only in the event when the Assessing Officer of the searched person makes a satisfaction note that during the search, some material belonging to the assessee is found. The A.O. of the searched person, thereafter, transmits such material along with satisfaction note to the A.O. of the Assessing Officer of such other person. If this exercise is found to be

wanting, any action taken would be illegal and not in conformity with the law.

5. Ld. D.R. supported the order of the authority below and submitted that law does not require the assessing officer of the searched person to make a written note. He has to just satisfy himself and transfer the material to the concerned A.O., who thereafter in accordance with law would issue a notice calling upon the assessee to file return of income and accordingly assess the income. He submitted that throughout, the assessee has not raised any objection with regard to the satisfaction note in the entire proceedings. The assessee had attended the assessment proceedings, filed details, thereafter he filed an appeal before Ld. CIT(A). Before both the authorities, the assessee has not taken any ground that no satisfaction has been recorded. He submitted that no such ground was taken even before the Ld. CIT(A). Under these facts, the

assessee cannot be allowed to take an objection that no satisfaction has been recorded and the assessment proceedings are vitiated on this account.

6. We have heard the rival submissions, perused the materials available on record and gone through the orders of the authorities below. We find merit into the contention of the Ld. D.R. that no specific ground was raised before Ld. CIT(A) challenging the assessment on the ground that no satisfaction was recorded by the assessing officer of the searched person. Hence, the assessment is vitiated. Ld. Senior Counsel Shri Sumit Nema in response to the query submitted that law is well settled that a ground on legal issue can be raised at the appellate stage. In support of this contention, Ld. Counsel relied upon the judgement of the Hon'ble apex court rendered in the case of NTPC Limited Vs. CIT (1998) 229 ITR 353 (SC). Therefore, respectfully following the judgement of the Hon'ble

Supreme Court rendered in the case of NTPC Limited Vs. CIT (supra), the ground raised was admitted for adjudication.

7. Before embarking upon rival contentions, for the sake of clarity, relevant to the provisions of the Act is reproduced hereunder:-

“153C [Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, where the Assessing officer is satisfied that,--

- (a) Any money, bullion, jewellery or other valuable article or thing, seized or requisitioned, belongs to; or
- (b) Any books of account or documents, seized or requisitioned, pertains or pertain to, or any information contained therein, relates to,

A person other than the person referred to in section 153A, then, the books of account or documents or assets, seized or requisitioned shall be handed over to the Assessing Officer having jurisdiction over such other person] [and that Assessing Officer shall proceed against each such other person in accordance with the provisions of section 153A, if, that Assessing Officer is satisfied that the books of account or documents or assets seized or requisitioned have a bearing on the determination of the total income of such other person [for six assessment years immediately preceding the assessment year relevant to the previous year in which search is conducted or requisition is made and] for the relevant assessment year or years referred to in sub-section (1) of section 153A:]

[Provided that in case of such other person, the reference to the date of initiation of the search under section 132 or making of requisition under section 132A in the second proviso to [sub-section (1) of] section 153A shall be construed as reference to the date of receiving the books of account or documents or assets seized or requisitioned by the Assessing Officer having jurisdiction over such other person:]

[Provided further that the Central Government may by rules made by it and published in the Official Gazette, specify the class or classes of cases in respect of such other person, in which the Assessing Officer shall not be required to issue notice for assessing or reassessing the total income for six assessment years immediately preceding the assessment year relevant to the previous year in which search is conducted or requisition is made [and for the relevant assessment year or years as referred to in sub-section (1) of section 153A] except in cases where any assessment or reassessment has abated.]

8. A bare reading of the above provision of law suggests that the satisfaction of the A.O. of the searched person is a sine-qua-non to the effect that “(a) any money, bullion, jewellery or other valuable article or thing, seized or requisitioned belongs to; or (b) any books of accounts or documents, seized or requisitioned pertains or pertain to, for any information contained thereto, relates to a person other than person referred to in sub section 153A of the Act.

9. Admittedly, in the present case, no satisfaction note by the A.O. of the searched person is furnished by revenue, despite categorical directions dated 21.6.2017 & 17.5.2018

given by this Tribunal. However, a satisfaction note in the case of assessee has been furnished by the revenue vide letter dated 24.4.2017. Ld. CIT(DR) fairly conceded the fact that despite various reminders, the satisfaction note by A.O. of searched person i.e. M/s. Phoenix Devcons Pvt. Ltd., 434, Orbit Mall, Indore is not made available.

10. The Hon'ble jurisdictional High Court in the case of CIT Vs. Mechmen 11-C (supra) has held as under:

14. Thus, as envisaged by Section 158BD, "satisfaction" of the Assessing Officer before he transmits the material/records to other Assessing Officer having jurisdiction over such other person is sine qua non. Sans such satisfaction, the Assessing Officer cannot validly take recourse to the machinery provision.

15. We may now turn to Section 153C. No doubt, the form of Section 153C is dissimilar to that of Section 158BD. It is also true that the two provisions are embedded under different chapters. For, Section 153C is in Chapter XIV providing for procedure for assessment, whereas Section 158BD is found in Chapter XIV-B providing for special procedure for assessment of search cases. Further, Section 153C opens with non-obstante clause. However, the non-obstante clause in Section 153C is necessitated to give power to the Assessing Officer having jurisdiction to proceed against the person other than the person referred to in Section 153A, inspite of the action under Section 139, 147, 148, 149, 151 and 153 of the I.T. Act. However, on closer scrutiny of the two provisions, it is indisputable that, these provisions are machinery provisions and have been provided for in the statute book for the purpose of carrying out assessment of a person other than the searched person under Section 132 or 132A of the I.T. Act in relation to Section 158BD; and Section 153A in relation to Section 153C. Notably, the purpose underlying both these provisions is similar, even though Section 153C does not specifically refer to the expression "undisclosed" income. However, in both the situations, the Assessing Officer engaged in carrying on search of the assessee within his jurisdiction, if seizes or requisitions the items (books of account or other

documents or any assets for Section 158BD; and money, bullion, jewellery or other valuable article or thing or books of account or documents for Section 153C), is expected to handover those items to the Assessing Officer having jurisdiction over such other person and thereafter the Assessing Officer having jurisdiction has to proceed against such other person within his jurisdiction. Even for the purpose of Section 153C, the Assessing Officer before handing over the items to the Assessing Officer having jurisdiction must be "satisfied" that the items belongs or belong to the person other than the person referred to in Section 153A. That satisfaction of the concerned Assessing Officer is a *sine qua non*. The consequences flowing from the action to be taken on the basis of such information handed over to the Assessing Officer having jurisdiction, for the assessee, who is a person other than the person referred to in Section 153A, is drastic of assessment or reassessment of his income falling within six assessment years.

16. Suffice it to observe that the dissimilarity of the form of two provisions would make no difference to the purpose underlying. The power bestowed on the Assessing Officer having jurisdiction be it under Section 153C or Section 158BD is identical.

17. We are not inclined to accept the argument of the Department that the purpose underlying the two provisions is different. We also find that even the procedure is not different. The subject matter of the action would differ in the context of the machinery provision invoked, in the given case. That, however, cannot be the basis to extricate the Assessing Officer, who resorts to power under Section 153C of handing over the items referred to in Section 153C to the Assessing Officer having jurisdiction, of his duty to be satisfied about the jurisdictional fact that the items belongs or belong to a person other than the person referred to in Section 153A.

18. The concomitant of this conclusion, is that, the legal position as applicable to Section 158BD regarding satisfaction in the first instance of the first Assessing Officer forwarding the items to the Assessing Officer having jurisdiction; and in the second instance of the Assessing Officer having jurisdiction whilst sending notice to such other person (other than the person referred to in Section 153A), must apply *proprio vigore*. The fact that incidentally the Assessing Officer is common at both the stages would not extricate him from recording satisfaction at the respective stages. In that, the Assessing Officer is satisfied that the items referred to in Section 153C belongs or belong to a person (other than the person referred to in Section 153A), being *sine qua non*. He cannot assume jurisdiction to transmit those items to another file which incidentally is pending before him concerning other person (person other than the person referred to in Section 153A). The question as to whether that may influence the opinion of the Assessing Officer having jurisdiction over such other person, also cannot be the basis to take any other view. As a matter of fact, the other Assessing Officer to whom the items are handed over, before issuing notice must himself be satisfied after due verification of the items received and the disclosures made by the other person in the returns for the relevant period already filed by the other person before him. For the same reason, we must reject the argument of the Department that the discretion of the Assessing Officer having jurisdiction will be impaired in any manner, if he were to hold a different view. Similarly, as there is no provision either express or implied (in the Act) to dispense with the requirement of satisfaction, if the Assessing Officer happens to be the same, as in this case, the argument of the Department must be negated.

19. After receipt of the materials, the Assessing Officer having jurisdiction is expected to conduct enquiry and due verification of the relevant facts; before forming his prima facie satisfaction. The Assessing Officer having jurisdiction will be well within his rights to form an independent view before issuing notice to the other person (person other than the person referred to in Section 153A) under his jurisdiction on the basis of his own enquiry. In our opinion, the view formed by the Assessing Officer after his own enquiry does not entail in seating in appeal

over the satisfaction of the first Assessing Officer, who had handed over the items to him

20. As a result, we hold that there is no infirmity in the view taken by the Tribunal on the questions under consideration. The view taken by us is reinforced from the decisions of other High Courts in the cases of *Gopi Apartment (supra)*, *Peps: Foods (P.) Ltd. (supra)*, *Pepsico India Holdings (P.) Ltd. (supra)* and lastly *Madhi Keshwani (supra)*. The observations of the Delhi High Court in the case of *SSP Aviation Ltd. (supra)* have been explained in the subsequent case of *Pepsico India Holdings (P.) Ltd. (supra)*.

21. We conclude that the condition precedent for resorting to action under Section 158BD delineated by the Supreme Court in the case of *Manish Maheshwari (supra)* and in the recent case of *Calcutta Knitweaves (supra)*, would apply on all fours mandating satisfaction of the Assessing Officer(s) dealing with the case at the respective stages referred to in Section 153C.

11. The revenue has not brought to our notice any other binding precedent by the Hon'ble Supreme Court or the Hon'ble jurisdictional High Court. We therefore, respectfully following the Hon'ble High Court of Madhya Pradesh in the case of CIT Vs. Mechmen 11-C (supra) hold that the proceedings u/s 153C of the Act is not validly initiated and is contrary to settled position of law and the same is therefore hereby quashed.

12. The other grounds are not being adjudicated as we have quashed the initiation of proceedings itself. Appeal of the assessee is allowed in the terms indicated above.

13. In the result, the appeal filed by the assessee is allowed.

Order was pronounced in the open court on 04.12.2018.

Sd/-
(MANISH BORAD)
ACCOUNTANT MEMBER

Sd/-
(KUL BHARAT)
JUDICIALMEMBER

Indore; दिनांक Dated : 04/12/2018
VG/SPS

Copy to: Assessee/AO/Pr. CIT/ CIT (A)/ITAT (DR)/Guard file.

By order

Sr. Private Secretary, Indore