

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES: 'D', NEW DELHI

BEFORE SMT. BEENA A PILLAI, JUDICIAL MEMBER
AND SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 2395/Del/2015
AY: 2007-08

Dy.CIT C.Circle 28A Subhash Raod, ITO Dehradun	Vs.	Kohli Realtors (P) Ltd. C 389, Defence Colony New Delhi PAN: AACCK8156E
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ITA No. 2026/Del/2015
AY: 2011-12

Kohli Realtors (P) Ltd. C 389, Defence Colony New Delhi PAN: AACCK8156E (Appellant)	Vs.	Dy.CIT Central Circle Dehradun (Respondent)
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Department by : Sh. JK Mishra, CIT, D.R.
Assessee by : Sh. Rakesh Gupta & Sh. Somil Agarwal, Advs.

Date of Hearing : 31/01/2019
Date of Pronouncement: 08/02/2019

ORDER

PER BEENA A PILLAI, JUDICIAL MEMBER

Present appeals have been filed by revenue and assessee for Assessment Year 2007-08 and 2011-12 respectively against order dated 27/01/15 passed by Ld.CIT (A), Dehradun, on following grounds of appeal:

ITA No. 2395/Del/2015 (Assessment Year 2007-08)-Revenue's appeal:

1. That having regard to the facts and circumstances of the case, Ld. CIT (A) has erred in law and on facts in declaring the proceedings u/s 153A void ab initio without appreciating the facts that search action u/s 132 had actually been carried out in the premises belonging to assessee company and panchnama for that address was drawn as indicated in statement of facts attached to these grounds of appeal.
2. The assessee never challenged the issue of statutory notice u/s 153A(1)(a) of the I.T.Act, 1961 before the completion of assessment proceedings on the issue of panchnama/warrant of authorization u/s 132. Assessee never disputed in assessment proceedings or even during appeal proceedings that the registered office of the assessee company was in the same premises, and the authorization was duly served upon one of the directors of the assessee company as stated in the statement of facts enclosed as annexure to the grounds of appeal.
3. That having regard to the facts and circumstances of the case, Ld. CIT (A) has erred in law and on facts in annulling the assessment finalized u/s 153 A (1) (b) despite the fact that assessee never disputed in assessment proceedings or even appeals proceedings that the registered office of the assessee company was in the same premises and the authorization was duly served upon one of the directors of the assessee company.
4. That having regard to the facts and circumstances of the case, Ld. CIT (A) has erred in law and in assuming incorrect facts that in remand report AO stated that assessment was carried under provisions of section 153C of the 1 T Act.
5. That having regard to the facts and circumstances of the case, Ld. CIT (A) has erred in law and on facts in deleting the addition of Rs. 2 crores made on account of cash payment to Shri Kunwar S Vishal as indicated in the statement of fact.
6. That having regard to the facts and circumstances of the case, Ld. CIT (A) has erred in law and on facts in deleting the addition of Rs. 3,32,93,834/- made by AO on account of difference in amount stated by company to have been spent on the property in a court

case between assessee company and Shri KunwarS. Vishal by incorrectly holding that no tangible evidence has been brought on record as indicated in the statement of fact. The assessee company has itself in a civil suit filed in a court of law admitted to have incurred said investment which has been accepted in a civil court.

7. That having regard to the facts and circumstances of the case, Ld. CIT (A) has erred in law and on facts in not appreciating the facts and material brought on records by the AO including the material seized during course of search.

8. That the order of the Ld. CIT (A) being erroneous in law and on facts which needs to be vacated and the order of the A.O. be restored.

9. That the appellant craves leave to add or amend any one or more of the ground of the appeal as stated above as and when need for doing so may arise.

ITA No. 2026/Del/2015 (assessment year 2011-12)-assessee's appeal:

1. That in facts and circumstance of the case, AO has wrongly invoked the provisions of section 36(1)(iii) the same is erroneous and uncalled for.

2. That in facts and circumstances of the case, the Learned CIT(A) had wrongly sustained the addition of Rs. 49,59,238/- without appreciating the complete fact which was brought to his knowledge is unjustified and bad at law.

3. That in facts and circumstances of the case, the AO as well as the Learned CIT(A) has failed to considered the credit side of the depositors account which was highlighted in the submission for the calculation of the interest is arbitrary and unwarranted.

4. That in facts and circumstances of the case, the AO has failed to appreciate that the appellant company has got the substantial amount with them free of interest which has not been considered is wrong and superfluous.

5. That in fact and circumstances of the case the addition of Rs. 49,59,238/- as sustained by the CIT(A) may please be deleted.

That in fact and circumstance of the case, appellant be permitted to add or delete any grounds of appeal.

2. We shall first take up the appeal filed by revenue for assessment year 2007-08.

3. Brief facts of the case are as under:

Ld.Counsel at the outset started his argument by submitting that no search warrant under section 132 was issued in name of assessee and no panchnama has been drawn which stands in name of assessee. He submitted that search under section 132 was initiated in business and residential premises of assessee on 21/10/10. Accordingly notice under section 153A was issued to assessee and was called upon to furnish return of income. In response to statutory notices, assessee filed its return of income which was followed by notice under section 143(2) of the Act. In response to statutory notices, representative of assessee from time to time appeared before Ld.AO and filed explanation. Based upon certain seized material, Ld. AO made addition in hands of assessee.

4. Aggrieved by addition made by Ld.AO assessee preferred appeal before Ld.CIT(A) wherein assessee challenged jurisdiction of Ld. AO in framing assessment under section 153A (1) (b) of the Act.

5. It was submitted before us that Ld.CIT(A) during appellate proceedings called for a remand report from Ld.AO asking to confirm whether any search was carried out relating to assessee whether any search material relevant to assessee was found during course of search at any premises. Ld.AO was also requested to submit a copy of panchnama. Referring to para 11 of Ld.CIT (A)'s order, Ld.Counsel submitted that warrant of authorisation was not issued in name of assessee but in names of its directors. He further submitted that premises occupied by assessee was covered but as panchnama shows search was

conducted in case of other companies of group and directors but not assessee company it cannot be said that assessee has been searched. He placed reliance upon decision of *Hon'ble Supreme Court* in case of *Manish Maheshwari vs. ACIT* reported in (2007) 289 ITR 341 in support of his arguments.

6. On the contrary Ld.CIT DR relied upon order of Ld. AO.

7. We have perused submissions advanced by both sides in light of records placed before us.

7.1. Ld. CIT (A) in impugned order has very categorically recorded as under:

" 15. In the instant case it is quite clear that there is no warrant of authorization in the case of the assessee company. Therefore, irrespective of the fact that the premises covered may also have been its office, it cannot be proceeded against under section 153 A. It is seen that : assessee has specifically questioned the validity of the proceedings under section 153A while filling the return in response to the notice under that section. In the remand AO has submitted that in fact, the jurisdiction under section 153A had been assumed under the provisions of section 153C. However, no evidence of the same has been furnished before the undersigned either in the form of satisfaction being recorded under section 153C or a copy of the notice where it could be seen that it had been issued under section 153C. In fact the satisfaction that the case has been taken up under section 153C is not found recorded anywhere in the assessment order either. It is quite clearly mentioned that the notice was issued under section 153A(1)(a) of the Act. Furthermore, it has been recorded that certain papers were found and seized from the residence of the assessee (which is a company). No where it is stated that papers were found from the residence of the Directors of the company at Shalimar Bagh or during the search of the premises at B- 44 and that these papers belong to the assessee company justifying the initiation of proceedings under section 153C. In the circumstances, it can safely be assumed that the reference to section 153C, is an

afterthought in the event of the failure to explain the assessment under section 153A read with section 143(3) of the Act. Furthermore, it is clear that the prescribed procedure has not been followed for initiation of the proceedings under section 153C. Finally, it is seen that the assessee has raised the issue of validity of notice under section 153A(1)(a) the very first instance while filing the return . Hence, such defect cannot even be cured by the provisions of section 292B of the Act. In the circumstances, after considering the facts of the case and the relevant case laws on the subject, I am constrained to hold that the assessment under section 153A(1)(b) read with section 143(3) of the Act is void ah initio. Accordingly the same is liable to be quashed."

7.2. Ld. CIT DR has not been able to produce anything contrary to aforestated findings of Ld.CIT (A) in order to deviate from aforestated view. We are therefore inclined to uphold order passed by Ld. CIT (A).

7.3. Accordingly Ground Nos. 1-4 raised by assessee on jurisdictional issue stands allowed.

8. As the assessment under section 153A(1)(b) has been quashed and set-aside thereby additions deleted by Ld.CIT (A) becomes academic in nature.

9. In the result appeal filed by revenue for assessment year 2007-08 stands dismissed.

10. Assessment year 2011-12

Assessee has raised an additional ground for year under consideration as under:

- 1. That the assumption of jurisdiction to pass the assessment order u/s 143(3) dated 28-03-2013 vide notice u/s 143(2) dated 06-03-2013 is bad in law, more so when the first notice u/s 143(2) was not issued within the time period as per section 143(2) of Income Tax Act, 1961*
- 2. That in any case and in any view of the matter, assessment*

order passed u/s 143(3) dated 28-03-2013, is bad in law and against the facts and circumstances of the case."

10.1. As additional ground raised by assessee goes to root of assessment, we are inclined to consider the additional ground first.

11. Ld.Counsel submitted that assumption of jurisdiction under section 143(2) is bad in law since notice under section 143(2) has not been issued. He submitted that assessee filed original return of income on 21/09/11. Subsequently search was initiated under section 132 of the Act and assessee was called upon to furnish return of income, on or before 05/03/12. In response to notice under section 142(1), assessee submitted return of income on 30/01/13, declaring total income of Rs. 41,96,600/-. Subsequently notice under section 143(2) was issued to assessee on 06/03/13 along with questionnaire. Assessment was completed under section 143 (3) of the act on 28/03/13. Ld.Counsel submitted that, as per mandate of the Act, notice under section 143 (2) is to be issued to assessee within period of 6 months from end of financial year in which return is furnished. He submitted that assessee filed its return of income on 21/09/11, whereas notice under section 143 (2) was issued to assessee on 06/03/13, which is beyond period of limitation prescribed under the Act. Placing reliance upon decisions of *Hon'ble High Court* in case of *Pr.CIT vs Jai Shiv Shankar Traders Pvt. Ltd.*, reported in (2016) 383 ITR 448 and *Pr.CIT & Anr. vs Silver Line & Anr.* reported in (2016) 383 ITR 455 as well as *Hon'ble Supreme Court* in case of *ACIT vs. Hotel blue Moon*

reported in (2010) 321 ITR 362, Ld.Counsel submitted that assessment order passed is illegal and bad in law.

12. On the contrary Ld.CIT,DR submitted that, in terms of section 292 BB of the Act assessee participated in assessment proceedings, without plea of limitation being raised before Ld. AO. Ld. CIT DR submitted that in present case notice under section 143(2) has been issued to assessee pursuant to returns filed by assessee in view of notice under section 142(1) after issuance of notice under section 132 the Act. He thus submitted that notice under section 143(2) of the Act could not be held as fatal to reassessment proceedings.

13. We have perused submissions advanced by both sides in light of records placed before us.

14. In assessment order for year under consideration Ld.AO refers to date of search to be 21/10/10, whereby, relevant assessment year falls in block of 6 years.

14.1. It is pertinent to note that Ld.CIT (A) for preceding assessment year 2007-08 has returned a factual finding that, no search under section 132 was conducted in name of assessee nor any panchnama drawn, and therefore basis and initial condition for initiating proceedings under section 153A does not exist. The impugned order passed by Ld.CIT (A) for assessment year 2007-08, has been considered in aforestated paragraphs. It is observed that Ld.CIT (A) therein has analysed panchnamas drawn, which was part of remand report, forwarded by Assessing Officer dated 08/10/14 before making such factual observation. Under such circumstances, in our considered view limitation for issuance of notice under section 143 (2) has to be reckoned from

date of filing of original return of income, for year under consideration being 21/09/11 and notice under section 143 (2) has been issued on 06/03/13, which is beyond limitation period. There are plethora of decisions by *Hon'ble Supreme Court* in case of *ACIT vs Hotel blue Moon* reported in (2010) 188 *Taxmann* 113, which opines settled legal position that, requirement of issuance of notice under section 143 (2) within period of limitation is mandatory for completing assessment under section 143(3) of the Act.

14.2. Thus, in our considered opinion, legal ground raised by assessee stands allowed, and assessment order dated 28/03/13 is quashed and set-aside. As we have allowed legal ground raised by assessee, grounds raised challenging addition confirmed by Ld.CIT(A) becomes academic in nature and therefore has not adjudicated upon.

15. In the result appeal filed by assessee stands allowed.

Order pronounced in the open court on 08th February, 2019.

Sd/-

(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Sd/-

(BEENA A PILLAI)
JUDICIAL MEMBER

Dt. 08th February, 2019

- GMV

Copy forwarded to: -

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT

- TRUE COPY -

By Order,

ASSISTANT REGISTRAR
ITAT Delhi Benches

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