

I.T.A. No. 1312/KOL/2017
Assessment Year: 2008-2009 &
C.O. No. 78/KOL/2017 (in ITA No. 1312/KOL/2017)
Assessment Year : 2008-2009 &
IT(SS) Nos. 20 & 22/KOL/2017 (A.Y. 2009-10 & 2012-13) &
C.O. Nos. 74 & 76/KOL/2017 [in IT(SS)A Nos. 20 & 22/KOL/2017]
Assessment Years: 2009-10 & 2012-2013
M/s. Imax Infrastructure Pvt. Limited

**IN THE INCOME TAX APPELLATE TRIBUNAL,
KOLKATA 'A' BENCH, KOLKATA**

**Before Shri P.M. Jagtap, Vice-President (Kolkata Zone)
and Shri S.S. Viswanethra Ravi, Judicial Member**

***I.T.A. No. 1312/KOL/2017
Assessment Year: 2008-2009***

***Assistant Commissioner of Income Tax,.....Appellant
Central Circle-3(3), Kolkata,
Aayakar Bhawan Poorva,E.M. Bye Pass,
110, Shanti Pally, Kolkata-700 107***

-Vs.-

***M/s. Imax Infrastructure Pvt. Limited,.....Respondent
41, B.B. Ganguly Street, Central Plaza, Kolkata-700 012
[PAN: AABCI 6031 K]***

&

***C.O. No. 78/KOL/2017
(in ITA No. 1312/KOL/2017)
Assessment year: 2008-2009***

***M/s. Imax Infrastructure Pvt. Limited,.....Cross Objector
41, B.B. Ganguly Street, Central Plaza, Kolkata-700 012
[PAN: AABCI 6031 K]***

-Vs.-

***Assistant/Deputy Commissioner of Income Tax,.....Respondent
Central Circle-3(3), Kolkata,
Aayakar Bhawan Poorva,E.M. Bye Pass,
110, Shanti Pally, Kolkata-700 107***

&

***I.T.(S.S.)A. Nos. 20 & 22/KOL/2017
Assessment years: 2009-2010 & 2012-2013***

***Assistant Commissioner of Income Tax,.....Appellant
Central Circle-3(3), Kolkata,
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***C.O. Nos. 74 & 76/KOL/2017
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Appearances by:

*Shri A.K. Nayak, CIT (D.R.), for the Department
Shri S.M. Surana, Advocate, for the Assessee*

Date of concluding the hearing : March 11, 2019

Date of pronouncing the order : May 1, 2019

O R D E R

Per Shri P.M. Jagtap, Vice-President (Kolkata Zone):-

These three appeals are preferred by the Revenue against three separate orders, all dated 24.03.2017 passed by the Id. Commissioner of Income Tax (Appeals)-21, Kolkata for Assessment years 2008-09, 2009-10 and 2012-13 and since some common issues are involved therein, the same have been heard together and are being disposed of by a single

consolidated order along with the Cross Objections filed by the assessee being C.O. Nos. 78/KOL/2017, 74/KOL/2017 & 76/KOL/2017.

2. The relevant facts of the case giving rise to these appeals are that the search and seizure action under section 132 of the Act was conducted in the case of various assesses belonging to Prakash Group of Companies on 21.11.2013 and on subsequent dates. In consequence of the said action, a survey under section 133A was carried out at the business premises of the assessee, which was connected with the Prakash Group. During the course of survey, books of account identified as IIP/L/13 to IIP/L/19 relating to the assessee-company were found and impounded. Thereafter notices under section 153 were issued by the Assessing officer on 09.12.2015, in response to which the copies of returns of income regularly filed for the years under consideration were submitted by the assessee. As noticed by the Assessing Officer, the assessee-company had received share capital and share premium amounts aggregating to Rs.4,04,00,000/- during the previous year relevant to assessment year 2008-09 while a sum of Rs.2,30,00,000/- was received as share application money during the previous year relevant to assessment year 2009-10. During the course of assessment proceedings, the assessee-company was called upon by the Assessing Officer to explain the said amounts representing cash credits in terms of section 68. As noted by the Assessing Officer in the assessment orders, the assessee-company, however, submitted incomplete and inaccurate particulars, on the basis of which necessary enquiry to ascertain the genuineness of the transactions could not be done. He also found that cash was deposited in their Bank accounts by the share subscriber companies just before making the payment to the assessee-company on account of share capital/share premium/share application money. He further found from the documents

found during the course of search that various amounts were paid by the promoters of the assessee-company to the accommodation entry operators, which were routed back by cheques towards share capital/share premium/share application money. As noted by the Assessing Officer, the accommodation entry providers had also accepted in their statements recorded during the course of search of having given accommodation entries to the assessee-company in the form of share application money. Keeping in view all these findings, the Assessing Officer treated the share capital/share premium/share application money of Rs.4,04,00,000/- and Rs.2,30,00,000/- received by the assessee in the previous years relevant to assessment years 2008-09 and 2009-10 respectively as the unexplained cash credit and addition to that extent was made by him to the total income of the assessee for A.Ys. 2008-09 and 2009-10 in the assessment completed under section 153C/143(3) of the Act vide orders dated 29.03.2016. The Assessing Officer also completed the assessment under section 153C/143(3) of the Act for A.Y. 2012-13 vide an order dated 29.03.2016, wherein he made an addition of Rs67,28,150/- by way of disallowance under section 40(a)(ia) on account of payments made by the assessee to the contractors without deducting tax at source.

3. Aggrieved by the orders passed by the Assessing Officer under section 153C/143(3) of the Act for all the three years under consideration, appeals were preferred by the assessee before the Id. CIT(Appeals) challenging the validity of the said assessments as well as disputing the additions made therein on various grounds. One of the grounds raised by the assessee was that all the additions made in the assessments completed under section 153C/143(3) were not based on any incriminating material found during the course of search and the

same, therefore, were not sustainable. The Id. CIT(Appeals) found merit in this ground raised by the assessee and deleted the additions made by the Assessing Officer for all the three years under consideration for the following reasons given in paragraph no. 8 of his impugned order, which are identical in all the three years under consideration:-

"8. I have considered the findings of the AO in the assessment order, different case laws brought on record and appeal orders passed by my predecessors on this legal issue. I find that it seems that during the search and seizure operations conducted u/s 132 of the I.T. Act, 1961, in the case of Sri Balaji Log Products Pvt Ltd (SBLP) no incriminating documents/papers related/pertaining to the assessee were seized and I also find that in the case of the assessee a survey u/s 133A was conducted in which some papers/documents were impounded. There was no search in the case of the assessee. At least, additions made by the AO In the assessment order passed u/s 153C 143(3) are not based on any incriminating documents/papers seized during the search operation. It would also not be out of context to mention here that in this case, on the date of search, no assessment for this year was pending. Therefore, keeping in view the ratio decided by the Jurisdictional bench of Kolkata Tribunal in cases referred above and the ratio decided by the Hon'ble Calcutta High Court in the case of Veer Prabhu Marketing Ltd (supra) in the light of CB DT's decision of not filing SLP in this case in the Supreme Court and keeping in view the Apex Court's decision to dismiss SLP on similar issue in the case of Pr CIT vs Kurele Paper Mills Pvt Ltd : SLP (C) No.34554 of 2015 dt.07-12-2015, I am of this view that in order to maintain judicial continuity on this issue and respectfully following the ratio decided by the Hon 'ble Calcutta High Court in the case of Veer Prabhu Marketing Ltd (supra), assessee's appeal on grounds no 1 and 2 are allowed".

Keeping in view the relief given by him to the assessee on the above ground, the Id. CIT(Appeals) did not adjudicate upon the other grounds raised by the assessee in the appeals on merit. Aggrieved by the orders of the Id. CIT(Appeals), the Revenue has preferred these appeals before the Tribunal, while the assessee-company has also filed its Cross Objections.

4. We have heard the arguments of both the sides and also perused the relevant material available on record. In its Cross Objections filed for all

the three years under consideration, the assessee-company has raised a common preliminary issue challenging the validity of the assessments made by the Assessing Officer under section 153C/143(3) of the Act on the ground that proper satisfaction was not recorded by the Assessing Officer as required by Section 153C and in the absence of the same, the initiation of the proceedings under section 153C for all the three years under consideration was bad-in-law. In this regard, the Id. D.R. has placed on record the satisfaction recorded by the assessing Officer for all the three years under consideration, which is as under:-

"09.12.2015- A search and seizure operation was conducted in the "Prakash Group of cases on 21/22-11-2013. The assessee named M/s. Imax Infrastructure Pvt. Ltd. is connected with this Group. During the course of search/survey operation, several books of account and documents were found and seized/impounded such as IIPL/13 to IIPL/19. On perusal of the seized/impounded documents, it is seen that some documents are related to M/s. Imax Infrastructure Pvt. Ltd.

Thus it is reason to satisfy that this case is considered to be a fit case for issuing a notice u/s 153C of the Act. Hence, notice u/s 153C is issued to the assessee for compliance".

On perusal of the satisfaction recorded by the Assessing Officer as above, the Id. Counsel for the assessee has contended that the said satisfaction appears to have been recorded by the Assessing Officer of the assessee and not by the Assessing Officer of the searched person as specifically required by section 153C. He has also contended that the said satisfaction in any case is very vague and not specific, inasmuch as, there is no reference particularly to any document found and seized which belonged to the assessee. He has pointed out that what is recorded by the Assessing Officer in the satisfaction is only that certain documents belonged to the assessee without pointing out specifically such documents and the

satisfaction recorded by the Assessing Officer thus is not proper or sufficient. Relying on the decision of the Hon'ble Delhi High Court in the case of CIT -vs.- M/s. N.S. Software (I.T.A. No. 791/2017 dated 18.04.2018), he has contended that in the absence of proper and sufficient satisfaction recorded by the Assessing Officer, the initiation of proceedings under section 153C itself was invalid and the assessments completed in pursuance thereof are liable to be cancelled being bad-in-law. The ld. D.R. on the other hand has relied on the satisfaction recorded by the Assessing Officer to contend that it satisfies the requirement of section 153C.

5. We have carefully gone through the judgment of the Hon'ble Delhi High Court in the case of M/s. N.S. Software (supra) cited by the ld. Counsel for the assessee. In the said case, the satisfaction note recorded by the Assessing Officer while initiating the proceedings under section 153C was as under:-

"23.07.2010 - A search operation was conducted on Rajdurbar group of cases on 31.07.2008. During the course of search operation at the premises of Party A-20, Residence-cum-Office of Narender Kumar Agarwal, 1st & 2nd Floor, 7, Western Avenue, Maharani Bagh, New Delhi, various papers were found and seized belonging to M/s. N.S. Softwares Pvt. Ltd. The same are marked as Annexure-A/26, Hard Disk containing books of account of M/s. N.S. Softwares Pvt. Limited. Thus the proceedings under section 153C read with section 153A of the Income Tax Act, 1961 are being initiated in the above case".

In the appeal filed against the order passed by the Assessing Officer under section 153C read with section 143(3), the validity of satisfaction note recorded by the Assessing Officer was challenged by the assessee. The Id. CIT(Appeals), however, did not find merit in the case of the assessee and upheld the validity of satisfaction note. On further appeal, the ITAT found the satisfaction note under section 153C to be inadequate, inter alia, on the ground that the Assessing Officer had not even indicated as to how the vaguely referred documents in the satisfaction note were found to be belonging to the assessee within the meaning of section 153C of the Act. The Tribunal also found that there was no recording/reference about the contents of these documents allegedly pertaining to the assessee. When the matter was travelled to the Hon'ble Delhi High Court, Their Lordships concurred with the view of the ITAT. It was observed by the Hon'ble Delhi High Court that the Assessing Officer had not explained the steps taken by him to determine that the seized material belonged to the assessee-firm. It was further observed that the satisfaction note had been prepared in a standard mechanical format and did not provide any details about the books of account, which allegedly belonged to the assessee-firm. It was held that the Assessing Officer at the stage of sending notice under section 153C was required to record a specific reason or reasons why the material seized from the other person has a nexus to the assessee to whom the notice under that provision is addressed. It was held that the failure of the Assessing Officer to record a specific satisfaction as to how the recovered material belonged to the assessee in the note that preceded the notice issued under section 153C vitiated the assessment. It was held that since the satisfaction recorded by the Assessing Officer in terms of section 153C(1) was clearly inadequate, the assessment completed in pursuance thereof was also invalid.

6. In arriving at a conclusion as discussed above in the case of M/s. N.S. Softwares (supra), Hon'ble Delhi High Court relied heavily on its earlier decision rendered in the case of Pepsi Foods Pvt. Limited [52 taxmann.com 220 (Delhi), wherein it was clarified that section 132(4A) creates a general presumption that the documents found in the control and possession of a person belong to him or her and to rebut this presumption, the Assessing Officer should provide clear and cogent reasons which explain why the seized material belongs to somebody else. In the satisfaction note recorded in the said case, apart from saying that the documents belonged to the petitioner and the Assessing Officer was satisfied that it was a fit case for issuance of notice under section 153C, there was nothing which would indicate as to how the presumptions which were to be normally raised as indicated above, had been rebutted by the Assessing Officer and keeping in view the same, it was held by the Hon'ble Delhi High Court that the note would not meet the requirement of the concept of satisfaction as used in section 153C of the Act. It was observed by the Hon'ble Delhi High Court that the satisfaction note itself must display the reasons or basis for the conclusion that the Assessing Officer of the searched person is satisfied that the seized documents belong to a person other than the searched person. It was held that the satisfaction of the kind required under section 153C was not discernable from the contents of the satisfaction note and the said note, therefore, was not valid.

7. In the present case, the satisfaction note was apparently recorded by the Assessing Officer of the assessee and not by the Assessing Officer of the searched person as required by the provision of section 153C. A perusal of the said note, which is reproduced hereinabove, shows that the documents referred therein and identified as IIPL/13 to IIPL/19 were

found and impounded during the course of survey operation carried out at the business premises of the assessee and there is no specific reference in the said satisfaction note to any documents found during the course of search and seizure action conducted in Prakash Group of cases. There is nothing even to indicate as to how these vaguely referred documents were found to be belonging to the assessee. There is no recording about the contents of these documents allegedly pertaining to the assessee and the Assessing Officer nowhere has explained the steps taken by him to determine that the seized material belonged to the assessee. There is no specific satisfaction recorded by the Assessing Officer as to how the seized material belonged to the assessee. There is a failure on the part of the Assessing Officer to provide clear and cogent reasons, which can explain why the seized material belonged to the assessee apart from saying that the documents belonged to the assessee and he was satisfied that it was a fit case for issuing of notice under section 153C. If all these facts of the case are considered in the light of the decision of the Hon'ble Delhi High Court in the case of N.S. Softwares (supra) and Pepsi Foods Pvt. Limited (supra), we find that the satisfaction recorded by the Assessing Officer is neither adequate nor proper and since it does not meet the requirement of the concept of satisfaction as used in section 153C of the Act, we hold that the initiation of proceedings under section 153C itself was bad-in-law and the assessments completed in pursuance of such initiation are liable to be cancelled being invalid. We accordingly uphold the impugned orders of the Id. CIT(Appeals) giving relief to the assessee for all the three years under consideration, although on a different ground.

8. Keeping in view our decision rendered above on the preliminary issue raised by the assessee-company in its Cross Objections cancelling

the assessments made by the Assessing Officer under section 153C/143(3) of the Act for all the three years under consideration by holding the same to be invalid, the other issues raised by the assessee-company in its Cross Objections as well as by the Revenue in its appeals have become infructuous or academic. We, therefore, do not consider it necessary or expedient to decide the same.

9. In the result, the appeals of the Revenue are dismissed while the Cross Objections of the assessee are allowed.

Order pronounced in the open Court on May 01, 2019.

Sd/- (S.S. Viswanethra Ravi) Judicial Member	Sd/- (P.M. Jagtap) Vice-President (KZ)
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Kolkata, the 1st day of May, 2019

- Copies to :*
- (1) **Assistant/Deputy Commissioner of Income Tax,
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110, Shanti Pally, Kolkata-700 107**
 - (2) **M/s. Imax Infrastructure Pvt. Limited,
41, B.B. Ganguly Street, Central Plaza, Kolkata-700 012**
 - (3) **Commissioner of Income Tax (Appeals)-21, Kolkata,**
 - (4) **Commissioner of Income Tax- ,**
 - (5) **The Departmental Representative**
 - (6) **Guard File**

By order

*Assistant Registrar,
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata*

Laha/Sr. P.S.