

आयकरअपीलीयअधिकरण, दिल्ली न्यायपीठ 'सी', नई दिल्ली
IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES 'C', NEW DELHI

BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER
AND SHRI O.P.MEENA, ACCOUNTANT MEMBER

आ.अ.सं./I.T.A No.1738/Del/2013

निर्धारणवर्ष/Assessment Year: 2006-07

M/s. Gag Construction Pvt. Ltd., M-11, Middle Circular, Connaught Circus, New Delhi-110 001.	बनाम Vs.	Assistant Commissioner of Income Tax, Central Circle- 23, Jhandewalan Extension, New Delhi -110 055.
[PAN: AABCG 3001 H]		
अपीलार्थी Appellant		प्रत्यर्थी/Respondent

निर्धारितकीओरसे /Assessee by	Shri Ajay Bhagwani, CA
राजस्वकीओरसे /Revenue by	Ms. Nidhi Srivastava, CIT(D.R.)

सुनवाईकीतारीख/ Date of hearing:	13.11.2019
उद्घोषणाकीतारीख/Pronouncement on:	22.11.2019

आदेश /ORDER

PER O. P. MEENA,AM:

1. This appeal by the Assessee is directed against the order of learned Commissioner of Income tax (Appeals)-XXXIII, New Delhi (in short "the CIT(A)") dated 17.12.2012 pertaining to Assessment Year 2006-07, which in turn has arisen from the assessment order passed under section 143(3)/147 dated 24.12.2010 of Income Tax Act,1961 (in short 'the Act') by the Deputy Commissioner of Income-Tax, Central Circle – 23, New Delhi (in short "the AO").

2. Ground No.1,4& 5 are not pressed before us by the learned counsel for the assessee, ex-consequenti, these are treated as dismissed as not pressed.

3. Ground No. 2 states that on the facts and in the circumstances of the case and law, the Ld. CIT (A) erred in upholding the assumption of jurisdiction u/s.147 by the Assessing Officer and in making the assessment in pursuance thereof, without dealing with appellant's objection on merit and giving findings that no seized material obtained from the search of BPTP Group of cases (no search having been made on the Appellant) belonged to the appellant, clearly erred in yet upholding the action u/s.147 taken in the hands of the Appellant based on such seized material.

4. Succinct facts are that the assessee has filed return of income on 02.11.2006 declaring total income of Rs.2,70,090/-. The assessment was made under section 143(3) on 31.12.2008 by assessing total income at Rs.15,15,832/-.Subsequently, certain documents seized in the case of search action of BPTP group on 15.11.2007 and Post search enquiries, revealed that the group while dealing in land purchase was paying part payment at the time of execution of sale deed and the balance payment was being invariably paid by Post Dated Cheques (PDCs) and for intervening period (i.e. period between the date of sale deed and the date of encashment of PDCs) interest was being paid in cash @ 1.25% per month, on the amount of PDCs and this cash payment was not being accounted in the

books of accounts. The assessee company has also purchased a large chunk of land and followed this modus operandi of pertaining interest on PDCs in cash and not accounting the same in the books of accounts. Therefore, notice under section 148 of the Act was issued on 29.03.2010 and same was duly served upon the assessee by speed post. In response to which, the assessee has filed return of income on 22.04.2010, declaring total income of Rs.2,70,090/-. The assessee has also filed objection to issue of notice under section 148 of the Act which were disposed-off by the AO vide letter dated 03.12.2010.

5. Being, aggrieved, the assessee filed an appeal before the Ld.CIT (A). Wherein relying in the case of SSP Aviation Ltd. v. DCIT WPC NO. 309/2011 dated 29.03.2011 it was submitted that the AO has utilized document seized at premises of BPTP or its group, therefore, right course for action was to invoke section 153C instead of proceeding to assess u/s.147 of the Act. However, Ld. CIT (A) observed that undoubtedly, the AO utilized documents seized from premises of BPTP Ltd., but in the assessment order nowhere it is mentioned that document seized belongs to the assessee. A perusal of assessment order reveals that the appellant company is one of the group companies of BPTP Group and material seized from BPTP Group and other associates companies has shown some trend of unaccounted expenditure in the form of interest on PDC is being paid for the acquisition of land. Therefore, Ld. CIT (A) opined that as a result of search and seizure

operation, there may be three types of seized documents. One belonging to the person searched, the income of which will be assessed u/s. 153A, in the second category, the seized document belonged to other person, such assessment will be made under section 153C, and third category of documents establishes a general type of finding which is applicable for assessing income to a group of cases. In the case of third category, search assessment under section 153A or under section 153C cannot be invoked. Therefore, such income is to be assessed under normal provisions of the Act, either under section 143 (3) or 147 of I. T. Act, 1961, if any evidence is found, though not belonging to other person, but income has to be assessed in the hands of other person. Therefore, Ld. CIT (A) placing reliance in the case of judgment of Pooran Lal v. CIT [1974] 093 ITR 0505 (SC) where the Hon'ble Supreme Court held that material obtained from search even where search is made in contravention of the provisions can be used for making assessment. Accordingly, pronouncement relied by the assessee are of no consequence. Hence, reopening of assessment was upheld.

6. Being, aggrieved the assessee filed this appeal before the Tribunal.

7. The learned counsel for the assessee submitted that the original assessment was made under section 143(3), hence, reopening of assessment can be done as per first proviso to section 147 where there is failure on the part of the assessee to disclose truly and fully all material necessary for assessment. The learned counsel for the assessee referred

reasons recorded for reopening of assessment, placed at Paper Book, Page No. 93 and contended that that there is no charge against the assessee that there was any failure on the part of the assessee to disclose truly and fully all material facts necessary for the assessment. The learned counsel for the assessee further submitted that search and seizure operation was carried out on 15.11.2007 in the BPTP Group. The original assessment in the case of the assessee was made on 31.12.2008, therefore, the seized material was available at the time of making original assessment. However, the AO has not made any addition based on such seized material nor invoked the provisions of section 153C of the Act. Accordingly, reference to post search enquiries has no relevance. The learned counsel for the assessee further referred para 4.3 and 4.4 of the order of CIT (A) wherein the ld. CIT (A) observed that nowhere the AO has stated that part of seized material belonged to the assessee. It was also mentioned that seized material in group companies have shown trend of making additional payment for purchase of land, but there is nothing on record to show that the assessee had made any payments on account of PDCs interest. The learned counsel for the assessee referred Paper Book, Page No. 94 to 99 and claimed that none of the document belongs to the assessee nor any incriminating material in the documents of other group companies in respect of the assessee is found. Therefore, it was submitted that the reopening of assessment was based on incorrect inference that group companies involved in making interest payment of PDCs is not to be applied. The learned

counsel for the assessee further placed reliance in the case of decision of Co-ordinate Bench of Delhi Tribunal in the case M/s.Westland Developers Pvt. Ltd. Vs. ACIT, Central Circle-23, New Delhi in I.T.A.No.1757/Del/2013 on identical facts in which reopening of assessment was not found to be valid.

8. Per contra, Ld. CIT DR submitted that reasons recorded for reopening of assessment are not vague as assessment completed u/s 143(3) and not u/s 143C of the Act. Further, reopening of assessment was done within the four years, therefore, proviso to section 147 of the Act which says that the assessment can be reopened where there is a failure on the part of the assessee is not applicable, where the assessment has been reopened within four years from the end of the assessment year. In this case, the notice u/s 148 was issued on 29/03/2010 i.e. within four years from the end of the assessment year 2006-07. As regards para 4.3 & 4.4 of the Ld. CIT(A) the Ld. CIT DR submitted that the *modus operandi* adopted by the group companies are also applicable in the case of the assessee as the assessee also dealing in lands. Therefore, the Ld. CIT DR supported the order of Ld. CIT(A). The Ld. CIT DR also placed reliance in the case of ACIT, Cent. Circle 23 vs. M/s IAG Promoters & Developers Pvt. Ltd. ITA No. 1674/Del/2013 for AY 2008-09 of ITAT 'C' Bench Delhi dated 31/10/2014, wherein the additions made on account of interest paid on PDCs one of the group concern of the assessee was held to be valid.

9. We have heard the rival submissions and perused the relevant material on record. We find that the assessee has filed Return of Income on 12.11.2006 which was assessed u/s.143(3) on 31.12.2008 by determining total income at Rs.15,15,832/-, subsequently certain documents seized in the case of search action in the BPTP group on 15.11.2007. Further, post search enquiries revealed that the group was dealing in land purchase and paying part payment at the time of execution of sale and balance was invariably paid by the post dated cheques and for the intervening period i.e. period between the date of sale deed and the date of encashment of PDC's interest was being paid @1.25% per month. The AO has analysed these papers and grouped them into PDS-1 to PDS-54 which supports the modus-operandi adopted by the assessee. The reasons recorded for reopening of assessment placed at PB-93 and with Annexure-A at page 94 to 99 shows that based on number of seized material, the A.O. found that the assessee has also purchased large chunk of land and followed the modus-operandi of making payment of interest on PDC's and has made payment of interest in cash out of cash book of account. We, further find that the assessment was involved is A.Y.2006-07 and the notice for reopening of assessment has been issued on 29.03.2010, after recording the reasons. Thus, the assessment has been reopened within four years from the end of relevant assessment year, hence the assessment can be reopened even where there is no failure on the part of assessee to disclose fully and all material facts necessary for the assessment. If, one reads the Explanation-2 to section

147 of the Act including the proviso thereto, then it is clear that where the AO reopens assessment within a period of four years, it can do so on the ground of income having escaped assessment. Even, if there is no failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment. Further, the information of aforesaid modus-operandi has been received by the AO after post search enquiries conducted by the Department in the group cases, hence this information was not available at the time of assessment order. Moreover, there is no reference of modus-operandi or any search in the original assessment record. Therefore, the contention of the Id.Counsel that proviso to section 147 is applicable and there was no failure on the part on the assessee to disclose all material facts necessary for the assessment is without any basis and not applicable as the assessment has been reopened within four years from the end of relevant assessment year. We find that in group cases of the assessee, it has been categorically established the modus-operandi followed by the group companies and the assessee was also found indulging in land purchases. The Ld.CIT(A) has placed reliance on the decision of Pooran Mal Vs. CIT [1974] 93 ITR 505 (SC) wherein the Hon'ble Supreme Court has held that matter obtained from search even where search is made in contravention of provision can be used for making assessment. Therefore, the material obtained during the search in group concern which is duly corroborated by the modus-operandi of the group, can be used in reopening of assessment. The AO has therefore reason to believe that income

chargeable to tax has escaped assessment. Similarly, in the case of Phool Chand Bajranglal Vs. ITO [1993] 203 ITR 456 (SC) the Hon'ble Supreme Court has held that one of the purposes of section 147 is to ensure that a party cannot get away by willfully making a false or untrue statement at the time of original assessment. Similarly, in the case of Raymond Woolen Mills Ltd. Vs. ITO [1999] 236 ITR 34 (SC) the Hon'ble Supreme Court held that in determining whether commencement of the reassessment proceedings was valid, it has only to be seen whether there was prima-facie some material on the basis of which the Department could reopen the case. The sufficiency or correctness of the material is not a thing to be considered at such stage. Therefore, considering these facts on record, we are of the considered opinion that AO was justified in reopening assessment. So far as reliance placed on the decision of Westland Developers (supra) of ITAT is concerned, we find that the reopening of assessment has been made within four years from the end of the assessment year, hence, proviso to section 147 was not applicable, nor this arguments has been discussed. Further, the Tribunal in that case has carried away by independent evidence in respect of interest of PDC, hence whereas modus-operandi by recording of statement of Group concern and their directors was duly established, hence, the said case is distinguishable. Further, the ld.DR has cited decision of Co-ordinate Bench decision in the case of ACIT Vs. IAG Promoters and Developers Pvt. Ltd., in ITA No.1674/Del/2013 for A.Y.2008-09 dated 31.10.2014 in which modus-

operandi of group was approved, accordingly this ground of appeal is dismissed.

10. Ground No. 3 read as under :-

“3. That on the facts and circumstances of the case and in law the CIT(A) erred in not holding to quote “that seized documents definitely proves that interest is paid on PDC” despite –

i. that seized record on the basis of which above findings was given ,even according to his own finding by the CIT (A) , didn't belong to the appellant and ,

ii. that no enquiries were made for any alleged recipients of the interest and none was confronted with relevant documents

3.1. That the findings of the CIT (A) is based on mere surmises and conjectures without proof and corroboration by independent evidence.

3.2. That without prejudice the CIT(A) erred in upholding the addition of interest for the period for which PDCs were extended.

3.3 That without prejudice the CIT(A) erred in not quantifying the addition and instead giving ambiguous direction to compute the interest after six months from the date of sale.

11. Succinctly, facts as culled out from the orders of lower authorities are that the AO noticed that the assessee company is one of the group companies of BPTP Group in which land has been purchased mainly in the NCR (National Capital Region). The assessee company has also purchased large junk of land and has made only part payment of sale consideration to the seller at the time of executing sale deed and balance payment is made by way of post dated cheques (PDCs). During the course of assessment, the AO obtained details of such PDCs from the assessee as given at the time of registration to the seller and obtained date of encashment and applied rate of 15% interest per annum paid for the period from sale deed to date of encashment, on the amount of PDCs on the basis of seized material. The AO gave a finding in the assessment order that total such interest payable comes to Rs.24,47,405/- on PDCs which was paid in cash out of books of

account. Therefore, such interest was added as unaccounted/unexplained expenses.

12. Being, aggrieved, the assessee filed an appeal before the Ld. CIT (A). However, the Ld. CIT(A) after examining the issue in detailed, has given his direction for the recalculation of the interest on PDCs which is reproduced as under: :-

"5.4 Conclusion :-

Learned AR has been maintain all along that interest is not paid as all the receipts are only memorandum only. Analysis of these above seized document reveals that these seized documents definitely proves that interest is paid on PDCs. Various voucher in seized documents conclusively proves that the recipient has signed on voucher for receipt of the interest. Ld AR's contention that these are only working of interest claimed by seller for putting up before senior management does not appear to be convincing. In case of claim, the receiver will not sign the voucher as recipient. Amounts are specific and calculation is 15% per annum. Therefore, ld AR without conceding that the interest is paid on PDCs has taken the stand that in none of the seized material, i.e., even in receipt seized, the interest is from date of issue of PDCs. Now issue arises whether interest on PDCs are paid from date of issue or for extension of PDCs. Documents discussed above where there is clear evidences of receipt of interest is for extension of period of PDCs. Ld AR's arguments that calculation of interest on PDCs has been considered while entering into agreements holds some logic. But when date of PDCs are extended, the recipient will definitely ask and settle for some additional compensation in form of interest. There is no evidence which proves that interest is paid from the date of sale to date of encashment of post dated cheques. However, there is concrete evidence in form of seized material to show that interest is paid and received by seller on the extension of PDCs as discussed above while analyzing the seized document. Therefore, in my view where ever the date of PDCs are extended interest is paid @ 15% per annum in cash out of books of accounts which are evident from seized material. Therefore, interest on PDCs to the extent of extension period appears to quite reasonable and logical. Accordingly, interest on PDCs either as sale consideration or additional payment may be recomputed to the extent of extended period of PDCs by the A.O. and to that extent addition is confirmed. The above formulae will apply to all group companies under the management of BPTP i.e. (M/s BPTP and Associate companies) including the appellant company as evidence is found in respect of various companies of BPTP and some seized paper could not be related to specific company. Therefore, it is proper to apply this formula for all companies under the common management of BPTP Group, head by Shri Kabul Chawla. All these companies are closely linked. Some companies purchase land and transfer the same to M/s BPTP Ltd. or Countrywide Promoters (P) Ltd. for housing or commercial projects are ultimately developed and sold by M/s BPTP Ltd. and Countrywide Promoters Ltd. or in stray case by some other companies. Assessing Officer has applied the case of Eusuf Ali for applying interest on PDCs for all companies of BPTP Group for all assessment year under consideration. Ld AR has tried to differentiate the above cited case on facts. In my view, as interest payment on extension of period of PDCs are established on numerous seized documents. A trend is established for the group as the overall 4 ITA-1674/D/2013 & 1765/D/2013 management is controlled by one person Sh. Kabul Chawla and activities of all companies are interrelated.

If it is not possible to work out the extension of PDCs in each case then A.O. is directed to recompute interest on PDCs after six months from date of issue of PDCs i.e. date of sale, as six months is taken as reasonable period for giving PDC as per sale deed. This view is formed on the basis the statement of Sh. Chhotu Ram which says that normally PDCs are given for 8 to 10 months. Further Ld AR has also

submitted few sale deed in respect of some of seized record in the case of Ramvati Beero etc. where the interest working is made after 9/15 months. Taking these facts into consideration, it would be proper to compute interest after 6 months from date of sale on conservative side. Accordingly this ground is partly allowed."

13. Being, aggrieved the assessee filed this appeal before the Tribunal. The learned counsel for the assessee submitted that the AO categorized seized documents and marked as PDC-1 to PDC-54 relating to various companies of BPTP Group. The AO utilized all these documents in making present assessment. The assessee on purchase of several tracks of land in NCR "National Capital Region" and in some cases made part payment on sale consideration to the seller at the time of execution of sale deeds and balance payment was made by way of PDC. The AO obtained details of such PDC's given at the time of registration to the sellers and dates of encashment. The AO applied rate of interest @ 15% per annum paid for the period from sale deed to date of encashment on the amount of all the PDC issued. However, the Ld. CIT(A) has allowed relief in respect of addition on account of PDC interest for a period up to six months from the date of sale deed based on the statement of Shri Chhotu Ram which says that normal PDC's are given for 8 to 10 months. The ld.Counsel submitted that in the instant case interest is for a period of 7 months, therefore whole of the addition needs to be deleted. However, this finding of Ld. CIT(A) has resulted in deletion of addition of Rs.24,36,653/- and confirmation of the balance addition of Rs.10,752/- in respect of four transactions of which interest was calculated for one month each only. However, this addition is also not sustainable as the A.O. has failed to summon the vendors of land

u/s.131 of the Act, to whom the appellant is alleged to have paid interest on PDC's. He, further submitted that the A.O. made addition on account of unexplained expenditure u/s.69C of the Act. However, section 69C is applicable where the assessee had incurred expenditure. In the instant case, the assessee has denied to have incurred any expenditure in the form of interest on PDC being paid. However, the A.O. has made addition without any material or evidence brought on record, simply on the basis of presumption. The ld.Counsel placed reliance on the decision on the decision of Hon'ble Delhi High Court in the case of CIT Vs. Lubtec India Ltd., [2009] 311 ITR 175 (Del) and CIT Vs. Ved Prakash Chowdhary 305 ITR 245 (Del) in this regard.

14. *Per contra*, the ld.CIT-DR submitted that the modus-operandi adopted by the group in BPTP has been accepted that the interest is being paid that PDC's only during the period of extension of PDC such finding for calculation of interest in respect of payment on similar circumstances after six months from the date of issue of PDC's has been upheld by the Coordinate Bench of the ITAT Delhi Tribunal in the case of ACIT Vs. IAG Promoters and Developers Pvt. Ltd., in ITA No.1674/Del/2013 for A.Y.2008-09 dated 31.10.2014.

15. We have heard the rival submissions and perused the relevant material on record. We find that the modus operandi adopted by the Group has been established from the findings as given in the number of group

concern. We find that Ld. CIT (A) has found that wherever the date of post dated cheque was extended, interest was being paid at 15% p.a. in cash out of books of account as was evident from the seized material, therefore, the interest on PDC to the extent of extension period was logical. Ld. CIT (A), therefore, directed the AO to re-compute the interest on PDC either on the sale consideration or additional payment to the extent of extended period of PDCs by the AO and in case the working out of the same is not possible, to re-compute the interest on PDCs after six months from the date of issue of PDCs i.e. date of sale, as six months is taken as reasonable period for giving PDC as per sale deed. The Ld. CIT(A) has above relied on the statement of Shri Chhoturam as mentioned above. We find that the Co-ordinate Bench of Delhi Tribunal – C Bench in the case of ACITv. M/s.IAG Promoters & Developers (P) Ltd. [I.T.A.No.1674/Del/2013/A.Y. 2008-09 dated 31.10.2014 has upheld the findings of Ld. CIT (A) on similar circumstances in appeal by the Revenue. Which are reproduced as under:

“5. We have heard the arguments of both the sides and perused relevant material placed before us. At the outset, the ground raised by the Revenue is misconceived because learned CIT(A) has not deleted the addition of `5,06,625/- but has only directed to recalculate the interest. We have carefully gone through the order of the learned CIT(A) and also the submissions of both the parties and we do not find any infirmity in the order of the learned CIT(A). After examining the loose papers seized at the time of search at the assessee's premises, it was noticed that interest is paid on the PDCs only during the period of extension of PDCs and, therefore, he directed the Assessing Officer to recompute the interest on PDCs at the time of extension of the PDCs. He has further observed that if it is not possible to work out the extension of PDCs in each case, then the Assessing Officer is directed to recompute interest on PDCs after six months from the date of issue of the PDCs. Therefore, the ground of appeal of the Revenue that the CIT(A) deleted the addition of Rs. 5,06,625/- made by the Assessing Officer on account of interest on PDCs is factually incorrect and 5 ITA-1674/D/2013 & 1765/D/2013 contrary to the order of the CIT(A). The CIT(A) directed to recalculate the interest on PDCs and there was a sound logic for such direction. His direction is based on material found and seized at the time of search. In view of the above, we do not find any justification to interfere with the order of learned CIT(A) in this regard and accordingly, we reject ground No.1 of the Revenue's appeal.”

16. Since the issue is squarely covered by the decision of Tribunal in the case of group companies of the assessee company. Therefore, respectfully following the same we upheld findings of Ld. CIT(A) in sustaining the addition of Rs.10,752/- in the present case. Accordingly, this grounds of appeal is therefore, dismissed.

17. In the result, the appeal of the assessee is dismissed.

Sd/-
(KULDIP SINGH)

(न्यायिकसदस्यतथा/JUDICIAL MEMBER)

Sd/-
(O.P.MEENA)

(लेखासदस्यकेसमक्ष /ACCOUNTANT MEMBER)

नई दिल्ली /New Delhi, दिनांक Dated: 22nd November, 2019 /S.Gangadhara Rao, Sr.PS
Copy of order sent to- Assessee/AO/Pr. CIT/ CIT (A)/ ITAT (DR)/Guard file of ITAT.

By order

/ / TRUE COPY / /

Assistant Registrar, New Delhi