

INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "B": NEW DELHI
BEFORE SHRI H.S.SIDHU, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
(Through Video Conferencing)

ITA No. 1824 & 1826/Del/2013
(Assessment Year: 2006-07 & 2008-09)

Dynasty Construction Pvt. Ltd, M-11, Middle Circle, Connaught Circus, New Delhi PAN: AAACD9800C	Vs.	ACIT, Central Circle-23, New Delhi
(Appellant)		(Respondent)

Assessee by :	Shri Ajay Bhagwani, FCA
Revenue by:	Ms. Nidhi Srivastava, CIT DR
Date of Hearing	21/09/2020
Date of pronouncement	30/09/2020

O R D E R

PER PRASHANT MAHARISHI, A. M.

1. ITA No. 1824/Del/2013 is filed by the assessee against the order of the Id CIT(A)-33, New Delhi dated 18.12.2012 for AY 2006-07. The assessee has challenged this order on the following grounds of appeal:-

- "1. *That on the facts and circumstances of the case and in law, the CIT(A) erred in rejecting the appellant's contention that the assumption of jurisdiction by Assessing Officer for making assessment u/s 153C of the IT Act was bad on facts and in law, thereby rendering the assessment also as bad in law and void ab-initio.*
2. *That on the facts and circumstances of the case and in law, the CIT(A) erred in holding to quote, 'that seized documents definitely proved that interest is paid on PDC' in view of the fact-*
 - i. that there is no specific reference of any seized material belonging to the appellant on the basis of which above finding was given, and*
 - ii. that no enquiries were made from any of the alleged recipients of the interest and none was confronted with relevant document(s).*

- 2.1 *That the finding of the CIT(A) is based on mere surmises and conjectures without proof and corroboration by independent evidence.*
 3. *That on the facts and circumstances of the case and in law the CIT(A) erred in not accepting the appellant's contention that Additional Payments having not been claimed as deduction by appellant, no disallowance could have been made in the hands of the appellant.*
 - 3.1 *That without prejudice the CIT(A) erred in upholding the disallowance of Additional Payments made to the recipients who were not the owners of land and to the payment made in cash.*
 - 3.2 *That without prejudice the CIT(A) erred in not himself quantifying the addition to be made.*
 4. *That on the facts and circumstances of the case and in law the CIT(A) erred in upholding the disallowance u/s 40A(3) in respect of which no deduction was claimed by the appellant.*
 - 4.1 *That even on merits the disallowance was not justified.*
 5. *That the orders passed by the Assessing Officer and Commissioner of Income Tax (Appeals)-XXXIII, New Delhi are bad in law and void ab-initio.*
 6. *The appellant craves permission to add, amend, alter or vary all or any grounds of appeal on or before the date of hearing of the appeal."*
2. During the course of hearing the assessee raised following additional grounds of appeal as per application dated 26.04.2017:-
- " *In the captioned appeal Ground No. 1 taken is as under:-*
1. *That on the facts and circumstances of the case and in law, the CIT(A) erred in rejecting the appellant's contention that the assumption of jurisdiction by Assessing Officer for making assessment u/s 153C of the IT Act was bad on facts and in law, thereby rendering the whole assessment also as bad in law and void ab-initio."*
 2. *The genesis of this ground is stated hereunder:-*
 - 2.1 *A search was conducted u/s 132(1) of the Act on M/s BPTP Ltd on 15.11.2007, of which the assessee is a group company. No search was carried on the assessee. In the documents seized u/s 132(1) in the search on BPTP Ltd, certain documents belonged to the assessee. This resulted in taking action u/s 153C of the Act. The order passed u/s 153C is the subject matter of present appeal.*
 - 2.2 *One of the objections taken by the assessee before the CIT(A) was against the assumption of jurisdiction for making assessment u/s 153C of the Act. This objection was taken in grounds of Appeal no.3*

and 3.1. The thrust of the objection by the assessee was that the AO of the searched person (i.e. BPTP Ltd) had not recorded satisfaction note in the file of M/s BPTP Ltd by identifying the documents belonging to M/s Dynasty Construction Pvt. Ltd (the other person in the present case) and transmitting them to AO of the other person for taking action u/s 153C.

2.3 The CIT(A) rejected the contention in para 5.2(ii) by observing that BPTP (searched person) and Dynasty Construction Pvt. Ltd (the other person) being assessed by the same AO the above requirement was not necessary.

3. Aggrieved by the aforesaid order, a specific ground was taken as ground no.1, as above, in the present appeal. Indubitably the rationale of ground no.1 is ascribed to the order passed by the CIT(A) on the specific plea that no satisfaction having been recorded by the AO of the searched person in the file of the searched person, the assumption of jurisdiction u/s 153C in the present case was bad in law, thereby rendering the assessment also bad in law and void-ab-initio.

4. In the ground of Appeal no.1 taken as above, no doubt, it has not been specifically mentioned that assumption of jurisdiction is bad in law on the ground that satisfaction was not recorded in the file of the searched person. However, lest it may be construed a deficiency/shortcoming/defect in the ground no.1, a supplementary ground is being taken on the same issue, as an additional ground, to put away any doubt. The assessee seeks to take the following additional ground.

5. Additional Ground of Appeal:-

"That on the facts and circumstances of the case and in law, the CIT(A) erred in rejecting the appellant's contention that the assumption of jurisdiction by the AO for making assessment u/s 153C was bad on facts and in law on the ground that the AO of the searched person had not recorded satisfaction in the file of the searched person, for assuming jurisdiction u/s 153C of the Act in the case of the appellant."

6. Before closing, it may be submitted that while ground no.1 is an omnibus ground, which on standalone basis includes the plea of not recording satisfaction by the AO of the person searched, nevertheless the additional ground is being taken to obviate any dispute. Further, this ground by itself constitutes a legal ground which can be taken before the Appellate Tribunal as held by the Supreme Court in the case of NTPC vs. DCIT 229 ITR 383 (SC)."

3. The assessee submitted that the additional grounds raised are legal in nature and no fresh facts are required to be investigated, that goes to the root of the matter, therefore same should be admitted.

4. The Id DR objected to the same stating that assessee cannot raised the pleas which were raised in additional grounds of appeal as those were not raised before the lower authorities.
5. We have carefully considered the rival contentions and find that additional ground raised by the assessee goes to the root of the matter and are legal in nature. Further no fresh facts are required to be investigated on this ground. Hence, same are admitted. As the additional ground of appeal goes to the jurisdiction of the assessment made we proceed to decide the same first.
6. The brief facts of the case shows that on 15.11.2007, search u/s 132(1) of the Act was carried out on M/s. BPTP Ltd. The assessee is a group concern. However, no search was carried out on the assessee. Further, in the search of BPTP Ltd certain documents belonging to the assessee were found. Therefore, the proceedings are required to be undertaken for determination of undisclosed income in the hands of the assessee by invoking the provisions of section 153C of the Act. Accordingly, notice under that section was issued on 26.08.2009 requiring the assessee to furnish return of income for AY 2002-03 to AY 2007-08. For AY 2006-07 impugned AY , assessee filed its return of income on 08.10.2009 showing income of Rs. 340110/-. The assessment was made on 30.12.2009 determining total income of the assessee at Rs. 12425415/- u/s 153A/ 153C of the Act on 30.12.2009. The Id AO made additions on account of interest of PDC of Rs. 2540792/-, addition on account of additional payment of Rs. 8107570/-, deemed dividend of Rs. 775000/- and disallowance u/s 40A(3) of Rs. 661943/-. All additions except interest on PDC were repeated as those were made as per u/s 143(3) of the Act passed on 31.12.2008.
7. The assessee preferred appeal before the Id CIT(A) who confirmed the addition on account of PDC, additional payment as well as disallowance u/s 40(3). These additions are challenged before us. The additional grounds raised by the assessee is challenging the addition stating that disallowances/ additions made in assessment order u/s 153C are not based on any incriminating material for AY 2006-07 and therefore, the

issue is squarely covered in favour of the assessee by the decision of the Hon'ble Delhi High Court in case of Kabul Chawla Vs. CIT. The second contention raised was that the Id AO has repeated the addition which were already made in the assessment order passed u/s 143(3) of the Act. He otherwise submitted that additions are made on the basis of recorded entries in the books of account and not on basis of incriminating material found. He further referred to the assessment order also to show that there is no incriminating material found with respect to assessment year 2006-07.

8. The Id DR vehemently submitted that it is not necessary that in 153C proceedings the additions are required to be made only on the basis of some incriminating material.
9. We have carefully considered the contentions of the parties. Issue of addition on account of interest on PDC amounting to Rs. 2540792/- is not pressed by the assessee. Therefore, now only issue is required to be adjudicate is whether the disallowance on account of additional payment of Rs. 8107570/- and disallowance u/s 40A(3) of the Act is made on the basis of any incriminating material found during the course of search. The addition has been discussed by the Id AO in para No. 3 of the assessment order. The Id AO has repeated this addition once again in this assessment order passed u/s 153C of the Act and which was also made in assessment order u/s 143(3) dated 31.12.2008. This fact is recorded by the Id AO himself in para No. 3.1 as well as in para 3.5 of the order. The Id DR could not show that these additions are on the basis of any incriminating documents found during the course of search. On perusal of the order also we could not found that same is based on some incriminating material found during the course of search. When an assessment is initiated u/s 153C of the Act it is necessary that already assessed income can be tempered only when there is some incriminating material which has a capacity of upward assessment of already assessed income. Such is the mandate of the decision of the Hon'ble Supreme Court in 397 ITR 344 in CIT Vs Sinhgadh Technical Education Society as well the decision of the Hon'ble Delhi High Court in CIT Vs. Kabul Chawla

380 ITR 573. In view of this, it is apparent that addition on account of disallowance of additional payment of Rs. 8107570/- is made without any incriminating material found during the course of search. Same is the case of disallowance u/s 40A(3) of the Act amounting to Rs. 661943/-. Thus, both the disallowances challenged before us are not based on any incriminating material found during the course of search. Thus we direct the Id AO to delete both the disallowances. Accordingly, ground Nos. 3 and 4 of the appeal along with additional grounds are allowed.

10. Ground Nos. 1, 2, 5 and 6 are not pressed before us hence, same are dismissed.
11. Accordingly, ITA No. 1824/Del/2013 for AY 2006-07 is partly allowed.
12. ITA No. 1826/Del/2013 for AY 2008-09 is filed by the assessee against the order of the Id CIT(A)-33, New Delhi dated 15.01.2012.
13. The assessee raised the following grounds of appeal in ITA No. 1826/Del/2013 for the AY 2008-09:-

- “1. *That on the facts and circumstances of the case and in law, the CIT(A) erred in rejecting the appellant's contention that the assumption of jurisdiction to make assessment by the Assessing Officer was bad in law, thereby rendering the assessment also as bad in law and void ab-initio.*
2. *'That on the facts and circumstances of the case and in law, the CIT(A) erred in rejecting appellant's contention that assessment order was bad in law and void ab-initio on the ground that the Assessing Officer relied upon the material seized in the course of search on M/s BPTP group of cases despite:-*
 - i} that such material did not belong or relate to the appellant and,*
 - ii) that no incriminating material belonging to the appellant was discovered and seized in the course of such search.*
3. *That on the facts and circumstances of the case and in law the CIT(A) erred in holding to quote, 'that seized documents definitely prove that interest is paid on PDC' despite-*
 - i. that the seized record on the basis of which above finding was given, did not belong to the appellant and,*
 - ii. that no enquiries were made from any of the alleged recipients of the interest and none was confronted with relevant document(s).*

- 3.1 *That the finding of the CIT(A) is based on mere surmises and conjectures without proof and corroboration by independent evidence.*
 4. *That on the facts and circumstances of the case and in law the CIT(A) erred in not accepting the appellant's contention that Additional Payments having not been claimed as deduction by appellant, no disallowance could have been made in the hands of the appellant.*
 - 4.1 *That without prejudice the CIT(A) erred in upholding the disallowance of Additional Payments made to the recipients who were not the owners of land and to the payment made in cash.*
 - 4.2 *That without prejudice the CIT(A) erred in not himself quantifying the addition to be made.*
 5. *That on the facts and circumstances of the case and in law the CIT(A) erred in upholding the disallowance u/s 40A(3) in respect of which no deduction was claimed by the appellant.*
 - 5.1 *That even on merits the disallowance was not justified.*
 6. *That the orders passed by the Assessing Officer and Commissioner of Income Tax (Appeals)-XXXIII, New Delhi are bad in law and void ab-initio."*
14. In this appeal also assessee has made an application for admission of the additional ground which are placed in the paper book. The assessee seeks to raise the following additional ground:-
"That on the facts and circumstances of the case and in law, the impugned assessment order dated 31 December 2009 passed by the assessing officer u/s 143 (3) of the income tax act, 1961 is bad in law and void ab initio inasmuch as it ought to have been passed u/s 153C of the income tax act, 1961."
15. The assessee submitted that the additional ground taken is purely a legal ground and this being so be taken before the tribunal for the first time. He submitted that the facts are already on record for deciding the additional ground in the omission to take the additional ground cannot be said to be either wilful or unreasonable. He further stated that it goes to the basic jurisdictional issue of the assessment order and therefore should be admitted. He further stated that the issue is squarely covered in favour of the assessee in view of the decision of the honourable jurisdictional High Court.

16. The learned departmental representative vehemently objected to the additional ground and stated that this are not raised before the lower authorities and therefore it cannot be allowed to be raised now
17. we find that the assessee has raised the jurisdictional issues with respect to Under which Section the assessment order should have been passed. This goes to the root of the matter, no fresh facts are required to be investigated as complete details are available in the assessment orders itself, failure to raise the ground in the original appeal memo cannot be a reason to deprive the assessee to raise a jurisdictional issue and it can be raised at any time during the course of the pendency of the appeal. Hence we admit the same.
18. Now we proceed to adjudicate on the additional ground whether the assessment order should have been passed by the assessing officer u/s 153C of the act on it has been correctly passed by the assessing officer u/s 143 (3) of the act. It is also pertinent to note that the assessment order has been passed u/s 153A read with Section 143 (3) of the act. This is also in accordance with the provision of the income tax act or not is also required to be tested.
19. The brief facts of the case show that there was a search in the case of BPTP Ltd on 15.11.2007 wherein, certain incriminating documents were found and seized belonging to the assessee. Therefore, satisfaction was recorded on 26.08.2009 and notice u/s 153C was issued for AY 2002-03 to AY 2007-08. For this assessment year the return of income was filed on 16.09.2008 at Rs 76955/- and subsequently, notice u/s 143(2) was issued on 07.08.2009. Consequently, assessment u/s 153A/ 143(3) of the Act was passed on 31.12.2009 wherein, the total income of the assessee was assessed at Rs. 4326180/-. The Id AO made an addition on account of additional payment of Rs. 2114062/-, disallowance u/s 40A(3) of Rs. 17750/- and further addition of Rs 2117413/- on account of undisclosed source on interest paid on PDCs. The assessee challenged the same before the Id CIT(A) who confirmed the addition made by the Id AO therefore, the assessee is in appeal before us.

20. The main ground of appeal as per ground No. 1 the assessee challenged the jurisdiction of the Id AO. It is submitted that satisfaction was recorded by issue of notice u/s 153C of the Act on 26.08.2009 for issue of notice for AY 2002-03 to 2007-08. He submitted that as per the decision of the Hon'ble Delhi High Court in case of *CIT v. RRJ Securities Ltd.* [2015] 62 taxmann.com 391/380 ITR 612 (Delhi) date of recording of satisfaction is the date of search and therefore, the assessment should have been passed for this assessment year u/s 153C of the Act which has been passed by the Id AO u/s 143(3) of the Act. He submitted that merely because the Id AO has mentioned one of the section under which order is passed as 153A cannot cure the defect for the reason that no notice u/s 153C was ever issued to the assessee. He therefore, submitted that issue is squarely covered in favour of the assessee by the decision of the Hon'ble Delhi High Court in *CIT Vs. RRJ Securities Ltd (supra)* . He also referred to the several group cases of the assessee where the identical view has been taken by the coordinate benches. He also referred to the decision of the honourable Delhi High Court in case of *CIT versus Jasjit singh* in ITA number 337/2015 dated 11/8/2015 and also order dated 12 October 2015 in principle *Commissioner of income tax versus Bhupendra Singh sarna* in ITA number 772/2015.
21. The Id DR submitted that the Id AO has clearly mentioned that the order passed u/s 153 A of the Act and therefore, there is no infirmity.
22. We have carefully considered the rival contentions. In the present case undoubtedly search took place on BPTP Group on 15.11.2007 wherein certain incriminating material was found belonging to the assessee. The Id AO recorded the satisfaction note on 26.08.2009 and issued notice u/s 153C of the Act for AY 2002-03 to AY 2007-08. Further, no notice u/s 153C was issued for AY 2008-09 instead assessment for this year was made by issuing notice u/s 143(2) of the Act as emphatically mentioned in the assessment order. Consequently, the assessment was made u/s 143(3) of the Act on 31.12.2009. In the present case according to provision of section 153C(1) the date of search in case of person other than searched person would be postponed to the date of receipt of books

of account or necessary documents by the jurisdictional AO. Correspondingly, the period of this orders would be reckoned with respect to such date therefore as the satisfaction note was recorded on 26.08.2009, the corresponding 6 assessment years covered under the provision of section 153C of the Act are starting from AY 2004-05 to 2009-10. Consequently, the impugned assessment year 2008-09 is covered by provision of section 153C of the Act. Thus, necessarily it should have been made u/s 153C of the Act. Admittedly, no notice u/s 153C of the Act was issued to the assessee for this assessment year. Instead notice u/s 143(2) of the Act was issued and assessment order was passed u/s 143(3) of the Act. Therefore merely mentioning that order as been passed u/s 153A of that without issuing any notice u/s 153C of the act we are not in a position to hold that the learned assessing officer has passed the assessment order u/s 153A of the act. Kindly Therefore, according to us the assessment order passed by the Id AO is quashed. Accordingly, appeal of the assessee is allowed.

23. In the result both the appeals are disposed off.

Order pronounced in the open court on 30/09/2020.

-Sd/-
(H.S.SIDHU)
JUDICIAL MEMBER

-Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated: 30/09/2020
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating member	
Date on which the typed draft is placed before the other member	
Date on which the approved draft comes to the Sr. PS/ PS	
Date on which the fair order is placed before the dictating member for pronouncement	
Date on which the fair order comes back to the Sr. PS/ PS	
Date on which the final order is uploaded on the website of ITAT	
date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the order	