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Section 153C proceedings couldn't be invoked in absence of incriminating materials recorded in satisfaction note

Summary – The Delhi ITAT in a recent case of Pavitra Realcon (P.) Ltd., (the Assessee) held that where only in independent search of accommodation entry provider, alleged incriminating material was found doubting assessee's transactions but extensive search operation on assessee had not yielded any incriminating material and further, no notice under section 153C had been issued on assessee for period under consideration, no addition could be made in hands of assessee

Facts

- The BPTP Ltd. group was incorporated in 2003 and was a leading real estate developer in NCR region. The group was one of the major players in development of integrated township, residential projects, IT Parks, Sez, Hospitality Sectors etc. in NCR region comprising of Delhi, Noida, Gurgaon and Faridabad.
- A search and seizure operation under section 132 in the case of BPTP Ltd. group of companies was carried out at 7-12-2010 and finally concluded on 5-2-2011. Notice under section 143(2) was issued to the assessee on 13-9-2012. The assessee had filed its return of income on 30-9-2011 declaring total income at *Nil*.
- During the course of search action it was seen that three companies of the group viz. DIPL, DRPL and PRPL had shown a total amount of Rs. 325.23 crores as 'advance against property', from three Jain group of companies namely AFPL, ACPL and APL. On the basis of the information in the possession of the department, directors of these three companies were confronted with the fact that the above three companies were accommodation entry providing companies and had given the above amount by converting unaccounted cash after routing them through a series of transactions. Directors of the three companies DIPL, DRPL and PRPL namely SK, NKJ and SS in the statements recorded on oath under section 132(4) accepted that they were not in a position to explain the receipts of above amount and hence came out with a voluntary disclosure of Rs. 325.23 to be their unaccounted income for the assessment year 2011-12. However, since in the return of income the assessee-company did not declare the above said disclosed income, show cause notice in respect of credit into the account of the assessee company was issued.
- The Assessing Officer observed that during the various searches conducted and evidence collected, it was found that these were entry providing Companies used as conduits for channeling of unaccounted money. In addition to the statements given by directors of DIPL, DRPL and PRVL, the perusal of documents seized from residential premises of Jain brothers revealed that SKJ and VJ had provided accommodation entries amounting to Rs. 341 crores to DIPL, DRPL and PRPL for financial year 2010-11 from Jain group of companies. Thus, rejecting the various explanations by assessee, the Assessing Officer made additions under section 68 in case of all three companies DIPL, DRPL and PRPL.

- On appeal, the Commissioner (Appeals) upheld the action of the Assessing Officer.
- On appeal to the Tribunal:

Held

- From a perusal of the orders of the authorities below as well as arguments advanced by both the sides, it is found that no search under section 132 was conducted in the case of PRPL and DRPL. However, a search under section 132 was conducted in the case of DIPL. It is further found that the Assessing Officer has recorded satisfaction under section 153C in the case of DRPL and PRPL on 27-7-2012.
- Since the satisfaction was recorded on 27-7-2012, therefore, deemed date of search in the case of other person for computing the period of six years is 27-7-2012 and the six assessment years immediately preceding the assessment year relevant to previous year in which such search is conducted in assessment years 2006-07 to 2012-13. However, it is an admitted fact that no such notice under section 153C was issued by the Assessing Officer in the above two cases for the impugned assessment years and the revenue also fairly admitted the same. It is a fact that the Assessing Officer mentioned in the body of the assessment order that the same has been passed under section 153C/143(3). However, the Assessing Officer has not assumed jurisdiction under section 153C as per the copies of order sheet entries filed during the course of hearing and the revenue also confirmed that no notice under section 153C has been issued by the Assessing Officer in the above two cases. As per the requirement of the proceedings under Income-tax Act, the assessment proceeding has to be done as per section 153C in case of the searched party. But the Assessing Officer choose to follow procedure under section 143(3), yet while conducting the proceedings under the said section chooses to use the material which was found during search with the third party without confronting the same to the present assessees. This is not permissible as per the provisions of the Income-tax Act, 1961. The contention of the revenue that Principle of natural justice is a flexible concept is not permissible. The statute has to be strictly followed and the revenue cannot ignore the procedure given under section 143(2) or section 153A/153C. If the submissions made by the revenue that the Assessing Officer has rightly issued notice under section 143(2) dated 13-9-2012 is admitted then how the Assessing Officer has used the material which was found during the search in this particular assessment year 2011-12. Section 143(2) and section 153C are not only governing the procedure to be followed by the Assessing Officer but there is an obligation upon the Assessing Officer to properly fulfil the provisions of the Income-tax Act. Section 143(2) notice is given when the returns are furnished under section 139 or in response to notice under sub-section 1 of section 142 when the assessee has not stated the income properly. Section 153C begins with *non obstante* clause that notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, the Assessing Officer will issue notice as per provisions of section 153A. The intention of the parliament for separate sections for issuing notice under section 143(2) and section 153A is specifically different and falls in particular

circumstances mentioned in those particular sections. It cannot be interlocated or inter related. Clearly, here the Assessing Officer was *prima facie* of the opinion that there was a search in the premises of BPTP Group. But instead of the searched material whether belong to the assessee or not which is in doubt cannot be simply taken in proceedings under section 143(2) by the Assessing Officer. The Assessing Officer cannot take the benefit of both the sections. It has to be specifically mentioned in the assessment order why he is invoking that particular section because each section has its own procedure and if there is a procedure which has to be followed the same cannot be ignored by the Assessing Officer. All the sections to Income-tax Act has given its own formats and whenever necessary they have given specific sections in that particular section and why the other section has to be taken in cognizance while interpreting that particular section. Thus, the legal ground of the assessee that Assessing Officer as well as the Commissioner (Appeals) has not carried out proper proceedings against the assessee by invoking section 143(2) in case of PRPL and DRPL sustains to the test of legal scrutiny. The revenue relied upon various Supreme Court and High Court judgments. The legal principle in all these judgments does not give the right to the revenue to over look the sections or misinterpret the section as per the convenience of the department. In fact, all the Supreme Court as well as the High Court judgments have rather reiterated each and every factual aspect of each case and after that have come to the conclusion whether that particular section in the particular case has been properly followed or not. The decision is not only based on the legal principle but how the legal principle has to be applied to the factual aspect of each case has been taken care of by the Apex Court and the High Court.

- The year for which the impugned assessment order has been passed under section 143(3) is for assessment year 2011-12. This year falls within the period of six years when counted from the date of recording of satisfaction note under section 153/153C which is deemed date of search. The Act has been amended recently by the Finance Act, 2017 with prospective effect *i.e.* from assessment year 2018-19. Thus, the period is same now only for the searched parties as well as the other person as per the amended provisions of the said section. In view of the above, the assessment completed under section 143(3) is invalid.
- So far as the argument of the revenue that although no notice under section 153C has been issued but the assessment has been completed under section 153C/143(3) and therefore, the error is curable under section 292B is concerned, the same cannot be read to confer the jurisdiction on the Assessing Officer where none exists. The said section, only protects return of income, assessment, notice, summons or other proceedings from any mistake in such return of income, assessment notices, summons or other proceedings provided the same are in-substance and in-effect are in conformity with the intent or purposes of the Act *i.e.* section 292B cannot save an order not passed in accordance with the provisions of the Act. From the perusal of the order-sheet entries, copies of which were filed during the course of hearing also it is found that no notice under section 153C has been issued for the period under consideration. Since the assessment order has not been passed in

conformity with the provisions of the law, the same is liable to be quashed since such assessment is palpably and patently illegal.

- The Delhi High Court in a series of decisions relied on by the assessee has held that additions cannot be made in proceedings under section 153C in absence of any incriminating material.
- Further, it is noticed that the Apex Court in the case of *CIT* v *Sinhagad Technical Education Society* [2017] 84 taxmann.com 290 has held that section 153C can be invoked only when incriminating materials assessment year-wise are recorded in satisfaction note which is missing here. Therefore, the proceedings drawn under section 143(3) as against section 153C are invalid for want of any incriminating material found for the impugned assessment year.
- In view of the above, the additional grounds raised by the assessee in the case of PRPL and DRPL are accepted.
- Now, coming to DIPL, it is found from the material available on record that there is brazen violation of principles of natural justice inasmuch as neither the statement of SKJ recorded at the time of search nor his cross-examination was provided to the assessee by both the lower authorities despite specific and repeated requests made by the assessee in this regard. The Supreme Court in the case of *Andaman Timber Industries* v. *CCE* [2015] 62 taxmann.com 3 has held that not giving opportunity of cross-examination makes the entire proceedings invalid and nullity.
- It is further found from the records that the assessee has received advance from sale of land which has duly been recorded in the audited financial account of the assessee as well as the payee company. Further, the said advance has been claimed as refund by the payee company since arbitration proceedings between the assessee and the payee company are going on which has not been disputed by the revenue. Although the payee company was assessed to tax under the same Assessing Officer, however, no enquiry worth name has been carried out by the Assessing Officer. Further the said amount has been received through banking channel and all entries in this regard are filed by the assessee. A perusal of the record shows that the assessee has filed the evidences such as confirmed copy of accounts, copy of income-tax return, details of PAN and complete set of audited accounts. Further, the case of the revenue rests upon finding of the search action in the case of one SKJ where some alleged incriminating material was found doubting the assessee's transactions coupled with the recording of satisfaction of Directors of the assessee-company under section 132(4). However, so far as the seized materials are concerned, the same were not found during the assessee's own search action and were found from SKJ's independent search. The procedure prescribed under section 153C has not been followed in the instant case. It is found from a perusal of the record that on such search documents found from the premises of SKJ neither the statement of SKJ was brought on record nor the said documents are independently corroborated. This is more so when assessee's extensive search operation has not yielded any incriminating material. The provisions of section 292C creates presumption only to the person from whose possession the said documents are found and therefore, the same will not be applicable *qua* the assessee.

- As far as the statements under section 132(4) are concerned, which are heavily relied on by the revenue, the same are bereft of any admission of any undisclosed income on the basis of any incriminating material found from the assessee's own search. There is no corroboration of the statement recorded under section 132(4) by any independent corroborative material.
- Further, since arbitration proceedings are still going on therefore, there is no accrual of income pending litigation so as to bring the amount to tax.
- In the instant case both the Assessing Officer and the Commissioner (Appeals) are looking for proof beyond doubt which is not possible and they are basing their decision on an element of suspicion. It has been held in various decisions that presumptions and surmises, however strong may be, cannot be the basis for any addition. In view of above discussion, the Commissioner (Appeals) was not justified in confirming the addition made by the Assessing Officer. Therefore, the order of the Commissioner (Appeals) is set aside and the Assessing Officer is directed to delete the addition made in the hands of DIPL. The grounds raised by the assessee are accordingly allowed.
- In the result, all the three appeals filed by the respective assessees are allowed.