

Acit and Another Vs. M/S. True Zone Buildwell Pvt. Ltd. and Another

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Court : Income Tax Appellate Tribunal ITAT Delhi

Decided On : Jan-04-2013

Judge : The Honourable R.P. Tolani, Judicial Member & the Honourable Mr. B.C. Meena, Accountant Member

Appeal No. : ITA Nos. 1694 & 2092/Del./2012, CO No. 247/Del/2012

Appellant : Acit and Another

Respondent : M/S. True Zone Buildwell Pvt. Ltd. and Another

Judgement :

B.C. Meena, Accountant Member

1. The revenue has filed ITA No.1694/Del/2012 and the assessee has preferred Cross Objection No.247/Del/2012 against this appeal. The assessee has also filed ITA No.2092/Del/2012 on certain issues against the order of CIT (A) dated 31.01.2012. The grounds of appeal taken in these three matters are as under:-

"1. The order of Ld. CIT(A) is not correct in law and facts.

2. On the facts and in the circumstances of the case, the Ld CIT(A) has erred in deleting the addition of Rs.89,51,418/- (Rs.47,23,372/- in respect of M/s Omway Builders Pvt. Ltd., Rs.33,27,337/- in respect of M/s Unison Estate Pvt. Ltd., RS.8,72,659/- in respect of M/s Vardhman Associates Pvt. Ltd and Rs.28,050/- in respect of Shree Ganesh Estate) out of the total addition of Rs.95,50,548/- made

by the Assessing officer in respect of disallowance of commission by admitting additional evidence in contravention of rule 46A of Income Tax Rules, 1962.

3. On the facts and in the circumstances of the case, the Ld CIT(A) has erred in law as well as in facts in deleting the disallowance of interest of Rs.23,37,215/- made by the assessing officer as the advances given by the assessee was utilized for non-business purpose by admitting additional evidence in contravention of rule 46A of Income Tax Rules, 1962 even though the assessee did not furnish information to the assessing officer during the course of assessment proceedings.

4. On the facts and in the circumstances of the case, the Ld CIT(A) has erred in law as well as in facts in deleting the addition of Rs.54,51,00,877/- made by the Assessing officer u/s 68 of I.T. Act, 1961 in respect of unexplained share capital, share premium, share application money, unsecured loans and sundry creditors.

5. On the facts and in the circumstances of the case, the Ld CIT(A) has erred in holding that the assessment order passed by the AO u/s 144 of I.T. Act, 1961 is a nullity in view of the provisions of section 153 A of I.T. Act, 1961.

6. The order of Ld CIT(A) is perverse in law and on facts.

7. The appellant craves leave to add, amend any/all the grounds of appeal before or during the course of hearing of the appeal."

"1. That the Ld AO has erred in law as well as on facts in raising Ground No.2 on admitting additional evidence:

a) Because the evidence relied upon by the CIT(A) was amount of the seized material already in possession of the AO and not fresh evidence

b) Because AO has erred in appraising part evidence for making disallowance, ignoring the other seized material already in possession without raising any query on the doubts in his minds.

c) Because Rule 46A is applicable only admission of additional evidence not produced before the AO but not on the evidence in possession of the AO.

2. That the Ld. AO has also erred in law as well as on facts in raising ground no.-3 on admission of additional evidence of 46A:

a) Because CIT(A) has not admitted any additional evidence which was not examined or was in possession of the AO.

b) Because analysis of interest free funds was out of the material already in possession of the AO and out of amount of books of accounts examined by him. c) Because there was no fresh evidence furnished but analysis of the funds was prepared from the entries of receipts already made in the books of the accounts examined by the AO and the material placed before him.

d) Because AO made the disallowance without appraising the details and evidence in his possession and without raising any query in his mind after analysis was made by him.

3. The respondent craves leave for addition, modification, alteration, amendment of any of the cross objection.

"1. Whether on the facts and circumstances of the case, the Ld. CIT(A)-XXXI is correct in upholding the assessment framed outside the search material and after the change of opinion?

2. That on the facts and circumstance of the case, the Ld. CIT(A)-XXXI erred in confirming the addition of Rs.5,99,130/- being the amount of out of books commission paid by the assessee company u/ s 69C of the Income Tax Act, 1961.

3. The assessee craves for the addition, modification and deletion of the grounds of appeal."

2. A search and seizure operation was carried out u/s 132 of the Income-tax Act, 1961 along with other group cases on 31.07.2008. The search was also carried out at the residence of the Director, Shri Rakesh Kumar Garg where certain documents relating to the assessee were found and seized.

3. Ground Nos.1, 6 and 7 of revenue's appeal (ITA No.1694/Del/2012), ground no.3 of cross objection and ground no.3 of assessee's appeal (ITA

No.2092/Del/2012) are general in nature and do not require any adjudication, hence the same are dismissed.

4. First of all, we will consider the issue raised in assessee's appeal in the ground no.1. The issue involved in this ground is upholding the assessment framed by the Assessing Officer. The assessee's contention is that the assessment was framed on the basis of outside the search material and change of opinion.

5. We have heard both the sides on the issue. We have upheld the assessment on the basis of similar facts and circumstances in assessee's own case in ITA No.2091/Del/2012 for Assessment Year 2006-07 vide order dated 31.12.2012. The relevant para of the said order is reproduced as under:-

"6. We have considered rival submissions on the issue and has gone through the material on record and relevant pages of the paper book. In our considered view, there was a seized material found at the residence of the Director which has to be considered for making the assessment u/s 153A in the case of assessee company and on the basis of such seized material as far as it relates to the undisclosed income of the assessee the addition is required to be made. It is not the material, whether the seized material was found at the premises of the assessee or at the residence of the Director. The company is represented through its Directors, therefore, material found at the residence of the Director is relevant and has to be considered for making the assessments u/s 153A. As far as the scope of the assessment is concerned, we hold that wherever the issues have been considered u/s 143(3) and the assessment has been concluded prior to the initiation of the search the scope of assessment remains limited to the search material and other issues not considered at the time of making the assessment u/s 143(3) of the Act. Considering the totality of the facts and circumstances, we are unable to agree with the contention of the assessee that assessment u/s 153A has been made on the basis of outside the search material and after the change of opinion."

Moreover, in this year, the assessment was made u/s 144 of the Income-tax Act, 1961 on 09.12.2009. The same was held invalid as there was a search operation at the premises of the assessee on 31.07.2008. In view of the provisions of section 153A, the pending assessments abate. The order passed u/s 144 was against the

law. Considering all the relevant facts, we dismiss this ground of assessee's appeal.

6. Ground No.2 of assessee's appeal is against sustaining the addition of Rs.5,99,130/- being the commission paid u/s 69C of the Income-tax Act, 1961. The CIT (A) granted the part relief. Revenue has also taken ground no.2 in its appeal against deleting part addition. The revenue has also taken a ground against admitting additional evidence in contravention of Rule 46A of Income-tax Rules, 1962. The assessee has also taken ground no.1 in its cross objection for stating that no fresh evidences were filed before CIT (A) and all material was available to Assessing Officer in search material. The revenue's plea that CIT (A) has admitted any additional evidence in contravention of Rule 46A while assessee objected it on the ground that all seized material was available to Assessing Officer. On this issue, we find that the evidences relied upon by the CIT (A) were also available in seized material which was in the possession of the Assessing Officer. Thus, there was no fresh evidence filed before the CIT (A) which could be considered for violation of Rule 46A of Income-tax Rules. Further we also hold that Assessing Officer has not appreciated the seized material under his possession, rather ignored the seized material which was under his possession. The Assessing Officer has also not raised any query on these issues. Therefore, in our considered view, there was no contravention of Rule 46A of the Income-tax Rules, 1962. This plea of revenue stands dismissed.

7. On the other aspect of deletion / sustaining of addition, we have heard both the sides. Brief facts of this issue are as under:-

Following bills were found at the time of search at the residence of Shri Rakesh Kumar Garg on 31.07.2008 :-

DETAIL OF BILLS FOUND AT THE TIME OF SEARCH AT THE RESIDENCE OF SH. RAKESH KUMAR GARG ON 31-7-2008				
Period 1.4.2006 - 31.3.2007				PARTY A-1
S.NO	Annexure no/PAGE	DATE	NAME OF THE PARTY	AMOUNT

1	A-1/42	31.10.2006	OMWAY BUILDERS (P) LTD.	5885444
2	A-1/44	25.10.2006	UNISON ESTATE PRIVATE LTD.	2011340
3	A-1/44	20.10.2006	UNISON ESTATE PRIVATE LTD.	323251
4	A-2/5	30.8.2006	SHREE GANESHA ESTATES	28050
5	A-2/69	20.9.2006	VARDHMAN ASSOCIATES (P) LTD.	766038
6	A-2/70	20.9.2006	VARDHMAN ASSOCIATES (P) LTD.	682500
7	A-1/36	15.1.2007	UNISON ESTATE PRIVATE LTD	1015997
			TOTAL	10712620

CIT (A) granted part relief by holding as under:-

5.3 I have carefully considered the submission, perused the order of assessment and evidence on record. The dispute, as raised by the appellant, pertains to the addition of Rs.95,50,548/- made by the A.O. on account of commission paid out of books u/s 69C of the. Income Tax Act. As per the AO, amount paid for commission during the year is less than the amount of bills of commission seized by the department at the time of search and therefore an addition of difference amount was made by the AO. In contention to that the AR has submitted detailed explanation party wise and also submitted the reconciliation for the difference amount. After considering the submissions made and documents submitted, I am of the considered opinion that an addition of Rs.5,75,879 is to be retained against Rs.14,48,538/- of Vardhaman Associates Pvt. Ltd and Rs.23,251/- against Rs.33,50,588/- of Unison Estates Pvt Ltd. In the case of M/s Unison Estates Pvt Ltd the amount of Rs.20,11,340/- is finally settled for 10,15,997/- as evident from the seized records itself and the payment of this amount has been shown in the books. However from the bill of Rs.323,251 of the same party, the payment in the books is shown at Rs.3,00,000 thus the difference of Rs.23251/- is liable to be

confirmed. Further, an addition of Rs.28,050 of Shree Ganesh Estate has been found to be unwarranted as reflected in the books of account, thus deleted. In relation to commission of Rs.58,85,444/- of M/s Omway Builders Pvt. Ltd it was submitted that same has been settled in the subsequent year for Rs.27,55,688 as per annexure A- 2/6 of party A-1 at serial no.6 of page no.3 of the Assessment order 2008- 09 and an amount of Rs.22,65,146 has been booked and paid by the appellant in his books of account of F.Y 2007-2008 relevant to A.Y 2008- 2009 and Rs.2,92,500 was outstanding as per the same seized document supra, therefore, on comprehension of the submission of the AR, an addition of Rs.1,98,042 (Rs.27,55,688 - Rs.22,65,146 - Rs.2,92,500) if any out of Rs.58,85,444/- shall be considered in the order of A.Y. 2008-09. The ground raised by the appellant is thus partly allowed."

7.1 The similar issue was also involved in Assessment Year 2006-07 where also both the sides were in appeal. The relevant para of the order for Assessment Year 2006-07 dated 31.12.2012 is as under:-

"13. We have heard both the sides on the issue. These bills were raised by brokers were found during the search operation at the residence of Director of assessee. As per revenue, the payments of all these bills were not accounted for in the books of account as these cannot be reconciled with the books of account and only on this basis, the revenue presumed that these payments have been made out of undisclosed source. We have perused the seized material and the relevant provisions of section 69C of the Act. This seized material relates to certain correspondence by which the brokers have demanded their commission. As per these correspondences, the rate of commission asked was varying from 4-6%. There is no document referred by the AO or by the CIT (A) or even before us by the revenue which could show that the rate of commission was in the range of 4-6%. Further the revenue has failed to confirm the contents of the correspondence with the brokers by way of verifying their books of account or recording the statement of concerned persons. The Assessing Officer has not made any enquiry in respect of correctness of the contents of the correspondence by the brokers. There is no evidence found with regard to the payment of these bills from any source of income. The assessee's claim that payments of

commission had been made by cheques and the necessary TDS were deducted had some force. In our considered view, no addition can be made merely on the basis of certain correspondence on the presumption when addition is to be made u/s 69C of the Income- tax Act while making the assessment u/s 153A of the Income- tax Act. No addition can be made under the scope of section 153A on presumption basis. The revenue has to bring certain corroborative evidence or supporting material by way of making investigation or enquiries. All the brokers were located in Delhi, however, the revenue has done nothing in this regard. Some of the brokers were even corporate assessees. Their records could have been easily verified. The seized material relied upon by the AO alone cannot be made a basis for driving adverse inference with regard to the undisclosed expenditure which can be added u/s 69 of the Income-tax Act. In our considered view, material relied upon by the AO for making the addition was merely a correspondence which alone cannot lead to the inference that assessee had incurred such expenditure. This cannot be made basis for addition made u/s 69 of the Income-tax Act while framing the assessment u/s 153A of the Income-tax Act, 1961. There is no evidence gathered by revenue from anywhere, which could establish a bit of the fact that assessee has paid anything more than whatever recorded in the books of account. Therefore, in our considered view, such addition cannot be sustained.

13.1 The revenue has also raised the issue of admitting additional evidence in contravention of Rule 46A of the Income- tax Rules. Our notice was brought to the relevant copies of the ledger account showing payments to various parties on which TDS was deducted. The confirmation of the account was also filed along with ledger account. These evidences were part of the assessment record and in our considered view, nothing new has been brought into notice of CIT(A). Therefore, there was no violation of Rule 46A of Income-tax Rules, 1962. These documents were filed before the Assessing Officer and this was not filed for the first time before the CIT (A). Therefore, the revenue's contention is not tenable.

13.2 We dismiss this ground of revenue's appeal and allow the assessee's ground of appeal."

7.2 We have considered rival submissions. We have also perused the order made by authorities below. We have also perused the paper book in this regard. We have also considered the issue raised in the cross objection regarding the violation of Rule 46A. As far as the issue raised in the revenue's appeal and cross objection of the assessee are concerned, we hold that the issue is covered by our decision in assessee's own case for Assessment Year 2006-07 which has been reproduced above. As far as the issue raised in assessee's appeal is concerned, we find that the CIT (A) has considered the reconciliation for the difference in the amount and the CIT (A) was justified in sustaining the addition of Rs.5,99,130/-. Therefore, we find no fault in the order of the CIT (A) on this issue. This ground of assessee's appeal stands dismissed.

8. In the ground no.3 of revenue's appeal, the issue relates to deleting the disallowance of interest of Rs.23,37,215/- out of the interest paid by the assessee. The revenue has also challenged the issue on account of admitting additional evidence by taking the shelter of Rule 46A of Income-tax Rules, 1962. The assessee has also taken ground no.2 in its cross objection against the issue raised in ground no.3 of revenue's appeal for contravention of Rule 46A of Income-tax Rules, 1962. We find that the documents/evidences on the basis of which the CIT (A) has granted the relief were available to Assessing Officer as the same were under his possession which has not been examined. The details of interest free funds were available before the Assessing Officer. Assessing Officer has not analyzed the same. In our considered view, CIT (A) has not admitted any fresh evidence as no fresh evidence was furnished. The analysis of interest free funds made available by the assessee was nothing but only the analysis of books of account which were examined by the Assessing Officer himself.

9. We have heard both the sides on this issue. We have also decided the issue by deciding the revenue's appeal in ITA No.1693/Del/2012 for Assessment Year 2006-07 vide order dated 31.12.2012 where we have held as under:-

"17.3 In ground no.5 of revenue's appeal, the issue is deletion of interest on loan to sister concerns. On this, we hold that the earlier assessment was completed u/s 143(3) of the Income-tax Act, 1961 and no such disallowance was made on this

issue. The issue was considered at that time by Assessing Officer and asked for details. There is no new evidence or incriminating document found and seized during the search operation which can make the Assessing Officer to form a belief that income has escaped assessment on this account. In such circumstances, in absence of any evidence of any sort, such disallowances shall be only on the basis of change in the opinion and the same is not permissible in law. Further, on merits also, the assessee was having sufficient and adequate non-interest bearing funds by way of share capital, reserves and advances received from the booking of the plots. The revenue has failed to establish any nexus between the borrowed funds and interest free advances given to sister concerns. In such circumstances, we find there was no infirmity in the order of CIT (A) and we sustain the same on this issue."

Being no change in the facts of the case, we dismiss this ground of revenue's appeal, we also allow the plea of the assessee that there was no contravention of Rule 46A of Income-tax Rules, 1962.

10. In the ground nos.4 and 5 of revenue's appeal, the issue is against the deletion of addition of Rs.54,51,00,877/- made by Assessing Officer u/s 68 of Income-tax Act, 1961 and holding order u/s 144 dated 09.12.2009 as null and void.

11. The Id. DR submitted that the addition was made while making the assessment u/s 144 of the Income-tax Act, 1961 where the assessee has not filed the details before the Assessing Officer. The addition was also made u/s 153A. He relied on the orders of the Assessing Officer.

12. The Id. AR submitted that the addition was made while making illegal assessment u/s 144 of the Act stating that evidences were not filed, hence Assessing Officer could not examine evidences. Assessee submitted all relevant documents before Assessing Officer during proceedings u/s 153A of the Act. The Assessing Officer has also ignored these evidences which were submitted during the assessment proceeding u/s 153A of the Income-tax Act, 1961. During the assessment proceedings u/s 153A, the Assessing Officer issued specific questionnaire where all details were called for. Assessee filed all details. This is evident from paper book. Material is placed in the paper book at pages 65 to 135

in respect of unsecured loans of Rs.51,16,780/- where PAN number, income-tax return, confirmation of accounts, bank statements and audited accounts of all four parties were submitted. Similarly, details of sundry creditors of Rs.37,97,44,080/- were also submitted. All these creditors were related or sister concerns of assessee. Copy of their PAN number, income-tax return, confirmation of accounts and audited accounts were filed. These details are available at pages 1317 to 295 of the paper book. Similarly, documents relating to share application money of Rs.81,55,000/- received from three parties were also filed. Copy of PAN number, income-tax return, confirmation of accounts, audited accounts and bank statements of these parties are available at pages 297 to 332 of the paper book. These parties from whom the share application money was received were also examined at the time of making the assessment for the Assessment Year 2006-07 u/s 143(3) of the Income-tax Act, 1961. All these confirmations are available at pages 333 to 345 of the paper book. He also pleaded that all companies who have invested money in the assessee company are group companies whose assessment is also being made by the same Assessing Officer as all cases of the group are centralized. The assessment of these group companies have been made after examination of the books of accounts and no addition has been made. The Id. AR submitted that the Assessing Officer raised questionnaires which have been duly replied by the assessee. Subsequently, queries raised by the Assessing Officer were also replied to the satisfaction of the Assessing Officer. The Assessing Officer has not found any fault in these details. The Assessing Officer has conveniently ignored the details submitted before him during the assessment proceedings u/s 153A and made a huge addition without any basis. He further submitted that CIT (A) has quashed the order made u/s 144 in assessee's appeal no.170/09-10 and 133/10 and the revenue has not filed any appeal against that order. The Assessing Officer has not raised any further query during the assessment proceedings. All the parties were assessed by the same Assessing Officer. All the details were available before him. No additional evidences were filed before the CIT (A). No fresh material filed before the CIT (A). In such circumstances, the CIT (A) has rightly deleted the addition and he pleaded to sustain the same.

13. We have heard both the sides on this issue. The facts of the case show that search and seizure operation was carried out on 31.07.2008. The return for the income was filed by the assessee on 27.03.2008 which was selected for scrutiny and notice u/s 143(2) was issued on 23.09.2008. As per the provisions of section 153A, the pending assessments abate wherever the search operation takes place. The Assessing Officer without giving any cognizance to the search operation made an assessment u/s 144 of the Income-tax Act, 1961 and made an addition of Rs.54,41,00,877/- by holding that assessee has not furnished details. Its source is not explained with documentary evidence/confirmation. While making the assessment u/s 153A/143(3) of Income-tax Act, 1961, the same addition has been made by Assessing Officer and the relevant para of the order read as under:-

"3. It is gathered that in this case original assessment was completed u/ 144 of the Act as the assessee failed to comply with the notices issued during that proceedings. For the reasons mentioned in the as order dated 9.12.2009, an addition of R.54,51,00,877/- was made u/s 68 of the Act. Thus, the original assessment was completed at a taxable income of Rs.54,75,67,118/-. It is also gathered that an appeal against this order is pending before CIT (A), therefore, for the reasons mentioned in that order, the same addition is being retained while completing assessment u/s 153A/143(3) of the Act."

The CIT (A) has granted the relief by holding as under:-

"7.6 I have carefully considered the submissions, perused the order of assessment and, evidence on record. The dispute, as raised by the appellant, pertains to the additions made by the AO on account of section 68 of the Income Tax Act. After analyzing the submissions made by the AR of the appellant, I am of the considered opinion that AO has completed the assessment u/ s 144 on 09/12/2009 at Rs.54,51,00,877/ - which is after the date of the search initiated (i.e. 31.07.2008) on the appellant by the Income tax department. The order passed by the AO u/s 144 is thus a nullity in the light of provisions of section 153A of the Income Tax Act. This view has been endorsed in the case of Abhay Kumar Shroff vs. CIT (2007) 290 ITR 114, 123 Jharkhand. Further, the same addition affirmed and retained by the A.O. of CC-12 u/s 153A without going into the merits of the

addition u/s 144 by ITO ward 16(4) is not sustainable. The assessment which is held as void cannot be made basis of subsequent assessment by the AO, CC-12, I am unable to understand why the A.O. of CC-12 preferred to borrow the addition u/s 144 for Rs.54,51,00,877/- when he was seized of the matter and completing a search assessment under section 153A. The A.O. of CC- 12 rather than analyzing the papers submitted before him for the identity, genuineness and creditworthiness retained the additions of previous A.O. which was completed after search and without jurisdiction. Further, while framing the assessment of the group companies appearing as investors and creditors to the appellant company, the A.O. has not given an adverse finding as regard to their identity, creditworthiness and genuineness of the transaction. The same A.O. has assessed these group companies under 153A/153C. Therefore, the additions made by the A.O. while importing addition u/s 144 in the assessment u/s 153A cannot pass muster the judicial scrutiny. The department has used its long arm of search and seizure and there is no justification to retain assessment u/s 144 for want of details. Thus the ground no.4 of appeal no.333/10-11 and ground no.1 of appeal no.170/09-10 of the appellant are allowed."

14. We have perused the orders of the authorities below on this issue. We have considered the relevant material to the issue. We have heard both the sides on the issue. After hearing we hold that the order u/s 144 was passed by the Assessing Officer for non-compliance of notice u/s 143(2) and 142. The order was made ex-parte. There was a change in the address of the assessee from Delhi to Calcutta in view of the order of the Company Law Board dated 26.10.2007. Thus, there was no service of notice on the assessee. Assessing Officer passed ex-parte order u/s 144 of Income-tax Act, 1961. There was a search operation prior to making the assessment u/s 144 of the Act, therefore, the order passed u/s 144 was null and void in view of the provisions of section 153A of the Income-tax Act, 1961. Further while making the assessment u/s 143(3) read with section 153A of the Act, the Assessing Officer has simply added the amount in the total income of the assessee by writing that income assessed as per order u/s 144 dated 09.12.2009 made by ITO, Ward 16(4). Since the assessment framed u/s 144 itself was void and illegal, additions made on that basis itself cannot be sustained. Further the assessee has submitted necessary details like PAN number, Income-tax Return,

Bank accounts, confirmations, balance sheets of all the relevant persons but the Assessing Officer has ignored the same. The persons from whom the share application money, share capital and share premium including the loans taken and the creditors belonging to the same group companies, the same Assessing Officer is the Assessing Officer of these persons also. The necessary evidence, confirmations, bank accounts, etc. were available with the Assessing Officer to verify the genuineness of the transactions. The Assessing Officer has not taken any cognizance of these documents. The Assessing Officer has blindly applied the provisions of section 68 for making huge additions as per ex-parte order wherein all the outstanding balances were added to the income of the assessee. Therefore, in our considered view, the CIT (A) has rightly deleted the addition and we sustain the same.

15. In the result, the appeal of the revenue is dismissed, appeal of the assessee is partly allowed and the cross objection filed by the assessee is allowed.

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