

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'एच', मुंबई ।
IN THE INCOME TAX APPELLATE TRIBUNAL "H", BENCH MUMBAI
BEFORE SHRI R.C.SHARMA, AM
&
SHRI C.N.PRASAD, JM

आयकर अपील सं./ITA No.926 to 931/Mum/2013
(निर्धारण वर्ष / Assessment Year : 2002-03 to 2007-08)

HiKlass Moving Picture Pvt. Ltd., 607/3, Navjivan Society, Lamingaton Road, Mumbai Central, Mumbai-400008	Vs.	ACIT, Cir-6(3), Mumbai
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACH 1582 K		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

निर्धारिती की ओर से /Assessee by : Shri Bhupendra Shah
राजस्व की ओर से /Revenue by : Shri Rahul Raman
सुनवाई की तारीख / Date of Hearing : **30/08/2016**
घोषणा की तारीख/Date of Pronouncement **30/09/2016**

आदेश / O R D E R

PER BENCH:

These are the appeals filed by the assessee against the order of CIT(A), Mumbai, for the assessment years 2002-03 to 2007-08, in the matter of order passed u/s.143(3) r.w.s.153C of I.T.Act.

2. Common grounds have been raised in all the years under consideration.

3. Rival contentions have been heard and record perused. Facts in brief are that there was a search u/s.132 in the Raisoni-Sancheti group of cases. As a part of the said group, the director of assessee-company Shri Chaitanya Kochar was also covered under the search conducted. During the course of the search undertaken, it was found that the assessee-company was a paper company used by the Raisoni-Sancheti group as a

conduit for bringing unaccounted income of the group into its regular books by way of share capital and share premium. The AO issued notice u/s.153C to the assessee on 15-12-2009 and 7-12-2010 for A.Y.2002-03 to 2007-08 commencing the proceedings u/s.153C of the I.T.Act. In the assessment framed u/s.153C r.w.s.143(3), the AO made addition in the assessment year 2005-06 amounting to Rs.56,70,000/- on account of share premium. However, no additions were made in any of other years covered under the search.

4. By the impugned order, CIT(A) confirmed the action of the AO, against which assessee is in further appeal before us and has raised following grounds :-

1) Learned AO erred in making assessment U/s 143(3) rws 153C. Assessment U/s 143(3) can be made only when the Return of Income has been made by the assessee. If assessee has not filed Return of Income then assessing officer can make an assessment 'of the total income to the best of his judgment U/s 144. Thus when no return of income is filed by the assessee then no assessment can be done U/s 143(3). Learned AO erred in not considering this comprehensive scheme of assessment and wrong in passing order U/s 143(3) even when no return of Income and no explanations etc are filed by the Assessee.

2) Learned AO erred in passing assessment order U/s 143(3) rws 153 C without getting approval from Joint Commissioner of Income Tax as prescribed U/s 153 D. As per section 153 D No order of Assessment or reassessment shall be passed by an assessing officer below-the rank of Joint Commissioner in respect of each assessment year referred to in clause (b) of [sub section (1) of section 153A] of the assessment year referred to in clause (b) of sub section (1) of section 153 B, except with the prior approval of the Joint Commissioner. It is mandatory to take such approval and also to mention it in the body of assessment order itself. The learned CIT appeals also erred. to held that approval to re open the case had already be sought and got by the AO from Addl.CIT,Rg-6(3) on 17-03-2009 when it was proposed that the case should be assessed U/s 147 r.w.s.148 of the Act. Therefore the contention of the appellant that there was no approval available with the AO before making said assessment does not hold ground". Actually the approval is taken by I.T.0.6(3)(2) from Addl.CIT is only to issue

notice U/s 148 dated 20-03-2009 as required U/s 148 . Learned CIT Appeals was wrong in not admitting that approval to issue' notice U/s 148 taken by I.T.O.6(3)(2) has nothing to do with approval as required U/s'153 D before passing the order of assessment by ACIT 6(3) on 31-12-2010.

3) Learned AO erred in passing assessment order U/s 143(3) without any service of notice U/s 153 C, 143(2) and 142(1). Learned CIT appeal erred in not holding the assessment order passed by AO without service of any notice U/s 153C or U/s 143(2) or 142(1) as illegal. Statement of facts filed by appellant before CIT Appeals very clearly mentions that the impugned assessment order is passed without service of any notice U/s 153 C or 143(2) or 142(1) and hence bad in law and null and void and assessee clearly mentioned that the only communication received by the assessee was a telephone call at Directors Mobile No.9822224177 on 23-12-2010 from ACIT 6(3) Shri Alok Singh stating that proceedings under section 153 C are initiated against appellant. Learned CIT Appeals also admitted in her order that Statement of Facts filed by appellant was never objected by AO irrespective of ITNS 51 issued and served on him by CIT Appeals on 2-05-2011.

4) Learned CIT Appeals erred in giving benefit of doubt to the AO instead of giving it to Appellant- who is ready to make statement on oath about non service of any notice U/s 153C etc. Had the notice U/s 153 C dated 15-12-2009 been served on the assessee it must be in the case record' called by CIT Appeals .CIT Appeals does not found any such notice dated 15-12-2009 in the case record called by her neither AO denied the statement of fact made by assessee about non service of notice U/s 153 C etc. In the case record called CIT Appeals found notice dated 7-12 2010 has been served on some V. Jain who is neither the Director nor the principal officer nor the employee of the Company and fact is known to department. CIT appeals erred in not considering that as per procedure prescribed, service of the notice can be said to be valid only if it is served on principal officer of the Company. Normally notice U/s 153 C gives 30 days time period to file return of income but in this case assessment order was said to be passed within 13 days of notice said to be issued on 7-12-2010 and never served. ;

5) CIT appeals erred in not considering the fact that if notice U/s 153 C was served on 15-12-2009, then no notice under the same section can be issued after a lapse of one year on 7-12-2010 Evan assuming that' notice said to be served on 15-12-2009 was not complied by the appellant. the available remedy is to start proceeding for non compliance of notice U/s 153 C dated 15-12-2009 ,but no such proceedings were initiated and no reminder was issued during entire period' of 12 months to appellant to comply to the notice dt. 15-12-2009 . A new notice under same section 153 C was said to be issued on 7-12-2010 and assessment completed within 23 days of issue of said notice which is a period even short to period of 30 days normally allowed to file return of Income U/s 153 C.

6) Learned AO erred in initiating proceedings U/s 153 C without any receipt of satisfaction report" from the AO of person searched. Proceedings U/s 153 can be initiated only when the AO 'of the person searched C.Kochar is satisfied that any money bullion etc belongs to appellant and hand over the money bullion etc to the AO of the appellant along with his satisfaction report. learned CIT Appeals erred in holding that "Here it is to be considered that at the point of time of recording his satisfaction and sending across the information to the AO of the appellant Company, the Dy.CIT CC 2(3),Nagpur was the AO for Mr. C. Kochar by virtue of jurisdiction conferred upon him by the order passed on 7-03-2008 bY,CIT-11 Nagpur even though Mr. C. Kochar Challenged the said Jurisdiction before the Hon'ble Bombay High Court." Assessee filed. copy of order of Honourable Bombay High Court quashing the order U/s 127 passed by CIT 11 Nagpur dated 7-03-2008 and their Honour also quashed the assessment orders against shri C. Kochar being passed without jurisdiction by Dy. CIT Central Circle2(3) Nagpur. Learned AO and CIT Appeals failed to understand that by virtue of order of Hon'ble Bombay High Court quashing order U/s 127 dated 7-3-2008 Jurisdiction of person searched never vest in AO at Central Circle Nagpur for a single' day but is for all the period vest only with Income Tax Officer, Wardha: Thus satisfaction of the Dy.CIT CC 2(3) Nagpur and forwarding of document by him to the' AO of appellant is of no value as regards provisions of section 153 C are concerned.

7) Learned AO and learned CIT Appeals erred in not considering the fact that assessment was made without fallowing the principals laid down by judgements various courts. Honable Supreme Court in Manish Maheshwari V Asstt.CIT (2007) 289 ITR 341 held that recording of satisfaction is must. Honable Delhi High Court (2010) 321 ITR 485 in CIT Vs. Anupam sweets also ,held that recording of satisfaction by the AO, having jurisdiction over :he searched person is mandatory. Hon.Delhi High Court in ITA 582/2008-CIT Vs. Radhey Shyam Bansal also held that the recording. of satisfaction by assessing officer of the searched person is a condition precedent. Thus Learned CIT erred in to hold that recording of satisfaction is not required.

8) Learned CIT Appeals erred in considering that by recording the reasons the AO of appellant (instead of the satisfaction of the AO of the person searched C.Kochar) has taken cognizance of the facts of the case in its totality and proceed to take action as per the right section under the income tax act. Receipt of information or document from any AO other than AO of person- searched may give valid ground to initiate proceedings u/s 148 but in no case gives ground to initiate proceedings U/s 153 C as per provisions of that section and various judgments' pronounced by Hon'ble Apex Court and various High Courts.

9) Learned AO and CIT Appeals erred in not fallowing the provisions of section 153 C Satisfaction must be recorded by the AO of person searched that any undisclosed income belongs to any

person other than person searched. In this case AO of assessee received information from Central Circle Nagpur that " these investments will have to added substantively in the hands of the Raisoni/Sancheti group of assessee in the relevant assessment years . The protective' additions may be made in the hands of your assessee". Thus AO of the appellant received information with a clear satisfaction of AO of central circle Nagpur hat income does not belong to the appellant but belongs to the assessee of AO at Nagpur and he is making substantive additions in hands of his assessee at Nagpur which AO at Nagpur have done by making substantive additions in the hands of shri C Kochar by assessment order dated 23-1- 2009.Learned AO erred to understand that AO of the person searched is satisfied that the income belongs to person searched and not to the appellant and thus AO of appellant thus not get validity to start proceedings U/s 153 C, because there is no satisfaction that income belongs' to appellant by the AO of person searched.

10) Learned AO erred in making additions in the hand of assessee even though the AD of person searched (Mr. CKochar) informed him to make only protective assessment . Learned CIT Appeals though observed that" A protective assessment is made to ensure that same income does not get taxed twice a different hands," erred in not considering that it was already been added substantively in the hands of person searched Mr. C. Kochar by order U/s 143(3) r.w.s. 153A by AO Central Circle Nagpur on 23-12-2009. So question of adding same again in the' hands of assessee does not arise irrespective of the letter of the AO of person searched that substantive additions are made in the hands of person searched Mr. C Kochar and AO of the appellant is only required to make protective additions.

11) learned CIT Appeals erred in not considering the fact that assessee was regularly assessed to ITO 6(3)(2) Mumbai and his case was transferred to ACIT 6(3) without any communication of the' order to the assessee. As per order of CIT Appeals , case of the assessee stood transferred from ITO 6(3)(2) to ACIT 6(3) by order dated 23/07/2010 of the CIT 6 Mumbai in exercise of powers conferred by the CBDT by notification no.267 of 2001 dated 17-09-2001. No such notification is available to the assessee at the sight of Department. The order dated 23-07-2010 was never served on the assessee. It is said during course of hearing by CIT Appeals that by notification nO.267 of 2001 dated 17-09-2001, no assessment u/s 153 A can be done by officer below the rank of ACIT and hence the case of assessee is validly transferred by order dated 23-07-2010 but copy of said order was not given and even not shown when demanded during course of appeal hearing by the appellant. The Section 153 A has been inserted from June 1 2003. Hence there cannot be a notification dated 17-09-2001 stating that no assessment U/s 153 A can be done by any officer below the Rank of ACIT. Thus it is clear that the reason for transferring case of assessee from ITO 6(3)(2) does not exists. Learned CIT Appeals erred in non considering submission of the assessee that in case of

transfer of case in the same city, the opportunity of hearing in section 127(1) and (2) has been dispensed with, but other statutory formalities are to be complied with as held by Hon High Court of Calcutta -WP No.1229 of 2009 CIT appeals erred' in not considering the findings of Hon High Court of Bombay that non communication of reason is a serious infirmity which renders the order invalid in WP no,5)14 of 2009 in Smt. Kiranbala Kochar Vs, Dy.CIT C.C.2(3) Nagpur. Learned CIT appeals erred in not considering the fact that reason for transfer of assessee case U/s 127 that no order U/s 153A can be made by AO below the rank of ACIT as per notification 267 of 2001 is absolutely wrong and hence order transferring case of assessee U/s 127 is invalid. Non Communication of the order U/s 127 and non communication of reason and invalid reason for transfer U/s 127 also render it illegal.

12) Learned CIT Appeals erred in mentioning that Assessee has neither responded to queries raised by the AO in notice U/s 153 C. The Standard form of notice U/s 153 C does not contains any query but it requires filing of Return of Income within a stipulated period (normally of 3C) days Jas. stated in that notice, Since no such notice was served on the assessee question of filing return in response to notice u/s.153C does not arise.

13) The learned CIT Appeals erred in not considering the submission filed by assessee that assessment U/s 153 C is time barred. The AO of assessee received information from I\CIT C.C.1(1) Nagpur AND further received a letter dated 19-09-2008 from Dy. CIT Central Circle2(3) Nagpur on the basis of this reason notice U/s 153 C of the Act was issued.(Page "2 para 3 of Assessment order for A.Y.2005-06).The Search Action u/s 132 on Mr. Chaitanya Kochar was completed on 8-09-2007 and thus as per provisions of section 153 B assessment U/s 153 C was to be completed before 30-12-2009.The order passed by AO of assessee is on 31-12-2010 and thus barred by time as per provisions of section 153B.

14) Learned CIT Appeals erred in not considering the fact that order of assessment was not even passed on 31-12-2010. It was served on the assessee on 15-03-2011. There was no record available to justify that order was passed and issued to the assessee on 31-12-2010. There is no reason for such a delayed service of order along with demand notice after a lapse of 75 days of passing of the order.

15) Learned AO erred in not considering that Appellant had fully disclosed with all necessary documents the receipt of Share application money during course of regular scrutiny assessment for A.Y.2005-06 by I.T.O.6(3)(2). Assessee during course of regular scrutiny assessment filed details of Share applicant there confirmation letters and full addresses, their PAN numbers Copy of Return of Income and Balance sheets and Bank Account statements of share applicant and these papers are always available in case record. Appellant also filed his Bank statement and reconciled the share money received with the Bank statements of-Share Applicants filed during course of Regular Assessment U/s

143(3). Assessee not only filed detailed Bank, statement of Share Applicant but had also filed the Bank statement from where these share applicants had received cheques. Thus assessee had not only given details of receipt of share. money but also filed details of source from where those share applicant had received money. Assessee had thus during original assessment not only proved the source of share money received by it but also proved the source of the source. I.T.O.6(3)(2) 'after" making detailed enquiries accepted the details of share money received by appellant during original scrutiny assessment proceedings. ITO 6(3)(2) in original assessment had accepted share money received but disallowed few expenses being pre operative expenses. Assessee filed appeal against this disallowance as pre operative expenses and lost before (IT Appeals and before Honourable Income Tax Tribunal Mumbai. Learned AO and (IT appeals erred in not considering that the original Scrutiny assessment had reached finality.

16) Learned AO erred to understand that since no document which was not filed and explained during original scrutiny assessment before ITO 6(3)(2) was seized during search operation and thus the items of regular assessment which had reached finality after order of CIT appeals and Hon'ble Income Tax tribunal cannot be added back in proceedings under section 153 C. There was no seizer of any new paper, statement or document not produced during Regular' assessment proceedings. Learned AO and (IT appeals erred in not admitting that section 153 C does not authorize de nova assessment. Additions must be confined to search material and cannot include items which are disclosed, questioned, explained, considered and proved in the original assessment proceedings.

5. It was argued by Id. AR that AO erred in passing assessment order u/s.143(3) rws 153C without obtaining prior approval of JCIT u/s.153D and hence bad in law. Since no approval is taken before passing the assessment order it was not mentioned in the body of assessment order. Our attention was also invited to application filed u/s.6 of the RTI Act on 9-4-13, 16-4-13, 22-5-13 and 28-5-13 asking for copy of proof of approval obtained u/s.153D for the assessment year 2002-03 to 07-08. However, no such approval was given. We found that in reply to the RTI application, department has only supplied copy of the order of Commissioner of Income Tax-6, Mumbai dated 23-7-2010 and no approval was obtained by

AO u/s.153D was supplied in reply to the RTI application. However, CIT(A) has treated approval to reopen the case u/s.147 r.w.s.148 to be the approval available to the AO for passing assessment u/s.153D.

6. It was contended by Id. AR that AO erred in passing assessment order u/s.143(3) rws 153C even though there was no satisfaction report as contemplated u/s.153-C and hence any proceedings u/s.153-C were rendered null and void. Reliance was placed on the decision of the Supreme Court in the case of Manish Maheshwari 289 ITR 341. Our attention was also invited to application dated 9-4-13, 16-4-13, filed u/s.6 of RTI Act to ACIT-6(3) asking for copy of documents received u/s.153C and the satisfaction recorded u/s.153C transferring the records to the AO of the assessee for all the years. We found that in reply to the RTI application the department has supplied copy of letter of assessee itself dated 23-12-10, however, no proof of any satisfaction having been recorded u/s.153C was supplied to the assessee nor produced before us during the course of hearing. We found that on a further enquiry through RTI the department has supplied copy of the correspondence between Central Circle Nagpur, reason for the reopening u/s.147, postal acknowledgement of letter sent to Central Circle Nagpur and copy of notice u/s.153C dated 14-12-09.

7. We found that the CIT appeals has mentioned in his order that it is not explicitly mentioned in section 153C that the satisfaction is to be recorded by their AO in writing.

8. We have considered rival contentions. The Hon'ble Supreme Court in the case of M/s Calcutta Knitwear in its detailed judgment in Civil Appeal No.3958 of 2014 dated 12.3.2014 (available in NJRS at 2014-LL-0312-5 I) has laid down that for the purpose of section 158BD of the Act recording of a satisfaction note is a prerequisite and the satisfaction note must be prepared by the AO before he transmits the record to the other AO who has jurisdiction over such other person u/s.158BD. The Hon'ble Court held that "the satisfaction note could be prepared at any of the following stages:

- (a) *at the time of or along with the initiation of proceedings against the searched person under section 158BC of the Act: or*
- (b) *in the course of the assessment proceedings under section 158BC of the Act; or*
- (e) *immediately after the assessment proceedings are completed under section 158BC of the Act of the searched person."*

Furthermore, CBDT vide Circular No.24/15 dated 31-12-15 have observed as under :-

Several High Courts have held that the provision of section 153C of the Act are substantially similar/pari-materia to the provisions of section 158BD of the Act and therefore, the above guideline of the Hon'ble SC, apply to proceeding u/s 153C of the IT Act, for the purposes of assessment of income of other than the searched person. This view has been accepted by CBDT.

4. The guidelines of the Hon'ble Supreme Court as referred to in para 2 above, with regard to recording of satisfaction note may be brought to the notice of all for strict compliance. It is further clarified that even if the AO of the searched person and the "other person" is one and the same then also he is required to record his satisfaction as has been held by the Courts.

5. In view of the above, filing of appeals on the issue of recording of satisfaction note should also be decided in the light of the above judgment. Accordingly, the Board hereby directs that pending litigation with regard to recording of satisfaction note under section 158BD/153C should be withdrawn/not pressed if it does not meet the guidelines laid down by the Apex Court."

9. In view of the above, recording of satisfaction before proceedings u/s.153C is mandatory, which is lacking in all these cases.

10. From the record we found that these appeals were filed on 04/02/2013 and the Bench has asked DR to produce copy of approval from Joint Commissioner of Income Tax as prescribed u/s 153D. The department was also asked to confirm as to whether u/s 153C notice or u/s 143(2) notice was issued. However, nothing came from the department. On 24/02/2016 hearing was adjourned at the request of the CIT DR and it was also mentioned that last opportunity was given to the department and cases were adjourned on 09/03/2016. Again on 09/03/2016 at the request of the CIT DR cases were adjourned to 18/04/2016 as last chance. Again on 09/05/2016 hearing was adjourned at the request of CIT DR. However, on 05/07/2016 following note sheet was written by the Bench.

“We find that on 09/03/2016 last opportunity was provided to the department to produce the relevant record / report. Thereafter this appeal was adjourned on 18/04/2016, 09/05/2016 and 12/05/2016. Today the Id. CIT DR states that the letter sent to Assessing Officer but he not responded in such situation the Id AO is directed appearance in person with record/report. Otherwise adverse view will be taken. Ld CIT DR is also directed to inform the Assessing Officer. Accordingly adjourned to 28/07/2016 as suggested by both side. Parties informed (ITA926 to 929/M/13 and ITA931/M/13)”

11. However, none of the evidence as asked by the Bench was supplied. Under these circumstances, we do not find any merit in the order passed under Section 153C without having approval from Joint Commissioner of Income Tax as prescribed u/s 153D. No evidence of any satisfaction have been recorded was brought to our notice. Even it was also not shown

whether any notice u/s 143 (2) was issued. Accordingly, we set aside the order passed by the lower authorities and the appeals of the assessee are allowed.

12. In the result, all appeals of the assessee are allowed.

Order pronounced in the open court on this 30/09/2016.

Sd/-

C.N.PRASAD

न्यायिक सदस्य / JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated 30/09/2016

प्र.कु.मि/pkm, नि.स/ PS

sd/-

R.C.SHARMA

लेखा सदस्य / ACCOUNTANT MEMBER

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A), Mumbai.
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार

(Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai