IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE SMC BENCH, INDORE

BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER

ITA No.655/Ind/2018
Assessment Year: 2010-11

Shri Abhishek Dhanotia FH-441, Scheme No.54, Vijay Nagar, Indore	**बनाम**/ Vs.	ITO-3(1) Indore
(Appellant)		(Revenue)
P.A. No.AJOPD1011H		

Appellant by	Shri Girish Agrawal & Nisha Lahoti, CAs
Respondent by	Shri Ashish Porwal, Sr. DR
Date of Hearing:	**07.07.2020**
Date of Pronouncement:	**09.09.2020**

आदेश / O R D E R

This appeal by the assessee is directed against order of the Commissioner of Income Tax Appeals [CIT(A)]-I, Indore dated 10.05.2018 pertaining to the assessment year 2010-11.

The assessee has raised following grounds of appeal:

1.In the facts and in the circumstances of the case, Ld. (IT(A)-I, Indore erred in sustaining the order passed by Ld. AO u/s

143(3) rws 147 of the Act which is contrary to the material on record and provisions of the Act, unjust and bad in law.

2.In the facts and in the circumstances of the case, Ld. (IT(A)-I, Indore erred in summarily disposing all the grounds from 02 to 05 taken together.

3.In the facts and in the circumstances of the case, Ld. (IT(A)-I, Indore erred in sustaining addition of Rs. 16,00,000 made by Ld. AD by placing reliance on the statement of a third party without bringing any positive material on record to corroborate the addition made.

4.In the facts and in the circumstances of the case, Ld. (IT(A)-I, Indore erred in holding that there are evidences in respect of on-money paid by the appellant.

5.In the facts and in the circumstances of the case, Ld. CIT(A)-I, Indore erred in not considering the specific request made before Ld. AD for providing an opportunity of cross-examination of Mr. Akshay Doshi on whose statement sole reliance was placed by Ld.AD to make addition of Rs. 16,00,000.

6.In the facts and in the circumstances of the case, Ld. CIT (A)-I, Indore erred in not considering the specific request made before Ld. AD for making available the copies of documents, statements and assessment orders in the case of M/s. Bhoomi Elegant and Mr. Akshay Doshi on the basis of which adverse view is taken.

7.In the facts and in the circumstances of the case, Ld. (IT(A)-I, Indore erred in sustaining the addition of Rs. 16,00,000 made by Ld. AD to the total income of the assessee against the purchase of flat for payment in cash by treating it as unexplained/undisclosed investment u/s 69 of the Act.

8.In the facts and in the circumstances of the case, Ld. (IT(A)-I, Indore erred in sustaining the levy of interest u/s 234A, 234B and 234(.

9.The appellant craves leave to add, amend, alter or otherwise raise any other ground of appeal.

2.The facts giving rise to the present appeal are that the case of the assessee was reopened on the ground that the information was received from the DCIT Central Circle 6(2), Mumbai that during the search and survey proceedings carried out on 05.10.2015 on M/s Ekta & Bhoomi Group several incriminating data of M/s Bhoomi Group was found which was related to cash transactions executed by the Bhoomi Group with different parties. The data in respect of cash transactions pertaining to Bhoomi, Group was found in digital form. The directors of M/s Bhoomi Group, in his statement recorded u/s 131 dated 28.12.2015 had admitted that the digital date found during the course of search demonstrated the cash transactions executed by Bhoomi Group which was not recorded in regular books of accounts. It was noticed that the assessee paid an amount of Rs.16,00,000/- in cash on 02.01.2010 for the purchase of Flat No. C/604 in project "Bhoomi Elegant" it was

established during the course of search proceedings that M/s. Bhoomi Elegant of Bhoomi Group had accepted on money of Rs.16,00,000/- from Shri Abhishek Dhanotiya the assessee herein in respect of the deal done on 08.01.2010. The sale consideration was Rs. 24,59,000/- as per sale agreement whereas the total sale consideration was paid of Rs.40,59,000/- hence, the assessee had paid on money of Rs. 16,00,000/-. The Assessing Officer, therefore, reopened the assessment and issued a notice u/s 148 dated 31.03.2017 after recording the reasons and obtaining approval from the competent authority. Thereafter, the assessing officer framed assessment u/s 143(3) r.w.s. 147 thereby the assessing officer made an addition of Rs.16,00,000/- in the return filed by the assessee.

3.Assessee aggrieved by this action of the assessing officer preferred an appeal before the Ld. CIT(A) who sustained the addition and appeal of the assessee was dismissed.

4. Aggrieved against the action of the Ld. CIT(A) the assessee is in appeal before this Tribunal.

5. Ground No.1 and 2 are against the legality of the reopening of the case and other grounds 3 to 6 against the sustaining of addition. The Ld. counsel for the assessee submitted that the assessing officer was not justified in invoking the provisions of section 147 of the Act. He submitted that the alleged material/information was gathered during the course of search, therefore, provisions of section 153 would be applicable but not of such u/s 147 of the Act. Further, he contended that the material was collected at the data of the assessee. The statement of 3rd party was recorded on the basis of such statements, addition was made by the assessing officer. It is contrary to

the settled principle of law. Ld. counsel further reiterated the submission as made in the written submissions. For the sake of clarity written submission are reproduced as under:

> *A. Apropos ground no.1 - In the facts and circumstances of the case, Ld. CIT(A)-1, Indore erred in sustaining the order passed by Ld. AO u/s 143(3) rws 147 of the act which is contrary to the material on record and provisions of the Act, unjust and bad in law.*
>
> 1. *In the instant case, the basis of initiation of proceedings is the information received from the DCIT Central Circle -6(2), Mumbai during the search and survey proceedings carried out on 05.10.2015 on M/s. Ekta & Bhoomi Group. Several incriminating data of M/s Bhoomi Group was found which is related to cash transactions executed by the Bhoomi Group with different parties. The data in respect of cash transactions pertaining to Bhoomi Group was found in digital form. The director of Bhoomi Group, Mr. Akshay Doshi in his post search statement recorded u/s 131 of the Act on 28.12.2015 admitted that digital data found during the course of their search represents cash transactions executed by Bhoomi Group which have not been recorded in regular books of accounts.*
>
> 2. *Provisions of section 153C read -*
>
> *"Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, where the Assessing Officer is satisfied……." Section 153C starts with a non obstante clause that is 'Notwithstanding'. This non obstante clause has an overriding effect on the provisions of the other sections mentioned after this word. Thus, it is clear that, owing to the non obstante clause, provisions of section 139, 147, 148, 149, 151 and 153 are not*

applicable to the assessments covered by the provisions of section 153C.

3. *CBDT Circular No. 7 of 2003 dated 05.09.2003 - Finance Act, 2003 Explanatory notes on provisions relating to Direct Taxes - Para 65.9 - "The new section 153C provides that where an Assessing Officer is satisfied that any money, bullion, jewellery or other valuable article or thing or books of account or documents seized or requisitioned belong or belongs to a person other than the person referred to in section 153A, then the books of account, or documents or assets seized or requisitioned shall be handed over to the Assessing Officer having jurisdiction over such other person and that Assessing Officer shall proceed against such other person and issue such other person notice and assess or reassess income of such other person in accordance with the provisions of section 153A." [emphasis supplied]*

4. *From the above mentioned circular, it is evident that provisions of section 153C are applicable in specific circumstances when any money, bullion, jewellery or other valuable article or thing or books of account or documents seized or requisitioned belong or belongs to a person other than the searched person.*

5. *Provisions of section 153C are specific, separate and independent provisions applicable only in the circumstances where the material is seized or requisitioned during the conduct of search u/s 132 of the Act.*

In the instant case, addition has been made on the basis of material seized in the search conducted in Ekta and Bhoomi Group. Thus, the special provisions of section 153C which are separate and independent provisions are applicable in the instant case and have an overriding effect on the other provisions of the Act. Detailed submission was made before the Ld. AO explaining the aspects of 'general provisions' vis-à-vis 'special provisions' which he failed to consider. [PB 62 – 64]

6. *Assessee submits that Ld. AO had no jurisdiction to issue notice under the general provisions of section 148 to re-open the assessment which is solely based on material seized during the search conducted at the third party premises. The matter is governed by the provisions of section 153C as against the general provisions of section 147.*

7. *Accordingly, the impugned assessment is a void ab ignition, bad in law and illegal, liable to be quashed.*

8. *Reliance is placed on the decision of Hon'ble Amritsar Bench of ITAT in the case of Arun Kumar Kapoor - [2011] 16 taxmann.com 373 - order pronounced on 21.06.2011 - Para 8 - "On a perusal of the above provisions, it would be clear that the provisions of s. 153C of the Act were applicable, which supersedes the applicability of provisions of ss. 147 and 148 of the Act. As we have already noted hereinabove that the documents were seized during the search under s. 132 of the Act and the same were sent to the assessee's AO at Amritsar by the officer at Delhi in our view, the learned CIT(A) has correctly observed that only the provision in which any assessment could be made against the assessee in the IT Act was s. 153C r/w s. 153A of the Act. It is also apparent from the record that the officer at Delhi has mentioned in his letter that the necessary action may be taken as per law under s. 153C/148 of the Act. Hence, notice issued under s. 148 of the Act and proceedings under s. 147 of the Act by the AO are illegal and void ab initio. In view of the provisions of s. 153C of the Act, s. 147/148 stands ousted. In the instant case, the procedure laid down under s. 153C has not been followed by the AO and, therefore, assessment has become invalid. We also observe that the CIT(A) was justified in following the ratio laid down by the Hon'ble Supreme Court in the case of Manish Maheshwari v. Asstt. CIT [2007] 289 ITR 341 / 159 Taxman 258 wherein it has been held that if the procedure laid down in s. 158BD is not followed, block assessment proceedings would be illegal. The CIT(A) has correctly observed that the provisions of s. 153C are exactly*

similar to the provisions of s. 158BD of the Act in block assessment proceedings. ….." [emphasis supplied]

This decision has been referred by Hon'ble Pune Bench of ITAT in the case of Radheyshyam B Agrawal [2015] 61 taxmann.com 50 and by Hon'ble Mumbai Bench of ITAT in the case of Skylark Build [2018] 97 taxmann.com 682.

In the instant case, the basis of proceedings is certain documents which were seized during the search in the case of M/s Ekta and Bhoomi Group. The only provisions in which the assessment could have been made was section 153C subject to fulfilment of its conditions. Assessee submits that the notice issued u/s 148 and the proceedings u/s 147 are illegal, void ab initio in view of the specific provisions envisaged u/s 153C.

9. *Before issuing notice u/s 153C certain conditions are to be satisfied which are as follows -*
a. Recording of satisfaction by AO of the searched person and by AO of other person
b. AO of other person has to apply his mind as to whether the assets or documents have a bearing on the total income of the other person.
c. Seized material should be incriminating.

In the instant case, the material seized in the search of third party is noted to be in digital form. It is not in the handwriting of the assessee. Further, it is noted from the Q.3 of the statement of Shri Akshay Doshi recorded post search u/s 131 that this seized material is from the laptop seized from the premises of one Smt. Vasumati Shah residing at a place different from that of Shri Akshay Doshi. It is nowhere specified as to what is the relation between Shri Akshay Doshi and Smt. Vasumati Shah.

10. *Search was conducted in Ekta and Bhoomi Group on 05.10.2015. Assessee apprehends that having missed the time limit for issuance of notice u/s 153C. Ld. AO resorted to proceedings u/s 148 to take the advantage of time permissible*

for the same. If so, such an approach is illegal, unwarranted, void ab initio and ought to be discouraged.

11. *In the instant case, above mentioned conditions for issue of notice u/s 153C are not satisfied. Such defects cannot be cured by virtue of provisions of section 292B. Reliance is placed on the decision of Hon'ble Apex Court in the case of Manish Maheshwari - [2007] 289 ITR 341 - order pronounced on 23.02.2007 wherein it is held that if procedure laid down in Section 158BD is not followed, the block assessment proceedings would be illegal.*

The provisions of section 153C are exactly similar to provisions of section 158BD. Thus, the decision of Hon'ble Apex Court mentioned supra is applicable mutatis mutandis to the provisions of section 153C.

12. *Considering the above facts, circumstances of the case, submissions made, documents on record and judicial precedents, assessee prays before your Honors that the impugned order passed u/s 143(3) rws 147 be quashed.*

Without prejudice to submissions above for Ground No. 01

B. Assessment completed u/s 143(3) rws 147 is without complying to the provisions envisaged thereunder

1. *Reasons recorded very categorically demonstrate that the proceedings u/s 147 have been initiated merely on the basis of information received from the DCIT Central Circle 6(2), Mumbai. There is no independent application of mind by the Ld. AO on the information so received which pertains to search conducted in some other group.*

2. *Ld. AO noted in Para 3.3 – "The statement of Akshay Doshi accepting the cash against the sale proceeds of the flat in addition to the value so recorded in the books of account and*

mentioned on the registered deed itself becomes a strong evidence to reopen the case." [emphasis supplied]

3. *Instant case was reopened on the basis of statement recorded u/s 131 of one Shri Akshay Doshi by DDIT(Inv.) Mumbai in the search case of M/s. Ekta & Bhoomi Group wherein he made certain assertions of accepting on-money of Rs. 16,00,000 from the assessee. [PB 52]*

4. *The post search statement made by Shri Akshay Doshi is an isolated statement and binding on him only. The statement on the basis of which proceedings in the instant case were initiated is vague in nature and needs to be cross-examined. [PB 50 - 55]*

5. *A specific request was made both before the Ld. AO and Ld. CIT(A) to provide an opportunity for cross-examination but never so provided. Ld. AO issued a summon u/s 131 to which reply was received from M/s. Bhoomi Elegant, Mumbai giving certain details and documents. This reply does not contain any detail relating to alleged cash transaction with the assessee though signatory to this letter of reply is Shri Akshay Doshi himself. This demonstrates contradiction in his averments in the post search statement with this letter as to alleged cash transaction with the assessee. [PB 07]*

6. *Assessee had purchased a flat from M/s. Bhoomi Elegant, Mumbai for a registered value of Rs. 24,59,000. A registered agreement is on record which was made available by the seller which mentions the correct and real consideration for the flat purchased for Rs. 24,59,000. Market value of the flat mentioned in the sale deed is Rs. 24,12,500. Importantly, Shri Akshay Doshi is a party to the registered sale deed whose assertions therein are contrary to his own statements made u/s 131. [PB 15 and 22]*

7. *Assessee is a software engineer and salary is the dominant source of his income. Details of his bank accounts*

with withdrawals for the past three years were placed on record before the Ld. AO which very evidently establishes that there was neither any occasion nor any source available with the assessee to pay such a huge amount of Rs. 16,00,000 in cash.

8. *In the reasons recorded for issue of notice u/s 148, Ld. AO states – "During the course of search proceedings, it was established that M/s. Bhoomi Elegant of Bhoomi Group has accepted on-money of Rs. 16,00,000/- from Shri Abhishek Dhanotiya in respect of deal done on 08/01/2010; the agreement value was 24,59,000/- whereas the deal value was of Rs. 40,59,000/- thus assessee paid on money of Rs. 16,00,000/- that was not disclosed by the assessee." [PB 05]*

a. From the above reasons as recorded, it is evident that without making any enquiry or investigation at his own end, Ld. AO came to a conclusion about what was established in the search proceedings of M/s. Bhoomi Elegant of Bhoomi Group.

b. The agreement value noted by the Ld. AO is Rs. 24,59,000/- which is the registered value. Figure of Rs. 40,59,000 does not appear anywhere, even in the documents supplied by M/s. Bhoomi Elegant. The excel sheet on which reliance is placed for alleged payment of cash of Rs. 16,00,000 by the assessee also very categorically states agreement value at Rs. 24,59,000/- only. [PB 55]

c. Treatment of alleged acceptance of on-money by M/s. Bhoomi Elegant from the assessee has not been revealed for which assessment orders of M/s. Bhoomi Elegant and Shri Akshay Doshi are important documents and ought to have been verified as also made available to the assessee.

d. Ld. AO did not apply his mind independently on the information received from the DCIT Central Circle 6(2), Mumbai but mechanically proceeded to initiate the proceedings u/s 148. The reasons so recorded to arrive at a belief that income has

escaped assessment does not in any way reflect the application of mind by the Ld. AO. It is an approach adopted for making fishing and roving enquiries only.

Reliance is placed on the decision of Hon'ble Delhi ITAT in the case of ACIT v. Devesh Kumar ITA No. 2068/Del/2010 dated 31.10.2014 wherein Para 19 and Para 20 deals with similar issue as in the instant case.

e. There is no reference to any agreement or document or loose paper which bears the signatures of the assessee and the person on whose statement reliance is placed, which is found during the course of search conducted in the case of M/s. Bhoomi Group, Mumbai and which suggests that assessee has agreed to pay Rs. 16,00,000 in cash to the seller of the flat.

f. Without prejudice, it is also submitted that assessee being a salaried person, return filed by him does not require and also does not have any provision to make a disclosure of the investment made by him in the house property. Accordingly, there cannot be a case of undisclosed investment in the instant case. Interest on the housing loan availed for making investment in the impugned flat is claimed as a deduction in the return and has been allowed in the assessment.

g. Also, addition made u/s 69 by the Ld. AO is a deeming provision. To apply such a deeming provision, there must be, in the first instance, a transaction which is real and actual and which is not of the character of income. In the instant case, alleged cash payment of Rs. 16,00,000 by the assessee to the seller of the flat is purely based on surmises, conjectures and suspicion. Such a transaction cannot be characterized as an income by applying deeming provisions of the Act which are to be construed in the strictest sense.

9. *There is no occasion to issue notice u/s 148 which in fact tantamount to making fishing and roving enquires for what has been found in the search proceedings of some other group. It is*

a settled law that provisions of section 148 rws 147 are not meant for making enquires. There has to be a rational and intelligible nexus between the reasons which exists and the belief which is formed on such reasons.

Section 148 rws 147 necessarily postulates that before the AO is satisfied to act under the said provisions, he must put in writing as to why in his opinion or why he holds the belief that income has escaped assessment. 'Why' for holding such belief must be reflected from the record of reasons made by the AO. The reasons recorded by the AO must disclose by what process of reasoning he holds such a belief. Merely saying the income has escaped assessment does not confer jurisdiction on the AO to take action u/s 148 rws 147 of the Act. Reliance is placed on the decision of Hon'ble Gujarat High Court in the case of Birla VXL 217 ITR 1.

Action of the Ld. AO per se reflects that the matter required detailed investigation and further verification which at best could be categorized as AO having 'reasons to suspect' and not reasons to believe. Assumption of jurisdiction by the Ld. AO on the basis of reasons to suspect is invalid and the entire proceedings so undertaken with the sole object of making open ended enquiries is not sustainable and liable to be quashed.

Reliance is placed on the decisions of Hon'ble Jurisdictional High Court of Madhya Pradesh in the following decisions –

a. Arjun Singh [2000] 246 ITR 363 (MP)
b. Lokendra Singh Rathore [1985] 155 ITR 629 (MP)
c. Bombay Pharma Products [1999] 237 ITR 614 (MP)

10. *Without prejudice, the instant proceedings carried out without making available copies of documents, returns and computation of income for verifying the treatment of alleged cash of Rs. 16,00,000 and resulting assessment orders of M/s. Bhoomi Elegant, Shri Akshay Doshi and other relevant person is in gross violation of principles of natural justice.*

Assessee never had an opportunity to verify the assertions made by Shri Akshay Doshi nor the documents and records which formed the basis of instant proceedings. Statements recorded behind the back of the assessee and relied up on for taking an adverse view against the assessee has no evidentiary value since no opportunity of cross examining the said party has been given to the assessee.

11. *Assessee had purchased the flat for a consideration of Rs. 24,59,000. Registry was done at this value and guideline value as recorded in the registry is Rs. 24,12,500 which is less than the actual and real consideration. The sale consideration has been accepted by the Registering Authority and by the seller, amount for which have been paid through banking channel. Assessee had availed housing loan from State Bank of India and has claimed deduction for interest paid on housing loan which has been allowed in the assessment order. [PB 48]*

No document is found which establishes that cash has been paid by the assessee. Reply received from Shri Akshay Doshi against notice issued u/s 131 by the Ld. AO categorically states that agreement to sell the flat was made at the value stated in the registered document. There is no mention by him in the said reply about any 'on-money' paid by the assessee to him in cash for Rs. 16,00,000. There is no concrete proof / evidence / paper which establishes payment of Rs. 16,00,000 by in cash the assessee. [PB 07]

12. *It is submitted that the addition of Rs. 16,00,000 in the case of the assessee is based on some data found in digital form in excel sheets in laptop seized from the premises of Smt. Vasumati Shah (Vasumati V Mody) which contained data related to transactions executed by Bhoomi Group in cash and not recorded in regular books of accounts. [PB 51, Answer to Question No. 3]*

13. *It is submitted that it is open for AO to collect evidence from any source but if the assessee denies the information collected by the AO, the AO has to satisfy himself by making independent enquiry from source considered reliable by him and decide whether information passed on to him is true or not. It is a settled legal position that the entries found recorded in the books of account of the third party or statement recorded under section 132(4) or 131 of the Act of a third party are binding upon him in his own case only and the same cannot be foisted upon the other parties in the absence of sufficient corroboratory material. It is settled law that assessee cannot be penalized for hand written entries in the diary [digital record of entries in the instant case] maintained by third party unless any evidence is found against him. In support reliance is placed on following judgments:*

a) *Eagle Seeds & Biotech Ltd v. ACIT [2006] 6 ITJ 668 (Indore) -*

Held - "Statement of third party or any evidence found during search in case of third party not confronted to assessee. Statement of accountant of third person given to assessee and opportunity to cross examine given to assessee, is not of much relevance as he is not accountable or connected with the case."

b) *ITO v. R.L. Narang (Dr.) [2008] 174 Taxmann 96 (Chand.) -*

Held - "Assessee's income cannot be assessed on basis of statement of a third party, unless there is some material to corroborate that statement. Burden shifts on the Revenue to prove that assessee had deliberately suppressed his income".
Para 4. .....The mere fact that somebody made a statement, by itself, cannot be treated as having resulted in an irrebuttable presumption against the assessee. The burden of showing that the assessee had disclosed income is on the revenue and that burden cannot be said to have been discharged by merely referring to the statement of a third party in connection with the transaction. Therefore, such statement

cannot be made the sole foundation that the assessee had deliberately suppressed his income. Even otherwise, if the explanation of the assessee is not acceptable, the onus shifts to the revenue to prove the same with corroborating material. No specific infirmity had been pinpointed by the revenue in the impugned order, nor any adverse material had been brought on record by the Assessing Officer to substantiate his contention that the assessee had paid any underhand money, except the money which had been shown in the sale deed.

c) *Addl. CIT v. Lata Mngeshkar [1974] 97 ITR 696 (Bom) -*

In this case, the Income Tax Officer came across a sort of a ledger maintained by the firm known as Vasu Films of Madras containing certain entries, which had been seized by the Income Tax Authorities from the premises of that firm at Madras and relying on those entries additions were made. On appeal, Tribunal deleted the additions made which was confirmed by the High Court.

The Hon'ble High Court observed - "The evidence on which the income tax authorities relied were statements by two persons that they had paid money in "black" to the assessee and entries in books belonging to them regarding alleged payments to the assessee. The Tribunal examined the statements made by the two persons and found that the evidence tendered by them suffered from serious infirmities. It held that mere entries in the accounts regarding payments to the assessee was not sufficient as there was no guarantee that the entries were genuine. The Tribunal, therefore, held that there was no proof that the amounts in question represented income from undisclosed sources belonging to the assessee".

d) *Chiranji Lal Steel Rolling Mills v. CIT [1972[84 ITR 222 (P&H) -*

Held - "The copy of entries from the accounts of another firm supplied to the Income Tax Officer by the Sales tax department

was not legal and admissible evidence on which the Income tax Officer could act for imposing extra burden of income tax on the assessee when the original accounts were missing and could not be verified and when the assessee denied the entries therein."

e) *Dy. CIT v. Mahendra Ambalal Patel [2010] 40 DTR 243 (Guj) -*

Held - "Addition in the hands of the assessee having been made merely on the basis of a statement made by a third party without there being any corroborative evidence, the Tribunal was justified in deleting the addition particularly when the assessee was not allowed opportunity to cross examine the persons who made such a statement."

f) *Heirs & L.Rs of Late Laxman Bhai S. Patel v.CIT [2008] 327 ITR 290 (Guj) -*

Held - "The assessee's statement was recorded by the assessing officer and some discrepancies were pointed out but merely on the basis of such discrepancies, adverse presumptions could not be drawn against him. The Department had failed to establish any nexus between the promissory note and the amount said to have been given by the assessee to K. The Tribunal was not right in law in upholding the addition of Rs.8,78,358/- in the hands of the assessee."

g) *CIT v. Naresh Khattar (HUF) [2003] 261 ITR 664 (Del HC) -*
Held - "The addition in question was made only on the basis of the observations in the interim order passed by the Court in a civil suit between the three parties, including the assessee. The Tribunal was correct in holding that merely because counsel for the assessee made a statement in the civil court that the total investment in the properly was Rs.13 crores and odd, it would not be sufficient material to come to the conclusion that the said figure represented the actual investment. There had to be something more than that. The Tribunal's finding that the

Revenue had failed to prove that the total investment of the assessee was Rs. 13 crores was not perverse."

h) *Neena Syal v. ACIT [1999] 70 ITD 62 (Chand.) -*
Held - "In the instant case, even the seized document on the basis of which the impugned addition of Rs.4.83 lakhs had been made, had not been found at the residence of the assessee and the same had not been specifically confronted to the assessee before making the impugned addition. Further, in assessment of V addition of Rs.14.20 lacs found at his residence had been made without discussing the diary seized at his residence. Thus, the addition of Rs.4.83 lacs was not sustainable in the case of the assessee when the assessing officer had failed to comply with the basis conditions stipulated in section 69."

i) *Amarjit Singh Bakshi (HUF) [2003] 86 ITD 13 (DELHI) (TM) -*
Held – [Para 54] "……The entire addition rested on the seized document and no other material had been adverted to which would conclusively show that a huge amount of the magnitude mentioned in the seized document proceeded from one side to the other. In his own tax assessment, 'N' at one stage took the stand that the seized document was only a 'projection' or 'estimate' and nothing else."

14. *Accordingly, it is submitted that the inference drawn by Ld. AO is purely based on conjectures, surmises and suspicion and does not have sanction of law as held by Hon'ble Supreme Court in several cases as under –*

a. Dhirajlal Girdharilal v. CIT [1954] 26 ITR 736 (SC)
b. Dhakeswari Cotton Mills Ltd v. CIT [1954] 26 ITR 775 (SC)
c. Lalchand Bhagat Ambica Ram v. CIT [1959] 37 ITR 288 (SC)
d. Umacharan Shaw& Bros. v. CIT [1959] 37 ITR 271 (SC)
e. Omar Salay Mohamed Sait v. CIT [1959] 37 ITR 151 (SC)

15. *Attention is also invited to the judgment in the case of Central Bureau of Investigation v. V.C. Shukla & Others [1998] 3 SCC 410 (SC) wherein the Hon'ble Apex Court had considered the evidentiary value of any loose sheets or diary found with the party where search was conducted, which can be used against third party. Relevant observations of the Hon'ble Apex Court are as under:*

"From the above definitions of 'account' it is evident that if it has to be narrowly construed to mean a formal statement of transactions between two parties including debtor-creditor relation and arising out of contract, or some fiduciary relations undoubtedly the book MR 71/91 would not come within the purview of Section 34.."

"If no other evidence besides the accounts were given, however strongly those accounts may be supported by the probabilities, and however strong may be the evidence as to the honesty of those who kept them, such consideration could not alone with reference to s.34, Evidence Act, be the basis of a decree."

"From a combined reading of the above Sections it is manifest that an oral or documentary statement made by a party or his authorized agent, suggesting any inference as to any fact in issue or relevant fact may be proved against a party t the proceeding or his authorized agent as 'admission' but, apart from exceptional cases (as contained in Section 21), such a statement cannot be proved by or on their behalf".

16. *Further, relying on the decision of Hon'ble Supreme Court in the case of K P Varghese [1981] 131 ITR 597 (SC), assessee cannot be made to prove the negative or to do an impossible act. It was stated by the Hon'ble Apex Court in Para 13 – "……It is a well-settled rule of law that the onus of establishing that the conditions of taxability are fulfilled is always on the revenue and the second condition being as much a condition of taxability as the first, the burden lies on the revenue to show that there is understatement of the consideration and the second condition is fulfilled. Moreover, to throw the burden of showing that there is no under statement of the consideration on the assessee would be to cast an almost*

impossible burden upon him to establish a negative, namely, that he did not receive any consideration beyond that declared by him." [emphasis supplied]

Ld. AO has not brought any positive and cogent material on record to establish that cash of Rs. 16,00,000 has in fact and in reality moved from the hands of the assessee to M/s. Bhoomi Elegant or its associates.

17. *Thus, in spite of specific request made to Ld. AO to give an opportunity to cross examine Shri Akshay Doshi by the assessee and also to make available the documents, returns and computation of income and assessment orders to verify the treatment of Rs. 16,00,000, adverse inference has been drawn ignoring the principals of natural justice and section 34 of evidence Act. Accordingly, addition made based on some data found in digital form and assertion made by the person in his search proceedings is wholly unjustified, improper, bad in law.*

18. *Ld. CIT(A) also erred in not considering the submission of assessee and proceeded to sustain the addition made by Ld. AO u/s 69 of Rs. 16,00,000 as income from undisclosed source.*

19. *Assessee submits that even if the matter is set aside, the legal issue of applicability of provisions of section 153C as against the provisions of section 147 shall remain to be adjudicated.*

Considering the above facts, circumstances of the case, submissions made, documents on record and judicial precedents, addition made u/s 69 by treating Rs. 16,00,000 as income from undisclosed sources ought to be deleted."

6. Ld. D.R. opposed the submissions and supported the orders of authority below. In respect of objection regarding legality of reopening of assessment, he submitted that there is no legal impediment provided under the Act. The language of section 147 of the Act is clear there is no ambiguity so far the provision is concerned. As per this section there has to be some reason with the assessing officer that makes him to believe that any income chargeable to tax has escaped assessment for any assessment year. In the present case seller of the property admitted the fact of having received on money in excess of sale consideration recorded in the sale deed. Therefore, this reason was sufficient to believe that the assessee made unexplained investment in property. He submitted that non-granting of cross examination to the assessee is not fatal to assessment, it is only a procedural lapse.

7. I have heard the rival submissions, perused the materials available on records and gone through the orders of the authorities below. The objections against reopening of assessment and making additions are three fold; Firstly, the information which was with the assessing officer was gathered at the back of the assessee in a search proceeding. Secondly, the assessee was not granted cross examine and thirdly, the assessing officer ought to have proceeded u/s 153C of the Act. It is submitted on behalf of the assessee that the assessee had not given any on money to the assessee. It is only the statement made by third party in respect of its accounts for which the assessee could not be made liable. It is contended that the assessing officer has duly recorded the fact that search and survey proceedings was carried out on 05.10.2015 on M/s Ekta & Bhoomi Group. The directors of M/s Bhoomi Group, Mr. Akshay Doshi in his post search statement recorded u/s

131 of the Act dated 28.12.2015 has admitted that the digital data found during the course of search represent the cash transactions executed by M/s. Bhoomi Group which was not been recorded in regular books of accounts. It was further observed by the Assessing Officer that on the basis of seized data, it was noticed that the assessee paid an amount of Rs.16,00,000/- in cash on 02.01.2010 for the purchase of Flat No.C/604 in project "Bhoomi Elegant" undertaken by M/s Bhoomi Group. He submitted that the issue is squarely covered by the various decisions of the Coordinate Benches as well as division bench of this Tribunal and the judgment of the Hon'ble jurisdictional High Court. Reliance is placed on the decision of division Bench of the Tribunal rendered in the case of *ITO vs. Arun Kumar Kapoor, ITANo.147/ASR/2010 reported (2011) 16 taxmann.com 373 (Amritsar).* The Hon'ble Divisions Bench of this Tribunal in para 8 of its order held as under:

"*On a perusal of the above provisions, it would be clear that the provisions of section 153C of the Act were applicable, which supersedes the applicability of provisions of sections 147 and 148 of the Act. As we have already noted hereinabove that the documents were seized during the search under section 132 of the Act and the same was sent to the assessee's A.O. at Amritsar by the Officer at Delhi. In our view, the learned CIT(A) has correctly observed that only the provisions in which any assessment could be made against the assessee in the Income tax Act was section 153C read with section 153 of the Act. It is also apparent from the record that the Officer at Delhi has mentioned in his letter that the necessary action may be taken as per law under section 153C/148 of the Act. Hence, notice issued under section 148 of the Act and proceedings under section 147 of the Act by the AO are illegal and void ab initio. In view of the provisions of section 153C of the Act, section 147/148 stand ousted. In the instant case, the procedure laid down under section 153C has not been followed by the A.O. and, therefore, assessment has become invalid. We also observe that the CIT(A) was justified in following the ratio laid down by the Hon'ble Supreme Court in the case of Manish Maheshwari Vs. ACIT and another, reported in (2007) 289 ITR 341, wherein it has been held that if the procedure laid down in section 158BD is not followed, block assessment proceedings would be illegal. The CIT(A) has correctly observed that the provisions of section 153C are exactly similar to the provisions of section 158BD of the Act in block assessment proceedings. Thus, considering the entire facts and the circumstances of the present case, we hold that the CIT(A) was fully justified in quashing the reassessment order. We also do not find any merit in the submissions of the learned DR that during the course of search, it was found at premises of M/s.Today Homes & Infrastructure Pvt. Ltd. pertaining to M/s.P.R. Infrastructure Ltd. and not the assessee. In this regard, we may point out that the contention raised by the learned D.R. is factually incorrect and contrary to the available records of seized documents specifically mentioned in the assessment order dated 30-12-2008. In view of the above factual discussion, we do not find*

any merit and substance in the contention of the learned D.R. Therefore, we uphold the order of the CIT(A) and dismiss the ground Nos.1 to 4 of the appeal."

8. The reliance is placed on the decision of Coordinate Bench of this Tribunal in *ITANo. 6276/Del/2018 in the case of Saurashtra Color Tones Pvt. Ltd. vs. ITO* wherein it is held as under:

The above reasons for reopening of the assessment shows that during the course of search incriminating material pertaining to assessee-company were found and seized and that M/s. Blue Bell Finance Ltd., has made investment in assessee-company. The A.O. has specifically referred to the seized documents during the course of search as Annexures B & D and also attached various other documents found during the course of search to the assessment order. The Ld. D.R. also admitted that the aforesaid Annexures were found during the course of search in the case of Jain Group. Therefore, when incriminating documents were found during the course of search, the same have been used in the case of the assessee-company. The proper course the A.O. should have adopted is to proceed against the assessee-company under section 153C of the I.T. Act instead of recording reasons for reopening of the assessment under section 147/148 of the I.T. Act. The issues involved in the additional grounds are, therefore, covered by the Orders of the Division Bench of the ITAT, Delhi A-Bench in the cases of Shri Meer Hassan & Shri Ali Hassan, Dehradun (supra) and in the case of Shri Adarsh Agarwal, Delhi vs., ITO, Ward-61(1), New Delhi (supra). In view of the above, we are of the view that A.O. was not justified in initiating the re-assessment proceedings under section 147 of the I.T. Act, 1961. The A.O.

should have proceeded against the assessee under section 153C of the I.T. Act.

9. Similarly, the Division Bench in the case of *G. Koteswara Rao (2015) 64 taxmann.com 159* held as under:

17. Considering the facts and circumstances of the case and also applying the ratios of the above mentioned decisions, we are of the considered opinion that the Assessing Officer, has no jurisdiction to issue notice u/s 148 of the Act to reopen the assessments in respect of those six assessment years immediately preceding the assessment year in which search is conducted or requisition is made. The period under consideration falls within the exclusive domain of section 153A. In the instant case, since the assessment is made consequent to search in another case, the Assessing Officer is bound to issue notice u/s 153C and thereafter proceed to assess or reassess total income under section 153A of the Act. The Assessing Officer, instead of complying with the provisions of section 153C, proceeded with the reassessment under section 147/148 which is not applicable to search cases. Therefore, the impugned assessment order passed u/s 143(3), r.w.s.147 of the Income Tax Act, 1961 is illegal, arbitrary and without any jurisdiction. Hence the assessment order dated 31.12.2010 passed u/s 143(3) r.w.s. 147 is quashed."

10. Reliance is also placed on the decision of Hon'ble High Court of M.P. in the case of *Ramballabh Gupta vs. ACIT 288 ITR 347 (MP)*. The Hon'ble High court has held as under:

As I have observed supra, Section 148 being an independent section, powers exercised by AO cannot be curtailed if the

impugned notice otherwise satisfies the requirement of Section 148 ibid. In my opinion, the only fetter put on the powers of AO in taking recourse to Section 148 is that it cannot be issued in relation to those six assessment years which are defined in Section 153A ibid. This fetter is due to use of non obstante clause in Section 153A ibid. In all other cases and for all other assessment years, Section 148 can always be resorted to subject of course to condition that it must satisfy the requirement specified in Section 148 ibid.

11. In the light of ratio laid down by aforementioned binding precedents and respectfully following the ratio laid therein. I hold that the reopening of the assessment is contrary to the ratio decided by the aforesaid case laws. Moreover, the Revenue has not brought to my notice any other binding precedents to take a contrary view.

12. Now coming to the second objection of the assessee that the assessee was not provided cross examination. It is not in dispute that the information was gathered at the premises of the 3rd party addition is based upon the statement of the 3rd party. This fact is not rebutted by the revenue, therefore, in my considered view the assessee

ought to have been provided opportunity of cross examination. The Assessing Officer purely based his finding on the statement made by third party and data recovered from third party. In my view not providing opportunity of cross examination is *ex-facie* contrary to the principles of natural justice, therefore, on this ground also assessment so framed is against settled principles of law. In view of the above, I hereby quash the assessment order being contrary to judicial pronouncements. The AO is directed to delete the impugned addition.

13. The appeal filed by the assessee is allowed.

Order was pronounced in the open court on 09 .09.2020.

Sd/-
(KUL BHARAT)
JUDICIAL MEMBER

Indore; दिनांक Dated : 09/09/2020
Patel/PS

Copy to: Assessee/AO/Pr. CIT/ CIT (A)/ITAT (DR)/Guard file.

By order
Assistant Registrar, Indore