आयकर अपीलीय अधिकरण "वी" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH, MUMBAI

श्री महावीर सिंह,न्यायिक सदस्य
एवं
श्री एन. के. प्रधान , लेखा सदस्य के समक्ष।

BEFORE SHRI MAHAVIR SINGH, JM AND
SHRI N. K. PRADHAN, AM

आयकरअपीलसं./I.T.A. No.3613 & 3615/Mum/2015
(**निर्धारणवर्ष /** Assessment Year: 2008-09 & 2010-11)

Danish Merchant 9, Opriya, Dr. Peter Dias road, Bandra(W) Mumbai-400 050	बनाम/ Vs.	**Deputy Commissioner Of Income Tax Central Circle 25** IT Office, New Marine Lines Mumbai-400 020
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. **AFYPM-37292-R**		
(अपीलार्थी/**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

Assesseeby	:	Kirit S. Sanghvi, Ld. AR
Revenue by	:	Jacinta zimikVashai, (CIT,DR)

सुनवाईकीतारीख/ **Date of Hearing**	:	18/10/2017
घोषणाकीतारीख / **Date of Pronouncement**	:	25/10/2017

आदेश / O R D E R

Per Mahavir Singh (Judicial Member):-

These two appeals by assessee are arising out of the different orders of the Pr. Commissioner of Income Tax (OSD) (Appeals)-51 [in short PCIT], Mumbai in Appeal Nos. Pr.CIT (OSD) [h/c.CIT(A)-51/IT-55 & 27/2013-14] vide orders of even date 28/03/2015. Assessment for both years were framed by Deputy Commissioner of Income Tax, Central Circle-25, Mumbai for the Assessment Years 2008-09 & 2010-11 u/s.143(3) r.w.s 153C of the Income Tax Act, 1961 [hereinafter "the Act"] vide orders of even date 19/03/2013.

2. At the outset in regard to ITA No. 3613/Mum/2015 for AY 2008-09, Ld. Counsel for the Assessee Shri Kirit S Sanghvi raised the issue of jurisdiction assumed by the A.O. for making assessment u/s.143(3) r.w.s 153C of the Act by stating that there is no search material pertaining to the assessee found pursuant to a search u/s.132 of the Act on a third party. For this assessee has raised identically worded ground, the ground as raised in ITA.NO.3613/Mum/2015 for A.Y.2008-09 reads as under:

> *"<u>Addition/Disallowances ultra rives s.153C</u>*
>
> *The learned CIT(A) erred on facts and in law in confirming the following additions/disallowances without realizing that the assessment was made under s. 153C pursuant to a search operation under s.132 on a third party, and therefore, the additions/disallowances should have been made on the basis of material found in the course of search operations.*

Nature of Addition/ Disallowance	***Amount***	***Reference***
Expenses from Income from partnership	*69,889/-*	*Para 9 of Asstt.Order*
Expenses from Income from other sources	*93,146*	*Para 10 of Asstt.Order*
Income from sale of shares treated as Income from Business	*44,30,969*	*Para 8 of Asstt.Order*

3. Brief facts are that the assessee is director in ACE Housing & Construction Limited and partner in M/s. ACE Links, who are engaged in developing housing projects. A search u/s.132 of the Act was conducted on the group cases of Patel Engineering Limited on 16/12/2010. The A.O issued notice u/s153C of the Act dated 10/07/2012 for the A.Y.2008-09 and in response to the same, the assessee requested to treat the return of income filed on 19/11/2008 as returned filed in response to notice u/s.153C of the Act. The A.O framed assessment by making the additions in the nature of disallowances as mentioned in the ground above reproduced. The A.O noted from the accounts of the assessee filed along with the original return of income and brought to tax the income disclosed as long-term capital gains and short term capital gains as business income. Similarly, he also disallowed the expenses claimed against interest from partnership firm and against income from other sources by going through the computation of income filed by the assessee along with the original return of income. The CIT(A) also confirmed the action of the A.O.

4. In view of these facts, Ld. Counsel for the assessee demonstrated before us that for the A.Y.2008-09 assessee has filed return of income originally on 19/11/2008 and no notice u/s 143(2) of the Act was issued up to 30/11/2009 and no proceedings are pending against the assessee for the relevant assessment year. The alleged search on a third party was conducted on 16/12/2010 but there is no incriminating material or seized material relating to this assessee was found during search and even now there is no material linking to this assessment which forms basis for assessment u/s.153C of the Act. In view of these facts, it was argued that the assessment has not been abated and this is a case of non abated assessment. According to Ld. Counsel, the assessment framed u/s.153C of the Act without any search material or incriminating material, the assessment framed is bad in law and hence to be quashed.

5. When pointed out to Ld. CIT DR, she only relied on the orders of the Lower Authorities. Further, when a query was put to her, whether there is any incriminating material for framing assessment for the A.Y u/s.153C of the Act, she could not point out any incriminating material found during the course of search.

6. On hearing both the parties and on perusal of the orders of the Lower Authorities, we find that there is no whisper about any incriminating material basing on which the above stated additions were made. Once there is no incriminating material for framing the assessment for the relevant A.Y and assessment has not abated, the assessment framed u/s.153C read with section 143(3) of the Act is bad in law and hence quashed.

7. As we have decided the issue on legal ground and quashed the assessment, we need not to adjudicate the issues on merits because, these becomes academic in nature. Accordingly, this appeal of the assessee is allowed.

Coming to ITA.No.3615/Mum/2015 for A.Y.2010-11

8. At the outset, it is noted that the return of income originally was filed on 12/10/2010 for the A.Y. 2010-11 and search took place u/s.132 of the Act on group cases on 16/12/2010. Hence, the assessment has abated and the A.O can frame assessment under the provisions of section 143(3) of the Act. Accordingly, the assessment framed cannot be quashed on the jurisdictional issue.

9. We find that the A.O has made the following additions

Nature of Addition/ Disallowance	***Amount***	***Reference***
Income from House Property	*1,95,636/-*	*Para 6 of Asstt.Order*
Expenses from Income	*2,66,155/-*	*Para 8 of*

from partnership		*Asstt.Order*
Expenses from Income from other sources	*7,42,056/-*	*Para 9 of Asstt.Order*

The CIT (A) Confirmed the additions.

10. Now the assessee has made only one argument that the CIT(A) did not consider the arguments of the assessee and summarily rejected the explanation of the assessee by simply stating that, *"neither the said explanation were furnished by the AO nor any material /documents placed before him. The appellant is estopped from producing any evidence before the appellant authority that was not placed before the authorities below."* Similar is the findings for all the three grounds on merits. In view of the above, Ld. Counsel for the assessee only requested for remanding the matter back to the file of the CIT(A) for considering the entire submissions and explanations and also consider the evidences.

11. We have considered the plea of the assessee and accordingly set aside the order of CIT(A). We remand the matter back to the file of the CIT(A) for fresh adjudication after considering the submissions, explanations and evidences whatever is filed by the assessee. We direct the CIT(A) accordingly. The appeal of the assessee partly allowed for statistical purposes.

12. **In the result, the appeal No.3613/Mum/2015 for A.Y.2008-09 is allowed and appeal in ITA.No.3615/Mum/2015 for A.Y.2010-11 is allowed for statistical purposes.**

Order pronounced in the open court on 25-10-2017.

Sd/-
(N.K.Pradhan)
लेखासदस्य **/ Accountant Member**

Sd/-
(Mahavir Singh)
न्यायिकसदस्य **/ Judicial Member**

मुंबई Mumbai; दिनांकDated : 25 10.2017
Sr.PS:-Thirumalesh

<u>आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to</u> :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT– concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायकपंजीकार (Dy./Asstt.Registrar)

आयकरअपीलीयअधिकरण, मुंबई **/ ITAT, Mumbai**