

आयकर अपीलीय अधिकरण, " ए " खंडपीठ मुंबई
INCOME TAX APPELLATE TRIBUNAL, MUMBAI-"A", BENCH
 सर्वश्री राजेन्द्र, लेखा सदस्य एवं संजय गर्ग, न्यायिक सदस्य
Before S/Sh. Rajendra, Accountant Member & Sanjay Garg, Judicial Member
आयकर अपील (तलाशियां और अभिग्रहण)/IT(SS)A No.232/Mum/2006,
निर्धारण वर्ष/Block Period-14.01.97 to 13.09.01

The Asstt. CIT, Central Circle-24 & 26, 4 th Floor, Room No.465, Assessee Building, M.K. Road Mumbai-400 020.	Vs	M/s. Apoorva Caterers Flat No.2, Milan Building, Perin Nariman Street, Fort Mumbai-400 001. PAN:AABFA 7369 M
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(अपीलार्थी / Assessee)

(प्रत्यर्थी / Respondent)

C.O. No.49/Mum/2009

Arising out of IT(SS)A No.232/Mum/2006

M/s. Apoorva Caterers Mumbai-400 001.	Vs	The Asstt. CIT, Central Circle-24 & 26, Mumbai-400 020.
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(Cross Objector)

(प्रत्यर्थी / Respondent)

निर्धारिती ओर से/ Assessee by : Shri Deepak Tralshawala

राजस्व की ओर से/ Revenue by : Ms. S. Misra

सुनवाई की तारीख/ Date of Hearing : 14-09-2015

घोषणा की तारीख / Date of Pronouncement : 07-10-2015

आयकर अधिनियम, 1961 की धारा 254(1) के अन्तर्गत आदेश

Order u/s.254(1) of the Income-tax Act, 1961 (Act)

लेखा सदस्य राजेन्द्र के अनुसार PER RAJENDRA, AM-

Challenging the orders dt.24.05.2006 of CIT(A)-14, Mumbai, the Assessing Officer(AO) has filed following grounds of appeals:

1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) failed to appreciate that the assessee did not file return for AY. 1999-00 and 2000-01, even though the due dates for filing such returns of income had expired before the date of search i.e. 13.09.2001 and thereby erred in deleting the additions on account of net profit of Rs. 22,81,664/- and Rs. 11,49,245/- respectively estimated by the AO on the basis of seized papers as per provisions of section 158BB(1)(ca).
2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs. 81,773/- for A.Y. 99-00 on account of unpaid Sales tax without considering the provisions of Sec. 158BB(1)(ca).
3. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs. 3,11,725/- for A.Y. 2000-01 on account of unpaid Sales tax without considering the provision of Sec. 158BB(1)(ca).
4. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs. 1,83,176/- for AY. 2000-01 on account of profit from contract with Silverline Technology Ltd.
5. The appellant craves to leave to add, to amend and/or to alter any of the grounds of appeal, if need be.
6. The appellant, therefore, prays that on the grounds stated above, the order of the CIT(A), C-IV, Mumbai may be set aside and that of the Assessing Officer restored."

CO No. 49/Mum/2009

The assessee-firm has filed following grounds of appeal in the cross objection(CO) filed by it.

“On the facts and circumstances of the case and in law, the Learned Commissioner of Income Tax Central (Appeals) IV, Mumbai, erred in failing to consider that the assessment order u/s 158BB was non est and bad in law ab initio, as

i. No notice u/s 143(2) was issued by the Assessing Officer.

ii. No satisfaction~ was recorded before issuing notice u/s 15880-”

The Assessee craves leave to add, alter, modify or delete the above cross objections.”

The CO is accompanied by an application where it was stated that firm was dissolved on 9.9.1999,that no proceedings under the Act were pending against it, that on receipt of the notice of hearing of the appeal filed by the AO,the assessee came to know about the appeal filed by him,that there was delay in filing cross objections,that considering the above facts, same should be admitted.The application is accompanied by affidavit dated 16.7.2009 of Devdas A.Alva, one of the partners of the firm. In the affidavit, the partner has reiterated the facts that are part of the application filed for admitting the cross objection. The Tribunal had directed the departmental representative(DR)to produce the satisfaction note for initiating proceedings u/s. 158BD of the Act and copy of the notice issued u/s. 143(2) of the Act. The AO vide his letter dt.02.07.13 forwarded the documents to the office of the DR who later on furnished the same before the Tribunal.

Brief facts:

2.A search and seizure action was carried out at the residence of Devdas A.Alva on 13.9.2001.During the action,a loose paper file marked A-1was seized.Pages No 1-17 contained a copy of the catering contract entered into by Apporva caterers and Ooters Club and Page No. 26 to 28 were the bills raised by the assessee on M/s. Silver Line technologies Ltd. for Rs. 10.63 lacs.A simultaneous search was also carried out in the case of M/s. Lalit Refreshments. Statements of partners were recorded u/s.131 of the Act on 24.10.01 and 8.11.2001by the DDIT(Inv.).As per the AO,in the statements,the partners admitted undisclosed income of Rs.70.00 lacs approx. The assessee had filed return of income for AY 97-98 sand 98-99 prior to the date of search.However,it had not filed its return for AY.1999-00.The AO issued notice u/s. 158BD of the Act and directed the assessee to fiurnish block return within 16 days.It filed return on 23.8.2005 disclosing loss of Rs.9.84 lacs.The AO directed the assessee to furnish explanation regarding seized papers and to produce books of account with supporting evidences.After considering the submission of the assessee,the AO assessed the undisclosed income for the block period as under :

Sr.No.	Nature of Income	Asstt. Year	Undisclosed Income(Rs.)
1.	Net profit	1999-00	22,81,864
2.	Net profit	2000-01	11,49,245
3.	BST	1999-2000	81,773
4.	Sales tax	2000-02	3,11,725
5.	GP on Silver Line contract	2000-01	4,25,593
	TOTAL		42,50,200

The assessee agitated the matter before the First Appellate Authority(FAA).Before him,the assessee stated that the order passed by the AO was illegal,unjustified and bad in law,that notice u/s.158BD was served after two years,that no satisfaction was recorded by the AO passing on search material that undisclosed income belonged to any other person.It made elaborate submissions about the additions made by the AO for various AY.s.

After considering the block assessment order and the submissions of the assessee the FAA upheld that notice u/s.158BD was issued in time,that estimated additions made by the AO

were not based on any documentary evidences, that the GP and NP shown by the assessee was bound to be lower than the other assessing engaged in general catering business, that the DDIT(Inv.) had asked question about the seized papers to the non-working partners and not to the managing partner i.e. Devdas Alva, that it was not proved that the seized material belonged to the assessee though the AO had made such an allegation, that that no papers were found for the AY.2000-01, that AO had mechanically applied same rate of GP and NP of AT.1999-00, that the addition made by him for the AY.1999-00 (Rs.22.81 lakhs) and AY.2001-02 (Rs.11.49 lakhs) were not justified, that the AO, while finalising the block-assessment, had not considered the expenses incurred by the assessee. However he upheld the action of the AO in rejecting the books of accounts u/s.145(1) of the Act. He further observed that block assessment had to be made on the basis of material found during the search action only, that imputing of profit on estimate basis had to be restricted to part of the block period for which material seized was found. He reworked the results of books of accounts for the block period.

4. Before taking up the appeal filed by the AO, we would like to deal with the issues raised by the assessee in its CO. The first issue is about recording of satisfaction for initiating proceedings u/s.158BD of the Act. The Authorised Representative (AR) stated that in there was no material on record to show the AO's satisfaction that documents seized from the searched person indicated that income belonging to the assessee was not offered for taxation. Departmental Representative (DR) supported the order of the FAA.

5. We have heard the rival submissions and perused the material before us. We find that the assessee had raised the issue before the FAA also. We are of the opinion that a bare reading of the provisions of section 158BD shows that for taking action under the said section, the AO is required to be satisfied that the books of account or other documents or assets found in the search showed undisclosed income of the person other than one against whom the search was conducted and that the satisfaction is required to be preceded by the investigation and the investigation is not required to be preceded by the satisfaction. In the case of Janki Export International (278 ITR 296) Hon'ble Delhi High Court has held as under

“Section 158BD of the Income-tax Act, 1961, is somewhat analogous to section 147 in so far as the procedure that is required to be followed. Section 147 contemplates that if the Assessing Officer has reasons to believe that there is escapement of income, then notice can be issued under section 148 of the Act. So far as section 158BD of the Act is concerned, the Assessing Officer has to be satisfied that there is undisclosed income. Upon such satisfaction, the Assessing Officer is required to forward the relevant documents, papers, etc., to the Assessing Officer who is required to assess the person in respect of whom the undisclosed income has been discovered. Once this is done, the person who is to be proceeded against under section 158BD and then section 158BC must be informed about the satisfaction of the Assessing Officer which has been recorded and must be given a reasonable opportunity to object to the same.

In the case of Mridula, Prop. Dhruv Fabrics (335 ITR 266), the Hon'ble P&H High Court has held as follow:

"According to the plain reading of section 158BD ibid, the Assessing Officer, while framing assessment of an assessee under section 158BC of the Act against whom action has been taken under section 132 or 132A of the Act, is mandatorily required to record satisfaction before action can be initiated under section 158BD of the Act against such other person. In other words, the satisfaction by the Assessing Officer making assessment under section 158BC of the Act, in the case of the person searched, that there is certain undisclosed income as a result of examination of the seized material which belongs to some other identified person, is essential for assuming jurisdiction under section 158BD of the Act. The satisfaction

required to be recorded is prima facie satisfaction and is not firm or conclusive satisfaction at that stage.

Finally, we would like to refer to the matter of Radheyshyam Bansal(337ITR217)of the Hon'ble Delhi High Court, who has dealt the section in following manner:

“Section 158BD of the Income-tax Act, 1961, provides that for assessing the undisclosed income of any other person, that is, other than the person with respect to whom search was made under section 132, the Assessing Officer must be satisfied that the undisclosed income belongs to such person that is, the person other than the searched person. The Assessing Officer cannot proceed against "such other person" without having the required satisfaction. The requirement of satisfaction is a prerequisite condition for initiating assessment proceedings against "any other person" under section 158BD. The word "satisfaction", appearing in section 158BD, clearly denotes that it should be based upon the material before the Assessing Officer and such satisfaction should be brought on record. The requirement of satisfaction is a statutory requirement and it cannot be assumed merely on the basis of certain material. It cannot also be correlated to any material until and unless it is shown on record that the satisfaction required under section 158BD was based on such record or material. Wherever "reason to believe" or "satisfaction" are to be recorded in writing, at least the Assessing Officer should demonstrate in some way his satisfaction about there being undisclosed income hidden in the searched material.”

From the above discussion, it is clear that the requirement of satisfaction is a prerequisite condition for initiating assessment proceedings against any other person u/s.158BD. The word **satisfaction**, appearing in the section clearly denotes that it should be based upon the material before the AO and such satisfaction should be brought on record. The requirement of satisfaction is a statutory requirement and it cannot be assumed merely on the basis of certain material. It cannot also be correlated to any material until and unless it is shown on record that the satisfaction required under section 158BD was based on such record or material. Wherever reason to believe or satisfaction are to be recorded in writing, at least the AO should demonstrate in some way his satisfaction about there being undisclosed income hidden in the searched material. In the present case, we find there was nothing to indicate that the AO could have formed an opinion and arrived at a satisfaction that the assessee had not truly disclosed its income. As the basic satisfaction for issuing notice u/s.158 is missing, so, the action taken in pursuance of it cannot be endorsed.

6. The second issue raised in the CO is about non issuance of notice u/s.143(2) of the Act. Before us, AR stated that no notice was issued to the assessee u/s.143(2) by the AO before completing the assessment proceedings, that the notice was issued to the partner, that the assessee was a separate entity. He relied upon the case of Hotel Blue Moon(321ITR362). The DR said that notice was issued to the partner. In our opinion, issuing a notice to the partner was not sufficient. In the case of Hotel Blue Moon the Hon'ble Supreme Court has held as under:

“If the Assessing Officer, for any reason, repudiates the return filed by an assessee in response to notice under section 158BC(a) of the Income-tax Act, 1961 relating to a block assessment, the Assessing Officer must necessarily issue notice under section 143(2) of the Act within the time prescribed in the proviso to section 143(2) .

By making the issue of notice mandatory, section 158BC, dealing with block assessments, makes such notice the very foundation for jurisdiction. Such notice is required to be served on the person who is found to have undisclosed income.

Section 158BC provides for enquiry and assessment. After the return is filed, clause (b) of section 158BC provides that the Assessing Officer shall proceed to determine the undisclosed income of the block period in the manner laid down in section 158BB and “the provisions of section 142 , sub-sections (2) and (3) of section 143 , section 144 and section 145 shall, so far

as may be, apply". This indicates that this clause enables the Assessing Officer, after the return is filed, to complete the assessment under section 143(2) by following the procedure like issue of notice under section 143(2) /142. This does not provide accepting the return as provided under section 143(1)(a) : the officer has to complete the assessment under section 143(3) only. If an assessment is to be completed under section 143(3) read with section 158BC , notice under section 143(2) should be issued within one year from the date of filing of the block return. Omission on the part of the assessing authority to issue notice under section 143(2) cannot be a procedural irregularity and is not curable. Therefore, the requirement of notice under section 143(2) cannot be dispensed with."

In our opinion not issuing notice to the assessee was not a procedural irregularity and same is not curable.

Thus, on the both the counts, the order passed by the AO u/s.158BD of the Act, is not a valid order.

7. We have decided the jurisdictional issue in favour of the assessee and against the AO. However, we would like to mention that even on merits we do not find any infirmity in the order of the FAA. He has analysed the documents seized from the residence of the one of the partners and has given a categorical finding of fact that there was nothing in the documents that could be linked to the income estimated by the AO for the AY.1999-00 and AY.2000-01. The AO has not mentioned the number of the seized pages that proved that the assessee had actually earned for the above referred AY.s. In our opinion, for making block assessment the AO has to refer to the seized material only. In the case before us, we find that he had not done any such exercise. The FAA also found that while calculating the income the AO had not taken in to account the expenditure incurred by the assessee. We are unable as how taxable income can be determined without considering the corresponding expenses. Therefore, we agree with the FAA that the order of the AO is not based on reliable evidence. Confirming his order we decide effective ground of appeal against the AO.

As a result, appeal filed by the AO stand dismissed and the CO of the assessee is allowed.

फलतः निर्धारिती अधिकारी की अपील नामंजूर की जाती है और निर्धारिती का प्रत्याक्षेप मंजूर किया जाता है.

Order pronounced in the open court on 07th October, 2015.

आदेश की घोषणा खुले न्यायालय में दिनांक 07, अक्टूबर, 2015 को की गई।

Sd/-

(संजय गर्ग / Sanjay Garg)

न्यायिक सदस्य / JUDICIAL MEMBER

मुंबई/Mumbai, दिनांक/Date: 07.10. 2015

व.नि.स./v.Sr.PS.

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

1.Appellant /अपीलार्थी

2. Respondent /प्रत्यर्थी

3.The concerned CIT(A)/संबद्ध अपीलिय आयकर आयुक्त, 4.The concerned CIT /संबद्ध आयकर आयुक्त

5.DR "A" Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, ए खंडपीठ, आ.अ.न्याया.मुंबई

6.Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार Dy./Asst. Registrar

आयकर अपीलिय अधिकरण, मुंबई /ITAT, Mumbai.