INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "F": NEW DELHI
BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 3447/Del/2016
(Assessment Year: 2006-07)

Smt Sunita Bhagchandka, 5, Palam Marg, Vasant Vihar, New Delhi PAN: AAHPB7159E	Vs.	The Assistant Commissioner of Income tax , Circle-24(1), New Delhi
(Appellant)		(Respondent)

Assessee by :	Shri Dr. Rakesh Gupta, Adv Shri Somil Agarwal, Adv
Revenue by:	Shri Surender Pal, Sr. DR
Date of Hearing	09/07/2019
Date of pronouncement	/08/2019

O R D E R

PER PRASHANT MAHARISHI, A. M.

1. This is an appeal filed by the assessee against the order of the ld CIT (A)-11, New Delhi dated 16.04.2014 for the Assessment Year 2006-07 where in addition of Rs 28261091/- made by the ld AO is confirmed.

2. The assessee has raised the following grounds of appeal:-

"*1. That having regard to the facts and circumstances of the case, Ld. CIT (A) has erred in law and on facts in not admitting the ground of assuming jurisdiction u/s 153C and has erred in upholding the impugned assessment order.*

2. That in any case and in any view of the matter, action of Ld. CIT (A) in not admitting the jurisdictional ground and in confirming the action of Ld. AO in assuming jurisdiction u/s 153C and framing the impugned assessment order is bad in law and against the facts and circumstances of the case.

3. That in any case and in any view of the matter, assumption of jurisdiction u/s 153C is bad in law and void and Ld. CIT (A) ought to have quashed the impugned assessment.

4. *That having regard to the facts and circumstances of the case, Ld. CIT (A) has erred in law and on facts in confirming the action of Ld. AO in making addition of Rs.2,82,61,091/- on account of gift received from Smt. Meena Bhagchandka treating the same as alleged undisclosed income and that too by recording incorrect facts and findings and without observing the principles of natural justice.*

5. *That in any case and in any view of the matter, action of Ld. CIT(A) in confirming the action of Ld. AO in making addition of Rs.2,82,61,091/- on account of gift received from Smt. Meena Bhagchandka is bad in law and against the facts and circumstances of the case.*

3. The assessee is an individual earning income from house property and income from other sources. Search and seizure action was conducted on M2K group of companies on 24/2/2007. According to ld AO, Certain documents were seized relating to the assessee as per the provisions of section 153C of the income tax act and therefore notice was issued. The assessee filed its return of income on 15/8/2008 declaring income of INR 1990520/–.

4. This appeal has a history. During the course of original assessment proceedings the assessee has claimed to have received a gift of Rs 2 8261091/–. The assessee was directed to explain the same. The assessee submitted that she has received 23,00,000 shares of the Negolice India from her sister –in –law Mrs. Meena Bhagachandka. The copy of the gift deed was also filed. The donor was also assessed u/s 153A of the income tax act. In the original assessment, proceedings the AO cross checked the balance sheet and the assessment records of Mrs. Meena Bhagchandka. It was found that as on 31/3/2005, the shares of Negolice India Ltd worth Rs. 28261091/– appearing in the balance sheet as part of the investment, however, as on 31/3/2006 in the schedule of investment is also appearing. Therefore the AO concluded that the alleged gift shown by the assessee in her balance sheet was nothing but bogus and there was no such real transfer of shares from Mrs. Meena Bhagchandka to the assessee as in the balance sheet of subsequent year investment is appearing. Thus, the AO treated Rs 28261091/– as undisclosed income of the assessee. The assessee preferred an appeal before the learned CIT – A, who passed an order on 26/8/2010 after admission of the additional evidence in the form of share transfer form dated 6/12/2005 , allowed the

appeal of the assessee deleting above addition. Learned AO aggrieved with the order of the CIT – A preferred an appeal before the coordinate bench, who passed an order on 14/12/2012 in ITA number 2737/Del/2011 and restored the matter back to the file of the learned assessing officer for examination of the additional evidences filed by the assessee before the learned CIT – A. Thus, assessee aggrieved with the order of the coordinate bench preferred an appeal before the honourable High Court, however, at the time of hearing the appeal was withdrawn. Consequent to that, the fresh assessment proceedings commenced. The learned assessing officer noted that in the share transfer form dated 6/12/2005, no share transfer stamps were a fixed. The assessee submitted that the space provided in the share transfer deed is small and therefore the stamps were attached separately. The learned AO issued notice u/s 133 (6) to The Registrar Of Companies asking for the details of share transfer in case of the assessee. However, AO held that no concrete information was received. As the assessee has withdrawn its appeal before the honourable High Court the assessing officer held that it has strengthened the case of the revenue and the fact remains that shares worth Rs. 28261091/– appearing in both the balance sheet as on 31/3/2006 and the share transfer stamps were not attached with the share transfer form at the time of original assessment proceedings. Accordingly the addition of Rs. 2,82,61,091/– was made. The income of the assessee was assessed at INR 30251611/– against the returned income assessed u/s 143 (1) of the act of INR 1990520/–.

5. The assessee aggrieved with the order of the learned assessing officer preferred an appeal before the learned CIT – A (11), New Delhi. He passed an order dismissing the appeal of the assessee. Therefore, assessee aggrieved with the order of the learned CIT – A has preferred this appeal.

6. Ground no 1 to 3 is against the assumption of jurisdiction u/s 153C of the act and Ground no 4 -5 is against the merits of the addition.

7. The learned authorised representative, adverting to Ground no 1-3 , first challenged assumption of jurisdiction u/s 153C of the income tax act.

   a. He submitted that there was no material relating to the impugned gift found because of search, which is evident from the plain reading of the impugned assessment order, and the satisfaction note. He referred to the assessment order and the satisfaction note placed at page number 187 of the paper book and the seized document at page number 188 of the paper book. He

extensively referred to the satisfaction note and stated that the learned assessing officer has recorded the satisfaction based on certificate of Vijaya bank. He referred to page number 188 of the paper book which is a certificate dated 2/12/2005 in the name of the assessee issued by Vijaya Bank which certifies that assessee is maintaining a saving bank account number 601701010007601 with that bank since 23/12/1993. It further certifies that assessee is one of the esteemed customers of the bank and her dealings with the bank are highly satisfactory. It further says that the balance in the said above bank as on date is INR 5 767505.44 only. It further said that the certificate is given at the request of the customer without any responsibility on bank part. The learned authorised representative submitted that the above bank certificate is merely a balance certificate with good conduct certifying the credentials of the customer. There is no indication in the same that there is any unaccounted income of the assessee. He referred to many judicial precedents of various high Courts and of the honourable Supreme Court, which holds that when the assessment is made u/s 153A/153C in case of concluded assessment, addition can be made only based on incriminating material found during the course of search. He submitted that based on the above certificate there is no indication at all that the bank certificate issued by Vijaya Bank can be by the remotest possibility called as incriminating material as it does not contain any information of the unaccounted income of the assessee. He further submitted that the above video bank account has been disclosed by the assessee in her return of income. He specifically referred to the return of income filed for assessment year 2006 – 2007 on 11/07/2006 wherein at serial number 13 of form number 2D (SARAL) , assessee has disclosed the bank account which is referred to in the certificate issued by the bank. He also referred to the computation of the total income filed by the assessee wherein interest from the above bank account has been disclosed by the assessee. In view of this, he submitted that when holding of the bank account, its income is also disclosed of interest in computation, there is no incriminating evidence in the form of bank certificate as it does not show any unaccounted income of the assessee, the whole addition made by the learned assessing officer deserves to be quashed.

b. Adverting to Ground no 4 & 5 of the appeal, on merits of impugned addition, he submitted that assessee has received 23,00,000 shares of the Negolice India Ltd from her sister-in-law as gift, which is supported by Gift deed, share transfer details, affidavit of sister in law, confirmation of sister in law . Factum of share holding by assessee as well as details of transfer from her sister in law to assessee also demonstrated by the Annual return in Form No 20 B filed by the company. He submitted that these shares are received as a gift supported by above evidences including transfer deed along with the transfer stamps and letter from the company about transfer of these shares. He submitted that it are lying in demat account. He further referred to the letter from the company along with the copies of the certificate confirming the transfer of shares in the name of the assessee and further certifying that the share transfer deed were accompanied with the share transfer stamps. He referred to the certificate from the company that on 15/2/2006, 23,00,000 shares he therefore submitted that there is no reason the gift of the shares by sister in law of the assessee to the assessee is disbelieved. He hence submitted that merely because in the balance sheets of the transfer the transferred shares have not been reduced, it cannot be said that the assessee has not received those transfer of shares.

8. The learned departmental representative vehemently contested the argument of the learned authorised representative that there is no incriminating material found. He submitted that this is the 2nd innings of the appellate proceedings. The assessee has never questioned before any of the lower authorities that there is no incriminating material found during the course of search and therefore no addition can be made. He submitted that as this is a new argument, which has been taken by the assessee very late, now it could not be entertained. On the merits of the case, he supported the order of the lower authorities.

9. The learned authorised representative submitted that the issue of the jurisdiction u/s 153C of the act and the argument that addition can only be made based on incriminating material is a legal argument, which can be raised by the assessee at any point of time. For this proposition he relied upon the decision of the honourable Supreme Court in 397 ITR 344, Bombay High Court in 194 ITR 568 and Gujarat High Court in 113 ITR 22.

10. We have carefully considered the rival contentions and perused orders of the lower authorities. We first come to the issue whether assessee can raise issue of assumption of jurisdiction u/s 153C of the act for the first time in second innings or not. This issue is no more res integra in view of the decision of Honourable Supreme court in case of **COMMISSIONER OF INCOME-TAX** *v.* **SINHGAD TECHNICAL EDUCATION SOCIETY[2017] 397 ITR 344 (SC)** as under :-

> *16. In these appeals, qua the aforesaid four assessment years, the assessment is quashed by the Income-tax Appellate Tribunal (which order is upheld by the High Court) on the sole ground that notice under section 153C of the Act was legally unsustainable. The events recorded above further disclose that the issue pertaining to validity of notice under section 153C of the Act was raised for the first time before the Tribunal and the Tribunal permitted the assessee to raise this additional ground and while dealing with the same on the merits, accepted the contention of the assessee.*
>
> *17. First objection of the learned Solicitor General was that it was improper on the part of the Income-tax Appellate Tribunal to allow this ground to be raised, when the assessee had not objected to the jurisdiction under section 153C of the Act before the Assessing Officer. Therefore, in the first instance, it needs to be determined as to whether the Income-tax Appellate Tribunal was right in permitting the assessee to raise this ground for the first time before it, as an additional ground.*
>
> *18. The Income-tax Appellate Tribunal permitted this additional ground by giving a reason that it was a jurisdictional issue taken up on the basis of facts already on the record and, therefore, could be raised. In this behalf, it was noted by the Income-tax Appellate Tribunal that as per the provisions*
>
> *Page No : 0353*
>
> *of section 153C of the Act, incriminating material which was seized had to pertain to the assessment years in question and it is an undisputed fact that the documents which were seized did not establish any co-relation, document-wise, with these four assessment years. Since this requirement under section 153C of the Act is essential for assessment under that provision, it becomes a jurisdictional fact. We find this reasoning to be logical and valid, having regard to the provisions of section 153C of the Act. Para 9 of the order of the Income-tax Appellate Tribunal reveals that the Income-tax Appellate Tribunal had scanned through the satisfaction note and the material which was disclosed therein was culled out and it showed that the same belongs to the assessment year 2004-05 or thereafter. After taking note of the material in para 9 of the order, the position that emerges therefrom is discussed in para 10. It was specifically recorded that the counsel for the Department could not point out to the contrary. It is for this reason the High Court has also given its imprimatur to the aforesaid approach of the Tribunal. That apart, learned senior counsel*

appearing for the respondent, argued that notice in respect of the assessment years 2000-01 and 2001-02 was even time barred.

19. We, thus, find that the Income-tax Appellate Tribunal rightly permitted this additional ground to be raised and correctly dealt with the same ground on the merits as well. Order of the High Court affirming this view of the Tribunal is, therefore, without any blemish. Before us, it was argued by the respondent that notice in respect of the assessment years 2000-01 and 2001-02 was time barred. However, in view of our aforementioned findings, it is not necessary to enter into this controversy.

11. Thus, it is the right of the assessee to challenge the jurisdiction at any stage of appeal before ITAT, if no fresh facts are required to be investigated. In present case, satisfaction note and incriminating material both are on record. Revenue has also not shown that there are basic facts to test above argument of assessee is missing. In view of this, we reject the arguments of the ld DR that assessee cannot challenge the jurisdictional issue in the present case now.

12. Now we proceed to examine whether the ld AO has assumed the jurisdiction u/s 153 C of the act correctly or not. There was a search and seizure action on M2K group of companies on 24/2/2007. Based on this the learned assessing officer recorded the satisfaction under section 153C of the income tax act on 28/11/2008, which is placed at page number 187 of the paper book, as under:-

> " <u>satisfaction note for taking up the case of Mrs. Sunita Bhagchandka u/s 153C of the act</u>
>
> A search and seizure action u/s 132 (1) of the IT act, 196 was conducted on 24/1/2007 in the case of the company Messer M2K group and their directors. Shri Mahesh Kumar Bhagchandka was one such a director who is residence 5, Olof palm Mark, Vasant Vihar was covered under the above action. As consequence of the search and seizure action certificate, in original, issued by Vijaya Bank , in the name of Mrs. Sunita Bhagchandka , was seized as page 24 of annexure A – 1, party 1. I am satisfied that the very certificate belongs to Mrs. Sunita Bhagchandka and thus case is being taken up for assessment u/s 153C of the income tax act 1961."

13. On page number 188 of the paper book the assessee has shown a certificate dated 2/12/2005 which is issued by Vijaya Bank's daryaganj Branch, New Delhi signed by the Chief manager as under:-

> "This is to certify that Mrs. Sunita Bhagchandka is maintaining saving account number 601701010007601 with us since 23/12/1993. She is one of our esteemed customer and her dealings with the bank are highly satisfactory. The balance in the sale above account as on date is Rs. 57,67,505.44 (Rs. Fifty Seven Lacs Sixty Seven Thousand Five Hundred and paisa Forty-Four only),
> This certificate is given at the request of the customer without any responsibility on bank part."

14. As the original certificate issued by Vijaya Bank in the name of the assessee is found from the residence of other party, naturally the document belongs to the assessee. Therefore, there is nothing wrong in assumption of jurisdiction by the learned assessing officer u/s 153C of the act.

15. Now the second question that arises that present Assessment Year involved in this appeal is assessment year 2006 – 07. The search took place on 24/1/2007. The notice u/s 153C read with section 153A was issued to the assessee on 1/12/2008. The assessee filed a return of income for the impugned assessment year on 11/07/2006. The due date for issue of any notice u/s 143 (2) of the income tax act was up to 30/9/2007. Admittedly, no notice u/s 143 (2) of the act was issued to the assessee however on 28/11/2008, learned assessing officer recorded the satisfaction u/s 153C of the act. Based on this on 01/12/2008, notice u/s 153C was issued. On the above chronology of events, it is apparent that the assessment as on that date is concluded. Such concluded assessment, can only be disturbed, if there is any incriminating material unearthed during the course of search. The only material unearthed during the course of search was a certificate issued by the bank to the assessee. Such bank account was already disclosed by the assessee in her form number 2D filed for assessment year 2006 – 07 in column number 13. According to that column, the assessee is required to disclosed the details of bank account stating the name of the bank, MICR code, address of the bank branch, type of account and account number. The assessee has disclosed that she is holding an

account with which the bank having MICR code of 110029002 at address of Ansari Road, , darya Ganj, New Delhi in the form of savings account with account number 7601. In the computation of total income the assessee has also shown the interest income of INR 1 5522/– under the head income from other sources. Therefore, it is apparent that whatever information, unearthed during the course of search, already existed on the record of the revenue disclosed by the assessee herself in her return of income. Therefore it is apparent that the existence of the bank account cannot be said to be a new information that is undisclosed, unearthed by the revenue.

16. Now we come to the bank certificate issued by the bank. In impugned bank certificate there is no information about the undisclosed income of the assessee. If the documents unearthed during the course of search do not indicate existence of any unaccounted income, they are not incriminating in nature. It is important that documents found during the course of search must give some indication about the undisclosed income of the assessee. The impugned certificate did not give any indication about the fact of gift of the shares, which are alleged to be undisclosed income of the assessee. As held by the honourable Delhi High Court in **CIT vs. Kabul Chawla (2016) 380 ITR 573 (Del), principal Commissioner of income tax vs. Meeta Gutgutia (2017) 395 ITR 526 (Del), Principal Commissioner Of Income Tax Vs Best Infrastructure (India) Private Ltd** in ITA number 11/22/2017 dated 1/8/2017, that the concluded assessment can only be disturbed on the basis of the undisclosed income contained in the incriminating documents found during the course of search. The revenue could not show us any evidence that how the bank certificate found during the course of search at the premises of 3rd party belonging to the assessee can be said to be an incriminating document and what is the undisclosed income of the assessee contained in those documents. Apparently, that bank account clearly shows only the bank balance of that bank account. It is not the case of the revenue that such bank account is not disclosed by the assessee to the income tax department. Is the contention of the revenue is upheld, then it would imply that any document found during the course of search on other person belonging to the 3rd person, whether it contains any details of unaccounted income of 3rd person or not, the concluded assessment of the 3rd person will be disturbed and any addition can be made in the hands of 3rd person even if, in the seized document no reference of unaccounted income is found. Thus, such a view, will render the distinction between concluded assessment and abetted assessment

meaningless. Thus, we cannot uphold the view of the revenue. In view of this, we do not have any hesitation in holding that the impugned bank certificate is not an incriminating document based on which the concluded assessment in the case of the assessee can be disturbed. In view of this according to us , we hold that no addition can be made in the hands of the assessee in absence of any incriminating evidence leading to any unaccounted income unearthed during the course of search. Accordingly, ground number 1 – 3 of the appeal of the assessee is allowed.

17. Even on the merit coming to ground number 4 and 5 of the appeal of the assessee, it is apparent that as per the certificate dated 26/11/2013 by Negolice India Ltd, it is certified that on 15/2/2006 that company transferred 23,00,000 equity shares in the name of the assessee is as per folio number 570. Such transfer is made in view of share transfer deed signed by Mrs. Meena Bhagchandka folio number 557 executive on 23/1/2006 between the transferor and transferee. The company also certified that the share transfer deed was also accompanied by requisite share transfer stamps attached separately for transfer of shares in the name of assessee. It further clarified that there is nothing unusual for share transfer tickets to be attached separately on a sheet accompanying the share transfer deed, as the space provided in the deed is insufficient. It was further clarified that the company is concerned only with the said transfer duty paid which has been correctly paid in the present transfer. The company also stated that transfer deed was duly completed in all respect and the transfer of shares was made by the company after verifying all the particulars and it is in accordance with the law. Such certificate of the company is placed at page number 4 of the paper book. At page number, seven of the paper book the assessee produced the duly executed share transfer deed of 23,00, 000 equity shares in Negolice India private limited dated 23rd of January 2006. On page number 10 onwards which is part of the share transfer forms the requisite stamps are also a fixed. At page number 18 of the paper book the assessee produced the annual return of the company filed u/s 159 of the companies act wherein the name of the assessee is appearing as existing shareholder and the details of the transfer during the year is also attached at page number 29 – 34 being part of the annexure is of the annual return. The assessee is shown at serial number 8 of the shareholder of the company as on 30/9/2006 holding 2392690 equity shares of the company and page number 34 shows that on 15/2/2006 there is a transfer of 23,00,000 shares in favour of the company from transferor Mrs. Meena

Bhagchandka. Further the assessee supported the about transaction of the gift by gifted deed executive on 23/1/2006, affidavit of the donor dated 23/1/2006 along with share transfer deed. In view of the above overwhelming evidences produced by the assessee, it cannot be said that the gift received by the assessee is not the correct explanation. Further, the learned assessing officer has held the gift for the only reason that in the investment schedule of the donor in the consecutive to balance sheet dates there is no reduction in the shares. Therefore, the learned AO was of the view that the gift is not proved. However, when the donor has given the complete details of the shares gifted to the assessee by producing the overwhelming evidences and furnishing the affidavit and confirmation establishing the transfer of the shares. Therefore, now it is the issue whether the balance sheet of the donor is to be considered as sacrosanct despite overwhelming evidence given by the assessee duly confirmed by the donor. In our opinion, there may be an error in the balance sheet of donor of not reducing the shares from the investment in the hands of the donor, but such an error cannot result into an addition in the hands of the assessee. Further it is not the case of the revenue that donor was still holding those shares and subsequently sold them. As there is merely an error in the balance sheet of the donor, the addition is made in the hands of the done , without finding that balance sheet of the donor was correct and there was no gift. Did the revenue have the evidence that the donor was still holding those shares in the record of the company or has subsequently sold the shares, the issued have been altogether different. However, in the present case, it is merely an accounting error in the books of the donor, which is conclusively proved by the assessee by producing substantial evidences as well as the confirmation of the donor and of the company whose shares were sold, the addition made in the hands of the assessee deserves to be deleted. Further, on the issue of withdrawal of appeal by assessee before honourable High court , we are of the view that decision of the honourable High Court is merely on withdrawal of the appeal and it is not on the merits of the case. The assessee may withdraw appeal for many numbers of reasons. Such withdrawal cannot go either in favour of the assessee or against the assessee. Thus on the merits of the addition it does not have any impact. Coming to the order of the learned CIT – A wherein he referred to the enquiry made by the AO u/s 133 (6) to the registrar of the companies asking for details regarding the said transfer in case of the assessee, it is apparent that when the assessee has produced the annual return of the company filed before

the registrar of companies which was downloaded from the website of the Ministry of corporate affairs (MCA) , wherein the complete details of the holding of the shares as well as the transfer of the share in the name of the assessee is available, it is not proper to disbelieve the transfer of shares in the hands of the assessee. Further, merely because the affidavit is not on the nonjudicial stamp paper, the learned CIT – A has rejected the affidavit of the donor. Even for a minute, it is believed that the affidavit of the donor is not proper, the content of the affidavit needs to be looked into in view of the overwhelming evidence produced by the assessee, which supports the affidavit. In view of this rejecting an evidence on technical grounds by the learned CIT – A to uphold the addition in the hands of the assessee cannot be approved. With respect to the payment of sale transfer stamps paid by the appellant of INR 5 7500/– on the share transfer forms, the learned CIT – A found that no such withdrawal/drawings are found in the books of the donor. That may be the case of any addition if at all in the hands of the donor and not in the hands of the Donee. Further the learned CIT – A in para number 2.14 has disbelieved the annexure attached to the annual return of the company. If the learned CIT – A even did not believe the downloaded annual return of the company, then, if he wanted to have a further enquiry, he could have summoned the share of registry Department of that company. However, in absence of doing so, he cannot merely disbelieve the annual return of the company and confirm the addition in the hands of the assessee. With respect to the dematerialization of the shares, the learned CIT – A unnecessarily referred to the correspondence of dematerialization, wherein the company itself who shares are transferred is confirming the date of the transfer producing the share transfer deed as well as confirming the same by way of a separate letter. Thus merely because the dematerialization request made by the assessee on 16/12/2007 it cannot be said that the share transfer did not happen on 23/1/2006 when the donee and the donor both confirmed the same along with the certificate of the company whose shares are transferred. It is also not the case of the revenue about the fact that donor was not having the shares. Thus, the lower authorities have wrongly made the addition of Rs. 28261091/– in the hands of the assessee u/s 68 of the act. In view of this, we reverse the finding of the lower authorities and direct the learned assessing officer to delete the addition of Rs 28261091 in the hands of the assessee. Accordingly, ground number 4 and 5 of the appeal are allowed.

18. Accordingly, appeal of the assessee is allowed.

Order pronounced in the open court on 19/08/2019.

-Sd/-	-Sd/-
(AMIT SHUKLA)	(PRASHANT MAHARISHI)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Dated: 19/08/2019
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi