IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "**B**" BENCH *AHMEDABAD*

Before Shri Mukul Kr. Shrawat, Judicial Member and
Shri T.R. Meena, Accountant Member

ITA Nos. 2404, 2405, 2406, 2407 & 2408/Ahd/2007 Assessment Years :1999-2000,2000-01, 2002-03, 2003-04 & 2004-05 respectively

M/s Bharat Ginning & Pressing Factory, Behind Railway Station, Palej	**V/s.**	Income Tax Officer Central Ward -1 Baroda
PAN No. AABFB9254G		
(Appellant)	..	(Respondent)

अपीलार्थी की ओर से By Appellant	Shri Nimish Vayawala, A.R.
प्रत्यर्थी की ओर से/By Respondent	Shri O. P. Vaishnav, CIT. D.R.
सुनवाई की तारीख/Date of Hearing	07.02.2013
घोषणा की तारीख/Date of Pronouncement	12.04.2013

O R D E R

PER : T.R.Meena, Accountant Member

These are five appeals filed by the Assessee, which have emanated from the orders of CIT(A)-IV, Ahmedabad, dated January 17, 2010 for A.Y. 1999-2000, 2000-01, 2002-03, 2003-04, 2004-05. These five appeals were heard together and are being disposed of by way of this common order for the sake of convenience. In all assessment years, there are two common grounds i.e. upholding the validity of assessments u/s.153C and disallowance of salary and wages but in A.Y. 1999-2000, there is one another ground i.e. upholding addition of capital gains u/s.45(4) of the IT Act.

2. There was a search and seizure operation u/s.132 of the IT Act on 29.08.2003 covering the residential premises as well as business premises of Shri Yakub A Colddrink, C/o Bharat Ginning & Pressing Factory, Palej. A survey u/s.133A was carried out in the factory premises on same day. The firm is engaged in the business of ginning and pressing of cotton. The A.O. issued notice u/s. 153C of the Act on 11.10.2004, requiring the assessee to file return of income for all the six assessment years relevant to the previous year in which the search took place. The assessee filed return for all the years on 18.01.2005 in all the years against the notice issued u/s.153C of the IT Act. The appellant challenged the proceeding initiated u/s.153C of the Act on the ground that no satisfaction was recorded by the A.O. of case in which a search conducted i.e. Shri Yakub A Colddrink. There was no document, assets etc. found during the course of search of the appellant. It was argued by the ld. Counsel that during the course of search at the partners no assets belonging to firm as well as no books of account were found. The statutory requirements of recording the satisfaction is also not satisfied. The assessment is finalized by making the addition in respect of the capital gain and disallowance of expenses on estimate basis.

3. The ld. CIT(A) observed that assessment u/s. 153C in case of other persons is required to issue satisfaction note that any money, bullion, jewellery or other valuable articles or things or books of account or document seized, requisition belonged to a person other than the person referred to in Section 153A. During the course of search from the residence premises

certain documents and note books pertaining to the firm were found seized, which revealed that the firm M/s. Bharat Ginning & Pressing Factory was doing job work of cotton processing and ginning which were not recorded in the books of account. Two partners, namely, Yakub A Colddrink and Vali A. Colddrink had admitted unaccounted job work income earned in their return of income. Further, books of account pertaining to firm M/s. Bharat Ginning & Pressing Factory were found and seized as per Annexure A/11 & A/12 from the residence of Shri Yakub A. Colddrink. These books of account were admitted to be of the firm by Shri Yakub A. Colddrink vide his reply in question nos. 52 & 60 of the statement dated 29.08.2003 recorded u/s.132(4) of the IT Act. Thus, the CIT(A) rejected this ground in all years.

4. Now the assessee is before us in all the years. Ld. Counsel for the appellant contended that there is no books of account were found during the course of search belonging to the firm. Therefore, no proceeding u/s. 153C could be initiated against the firm. He relied upon the decision of *ITAT, Special Bench, Mumbai,* in case of *All Cargo Global Logistics Ltd. vs. DCIT in ITA Nos. 5018 to 5022 & 5059/M/10, order dated 6th July, 2012,* wherein it was held that proceeding u/s. 153A will be made on the basis of incriminating material. He further relied upon the decision of *ITAT, 'C' Bench, Mumbai,* in case of *ACIT vs. M/s Pratibha Industries Ltd. in ITA Nos. 2197 to 2199/Mum/2008, A.Y. 2000-01 to 2002-03, ITA Nos. 2200 to 2201/Mum/2008, A.Y. 2003-04 to 2004-05 & ITA No. 2202/Mum/2008, A.Y. 2005-06,* wherein it was held that CIT(A) was right in apportionment of offered amount of Rs. 1.95

Crore to the income eligible for deduction u/s.80IA for the A.Y. 05-06 and proceeding u/s. 153A is to be made on the basis of incriminating document found indicating undisclosed income. Then the addition was only be restricted to those documents/incriminating materials and clubbed only to the assessment remained originally as the law does not permit the A.O. to disturb already concluded issues whether it pertained to any income or expenditure or deduction by relying the Honoble Delhi High Court decision in case of *CIT vs. Anil Kumar Bhatia.* He submitted written reply vide letter dated 06th February, 2013, which is reproduced as under:

(1) Nothing belonging to the assessee is found & same is confirmed by reply to RTI & Order also do not refer to any seized material.

(2) The paper book filed by the department also do not contain any paper which is even alleged to belonging to the assessee. Those papers are used in case of Y.A. Colddrink but not in case of the assessee.

(3) The issue was raised before C.I.T.(A). He has held that 153C applicable if undisclosed income of third persons is found. He has erroneously applied principles of 158 BD. The requirement u/s. 153C is that something belonging to the assessee must be found.

(4) The department is bound to show as to which document thing etc found during search belongs to the assessee. In spite of several adjournments the onus is not discharged. The reply to the RTI clearly shows that A.O. denies that any thing belonging to the assessee was found the onus to prove that ingredient of 153C are satisfied is on the A.O. Agra Bench. ***144 to 149/Agra 2011 (Para no.9.4 to 9.7).***

(5) *On an earlier occasion when matter substantially progressed for about 45 minutes the Hon'ble Bench was taken through all the papers. The synopsis of that proceeding has been prepared & filed. Kindly refer to our submitted dated 30-11-2012 and 18-06-2012. In the submission dated 30-11-2012 the reference to made to the paper book filed on 30-09-2012 to the paper book filed on 03-09-2012.*

(6) *Further the perusal of assessment order will show that same has been passed without permission of joint C.I.T. it has been held that the order passed without prior approval of joint C.I.T. are invalid we refer to the recent decision of Pune Bench* ***20 taxmann.com 380(Pune).***

(7) *We have also referred to various decision to show that unless the property goes out of the firm 45(4) is not applicable. Here simply on the basis of retirement and admission of some partners the capital gain u/s.45(4) has been even though the same firm continues.*

Further, he relied upon the case of *ACIT, Circle-1, Gwalior vs. M/s Global Estate In ITA Nos. 144 to 149/Agra/2011 for A.Y. 2003-04 to 2008-09, order dated 30.11.2012,* wherein the issue was no satisfaction recorded by the A.O. of the search party. Again, he further relied upon in case of *Akil Gulamali somji vs. ITO, Pune [2012] 20 taxmann.com 380 (Pune),* wherein the issue of prior approval of ACIT/ JCIT is required to pass the order u/s.153C r.w.s. 153A of the IT Act. The assessee further relied upon following cases:

i. CIT vs. M/s Gambhir Silk Mills in Tax Appeal No. 1493 of 2010 – wherein assessment proceeding u/s. 153C was completed and documents not written by the assessee. Held, proceeding invalid.

ii. CIT vs. Meghmani Organics Limited in Tax Appeal Nos. 2077, 2078 to 2086 of 2009 – wherein documents not written by the assessee. The proceeding held invalid.

iii. CIT vs. Jyotindra V Vasa in Tax Appeal No. 99 of 2011- wherein proceeding u/s. 153C held invalid on the ground that no books of account and other valuables were found belonging to the assessee.

iv. Vijaybhai N. Chandrani vs. ACIT [2011] 333 ITR 436 (Guj.) – wherein proceeding u/s. 153C is held invalid on the basis of assessee's name referred in different columns.

v. Shri Alkesh M. Patel vs. DCIT, Central Circle-1(1), Ahmadabad in IT(SS)A Nos. 144 to 146/Ahd/2010 & C.O. Nos. 90, 91, 105/Ahd/2010 – wherein Co-ordinate 'D' Bench, Ahmedabad held that diary belonging to the assessee was found, therefore, initiation proceeding u/s.153C is held valid.

vi. DCIT, CC-1(2), Ahmadabad vs. Shri Abhalbhai Arjanbhai Jadeja in ITA Nos. 174, 175 & 176/Ahd/2009 for A.Y. 03-04, 04-05 & 05-06 – wherein Co-ordinate 'B' Bench, Ahmadabad held that proceeding u/s. 153C is held valid.

vii. Vishnu Anant Mahajan vs. ACIT, Circle 5, Baroda – wherein salary and interest income of the partner is held business income in the hands of partner.

viii. CIT vs. Late J. Chandrasekar (HUF) [2011] 338 ITR 61 (mad) – wherein proceeding u/s. 153C is held invalid as the Revenue do not possess any material to show that materials were available at the hand of the Assessing Officer at the time of issuing notice. Besides above, number of cases have also been referred by the ld. A.R. Therefore, he requested that the

proceeding initiated u/s.153C is to be declared null and void. At the outset, ld. CIT D.R. argued that both the lower authorities were right in confirming the action u/s.153C of the IT Act as during the course of search at the residence premises of Shri Yakub A. Colddrink, books of the firm as per Annexure A/11 & A/12 were found and seized which were admitted by the partner belonging to the appellant firm in his statement dated 29.08.2003 recorded u/s. 132(4) of the IT Act. Thus, he prayed to confirm the action of the CIT(A).

5. We have heard the rival contentions and perused the material on record. The search operation was carried out at the residence as well as business premises of Shri Yakub A. Colddrink where from the books of account of the firm as per Annexure A/11 & A/12 and loose paper as per Annexure-3 were found and seized. As per Section 153C, the books of account belonging to the other person is required to be found and seized at the premises of the search took place where assessment u/s. 153A has been made i.e. searched party. For initiating proceeding u/s.153C, it is not necessary that these books of account should be incriminating. When books of account of the appellant found and seized from the search place of the partner of the firm, the A.O. is fully empowered to initiate proceeding u/s. 153C of the IT Act against the firm i.e. other person. The A.O. of the both partners as well as firm was same. Therefore, no separate satisfaction is required to be recorded as held in case of *CIT vs.* Panchajanyam Management Agencies & Services [2011] **333 ITR 281** (Ker.), wherein it was held that search in premises of the managing partner – same A.O. having

jurisdiction over managing partner and firm – notice to firm u/s.158 BD r.w.s. 158BC, the A.O. need not to record reasons – block assessment of firm is valid. The case laws cited by the appellant are squarely not applicable as in case of *All Cargo Global Logistics Ltd. vs. DCIT (supra),* already scrutiny assessment has been made and no incriminating documents were found during the course of search. Therefore, proceeding u/s.153A was invalid. The case laws cited by the appellant in case of *ACIT vs. M/s Pratibha Industries Ltd. (supra)* is totally on different footing which was on apportionment of the disclosure between 80IA unit or non 80IA unit. In assessee's case, in all the years, no scrutiny assessment has been made by the A.O. The return of the appellant had been process u/s. 143 (1) (a) and it was held by the Hon'ble Apex Court in case of *ACIT vs. Rajesh Jhaveri Stock Brokers Pvt. Ltd, 291 ITR 500 (SC),* intimation u/s.143(1)(a) cannot be treated to be an order of assessment and there being no assessment u/s.143(1)(a). The Section 153D has been amended w.e.f. 01.06.2007 whereas the ld. A.O. has passed orders u/s. 153C in all the years on 24/03/2006. Thus, no approval of JCIT/ACIT is required. Keeping in view of the facts and legal position on this issue, we have considered view that CIT(A) was right in confirming the action of the A.O. u/s.153 of the IT Act. Thus, the first ground of appeal in all the years is dismissed.

6. In A.Y. 1999-2000, the second ground of appeal is against upholding the addition of capital gain u/s. 45(4) of the IT Act. The A.O. observed that the appellant firm had been re-constituted its partnership on 20.11.1998 wherein

three partners which Bharatkumar Harilal Shah having share of 25%, Shri Pragnesh Babulal Shah of 12.5% and Shri Kinalkumar Bharatbhai Shah of 12.5% had retired from the partnership firm. On account of re-constitution of the partnership firm, the assets of the firm i.e. land and building had been re-valued on mutual understanding to Rs.47,86,081/- as against Rs.6,44,958/- and credited the amount on account of revaluation in respective partners Capital Accounts in their ratios in the firm. Accordingly, the firm had paid Rs.23,93,040/- to the retiring partners on account of revaluation of assets of the firm as under:

1.	Shri Bharat H Shah	25%share	Rs.11,96,520/-
2.	Shri Kinal B Shah	12.5%share	Rs. 5,98,260/-
3.	Shri Pragnesh B Shah	12.5%share	Rs. 5,98,260/-

Therefore, the A.O. invoked provisions of Section 45(4) of the IT Act. The assessee was given reasonable opportunity of being heard on this issue. After considering the assessee's reply as well as Hon'ble Bombay High Court decision in case of *CIT v A. N. Naik Associates [2004] 265 ITR 346.* The A.O. concluded that the assessee transferred the building otherwise u/s. 45(4) of the IT Act. Therefore, he made addition of Rs. 23,93,040/- on account of Long Term Capital Gain in the income of the firm.

7. Being aggrieved by the order of the A.O., the assessee carried the matter before the CIT(A), who had confirmed the addition by observing as under:

> *"3.4 I have carefully considered the contentions of ld. Counsel as well as gone through the records. The case is relied upon by the ld. Counsel are not applicable to the facts of the present case since*

facts are different in the present case. On perusal of assessment order, it has been noticed that re-constitution of the firm is covered u/s.45(4) of the Act. since the word 'otherwise' takes into consideration not only dissolution of the firm but also cases of re-constitution of the firm as discussed in the decision delivered by the Hon'ble Bombay High Court in CIT v/s. A.N. Naik Associates (265 ITR 346) (Bom.). Further, the amount of Rs.23,93,040/- was paid to retiring partners in lieu of relinquishment of their rights in the assets of the firm which is clearly covered by the defininition of 'transfer' as per section 2(47) of the Act. Whether on account of re-constitution of the Partnership firm, or, on re-valuation of assets i.e. land and building of the firm. The word 'transfer' as defined in section 2(47) of the Act includes the extinguishment of any rights therein or relinquishment of the capital asset. Here, in this case, the retiring partners had extinguished or relinquished their right in the assets of the firm for which they had received consideration of Rs.23,93,040/- from the firm. The gain to the firm was in the form of amount introduced in the firm by two new partners. Keeping in view the above facts and circumstances of the above case, the first ground of appeal is dismissed as capital gain clearly applicable in the present case."

8. Now the assessee is before us. Ld. Counsel for the appellant contended that there was no transfer of asset to the retiring partner. The amount due were paid by the cheque. In other words, no asset was distributed. The firm was re-constituted vide deed dated 20.11.1998 and carries on the business with same assets. The Section 45(4) applied where there is dissolution of a firm and consequence to that dissolution the asset is hand over to the partner. It also include "otherwise transfer of assets i.e. of on

retirement of any partner if he is allotted any asset in lieu of statement of his claim then only Section 45(4) is applicable. The section 45(4) is not applicable because firm is in continuance. The Section 45(4) is applicable when assets change hand then capital gain is applicable. The capital assets revalued cannot be transferred through formation of firm. Even in the case when firm is dissolved but the assets continue to remain with the firm and liquidator is carrying out the finding of process even in that case also, Section 45(4) is not applicable. He further relied in case of *ITO vs. Fine Developers [2012] 26 taxmann.com 202 (Mum.),* wherein the plot in question was part of stock in trade of the firm which was 50% transferred in favour of new partner but shown still in the current accounts of the firm. Thus, the Mumbai 'F' Bench held no capital gain is leviable u/s. 45(4) r.w.s. 2(47) of the IT Act. He also relied in case of *CIT vs. Vijayalakshmi Metal Industires [2003] 132 Taxman 49 (Mad.),* wherein dissolution of partnership by operation of law does not imply that on that day there is a notional transfer of capital assets erstwhile firm stand transferred to other partner or to other persons entitled to claim share of deceased partner. He further relied upon the decision of ITAT, Ahmadabad 'A' Bench, in case of *ITO vs. Gubabdas Printers in ITA NO. 1931/Ahd/2007 for A.Y. 1994-95, order dated 5th February, 2010,* wherein conversion of partnership firm into Limited company on revaluation of assets. The Section 45(4) is not attracted as first condition of transfer by way of distribution of capital assets is not satisfied. He also relied upon the decision of Mumbai 'F' Bench in case of *ITO vs. Smt. Paru D. Dave in ITA No. 2583/Mum/1999 for*

A.Y. 1994-95, order dated 22.12.2006, wherein the reduction in share in favour of five new partners and revaluation of the building which was equally credited held no Short Term Capital Gain in the hands of partners. He also relied upon in case of *CIT vs. Gokuldas Exports [2012] 18 taxmann.com 226 (Kar.),* wherein the partner withdrew individually property contributed by them and firm was converted into joint stock company. The Hon'ble Karnataka High Court set aside the issue to the ITAT. At the outset, ld. CIT D.R. relied upon the order of the CIT(A) and A.O. and requested to confirm the order of the CIT(A).

9. We have heard the rival contentions and perused the material on record. The ld. A.O. made addition by following Hon'ble Bombay High Court decision in case of CIT vs. A.N. Naik Associates and Anr. (**265 ITR 346**), which has been confirmed by the CIT(A), wherein it was held that transfer of capital assets by way of distribution of capital assets on account of dissolution of firm or otherwise, the gain shall be chargeable to tax as the income of the firm. The expression 'otherwise' has to be read with the words transfer of the capital assets. If so read, it become clear that even when a firm is in existence and there is a transfer of capital assets, it comes within expression 'otherwise'. The word 'otherwise' takes into sweep not only cases of dissolution but also cases of subsisting partners of partnership transferring assets to a retiring partner. As per Section 2(47) of the Act, the distribution of capital assets that dissolution of a firm would be regarded as transfer. It is now clear that when the assets are transferred to a partner that falls within the

expression 'otherwise' and the rights of the other partners in those assets of the partnership firm extinguished. In this case, there was a family settlement and there was a retirement as well as induction on a new partner and assets of the partnership transferred to the retiring partner would amount to the transfer of capital assets in the nature of capital gain and business profit which were chargeable to tax u/s.45(4) of the IT Act. In appellant's case, the land and building had been revalued at Rs.47,86,081/- as against book value of Rs.6,44,958/- and credited the amount on account of revaluation in the respective partners' capital account in their ratio in the firm. The retiring partner had paid Rs.23,93,040/-. The Hon'ble Karnatka High Court in case of *Suvardhan v CIT (2006) 287 ITR 404 (Karn),* held that any distribution of capital assets and dissolution of firm was chargeable tax as the income of the firm in the light of the fact that a transfer had taken place. In this case, one partner retired and two were continue in the partnership firm. In another case, *CIT v. Gurunath Talkies [2010] 214 Taxation 729 (Karnatka),* wherein two partners retired and two new partners inducted. The Court held that provisions of Section 45(4) is applicable as it amounts to transfer. Hence, capital gain is applicable. After considering the various legal position and factual aspect, we have considered view that the assessee's case is fully covered u/s. 45(4) of the IT Act and accordingly, we confirm the order of the CIT(A).

10. Ground no.3 in A.Y. 1999-2000 and Ground no.2 in all other years are against confirming the addition disallowance of salary and wages. The A.O.

observed that on verification of the books of account and vouchers of payment on wages to the seasonal and other regular wage workers were not properly maintained. Therefore, inflation of wages to the workers cannot be ruled out. He worked out the ratio of salary and wages income for F.Y. 97-98 to 2003-04 and average ratio was worked out at 39.33%. During the course of search, certain documents were found wherein the job work of cotton processing and ginning were not found recorded in the regular books of accounts. Shri Yakub A Colddrink had admitted and disclosed job work income during the course of search proceeding. On that basis, he made addition of following additions: Rs.3,23,788/- for A.Y. 1999-2000, Rs.2,45,832/- for A.Y. 2000-01, Rs. 12,000/- for A.Y. 2002-03, Rs.16,855/- for A.Y. 2003-04 & Rs. 66,880/- for A.Y. 2004-05, which have been confirmed by the CIT(A) on the basis of disclosure made on this account by the partner and pencil entry made in the vouchers.

11. Now the assessee is before us. Ld. Counsel for the appellant contended that there is no evidence found during the course of search proceeding in case of firm. The evidences were found in case of partners who had disclosed the income u/s.132(4) of the IT Act during the course of search proceeding but same logic without any evidence cannot be applied in case of firm. Therefore, he requested to delete the addition. At the outset, ld. CIT D.R. relied upon the orders of lower authorities and argued for confirmation of the order of the CIT(A).

12. We have heard the rival contentions and gone through the paper books submitted during the course of search. Nothing incriminating documents for inflating on wages were found, whatever found incriminating has been considered in case of partner who had disclosed the additional income under this head. The ld. A.O. made addition on the basis of presumption that in case of firm also such types of inflation on wages had been made. But the burden on the revenue to prove that wages expenses had been inflated by the appellant which has not been discharged by bringing out any evidence on record. Thus, we reverse the order of the CIT(A) in all the years on this ground. The assessee's appeal on this ground is allowed.

13. In the combined result, Assessee's appeal is partly allowed in all years.

These Orders pronounced in open Court on 12.04.2013

Sd/-	Sd/-
(Mukul Kr. Shrawat)	**(T.R. Meena)**
Judicial Member	**Accountant Member**

True Copy

S.K.Sinha

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. अपीलार्थी / Appellant
2. प्रत्यर्थी / Respondent
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाइल / Guard file.

By order/आदेश से,
उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
अहमदाबाद ।