

GAHC010094692022



**THE GAUHATI HIGH COURT**  
**(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)**

**Case No. : ITA/5/2022**

THE COMMISSIONER OF INCOME TAX AND ANR.  
OFFICE OF THE PRINCIPAL COMMISSIONER OF INCOME TAX, GUWAHATI,  
AAYAKAR BHAWAN, 7TH FLOOR, G.S ROAD, GUWAHATI 781005

2: INCOME TAX OFFICER  
ACIT  
CIRCLE 2  
GUWAHATI  
OFFICE OF THE PRINCIPAL COMMISSIONER OF INCOME TAX  
GUWAHATI  
AAYAKAR BHAWAN  
7TH FLOOR  
G.S ROAD  
GUWAHATI 78100

VERSUS

FORTUNE VANIJYA PVT. LTD.  
S. J ROAD, ATHGAON, GUWAHATI 781001

**Advocate for the Petitioner : MR H GUPTA**

**Advocate for the Respondent : MR P BARUAH**

**BEFORE**  
**HONOURABLE THE CHIEF JUSTICE**  
**HONOURABLE MRS. JUSTICE SUSMITA PHUKAN KHAUND**

**JUDGMENT**

**Date : 14-08-2023**

**(Susmita Phukan Khaund, J.)**

Heard Mr. S. C. Keyal, learned Senior Standing Counsel, CBDT, appearing on behalf of the appellants. Also heard Dr. Ashok Saraf, learned Senior Counsel, assisted by Mr. N. N. Dutta, learned counsel appearing on behalf of the respondent.

**2.** This appeal under Section 260A of the Income Tax Act, 1961 ('IT Act' for short), has been filed by the appellants, against the order dated 10.12.2021, passed by the Income Tax Appellate Tribunal, (ITAT for short) Gauhati Bench, in ITA No. 21/Gau/2021 for the Assessment Year 2011-2012.

**3.** The appellant No. 1 is the Commissioner of Income Tax, (CIT) Guwahati and the appellant No. 2 is the Income Tax Officer, ACIT, Circle-2, Guwahati, in the Office of the Principal Commissioner of Income Tax, Guwahati, respectively. The respondent is Fortune Vanijya Private Limited.

**4.** Brief facts of the present case are that during search under Section 132(1) of the IT Act, in the case of M/s. Sagar Steels, Guwahati on 22.12.2017, a bunch of loose sheets with identification mark SST-01 containing pages 1 to 90 were seized. Examination of pages 61 to 69 revealed that these were Journal of Bank Ledgers of M/s Fortune Vanijya Pvt. Ltd. On the basis of these documents notice u/s 153C was issued to the assessee. In compliance, the assessee furnished return of income on 25.12.2019 declaring a total income of Rs. 360/-.

**5.** The assessment was conducted for the year 2018/2019. The Assessing Officer ('AO', for short), initially issued notices dated 27.09.2019, under Section 153 A of the Act, for the

Assessment Year 2012-13 up to the Assessment Year 2017-18, assuming that the respondent/assessee was searched. The assessee in fact was not the searched person. Notices were also issued under Section 142(1) of the Act dated 11.11.2019, calling for several details/information. It has been alleged by the AO that Pages 61 to 69 of SST-01 pertaining to the respondent (also referred to as the assessee), which comprised of journal ledger and bank ledger of the assessee, for the period 01.04.2010 to 04.07.2011 were found amongst the 90 seized pages. The AO was of the view that the aforementioned documents seized from the office premises of M/s Sagar Steels had a bearing on the determination of total income of the assessee for 9<sup>th</sup> assessment year prior to the date of search.

**6.** The AO issued notices dated 05.12.2019 to the respondent/assessee under Section 153C of the Act for six assessment years, i.e., AYs 2012-13 to 2017-18 and for the 9<sup>th</sup> AY, i.e., relevant assessment year under consideration, i.e., AY-2011-12. The assessee filed return of income in response to the notice under Section 153 C of the Act for AY-2011-12 on 25.12.2019 and also simultaneously filed objections challenging the validity of notices issued under Section 153 C of the ACT for AY 2011-12. The assessee raised an objection as the AY 2011-12 was beyond the normal period of six assessment years and reopening of the ninth AY in terms of the fourth proviso to Section 153A of the Act was beyond jurisdiction. The AO was requested to provide the details of the '*unexplained asset*' found in the course of search, based on which he chose to initiate proceedings under Section 153 C for AY 2011-12. In the course of assessment, the AO required the assessee to explain as to why the proceeds of Rs. 9,63,00,000/- received upon sale of investment holdings should not be added as unexplained cash credit under Section 68 of the Act.

**7.** In response, the assessee furnished explanations, as to why no addition was warranted and *inter alia* contended that the assessee had disclosed this sale transaction in its regular books of accounts and by no stretch of imagination, the said transaction and the receipt from it can be termed as undisclosed sales/receipt, which has escaped assessment. The AO, however did not agree with the explanations put forth by the assessee. It was concluded that that the assessee had brought back its undisclosed monies in the guise of sale of investments and thereafter, transferred the proceeds to its other group entities, namely, M/s Bajrangbali Ispat Pvt. Ltd and M/s Sagar Hardware and Steel Pvt. Ltd. Even though the AO acknowledged that the entire arrangement/transaction was done through proper banking channels and all formalities of ROC were fulfilled, but according to him these facts alone did not make the arrangement genuine. The AO, thereafter referred to the purported statement given by Shri Hemant Kumar Agarwal, one of the Directors of Sagar Group, under Section 132(4) of the Act, wherein he stated that he had acquired the assessee company to route his undisclosed monies. The AO, therefore, was not satisfied with the explanations provided by the assessee regarding the proceeds of Rs. 9,63,00,000/- received upon sale of investments and thus added the same by way of unexplained cash credit under Section 68 of the Act.

**8.** The assessee challenged the usurpation of jurisdiction under Section 153C of the Act by the AO, without first satisfying the essential condition precedent in the fourth proviso to Section 153A, read with Explanation 2 of the Act. It was pointed out that the notice for re-assessment of AY 2011-12, which was beyond the period of six assessment years preceding the searched AY, could have been issued only where the AO had in his possession any incriminating material which revealed that income represented in the form of asset valued at Rs. 50 lacs or more had escaped assessment. The term '*asset*' is defined in Explanation (2)

to include (a) immovable property being land or building or both, (b) shares and securities, (c) loans and advances and (d) deposits in bank account and, therefore, the AO could not have assumed jurisdiction under Section 153A of the Act without first having in his possession, the undisclosed/unaccounted asset qua the assessee for AY 2011-12 in terms of the fourth proviso to Section 153 A of the Act, which is the "*jurisdictional fact*". Without the '*jurisdictional fact*' in his possession, the AO could not have assumed jurisdiction to assess/re-assess the accounts of the assessee for the ninth year preceding the searched AY. It was submitted that the '*jurisdictional fact*' is *sine qua non* for valid assumption of jurisdiction to issue notice for AY 2011-12. It is contended that despite specific requests, the AO never provided the details of the '*asset*' which had purportedly escaped assessment of assessee for AY 2011-12 and so, AO could not have issued notice under Section 153 C of the Act for the relevant Assessment Year 2011-12 without valid assumption of jurisdiction.

**9.** It is contended by the respondent that the Pages 61 to 69 of SST-01, found and seized from the premises of M/s Sagar Steels did not reveal any such '*asset*' which had escaped assessment. The scope of the fourth proviso to Section 153 A of the Act was restricted in the sense that the assessment for four years beyond the six assessment years could be reopened only where any income represented in form of '*asset*' had escaped assessment, meaning thereby, only if any unexplained or undisclosed asset is found in the course of search of the assessee, which can be added or assessed under Section 69 or 69A or 69B of the Act in that event only, the AO can validly initiate proceedings under Section 153C for such relevant assessment year. The AO's case was not that the bank account held by the assessee was unexplained or undisclosed, so as to attract the rigours of the fourth proviso to Section 153A of the Act. The AO had only disputed the genuineness of the proceedings received in the

disclosed bank account and added it by way of unexplained cash credit under Section 68 of the Act, which did not constitute income represented in the form of 'asset' escaping assessment in terms of fourth proviso to Section 153A to the Act. It is contended that the notice which was issued under Section 153C of the Act in terms of fourth proviso to Section 153A of the Act and the consequent order framed under Section 153C/143(3) was bad for want of jurisdiction, rendering the assessment order framed by the AO *non est* and void.

**10.** Being aggrieved by the order of the AO, the assessee preferred an appeal before the learned CIT (A). The learned CIT(A) called for the assessment folder of the assessee and granted relief to the assessee on the following grounds, viz.

- i) The satisfaction note was recorded on factually perverse and incorrect facts and for that reason, the proceedings initiated under Section 153C of the Act was bad in law and thus, the consequent order passed was void and so, it was quashed.
- ii) The AO had initially issued notices under Section 153A of the Act and thereafter, switched over to proceedings under Section 153C of the Act without consigning (sic) the earlier proceedings and, therefore, according to him, the assessments which were framed under Section 153C based on the returns filed under Section 153A of the Act were a nullity.
- iii) The AO had not issued the mandatory notice under Section 143(2) of the Act after the assessee had filed the return of income and, therefore, non-issuance of such notice vitiated the assessment for AY 2011-12.

**11.** Being aggrieved by the order of the learned CIT (A), the Revenue preferred an appeal

before the Income Tax Appellate Tribunal, Guwahati Bench, ('ITAT' for short) which came to be rejected vide order dated 10.12.2021 which is subjected to challenge in this appeal.

### **SUBMISSIONS**

**13.** It is submitted on behalf of the appellants that there was no requirement in law for the AO to have pointed out the 'undisclosed asset to the assessee for which the relevant Assessment Year 2011-12 was being re-assessed under Section 153 C, read with fourth proviso to Section 153 A of the Act. Any item of income escaping assessment unearthed in the course of search in relation to 7<sup>th</sup>-10<sup>th</sup> AY was amenable to the fourth proviso to Section 153 A of the Act. It is also contended that the Pages 61-69 of SST-01 revealed that the assessee had sold shares, during the year, of several bodies corporate, which according to the AO was not genuine. Mr. Keyal urged that this material had a bearing on determination of total income of the assessee and thus, the AO had validly recorded satisfaction under Section 153 C (1) (b) of the Act and made addition in the unabated assessment for AY 2011-12. It is also further submitted on behalf of the appellants that, since the AO of the assessee and the AO of the searched person was same, one satisfaction note dated 05.12.2019 amounted to substantial compliance of the CBDT Circular No. 24/2015.

**14.** It is the appellant's case that the assessee is a Private Limited Company, which had filed return of income for AY 2011-12, declaring total income of Rs. 360. The assessee was not the searched person and the time limit for issuance of notice under Section 143(2) of the Act expired on 30.09.2012. Later the case of the assessee was re-opened by notice under Section

148 of the Act dated 23.03.2019, on the premise that the AO was in receipt of information that income to the tune of Rs. 50 lacs had escaped assessment. After notices were issued to the assessee and based on the details submitted by the assessee, the AO noted that the assessee had received payments during FY 2010-11 (AY 2011-12), on account of sale of investments, which was checked and verified by him. The satisfaction note, drawn by the AO found in the course of search, however, pertains to "other person" only on 05.12.2019. Hence, by virtue of first proviso to Section 153 C of the Act, this date, i.e., 05.12.2019, had to be reckoned as the date of search for the purpose of assessment under Section 153 C of the Act. The relevant year in question is, however, AY 2011-12, which is the ninth assessment year preceding the date of search. There was an inadvertent error, wherein it was mentioned that the AY 2011-12 was the seventh assessment year.

**15.** It is argued by the respondent that the AO has no locus to issue notice under Section 153A/153C of the Act, unless the condition precedent therein is satisfied. The fourth proviso to Section 153 A of the Act bars the AO from issuing notice under Section 153 A/153 C of the Act, for the assessment or reassessment of the 7<sup>th</sup> upto 10<sup>th</sup> assessment years, unless he has in his possession evidence/material, which reveals that income represented in the form of '*asset*', valued at Rs. 50 lacs or more had escaped assessment. This is the '*jurisdictional fact*', which if available/ or in possession of AO will only enable the AO to assume jurisdiction under Section 153 A/ 153 C of the Act for these extended AYs. The AO however acted sans '*jurisdictional fact*'.

#### Consideration of submissions

**16.** From the rival contentions, we note that, the assessee had specifically objected to the

AO's action of reopening the unabated assessment for AY 2011-12 u/s 153C of the Act and had requested the AO to give details of the purported 'assets' which had escaped assessment. The AO however did not provide the details of the undisclosed/unaccounted assets of the assessee, which he claims were in his possession before the issuance of notice u/s 153C of the Act for AY 2011-12. The AO was however duty bound to decide the said question as to his jurisdiction, and record finding as to whether he had in his possession, details of any undisclosed/unaccounted assets valued as Rs. 50 lacs and more, qua the assessee qua the assessment year (7<sup>th</sup> to 10<sup>th</sup> year) preceding the searched assessment year, and thereby state clearly as to how the case of assessee was being brought under the 4<sup>th</sup> proviso of Section 153A read with explanation 2. Only upon valid assumption of jurisdiction, the AO could have proceeded against the assessee for assessment of escaped/undisclosed assets.

**17.** It has been observed by the Hon'ble Supreme Court in *Commissioner of Income Tax-III, Pune Vs. Sinhgad Technical Education Society*, reported in *MANU/SC/1101/2017* that:-

**“18) The ITAT 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 ITAT that as per the provisions 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 ITAT reveals that the ITAT had scanned through the Satisfaction Note and the material which was disclosed therein was culled out and it showed that the same belongs to 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 Assessment Years 2000-01 and 2001-02 was even time barred.**

**19) We, thus, find that the ITAT rightly permitted this additional ground to be raised and correctly dealt with the same ground on 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.**

**18.** In this case at hand, the ITAT has observed that the satisfaction note reveals that, the AO had referred to the pages 61 to 69 of seized material bearing identification mark SST-01 for assuming jurisdiction u/s 153C read with the fourth proviso to Section 153A of the Act. The ITAT has also observed that the satisfaction note of the AO does not reveal any '*asset*' which had escaped assessment. On the other hand, the AO himself had observed that these pages, 61 to 69, comprise journal ledger and bank ledger, which clearly indicates that the assessee had liquidated his investments in shares and the proceeds thereof were received in bank. These ledgers were in form of printouts from regular books of accounts of the assessee maintained in computerized system and all the entries mentioned therein forms part of regular books of accounts. The AO was not satisfied with the explanation of one of the Directors of Sagar Group whose statement was recorded u/s 132(4) of the Act. As the satisfaction note scrutinized by the CITA as well as the ITAT did not reveal any asset, the addition made by the AO in AY 2011-12 on account of unexplained cash-credit represented by sale proceeds of Rs. 9,63,00,000/- is held to be made without jurisdiction. Thus, it can safely be concluded that the contents of seized material are neither incriminating in nature nor do

they in any manner reveal "*income represented in form of 'assets' which had escaped assessment.*" This satisfaction note dated 13.12.2019 has been referred to by the ITAT and it has not been disputed by the appellants.

**19.** As a consequence, we have no hesitation in holding that the AO did not have in his charge, any "*Jurisdictional fact*" (on or prior to 05.12.2019) to invoke and issue notice u/s 153C of the Act to the respondent assessee. The extended jurisdiction to invoke/assess 7<sup>th</sup> to 10<sup>th</sup> AY is conferred on the AO by authority of law and the AO cannot confer to himself the jurisdiction in a casual manner by stating/substituting the specific *jurisdictional fact*. It is imperative that before issuance of notice u/s 153C (for the extended period) the AO sets out his objective satisfaction from the seized material, the details of the specified/undisclosed assets in possession qua the assessee for AY 2011-12 valued at Rs. 50 lacs or more. If this essential requirement of law is not satisfied, the AO does not get the authority of law to invoke the jurisdiction u/s 153A of the Act for 7<sup>th</sup> to 10<sup>th</sup> AY. At the cost of repetition, it is pertinent to mention that the assessee had disclosed the sale transactions and liquidation of shares in his regular books of accounts and the liquidation of shares were received in bank. Thus the aforementioned assets cannot be termed as undisclosed assets. It has been appositely concluded in the concurrent decisions of the CITA and ITAT that it cannot be held that the allegedly undisclosed assets have escaped assessment.

**20.** It has emerged from the foregoing discussions that the addition made by the AO in AY 2011-12 was on account of unexplained 'cash credit' represented by sale proceeds of Rs. 9,63,00,000/- u/s 68 of the Act. The additions on account of unexplained 'cash credit', could not have been made by the AO, unless he initially made an addition of undisclosed '*asset*'

valued at Rs. 50 lacs or more. In this case, as there was no addition made by the AO on account of undisclosed assets, ex consequenti, an inference deserves to be drawn that there was no '*jurisdictional fact*' for the AO to assume jurisdiction u/s 153C for AY 2011-12. The usurpation of jurisdiction u/s 153C of the Act is bad in law, for want of jurisdiction as the AO was precluded from making any other addition in the assessment for AY 2011-12. Therefore, the AO's action of addition u/s 68 of the Act for the relevant AY 2011-12 is untenable in the eyes of law.

**21.** The learned ITAT has appositely held that as the AO had recorded his satisfaction on 05.12.2019 and by virtue of the first proviso to Section 153C of the Act, this date was reckoned to be the date of search and hence the time limit for issuance of notice u/s 143(2) of the Act for AY 2011-12 had expired on 13.09.2012. It was rightly held that the subsequent reassessment u/s 147/143(3) of the Act had already been completed on 24.12.2018 and therefore on the date of search i.e. on 05.12.2019 the Income Tax assessment for AY 2011-12 stood unabated. It has been observed by the Hon'ble Supreme Court in *Singhad Technical Education Society's case [supra]* that unless and until the AO establishes correlation between what has been seized from the searched person and how the same is incriminating in nature qua each of the assessment years in question for which jurisdiction u/s 153C is sought to be invoked for the other person (assessee in this case), then the notice u/s 153C to the assessee/third party qua the assessment year would be without satisfying the jurisdictional fact required to invoke Section 153C of the Act.

**22.** It has been observed by the Hon'ble Supreme Court in the case of *Principal Commissioner of Income Tax, Central-3 Vs. Abhisar Buildwell P. Ltd.* vide order dated

24.04.2023, in *Civil Appeal No. 6580 of 2021* and other connected appeals filed by the revenue that :-

**“In case where no incriminating material is unearthed during the search, the AO cannot assess or reassess taking into consideration the other material in respect of completed assessments/unabated assessments. Meaning thereby, in respect of completed/unabated assessment, no addition can be made by the AO in absence of any incriminating material found during the course of search u/s 132 or requisition u/s 132A of the Act, 1961.**

**23.** After scrutiny of the evidence it was held by the ITAT that the CITA's action of deleting the addition made u/s 68 of the Act was appropriate. The ITAT has spelt out sound reasonings while dismissing the appeal. The appeal preferred by the revenue was partly dismissed by the ITAT. The ITAT and the CITA have recorded concurrent findings after scrutinizing the evidence and the facts placed before them. In this Income Tax appeal where concurrent findings of two forums prevail, there is minimal scope of interference.

**24.** It has been held by the ITAT that on the date of search i.e. on 05.12.2019, the income tax assessment for AY 2011-12 of the assessee stood unabated. The concurrent decisions of both the CITA and the ITAT reflect that no incriminating materials were found during the search conducted by the AO. The pages 61 to 69 cannot be termed as undisclosed or unaccounted assets on the basis of the assessment order (Annexure-A). The addition to the income of the assessee of Rs. 9,63,00,000/- u/s 68 of the IT Act for the relevant AY 2011-12 was found to be untenable in law. The concurrent factual findings, which are not found to be perverse are hereby upheld. As no incriminating materials were found during the course of search, the decision of the ITAT cannot be said to be suffering from any illegality as would fortify the “proposed substantial question of law”.

**25.** In view of the foregoing discussions, it is held that the appeal does not involve any substantial question/s of law and being bereft of merits is being hereby dismissed.

**JUDGE**

**CHIEF JUSTICE**

**Comparing Assistant**