

IN THE INCOME TAX APPELLATE TRIBUNAL  
“B” BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, JUDICIAL MEMBER  
AND SHRI ABRAHAM P. GEORGE, ACCOUNTANT MEMBER

ITA Nos.1362, 1363 & 1367/Bang/2013
Assessment years : 2004-05, 2005-06 & 2007-08

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S.P. Nos.178 & 179/Bang/2014 (A/o of ITA Nos.1362, 1363/Bang/2013)
Assessment years : 2004-05 & 2005-06

Trishul Buildtech Infrastructure (P) Ltd. [the erstwhile Trishul Developers], No.9, Ali Askar Road, Off. Cunningham Road, Bangalore – 560 025. <b>PAN : AAAFT 9756G</b>	Vs.	The Joint Commissioner of Income Tax (OSD), Central Range, Bangalore.
APPELLANT/APPLICANT		RESPONDENT

Appellant/Applicant by	:	Shri H.N. Khincha, C.A.
Revenue by	:	Shri Farahat Hussain Qureshi, CIT-II(DR)

Date of hearing	:	03.02.2015
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Date of Pronouncement	:	20.02.2015
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## **ORDER**

*Per Bench*

The appeals in ITA Nos.1362, 1363 & 1367/B/13 are by the assessee against the common order dated 16.8.2013 of the CIT(Appeals)VI, Bengaluru relating to assessment year 2004-05, 2005-06 & 2007-08.

2. The assessee is a partnership firm. There was a search and seizure operation carried out by the authorities u/s. 132 of the Income-tax Act, 1961 [hereinafter referred to as "the Act"] in the case of the assessee on 20.11.2009. Simultaneous search proceedings u/s. 132 of the Act were also carried out in the case of M/s. Gold Finch Hotels Group. Mr. K. Prakash Shetty [hereinafter referred to as "K.P. Shetty] was one of the partners of the assessee and was also a partner in other group entity companies. One Mr. Vijay Bhat, Manager of K.P. Shetty, was also searched on 20.11.2009. In his residential premises, a bunch of diaries were found and seized. Those were marked as A/UB/2 of the seized material. The diaries contained recording of receipts and payments from

and to various persons. The transactions so recorded were mostly cash transactions, besides some cheque transactions.

3. In post search proceedings, Mr. Vijay Kumar, Manager of the assessee was examined. In his statement, he admitted that the writing in the diaries was written by him and one Ms. Indira, Office Assistant. The writings in the diaries were made as told by Mr. K.P. Shetty and Smt. Asha P. Shetty, another partner of the assessee and other seniors of Trishul

Developers (the assessee). The questions and answers in this regard is reproduced for better appreciation of facts:-

“Q.No.3: I am showing you the pages 1 to 167 of the seized material marked A/VB/2 which was seized from your residence during the course of search proceedings under section 132 on 20.11.2009. Please go through the seized material and explain the contents of the seized material?”

Ans.: I have gone through the pages 1 to 167 of the seized material marked A/VB/2. These are the diaries most of which are written by me except pages 1 to 47 which were written by Miss Indira, office assistant.

These pages contains the cheque and cash transactions written by me as told by Mr. Prakash Shetty, the Managing Director, Smt. Asha P Shetty and sometimes by the other seniors of Trishul Developers.

I am not aware of the details of the transactions and only Mr. Prakash Shetty is aware of it. I had written what was told by the Mr. Prakash Shetty.”

4. The Assessing Officer noticed that most of the transactions in the diaries were by cash and not accounted in the regular books of account.

5. During the course of another statement recorded from Mr. Vijay Kumar B on 17.12.2009, he has stated that he has written the transactions on the instructions received by him from Mr. K Prakash Shetty and he has also stated that these cash transactions pertains to M/s Trishul Developers. When he was asked to explain the cash transactions, he stated that he has written the transactions on the instructions given by Mr. K Prakash Shetty and that he can only explain these transactions. The relevant portion is reproduced as follows:

“Q.No.4: Please explain the transaction written in these diaries from page numbers 48 to 167?”

Ans.: I am not able to explain the transactions written in the diaries at pages 48 to 167. Mr. K Prakash Shetty, Managing Director can only explain the transactions.

Q.No.5: Can you identify the transactions and the persons who had asked you to write these transactions in the diaries?

Ans.: I cannot directly identify the transactions and the seniors who had instructed me to write the transactions. But these have been written on the instructions of the Managing Director Mr. Prakash Shetty and other senior managers.

Q.No.6: Who had told you to keep these diaries at your residence?

Ans.: These diaries were kept in my residence as we had shifted our corporate office from Sadashiv Nagar.

Q.No. 7: Who has written the pages 1 to 47?

Ans.: Ms Indira, office assistant, has written the pages 1 to 47 of the seized material which is a pocket diary. She has written this pocket diary on my instructions. Whatever my Managing Director Mr. K Prakash Shetty had instructed me orally was instructed by me to Ms Indira and she had written the same in this pocket diary.”

6. Later, Mr. Prakash Shetty was confronted with the seized material marked A/VB/2 and also with the statement recorded from Mr. Vijay Kumar. Mr. Prakash admitted that the diaries and the notebooks in the seized material marked A/VB/2 have been written by his employees. The relevant portion is reproduced as under:

“Q.No.3: I am showing you the seized material marked A/VB/2 which was seized from the residence of Shri. Vijay Kumar B during the course of search proceedings under section 132 on 20.11.2009 at his residence. Please go through the seized material and explain the contents of the seized material?”

Ans.: I have seen the seized material marked A/VB/2 which was seized from the residence of Shri. Vijay Kumar B on 20.11.2009. The seized material contains hand written pocket diaries written by Mr. Vijay Kumar B, Vice President (Infrastructure) of Goldfinch Hotels group and Ms Indira, office assistant. The entries in these pocket diaries are written by them. I will go through the diaries after taking Xerox copies and come back with detailed explanation as far as directly connected to my business income.

Q.No.4: I am showing you the statement recorded from Mr. Vijay Kumar B(Vijay Bhat,) wherein he has stated that these diaries are written by him on your instructions and also on the instructions of his seniors. Please go through the statement and comment on it?

Ans.: I have gone through the statement of Mr. Vijay Bhat and I have to go through the diary and which all entries which I had told, I will come and explain all the entries in two days.”

7. Subsequently, Mr. K Prakash Shetty filed a letter dated 02.02.2010 admitting undisclosed income pertaining to certain cash payments made by him for purchase of lands, interest payments to some persons, etc. which were found written in the above seized material marked as A/VB/2. The undisclosed income had been offered in the hands of M/s Trishul Developers and Prakash Shetty. The annexure I filed at the time of post search proceedings pertaining to undisclosed income is as below:-

**ANNEXURE-I**

Amount offered in the hands of Trishul Developers is as follows:

Page No of seized material A/VB/2	Name of the party	Rs. in Crores	Asst. Year
165	Abdul Wahab (Veerasandra Property)	2.20	2006-07
161	Keshava Reddy	1.15	2006-07
Various folios	Ram Prakash	2.00	2009-10
	<b>Total</b>	<b>5.35</b>	

Amount offered in my own hands are as follows:

Page No of seized material A/VB/2	Name of the party	Rs. in Crores	Asst. Year
70 & 72	Techno art Rau	1.00	2009-10
93	Sambaiah	0.10	2009-10
85 & 90	Rajesh	1.40	2009-10
148	Rakesh Batra	0.50	2006-07
132, 133	Sunil Hospitality	0.36	2008-09
157	Deejay Farm	0.12	2009-10
147	Classic Builders	0.10	2006-07
156	Denkanikote	0.40	2006-07
Separate Statement produced	Interest paid to		
	Laloo	0.77	
	Vinod Bansilal	0.10	
	Ashok	0.03	
	Avinash	0.06	
	Lakshman	0.11	
	Soni	0.06	
	<b>Total</b>	<b>5.11</b>	

8. The AO was of the view that the transactions in the diaries seized and marked as A/VB/2 contained receipts totaling to Rs.56,00,51,300 and total payments of Rs.88,24,82,425. The assessee has however chosen only a few selected items and offered income from those items to tax. According to the AO, this was unacceptable in the absence of any explanation by the assessee with regard to the entries in the seized diaries in respect of which assessee did not make any declaration of income.

9. There was a search carried out at Mangalore in the premises of one Mr. Prasad Kumar Shetty [hereinafter referred to as "Prasad Kumar"], who is the brother-in-law of K.P. Shetty. Prasad Kumar was involved in purchase of lands for the group concerns. In the course of search proceedings in the premises of Motel Infrastructure Pvt. Ltd., certain diaries were found and seized from the cabin of Prasad Kumar. These diaries were marked as A/TD/34, 35 and A/TD/36. Prasad Kumar was examined at the time of search and in his statement, he admitted that the diaries were written by him. Later on, a statement u/s. 131 of the Act was recorded from him on 13.4.2010. In the statement, he admitted that seized diary contains entries of cash payments and that payments were made on instructions from head office of Trishul Developers (assessee). The instructions were given by directors by K.P. Shetty and cash for payments were also accounted by the head office. The relevant questions & answers read as under:-

“Q.No.:4: I am showing you the seized material marked as A/TD/35 dated 20.11.2009 seized from the office of M/s Trishul Developers, Mangalore during the search proceedings. Please go through it and state who has written this diary?”

Ans.: I have gone through the seized material marked as A/TD/35 dated 20.11.2009. This diary has been written by me.

Q.No.5: Please go through the page number 1 to 6 of the diary marked A/TD/35 and explain the contents of these pages?

Ans.: I get instructions through phone from the staff at the head office of by the head office at Bangalore to make payments to various



persons. Accordingly, I make the payments and the same are written by me in this diary. However, I do not remember the exact nature of these payments. I do not know the details of the persons to whom the payments are made and in what context.

Q.No. 6: Who gives you the instructions to make the payments?

Ans.: I used to get calls from the various persons working in the corporate office of M/s Trishul Developers. They used to tell me about the instructions given by the Managing Director to pay or receive money from various persons at Mangalore. I acted upon the instructions to receive or pay the amount.”

10. Page 2 of the seized material marked as A/TD/34 contains a receipt account of a total sum of Rs.10,13,68,000 during the F.Ys. 2008-09 and

2009-10 as under:-

F.Y.2008-09 : Rs. 1,90,00,000/- F.Y.2009-1

0 : Rs. 8,23,68,000/-

11. During the statement recorded from Mr. Prasad Kumar, he was asked to explain the cash receipt in this page. He stated that the cash receipts of Rs.10.13,68,000 were received from the head office of M/s Trishul Developers, Bangalore and that it has been paid to various persons as their instructions. His statement is reproduced hereunder:-

“Q.No.32: The pages 1 and 2 contains total receipts of Rs. 10,13,68,000/-. Please explain the nature of these receipts and state what you did with that amount. It is also noted that no names are also written against the receipts shown on page 2. Can you state from whom these amounts were received?”

Ans.: All these amounts of Rs.10,13,68,000/- as mentioned in pages 1 and 2 were received from the head office of M/s Trishul Developers, Bangalore, by cash and paid to various persons as per their instructions. The head office people use to tell me that the instructions were given by the MD. I do not know the nature of these payments.”

12. When confronted with the seized material during the course of recording of statement from Mr. K.P. Shetty and asked to explain the entries, he has stated that except for a few entries, he does not know other entries, persons or the transactions.
13. In the above background, a reconciliation statement was prepared on the basis of entries in the said diaries during the post search investigations. The said reconciliation prepared contains both receipts and payments. The total receipts as per this is Rs.56,00,51,000 and total expenditure is Rs.88,24,82,425.
14. The AO issued a show cause notice dated 9.12.11 asking the assessee to explain the entries in the seized material. The assessee filed a reply disowning knowledge of the seized material. Reply by the assessee is extracted in page 7 of the assessment order. Apart from disowning the

entries in the seized diaries, the assessee also submitted that the entries are mere scribblings and they do not result in any income. The assessee also pleaded that the persons who wrote the diary should alone explain the entries.

15. The AO, however, rejected the reply filed by the assessee and held as follows:-

“8. The above contentions made by the assessee are not acceptable. It is a fact that certain diaries were found and seized in the residential premises of the manager of Shri. Prakash Shetty and also in the Mangalore premises managed by his brother-in-law as stated earlier. The diary entries were discussed during the course of search proceedings. The assessee has admitted certain entries present in the diaries and has admitted undisclosed income of Rs. 10.46 crores for various years in the hands of M/s Trishul Developers and in the hands of Shri. K Prakash Shetty. However, a total reconciliation of the diary entries during the search proceedings revealed that the total receipts were of 56,00,51,300/- and total payments were of 88,24,82,425/-.

9. During the course of assessment proceedings the diary entries were verified and it was found that only a few entries have been admitted by the assessee group. The circumstantial evidence and preponderance of probability suggests that the assessee has had numerous transactions which are in the nature of receipts and payments.

10. In view of the facts and the circumstances of this case and the type of diary entries available, it would be fair and reasonable to compute the difference in the receipts and payments and bring the same to tax. Accordingly, the following undisclosed incomes are being brought to tax:

A.Y.	Undisclosed Income brought to tax	Admitted earlier
2004-05	Rs.11 1,50,000/-	
2005-06	Rs.2, 14,00,000/-	
2006-07	NIL	Rs.3,35,00,000/-
2007-08	NIL	
2008-09	Rs. 2,40,26,395/-	
2009-10	Rs.16,80,01.030/-	Rs.2,00,00,000/-
2010-11	Rs. 1,28,97,250/-	
Total	Rs. 22,76,24,675/-	Rs.5,35,00,000/-

16. Accordingly undisclosed income was determined for A.Ys. 2005-06, 2006-07 & 2007-08 as per table given above.
17. Aggrieved by the aforesaid order of the AO, appeal was filed before the CIT(Appeals). Appeal was filed by one M/s. Trishul Buildtech Infrastructure Pvt. Ltd. ("TBIPL") claiming to be the successor in

interest of the erstwhile firm, Trishul Developers. Before the CIT(A), TBIPL submitted that it had taken over the business of the erstwhile firm, Trishul Developers on and from 1.2.2010 on as is where is basis. All assets & liabilities of the partnership firm were fully taken over by TBIPL and therefore appeal against the order of assessment was being filed by TBIPL. Further stand taken by the assessee before CIT(A) was that the notice U/s. 153A has been issued and the assessment order dated 30.12.2011 u/s. 153A r.w.s.143(3) has been passed in the name of M/s. Trishul Developers and that the order passed in the name of a non existent entity is bad in law and is liable to be quashed.

18. The Id. CIT(Appeals) considered the above issue and he held as

follows:-

“5. The technical issues which therefore arise are as under:-

(1) Whether the assessment made in the name of M/S Trishul Developers in the status of firm and Permanent Account Number AAFT9756G for the A.Ys when the firm was in existence is in order?

(2) Whether the appellant M/s Trishul Buildtech Infrastructure (P) Ltd (erstwhile firm Trishul Developers) has any locus standi to file the present appeal?

- (3) Whether the A.O. who passed the order i.e. JCIT(OSD) did not have jurisdiction over the said assessee in whose name the order was passed?

The above issues at (1) and (2) are inter-related and answered as under:-

6. The appellant has raised an issue that the business of the erstwhile firm M/s Trishul Developers had been taken over by M/s Trishul Buildtech Infrastructure Developers (P) Ltd w.e.f. 01.02.2010 and therefore the notice u/s 153A dated 30.12.2011 and subsequent assessment order dated 30.12.2011 (notice u/s 153A were issued on 25.04.2011 and returns of income filed on 09.08.2011, 09.08.2011 and 10.08.2011) in the name of M/s Trishul Developers which was a non existent entity is bad in law and deserves to be quashed.

In this regard, the Assessing Officer has brought on record the following facts tabulated below :-

01	Date of search	20/11/2009
02	Date of takeover of firm by the company	01/02/2010 (as claimed by the appellant and not in knowledge of the Assessing Officer.
03	PAN of firm	AAAFT9758G
04	PAN of company	AADCT3672P
05	Date of issue of notice u/s 153A	25/04/2011
06	Date of filing Return of Income in response to Notice u/s 153A	A.Y:2004-05-09/08/2011 A.Y.2005-06-09/-8/2011 A.Y.2006-07-07/12/2011 A.Y. 2007-08-10/08/2011 A.Y.2008-09-10/08/2011 A.Y.2009-10-10/08/2011 (In name and status of firm M/s

		Trishul Developers)
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As could be seen from the above dates, the Return of Income in response to notice u/s 153A have been filed on 09/09/2011, and 07/12/2011, much after the takeover of the firm by the Company. However, in the returns filed, the assessee has mentioned its name as M/s. Trishul Developers. The status of the assessee is mentioned as "FIRM" and the PAN used is that of the Firm. The Assessing Officer has presumably only gone by whatever the assessee has stated in its Return of Income filed in response to notice u/s. 153A. The Assessing Officer was not aware of the takeover of the Firm by the Company (which is a Pvt Ltd and not in public domain). The assessee has not informed the Assessing Officer about the change in its status. It has, on the other hand, by its own disclosures in the Return of Income, maintained its name as M/s Trishul Developers and status as a "Firm"

As is apparent from the above, at the time of search, the entity was the firm M/s Trishul Developers. As per the appellant, the said business of the firm was taken over by the company on 01.02.2010. However, as no intimation was forwarded to the Assessing Officer, notice u/s 153A was issued to the said assessee firm on 25.04.2011 which was complied with by the appellant and returns of income signed by Sri Prakash K Shetty, Managing Partner (who is also the Managing Director of the present company) on behalf of M/s Trishul Developers were filed in each case with the permanent account number of the firm, in the status of firm M/s Trishul Developers.

A.Y.	Date of filing of return of income in response to notice u/s. 153A
2004-05	09.08.2011
2005-06	09.09.2011

2007-08	10.08.2011
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These were processed and assessed in the status of firm as per the returns filed and as disclosed to the Income Tax Department. The appellant's claim that these assessments are invalid for the reason that these have been made in the name of M/s Trishul Developers in the status of firm and not M/s Trishul Buildtech Infrastructure Pvt Ltd cannot be accepted for the simple reason that the assessment is in respect of the income of M/s Trishul Developers in the status of firm. It was M/s Trishul Developers as also claimed by the appellant that existed for the relevant financial years. It is only for notice to the existing business entity i.e. M/s Trishul Developers (P) Ltd that the assessing officer could probably have mentioned "M/s Trishul Developers" now "M/s Trishul Buildtech Infrastructure Pvt Ltd." for clarification. However, it is to be considered that the entity in question i.e. M/s Trishul Developers had filed a return in the name of M/s Trishul Developers itself and not in the name of the then existing M/s Trishul Buildtech Infrastructure Pvt Ltd and the fact that the Assessing Officer had not been informed about the change in status of the entity. In the facts and circumstances of the case, where the appellant has filed a return itself in the said status, complied with the notices, received and understood the notices to have been intended for the said firm, the mere omission of not mentioning M/s Trishul Developers now M/s Trishul Buildtech Infrastructure Pvt Ltd instead of mentioning only "M/s Trishul Developers" in the notices issued and the order made do not negate the proceedings so made."

19. The CIT(A) relied on the provisions of section 170(1) of the Act and expressed the view that as per the aforesaid provisions, the predecessor has to be assessed in respect of income of the previous year, in which the succession took place upto the date of succession. He also held that the provisions of section 170(2) will not be applicable because the erstwhile firm was found and it filed return of income and that section 170(2) is



applicable only when the predecessor “cannot be found”. For the above reasons, he upheld the assessment in the hands of Trishul Developers. The CIT(A) also expressed the opinion that the defect, if any, in the procedure is a curable defect u/s. 292B of the Act.

20. As regards the other technical issue raised at (3) above, i.e. whether the A.O. who passed the order i.e. JCIT (OSD) did not have jurisdiction over the said assessee in whose name the order was passed, the CIT(A) held as under:-

“It is on record that the Assessing Officer to whom the case was notified i.e. to DCIT, Central Circle 1(3), who at that time was Dr R L Deepak, I.R.S. was promoted as Joint Commissioner of Income Tax vide CBDT’s Order in

F.No.A32012/02/2011-Ad.VI dated 27th October 2011, Order No.175 of 2011 (which was in public domain). As per the said order, the officer was promoted ‘in situ’ and was to continue performing the same functions which had already been assigned to him prior to the said promotion. Therefore, the jurisdiction of the said officer is in accordance with section 120(1) of the Income Tax Act. Moreover, the Commissioner of Income Tax (Central) vide order in F.No.Juris/CIT(C)/2011-12 dated 16.11.2011 has passed an order u/s 120(4)(b) of Income Tax Act which reads as under :-

“In exercise of the powers conferred upon the undersigned by the Board under sub section (4) of Section 120 of the Income Tax Act, orders are hereby issued in terms of clause (b) of sub-section (4) of section 120 of the Income Tax Act, 1961, to the effect that the powers and functions conferred on, or as the case may be, assigned to the Assessing Officer, Central Circle 1(3), Ban galore in respect of any specified area or persons or classes or persons or incomes or classes of incomes or cases or

classes of cases, shall be exercised or performed by Dr R L Deepak, who has been promoted as Joint Commissioner of Income Tax (OSD) w.e.f. 27.10.2011, vide the order of CBDT in

F.No.A32012/02/2011-Ad. VI dated 27.10.2011.

2. The Officer named above is designated as Joint Commissioner of Income Tax (OSD) in the office of the Commissioner of Income Tax, Karnataka (Central), Bangalore. This order is made effective from the date the Officer has assumed charge as Joint Commissioner of Income Tax (OSD).”

Thus, the jurisdiction of the officer concerned is protected u/s 120(4) of Income Tax Act as well.

It is also on record that the appellant has accepted the jurisdiction of the said promoted officer as Joint Commissioner of Income Tax and has appeared before him both prior and subsequent to his promotion with the knowledge of the promotion of the officer as Joint Commissioner of Income Tax and has therefore, accepted his jurisdiction over the case. This is evident from one of the letters of the appellant to the Assessing Officer (though undated as under).

“To

The Joint Commissioner of Income Tax  
Central Circle 1(3) Bangalore.

Sir,

Ref. PAN-AAAFr9756G

Sub: Assessment of our own AY (07-08)

With reference to your further enquiry during assessment proceedings we wish to submit as follows -

(1)Purchase of property at Kulai: We have purchased land from Srimati Umavati agricultural land at Kulai, Mangalore for sum of 1,066,000.00 paid in cash. Copy of RTC is enclosed showing that the land purchased is agricultural land.

(2) Ledger extract of TDS accounts in respect of commission, professional charges, interest and contracts payments showing tax deducted and remittance of the same are enclosed.

Kindly consider the above, do the needful finalize the assessment and oblige.

Thanking you”

Similar correspondence has been made for other years as well. As such, the jurisdiction of the officer assessing the case is in order and in accordance with section 120 and section 24 of Income tax Act. The ground raised at this stage is superfluous and is therefore dismissed.”

21. With regard to the merits of the addition made by the AO, the CIT(A) was of the view that the reasons given by the AO for making the addition for various assessment years are proper and do not call for any interference. The conclusions of the CIT(A) in this regard are at para 11 of the impugned order, which read as under:-

“11. I find that the findings of Assessing Officer are based on the seized material which contain recordings of transactions made on the instructions of Sri Prakash Shetty, Managing Partner. This has been admitted by the appellant. However, appellant has disclosed income contained in only part of these notings and not all. When the appellant has accepted these notings in part, there is no basis to deny the whole of it. The Assessing Officer has already given benefit to the payments and only the difference in receipts and payments and not entire receipts have been brought to tax. Under such circumstances, the assessment made by the Assessing Officer is in order and does not deserve any interference. The same is upheld.”

22. Aggrieved by the order of CIT(Appeals), the assessee has preferred the present appeal before the Tribunal.
23. We have heard the submissions of the Id. counsel for the assessee and the Id. DR. The first submission of the Id. counsel for the assessee was that assessment ought to have been made in the name of TBIPL in view of the provisions of section 170(2) of the Act.
24. The provisions of sections 170(1) and 170(2) read as follows:-

**“170. (1) Where a person carrying on any business or profession (such person hereinafter in this section being referred to as the predecessor) has been succeeded therein by any other person (hereinafter in this section referred to as the successor) who continues to carry on that business or profession, —**

(a) the predecessor shall be assessed in respect of the income of the previous year in which the succession took place up to the date of succession;

(b) the successor shall be assessed in respect of the income of the previous year after the date of succession.

(2) Notwithstanding anything contained in sub-section (1), when the predecessor cannot be found, the assessment of the income of the previous year in which the succession took place up to the date of succession and of the previous year preceding that year shall be made on the successor in like manner and to the same extent as it would have been made on the predecessor, and all the provisions of this Act shall, so far as may be, apply accordingly.”

25. It can be seen from the provisions of s. 170(1) that if there is a succession in the business of assessee, the predecessor has to be assessed in respect of income of the previous year in which succession took place upto the date of succession. The admitted factual position in the present case is that the conversion of Trishul Developers the partnership firm as a limited company by name TBIPL took place on 1.2.2010. Therefore, for A.Ys. 2004-05, 2005-06 & 2007-08, only Trishul Developers will have to be assessed. The provisions of s. 170(2) cannot be invoked for the simple reason that the erstwhile firm filed the return of income and was very much available. S. 170(2) is attracted only in a case where the predecessor "cannot be found". In our opinion, the CIT(A) has rightly rejected the contentions in this regard put forth by the assessee.
26. The next contention of the Id. counsel for the assessee was that diaries in question were not seized from the possession of the assessee, but were seized from the possession of Mr. Vijay Bhat and Mr. Prasad Kumar. According to him, such documents can be used against the assessee only in the manner u/s. 153C of the Act. S. 153C of the Act reads as follows:-

**“153C.** [(1)] Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, where the Assessing Officer is satisfied that any money, bullion,

jewellery or other valuable article or thing or books of account or documents seized or requisitioned belongs or belong to a person other than the person referred to in section 153A, then the books of account or documents or assets seized or requisitioned shall be handed over to the Assessing Officer having jurisdiction over such other person and that Assessing Officer shall proceed against each such other person and issue such other person notice and assess or reassess income of such other person in accordance with the provisions of section 153A.

**Provided** that in case of such other person, the reference to the date of initiation of the search under section 132 or making of requisition under section 132A in the second proviso to <sup>5</sup>[subsection (1) of] section 153A shall be construed as reference to the date of receiving the books of account or documents or assets seized or requisitioned by the Assessing Officer having jurisdiction over such other person:”

27. According to the Id. counsel for the assessee, though the assessee was subjected to search u/s. 132, no incriminating material whatsoever was recovered from the assessee and therefore proceedings u/s. 153A of the Act could not have been initiated. According to him, the proper course of action for the revenue was to have the documents recovered from the possession of Mr. Vijay Bhat and Mr. Prasad Kumar forwarded by their AO to the AO of the assessee and thereafter the AO of the assessee ought to have initiated proceedings u/s. 153C of the Act against the assessee.
28. We have considered the above submission of the Id. counsel for the assessee and we are of the view that the same is without any merit. It is not in dispute that the assessee was subjected to a search u/s.

132 of the Act on 20.11.2009. As per the provisions of section 153A of the Act, the AO was duty bound to make an assessment for the six assessment years as referred to in section 153A of the Act. A.Ys. 2004-05, 2005-06 and 2007-08 are assessment years falling within the period contemplated u/s. 153A of the Act. The assessment to be done u/s. 153A is not dependent on any incriminating material being found during the course of search.

There is no such requirement u/s. 153A. While concluding assessment u/s. 153A, the AO can take cognizance of any material relating to the assessee. As we have already seen, it is not in dispute that the diaries were written under his instructions and contains recordings of transactions. In fact, K.P. Shetty took copies of seized diary and admitted undisclosed income based on entries therein. In such circumstances, the plea taken by the assessee that the proceeding u/s. 153A are invalid and that the proper course would be to proceed u/s. 153C of the Act and therefore the impugned assessment order has to be held to invalid is a contention, which cannot be accepted and has no force or merit.

29. The next submission made by the Id. counsel for the assessee was that in the course of assessment proceedings, K.P. Shetty wrote a letter disowning the entries in the diary. According to the Id. counsel for assessee, in the light of this letter of assessee, the contents of the diary ought not to have been imputed to the assessee. In this

regard, the Id. counsel for the assessee placed reliance on the decision of Hon'ble

Supreme Court in the case of *CBI v. V.C. Shukla & Ors. (1998) 3*

*SCC 410*. In the aforesaid decision, the Hon'ble Supreme Court held that entries in the books of accounts cannot without independent evidence of their trust-worthiness, fix a liability upon a person.

30. We have considered the above submission and are of the view that the same is without any merit. As we have already seen, in a statement K.P. Shetty recorded in the post search proceedings, K.P. Shetty clearly admitted that the entries in the seized diaries were made on his instructions. It is for him to explain the entries in the seized diaries. In fact, in respect of some of the entries in the seized diaries, the assessee declared undisclosed income for various assessment years. In these circumstances, the assessee cannot disown the entries in the diary. It is another matter, if the assessee explains the entries and establishes that the entries do not give rise to income. In the absence of such an explanation by the assessee, the entries have to be presumed as representing income. In this regard, we are also of the view that u/s. 292C of the Act, there is a presumption that the documents found in the possession or control of any person in the course of search, belongs to such person and contents of



such document are true. In the light of the fact that the assessee owned the entries in the seized diary, the contents should be presumed to be true and it is for the assessee to show that all the entries in the seized diary does not represent income. The assessee having miserably failed to point out with reference to each of the entries in the seized diary as to how it does not give rise to income, the assessee cannot take a valid plea that he disowned the diary and therefore no reliance can be placed on the diary to make addition in the hands of assessee.

31. Another submission made by the Id. counsel for the assessee was that on the entries in the seized diary showing total receipts to the extent of Rs.56,00,51,300 and payments totaling Rs.88,24,82,425, the Revenue authorities have proceeded to tax the difference between the receipts and payments made. According to him, such a method of determination of undisclosed income was not proper. In our view, the above submission of the Id. counsel for the assessee cannot be accepted. The assessee, amongst other things, was a property developer. The payments made by the assessee are not reflected in the regular books of account. They were held to be in addition to and over and above the business transactions of the assessee. The assessee has not explained the source as to how this expenditure (payments) were made. Therefore, addition u/s. 69C of the Act is called for. As far as the receipts are concerned, the AO has taxed the excess of expenditure over the receipts. We fail to see as to how such

an approach adopted by the AO can be found fault with. We do not find any merits in the aforesaid submission made by the Id. counsel for the assessee.

32. We find no merits in these appeals by the assessee and accordingly the same are dismissed.

**SPs 178 & 179/B/14**

33. In view of the dismissal of the appeals, the stay petitions are also dismissed.

Pronounced in the open court on this 20<sup>th</sup> day of February, 2015.

Sd/-

( ABRAHAM P. GEORGE )  
Accountant Member

Sd/-

( N.V. VASUDEVAN )  
Judicial Member

Bangalore,

Dated, the 20<sup>th</sup> February, 2015.

/D S/

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard file

By order

Assistant Registrar /  
Senior Private Secretary  
ITAT, Bangalore.