IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL NO. 216 of 2016
TO
TAX APPEAL NO. 217 of 2016

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PR.COMMISSIONER OF INCOME-TAX....Appellant(s)

Versus

DESAI CONSTRUCTION PVT.LTD.....Opponent(s)

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Appearance:
MR SUDHIR M MEHTA, ADVOCATE for the Appellant(s) No. 1
MR TEJ SHAH, ADVOCATE for the Opponent(s) No. 1

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CORAM: **HONOURABLE MR.JUSTICE AKIL KURESHI**
and
HONOURABLE MR.JUSTICE A.J. SHASTRI

Date : 20/07/2016

COMMON ORAL ORDER

(PER : HONOURABLE MR.JUSTICE AKIL KURESHI)

1. In these appeals, Revenue has framed following questions for our consideration.

[A] "Whether on the fact and circumstances of the case and in law the ITAT is justified in holding that the action of the AO to disallow deduction claimed u/s 80IA in the proceeding u/s 153A is bad in law as there was no incriminating document found during the search ?"

[B] "Whether on the fact and circumstances of the case and in law the ITAT is justified in holding that in the reassessment u/s 153A, in

respect of unabated proceeding, the addition has to be restricted to the issues found during the search action only and no action is permissible in respect of escaped income unearthed during 153A proceeding ?"

[C] "Whether on the fact and circumstances of the case and in law the ITAT erred in not discussing the issue on merit in respect of disallowance of deduction claimed u/s 80-IA(4) in view of the Explanation to section 80-IA inserted in 2009 retrospectively w.e.f. 01.04.2000 ?"

[D] "Whether on the fact and circumstances of the case and in law the ITAT erred in not appreciating the ratio laid down by High Court of Karnataka at Banglore in the case of M/s Canara Housing Development Company (ITA No 38/2014), Delhi High Court in the case of Anil Bhatia (2012)24Taxmann.com 98(Delhi) ?"

2. Though as many as four questions are framed, it would be necessary for us to focus only on first question since if the Revenue fails to clear the first hurdle, it would not be necessary to examine the other three questions which are either element of the first question or consequential to it.

3. The respondent assessee was subjected to search

operations, pursuant to which, the Assessing Officer proceeded to frame assessment under section 153A of the Income Tax Act, during which he made disallowance of Rs.61.82 lacs (rounded off) and Rs.47.42 lacs (rounded off) for the assessment years 2004-05 and 2005-06 respectively, in respect to the assessee's claim of deduction under section 80IA of the Act. The assessee contested such claim mainly on the ground that no incriminating material was found during the search which would enable the Assessing Officer to reexamine assessee's claim for deduction under section 80IA, which was part of the original assessment proceedings and such assessments had abated. The Tribunal upheld the assessee's contention referring to the decision of Bombay High Court in case of ***Continental Warehousing Corporation (Nhava Sheva) Ltd.,*** reported in ***[2015] 58 taxmann.com 78 (Bombay)*** upon which, the Revenue has filed these appeals.

4. The Bombay High Court had occasion to consider similar issue in the case of ***Continental Warehousing Corporation*** (supra), in which, the Court held and observed as under:

"28. In dealing with those arguments, the

Division Bench outlined the ambit and scope of the powers conferred by section 153A and observed thus :

> *"8) We find it difficult to accept the above contention raised on behalf of the revenue. The object of inserting Sections 153A, 153B and 153C by Finance Act, 2003 by discarding the existing provisions relating to search cases contained in Chapter XIV B of the Income-tax Act, as stated in the Memorandum explaining the provisions in the Finance Bill 2003 (see 260 ITR (St) 191 at 219) was that under the existing provisions relating to search cases, often disputes were raised on the question, as to whether a particular income could be treated as `undisclosed income' or whether a particular income could be said to be relatable to the material found during the course of search, etc. which led to prolonged litigation. To overcome that difficulty, the legislature by Finance Act 2003, decided to discard Chapter XIV B provisions and introduce Sections 153A, 153B and 153C in the IT Act.*
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> *9) What Section 153A contemplates is that, notwithstanding the regular provisions for assessment/reassessment contained in the IT Act, where search is conducted under Section 132 or requisition is made under Section 132A on or after 31/5/2003 in the case of any person, the Assessing Officer shall issue notice to such person requiring him to furnish return of income within the time stipulated therein, in respect of six assessment years immediately preceding the assessment year relevant to the previous year in which the search is conducted or requisition is made and thereafter assess or reassess the total income for those assessment years. The second proviso to Section 153A provides for abatement of assessment/reassessment proceedings which are pending on the date*

of search/requisition. Section 153A (2) provides that when the assessment made under Section 153(A)(1)is annulled, the assessment or reassessment that stood abated shall stand revived.

10) Thus on a plain reading of Section 153A of the Income-tax Act, it becomes clear that on initiation of the proceedings under Section 153A, it is only the SRP 25/61 ::: Downloaded on - 07/05/2015 20:55:36 ::: ITXA523.13.doc assessment / reassessment proceedings that are pending on the date of conducting search under Section 132 or making requisition under Section 132A of the Act stand abated and not the assessments/reassessments already finalised for those assessment years covered under Section 153A of the Act. By a circular No. 8 of 2003 dated 18-9-2003 (See 263 ITR (St) 61 at 107) the CBDT has clarified that on initiation of proceedings under Section 153A, the proceedings pending in appeal, revision or rectification proceedings against finalised assessment/reassessment shall not abate. It is only because, the finalised assessments/reassessments do not abate, the appeal revision or rectification pending against finalised assessment/reassessments would not abate. Therefore, the argument of the revenue, that on initiation of proceedings under Section 153A, the assessments/reassessments finalised for the assessment years covered under Section 153A of the Income-tax Act stand abated cannot be accepted. Similarly on annulment of assessment made under Section 153A (1) what stands revived is the pending assessment / reassessment proceedings which stood abated as per section 153A(1).

11) In the present case, as contended by Shri Mani, learned counsel for the assessee, the assessment for assessment year 1998-99 was finalised on the 29-12-

2000 and search was conducted thereafter on 3-12- 2003. Therefore, in the facts of the present case, initiation of proceedings under Section 153A would not affect the assessment finalised on 29-12-2000.

12) Once it is held that the assessment finalised on 29.12.2000 has attained finality, then the deduction allowed under section 80 HHC of the Income-tax Act as well as the loss computed under the assessment dated 29-12-2000 would attain finality. In such a case, the A.O. while passing the independent assessment order under Section 153A read with Section 143 (3) of the I.T. Act could not have disturbed the assessment / SRP 26/61 ::: Downloaded on - 07/05/2015 20:55:36 ::: ITXA523.13.doc reassessment order which has attained finality, unless the materials gathered in the course of the proceedings under Section 153A of the Income-tax Act establish that the reliefs granted under the finalised assessment/ reassessment were contrary to the facts unearthed during the course of 153 A proceedings.

13) In the present case, there is nothing on record to suggest that any material was unearthed during the search or during the 153A proceedings which would show that the relief under Section 80 HHC was erroneous. In such a case, the A.O. while passing order under Section 153A read with Section 143(3) could not have disturbed the assessment order finalised on 29.12.2000 relating to Section 80 HHC deduction and consequently the C.I.T. could not have invoked jurisdiction under Section 263 of the Act."

29. We are not in agreement with Mr. Pinto that these observations are made in passing or that they are not binding on us because the essential controversy before the Bench was somewhat different. He urges that was

only in relation to the legality and validity of the order of the Commissioner under section 263 of the IT Act. Had that been the case, the Division Bench was not required to trace out the history of section 153A of the IT Act and the power that is conferred thereunder. When the Revenue argued before the Division Bench that the power under section 153A can be invoked and exercised even in cases where the second proviso to sub-section (1) is not applicable SRP 27/61 ::: Downloaded on - 07/05/2015 20:55:36 ::: ITXA523.13.doc that the Division Bench was required to express a specific opinion.

The provision deals with those cases where assessment or reassessment, if any, relating to the assessment years falling within the period of six assessment years referred to in sub-section (1) of section 153A were pending. If they were pending on the date of the initiation of the search under section 132 or making of requisition under section 132A, as the case may be, they abate. It is only pending proceedings that would abate and not where there are orders made of assessment or reassessment and which are in force on the date of initiation of the search or making of the requisition. As that specific argument was canvassed and dealt with by the Division Bench and that is how it was called upon to interpret section 153A of the IT Act, then, each of the above conclusions rendered by the Division Bench would bind us.

30. Even otherwise, we agree with the Division Bench when it observes as above with regard to the ambit and scope of the powers conferred under section 153A of the Act. Since we are not required to trace out the history and we can do nothing better than to reproduce the observations and conclusions as above that we are not repeating SRP 28/61 ::: Downloaded on - 07/05/2015 20:55:36 ::: ITXA523.13.doc the same. Even if the exercise of power under section 153A is permissible

still the provision cannot be read in the manner suggested by Mr. Pinto. Not only the finalised assessment cannot be touched by resorting to those provisions, but even while exercising the power can be exercised where a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A after 31st March, 2003. There is a mandate to issue notices under section 153(1)(a) and assess or reassess the total income of six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made. Thus, the crucial words "search" and "requisition" appear in the substantive provision and the provisos. That would throw light on the issue of applicability of the provision. It being enacted to a search or requisition that its construction would have to be accordingly. That is the conclusion reached by the Division Bench in Murli Agro (supra) with which we respectfully agree. These are the conclusions which can be reached and upon reading of the legal provisions in question. "

5. We are informed that against this judgment of Bombay High Court, the Revenue has preferred SLP, which is pending. We would have considered waiting for the outcome of such appeal. However, it was brought to our notice that this Court in case of ***Pr. Commissioner of Income-tax-4 v. Saumya Construction Pvt. Ltd.*** in Tax Appeal No.24 of 2016 in a judgment dated 14.03.2016, had also considered the similar issue as can be seen from para 3 of the judgment which

reads as under:

> *"3. Mr. Nitin Mehta, learned senior standing counsel for the appellant, submitted that the Tribunal has grossly erred in holding that addition can be made under section 153A only if incriminating material is found during the course of the search, that too, in relation to each of the six assessment years and that in respect of any assessment year, if no incriminating material is found, addition cannot be made under section 153A of the Act. It was argued that there is no condition in section 153A that additions should be made strictly on the basis of the evidence found during the course of search or other post search material or information available with the Assessing Officer, related to the evidence found. It was submitted that section 153A of the Act has two trigger points after which there is a mandate on the Assessing Officer to issue notice for assessment in each of the six years prior to the date of the search. It was submitted that the Tribunal, while holding that the addition should be based upon the incriminating material, found during the search under the new procedure provided under section 153A, failed to appreciate that the new procedure is different from the earlier procedure under section 158BC read with section 158BB of the Act."*

6. The Court in this background held and observed as under:

> *"15. On a plain reading of section 153A of the Act, it is evident that the trigger point for exercise of powers thereunder is a search under section 132 or a requisition under section 132A of the Act. Once a search or requisition is made, a mandate is cast upon the Assessing Officer to issue notice under section 153A of the Act to the person,*

requiring him to furnish the return of income in respect of each assessment year falling within six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made and assess or reassess the same. Since the assessment under section 153A of the Act is linked with search and requisition under sections 132 and 132A of the Act, it is evident that the object of the section is to bring to tax the undisclosed income which is found during the course of or pursuant to the search or requisition. However, instead of the earlier regime of block assessment whereby, it was only the undisclosed income of the block period that was assessed, section 153A of the Act seeks to assess the total income for the assessment year, which is clear from the first proviso thereto which provides that the Assessing Officer shall assess or reassess the total income in respect of each assessment year falling within such six assessment years. The second proviso makes the intention of the legislature clear as the same provides that assessment or reassessment, if any, relating to the six assessment years referred to in the sub-section pending on the date of initiation of search under section 132 or requisition under section 132A, as the case may be, shall abate. Sub-section (2) of section 153A of the Act provides that if any proceeding or any order of assessment or reassessment made under sub-section (1) is annulled in appeal or any other legal provision, then the assessment or reassessment relating to any assessment year which had abated under the second proviso would stand revived. The proviso thereto says that such revival shall cease to have effect if such order of annulment is set aside. Thus, any proceeding of assessment or reassessment falling within the six assessment years prior to the search or requisition stands abated and the total income of the assessee is required to be

determined under section 153A of the Act. Similarly, sub-section (2) provides for revival of any assessment or reassessment which stood abated, if any proceeding or any order of assessment or reassessment made under section 153A of the Act is annulled in appeal or any other proceeding.

16. Section 153A bears the heading Assessment in case of search or requisition. It is well settled as held by the Supreme Court in a catena of decisions that the heading of the section can be regarded as a key to the interpretation of the operative portion of the section and if there is no ambiguity in the language or if it is plain and clear, then the heading used in the section strengthens that meaning. From the heading of section 153, the intention of the legislature is clear viz., to provide for assessment in case of search and requisition. When the very purpose of the provision is to make assessment in case of search or requisition, it goes without saying that the assessment has to have relation to the search or requisition. In other words, the assessment should be connected with something found during the search or requisition, viz., incriminating material which reveals undisclosed income. Thus, while in view of the mandate of sub-section (1) of section 153A of the Act, in every case where there is a search or requisition, the Assessing Officer is obliged to issue notice to such person to furnish returns of income for the six years preceding the assessment year relevant to the previous year in which the search is conducted or requisition is made, any addition or disallowance can be made only on the basis of material collected during the search or requisition. In case no incriminating material is found, as held by the Rajasthan High Court in the case of ***Jai Steel (India), Jodhpur v. Assistant Commissioner of Income Tax*** *(supra), the earlier assessment would have to be*

reiterated. In case where pending assessments have abated, the Assessing Officer can pass assessment orders for each of the six years determining the total income of the assessee which would include income declared in the returns, if any, furnished by the assessee as well as undisclosed income, if any, unearthed during the search or requisition. In case where a pending reassessment under section 147 of the Act has abated, needless to state that the scope and ambit of the assessment would include any order which the Assessing Officer could have passed under section 147 of the Act as well as under section 153A of the Act.

17. In the facts of the present case, a search came to be conducted on 07.10.2009 and the notice was issued to the assessee under section 153A of the Act for assessment year 2006-07 on 04.08.2010. In response to the notice, the assessee filed return of income on 18.11.2010. In terms of section 153B, the assessment was required to be completed within a period of two years from the end of the financial year in which the search came to be carried out, namely, on or before 31st March, 2012. Here, insofar as the impugned addition is concerned, the notice in respect thereof came to be issued on 19.12.2011 seeking an explanation from the assessee. The assessee gave its response by reply dated 21.12.2011 calling upon the Assessing Officer to provide copies of statements recorded on oath of Shri Rohit P. Modi and Smt. Pareshaben K. Modi during the search as well as the copies of the documents upon which the department placed reliance for the purpose of making the proposed addition as well as the copy of the explanation given by Shri Rohit P. Modi and Smt. Pareshaben K. Modi regarding the on-money received, copies of the assessment orders in case of said persons and also requested the Assessing Officer to permit him to cross-examine the said persons. The Assessing Officer issued summons to the

said persons, however, they were out of station and it was not known as to when they would return. In this backdrop, without affording any opportunity to the assessee to cross-examine the said persons, the Assessing Officer made the addition in question.

18. In this case, it is not the case of the appellant that any incriminating material in respect of the assessment year under consideration was found during the course of search. At the relevant time when the notice came to be issued under section 153A of the Act, the assessee filed its return of income. Much later, at the fag end of the period within which the order under section 153A of the Act was to be made, in other words, when the limit for framing the assessment as provided under section 153 was about to expire, the notice has been issued in the present case seeking to make the proposed addition of Rs.11,05,51,000/- on the basis of the material which was not found during the course of search, but on the basis of a statement of another person. In the opinion of this court, in a case like the present one, where an assessment has been framed earlier and no assessment or reassessment was pending on the date of initiation of search under section 132 or making of requisition under section 132A, while computing the total income of the assessee under section 153A of the Act, additions or disallowances can be made only on the basis of the incriminating material found during the search or requisition. In the present case, it is an admitted position that no incriminating material was found during the course of search, however, it is on the basis of some material collected by the Assessing Officer much subsequent to the search, that the impugned additions came to be made."

7. In view of such legal position, we see no reason

to entertain these tax appeals. Both the tax appeals are dismissed.

(AKIL KURESHI, J.)

(A.J. SHASTRI, J.)

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