

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "A", MUMBAI

BEFORE SHRI G.S.PANNU, ACCOUNTANT MEMBER
AND
SHRI RAM LAL NEGI, JUDICIAL MEMBER

ITA No. 2740/Mum/2011,(A.Y.2004-05)

ITA No. 7552/Mum/2013,(A.Y.2004-05)

K.Sera Sera Productions Limited,
18, 4th Floor, Mohid Heights,
Above Masala Mantra Restaurant,
Lokhandwala Road, Andheri (W),
Mumbai 400 053
PAN:AAACG 5103D

..... Appellant

Vs.

The DCIT, C.C-38,
Room No.32(1) Ground Floor,
Aaykar Bhavan,M.K.Road,
Mumbai 400 020

.... Respondent

ITA No. 3308/Mum/2011,(A.Y.2004-05)

ITA No. 6961/Mum/2013,(A.Y.2004-05)

The DCIT, C.C-38,
Room No.32(1) Ground Floor,
Aaykar Bhavan,M.K.Road,
Mumbai 400 020

.... Appellant

Vs.

K.Sera Sera Productions Limited,
18, 4th Floor, Mohid Heights,
Above Masala Mantra Restaurant,
Lokhandwala Road, Andheri (W),
Mumbai 400 053
PAN:AAACG 5103D

..... Respondent

Assessee by : Shri Satish Mody
Revenue by : S/Shri R.P.Meena/Rajesh Kumar Yadav

Date of hearing : 23/10/2017
Date of pronouncement : 31/10/2017

ORDER

PER G.S.PANNU,A.M:

The captioned four appeals relate to the same assessee pertaining to assessment year 2004-05, therefore, they have been clubbed and heard together and a consolidated order is being passed for the sake of convenience and brevity.

2. Firstly, we may take up the appeals in ITA Nos. 2740/Mum/2011 & 3308/Mum/2011, which are cross-appeals preferred by the assessee and the Revenue against the order passed by the CIT(A) -41, Mumbai pertaining to the assessment year 2004-05, which in turn has arisen from an order passed by the Assessing Officer dated 31/12/2009 under section 143(3) r.w.s. 153A of the Act.

3. The background of the dispute can be summarized as follows. The assessee is a company incorporated under the provisions of the Companies Act, 1956 and is, inter-alia, engaged in the business of production and distribution of films. There was a search action under section 132(1) of the Act on the assessee and its group concerns as well as on its directors on 12/09/2007. As a consequence, a notice under section 153A was issued calling for a return of income, in response to which assessee filed a return of income on 10/09/2009 declaring a total

income of Rs.1,29,31,390/-, which was the same as filed under section 139(1) of the Act on 01/11/2004. In the ensuing assessment finalized under section 143(3) r.w.s. 153A of the Act dated 31/12/2009, the total income for the year has been assessed at Rs.1,87,67,986/-, which inter-alia, contains five additions. These additions are (i) disallowance of Preliminary expenses claimed under section 35D of the Act of Rs.10,12,826/-; (ii) disallowance of stock exchange listing fee on account of being a prior period expense – Rs.2,00,000; (iii) denial of depreciation – Rs.5,95,013/-; (iv) disallowance of expenditure on distribution of gifts Rs.28,00,000/-; and, (v) Disallowance of interest expense on loans – Rs.10,29,724/-.

4. All these additions were carried in appeal before the CIT(A), who has since allowed part relief. The CIT(A) deleted the disallowance made out of interest expenditure of Rs.10,29,724/- and has sustained the other four items of addition. As a consequence, Revenue is appeal before us contesting the action of the CIT(A) in deleting the disallowance out of interest expenditure, whereas assessee is challenging the order of the CIT(A) sustaining the other four items of addition.

5. In this background, the rival counsels have been heard and the relevant material perused. At the outset, Ld. Representative for the assessee referred to the Additional Grounds of appeal raised, which read as under:-

“5.(a). On the facts and circumstances of the cases and in law, the Id. CIT(A) ought to have quashed the order passed u/s 143(3) r.w.s. 153A of

the Act being invalid and bad in law and not doing so is wrong and contrary to the facts of the case, the provisions of the Act and the Rules made thereunder.

(b) On the facts and circumstances of the cases and in law, the Hon'ble CIT(A) failed to appreciate that the disallowances made by the Id. Assessing officer were not arising out of the search carried out at the appellant's premise but as per the direction given by the Commissioner of Income Tax u/s 263”.

5.1 The Ld. Representative for the assessee explained that initially in the Memo of appeal assessee had raised three Grounds challenging the action of CIT(A) in sustaining the disallowances made out of Listing Fee paid to Stock Exchange of Rs.2,00,000/-; depreciation disallowed of Rs.5,94,013/-; and, disallowance of expenditure on gifts of Rs.28,00,000/-. It is pointed out that in terms of the Additional Grounds of appeal, what is sought to be contended is that the Assessing Officer had no jurisdiction to make the impugned additions in the assessment finalized under section 143(3) r.w.s. 153A of the Act, inasmuch as, none of the additions were based on any incriminating material found in the course of search. The Ld. Representative for the assessee contended that the proposition sought to be canvassed by the assessee in the Additional Ground of appeal No.5(b) above, is clearly covered by the judgment of the Hon'ble Bombay High Court in the case of All Cargo Global Logistics Ltd. vs. DCIT, 374 ITR 645 (Bom). It has also been contended that necessary factual aspects of the dispute are clearly emerging from the orders of the authorities below and, therefore, since the relevant facts are available on record and the issue raised is a legal

issue, the Additional Grounds deserve to be admitted for adjudication following the ratio of the judgments of the Hon'ble Supreme Court in the case National Thermal Power Company Ltd. vs. CIT, 229 ITR 383(SC) as well as in the case of Jute Corporation of India Ltd. vs. CIT, 187 ITR 688 (SC).

5.2 In so far as the admission of the Additional Ground of appeal is concerned, the Ld. Departmental Representative has not seriously opposed the same, apart from pointing out that such a plea was not raised hitherto before the lower authorities. In our considered opinion, the point sought to be raised by the assessee in the Additional Grounds of appeal is a point of law, which is indeed supported by the judgment of the Hon'ble Bombay High Court in the case of All Cargo Global Logistics Ltd. (supra); and, with the necessary facts being available on record, the same deserves to be admitted for adjudication. Notably, it is also clear that the Additional Grounds sought to be raised by the assessee go to the root of the jurisdiction of the Assessing Officer to make the impugned addition and is thus quite relevant to decide the tax liability of the assessee and, thus, deserves to be admitted following the parity of reasoning laid down by the Hon'ble Supreme Court in the case of National Thermal Power Co. Ltd.(supra). Accordingly, we admit the Additional Grounds of appeal raised by the assessee for adjudication.

5.3 At the time of hearing, the rival counsels were also heard on the merits of the Additional Grounds of appeal of the assessee. In this background, we now proceed to adjudicate the dispute raised in this appeal.

6. Before us, the Ld. Representative for the assessee contended that in the course of search no incriminating material was found which would justify the additions made by the Assessing Officer in the impugned assessment order. Pointing to the factual matrix, it was shown that the return of income originally filed under section 139(1) of the Act on 10/09/2009, was subject to a scrutiny assessment vide order dated 22/11/2006 under section 143(3) of the Act. Thus, it was pointed out that as on the date of search i.e. 12/09/2007, the assessment for the impugned assessment year of 2004-05 was not pending. Consequently, it is explained that the assessment for the year under consideration did not abate in terms of second proviso to section 153A(1) of the Act. Since the original assessment did not abate and the fact that there was no incriminating material found in the course of search, the impugned additions could not have been made by the Assessing Officer in the assessment finalized under section 143(3) r.w.s. 153(A)(1) of the Act. In support of such proposition, reliance has been placed on various decisions:

- (i) All Cargo Global Logistics Ltd., 374 ITR 645 (Bom)
- (ii) Jai Steel (India), Jodhpur vs. ACIT, [2013] 36 taxmann.com 523(Raj)

7. On the other hand, Ld. Departmental Representative has justified the action of the lower authorities by pointing out that in terms of section 153A of the Act, the Assessing Officer was empowered to assess or reassess the total income of six assessment years immediately preceding the assessment year relevant to the previous year in which

search was conducted. It has been emphasized that the Assessing Officer was duty bound to assess or reassess the total income of such assessment years and, therefore, the impugned additions were justifiably made in the assessment year finalized under section 143(3) r.w.s. 153A(1) of the Act.

8. We have carefully considered the rival submissions. In order to appreciate the controversy, it is pertinent to observe that Section 153A of the Act postulates an assessment in case of search or requisition under section 132 or under section 132A of the Act respectively. The said section envisages that the Assessing Officer shall assess or reassess the total income for six assessment years immediately preceding the assessment year relevant to the previous year in which search was conducted. The second proviso to section 153A(1) of the Act also prescribes that assessment or re-assessment, if any, relating to any assessment year falling within the period of six years referred to in subsection(1) of section 153A of the Act, which is pending on the date of initiation of search or making of requisition, as the case may be, shall abate. Thus, in so far as the pending assessments are concerned, the competence of the Assessing Officer to make the original assessment converges with the assessment to be made under section 153A of the Act, i.e. only one assessment shall be made for such assessment years, based on the findings of the search as well as any other material existing or brought on record by the Assessing Officer. Notably, there would be assessments in the period of the six assessment years identified in section 153A(1) of the Act, which would have become final

(i.e. which are not pending on the date of search); such assessments do not abate in terms of the second proviso to section 153A(1) of the Act. The scope and ambit of the assessment where the original assessment has not abated is the controversy before us. In this context, it would be pertinent to refer to the judgment of the Hon'ble Bombay High Court in the case of All Cargo Global Logistics Ltd.(supra), wherein the scope of assessment under section 153A of the Act has been considered. One of the points addressed by the Hon'ble High Court was whether the scope of assessment under section 153A of the Act envisages additions, which are otherwise not based on any incriminating material found during the course of the search in the case of the original assessment not abating. As per Hon'ble High Court, no addition could be made in respect of the assessment that had become final, in the event where no incriminating material is found during the course of search. The Hon'ble High Court also noticed its earlier judgment in the case of CIT vs. Murali Agro-Products Ltd., Income Tax Appeal No.36 of 2009 order dated 29/10/2010 and elaborately culled out the scope and ambit of the assessment and reassessment of total income under section 153A(1) of the Act read with the proviso thereof. The Hon'ble Bombay High Court has ruled out that an assessment under section 153A(1) in an unabated year would not encompass any addition for which no incriminating material is found during the course of search, because in such a case, the original assessment had become final.

8.1 The aforesaid proposition is also supported by judgment of Hon'ble Delhi High Court in the case of CIT(Central)-III vs. Kabul Chawla

in ITA 707/2014 dated 28/08/2015, wherein the legal proposition has been summarized in the following words:-

"Summary of the legal position

37. On a conspectus of Section 153A(1) of the Act, read with the proviso thereto, and in the light of the law explained in the aforementioned decisions, the legal position that emerges is as under:

i. Once a search takes place under Section 132 of the Act, notice under Section 153A(1) will have to be mandatorily issued to the person searched requiring him to file returns for six AYs immediately preceding the previous year relevant to the AY in which the search takes places.

ii. Assessments and reassessments pending on the date of the search shall abate. The total income for such AYs will have to be computed by the AOs as afresh exercise.

iii. The AO will exercise normal assessment powers in respect of the six years previous to the relevant AY in which the search take place. The AO has the power to assess and reassess the 'total income' of the aforementioned six years in separate assessment orders for each of the six years. In other words there will be only one assessment order in respect of each of the six AYs "in which both the disclosed and the undisclosed income would be brought to tax".

iv. Although Section 153A does not say that additions should be strictly made on the basis of evidence found in the course of the search, or other post-search material or information available with the AO which can be related to the evidence found, it does not mean that the assessment " can be arbitrary or made without any relevance or nexus with the seized material. Obviously an assessment has to be made under this Section only on the basis of seized material."

v. In absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made. The word 'assess' in Section 153A is relatable to abated proceedings (i.e. those pending on the date of search) and the word 'reassess' to completed assessment proceedings.

vi. Insofar as pending assessments are concerned, the jurisdiction to make the original assessment and the assessment under Section 153A merges into one. Only one assessment shall be made separately for each AY on the basis of the findings of the search and any other material existing or brought on the record of the Assessing Officer.

vii. Completed assessments can be interfered with by the AO while making the assessment under Section 153A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment."

8.2 In this legal background, we may now turn to the addition made by the Assessing Officer in the impugned assessment and the manner in which such additions have been made. The first addition is out of claim of preliminary expenses under section 35D of the Act of Rs 10,12,826/-, and the relevant discussion in this regard is contained in para 5 of the assessment order which shows that it is based on the disallowance made in the assessment originally finalized under section 143(3) of the Act dated 22/11/2006. The second addition is the disallowance of Stock Exchange listing fee of Rs.2,00,000/- and the relevant discussion is contained in para-6 of the assessment order. The addition has been made primarily in the absence of evidence to substantiate the expenditure. Thirdly, depreciation on furniture and fixtures of Rs.5,94,013/- has been denied in terms of the discussion in para-7 of the assessment order. The relevant discussion shows that in case of some of the invoices of the cost of furniture and fixtures, the assessee could not substantiate the values and thus, depreciation was denied on such value of the assets. Fourthly, the addition of Rs.28,00,000/- out of expenditure on gifts has been made and the relevant discussion is contained in para-9 of the assessment order. The discussion shows that the Assessing Officer was not satisfied with the justification for incurrence of expenditure and out of the total expenditure of

Rs.30,00,000/- on gifts made, he disallowed an amount of Rs.28,00,000/-. Lastly, the Assessing Officer disallowed the interest expenditure of Rs.10,79,724/- as per the discussion contained in para-8 of the assessment order. The only reason advanced is the failure of the assessee is to prove that the corresponding borrowings were made for the purposes of business. The respective discussion made by the Assessing Officer with respect to each of the additions does not reflect reference to any incriminating material or any other information, which was unearthed in the course of search, so as to justify the additions. Even at the time of hearing before us, there is no reference to any incriminating material, much less any material found during the course of search in order to justify the additions made in the impugned assessment. Thus, on facts, it has to be concluded that the additions made to the returned income by the Assessing Officer in the impugned assessment is not with reference to any incriminating material found in the course of search. Thus, following the parity of reasoning laid down by Hon'ble Bombay High Court in the case of All Cargo Global Logistics Ltd. (supra), the impugned additions could not have been made in the impugned assessment since the original assessment made under section 143(3) of the Act had become final and did not abate. Thus, in the absence of any incriminating material, the Assessing Officer is not empowered to make the impugned additions in an assessment finalized under section 143(3) r.w.s. 153A of the Act. Accordingly, assessee succeeds on its Additional Ground of appeal No.5(b), as above.

8.3 As a consequence of above, all the additions made to the returned income are deleted. Thus, all the other issues raised by the assessee in its appeal become infructuous and are not being adjudicated.

9. The Cross Appeal preferred by the Revenue is with regard to the deletion of interest expenditure by the CIT(A). This appeal also become infructuous because we have already held in the earlier paras that the Assessing Officer was devoid of jurisdiction to make the addition of Rs. 10,29,724/- out of interest expenditure in an assessment finalized under section 143(3) r.w.s. 153(A)(1) of the Act.

10. In the result, so far as the appeal of the assessee is concerned, the same stands allowed and that of the Revenue is dismissed.

11. We may now take up the other two captioned Cross appeals, which arise from the penalty levied by the Assessing Officer under section 271(1)(c) of the Act of Rs.16,52,704/- with respect to the additions made to the returned income in the assessment finalized under section 143(3) r.w.s. 153A(1) of the Act dated 31/12/2009. Since, in the quantum appeals, we have already held that the additions made by the Assessing Officer do not survive, the question of levy of penalty under section 271(1)(c) of the Act does not arise as the additions itself have been found to be untenable. Therefore, in so far as the appeal of the assessee is concerned, the same is allowed and that of Revenue is dismissed.

In the result, whereas the captioned appeals of the assessee are allowed and that of Revenue are dismissed.

Order pronounced in the open court on 31/10/2017.

Sd/-
(RAM LAL NEGI)
JUDICIAL MEMBER

Sd/-
(G.S. PANNU)
ACCOCUNTANT MEMBER

Mumbai, Dated 31/10/2017

Vm, Sr. PS

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai