

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. 5055/Mum/2011,(A.Y.2005-06)
ITA No. 1287/Mum/2014,(A.Y.2005-06)

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

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

Date of hearing : 26/10/2017
Date of pronouncement : 31/10/2017

ORDER

PER G.S.PANNU,A.M:

The captioned appeals relates to the same assessee pertaining to assessment year 2005-06, therefore, they have been clubbed together and a consolidated order is being passed for the sake of convenience and brevity.

2. First, we may take up the appeal in ITA No.5055/Mum/2011 which is directed against the order passed by the CIT(A)- 41, Mumbai pertaining to the assessment year 2005-06, 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 genesis of this appeal arises from an assessment made by the Assessing Officer under section 143(3) r.w.s. 153A of the Act following a search action carried out at the business premises of the assessee and its other group concerns on 12/09/2007. The assessment has been finalized at Rs.7,85,86,225/- as against the returned income of Rs.4,80,06,298/-. The CIT(A) has allowed part relief to the assessee and the assessee is in appeal challenging the addition sustained by the CIT(A) of Rs.19,65,690/- on account of prior period expenses. However, subsequent to the filing of appeal before the Tribunal, assessee has raised an Additional Ground of appeal, which reads as under:-

"1. On the facts and in the circumstances of the case and in law the additions made by the assessing officer under section 143(3) r.w.s. 153A are bad in law as the additions are not based on any incriminating material found during the course of search."

4. In terms of the Additional Ground of appeal, it is sought to be canvassed that the addition is not based on any incriminating material found in the course of search and, therefore, it is outside the scope of the impugned assessment which has been finalized under section 143(3) r.w.s. 153A of the Act. It has been canvassed before us that the point raised by the assessee is based on the law laid down by the Hon'ble Bombay High Court in the case of All Cargo Global Logistics Ltd.,374 ITR 645 (Bom) and since necessary facts are available on

record, the Additional Ground be admitted for adjudication following the ratio of the judgment of the Hon'ble Supreme Court in the case of National Thermal Power Co.Ltd.,229 ITR 383(SC).

5. On the other hand, the Ld. Departmental Representative reiterated that the plea now sought to be raised was not raised before the lower authorities and further that a part of the disallowance made by the Assessing Officer under section 37(1) of the Act has also been admitted before the CIT(A) and, therefore, no relief should be extended on that score.

6. Having considered the rival stands, in our view, the Additional Ground of appeal sought to be raised by the assessee deserves to be admitted since it involves a pure point of law and the necessary facts required to adjudicate the same are already been on record. Thus, following the ratio of the judgment of the Hon'ble Supreme Court in the case of National Thermal Co. Ltd.(supra), we hereby admit the Additional Grounds of appeal for adjudication.

7. At the time of hearing the rival counsels were heard on the merits of the Additional Ground of appeal. In order to appreciate the plea of the assessee, the following facts are relevant. Originally, assessee filed a return of income under section 139(1) of the Act on 31/10/2005 declaring a total income of Rs.4,80,06,300/-. Consequent to the search action under section 132(1) of the Act on 12/09/2007, a notice under section 153A of the Act was issued calling for the return of income and in response assessee filed a return of income on 10/09/2009 declaring the total income at Rs.4,80,06,300/-, which the same as declared in the return of income originally filed for the instant

assessment year under section 139(1) of the Act. Notably, on the date of the search i.e. on 12/09/2007, the time limit for issuance of notice under section 143(2) of the Act with respect to the return of income originally filed on 31/10/2005 under section 139(1) of the Act had lapsed and thus it could not be said that any assessment on the date of search was pending. Thus, in terms of the second proviso to section 153A(1) of the Act the original return had become final and the assessment did not abate. As a consequence, following the ratio of the Hon'ble Bombay High Court in the case of All Cargo Global Logistics Ltd. (supra) in the ensuing assessment finalized under section 143(3) r.w.s. 153A of the Act, no addition could be made in the absence of any incriminating material found in the course of search. The plea of the assessee is that the additions made by the Assessing Officer in the impugned assessment are without recourse to any incriminating material found in the course of search and are thus, outside the scope of the impugned assessment, as per the proposition laid down by the Hon'ble Bombay High Court in the case of All Cargo Global Logistics Ltd. (supra).

8. In this context, we have perused the assessment order and find that three additions have been made to the income returned. Firstly, a disallowance under section 43B of the Act of Rs.1,78,911/-, which has since been deleted by the CIT(A) and in the absence of any appeal by the Revenue the said deletion has become final. Thus, as of now the said addition has no relevance. Secondly, a disallowance of Rs.19,65,690/- has been made on account of Prior Period expenses and relevant discussion is contained in para-6 of the assessment order. The

said addition has since been affirmed by the CIT(A) also, and it has been further challenged by the assessee in appeal before us. The discussion in the assessment order reveals that it is purely based on the Tax Audit Report and, there is no reference to any incriminating material found in the course of search in order support the said addition. Thirdly, a disallowance has been made under section 37(1) of the Act of Rs.2,84,35,326/- by noticing that there was a difference between the cost of production claimed by the assessee for various movies as per Rule 9A of the Income Tax Rules, 1962(in short "the Rules") vis-à-vis the cost of production debited to the Profit & loss Account. The difference between the two has been disallowed. Factually, on this aspect, we find that CIT(A) has sustained an addition of only Rs.24,84,694/- and the balance has been deleted. There is no appeal by the Revenue against the relief allowed by the CIT(A), as was stated in the hearing before us. In so far as the addition sustained, the CIT(A) has recorded a finding that assessee has admitted the disallowance to the tune of Rs.24,84,694/-. Thus, on this aspect also we find no necessity to make further discussion, as the CIT(A) has allowed part relief and the balance of Rs.24,84,694/- has been admitted by the assessee itself and there cannot be any further grievance of the assessee .

9. Be that as it may, the only disallowance which is challenged by the assessee before us is the Prior Period expenses and relevant discussion in the assessment order does not show that it is based on any incriminating material found in the course of search. Thus, the ratio of the judgment of the Hon'ble Bombay High Court in the case All Cargo

Global Logistics Ltd. (supra) is clearly attracted and the same is outside the purview of the impugned assessment finalized under section 143(3) r.w.s. 153A of the Act. Thus, on this aspect itself, we set aside the order of CIT(A) and direct the Assessing Officer to delete the addition of Rs.19,65,690/-. We may clarify here that we are not examining the aforesaid proposition with respect to the addition of Rs.24,84,964/- under Rule 9A of the Rules, since the same has been admitted by the assessee before the CIT(A), and there is no negation of the said aspect before us.

10. In the result, the appeal of the assessee is allowed, as above.

11. In so far as the appeal of the assessee in ITA No.1287/M/2014 is concerned, the same is directed against the order passed by the CIT(A)-41, Mumbai dated 29/11/2013, pertaining to the assessment year 2005-06, whereby the penalty levied under section 271(1)(c) of the Act with respect to the addition of Rs.24,84,964/- has been sustained.

12. Notably, the penalty has been levied by the Assessing Officer on an amount of Rs. 19,65,507/- representing disallowance of Prior Period expenses and under section 37(1) of the Act of Rs.24,84,964/-, which was confirmed by the CIT(A) on account of difference between the expenditure on production of movies claimed in terms of Rule 9A of the Rules vis-à-vis the expenditure debited in the Profit & loss Account. The CIT(A) has sustained the penalty with regard to the disallowance of cost of production of Rs.24,84,964/- whereas with respect to the disallowance of Prior Period expenditure of Rs.19,65,690/-, he has deleted the penalty. Not being satisfied with the order of CIT(A), assessee is in further appeal before us.

13. At the time of hearing, Ld. Representative for the assessee pointed out that even though assessee had admitted the disallowance of Rs.24,84,694/- in terms of Rule 9A of the Rules before the CIT(A) in the quantum proceedings, yet in the penalty proceedings assessee would be within its right to contend that such a disallowance is not permissible in an assessment made under section 143(3) r.w.s. 153A(1) of the Act, having regard to the ratio of the judgment of the Hon'ble Bombay High Court in the case of All Cargo Global Logistics Ltd. (supra).

14. On the other hand, the Ld. Departmental Representative primarily contended that since addition has been accepted by the assessee, the penalty under section 271(1)(c) of the Act is quite justified.

15. We have carefully considered the rival submissions. No doubt in the quantum proceedings, assessee agreed to the addition of Rs.24,84,694/- in terms of Rule 9A of the Rules before the CIT(A) however, the penalty proceedings under section 271(1)(c) of the Act are independent proceedings and the findings in the assessment proceedings cannot be conclusive to test the efficacy of penalty under section 271(1)(c) of the Act. As per the Hon'ble Supreme Court in the case of Anantharam Veerasinghaiah & Co. vs. CIT, 123 ITR 457 (SC) the penalty proceedings and assessment proceedings are independent proceedings and though the findings in the assessment proceedings may be relevant, but they are not conclusive to determine the efficacy of the penalty leviable under section 271(1)(c) of the Act. Therefore, in the penalty proceedings it is open to the assessee to demonstrate that the addition, which has resulted in the levy of penalty is itself not

tenable in law. Such a plea has been raised by the assessee before us and, in our view, the same deserves to be admitted. We are conscious that, presently we are not dealing with the quantum proceedings, but we are examining the efficacy of the addition only for the purpose of examining the exigibility of penalty under section 271(1)(c) of the Act. Considering the same, we find that the discussion in the assessment order or even in the order of the CIT(A) in the quantum proceedings does not show that the addition of Rs.24,84,964/- in terms of Rules 9A of the Rules is based on any incriminating material found in the course of search and, therefore, the same is not maintainable in view of the judgment of the Hon'ble Bombay High Court in the case of All Cargo Global Logistics Ltd. (supra). Thus, where the addition itself is otherwise unsustainable, the penalty under section 271(1)(c) of the Act is, therefore, not exigible. Accordingly, we set-aside the order of CIT(A) and direct the Assessing Officer to delete the penalty leviable with respect to the addition of Rs.24,84,964/- made in terms of Rule 9A of the Rules. Thus, assessee succeeds in this appeal also.

16. Resultantly, the captioned appeals of the assessee are allowed, as above.

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