

IN THE INCOME TAX APPELLATE TRIBUNAL
BENGALURU BENCH 'C', BENGALURU

BEFORE SHRI. INTURI RAMA RAO, ACCOUNTANT MEMBER
AND
SHRI. LALIT KUMAR, JUDICIAL MEMBER

I.T.A No.117/Bang/2017
(Assessment Year : 2010-11)

M/S. Brindavan Phosphates P. Ltd,
No.5/1 & 5/3, 1st Main, Jayamahal Extension,
Bengaluru .. Appellant
PAN : AAACB7371C

v.

Deputy Commissioner of Income-tax,
Central Circle -2(3), Bengaluru .. Respondent

Assessee by : Shri. V. Srinivasan, Advocate
Revenue by : Shri. B. K. Panda, CIT

Heard on : 07.11.2017
Pronounced on : 21.11.2017

ORDER

PER LALIT KUMAR, JUDICIAL MEMBER :

The present appeal is filed by the assessee against the order of the CIT (A) -11, Bengaluru, dt.30.11.2016, for the assessment year 2010-11.

02. Ground no.1 is general needing no adjudication.

03. Ground nos.2 and 2.1 are with respect to the validity of assessment order passed u/s.153A r.w.s. 143(3) of the Act. At the time of hearing, the Ld. AR for the assessee has submitted that the assessee is not pressing these grounds and the same may be dismissed as not pressed. The Ld. DR has no objection and accordingly the ground nos.2 and 2.1 are dismissed as not pressed.

04. Ground nos.3, 3.1 and 3.2 are reproduced here under :

3. The Ld. CIT (A) is not justified in sustaining the disallowance of Rs.2,98,709/- out of the original disallowance of Rs.27,69,619/- being the bad debts claimed by the appellant under the facts and in the circumstances of the appellant's case.

3.1 The learned CIT (A) ought to have appreciated that the aforesaid disallowance made was not based on any incriminating materials found during the course of search and therefore, the impugned addition made in course of the proceedings u/s.153A of the Act, was opposed to law and facts of the appellant's case and hence, the same deserves to be deleted.

3.2. The learned CIT (A) failed to appreciate that the aforesaid amounts were written off by the appellant and the same constituted loss incidental to business and therefore, the same ought to have been allowed under the facts and in the circumstances of the appellant's case.

05. Brief facts are that a search u/s.132 was carried out in the assessee's premises. During the course of assessment proceedings, the AO examined the issue relating to the claim of bad debts written off by the assessee to the extent of Rs.27,69,619/- in its books of account. The AO in his order u/s.143(3) r.w.s.153A made a

disallowance of Rs.27,69,616/- on the ground that the amount claimed as bad debts cannot be allowed as they did not represent any amount that was offered to tax in the earlier year. The AO also observed that the claim could not be considered as a revenue loss since the detailed furnished by the assessee showed that they were deposits made and the same would be only a capital loss. Accordingly, the AO disallowed a sum of Rs.27,69,616/- and added the same to the returned income of the assessee. Being aggrieved by the above disallowance of claim towards bad debts written off, the assessee filed an appeal before the CIT (A).

06. The CIT (A) in the appeal before him, after considering the issue at length, deleted the disallowance to the extent of Rs.24,70,907/- and confirmed the addition to the tune of Rs.2,98,709/-. In para 6.2.10, the CIT (A) has held as under :

6.2.10 The next disallowances made by the A.O are in respect of the amounts written off against Mahalakshmi Express Carriers of Rs.1,76,809/- and security deposit of Rs.1,11,900/- and a further sum of Rs.10,000/- in respect of which no details were furnished by the appellant. Here also, the appellant claims that the same is loss incidental to business. However, from the ledger accounts filed and explanation furnished, I find that the appellant has not been able to establish that these amounts were incurred for purposes of business. Hence, I find no reason to interfere with the order of the A.O. These disallowances are confirmed.

Being further aggrieved by the confirmation of the addition to the tune of Rs.2,98,709/- by the CIT (A), the assessee is in appeal before us with the grounds reproduced here in above.

07. Before us, it was the contention of the Ld. AR before us that no incriminating material was found during the course of search and therefore the addition made by the AO and confirmed by the CIT (A) in respect of bad debts were without any basis. It was submitted that the search was carried out pursuant to warrants of authorisation issued by the DIT (Inv), Agra. The premises of Sri. S. N. Ladhani, at Bengaluru and the assessee company which are abutting to each other were searched simultaneously. The Ld. AR submits that the warrant of authorisation to search Sri. S. N. Ladhani was only showed while there is a doubt whether there was any warrant issued to search the assessee company at all. The Ld. AR relied upon the order of the coordinate bench in the connected matter of Smt. Vidya Devi Ladhani v. ACIT [ITA Nos.118 to 120/Bang/2017, dt.07.04.2017, wherein after referring to a catena of judgments, the Tribunal came to the conclusion as under :

10. I have considered the rival submissions as well a relevant material on record. The search under Section 132 of the Act was conducted on 18.12.2012 in the cases of the assessee. There is no dispute that the assesseees were holding more than 10% of voting power in the company viz. BBPL and are Directors of the said company along with their husbands. It is also a matter of fact that no incriminating material was found or seized during the course of search in respect of any payment, advance, loan or other benefits by the said company i.e. BBPL to the assessee. Only during the course of assessment proceedings under Section 153A of the Act the Assessing Officer found from the ledger accounts that BBPL has paid the income tax liabilities of the assesseees for these assessment years. The assessee explained that since the assessee was not having any separate facility of online payment therefore the payment was made by using the BBPL account however while deciding this legal issue this aspect on the merits of the

issue is not relevant. It is also not in dispute that as on the date of search i.e. 18.12.2012 the assessment for the Assessment Years 2009-10 to 2011-12 were not pending as the limitation for issuing the Notice under Section 143(2) was already expired. Therefore for these three years in both cases the regular assessments stand concluded as on the date of search.

11. In pursuant to the search action under Section 132, the Assessing Officer shall assess or reassess the total income of six years immediately preceding assessment year relevant to the previous year in which search is conducted or requisition is made. Any assessment pertaining to these six assessment years pending on the date of initiation of search under Section 132 is liable to be abated and therefore the proceedings under Section 153A in respect of the said assessment year would be in the nature of assessment. Undisputedly the case of the assessee the assessments were already concluded and they were not pending as on 18.12.2012 and therefore, the proceedings under Section 153A would be in the nature of reassessment in which apart from the undisclosed income unearthed during the search and seizure proceedings, the Assessing Officer can reassess only income which was disclosed by the assessee in the original assessment. Thus it is clear that no addition could be made to the income already assessed by the Assessing Officer except the addition based on the seized material.

12. In the case of CIT Vs. Lancy Constructions (supra), the Hon'ble High Court has held that in the absence of any incriminating documents having been found, the same accounts of the assessee were reassessed by making further investigation which was not permissible as the same would amount to reopening of a concluded assessment without there being any additional material found at the time of search. Thus the Hon'ble High Court has observed that it would give the revenue a second opportunity to reopen the concluded assessment which is impermissible in law. The Hon'ble High Court has further observed that merely because a search is conducted in the premises of assessee would not entitle the revenue to initiate the process of reassessment for which there is a separate procedure prescribed in the statute. It is only when the conditions prescribed for reassessment are fulfilled that a concluded assessment can be reopened. In the subsequent decision in the case of CIT Vs. IBC Knowledge Park Pvt. Ltd. (supra), the Hon'ble jurisdictional High Court after considering

the decision in the case of Canara Housing Development Co. Vs. DCIT (surpa) as well as in the case of CIT Vs. Lancy Constructions (supra) and the decision of Hon'ble Delhi High Court in the case of CIT Vs. Anil Kumar Bhatia 352 ITR 493 (Delhi) has held in paras 45, 49 and 54 to 56 as under :

“ 45. Sections 153A, 153B and 153C were inserted by the Finance Act, 2003, with effect from 1/6/2003. They have replaced the post-search block assessment scheme in respect of any search or requisition made after 31/5/2003. Sub-section (1) of Section 153A inter alia deals with assessment in case of search or requisition. It begins with a non-obstante clause and states that notwithstanding anything contained in Sections 139, 147, 148, 149, 151 and 153, in the case of a person where a search is initiated under Section 132 or books of account, other documents or any valuable assets are requisitioned under Section 132A, the Assessing Officer shall issue notice to such person requiring him to furnish within such period, as may be specified in the notice, return of income in respect of each assessment year falling within six assessment years referred to in clause (b) of Section 153(1) in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed and the provisions of the Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under Section 139. The Assessing Officer can 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. However, assessment or reassessment, if any, relating to any assessment year falling within the period of six assessment years referred to in this sub-section pending on the date of initiation of the search under Section 132 or making of requisition under Section 132A, as the case may be, shall abate. The explanation states, save as otherwise provided in Sections 153A, 153B and 153C, all other provisions of the Act shall apply to the assessment made under Section 153A. Section 153B speaks about time limit for completion of assessment under Section 153A.

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49. *On a conjoint reading of the aforesaid provisions, it becomes clear that a search can take place only when a concerned officer has information and reason to believe that any person is in possession of any valuable assets, which has not been or would not be disclosed under the Act. In such a case, a search can take place. Following the search, if any books of account, other documents, any valuable assets is or are found in the possession or control of any person in the course of a search, then the books of account or other documents or valuable assets could be seized. Under Section 153A, the satisfaction regarding an inference of liability must be recorded. The Assessing Officer has to issue notice to the assessee i.e., the person searched for the purpose of assessment or reassessment of the total income of six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted. Section 153C as already noted, deals with assessment of income of any other person, when the Assessing Officer is satisfied that the books of account or documents or valuable assets seized or requisitioned have a bearing on the determination of the total income of such other person for the relevant assessment year or years referred to under sub-section(1) of Section 153A of the Act. In such a case, the Assessing Officer has to issue notice to assess or reassess income of other person under Section 153A of the Act. Thus, the fact that search has been conducted would not justify issuance of notice under Section 153A. If it is only during a valid search when certain incriminating materials are detected, notice could be issued.*

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54. *On a consideration of the relevant sections as well as judicial precedent referred to above, what emerges is that, Section 158BD of the Act deals with undisclosed income of a third party. However, insofar as the incriminating material of the searched person or other person detected during the course of search is concerned, the same can be considered during the course of assessment. Further, such incriminating material must relate to undisclosed income which would*

empower the Assessing Officer to upset or disturb a concluded assessment of the other person. Otherwise, a concluded assessment would be disturbed without there being any basis for doing so which is impermissible in law. Even in case of a searched person, the same reason would hold good as in case of any other person. As observed by us, detection or the existence of incriminating material is a must for disturbing the assessment already made and concluded. But, at the same time, such can be at three stages: one, at the stage when the reassessment is initiated, the second, at the stage during the course of reassessment and third, at a stage where the reassessment is altered by a different assessment in respect of searched person or in respect of third party. In this regard, reference may be made to the decision of Apex Court in case of M/s. Calcutta Knitwear (supra) and based on the said decision, the CBDT has also issued circular dated 31.12.2015 vide No.24/2015. The relevant extract of the circular for ready reference can be extracted as under:

'The issue of recording of satisfaction for the purposes of section 158BD/153C has been subject matter of litigation.

2. The Hon'ble Supreme Court in the case of M/s Calcutta Knitweaves in its detailed judgment in Civil Appeal No.3958 of 2014 dated 12.3.2014(available in NJRS at 2014- LL-0312-51) has laid down that for the purpose of Section 158BD of the Act, recording of a satisfaction note is a prerequisite and the satisfaction note must be prepared by the AO before he transmits the record to the other AO who has jurisdiction over such other person u/s 158BD. The Hon'ble Court held that

"the satisfaction note could be prepared at any of the following stages:

(a) at the time of or along with the initiation of proceedings against the searched person under section 158BC of the Act; or

(b) in the course of the assessment proceedings under section 158BC of the Act; or

(c) immediately after the assessment proceedings are completed under section 158BC of the Act of the searched person."

2. Several High Courts have held that the provisions of section 153C of the Act are substantially similar/pari-materia to the provisions of section 158BD of the Act and therefore, the above guidelines of the Hon'ble SC, apply to proceedings u/s 153C of the IT Act, for the purposes of assessment of income of other than the searched person. This view has been accepted by CBDT.

3. The guidelines of the Hon'ble Supreme Court as referred to in para 2 above, with regard to recording of satisfaction note, may be brought to the notice of all for strict compliance. It is further clarified that even if the AO of the searched person and the "other person" is one and the same, then also he is required to record his satisfaction as has been held by the Courts.

4. In view of the above, filing of appeals on the issue of recording of satisfaction note should also be decided in the light of the above judgment. Accordingly, the Board hereby directs that pending litigation with regard to recording of satisfaction note under section 158BD/153C should be withdrawn/not pressed if it does not meet the guidelines laid down by the Apex Court.' As per the aforesaid circular, at the time of or along with initiation of the proceedings, against the searched person or third party under Section 153C or in the course of assessment proceedings under Section 153C of the Act or immediately after the assessment proceedings are completed under Section 153C of the Act, recording of satisfaction is required.

55. If the observations made by the Tribunal are considered in this regard, it is noted by the Tribunal that it is not necessary that satisfaction should be recorded that documents or valuable assets found in the course of search showed undisclosed income. In view of the aforesaid discussion, we do not think that such can be the correct position of law.

56. Further, in the judgments referred to by the learned counsel for the Revenue, where incriminating material leading to undisclosed income of another assessee was detected in a search operation, in those cases, reopening of the concluded assessment have taken place. There has been no single decision cited by the learned counsel for the Revenue where the assumption of jurisdiction of the Assessing Officer is in the absence of any incriminating material or undisclosed income having been detected during the course of search leading to reopening

of a concluded assessment. In the instant case, though documents belonging to the assessee were seized at the time of search operation, there was no incriminating material found leading to undisclosed income. Therefore, assessment of income of the assessee was unwarranted. Consequently, no satisfaction was recorded in the case of the assessee. We answer substantial question of law No.2 by holding that the Tribunal was not correct in holding that the assessment under Section 153C was valid despite there being no satisfaction recorded to the effect that the documents found during the search on 17/06/2008 were incriminating in nature and prima facie represented undisclosed income.” Thus it is clear that the Hon'ble High Court having considered the decision of Canara Housing Development Co. Vs. DCIT (surpa) and after having been understood the same has clearly laid down the principle that a concluded assessment cannot be disturbed without there being any existence of incriminating material. 13. The Hon'ble Delhi High Court in the case of CIT Vs. Kabul Chawla (supra), after considering all the relevant decisions on this point has held in paras 35 to 38 as under :

“ 35. In CIT v. Continental Warehousing Corporation (Nhava Sheva) Ltd. [2015] 374 ITR 645/232 Taxman 270/58 taxmann.com 78 (Bom.) the question addressed by the Bombay High Court was whether the scope of assessment under Section 153A encompasses additions, not based on any incriminating material found during the course of search? It was held that no addition could be made in respect of the assessments that had become final in the event no incriminating material was found during search. The Bombay High Court relied on the earlier decision in Murli Agro Products Ltd. (supra) and discussed the scope and ambit of the proceedings for assessment and reassessment of total income under Section 153A (1) of the Act and the provisos thereto. One of the specific pleas taken by the Assessee was that if no incriminating material was found during the course of search in respect of an issue then no addition in respect of any issue can be made to the assessment under Sections 153A and 153C. It was observed that the assessment or reassessment under Section 153A arises only when a search has been initiated and conducted and, therefore, "such an assessment has a vital link with the initiation and conduct of the search."

The Court then reproduced and affirmed the decision of the Special Bench of the ITAT in All Cargo Global Logistics Ltd. v. Dy CIT

[2012] 23 taxmann.com 103/137 ITD 287 (Mum.) (SB) and answered the question as regards the scope of the assessment of total income as under:

"53. We are of the view that for answering this question, guidance will have to be sought from section 132(1). If any books of account or other documents relevant to the assessment had not been produced in the course of original assessment and found in the course of search in our humble opinion such books of account or other documents have to be taken into account while making assessment or reassessment of total income under the aforesaid provision. Similar position will obtain in a case where undisclosed income or undisclosed property has been found as a consequence of search. In other words, harmonious interpretation will produce the following results:

(a) Insofar as pending assessments are concerned, the jurisdiction to make original assessment and assessment u/s 153A merge into one and only one assessment for each assessment year shall be made separately on the basis of the findings of the search and any other material existing or brought on the record of the AO,

(b) in respect of non-abated assessments, the assessment will be made on the basis of books of account or other documents not produced in the course of original assessment but found in the course of search, and undisclosed income or undisclosed property discovered in the course of search"

36. Ultimately in Continental Warehousing Corporation (Nhava Sheva) Ltd. (supra), the Bombay High Court answered the question framed by it as under:

"a. In assessments that are abated, the AO retains the original jurisdiction as well as jurisdiction conferred on him u/s 153A for which assessments shall be made for each of the six assessment years separately;

b. In other cases, in addition to the income that has already been assessed, the assessment u/s 153A will be made on the basis of incriminating material, which in the context of relevant provisions means - (i) books of account, other documents, found in the course of search but not produced in the course of original assessment, and (ii)

undisclosed income or property discovered in the course of search."
Summary of the legal position

37. On a conspectus of Section 153A(1) of the Act, read with the provisos 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 153 A(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 place.

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 a fresh exercise. iii. The AO will exercise normal assessment powers in respect of the six years previous to the relevant AY in which the search takes 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 153 A 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 153 A 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 AO. vii. Completed assessments can be interfered with by the AO while making the assessment under Section 153 A 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.
Conclusion

38. The present appeals concern AYs, 2002-03, 2005-06 and 2006-07. On the date of the search the said assessments already stood completed. Since no incriminating material was unearthed during the search, no additions could have been made to the income already assessed.” Thus it is settled proposition of law that the Assessing Officer will exercise normal assessment powers in respect of six years preceeding to the relevant assessment year in which the search takes place and therefore, there will be only one assessment order in respect of each six assessment years in which both disclosed and undisclosed income would be brought to tax. In the absence of any incriminating material completed the assessment can be reiterated and the abated assessment or reassessment can be made. In case of completed assessments on the date of search, the assessment under Section 153A can be made only on the basis of some incriminating material unearthed during the course of search or requisition of document or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made open in the course of original assessment. Therefore the addition made by the Assessing Officer for the Assessment Years 2009-10 to 2011-12 towards deemed dividend under Section 2(22)(e) of the Act without any incriminating material found during the search is not sustainable under law. Hence the same is liable to be deleted.

08. The Ld. DR supported the order of the Assessee Officer.

09. We have heard the rival submissions and perused the material on record. We find that the coordinate bench in the above noted matter held that in the absence of incriminating material no addition can be made . As in the present case also no incriminating material was found during the course of search, undisclosed property or income was recovered during the course of search, the AO could not make any addition in respect of depreciation etc., In the light of the

above we do not find any justification for making the addition. Hence the same is deleted.

10. In the result appeal of the assessee is allowed.

Order pronounced in the open court on 21st day of November, 2017.

Sd/-

Sd/-

(INTURI RAMA RAO)
ACCOUNTANT MEMBER

(LALIT KUMAR)
JUDICIAL MEMBER

MCN*

Copy to:

1. The assessee
2. The Assessing Officer
3. The Commissioner of Income-tax
4. Commissioner of Income-tax(A)
5. DR
6. GF, ITAT, Bangalore

By Order

SENIOR PRIVATE SECRETARY