

**IN THE INCOME TAX APPELLATE TRIBUNAL
DIVISION BENCH, 'B' CHANDIGARH**

**BEFORE SHRI SANJAY GARG, JUDICIAL MEMBER AND
Dr. B.R.R. KUMAR, ACCOUNTANT MEMBER**

ITA No. 979 & 980/CHD/2017
Assessment Years : 2007-08 & 2008-09

The DCIT,
Circle-II
Chandigarh

Vs. M/s SAB Udyog Limited, Central
SCO 49-50,
Sector 26, Madhya Marg,
Chandigarh

PAN No. AAICS1499J

(Appellant)

(Respondent)

Appellant by : Smt. Mona Mohanti, Sr.DR
Respondent by : Sh. Ashwani Kumar, CA

Date of Hearing : 02.05.2018
Date of Pronouncement : 01.08.2018

ORDER

Per Sanjay Garg, Judicial Member:

The present appeals have been preferred by the assessee against the separate orders dated 31.3.2017 of the Commissioner of Income Tax(A)-3, Gurgaon [hereinafter referred to as 'CIT(A)']

2. Since the issue involved in both the appeals is identical, these have been heard together and are being disposed of by this common order. For the sake of conveniences, the facts are taken from **ITA No. 979/Chd/2017.**

ITA No. 979/Chd/2017

3. The Revenue is aggrieved by the order of CIT(A) in deleting the additions made by the Assessing officer in the assessment proceedings carried out u/s 153A of the Income-tax Act, 1961 (in short 'the Act') on the ground that no incriminating material was found during the search action.

4. The Ld. Counsel for the assessee has submitted that the issue is squarely covered by the decisions of the Hon'ble Bombay High Court in the case of "All Cargo Global Logistics Ltd." 120 DTR 89 and of the Delhi High Court in the case of "CIT Vs. Kabul Chawla" 234 Taxman 300 (Delhi) and in "Principal CIT Vs. Meeta Gutgutia Prop M/s Ferns 'N' Petals", ITA 306/2017 and others decided vide order dated 25.5.2017.

5. The Ld. D.R., in rebuttal to this legal plea raised by the assessee has strongly contended that even in the absence of any incriminating material found during the search action, the AO is empowered to look into, consider and make additions in relation to the issues regarding which no incriminating material was found during the search action as it was open to the AO to pass fresh assessment orders under section 153A of the Act looking into all the aspects of the matter irrespective of the fact whether or not the original assessments have been completed and not pending or abated on the date of search action. She has further contended that even otherwise the original assessment proceedings were not completed under section 143(3) of the Act rather the returns filed by the

assessee were processed under section 143(1) of the Act and under the circumstances the AO was empowered to examine and look into the issues as the same were not looked into while processing the return under section 143(1) of the Act.

6. We have considered the rival contentions. The issue relating to the validity of assessment made under section 153A without having any incriminating material found during the search action u/s 132 of the Act in case of completed assessments, even where the original return was processed under section 143(1) of the Act, has come into consideration before the co-ordinate Mumbai Bench of the Tribunal in the case of “The ACIT Cent. Cir. 33, Mumbai vs. Shri Jayendra P. Jhaveri” ITA Nos.2141, 2142, 2143 & 2144/M/2012 & CO Nos.248, 249, 250 & 251/M/2013 decided on 20.02.2014 (One of us being party to that order). The Tribunal has discussed the issue in detail and has made the following observations:

“8. The learned DR has also filed written submissions. To stress his point that the return processed u/s. 143(1) cannot be said to be an assessment but a mere intimation, he has relied upon the judgment of Hon’ble Supreme Court in the case of “Rajesh Jhaveri Stock Brokers P. Ltd.” (2007) 291 ITR 500 (SC). His contention has been that in the case in hand the assessment was not done originally u/s. 143(3) hence the estimation in question has been rightly made u/s. 153A of the Act by the AO. He has further contended that the principal laid down by the Special Bench of the Tribunal in the case of “All Cargo Global Logistics Ltd.” 137 ITD 287 can be applied to the case where the original assessment was completed u/s. 143(3) of the Act and not to the case where the return was processed u/s. 143(1) of the Act.

9. We have considered the submissions of the learned DR. So far so the reliance placed by him in the case

of “Rajesh Jhaveri Stock Brokers P. Ltd.” (supra) is concerned, we may observe that the issue before the Hon’ble Supreme Court in that case was regarding the reopening of the assessment u/s. 147 of the Act. The Hon’ble Supreme Court held that the proposition of law laid down by the Hon’ble Gujarat High Court in the case of “Adani Exports v. Deputy CIT”, (1999) 240 ITR 224 (Guj) was not applicable in that case. In the case of “Adani Exports” (supra), where the assessment was made u/s. 143(3) of the Act, and the AO did not hold any belief that income had escaped assessment on account of erroneous computation, the re-opening u/s. 147 made merely on the basis of audit objections was held to be bad in law by the Hon’ble High Court. In the case of “Rajesh Jhaveri Stock Brokers P. Ltd.” (supra), the Hon’ble Supreme Court while interpreting the provisions of section 143(1) and section 143(3) (as were in force during the relevant time period) has held that in case of assessment made u/s. 143(3), the assessment is made by the AO by applying his mind whereas in case of processing of return u/s. 143(1) of the Act, there is no application of mind by the AO and as such, if a new material comes into the knowledge of the AO and the requirements of section 147 of the Act are fulfilled, the AO is free to initiate proceedings u/s. 147 and the failure to take steps u/s. 143(3) will not render the AO powerless to initiate re-assessment proceedings even when intimation u/s. 143(1) had been issued. So the proposition of law laid down in the case of “Rajesh Jhaveri Stock Brokers P. Ltd.” (supra) relates to the powers of the AO for re-opening of assessment u/s. 147 in relation to the assessment proceedings conducted under section 143(1) viz-a-viz u/s 143(3) of the Act. (as were in force during the relevant period, since section 143 has been further amended vide Finance Act 2008 w.e.f 01.04.2008.) It is to be noted that powers of the AO to re-open an assessment u/s. 147 is subject to limitation of time period as prescribed u/s. 149 of the Act. So the reasonable conclusion will be that whether the return was processed u/s. 143(1) or u/s. 143(3), if the AO has a reason to believe that any income chargeable to tax has escaped assessment, he can re-open the assessment u/s. 147 by issuing notice u/s. 148 but within the time limit as prescribed u/s. 149 of the Act.

10. So far so, the question as to the processing of return u/s. 143(1) viz-a-viz assessment made u/s. 143(3) is concerned, it may further be observed that after processing of return u/s. 143(1) the same can be assessed u/s. 143(3) by issue of notice u/s. 143(2) subject to its issuance within the limitation period of 12 months from the end of the month in which return is furnished as per the proviso to clause (ii) of section 143(2) [as was existing at the time of relevant assessment year]. Once the limitation period as prescribed vide proviso to clause (ii) of sub section (2) of section 143 is expired, it is not open to the AO to assess the income u/s. 143(3) of the Act and the return filed by the assessee u/s. 139 is deemed to be accepted, which however, can be re-opened u/s. 147 of the Act subject to the fulfillment of ingredients of section 147 and within the time period as prescribed u/s. 149 of the Act, as discussed in the preceding para. So under such circumstances if the return is processed u/s. 143(1) and not u/s. 143(3) and after the prescribed period of limitation, the same cannot be assessed u/s. 143(3) though it may be interpreted as mere intimation assessment or otherwise, but the same shall be deemed to be accepted by the AO and it will not have any different colour other than the return which is processed u/s. 143(3) of the Act. The only distinguishing feature as held by the Hon'ble Supreme Court in the case of "Rajesh Jhaveri Stock Brokers P. Ltd." (supra), would be that if to a set of facts and circumstances, the AO has applied his mind and he was of the belief that there was no escapement of income then for invoking the provisions of section 147 of the Act, he is precluded, on the basis of same facts and circumstances, to say that he has reason to believe that income of the assessee has escaped assessment. Whereas in case of returns processed u/s. 143(1), since the AO does not apply his mind, such a defense is not available to the assessee. However, that proposition of law does not help the revenue in the present case which is a case of assessment/re-assessment u/s. 153A of the Act.

11. Admittedly, in the case in hand, the return was processed u/s. 143(1) of the Act but the same has attained finality due to the expiry of limitation period

of twelve months from the end of the month in which the return was filed. Hence, the assessment is deemed to be completed and not pending on the date of search on 14.08.2008. Admittedly, no incriminating material was found from the premises of the assessee during the search u/s. 132 of the Act. The Special Bench of the Tribunal in the case of "All Cargo Global Logistics Ltd." (supra), has held that assessment u/s. 153A can be made on the basis of incriminating material found during the search. The Hon'ble Rajasthan High Court in the case of "Jai Steel (India) v. ACIT" (2013) 259 CTR 281 has held that in case nothing incriminating is found on account of search or requisition, the question of reassessment of the concluded assessment does not arise. Under such circumstances, it is not open to the assessee to seek deduction or claim expenditure which has not been claimed in the original and already concluded assessment, in the case of assessment u/s. 153A in pursuance of search action. Hon'ble High Court rejected the argument of the learned counsel for assessee to the effect that once the notice u/s. 153A is issued, the assessments for six years are at large both for the AO and the assessee. It has been further held by the Hon'ble High Court that the provisions of section 153A to 153C cannot be interpreted to be further innings to the AO and/or assessee beyond the provisions of section 139(return of income), 139(5) (revised return of income), 147 (income escaping assessment) and 263(revision of orders) of the Act. The Hon'ble High Court has further observed that the words "assess" or "re-assess" have been used at more than one place in the section and a harmonious construction of the entire provision would lead to an irresistible conclusion that the word 'assess' has been used in the context of abated proceedings and 'reassess' has been used for completed assessment proceedings, which would not abate as they are not pending on the date of initiation of the search or making of requisition and which would also necessarily support the interpretation that for the completed assessments, the same can be tinkered only on the basis of the incriminating material found during the course of search or requisition of documents. The Hon'ble High Court while reproducing the proposition of law laid down by the

Hon'ble Supreme Court in the case of "K P Varghese v. ITO" (1981) 24 CTR 358 "that it is recognized rule of construction that a statutory proviso must be so construed, if possible, that absurdity and mischief may be avoided" has observed that if the argument of the counsel for the assessee was to be accepted, it would mean that even in case where the appeal arises out of the completed assessment has been decided by the CIT(A) or Tribunal and the High Court, on a notice issues u/s. 153A of the Act, the AO would have power to undo what has been concluded by the High Court. Any interpretation which leads to such conclusion has to be repelled and/or avoided as held by the Hon'ble Supreme Court in the case of K P Varghese (supra).

Almost similar proposition of law has been laid down by the co-ordinate bench of the Tribunal Bench of the Tribunal in the case of "M/s Deepa Restaurant & Bar P. Ltd." in ITA No.1336/M/2012 decided on 05.02.2014 (one of us being the party of the said order) wherein, it has been observed that where the scrutiny assessment order u/s. 143(3) of the Act was set aside by the higher authorities that, itself, cannot be a ground for re-opening the assessment u/s. 147 of the Act on the plea that since scrutiny assessment has been annulled on the legality of notice u/s. 143(2) of the Act and the case has not been heard at any of the stage hence, there was a reason to believe that the income assessed in this case has escaped assessment. The co-ordinate Bench in the above said case has further held that such an action cannot be allowed under the law as it may amount to defeating one of the statutory provisions in the grab of acting under other provisions of the statute. Once assessment u/s. 143(3) had been annulled by higher authorities on the ground of legality of notice u/s. 143(2) of the Act, re-opening u/s. 147 on that very ground would mean nothing else but the abuse of process of law. Hence, the contention of the learned DR that as the return was processed u/s. 143(1) and it was a mere intimation hence, the AO had reason to believe that income had escaped assessment and it was open to the AO to reassess the income u/s. 153A, even without any incriminating material found during the search action, is not tenable.

12. The learned DR has further relied on the judgment of the Hon'ble Andhra Pradesh High Court in the case of "Gopal Lal Badruka Vs. DCIT", 346 ITR 106 (AP) to stress the point that the AO can use evidence other than that found during the course of search while framing the assessment u/s. 153A of the Act. The said judgment of Hon'ble Andhra Pradesh High Court has been duly discussed by the Special Bench of the Tribunal in the case of "All Cargo Global Logistics Ltd." (supra), holding that the same was distinguishable on the facts. In the case of "Gopal Lal Badruka Vs. DCIT" (Supra), incriminating evidence was found in relation to eight plots of land but no evidence was found in respect of 24 plots. Since incriminating material was found in respect of eight plots, Hon'ble Court held that the AO can estimate the income in respect of all 32 plots. The fact was that incriminating material was found in that case.

The other judgment of the Hon'ble Delhi High Court in the case of "CIT vs. Chetan Dass Lachman Dass" [2012] 211 Taxmann 61, strongly relied upon by the learned DR, is also of no help to the revenue but to the assessee only. In the said case the Hon'ble Delhi High Court, in para 11 of the order, though has held that there is no condition in section 153A that additions should be strictly made on the basis of evidence found during the course of search or other post search material or information available with the AO which can be related to the evidence found and that the seized material can be relied upon to also draw inference that there can be similar transactions throughout the relevant period, yet, at the same time it has been further observed that this however, does not mean that assessment u/s 153 A can be arbitrarily made without any relevance or nexus with the seized material.

The proposition of law which emerges out in the light of the law laid down by the Rajasthan High Court in the case of "Jai Steel (India) (supra)", Hon'ble Gujarat High Court in the case of "Gopal Lal Badruka" (supra) and also by the Hon'ble Delhi High Court in the case of "Chetan Dass lachman Dass" is that where incriminating material is found

during the search action, the AO while making assessment u/s. 153A can take note of other materials on record, which are relevant and connected to the material found during the search and inference can be drawn relating to other transactions of similar nature. However, when no incriminating evidence is found during search, it is not open to the AO to make re-assessment of concluded assessment in the garb of invoking the provisions of section 153A. As observed above, such an action will defeat the other relevant provisions of the Act and also the rights of the assessee accrued therein.”

7. The above decision has also been followed by another co-ordinate bench of the Tribunal in the case of ‘Atul Barot (HUF) vs. DCIT” in ITA No.2889/M/2011 & ors’. decided on 26.02.2014.

Further, the Special Bench Decision in the case of “All Cargo Global Logistics Ltd.” (supra) has now been approved by the Hon’ble Bombay High Court in the cases of ‘All Cargo Logistics’ ITA No.1969 of 2013 and ‘Continental Warehousing Corporation’ ITA No. 523 of 2013 reported in (2015) 279 CTR 0389 (Bombay) decided by common order, wherein, it has been held that in relation to the assessments which have already been concluded, the AO was precluded from making additions on any other issue except relating or concerning to the incriminating material found during the search action. The AO cannot disturb the assessment order or reassessment order which has attained finality, unless the material gathered in the course of proceedings u/s 153A of the Act establishes that relief granted under the final assessment/reassessment was contrary to the fact unearthed during the course of 153A proceedings. Identical view has been taken by the Hon’ble Bombay High Court in the case of CIT Vs. Murli Agro Products Ltd. ITA No.36 of 2009 decided vide order

dated 29-10-2010 and by the Hon'ble Delhi High Court in the recent decision in the case of “Principal CIT Vs. Meeta Gutgutia Prop M/s Ferns ‘N’ Petals (supra)”.

8. At this stage, the Ld. DR has relied upon the decision of the Hon'ble Kerela High Court in the case of ‘E.N. Gopakumar Vs. CIT’ (2016) 75 taxmann.com 215 (Kerela) and further on the decision of the Hon'ble Allahabad High Court in the case of ‘CIT, Kanpur Vs. Raj Kumar Arora’ (2014) 52 taxmanm. Com 172 (Allahabad) and has submitted the Hon'ble High Court in these cases have held that the additions can be made, even without any incriminating material been available against the assessee in search action carried out u/s 132 of the Act, in assessment proceedings carried out u/s 153A of the Act pursuant to search action .

9. We have gone through the above decisions referred to by the Ld. DR. We find that though the decision in the case of CIT Vs. Kabul Chawla’ (supra) and ‘CIT Vs. Continental Warehousing Corporation ‘ were referred to before the Hon'ble Kerela High Court but there is no discussion found in the order in respect of its corrections or otherwise of the proposition laid down in this respect by the Hon'ble High Court of Delhi and Bombay respectively in the case of ‘CIT Vs. Kabul Chawla’ and in the case of ‘CIT Vs. Continental Warehousing Corporation’ (supra). Further, in the decision of the Hon'ble Allahabad High Court dated July 11, 2014 (supra) neither the above cited decisions were referred to nor there is any discussion on the proposition laid down by the various High

Court as discussed above that in the absence of any incriminating material founding during search action, no additions can be made in respect of the already concluded assessment proceedings. Moreover, we find that even after the decision of the Hon'ble Kerela High Court in the case of 'E.N. Gopakumar Vs. CIT' rendered on October 3, 2016, the Hon'ble Delhi High Court in the case of 'Principal CIT Vs. Meeta Gutgutia Prop M/s Ferns 'N' Petals' vide order dated 25.5.2017 has reaffirmed the proposition laid down in the case of 'CIT Vs. Kabul Chawla' (supra).

We may mention here that the Hon'ble Delhi High Court has also discussed and distinguished the case of "Smt. Dayawanti Vs. CIT" in ITA 357/2015 & others dated 27.10.2016, which authority has been relied upon by the Ld. DR. It has been held that in the case of Smt. Dayawanti Vs. CIT", incriminating material was found during the search action, however, in the case of "Principal CIT Vs. Meeta Gutgutia Prop M/s Ferns 'N' Petals (supra)", no incriminating material was found during the search action, hence, the additions made by the Assessing officer were not justified. Further, the Hon'ble Supreme Court in the case of 'Vegetable Products Ltd.' [1973] 88 ITR 192 (SC) has held that where two views are available on a proposition, the view favorable of the assessee is to be taken.

In view of this, we do not find any infirmity in the order of the CIT(A). There is no merit in the appeal of the Revenue and the same is accordingly dismissed.

ITA No. 980/Chd/2017

10. Since the facts and issue involved in other appeal of the Revenue in ITA No. 980/Chd/2017 are identical, in view of our decision above, the same also stand dismissed.

In the result, both the appeals of the Revenue are hereby dismissed.

Order pronounced in the Open Court on 01.08.2018

Sd/-

Sd/-

(B.R.R KUMAR)
ACCOUNTANT MEMBER

Dated : 08.2018

Rkk

Copy to:

- *The Appellant*
- *The Respondent*
- *The CIT*
- *The CIT(A)*
- *The DR*

(SANJAY GARG)
JUDICIAL MEMBER