आयकर अपीलीय अधिकरण,चण्डीगढ़ न्यायपीठ, "ए" चण्डीगढ़

IN THE INCOME TAX APPELLATE TRIBUNAL
DIVISION BENCH, 'A', CHANDIGARH

श्री एन. के. सैनी, उपाध्यक्ष एवं श्री संजय गर्ग, न्यायिक सदस्य

BEFORE SHRI N.K. SAINI, VICE PRESIDENT &
SHRI SANJAY GARG, JUDICIAL MEMBER

आयकरअपीलसं./**ITA No. 831/CHD/2017**

निर्धारण वर्ष / Assessment Year : 2007-08

Shri Deepak Kumar Jain, S/o Shri Rattan Lal Jain Through Legal Heir, Smt. Neeru Jain, Patel Street Club Chowk, Malerkotla	Vs. बनाम	The ACIT, CC-1, Ludhiana
स्थायीलेखासं./PAN NO: ABDPJ7192C		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारितीकीओरसे/Assessee by : Shri Ashwani Kumar, CA

राजस्वकीओरसे/ Revenue by : Shri Chandrajit Singh, CIT DR

सुनवाईकीतारीख/Date of Hearing : 10.12.2019

उदघोषणाकीतारीख/Date of Pronouncement : 22.01.2020

आदेश/Order

Per Sanjay Garg, Judicial Member:

The present appeal has been preferred by the assessee the order dated 3.3.2017 of the Commissioner of Income Tax, Bathinda. [hereinafter referred to as 'CIT(A)']

2. The assessee in this appeal has taken following grounds of appeal:-

1. *That order passed u/s 250(6) of the Income Tax Act, 1961 passed by Ld. Commissioner of Income Tax (Appeals), Bathinda is against law and facts on the file in as much he was not justified to arbitrarily*

uphold action of the Ld. Assessing Officer in making addition of Rs. 1,00,000/- received from Sh. Nusrat Ikram Khan Bagga as advance against sale of shop.

2. *That the Ld. CIT(A) further gravely erred in upholding action of the Ld. Assessing Officer in treating alleged excess jewellery found during the course of search at Rs. 8,16,625/- as undisclosed income.*

3. Apart from the above grounds of appeal, the assessee has taken the following additional ground:-

"On the facts and circumstances of the case, the impugned assessment framed u/s 153 A deserves to be quashed as assessment for A/Y 2007-08 framed u/s 153A was not valid and void abinitio".

4. The assessee vide ground No.1 has agitated the action of the CIT(A) in upholding the action of the Assessing Officer in making addition of Rs. 1 lac claimed to have been received by the assessee from one Shri Nusrat Ikram Khan Nusrat Ikram Khan Bagga as advance against sale of shop as 'unexplained cash credit' claimed to have been received by sale of shop. The assessee, vide second ground of appeal has contested the addition on account of unexplained jewellery found during the course of search action.

5. The brief facts of the case are that a search and seizure operation under the provisions of section 132 of the Income-tax Act, 1961 (in short 'the Act') was conducted on the premises of the assessee on 12.10.2006. Pursuant to the aforesaid search and seizure action, notice

u/s 153A of the Act was issued to the assessee for the six assessment years immediately preceding the relevant assessment year 2007-08. In response thereto, the assessee filed return of assessment for the assessment years 2001-02 to 2006-07. The assessment proceedings for the assessment year 2007-08 were also framed by the Assessing officer u/s 153A of the Act and made the impugned addition.

6. The assessee preferred appeal before Ld. CIT(A) against the said additions made by the Assessing Officer, however, remained unsuccessful.

7. Before us, the Ld. Counsel for the assessee submitted that, in fact, the agreement with Shri Nusrat Ikram Khan Bagga was for sale of four shops for a total consideration of Rs. 10 lacs, out of which, Rs. 1 lac was received as advance in cash on 9.3.2007. Later on, another payment of Rs. 6 lacs on 2.4.2007 was received ,however, Shri Nusrat Ikram Khan Bagga failed to make the balance payment of Rs. 3 lac since he was not in a position to pay the remaining amount of Rs. 3 lacs, the agreement was amended on 16.7.2009, whereby, the assessee agreed to sell two shops for Rs. 5 lacs. Hence, out of the total amount of Rs. 7 lacs, Rs. 2 lacs was returned to Shri Nusrat Ikram Khan Bagga. That the amount received from Mr. Nusrat Ikram Khan Bagga stands reflected in the subsequent returns for the next year.

So far as the jewellery was concerned, the Ld. counsel has explained that the total jewellery of the family was much more than the

prescribed limit as per the Instruction No.1916 dated 11.5.1994 of the CBDT. He has submitted that the jewellery stands explained. The Ld. counsel has further submitted that so far as the legal ground is concerned, the issue is covered in favour of the assessee by the decision of the Tribunal in the case of brother of the assessee who was also searched in the same search action, wherein, the Tribunal has allowed the legal ground taken in this case. He, in this respect has relied upon the copy of the order of the ITAT dated 11.12.2017 passed in ITA No. 830/Chd/2017 for Assessment year 2007-08 in the case of 'Shri Mahesh Jain vs ACIT'. We find that the premises of Shri Mahesh Jain was covered in the same search action and the facts as well as the legal issue involved are identical. The Tribunal in the case of brother of the assessee Shri Mahesh Jain has allowed the legal ground taken, observing as under:-

> "4. Before us, the assessee apart from agitating the additions on merits, has taken the additional legal ground, which reads as under:-
>
> > *"On the facts and circumstances of the case, the impugned assessment framed u/s 153A deserves to be quashed as assessment for assessment year 2007-08 framed u/s 153A was not valid and void abinitio."*
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> The Ld. AR has contended that the assessment in this case was framed u/s 153A of the Act whereas as per the clause (b) of sub section (1) to section 153A, the Assessing officer would assess or re-assess total income of 06 assessment years immediately preceding the assessment year,

relevant to previous year in which such search is conducted or requisition is made. He has furthered contended that the search in this case was conducted on 12.10.2006 and, therefore, the assessment u/s 153A of the Act could have been made only for 06 assessment year immediately preceding the assessment year relevant to searched year i.e. for the assessment years 2001-02 to 2006-07 only and not for the assessment year under consideration i.e. assessment year 2007-08. He, therefore, has contended that the assessment framed u/s 153A for assessment year 2007-08 was not valid and was void abinitio. He in this respect has relied upon the decision of the Coordinate Chandigarh Bench of the Tribunal in the case of 'Rajiv Kumar Vs. ACIT' (2017) 152 DTR (Chd) (Trib.) 233 and of the Hon'ble Allahabad High Court, Lucknow Bench in the case of 'CIT (Central) Vs. Sri Raj Kumar Jaiswal, Smt. Rekha Jaiswal and Sri Ram Dayal Jaiswal, Income Tax Appeal Nos. 25 to 27 of 2010 decided vide order dated 28.2.2017.

5. On the other hand, Ld. DR has pointed out that mentioning of section 153A in the assessment order was just a clerical mistake and that mere mentioning wrong section will not invalidate the assessment proceedings carried by the Assessing officer in the case of the assessee.

6. We have considered the rival contentions. We find that the issue is squarely covered in favour of the assessee by the decision of the Coordinate Bench of the Tribunal in the case of 'Rajiv Kumar Vs. ACIT' and of the Hon'ble Allahabad High Court, Lucknow Bench in the case of 'CIT (Central) Vs. Raj Kumar Jaiswal and others' (supra) in ITA Nos. 25, 26, & 27 of 2010. The Hon'ble Allahabad High Court (supra) while deciding the identical issue on framing of assessment u/s 153A of the Act for the assessment year relevant to the search year has observed that when a power is exercised under a particular provision and in the manner, it is so contemplated in such substantive provision, then this defence is not open that it may be treated as a mere mistake of wrong provision of statute. The relevant part of the observations made by the

Hon'ble Allahabad High Court is reproduced as under:-

> *"16. However the above proposition has no application for the reason, when a power is exercised under a particular provision and in the manner, it is so contemplated in such substantive provision, then this defence is not open that it may be treated as a mere mistake of wrong provision of the statute. Notice was specifically served under Section 153A. Assessment order clearly says that it is being passed under Section 153A. Moreover, jurisdiction for making assessment under Section 153A read with Section 153C apparently is quite different than requirement of notice under Section 143(2) of Act, 1961 and assessment made under Section 143(3).*

17. We find that this aspect has also been discussed by Tribunal and it has observed as under:-

> *"16.....The provisions of section 153A read with section 153C empower the AO to proceed with the assessment in search cases mentioned therein meaning thereby that the AO gets jurisdiction to proceed for*
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> *making assessment in search cases covered by these provisions, whereas provisions of section 143(2) subject to limitation provided under proviso to the sub-section require the AO to give the assessee an opportunity to support its return, before making of assessment under section 143(3) / 144 as the case may be. In other words jurisdiction to make assessment under section 143(3) is gathered by the AO just after furnishing the return of income by the assessee under section 139 or on issuance and service of notice under section 142(1) requiring the assessee to furnish the return of income or on notice issued under section 148 of the Act, meaning thereby that provisions of section 143(2) of the Act did not give jurisdiction to make an assessment under section 143(3) but make it obligatory to comply with these*

provisions before making assessment under section 143(3) or section 144 as the case may be. In view of this difference between the purpose and the result of taking recourse to provisions of section 153A read with section 153C on one hand and issuance of notice under section 143(2) of the Act on the other hand, we are unable to accept the plea advanced by the Ld. D.R.

17. Coming to the merits of the case, we, after having considered the provisions of section 153A, 153B and 153C, are of the opinion that though the provisions 153B(1)(b) provide the limitation for completing the assessment for the assessment year relevant to the previous year in which search is conducted under section 132 or requisition is made under section 132A of the Act, but there being no provision as to under which provision of law, the assessee can be called upon to furnish its return for that assessment year only under the provisions of section 139 and it is only in case of failure of the assessee to furnish the return under section 139 that the AO can call for return of income for the previous year either under section 142(1) or under section 147 of the Act, as the case may be, and if it is so, then the assessment for assessment year relevant to that previous year can be made only under section 143(1) or 143(3) or 144 or 147 of the Act but cannot be made under section 153A of the Act.

18. In view of the above discussion and the reasons stated by the CIT(A), we are of the opinion that the CIT(A) was quite justified in holding that for the assessment year under consideration, the AO had no jurisdiction to pass an order under section 153A of the Act. The order of the CIT (A) is, therefore, upheld."

18. We find ourselves in agreement with the view taken by Tribunal on this aspect, in absence of any otherwise sustainable argument advanced on behalf of appellant or binding authority taking otherwise view.

> *19. Question no.1 is therefore answered by holding that mere mention of a wrong provision will not deny jurisdiction to the authority, if it otherwise has, but this aspect has no application to the present case. Question no.2 is answered against appellant."*
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> 7. In view of the above, since the legal issue raised in this appeal is squarely covered by the above referred to decisions, hence, respectfully following the same, this issue is decided in favour of the assessee. The assessment framed for the year under consideration is accordingly held to be void and the consequent additions made thereto are accordingly ordered to be deleted.
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> 8. In the result, the appeal of the assessee is hereby allowed."

8. Since the facts and issue involved are identical, hence, respectfully following the decision of the Tribunal in the case of brother of the assessee on identical facts and circumstances, the assessment order in this case of the assessee is held to be void and consequent additions made thereby are ordered to be deleted.

In the result, the appeal of the assessee is hereby allowed.

Order pronounced in the Open Court on 22.01.2020

Sd/-	**Sd/-**
(एन. के. सैनी / N.K. SAINI)	**(संजय गर्ग / SANJAY GARG)**
उपाध्यक्ष /Vice President	**न्यायिकसदस्य/ Judicial Member**

Dated : 22.01.2019
"आर.के."

आदेशकीप्रतिलिपिअग्रेषित/ Copy of the order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent

3. आयकरआयुक्त/ CIT
4. आयकरआयुक्त (अपील)/ The CIT(A)
5. विभागीयप्रतिनिधि, आयकरअपीलीयआधिकरण, चण्डीगढ़/ DR, ITAT, CHANDIGARH
6. गार्डफाईल/ Guard File

आदेशानुसार/ By order,
सहायकपंजीकार/ Assistant Registrar