

**IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "A" : HYDERABAD
(THROUGH VIDEO CONFERENCE)**

**BEFORE SHRI S.S.GODARA, JUDICIAL MEMBER
AND
SHRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER**

I.T.A. Nos. 723, 724 & 725/HYD/2013

Assessment Years: 2004-05, 2005-06 & 2006-07

Asst. Director of Income Tax (Int. Tax)-II, HYDERABAD (Appellant)	Vs	M/s. Midwest Granites (P) Limited, HYDERABAD [PAN: AAACM9486D] (Respondent)
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C.O. Nos. 50, 51 & 52/HYD/2015

(in ITA Nos. 723, 724 & 725/Hyd/2013)

Assessment Years: 2004-05, 2005-06 & 2006-07

M/s. Midwest Granites (P) Limited, HYDERABAD [PAN: AAACM9486D] (Cross-Objector)	Vs	Asst. Director of Income Tax (Int. Tax)-II, HYDERABAD (Respondent)
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For Revenue : Shri T. Sunil Goutam, DR
For Assessee : Shri P. Murali Mohan Rao, AR

Date of Hearing : 13-12-2021

Date of Pronouncement : 16-12-2021

ORDER

PER S.S.GODARA, J.M. :

These Revenue's appeals ITA Nos. 723, 724 and 725/Hyd/2013 with assessee's cross objections C.O. Nos. 50, 51 and 52/Hyd/2015 thereto for AYs. 2004-05, 2005-06 & 2006-07 arise from the CIT(A)-V, Hyderabad's order dated 31-01-2013 passed in case No. 455, 457-460/ADIT(IT)-II/CIT(A)-

V/2011-12 in proceedings u/s.153C r.w.s.153A r.w.s.144(C) of the Income Tax Act, 1961 [in short, 'the Act']; respectively.

Heard both the parties. Case files perused.

2. We notice during the course of hearing that the Revenue's instant three appeals have been listed on 39th occasion to-day. Mr.Goutam invited our attention to the earlier notings that the issue as to whether the assessee had been rightly assessed as a representative-assessee of the Srilankan entity namely M/s.South Asia Granites & Marbles Pvt. Ltd. P.O. Malwana, BEPZ, Biyagama u/s.163 stands decided in the earlier lower co-ordinate bench's order dt.18-05-2016 against the department in the very assessment years' appeals ITA Nos.489 to 494/Hyd/2013 as under:

"3. Brief facts of the case are that M/s. South Asia Granites & Marbles P. Ltd., P.O. Malwana, BEPZ, Biyagama, Sri Lanka (henceforth will be referred to as SAM) is a company located in Sri Lanka near Colombo and was incorporated on 16.07.2002 under the Companies Act of Sri Lanka. Its main activity is processing and sale of granite and marble. The assessee owns about 65% equity in SAM. There was a search operation under section 132 of the I.T. Act in the case of the assessee herein, an Indian company, and also in the premises of one of the ex-employees of the assessee company. Prima facie, the material seized during the course of search relate to unaccounted cash receipts, under-invoicing of the quantity by SAM and subsequent realization of such receipts by the assessee herein. Since, some of the seized material indicated the transactions carried out by SAM, notice under section 153C of the I.T. Act was issued to the assessee on 16.03.2011 to assess, re-assess the income of the SAM which is deemed to have been accrued in India. In a reply filed by the assessee, it was submitted that it was neither an agent nor has the foreign company any business place at their office premises and therefore, its assessability was denied. The A.O. therefore, issued a show cause notice under section 163(1) of the I.T. Act on 29.11.2011 for treating the assessee as a "Representative Assessee of the Foreign Company". The assessee furnished his objections for treating it as an agent of the foreign company and also took an

objection that the time limit for completion of the assessment under section 153C has expired as the time to issue notice under section 148 of the I.T. Act had expired. The A.O. however, was not convinced with the assessee's contentions and treated the assessee as 'representative assessee' under section 163(1) of the I.T. Act. Against this order of the A.O., the assessee filed an appeal before the CIT(A) also taking an objection that the orders under section 163(1) of the I.T. Act could not have been passed in view of the provisions of section 149(3) of the I.T. Act. The CIT(A) however, confirmed the order of the A.O. but did not deal with the specific ground raised by the assessee against the validity of the orders passed in spite of lapse of time limit fixed under section 149(3) of the Act. Aggrieved, the assessee is in appeal before us.

4. Ld. Counsel for the assessee, submitted that search had taken place in the case of the assessee and some of its ex-employees and Directors on 24.07.2011 under section 132 of the I.T. Act. The Ld. Counsel for the assessee further submitted that these proceedings under section 163(1) for the A.Ys. 2004-05 to 2008-09 are beyond the time prescribed under section 149(3) of the I.T. Act. He drew our attention to the provisions of section 149(3) of the I.T. Act for the relevant period. He submitted that the time limit fixed under section 149(3) of the Act for the period prior to 01.04.2012 was two years only and since the notice was issued beyond the said period of two years, according to him, the proceedings are barred by limitation. In support of his contention, the Ld. Counsel for the assessee, also placed reliance upon the decision of Hon'ble Bombay High Court in the case of *Ingram Micro India Ltd., vs. DCIT (2012) 20 taxmann.com 206 (Bom.)*.

5. The Ld. D.R. however, supported the orders of the authorities below and submitted that the time limit prescribed under section 149(3) are not applicable to the assessee's case as the assessee's case was consequent to a search under section 132 of the I.T. Act and therefore, the provisions of section 153B are applicable. He, therefore, submitted that the orders of the authorities below be confirmed.

6. Having regard to the rival contentions and the material on record, we find that sub-section (2) of section 163 of the Act, provides that an assessee shall be heard before treating it 'as a representative-assessee' under section 163(1) of the I.T. Act. Subsequent to treating the assessee 'as a representative-assessee', assessment proceedings have to be initiated. In the case of regular assessment, the assessment would have to be initiated under section 148 and in the case of search proceedings, the proceedings have to be initiated

under section 153A/153C of the I.T. Act. Sub-section (3) of section 149 provides as under :

“(3) If the person on whom a notice under section 148 is to be served is a person treated as the agent of a non-resident under section 163 and the assessment, reassessment or recomputation to be made in pursuance of the notice is to be made on him as the agent of such non-resident, the notice shall not be issued after the expiry of the period of two years from the end of the relevant assessment year.”

6.1. The Revenue has relied upon the provisions of section 153B of the I.T. Act. However, we find that the provisions of section 153B are applicable for the assessment under section 153A of the Act i.e., in the case of the person searched under section 132 of the I.T. Act. In the case before us, the non-resident company, is not the person searched and originally the assessment proceedings were initiated in the case of the assessee herein under section 153C of the I.T. Act. Therefore, it is clear that the provisions of section 153B are not applicable. As per sub-section (3) of section 149, the assessment under section 148 on the ‘representative-assessee’ shall not be made after expiry of a period of two years from the end of the relevant assessment year. In the case before us, the relevant assessment years are the A.Ys. 2004-05 to 2008-09 wherein notice under section 163(1) has been issued after the expiry of the period of two years from the end of the relevant assessment year. Consequent to the proceedings under section 163(1), the A.O. would have to initiate the assessment proceedings. Where the time limit for initiating the assessment proceedings has lapsed, the proceedings under section 163(1) cannot be given effect to. In similar circumstances, the Hon’ble Bombay High Court in the case of *Ingram Micro India Ltd. vs. DCIT* (cited supra) at paras 7 to 9 of its order has held as under:

“7. Counsel appearing on behalf of the Petitioner has assailed the order that was passed under Section 163 on two grounds; (1) Firstly, it has been urged that under Section 160(1)(i), a representative assessee is defined to mean, in respect of the income of a non-resident specified in sub-Section (1) of Section 9, the agent of the non-resident, including a person who is treated as an agent under Section 163. In other words, a person can be treated as a representative assessee in respect of the income of a nonresident specified under Section 9(1). In the present case, what is sought to be brought to tax is a capital gain arising upon a transfer of shares of the Bermudian Company from the existing shareholders to the transferee shareholders. The submission is that no part of the consideration for the transfer of shares has flowed to the Bermudian Company and as a matter of first principle, income representing capital gains arising out of the transfer of shares can accrue or arise only to the transferor

and not to the company whose shares are transferred. There was no accrual of income to the Bermudian Company nor did any consideration flow to it. Hence, the Petitioner cannot be treated as a representative assessee under Section 160(1)(i); (2) The notice which has been issued under Section 163 is ex-facie barred by limitation. Under Section 149(3) a notice for assessment was required to be served upon the Petitioner within two years of the expiry of the relevant Assessment Year. The relevant Assessment Year being 2005-06, such a notice ought to have been issued on or before 31 March 2008. The First Respondent has relied upon the provisions of Section 153(b). Reliance on those provisions of Section 153(b) cannot be said to obviate the bar of limitation in this case because the search was of the Indian Company and not of the person who is sought to be assessed. The assessment of the Indian Company is a separate assessment altogether and in the present case, the assessment is of the income of the non-resident. The Petitioner being treated as an agent of the non-resident Bermudian Company, the limitation for initiating proceedings would expire on 31 March 2008 which was two years of the end of the relevant Assessment Year. The notice which was issued on 22 November 2010 was barred by limitation. Learned Counsel submitted that Section 149 of the Income Tax Act, 1961 provides for a period of limitation on the initiation of assessment proceedings following the order under Section 163. The assessment proceedings would ex-facie be barred upon the expiry of two years by virtue of Section 149(3).

8. Having heard Counsel appearing on behalf of the Petitioner, we were prima facie of the view that the objection on the ground of limitation would have to be sustained. Consequently, we have called upon Counsel appearing on behalf of the Revenue to address submissions on that aspect of the matter. If the proceedings are barred by limitation, then, it would not be necessary for the Court to determine issues wider than those that are strictly necessary for disposal of the proceedings. Counsel appearing on behalf of the Revenue has relied upon the observations contained in paragraphs 15.1 and 15.2 of the impugned order in support of the submissions that the proceedings are not barred by limitation. No further submissions have been urged.

9. Clause (i) of sub-Section (1) of Section 160 provides that for the purposes of the Act, "representative assessee" means in respect of the income of a non-resident specified in subSection (1) of Section 9, the agent of the nonresident including a person who is treated as an agent under Section 163. Section 163 of the Income Tax Act, 1961 stipulates that for the purposes of this Act, "agent", in relation to a non-resident includes any person in India - (a) Who is employed by or on behalf of the nonresident; or (b) Who has any business connection

with the non-resident; or (c) From or through whom the non-resident is in receipt of any income, whether directly or indirectly; or (d) Who is the trustee of the non-resident and includes also any other person who, whether a resident or non-resident, has acquired by means of a transfer, a capital asset in India. Sub-section (2) of Section 163 provides that no person shall be treated as the agent of a nonresident unless he has had an opportunity of being heard by the Assessing Officer as to his liability to be treated as such. What needs emphasis is that under Clause (i) of Section 160(1) a person is treated as a representative assessee in respect of the income of a nonresident where he is either an agent or a person who is treated as an agent under Section 163. Therefore, it is in respect of the income of the non-resident that a person is treated as a representative assessee. The income which is sought to be brought to tax is the income of the non-resident, in the hands of the representative assessee. By the impugned order, the First Respondent has held the Petitioner to be an agent of the non-resident under Section 163. Following an order under Section 163(2), a notice is liable to be issued under the provisions of Section 148. Under sub-Section (3) of Section 149 if the person on whom a notice is issued under Section 148 is a person treated as the agent of a non-resident under Section 163 and the assessment, re-assessment or recomputation to be made in pursuance of the notice is to be made on him as the agent of such non-resident, the notice shall not be issued after the expiry of a period of two years from the end of the relevant Assessment Year. The relevant Assessment Year to which the proceedings relate is 2005-06. Clearly, the plain consequence of the provisions of Section 149(3) is that no assessment, re-assessment or recomputation can take place after 31 March 2008. The notice under Section 163 is in aid of the action of the Revenue in bringing to tax the capital gains arising out of the transfer of shares of the Bermudian Company because according to the Revenue, this involved the transfer of a capital asset in India. The First Respondent, in our view, was clearly in error in relying upon the provisions of Section 153(B). The search and seizure operation took place in respect of the Indian company but it is an admitted position that what is sought to be brought to tax as capital gains are capital gains alleging to accrue to the Bermudian company. The Petitioner is treated as a representative assessee on the finding that it is an agent within the meaning of Section 163. In other words, what is brought to tax in the hands of the Petitioner is the capital gains which are stated to accrue to the Bermudian company. The provisions of Section 153(B) would therefore clearly not have any application. The judgment of the Supreme Court in Claggett Brachi Co. Ltd., v. CIT [1989] 177 ITR 4091 44 Taxman 186 dealt directly with Section 149(3). Chief Justice R.S. Pathak observed that "The issue of notice under Section 148 of the Act to the agent

after the expiry of two years from the end of the relevant assessment year is prohibited by the statute." In that case, the Income Tax Officer had issued notice to the agents of the assessee whereupon the agent took the defence of Section 149(3). The Income Tax Officer upheld their objection and dropped the proceedings since it was time barred. The Supreme Court held that the Officer had acted correctly in quashing the reassessment of the agent, since the provisions of Section 149(3) must be strictly construed. Thereafter, the Court went on to hold that this would not preclude the revenue from reassessing the assessee - merely because the revenue had taken out assessment proceedings against the agent of the assessee, which were dropped due to limitation restrictions, the revenue would not be precluded from taking out assessment proceedings against the assessee. Thus, the Supreme Court affirmed the duty of the Income Tax Officer to drop the proceedings against the agent of the assessee in that case, due to the strict wording of Section 149(3). In our view, the proceedings which were initiated by the First Respondent were clearly beyond limitation."

6.2. In the case before us also, the proceedings under section 163(1) were initiated pursuant to search and seizure operation but beyond the time prescribed under section 149(3) of the Act. Therefore, we are satisfied that the above decision is applicable to the facts of the case before us. Respectfully following the same, we set aside the orders of the A.O. under section 163(1) of the I.T. Act for the A.Ys. 2004-05 to 2008-09. The assessee's ground of appeal No.18 on this issue is treated as allowed and all the other grounds are not adjudicated at this stage as it would only be an academic exercise.

7. As regards the assessee's appeal for the A.Y. 2009-2010 (ITA.No.494/Hyd/2013), the Ld. Counsel for the assessee, submitted that since there has been no demand pursuant to the assessment under section 143(3) read with section 153C of the I.T. Act on the assessee by treating the assessee as a "Representative Assessee" under section 163(1) of the Act, the assessee is not pressing the appeal before the Tribunal against the order passed under section 163(1) of the I.T. Act and may be allowed to withdraw the same. A letter dated 03.05.2016 is filed to this effect. Accordingly, the assessee's appeal for the A.Y. 2009-10 is dismissed as withdrawn".

3. Mr.Goutam, DR thereafter sought to highlight the fact that hon'ble High Court is yet to decide the substantive question of law u/s.163 of the Act, we ought not to proceed with the instant batch of six cases.

4. We find no merit in the Revenue's instant stand as it has come on record from a perusal of the assessee's paper book that the latter had been held as not representative-assessee u/s.163 in these very AYs.2004-05 to 2006-07. We thus adopt judicial consistency and follow the foregoing detailed discussion *mutatis-mutandis qua* legality of the impugned proceedings. All these Revenue's three appeals ITA Nos.723, 724 & 725/Hyd/2013 fail and assessee's corresponding cross objection Nos.50, 51 & 52/Hyd/2015 are rendered infructuous therefore.

All other pleadings on merits stand rendered infructuous.

5. To sum-up, the Revenue's three appeals ITA Nos.723, 724 & 725/Hyd/2013 are dismissed and assessee's C.O.Nos.50, 51 & 52/Hyd/2015 are dismissed as rendered academic. A copy of this common order be placed in the respective case files.

Order pronounced in the open court on 16th December, 2021

Sd/-
(LAXMI PRASAD SAHU)
ACCOUNTANT MEMBER

Sd/-
(S.S.GODARA)
JUDICIAL MEMBER

Hyderabad,
Dated: 16-12-2021

Copy to :

1.The Deputy Commissioner of Income Tax-2, International Taxation, Hyderabad.

2.The Asst.Director of Income Tax (Int.Tax)-II, Hyderabad.

3.M/s.Midwest Granites (P) Ltd. C/o.P.Murali & Co., Chartered Accountants, 6-3-655/2/3, 1stFloor, Somajiguda, Hyderabad.

4.CIT(Appeals)-V, Hyderabad.

5.D.R. ITAT, Hyderabad.

6.Guard File.