IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH : KOLKATA

[Before Hon'ble Shri N.V.Vasudevan, JM & Shri M.Balaganesh, AM]

I.T.(SS)A No. 91/Kol/2017

Assessment Year : 2010-11

ACIT, CC-3(3), Kolkata -vs- M/s Sethia Agrotech Ltd.
[PAN: AACCD 3837 B]
(Appellant) (Respondent)

C.O. No. 85/Kol/2017

(Arising out of I.T.A No. 91/Kol/2017)

Assessment Year : 2010-11

M/s Sethia Agrotech Ltd. -vs- ACIT, CC-3(3), Kolkata
[PAN: AACCD 3837 B]
(Cross Objector) (Respondent)

For the Department : Shri Goulean Hangshing, CIT DR

For the Assessee : Shri S.M. Surana, AR

Date of Hearing : 21.11.2017

Date of Pronouncement : 01.12.2017

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ORDER

Per M.Balaganesh, AM

1. This appeal by the Revenue and the Cross Objection by the assessee arise out of the order of the Learned Commissioner of Income Tax (Appeals) -21, Kolkata [in short the ld CITA] in Appeal No. 905/CC-3(3)/CIT(A)-21/Kol/15-16 dated 12.05.2017 against the order passed by the DCIT, CC-3(3), Kolkata [in short the ld AO] under section 153A/143(3) of the Income Tax Act, 1961 (in short "the Act") dated 17.03.2016 for the Assessment Year 2010-11.

2. The only issue to be decided in this appeal is as to whether the ld CITA was justified in upholding the addition of Rs 1,40,00,000/- towards share capital in the search assessment framed u/s 153A/143(3) of the Act in the absence of any incriminating material found during the course of search to that effect.

3. The brief facts of this issue is that there was a search and seizure operation conducted u/s 132 of the Act on the Sethia group along with its sister concerns and / or others at various premises / offices of the group on 19.3.2014 . The assessee is one of the companies in the said group. In some cases, survey operation u/s 133A of the Act was also conducted on the same date and / or subsequent dates at the factory premises of Sethia Oil Industries Ltd. Consequent to the search, notice u/s 153A of the Act was issued and for the year under consideration, the assessee filed a letter dated 16.2.2015 to treat the return of income filed on 8.9.2010 disclosing total income of Rs 90,993/- as a return in response to notice u/s 153A of the Act. The original return of income was filed u/s 139(1) of the Act on 8.9.2010 declaring taxable income of Rs. 90,993/-. The assessee stated that the time limit for issuance of notice u/s 143(2) of the Act for the Asst Year 2010-11 in resp ct of the original return filed on 8.9.2010 had expired on 30.9.2011 and hence as on the date of search, that year (i.e Asst Year 2010-11) would fall under the category of unabated assessment and hence the income assessed originally thereon could not be disturbed unless there is any incriminating material found in the course of search relatable to such assessment year. It was argued that admittedly no incriminating materials were found for Asst year 2010-11 in the course of search with regard to share capital and accordingly pleaded not to disturb the originally assessed income, which is same as the returned income. The ld AO however did not heed to the contentions of the assessee and proceeded to frame the assessments u/s 153A of the Act by making an addition towards share capital u/s 68 of the Act in the sum of Rs 1,40,00,000/- on the plea that the assessments to be framed u/s 153A of the Act clears all the decks and would enable the ld AO to assess or reassess the total income as per

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the provisions of the Act irrespective of incriminating materials found in the search. The ld AO completed the assessment u/s 153A / 143(3) of the Act on 17.3.2016 determining the total income at Rs 1,40,90,993/- after making an addition of Rs. 1,40,00,000/- u/s 68 of the Act on account of share capital.

4. The assessee stated no incriminating materials relating to the share capital or share premium was found during the course of search. The assessee filed all the details with regard to the share capital and yet on the basis of post search deposition taken by the ADIT (Inv.) from Sri Murli Lahoti , Sri Shiv Kumar Banka and Sri Anand Singhania, who were not the directors of the share applicant companies, the ld AO added back the said amount of Rs 1,40,00,000/- as unexplained cash credit u/s 68 of the Act. The assessee pleaded before the ld CITA that even the opportunity of cross-examination of these three parties were denied to the assessee by the ld AO. The assessee before the ld CITA stated that in support of the receipt of share capital, the assessee had provided name & address of the share applicants, PAN of the share applicants, conformation letters from the share applicants, their ITR acknowledgement, copy of profit and loss account and balance sheet, source of the funds provided, bank statement, ROC documents etc. The ld AO did not proceed further , neither issued notice u/s 131 or 133(6) of the Act to the shareholders to disprove that the documents filed by the assessee were not reliable. The ld AO simply relied on the statement recorded by the ADIT (Inv.) in post search enquiries which too was recorded after 118 days of the search when he has to forward all the documents and report within 60 days of the search. The assessee further stated that there is no dispute that the shareholder companies have duly disclosed the investment in share capital with premium in their books and balance sheet and such investments have also been accepted balong with their source in the hands of the shareholders. The assessee further stated that it had filed all the evidences including affidavits from the shareholders to prove the credit in their names. It was pointed out that neither the ld AO himself examined the aforesaid three

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persons nor allowed the cross examination specifically called for. The addition was made merely based on the statement recorded during post search enquiries by the investigation wing.

4. The ld CITA deleted the addition made by the ld AO by observing as under:-

> *"I have considered findings of the AO in the assessment order, different case laws brought on record and appeal orders passed by my predecessors on this legal issue. I find from the assessment order that during the search and seizure operations conducted u/s 132 of the Income Tax Act, 1961, incriminating documents/papers were not seized. At least, additions made by the AO in the assessment order passed u/s 153A/143(3) are not based on any incriminating documents/papers seized during the search operation. It would also not be out of context to mention here that in this case, on the date of search, no assessment for this year was pending. Therefore, keeping in view the ratio decided by the Jurisdictional Bench of Kolkata Tribuna in cases referred above and the ratio decided by the Hon'ble Calcutta High Court in the case of Veer Prabhu Marketing Ltd. (Supra) in the light of CBDT's decision of not filing SLP in this case in the Supreme Court and keeping in view the Apex Court's decision to dismiss SLP on similar issue in the case of Pr. CIT vs. Kurele Paper Mills Pvt. Ltd: SLP (C) No. 34554 of 2015 dated 07.12.2015, I am of this view that in order to maintain judicial continuity on this issue and respectfully following the ratio decided by the Hon'ble Calcutta High Court in the case of Veer Prabhu Marketing Ltd. (Supra), assessee's appeal on grounds no. 2 and 3 are allowed and as such I am not inclined to adjudicate appeal on grounds no. 4 and 5 on merit".*

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5. Aggrieved, the revenue is in appeal before us on the following grounds:

> *1. Ld. CIT(A) has failed to appreciate that the finding of incriminating fact during search & seizure operation regarding buyback of Shares @ Rs. 10/- by the group companies immediately after allotment of those shares @ 50/- per share through entry operators and revealing of the related facts and statements under oath of the entry operators in post search investigation constitute sufficient cause to initiate proceedings u/s 153A for addition of the bogus share capital as all incriminating facts/documents are related to it.*
>
> *2. The Ld. CIT(A) has failed to appreciate that the finding of an incriminating fact during search & seizure operation amounts to seizure of incriminating document.*
>
> *3. Ld. CIT(A) has failed to explain as to why the judicial decisions mentioned in the assessment order are not applicable in this case.*

6. The ld DR argued that the expression 'incriminating material' is not found in the provisions of the Act and it is only the Hon'ble Courts which had imported those words while rendering the decisions. He stated that the Hon'ble Courts are divided on this issue and placed reliance on the decision of the *Hon'ble Karnataka High Court in the case of Canara Housing Development Co vs DCIT reported in (2014) 49 taxmann.com 98 (Kar HC)* wherein it was held that search assessments could be framed even without the existence of incriminating materials found in the course of search. He argued that the basic foundation for conducting the search is governed by the provisions of section 132 of the Act which has to be read harmoniously with section 153A of the Act. There are three conditions based on which a search action could be initiated u/s 132 of the Act on an assessee. They are :-

Section 132(1) - If the concerned authority has in consequence of information in his possession, has reason to believe that

(a) where a person fails to produce the books of accounts and other documents in response to notice u/s 142(1) or summons issued u/s 131(1) of the Act ; or
(b) where a person fail to comply with the requirements of summons issued u/s 131(1) of the Act or
(c) where a person is in possession of any money, bullion, jewellery or other valuable article or thing and such assets represents either wholly or partly income or property which has not been , or would not be, disclosed for the purposes of the Act (hereinafter referred to as the undisclosed income or property) ;

then the officer , so authorized could conduct a search and proceed as per the requirements laid down in the said section. He argued that the aforesaid three primary conditions for invoking search proceedings cannot be given a go by while framing section 153A assessments and the instant case falls under section 132(1)(c) of the Act.

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The provisions of section 153A of the Act use the expression 'assess or reassess total income' and hence the search assessment could be framed u/s 153A of the Act irrespective of any incriminating materials.

7. In response to this, the ld AR stated that the assessment for the Asst Year 2010-11 was originally completed u/s 143(1) of the Act as the case was not selected for scrutiny by issuance of notice u/s 143(2) of the Act on or before 30.9.2011. He reiterated the submissions made before the lower authorities with regard to framing of additions in section 153A assessments without any incriminating material found thereon. Reliance was placed on the following decisions in support of his contentions:-

(a) CIT vs Veerprabhu Marketing Ltd reported in (2016) 73 taxmann.com 149 (Cal HC)
(b) Decision of this tribunal in the case of ACIT vs Kanchan Oil Industries Ltd in ITA No. 725/Kol/2011 dated 9.12.2015
(c) CIT vs Kabul Chawla reported in (2016) 380 ITR 573 (Delhi HC)
(d)CIT vs Continental Warehousing Corporation (Nhava Sheva) Ltd and All Cargo Global Logistics Ltd reported in (2015) 374 ITR 645 (Bom)
(e) Decision of Hon'ble Apex Court in the case of Kabul Chawla reported in 380 ITR (St.) 64 (SC) wherein SLP of the revenue was dismissed.

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8. We have heard the rival submissions. We find it would be necessary to address the preliminary issue of whether the addition could be framed u/s 153A of the Act in respect of a concluded proceeding without the existence of any incriminating materials found in the course of search. The scheme of the act provides for abatement of pending proceedings as on the date of search. It is not in dispute that the assessment for the Asst Year 2010-11 was originally completed u/s 143(1) of the Act and the time limit for issuance of notice u/s 143(2) of the Act had expired and hence it falls under concluded proceeding , as on the date of search. We hold that the legislature does not differentiate

whether the assessments originally were framed u/s 143(1) or 143(3) or 147 of the Act. Hence unless there is any incriminating material found during the course of search relatable to such concluded year, the statute does not confer any power on the ld AO to disturb the findings given thereon and income determined thereon, as finality had already been reached thereon, and such proceeding was not pending on the date of search to get itself abated. The provisions of section 153A of the Act are reproduced hereunder for the sake of convenience :-

"[Assessment in case of search or requisition

153A. [(1)] Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, in the case of a person where a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A after the 31st day of May, 2003, the Assessing Officer shall—

(a) issue notice to such person requiring him to furnish within such period, as may be specified in the notice, the return of income in respect of each assessment year falling within six assessment years referred to in clause (b), in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139;

(b) 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 :

Provided that the Assessing Officer shall assess or reassess the total income in respect of each assessment year falling within such six assessment years:"

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8.1. We find that the Co-ordinate Bench of Delhi Tribunal in the case of *Dy. CIT* v. *Aggarwal Entertainment (P.) Ltd reported in* [2016] 72 taxmann.com 340 (Delhi - Trib.) had addressed this aspect. The relevant headnotes is reproduced below:—

"Section 153A, read with section 143, of the Income-tax Act, 1961-Search and seizure - Assessment in case of (in case of section 143(1) assessment)-Assessment year 2004-05- Whether assessment in respect of which return has been processed

under section 143(1), cannot be regarded as pending for purpose of section 153A as Assessing Officer is not required to do anything further about such a return and, thus, said assessment cannot be reopened in exercise of power of section 153A- Held yes (Paras 10 and 12) (In favour of assessee)."

8.2. We find that the Co-ordinate Bench of this tribunal in the case of *ACIT vs Kanchan Oil Industries Ltd in ITA No. 725/Kol/2011 dated 9.12.2015 reported in 2016-TIOL-167-ITAT-KOL* had explained the aforesaid provisions as below:-

"6.4 In our opinion, the scheme of assessment proceedings should be understood in the following manner pursuant to the search conducted u/s. 132 of the Act :-

(a) Notice u/s. 153A of the Act would be issued on the person on whom the warrant of authorization u/s. 132 of the Act was issued for the six assessment years preceding the year of search and assessments thereon would be completed u/s. 153A of the Act for those six assessment years.

(b) In respect of the year of search, notice u/s. 143(2) of the Act would be issued and assessment thereon would be completed u/s. 143(3) of the Act.

(c) In respect of concluded assessments prior to the year of search, no addition could be made in the relevant assessment year unless any incriminating material is found during the course of search with respect to the relevant assessment year

(d) Pursuant to the search u/s. 132 of the Act, the pending proceedings would get abated. In respect of abated assessments, the total income needs to be determined afresh in accordance with the provisions of section 153A and other provisions of the Act.

6.4.1 The concluded assessments for the purpose of section 153A of the Act shall be -

(i) assessment years where assessments are already completed u/s. 143(1) and time limit for issuance of notice u/s. 143(2) of the Act has expired or;

(ii) assessment years where assessments are already completed u/s. 143(3) of the Act ;

unless they are reopened u/s. 147 of the Act for some other purpose in both the scenarios stated above.

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6.4.2 The scheme of assessment proceedings contemplated u/s. 153A of the Act are totally different and distinct from the proceedings contemplated u/s. 147 of the Act and these procedures of assessment operate in different fields and have different purposes to be fulfilled altogether.

6.4.3 The expression 'assess or reassess' stated in section 153A(1)(b) has to be understood as below:-

'assess' means assessments to be framed in respect of abated assessment years irrespective of the fact whether there are any incriminating materials found during the course of search with respect to relevant assessment years ;

'reassess' means assessments to be framed in respect of concluded assessment years where incriminating materials were found during the course of search in respect of the relevant assessment year."

8.3. We also find that recently the *Hon'ble Delhi High Court in the case of CIT vs Kabul Chawla reported in (2016) 380 ITR 573 (Del)* held as under:-

'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 153A(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 LD AOs as a fresh exercise.

(iii) The LD AO will exercise normal assessment powers in respect of the six years previous to the relevant AY in which the search takes place. The LD 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 153A 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 LD 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

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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 complete 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 LD AO.

(vii) Completed assessments can be interfered with by the LD AO while making the assessment under section 153A 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."

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.

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8.4. We find that the decision relied upon by the ld DR in the case of *CIT vs Anil Kumar Bhatia reported in (2013) 352 ITR 493 (Del)* does not in any manner advance the case of the revenue as admittedly the Hon'ble Delhi High Court in para 24 of its order had held as under:-

"24. We are not concerned with a case where no incriminating material was found during the search conducted under section 132 of the Act. We, therefore, express no opinion as to whether Section 153A can be invoked even in such a situation. That question is therefore left open."

8.5. The ld DR also relied on the recent decision of the Hon'ble Kerala High Court in the case of E.N.Gopakumar vs CIT reported in (2016) 75 taxmann.com 215 (Kerala) in

support of his contentions. We find that the decision of Hon'ble Delhi High Court in the case of CIT vs Kabul Chawla reported in (2016) 380 ITR 573 (Del) had duly considered the decisions of CIT vs Anil Kumar Bhatia reported in (2013) 352 ITR 493 (Del) ; CIT vs Chetan Das Lachman Das reported in (2012) 211 Taxman 61 (Del HC) ; Madugula Venu vs DIT reported in (2013) 215 Taxman 298 (Del HC) ; Canara Housing Development Co. vs DCIT reported in (2014) 49 taxmann.com 98 (Kar HC) ; Filatex India Ltd vs CIT reported in (2014) 229 Taxman 555 (Del HC) ; Jai Steel (India) vs ACIT reported in (2013) 219 Taxman 223 (Del HC) ; CIT vs Murli Agro Products Ltd reported in (2014) 49 taxmann.com 172 (Bom HC) ; CIT vs Continental Warehousing Corporation (Nhava Sheva) Ltd reported in (2015) 374 ITR 645 (Bom HC) and All Cargo Global Logistics Ltd vs DCIT reported in (2012) 137 ITD 287 (Mum ITAT) (SB).

We also find that against the decision of the Hon'ble Delhi High Court in 380 ITR 573 (Del) , the revenue preferred Special Leave Petition before the Hon'ble Supreme Court and the same was dismissed by the apex court which is reported in 380 ITR (St.) 4 (SC). Hence it could be safely concluded that the decision of Hon'ble Delhi HC in the case of Kabul Chawla supra would have to be considered on the impugned issue and in any case, the *Hon'ble Supreme Court in the case of CIT vs Vegetable Products Ltd reported in 88 ITR 192 (SC)* had held that if two reasonable constructions of a taxing provision are possible, that construction which favours the assessee must be adopted.

8.6. We also find that the *Hon'ble Jurisdictional High Court recently in the case of Principal CIT vs M/s Salasar Stock Broking Ltd in G.A.No. 1929 of 2016 ITAT No. 264 of 2016 dated 24.8.2016* had endorsed the aforesaid view of Hon'ble Delhi High Court in Kabul Chawla's case and also placed reliance on its own decision in the case of CIT vs Veerprabhu Marketing Ltd reported in (2016) 73 taxmann.com 149 (Cal HC).

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8.7. We find that the provisions of section 132 of the Act relied upon by the ld DR would be relevant only for the purpose of conducting the search action and initiating proceedings u/s 153A of the Act. Once the proceedings u/s 153A of the Act are initiated, which are special proceedings, the legislature in its wisdom bifurcates differential treatments for abated assessments and unabated assessments. At the cost of repetition, we state that in respect of abated assessments (i.e pending proceedings on the date of search) , fresh assessments are to be framed by the ld AO u/s 153A of the Act which would have a bearing on the determination of total income by considering all the aspects, wherein the existence of incriminating materials does not have any relevance. However, in respect of unabated assessments, the legislature had conferred powers on the ld AO to just follow the assessments already concluded unless there is an incriminating material found in the search to disturb the said concluded assessment. In our considered opinion, this would be the correct understanding of the provisions of section 153A of the Act , as otherwise the necessity of bifurcation of abated and unabated assessments in section 153A of the Act would become redundant and would lose its relevance. Hence the arguments advanced by the ld DR in this regard deserves to be dismissed.

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8.8. In view of the aforesaid findings and respectfully following the judicial precedents relied upon hereinabove, we hold that the assessment framed u/s 143(1) of the Act for the Asst Year 2010-11, which was unabated / concluded assessment, on the date of search, deserves to be undisturbed in the absence of any incriminating material found in the course of search and accordingly the addition made on account of share capital u/s 68 of the Act is hereby directed to be deleted. Since the issue is addressed on preliminary ground of absence of incriminating materials, we refrain to give our findings on the merits of the addition u/s 68 of the Act for the Asst Year 2010-11. Accordingly the grounds raised by the revenue in this regard are dismissed.

9. The Cross Objections preferred by the assessee are only supportive of the order of the ld CITA and does not require any specific adjudication.

10. In the result, the appeal of the revenue is dismissed and cross objection of the assessee is allowed.

Order pronounced in the Court on 01.12.2017

Sd/-	Sd/-
[N.V. Vasudevan]	[M.Balaganesh]
Judicial Member	Accountant Member

Dated : 01.12.2017
SB, Sr. PS

Copy of the order forwarded to:
1. ACIT, CC-3(3), Kolkata, Aayak r Bhawan Poorva, E M By pass 110, Shanti Pally, 4th Floor, Kolkata-700107
2. M/s Sethia Agrotech Ltd., 143/1/1, Cotton Street, Kol-700007
3..C.I.T.(A)- , Kolkata 4. C.I.T.- Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

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