आयकर अपीलीय अधिकरण, कटक न्यायपीठ,कटक

IN THE INCOME TAX APPELLATE TRIBUNAL CUTTACK BENCH CUTTACK

BEFORE SHRI N.S.SAINI, AM & SHRI PAVAN KUMAR GADALE, JM

ITA No.206/CTK/2018

(**निर्धारण वर्ष /** Assessment Year :2011-2012)

Basukinath Builders Pvt. Ltd., Om Niwas, Barsuan-770041 Dist-Sundergarh(Odisha)	Vs.	Pr. CIT(Central), Direct Tax Building, M.V.P. Colony, Visakhapatnam-830017
स्थायी लेखा सं./जीआइआर सं./PAN/TAN No. : **AAECB 0928 K**		
(अपीलार्थी **/Appellant**)	..	(प्रत्यर्थी / **Respondent**)

निर्धारिती **की ओर से** /Assessee by : Shri P.K.Mishra, AR

राजस्व **की ओर से** /Revenue by : Shri S.M.Keshkamat, CITDR

सुनवाई की तारीख **/ Date of Hearing : 15/11/2018**

घोषणा की तारीख**/Date of Pronouncement 16/11/2018**

आदेश / O R D E R

Per Shri Pavan Kumar Gadale, JM

This is an appeal filed by the assessee against the revision order u/s.263 of the Act passed by the Pr.CIT(Central), Visakhapatnam, dated 20.03.2018.

2. The assessee has raised the following grounds :-

1. *That on the facts and in the circumstances of the case, the Ld. Pr. CIT (Central) has erred in law by invoking section 263 with a presumption that the assessment order passed U/s-153C has erroneous and prejudicial to the interest of the revenue particularly when the order passed U/s-153C itself was without jurisdiction, null and void. Neither any specific incrementing material was found in course of search nor proper satisfaction note was prepared before initiating the proceeding U/s-153C leading to nullity of the order. As the original assessment order was bad in law and subsequent proceedings U/s-263 is without any legs and hence needs to be quashed.*

2. *That on the facts and in the circumstances of the case, the Ld. Pr. CIT (Central) has erred in law by rejecting the argument of the assessee that "assessment has to be completed in course of proceeding U/s-153C based on seized material*

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only" (at para-8 last line) is not correct proposition of law and hence the order passed by the Pr. CIT (Central) U/s-263 needs to be annulled.

3. *That on the facts and in the circumstances of the case, the Ld. Pr. CIT (Central) has erred in presuming that the advance of Rs.50 lakhs to the assessee attracts section 2(22)(e) and not examined by AO in course of assessment U/s.153C is not proper in the eye of law and hence the order setting aside the assessment is bad in law and needs to be annulled.*

4. *That the order of the Ld. Pr. CIT (Central) being not based on the facts of the case of the appellant and being contrary to law, should hence be quashed and the appellant Company be given such relief or reliefs as prayed for.*

5. *That the appellant craves leave to amend, alter, modify, substitute, add to, abridge and/ or resc nd any or all of the above grounds.*

3. The facts in brief are that the assessee is partner of group concern of M/s Basukinath Roadways Pvt. Ltd. There was a search and seizure operation u/s.132 of the Act on 25/26.02.2014 in the business premises of the assessee's group. In the search operations certain materials and documents were seized and impounded and based on the seized materials and documents and books of accounts, notice u/s.153C of the Act was issued to the assessee calling for the information in the proceedings u/s.153C r.w.s.143(3) of the Act. In response to notice, assessee filed return of income electronically on 27.02.2015 with total income disclosing as Nil. The notice issued earlier u/s.153C of the Act was withdrawn and fresh notice u/s.153C of the Act was issued on 22.01.2016. In response to the same, the assessee filed written submissions on 04.02.2016 to treat the return filed earlier on 27.02.2015 in lieu of notice u/s.153C of the Act. Subsequently, notice u/s.143(2) & 142(1) of the Act was issued. The assessee was also served with

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questionnaire and in respect of same, ld. AR appeared and filed the documents and after discussion, the assessment was completed with assessed income at Nil. Subsequently, the Pr. CIT(Central), Visakhapatnam has issued notice for the revision in respect of the claim that the assessee has obtained unsecured loan advances from the group company where the assessee is holding a substantial share of 49.72% and the company being a substantial shareholder, therefore, the provisions of Section 2(22)(e) is applicable. In response to notice ld. AR appeared and filed the written submissions on 27 10.2017 mentioned and explained that there is no applicability of section 2(22)(e) of the Act in the said case. The Pr. CIT while dealing with the issue, relied on the decision of Hon'ble Kerala High Court in the case of E.N.Gopakumar vs. CIT [2017] 390 ITR 131 (Ker.) and observed that the loan or advance received by the assessee company would be taxable as deemed dividend, therefore set aside the assessment order u/s.153C r.w.s.143(3) of the Act and directed the AO to re-do the same afresh after examining the issue in detail.

4. Aggrieved by the order of Pr. CIT, the assessee filed an appeal before Tribunal.

5. Ld. AR submitted that the assessee has filed the return of income earlier on 27.02.2015 and subsequently in response to the notice u/s.153C of the Act the assessee filed a letter on 04.02.2016 with Nil income and the assessment was made u/s.153C r.w.s.143(3) of the Act dated 31.03.2016. The AO having satisfied with the explanation and the

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documents filed assessed the income at Rs.Nil. He further relied on the decision of Kolkata Bench of the Tribunal in case of M/s Tanuj Holdings Pvt. Ltd. Vs. DCIT, ITA No.360/Kol/2013, order dated 20.01.2016, and also no incriminating documents were found in respect of issue of deemed dividend and prayed for allowing the appeal.

6. Contra, ld. DR relied on the order of Pr. CIT and supported the findings of Pr. CIT.

7. We have heard the rival submissions and perused the material on record. Prima facie, the crux of the issue as envisaged by the ld. AR that no incriminating documents were found in search in respect of assessee whereas the assessee has complied with the notice u/s.153C and filed the return of income. Ld AR further submitted that the question of applicability of deemed dividend does not arise as there is no incriminating material was found in the course of search in respect of deemed dividend. The Pr. CIT has considered the transaction of deemed dividend has passed the revision order against the assessment proceedings u/s.153C r.w.s.143(3) of the Act. Further, the ld. AR further substantiated that the assessee has filed original return of income u/s.139(1) of the Act and also in compliance to notice dated 22.01.2016 filed written submission on the return of income on 04.02.2016 with nil income, whereas the ld. DR could not substantiate with any evidence or with any proof that there is any incriminating material was found in respect of deemed dividend as dealt in the revision order passed by the Pr. CIT. We are of the opinion that the proceedings u/s.263 of the Act are in respect of the order passed

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u/s.153C r.w.s.143(3) of the Act dated 31.03.2016 whereas the AO has accepted the assessee's return of income without any additions and the issue of deemed dividend. We found that the similar issue on deemed dividend was decided by the Kolkata Bench of the Tribunal in the case of M/s Tanuj Holding Pvt. Ltd.(supra) has held at para 5.5 as under :-

> *"5.5. We also find that no incriminating materials were found during the search in respect of the issue of deemed dividend. Hence it cannot be the subject matter of addition in 153C proceedings in respect of completed assessments. We hold that when an addition could not be made as per law in section 153Cproceedings, then the said order cannot be construed as erroneous warranting revision jurisdiction u/s 263 of the Act. This addition was made based on audited accounts already available with the revenue. Hence on this count also, the addition contemplated by the Learned CIT in section 263 proceedings is not in accordance with law. Reliance in this regard placed by the Learned AR on the decision of the Bombay High Court in the case of CIT vs Murli Agro Products Ltd (ITA NO. 36 of 2009 dated 29.10.2010- Bombay HC) is very well placed. The question before their Lordships and decision rendered thereon is as under:-*
>
> *Question:*
>
> *2) Although several questions are framed by the revenue, the basic question raised in this appeal is, whether the Income Tax Appellate Tribunal is justified in cancelling the order of Commissioner of Income Tax passed under Section 263 of the Income Tax Act, 1961?*
>
> *Held:*
>
> *"6. Challenging the order of the Commissioner of Income Tax passed under Section 263 of the IT Act, the assessee filed an appeal and the ITAT by its order dated 5/1/2009 set aside the order of the Commissioner of Income Tax dated 4/10/2007 on the ground that neither the computation of book profit under Section 115JA nor deduction under Section 80HHC of the IT Act were the subject matter of the proceedings under Section 153A and, therefore, the Commissioner of Income Tax could not have invoked the jurisdiction under Section 263 of the IT Act. Challenging the aforesaid order, the present appeal is filed by the revenue.*
>
> *7. According to Shri Jaiswal, learned Counsel for the revenue, once the proceedings under Section 153A of the IT Act are initiated, then the original assessment/reassessment orders already passed in the assessment years covered under Section 153A stand abated and*

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the Assessing officer is obliged to pass fresh assessment/reassessment orders and determine the total income afresh for those assessment years. In the present case, according to Mr. Jaiswal, the assessment order passed under Section 153A read with Section 143(3) of the Income- Tax Act is erroneous and prejudicial to the interests of the revenue because, firstly, the AO had only determined undisclosed income and had not determined the total income which the mandate of Section 153A of the Income- tax Act. Secondly, the total computed after giving effect to the order of Commissioner of Income-tax(A) being loss which less than 30% of the book profit, the AO ought to have computed book profit as per Section 115JA of the Income-tax Act. Thirdly, the deduction allowed under Section 80HHC of the Act in the original assessment was erroneous and since the original assessment order stood abated on initiation of proceedings under Section 153A of the Act, the AO ought to have correctly computed deduction under Section 80HHC in the assessment order passed under Section 153A read with Section 143(3) o the Income-tax Act. Accordingly, Mr. Jaiswal submitted that in the facts of the present case, the Commissioner of Income Tax was justified in invoking jurisdiction under Section 263 and the ITAT committed an error in setting aside the order passed by the C.I.T.

8. We find it difficult to accept the above contention raised on behalf of the revenue. The object of inserting Sections 153A, 153B and 153C by Finance Act, 2003 by discarding the existing provisions relating to search cases contained in Chapter XIVB of the Income-tax Act, as stated in the Memorandum explaining the provisions in the Finance Bill 2003 (see 260 ITR (St) 191 at 219) was that under the existing provisions relating to search cases, often disputes were raised on the question, as to whether a particular income could be treated as ' undisclosed income' or whether a particular income could be said to be relatable to the material found during the course of search, etc., which led to prolonged litigation. To overcome that difficulty, the legislature by Finance Act 2003, decided to discard Chapter XIVB provisions and introduce Sections 153A, 153B and 153C in the IT Act.

9. What Section 153A contemplates is that, notwithstanding the regular provisions for assessment/reassessment contained in the IT Act, where search is conducted under Section 132 or requisition is made under Section 132A on or after 31/5/2003 in the case of any person, the Assessing Officer shall issue notice to such person requiring him to furnish return of income within the time stipulated therein, in respect of six assessment years immediately preceding the assessment year relevant to the previous year in which the search is conducted or requisition is made and thereafter assess or reassess the total income for those assessment years. The second proviso to Section 153Aprovides for abatement of assessment/reassessment proceedings which are pending on the date of search/requisition. Section 153A(2) provides that when the

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assessment made under Section 153(A)(1)is annulled, the assessment or reassessment that stood abated shall stand revived.

10. Thus on a plain reading of section 153A of the Income-tax Act, it becomes clear that on initiation of proceedings under Section 153A, it is only the assessment/reassessment proceedings that are pending on the date of conducting search under Section 132 or making requisition under Section 132Aof the Act stand abated and not the assessments/reassessments already finalised for those assessment years covered under Section 153A of the Act. By a circular No.8 of 2003 dated 18-9-2003 (See 263 ITR (St) 61 at

107) the CBDT has clarified that on initiation of proceedings under Section 153A, the proceedings pending in appeal, revision or rectification proceedings against finalized assessment/reassessment shall not abate. It is only because, the finalized assessments/reassessments do not abate, the appeal, revision or rectification pending against finalized assessments/reassessments would not abate. Therefore, the argument of the revenue, that on initiation of under Section 153A, the assessments/reassessments finalised for the assessment years covered under Section 153A of the Income-tax Act stand abated cannot be accepted. Similarly on annulment of assessment made under Section 153(1) what stands revived is the pending assessment/reassessment proceedings which stood abated as per section 153A(1).

11. In the present case, as contended by Shri Mani, learned counsel for the assessee, the assessment for the assessment year 1998-99 was finalized on 29-12-2000 and search was conducted thereafter on 3-12-2003. Therefore, in the facts of the present case, initiation of proceedings under Section 153A would not affect the assessment finalized on 29-12-2000.

12. Once it is held that the assessment finalized on 29.12.2000 has attained finality, then the deduction allowed under section 80HHC of the Income-tax Act as well as the loss computed under the assessment dated 29-12-2000 would attain finality. In such a case, the AO while passing the independent assessment order under Section 153A read with Section 143(3) of the I.T Act could not have disturbed the assessment/reassessment order which has attained finality, unless the materials gathered in the course of the proceedings under Section 153A of the Income-tax Act establish that the reliefs granted under the finalized assessment/reassessment were contrary to the facts unearthed during the course of 153A proceedings.

13. In the present case, there is nothing on record to suggest that any material was unearthed during the search or during the 153A proceedings which would show that the relief under Section 80HHC was erroneous. In such a case, the AO while passing the assessment order under Section 153A read with Section

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143(3) could not have disturbed the assessment order finalized on 29.12.2000 relating to Section 80HHC deduction and consequently the C.I.T could not have invoked jurisdiction under Section 263 of the Act.

14. Moreover, since the AO had made addition on account of undisclosed income at Rs. 89,19,477/- in the assessment order passed under Section 153A, there was no question of computing book profits under Section 115JA of the I.T Act. When the addition of undisclosed income was deleted by CIT(A) without any direction to compute the book profits, the AO was bound to modify the assessment order passed under Section 153A read with s. 143(3) of the Act as directed by CIT(A). Therefore, in the facts of the present case, no fault could be found with the AO in giving effect to the order of CIT(A). Consequently, the CIT could not invoke jurisdiction under Section 263 of the income-tax Act on the ground that the assessment under Section 153A read with Section 143(3) was erroneous or prejudicial to the interests of revenue.

15. In the result, the decision of the Tribunal in quashing the order of C.I.T passed under Section 263of the I.T Act cannot be faulted. Accordingly, we see no merit in the present appeal and the same is hereby dismissed with no order as to costs."

We also find that the impugned issue is also supported by the decision of the Hon'ble Bombay High Court in the case of CIT vs Continental Warehousing Corporation (Nhava Sheva) Ltd and All Cargo Global Logistics Ltd reported in (2015) 374 ITR 645 (Bom) vide order dated 21 4 2015, wherein the facts before the Bombay High Court and decision rendered thereon are as below :-

"Under sect on 153A of the Income-tax Act, 1961, which enables carrying out of search or exercise of power of requisition, assessment in furtherance thereof is contemplated. There is a mandate to issue notices under section 153(1)(a) and 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. Thus, the crucial words "search" and "requisition" appear in the substantive provision and the provisos. That would throw light on the issue of applicability of the provision. True it is that the assessment which has to be made in pursuance of the notice is in relation to the six years. An order will have to be made in that regard. While making the order, the income or the return of income filed for all these assessment years is to be taken into account. A reference will have to be made to the income disclosed therein. However, the scope of enquiry though not confined essentially revolves around the search or the requisition under section 132A , as the case may be. The provision deals with those cases where assessment or reassessment, if any, relating to the assessment years falling within the period of six assessment years referred to in sub-section (1) of section 153A were pending. If they were pending on the date of

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the initiation of the search under section 132 or making of requisition under section 132A , as the case may be, they abate. It is only pending proceedings that would abate and not where there are orders made of assessment or reassessment and which are in force on the date of initiation of the search or making of the requisition.

The assessee was engaged in the operation of a container freight station. It claimed deduction under section 80-IA(4) producing a certificate dated July 13, 2006, from the Jawaharlal Nehru Port Trust Nhava Sheva declaring that the assessee was considered an extended arm of port-related services. The education was disallowed on the ground that the certificate was withdrawn on October 5, 2007. The Commissioner (Appeals) confirmed the view of the Assessing Officer. The Tribunal held in favour of the assessee.

A search was carried out on its premises and a notice under section 153A was issued to the assessee. The assessee declared a total income of Rs.5,54,63,220 while claiming the deduction under section 80-IA(4) of Rs.1,25,77,637. The Assessing Officer held that the assessee was not entitled to the deduction under section 80-IA. The Commissioner (Appeals) upheld the order of the Assessing Officer. The Special Bench of the Tribunal held that by the clear language of section 153A together with its provisos, pending assessments abated and that the Assessing Officer was required to make one assessment for each of the six years on the basis of the search and any other material existing or brought on record by the Assessing Officer, that in other cases assessments would be made on the basis of the books of account and other documents found during the search and not produced during assessment and also on any other undisclosed income or property found during the search. On the issue of deduction under section 80-IA(4) the Tribunal held that the container freight station was an inland port and its income was entitled to deduction under section 80-IA(4) .

On appeals:

Held, dismissing the appeals, (i) that the notice under section 153A was founded on search. If there was no incriminating material found during the search then the Tribunal was right in holding that the power under section 153A being not expected to be exercised routinely, should be exercised if the search revealed any incriminating material. If that was not found then in relation to the second phase of three years, there was no warrant for making an order within the meaning of this provision."

In view of the aforesaid findings and judicial precedent relied upon, we hold that the addition towards deemed dividend u/s 2(22)(e) of the Act in the assessments framed u/s 153C of the Act for the Asst Years 2007-08 to 2010-11 without any incriminating materials found

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during the course of search with respect to those assessment years, is not warranted and held as not in accordance with law."

We found that the facts of the present case are similar to the decision of the Tribunal. Accordingly, we follow the judicial precedence and the decision of the Tribunal and quash the order passed by the Pr. CIT u/s.263 of the Act and allow the grounds of appeal of the assessee.

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

Order pronounced in the open court on 16/11/2018.

Sd/-	**Sd/-**
(N. S. SAINI)	**(PAVAN KUMAR GADALE)**
लेखा सदस्य / ACCOUNTANT MEMBER	**न्यायिक सदस्य / JUDICIAL MEMBER**

कटक Cuttack; दिनांक Dated 16/11/2018

प्र.कु.मि/PKM, Senior Private Secretary

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant-
   Basukinath Builders Pvt. Ltd
   Om Niwas, Barsuan-770041
   Dist-Sundergarh(Odisha)
2. प्रत्यर्थी / The Resp ndent-
   Pr. CIT(Central),Direct Tax Building,
   M.V.P. Colony, Visakhapatnam-830017
3. आयकर आयुक्त(अपील) / The CIT(A),
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, **कटक** / DR, ITAT, Cuttack
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

(**Senior Private Secretary**)
आयकर अपीलीय अधिकरण, कटक / ITAT, Cuttack

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