

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ "डी", मुंबई
IN THE INCOME TAX APPELLATE TRIBUNAL BENCH "D" MUMBAI
BEFORE SHRI D.T.GARASIA, JM AND SHRI RAJESH KUMAR, AM

I.T.A. No.4814 to 4818/Mum/2013
(निर्धारण वर्ष / Assessment Years: 2004-05 to 2008-09)

M/s Dorf Ketal Chemicals LLC, 1, Dorf Ketal Tower Orlem, Malal (W), Mumbai-400064	<u>बनाम/</u> Vs.	Dy.Commissioner of Income Tax , Central Circle -45, Mumbai.
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स्थायी लेखा सं./PAN : AACCD1719J		
(अपीलार्थी /Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से / Assessee by	:	Shri Nishant Thakkar
प्रत्यर्थी की ओर से/ Revenue by	:	Shri B Pruseth

सुनवाई की तारीख /Date of Hearing	:	25.4.2017
घोषणा की तारीख /Date of Pronouncement	:	14.07.2017

आदेश / ORDER

PER RAJESH KUMAR, A. M:

The captioned are appeals by the assessee pertaining to assessment years 2004-05 to 2008-09. The appeals are directed against the common order of the CIT(A)-38, Mumbai, dated 28.3.2013 which in turn have arisen from an order passed by the Assessing Officer dated 30.12.2010 under section 143(3) r.s.w.153A of the Income Tax Act, 1961(in short 'the Act). Since issue involved in all these appeals is common, therefore these appeals

are clubbed together, heard together and are being disposed of by his common order for the sake of convenience.

2. First we shall take up the I.T.A. No.4814/Mum/2013 :

3. The assessee has taken following grounds of appeal:

"1. The learned CIT Appeals has grossly erred in confirming the disallowance of Rs. 2404059/- for payment made of royalty, u/s 40(a)(i) r.w.s. 195 of the Income Tax Act 1961.

2. The learned CIT Appeals has failed to appreciate that the royalty has been paid outside India on sales effected outside India and therefore, the provisions of section 40(a)(i) r.w.s 195 were not applicable in the case of the Assessee."

In addition to these grounds, the assessee also raised additional grounds of appeal which read as under :

"Additional Ground 1:

Considering the facts and circumstances of the case the impugned assessment order passed under Section 143(3) r.w.s 153A of the Income Tax Act, 1961 ('the assessment order') is void ab initio as there was no search action carried in the case or the appellant.

Additional Ground 2:

Without prejudice to Ground 1, the impugned assessment order passed is void ab-initio as the disallowance made under section 40(a)(i) of the Income Tax Act, 1961 is not based on any incriminating material found against DKLLC Additional Ground 3:

Without prejudice to Ground 1, 2 and 3, depreciation under Section 32 of the Act be allowed to the Appellant on the royalty paid to UOP LLC, US as the said payment is towards acquisition of assets eligible for depreciation under Section 32 of the Act.

It is respectfully submitted that the additional grounds of appeal being purely a legal issue, can be raised even at the Appellate stage, if the facts are on record. In this respect, reliance is placed on the decision of National Thermal Power Co. Limited vs. CIT 229 ITR 383 (SC).

In view of the above, we request your Honour to kindly consider our additional ground of appeal and decide on merits.

Revised ground of appeal

The Appellant wishes to modify the ground no 1 and 2 filed on 21 June 2013 as under:

"Without prejudice to Ground 1 and 2 above, the learned CIT(A) erred in confirming the disallowance of royalty paid to UOP LLC, US amounting to Rs 24,04,059 under section 40(a)(i) read with section 195 of the Income Tax Act, 1961."

4. The issue raised in additional ground no.1 by the assessee is qua wrongful assumption of jurisdiction by the AO u/s 153A of the Act in view of the fact that no search action has been carried out on the assessee.

5. The facts in brief are that the assessee filed its return of income on 1.11.2004 declaring total business loss of Rs.1,778/-. The assessee is a 100% subsidiary of Indian Company M/s DORF Ketal India Private Limited (DKIP) and has its control and management in India. The assessee apart from being resident of United States has also become the tax resident of India in India by virtue of 100% management and control in India. The assessee is engaged in the business of manufacturing chemicals and pharmaceuticals. A search and seizure action u/s 132(1) of the Act was carried out on 30.5.2008

at the business premises of M/s Dorf Ketal Chemicals (I) Pvt Ltd and also on the residential premises of the directors of the said company. The assessee is a wholly subsidiary company of M/s Dorf Ketal Chemicals (I) Pvt Ltd since 1989. The notice u/s 153A was issued to the assessee and thereafter the assessment was completed u/s 143(3) read with section 153A of the Act. According to the Assessee, there was no initiation of search under the provisions of section 132 of the Act as the name of the assessee was not mentioned in the warrant of authorization and therefore the issue of notice u/s 153A of the Act and the consequent assessment framed were void abinitio.

6. The ground challenging the jurisdiction of the AO was filed for the first time before the Tribunal and was not raked up either before the AO or the Id.CIT(A). However, we find that the issue raised is purely technical and legal in nature and arising out of the assessment records which was available before the authorities below, therefore we admit the said additional ground for adjudication in view of the decision of the Hon'ble Supreme Court in the case of National Thermal Power Co. Ltd. vs Commissioner Of Income Tax (1998) 229 ITR 383 (SC).

7. The Id. AR vehemently submitted before us that since there has been no initiation of search within the meaning of section 132 of the Act on the assessee, therefore, there is no jurisdiction with the AO to issue notice u/s

153A of the Act. The Id. AR submitted that the name of the assessee was not mentioned in the search warrant which has been admitted by the Departmental Representative also as the department has been allowed several opportunities to verify the fact and ultimately Id. DR agreed that the name of the assessee was not in letter of search but the search was conducted on the premises and therefore issue of notice u/s 153A and consequent assessment order u/s 143(3) r.w.s.153A is void ab-initio. In support of his submission the Id.AR relied on the following case law:

- i) M/s Balaji Yarn Ltd V/s CIT om ITA No.6199/Mum/2009 (AY-2001-02) dated 23.5.2013 which is confirmed by the Hon'ble Jurisdictional High Court in CIT V/s M/s Balaji Yarn Ltd in Income Tax Appeal no.230 of 2014 with ITA No.291 of 2014 dated 22.8.2016;
- ii) Shri Fazal Abdul Wahab Sarang V/s DCIT in ITA No.4929/Mum/2013(AY-2006-07) along with other appeal dated 14.12.2016;
- iii) CIT V/s Priyanka Singhanian (2015) 94 CCH 0003 Del High Court;
- iv) CIT V/s Ramesh D Patel (2014) 362 ITR 0492(Guj).

8. The Id. DR on the other hand opposed the arguments of the Id.AR by submitting that search was conducted in the building and though the name of the assessee was not mentioned in the warrant of authorization and the assessee has duly co-operated in all the assessment proceedings after issue of notice u/s 153A and has never objected to the issue of notice u/s 153A during the assessment proceedings. In support of his contention, the Id.DR strongly relied on the following decisions:

- i) Jose Cyriac V/s CIT (2012) 20 taxman.com 738 (Kerala);
- ii) Naresh Chand Baid V/s ACIT (2012) 23 taxmann.com 378(Chhattisgar);
- iii) MDLR V/s CIT (2013) 40 taxmann.com 365(Delhi);
- iv) M/s Ultratech Cement Ltd V/s Addl.CIT in ITA No.1060 of 2014 dated 18th April, 2017 (Bombay High Court).

Finally the Id Dr submitted before the bench that nonetheless the name of the assessee was not on the search warrant , a valid search has been conducted on the business premises of the assessee and therefore the ground additional ground raised by the assessee deserved to be dismissed.

9. We have heard the rival contentions and perused the material placed before us including the orders of authorities below and case law relied upon by rival parties. The undisputed facts of the case are that the assessee's name was not mentioned in the search warrant which was fairly admitted by the Id. DR after the Bench specifically asked the Id. DR to verify the said fact from the departmental records. In the instant case, the search was conducted on the holding company M/s DORF Ketal (India) Private Limited and residential premises of its directors. The assessee was a group company and was stated to be covered under the search as mentioned in the order of the AO and the Id.CIT(A) whereas the name of the assessee was not mentioned in the search warrant. Now, the issue before us whether the the AO has a proper and legal authority to issue notice u/s 153A of the Act when the name of the assessee is not mentioned in the search warrant and fate of

consequent proceedings culminating into assessment being framed u/s 143(3) r.w.s.153A of the Act. In order to fully and clearly understand the matter, we would like to refer the provisions of sections 153A of the Act:

"153A. Assessment in case of search or requisition.- (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:

Provided further that assessment or reassessment, if any, relating to any assessment year falling within the period of six assessment years referred to in this sub-section pending on the date of initiation of the search under section 132 or making of requisition under section 132A, as the case may be, shall abate.

(2) If any proceeding initiated or any order of assessment or reassessment made under sub-section (1) has been annulled in appeal or any other legal proceeding, then, notwithstanding anything contained in sub-section (1) or section 153, the assessment or reassessment relating to any assessment year which has abated under

the second proviso to sub-section (1), shall stand revived with effect from the date of receipt of the order of such annulment by the Commissioner:

Provided that such revival shall cease to have effect, if such order of annulment is set aside.

Explanation.—For the removal of doubts, it is hereby declared that,—

(i) save as otherwise provided in this section, section 153B and section 153C, all other provisions of this Act shall apply to the assessment made under this section;

(ii) in an assessment or reassessment made in respect of an assessment year under this section, the tax shall be chargeable at the rate or rates as applicable to such assessment year.”

Thus, it is clear from the perusal of the provisions of section 153A of the Act that notice u/s 153A can only be issued where a search is initiated u/s 132 of the Act or books of account or other documents other documents are requisitioned under section 132A after the 31st day of May, 2003 . Thus the AO has power to issue notice to such person requiring him to furnish return of income in respect of each assessment year falling within six assessment years falling immediately preceding assessments relevant to the previous year in which the search is conducted or requisition is made. Therefore, it is clear that for the purpose of assumption and exercise of powers u/s 153A of the Act in case of a person, the initiation of search in terms of section 132 of the Act or 132A of the Act on the said persons is mandatory and therefore whether there is no initiation of search as contemplated u/s 132 of the Act , the fundamental conditions for issuance of notice u/s 153A is not fulfilled .

Thus, the person in respect of whom the search is initiated u/s 132 of the Act is the same persons against whom the notice is to be issued u/s 153A of the Act. In view of this legal position, we are of the considered view that since no search has been initiated u/s 132 of the Act in the case of assessee, therefore notice issued u/s 153A of the Act is without jurisdiction and the consequent assessment so framed u/s 143(3) r.w.s 153A of the Act was also void ab initio. *The case of the assessee is also supported by several decisions as cited by the ld AR which are discussed as under:-*

- In the case of M/s Balaji Yarn Ltd (supra), the coordinate bench has held that where there is not initiation of search u/s 132 of the Act, no notice u/s 153A could be issued and the AO has no jurisdiction to frame assessment u/s 153A and hence the assessment framed by the AO was quashed. The Hon'ble Jurisdictional High Court has also dismissed the appeal filed by the Revenue observing that no substantial question of law arose and thus, confirmed the decision of the Tribunal vide decision rendered in Income Tax Appeal no.230 of 2014 with ITA No.291 of 2014 dated 22.8.2016;
- In the case of Priyanka Singhania (supra) the Hon'ble High Court held that where there is no search warrant in the name of the assessee then the question of assessment proceedings, u/s 153A would not arise.

➤ In the case of Ramesh D Patel (supra), the Hon'ble Gujarat High Court has held that where the assessee has not been subject to search proceedings, the AO had no jurisdiction to pass any order u/s 153A of the Act.

We have also perused the case law relied upon by the Revenue but find the same are distinguishable on facts.

➤ In the case of M/s Ultratech Cement Ltd (supra), the issue involved was deduction u/s 80IA of the Act.

➤ In the case of Jose Cyriac (supra), the Hon'ble Kerala High Court has held that the single warrant could be issued in a group of concerns but the name of the assessee has to be mentioned therein. But in the present case before us the name of the assessee is not mentioned in the search warrant and hence distinguishable.

➤ In the case of Naresh Chand Baid (supra), the Hon'ble High Court held that when the name of the assessee was found specifically mentioned in the warrant of authorisation issued in the name of the firm, the authority are competent to conduct search in the premises of the partner of the firm. However, in the present case, the name of the assessee was not mentioned.

Having regard to the facts of the assessee's case in the light of the ratio laid down by the various judicial forums, we are of the considered view that the notice issued by the AO u/s 153A of the Act is without jurisdiction as there was no initiation of search u/s 132 or requisition u/s 132A on the assessee

and therefore the consequent assessment framed u/s 143(3) r.w.s. 153A of the Act void ab-initio and is quashed. Accordingly, we allow the additional ground no.1 raised by the assessee. Since we have allowed the appeal of the assessee on technical and legal ground, the other grounds raised by the assessee become academic in nature . Resultantly, the appeal of the assessee is partly allowed.

I.T.A. No.4815 to 4818/Mum/2013

10. The facts of the above four appeals are identical to that of ITA No.4814/Mum/2013 and therefore, our decision in ITA No.4814/Mum/2013 would mutatis mutandis apply to these appeals as well. Accordingly, the proceedings u/s 153A and consequent assessments u/s 143(3) r.w.s. 153A of the Act are quashed.

11. In the result, the appeals of the assessee are partly allowed.

Order pronounced in the open court on 14th July, 2017.

Sd

sd

(D.T.GARASIA)
Judicial Member

(RAJESH KUMAR)
Accountant Member

मुंबई Mumbai; दिनांक Dated :: 14.7.2017

Sr.PS:SRL:

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT – concerned

5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

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उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / **ITAT, Mumbai**