

**IN THE INCOME TAX APPELLATE TRIBUNAL
"F" Bench, Mumbai**

**Before Shri Jason P. Boaz, Accountant Member
and Shri Sandeep Gosain , Judicial Member**

ITA No. 1456/Mum/2012
(Assessment Year: 2008-09)

Shri Fazal Sarang 302, Shabnam Apt., 33, S.V. Road, Opp. Lakdi Market Andheri (W), Mumbai 400048 PAN – AABPS9385F	Vs.	DCIT, Central Range 36 Aayakar Bhavan M.K. Road Mumbai 400020
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Appellant

Respondent

Appellant by: Shri Piyush Chhajed
Respondent by: Shri Ms. S. Padmaja

Date of Hearing: 22.12.2016
Date of Pronouncement: 04.01.2017

ORDER

Per Jason P. Boaz, A.M.

This appeal by the assessee is directed against the order of the CIT(A)-41, Mumbai dated 21.12.2011 for A.Y. 2008-09.

2.1 In this appeal, the assessee has raised the following revised grounds:-

- “1. On the facts and circumstances of the case, the learned assessing officer erred in assuming jurisdiction u/s. 153A of the Income Tax Act and consequently passing the order u/s. 143(3) r.w.s. 153A.
2. On the facts and circumstances of the case, the learned Commissioner of Income Tax (Appeals) erred in confirming the addition of Rs.29,46,650/- on the basis of loose slip found during the course of search at appellant’s brother’s premises, without appreciating that the said transaction never materialized.
3. On the facts and circumstances of the case, the learned Commissioner of Income Tax (Appeals) erred in confirming the addition of Rs.82,075/- being differential value of the amount invested in Mutual Fund and the redemption value when the major income was exempt from tax being Long Term Capital Gain.”

2.2 By way of letter dated 07.08.2015, the assessee submits that ground No. 1 of the revised grounds (supra) has been raised for the first time and has prayed for admission of the same, for consideration and adjudication in this appeal, since it is a legal ground and goes to the very root of the jurisdictional issue therein. The assessee's petition for admission of the above ground [i.e. ground No. 1 of the revised grounds (supra)] has been duly considered. After hearing both sides on the issue, we are of the view that in the interest of equity and justice, this ground be admitted for consideration in the appeal, being a legal ground which goes to the very root of the matter in respect of the assessee's challenging the Assessing Officer's (AO) assumption of jurisdiction under section 153A of the Income Tax Act, 1961 (in short 'the Act') and passing the order of assessment thereafter under section 143(3) r.w.s. 153A of the Act. We, accordingly admit this ground for consideration and adjudication in this appeal. We have also heard this appeal on this ground No. 1.

3. **Ground No. 1 – Validity of the AO's assumption of jurisdiction under section 153A of the Act and consequent passing of the order of assessment under section 143(3) r.w.s. 153A**

3.1 In this ground, the assessee has challenged the validity of the AO's assumption of jurisdiction by issue of notice under section 153A of the Act and consequent passing of the order of assessment under section 143(3) r.w.s. 153A of the Act dated 27.12.2010. According to the learned A.R. of the assessee it is evident from page 1 of the order of assessment that the AO initiated assessment proceedings on a factually erroneous basis, i.e. that a search and seizure action under section 132 of the Act was carried out on, among others, the assessee also on 24.02.2009. It is submitted that the correct factual position is that no search under section 132 of the Act was carried out on the assessee's premises on 24.02.2009, but only a survey action under section 133A of the Act was carried out at the assessee's premises on that day. It is contended by the learned A.R. of the assessee that in view of these undisputed facts on record, the AO's assumption of jurisdiction by issue of notice under section 153A of the Act was invalid and therefore it follows that the consequent order of

assessment for A.Y. 2008-09 passed under section 143(3) r.w.s. 153A of the Act vide order dated 27.12.2010 is also void ab initio. Further, in this case, on earlier occasions while hearing the assessee's appeals for assessment years 2006-07 and 2007-08, inspite of the directions of the Bench, Revenue was not able to produce a copy of the warrant of authorisation for conducting search under section 132 of the Act in the case on hand to establish/prove that the assessee was searched on 24.02.2009 as stated by the AO in the order of assessment. In fact, the AO's letter dated 30.11.2016, a copy of which was placed on record, clearly acknowledges the inability of the Department to produce the warrant of authorisation for search under section 132 of the Act and only confirms the fact a survey action under section 133A of the Act was conducted at the assessee's premises on 24.02.2009. In support of the proposition, that in the absence of a warrant of authorisation being issued to conduct search action under section 132 of the Act on the assessee in the case on hand, the prerequisite conditions for issue of notice under section 153A of the Act were absent, consequently the AO could not have assumed proper and lawful jurisdiction under section 153A of the Act and therefore valid order of assessment for A.Y. 2008-09 could not have been passed under section 153A of the Act. The learned A.R., inter alia, placed reliance on the decision of the Hon'ble Gujarat High Court in the case of CIT vs. Ramesh D. Patel (2014) 42 taxmann.com 540 (Gujarat), which is stated to be on similar facts. It is prayed that in the light of the admitted and uncontroverted fact that no search under section 132 of the Act was conducted on 24.02.2009 in the case on hand, the notice issued under section 153A of the Act lacking legal sanction, was an invalid notice and order of assessment passed consequent thereto under section 143(3) r.w.s. 153A of the Act for A.Y. 2008-09 is invalid and is to be quashed.

3.2 Per contra, the learned D.R. for Revenue placed reliance on the order of the AO in this regard. It was also contended that in view of the provisions of section 292BB of the Act, even though admitting that issue of the notice under section 153A of the Act dated 05.10.2009 was not warranted in the facts and circumstances of the case, the fact that the

assessee had appeared/cooperated in the assessment proceedings, without raising any objection in this regard, before completion of the assessment proceedings, precludes it from taking objection in the matter in any proceedings under the Act.

3.3.1 We have heard the rival contentions and perused and carefully considered the material on record, including the judicial pronouncements cited. The facts of the matter as emerge from the record are that admittedly only a survey under section 133A of the Act was conducted at the assessee's premises on 24.01.2009. The AO, however, in the impugned order of assessment for A.Y. 2008-09 had erroneously stated that a search under section 132 of the Act was carried out in the assessee's premises on 24.02.2009, when search operations were carried out in the case of Hicons & Pranay Group of cases. This statement of the AO was contradicted by the AO himself later on in the order of assessment where he states that during the survey under section 133A of the Act carried out at the premises of assessee in the case on hand a statement on oath was recorded by the assessee. According to the assessee, since it is not established by Revenue that any search proceedings under section 132 of the Act were carried in the assessee's case on 24.02.2009, the AO had no legal sanction for assuming jurisdiction to issue the notice under section 153A of the Act dated 05.10.2010; which were invalid and required to be quashed.

3.3.2 It is seen from the records before us that the Bench offered Revenue ample/sufficient opportunities to produce the warrant of authorisation issued for conducting search under section 132 of the Act in the case on hand on 24.02.2009 as stated by the AO in the impugned order of assessment. We find that despite these opportunities, revenue failed to produce the same and in report dated 30.11.2016, the AO has only confirmed that as per the Appraisal Report, survey action under section 133A of the Act was carried out at the assessee's business premises on 24.02.2009 and a statement of the assessee was recorded on that day. In this factual matrix of the case, as discussed above, we conclude that no

search warrant was issued authorising search under section 132 of the Act in the case on hand on 24.02.2009. Revenue has been unable to controvert this view as expressed by us.

3.3.3 Section 153A of the Act pertains to assessments to be carried out in case of search under section 132 or requisition under section 132A of the Act. Subsection (1) of section 153A provides that notwithstanding anything contained in sections 139, 147, 148, 149, 151 and 143 of the Act, in the case of a person in whose case search is initiated under section 132 of the Act or books of account, other documents or any assets are requisitioned under section 132A of the Act after 31.05.2003, the AO shall issue notice requiring such person to furnish the returns of income for and assess or re-assess the total income of six assessment years immediately preceding the assessment year relevant to the previous year in which such search was conducted or requisition is made. In our considered view, in the light of the factual matrix of the case as discussed from para 3.1 to 3.3.2, we record the finding that there was no warrant of authorisation issued to search the assessee's premises on 24.02.2009 and Revenue was unable to produce the same, if any, to controvert our finding. This was specifically required in the light of the contradictory statements made by the AO in the order of assessment which led to the confusion of whether the assessee was subjected to search or not. In the absence of any warrant of authorisation to search the assessee's premises under section 132 of the Act, on 24.02.2009, the AO had no jurisdiction to issue the notice under section 153A of the Act dated 05.10.2009 issued by him; thereby rendering it invalid and consequently the orders of assessment passed under section 143(3) r.w.s. 153A of the Act for assessment year 2008-09 subsequent to the issue of that notice under section 153A of the Act could not have been passed and the same is also held to be void abinitio and accordingly cancelled. In coming to this finding we draw support from the decisions of the Hon'ble Gujarat High Court in the case of CIT vs. Ramesh D. Patel (2014) 42 taxmann.com 540 (Gujarat), which is on similar facts and is squarely applicable to the case on hand. Ground No. 1 of assessee's appeal for A.Y. 2008-09 is allowed.

3.3.4 We now revert back to the contention of the learned D.R. for Revenue that in view of the provisions of section 292BB of the Act, even though admittedly the notice issued under section 143A of the Act dated 05.10.2009 was not warranted and wrongly issued in the facts and circumstances of the case, the fact that the assessee appeared/cooperated in assessment proceedings, without raising any objection about the notice before completion of assessment proceedings, precludes it from taking any objection in this regard in any proceedings under the Act. With due respect we are unable to agree or concur with this proposition/contention put forth by the learned D.R. The provisions of section 292BB of the Act read as under: -

“Notice deemed to be valid in certain circumstances.

292BB. *Where an assessee has appeared in any proceeding or co-operated in any inquiry relating to an assessment or reassessment, it shall be deemed that any notice under any provision of this Act, which is required to be served upon him, has been duly served upon him in time in accordance with the provisions of this Act and such assessee shall be precluded from taking any objection in any proceeding or inquiry under this Act that the notice was—*

- (a) not served upon him; or*
- (b) not served upon him in time; or*
- (c) served upon him in an improper manner:*

Provided *that nothing contained in this section shall apply where the assessee has raised such objection before the completion of such assessment or reassessment.”*

From a plain reading of Section 292BB (supra), it is clear that it provides for certain circumstances in which a notice is deemed to be valid. These are where a notice for assessment/reassessment was:

- (i) not been served upon the assessee;
- (ii) not been served upon him in time;
- (iii) served upon him in an improper manner.

As per this section, the assessee is precluded from raising any objection in this regard in any proceeding under the Act, if the assessee has appeared in or cooperated in such assessment/inquiry proceeding. **This proposition, however, is triggered and holds good/becomes applicable only if the said notice is required to be served upon him.** In

our considered view, the said notice under section 153A of the Act dated 05.10.2009 issued to the assessee for A.Y. 2008-09, in order to enable the AO to assume valid jurisdiction for making the assessment thereunder, was not the notice that was required to be issued by the AO in the case on hand as it is clearly and undisputedly established that no search under section 132 of the Act was carried out at the assessee's premises on 24.02.2009 as stated by the assessee. Since it is clearly evident that the notice required to be issued for the assessee was not the one issued under section 153A of the Act for A.Y. 2008-09, as was admittedly issued by the AO in the case on hand, the provisions of section 292BB of the Act would not, in our considered view, come to the rescue of Revenue. We accordingly reject this argument put forth by the learned D.R.

4. In view of our finding with reference to ground No. 1 in allowing the assessee's appeal for A.Y. 2009-10, the other grounds raised by the assessee on merits do not require to be adjudicated at this juncture.

5. In the result, the assessee's appeal for A.Y. 2008-09 is allowed as indicated above.

Order pronounced in the open court on 4th January, 2017.

Sd/-
(Sandeep Gosain)
Judicial Member

Sd/-
(Jason P. Boaz)
Accountant Member

Mumbai, Dated: 4th January, 2016

Copy to:

1. *The Appellant*
2. *The Respondent*
3. *The CIT(A) -41, Mumbai*
4. *The CIT, Central- III, Mumbai*
5. *The DR, "F" Bench, ITAT, Mumbai*

By Order

//True Copy//

Assistant Registrar
ITAT, Mumbai Benches, Mumbai

n.p.