ORDER SHEET
ITA 661/2008

IN THE HIGH COURT AT CALCUTTA

Special Jurisdiction(income tax)

ORIGINAL SIDE

COMMISSIONER OF INCOME TAX, KOLKATA-III

Versus

VEERPRABHU MARKETING LIMITED

BEFORE:

The Hon'ble JUSTICE GIRISH CHANDRA GUPTA

The Hon'ble JUSTICE ARINDAM SINHA

Date : 4th August, 2016.

Mr. Nizamuddin, Adv. appears with Ms. J. Roy Mukherjee, Adv. for appellant.
Mr. N. Jain, Adv. appears with Mr. A. Majumder, Adv. for respondent.

The Court : The subject matter of challenge is a judgment and order dated December 28, 2007 by which the learned Income Tax Appellate Tribunal, "E" Bench, Kolkata, in ITA No.2172 and 2174/Kol/2006, pertaining to the assessment years 1998-99 and 1999-2000, and I.T.(SS) A. Nos.61-63/Kol/2007, pertaining to the assessment years 2001-02, 2002-03 and 2003-04, allowed the appeals preferred by the assessee.

The aggrieved revenue has come up in appeal.

The following questions of law were formulated on September 10, 2008:

"1. Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal is justified in not holding that

all assessments were made under section 143(1) of the I.T. Act, therefore, disallowance as per law were not earlier made. As per section 153(c) of the I.T. Act assessment is to be made afresh and income to be assessed or reassessed. The meaning of reassessment is that that there is no need to resort to section 147 of the I.T. Act and to consider the disallowance in the assessment to be made under section 153 of the I.T. Act?

2. Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal is correct in misinterpreting the CBDT's Circular No.7 as the same applies to assessments made u/ss.143(3), 144 or 147 of the I.T. Act where appeals or rectification application will not abate?

3. Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal is correct in law for the fact that the decision of Jharkhand High Court (290 ITR 114) has not been properly interpreted as the same does not deal with a situation where assessment u/s. 143(1) of the I.T. Act and there is no proposition laid down that disallowance which required to be made if the return was selected for regular assessment u/s.143(1) or u/s.147 of the I.T. Act would not be made u/s.153A of the I.T. Act?"

Mr. Jain, learned Advocate appearing for the assessee, submitted as follows:

(a) The assessment under section 153C read with section 153A read with section 144 of the Income Tax Act was altogether without jurisdiction because such assessment was made for all the five years on the basis of survey conducted under section 133A of the Income Tax Act. He submitted that the power under section

153C read with section 153A cannot be exercised on the basis of any discovery made during survey under section 133A.

(b) His next submission was that in any event, during the survey, no incriminating material was found which may have led the revenue to exercise power under section 153C read with section 153A.

He drew our attention to sub-section 1 of Section 153C which provides as follows:-

"153C. [(1)] [Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, where the Assessing Officer is satisfied that,-

(a) any money, bullion, jewellery or other valuable article or thing, seized or requisitioned, belongs to; or

(b) any books of account or documents, seized or requisitioned, pertains or pertain to, or any information contained therein, relates to,

a person other than the person referred to in section 153A, then, the books of account or documents or assets, seized or requisitioned shall be handed over to the Assessing Officer having jurisdiction over such other person] [and that Assessing Officer shall proceed against each such other person and issue notice and assess or reassess the income of the other person in accordance with the provisions of section 153A, if , that Assessing Officer is satisfied that the books of account or documents or assets seized or requisitioned have a bearing on the determination of the total income of such other person for the relevant assessment year or years referred to in sub-section (1) of section 153A]:

[Provided that in case of such other person, the reference to the date of initiation of the search under section 132 or making of requisition under section 132A in the second proviso to [sub-section (1) of] section 153A shall be construed as reference to the date of receiving the books of account or documents or assets seized or requisitioned by the Assessing Officer having jurisdiction over such other person :]

[Provided further that the Central Government may by rules made by it and published in the Official Gazette, specify the class or classes of cases in respect of such other person, in which the Assessing Officer shall not be required to issue notice for assessing or reassessing the total income for six assessment years immediately preceding the assessment year relevant to the previous year in which search is conducted or requisition is made except in cases where any assessment or reassessment has abated.]"

He contended that even when assessment is made on the basis of a search under section 132 or a requisition made under section 132A, the power can only be resorted to provided any incriminating material is found. Existence of incriminating material is necessary before exercising power under the aforesaid sections. He, in support of his submission, relied upon the words "have a bearing on the determination of the total income of such other person". If the search or requisition did not unearth any incriminating material, the search or requisition was futile and can have no bearing on the determination of the total income of such other person. There shall thus be no occasion for exercise of power under section 153C.He, however, added that the portion which he relied upon from section 153C is of a recent origin which was not there in the statute at the relevant point of time and has been introduced with effect from 1st June, 2015. He however contended that Karnataka High Court is of the opinion that even without these expressions 'incriminating material' was the sine qua non for exercise of power under section 153C read with section 153A.

He relied upon the following views expressed in paragraph 50 of the judgment in the case of CIT, Bangalore Vs. IBC Knowledge Park (P) Ltd. reported in (2016) 69 taxmann.com 108(Karnataka):-

> *"Materials such as books of account, documents or valuable assets found during a search should belong to a third party which would lead to an inference of undisclosed income of such third party. Such an inference should be recorded by the Assessing Officer having jurisdiction over the searched persons and communicated to the Assessing Officer having jurisdiction over such third party along with the seized documents and other incriminating materials on the basis of which the Assessing Officer having jurisdiction over such third party would issue notice under Section 153C. On receipt of the aforesaid material, the Assessing Officer having jurisdiction over such third party would proceed against the said third party. Thus, where no material belonging to a third party is found during a search, but only an inference of an undisclosed income is drawn during the course of enquiry, during search or during post-search enquiry, Section 153C would have no application. Thus, the detection of incriminating material leading to an inference of undisclosed income is a sine qua non for invocation of Section 153C of the Act."*

Mr.Nizamuddin, learned advocate, appearing for the revenue-appellant submitted that it is true that section 153C read with section 153A proceeds on the basis of search under section 132 or requisition under section 132A. There is no reference to any survey under section 133A. He, therefore, did not dispute the submission made by Mr.Jain that power under section 153C read with section 153A could only have been exercised in the case of a search and requisition. He, however, added that there was, in fact, a search as also a requisition. He submitted that there has been survey in addition thereto. Therefore, it cannot

be said that exercise of power was bad. Admittedly, there was search as also requisition.

With respect to the second submission advanced by Mr. Jain, we called upon Mr. Nizamuddin in vain to show us the incriminating material, if any, found either during the search or during the requisition or even during the survey which is or may be relatable to the assessee. Mr.Nizamuddin as unable to show that any such incriminating material was unearthed at any of the three stages pertaining to the assessee.

We are in agreement with the views expressed by the Karnataka High Court that incriminating material is a pre-requisite before power could have been exercised under section 153C read with section 153A.

In the case before us, the assessing officer has made disallowances of the expenditure, which were already disclosed, for one reason or the other. But such disallowances were not contemplated by the provisions contained under section 153C read with section 153A. The disallowances made by the assessing officer were upheld by the CIT(A) but the learned Tribunal deleted those disallowances.

We find no infirmity in the aforesaid act of the learned Tribunal. The appeal is, therefore, dismissed.

The questions are answered accordingly.

(GIRISH CHANDRA GUPTA, J.)

(ARINDAM SINHA, J.)

tk/sb.