Income Tax Search and Seizure : Whether a new claim can be raised in the Income Tax return filed u/s 153A of the act:- By CA. Mohit Gupta

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Introduction:

The provisions of assessment in the case of search u/s. 153A etc. have been inserted by the Finance Act, 2003 with effect from 01.06.2003. These provisions are successor of the special procedure for assessment of search cases under Chapter XIV-B starting with section 158B. Whereas Chapter XIV-B required the assessment of "undisclosed income" as a result of search, which has been defined in section 158B(b), section 153A dealing with assessment in case of search with effect from 01.06.2003 requires the Assessing Officer to determine "total income" and not "undisclosed income".

Before going deeper into the issue, it is necessary to go through the provisions of Section 153A of the act, which are reproduced below (the amendment notes have been mentioned intentionally to have a better understanding):-

[18]***Assessment in case of search or requisition.***[19]

[20] ***153A.*** [21]*[(1)] Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, in*

the case of a person[22] 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 [23][and for the relevant assessment year or 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, [22]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 [23][and for the relevant assessment year or years] :

***Provided** that the Assessing Officer shall assess or reassess the total income in respect of each assessment year falling within such six assessment years [23][and for the relevant assessment year or years] :*

***Provided further** that assessment or reassessment, if any, relating to any assessment year falling within the period of six assessment years [23][and for the relevant assessment year or years] referred to in this [24][sub-section] pending[25] 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[25] :*

*[26][**Provided also** that the Central Government may by rules[27] made by it and published in the Official Gazette (except in cases where any assessment or reassessment has abated under the second proviso), specify the class or classes of cases 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 [28][and for the relevant assessment year or years]:]*

*[28][**Provided also** that no notice for assessment or reassessment shall be issued by the Assessing Officer for the relevant assessment year or years unless—*

(a) the Assessing Officer has in his possession books of account or other documents or evidence which reveal that the income,

represented in the form of asset, which has escaped assessment amounts to or is likely to amount to fifty lakh rupees or more in the relevant assessment year or in aggregate in the relevant assessment years;

(b) the income referred to in clause (a) or part thereof has escaped assessment for such year or years; and

(c) the search under section 132 is initiated or requisition under section 132A is made on or after the 1st day of April, 2017.

Explanation 1.—For the purposes of this sub-section, the expression "relevant assessment year" shall mean an assessment year preceding the assessment year relevant to the previous year in which search is conducted or requisition is made which falls beyond six assessment years but not later than ten assessment years from the end of the assessment year relevant to the previous year in which search is conducted or requisition is made.

Explanation 2.—For the purposes of the fourth proviso, "asset" shall include immovable property being land or building or both, shares and securities, loans and advances, deposits in bank account.]

[29][(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 [30][Principal Commissioner or] 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.

18. Sections 153A, 153B and 153C inserted by the Finance Act, 2003, w.e.f. 1-6-2003.

19. See also Circular No. 10/2012, dated 31-12-2012 (Cases in which Assessing Officer not required to issue notice for assessing total income for six assessment years). For details, see Taxmann's Master Guide to Income-tax Act.

20. For relevant case laws, see Taxmann's Master Guide to Income-tax Act.

21. Renumbered as sub-section (1) by the Finance Act, 2008, w.r.e.f. 1-6-2003.

22. For the meaning of the term/expression "person" and "so far as may be", see Taxmann's Direct Taxes Manual, Vol. 3.

23. Inserted by the Finance Act, 2017, w.e.f. 1-4-2017.

24. Substituted for "section" by the Finance Act, 2008, w.r.e.f. 1-6-2003.

25. For the meaning of the terms "pending" and "abate", see Taxmann's Direct Taxes Manual, Vol. 3.

26. Inserted by the Finance Act, 2012, w.e.f. 1-7-2012.

27. See rule 112F.

28. Inserted by the Finance Act, 2017, w.e.f. 1-4-2017.

29. Inserted by the Finance Act, 2008, w.r.e.f. 1-6-2003.

30. Inserted by the Finance (No. 2) Act, 2014, w.r.e.f. 1-6-2013.

Furthermore to the above, the scope and effect of the insertion of a new Section 153A of the Act by the Finance Act, 2003 have been elaborated by the CBDT in the following portion of the ***Departmental Circular No. 7 of 2003, dt. 5th Sept., 2003 [(2003) 184 CTR (St) 33]***, the relevant extract of which is reproduced herein under:-

"65. ***The special procedure for assessment of search cases under Chapter XIV-B be abolished***

65.1 The existing provisions of the Chapter XIV-B provide for a single assessment of undisclosed income of block period, which means the

period comprising previous years relevant to six assessment years preceding the preceding year in which the search was conducted and also includes the period upto the date of the commencement of such search and lay down the manner in which such income is to be computed.

65.2. The Finance Act, 2003 has provided that the provisions of this chapter shall not apply where a search is initiated under s. 132, or books of account, other documents or any assets are requisitioned under s. 132A after 31st May, 2003 by inserting a new s. 158BI in the IT Act.

65.3. Further, three new ss. 153A, 153B and 153C have been inserted in the IT Act to provide for assessment in case of search or making requisition.

65.4. The new s. 153A provides the procedure for completion of assessment where a search is initiated under s. 132 or books of account or other documents or any assets are requisitioned under s. 132A after 31st May, 2003. In such case, the AO shall issue notice to such person requiring him to furnish, within such period as may be specified in the notice, return of income in respect of six assessment years immediately preceding the assessment year relevant to the previous year in which the search was conducted under s. 132 or requisition was made under s. 132A.

65.5. The AO shall assess or reassess the total income of each of these six assessment years. Assessment or reassessment, if any, relating to any assessment year falling within the period of six assessment years pending on the date of initiation of the search under s. 132 or requisition under s. 132A, as the case may be, shall abate. It is clarified that the appeal, revision or rectification proceedings pending on the date of initiation of search under s. 132 or requisition shall not abate. Save as otherwise provided in the proposed s. 153A, s. 153B and s. 153C, all other provisions of this Act shall apply to the assessment or reassessment made under s. 153A. It is also clarified that assessment or reassessment made under s. 153A shall be subject to interest, penalty and prosecution, if applicable. In the 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.

65.6. The new s. 153B provides for the time-limit for completion of search assessments. It provides that the AO shall make an order of assessment or reassessment in respect of each assessment year, falling within six assessment years under s. 153A within a period of two years from the end of the financial year in which the last of the authorizations for search under s. 132 or for requisition under s. 132A was executed.

65.7. This section also provides that assessment in respect of the assessment year relevant to the preceding year in which the search is conducted under s. 132 or requisition is made under s. 132A shall be completed within a period of two years from the end of the financial year in which the last of the authorizations for search under s. 132 or for requisition under s. 132A as the case may be, was executed.

65.8. It also provides that in computing the period of limitation for completion of such assessment or reassessment, the period during which the assessment proceedings is stayed by an order or injunction of any Court; or the period commencing from the day on which the AO directed the assessee to get his accounts audited under s. (2A) of s. 142 and ending on the day on which the assessee is required to furnish report of such audit under that sub-section, or the time taken in reopening the whole or any part of the proceeding or giving an opportunity to the. assessee of being reheard under the proviso to s. 129 or in a case where an application made before the Settlement Commission under s. 245C is rejected by it or is not allowed to be proceeded with by it, the period commencing on the date on which such application is made and ending with the date on which the order under sub-s. (1) of s. 245D is received by the CIT under sub-s. 20 of that section, shall be excluded. If, after the exclusion of the aforesaid period, the period of limitation available to the AO for making an order of assessment or reassessment as the case may be, is less than sixty days, such remaining period shall be extended to sixty days and the period of limitation shall be deemed to be extended accordingly.

65.9. The new s. 153C provides that where an AO is satisfied that any money, bullion, jewellery or other valuable article or thing or books of account or documents seized or requisitioned belong or belongs to a person other than the person referred to in s. 153A, then the books of account, or documents or assets seized or requisitioned shall be handed over to the AO having jurisdiction over .such other person and that AO

shall proceed against such other person and issue such other person notice and assess or reassess income of such other person in accordance with the provisions of s. 153A.

65.10. An appeal against the order of assessment or reassessment under s. 153A shall lie with the CIT(A).

65.11. Consequential amendments have also been made in ss. 132, 132B, 140A, 234A, 234B, 246A and 276CC to give reference to s. 153A in these sections.

65.12. These amendments will take effect from 1st June, 2003 [ss. 59(b), 60(b), 63, 65, 67, 89, 90, 93 and 97]."

Therefore on the perusal of the Section 153A of the act read with aforementioned circular no. 7/2003, DATED 5-9-2003, It is pertinent to mention here that the contents of the provisions of Section 153A of the act starts with a non-obstante clause with reference to sections 139, 147, 148, 149, 151 and 153. In case of a person who has been searched u/s 132(1) or in whose case books of account, other documents or any assets are requisitioned u/s 132A after 31.5.2003, the Assessing Officer has to issue notice to him for filing the return in respect of each assessment year falling within six assessment years immediately preceding the assessment year relevant to the previous year in which the search or the requisition is made. Thereafter, the Assessing Officer has to assess or reassess the total income of the six assessment years. First proviso is nothing but reiteration of the provisions contained in clause (b) of section 153A (1) wherein it is provided that the Assessing Officer shall assess or reassess the total income of each of the six assessment years as mentioned above. The second proviso contemplates that if any of the aforesaid six assessments is pending on the date of initiation of the search or requisition, the same shall abate. However, there is no provision that even the completed assessment of aforesaid six years shall abate. Therefore, the distinction has been made between a completed assessment and a pending assessment. Further under the provision contained in sub-section (2), the assessment or reassessment relating to any assessment year which has abated under the second proviso, if such an assessment is annulled in appeal or any other legal proceeding, then it shall stand revived

w.e.f. the date of receipt of the order of such annulment by the Commissioner. Further such revival shall cease to have effect if the order of annulment is set aside. Therefore, in so far as the completed assessments are concerned, they do not abate and pending appeals etc. in respect thereof continue to exist notwithstanding the fact that the search has been made. Thus a completed assessment becomes final unless some incriminating material is found in the course of search. Such a legislation was inserted by the legislature to restrain the Assessing Officer to undo what has already been completed and has become final. Therefore, no reassessment in respect of completed assessment is contemplated under this provision in case no incriminating material is found in the search.

It is now also a well settled legal proposition in view of numerous judicial decisions and more particularly in case of decision delivered by the Hon'ble High Court of Delhi in case of ***CIT V. Kabul Chawla [2015] 61 taxmann.com 412 (Delhi)***, which is as under:-

(*a*) In so far as pending assessments are concerned, the jurisdiction to make original assessment and assessment u/s 153A merge into one and only one assessment for each assessment year shall be made separately on the basis of the findings of the search and any other material existing or brought on the record of the AO,

(*b*) in respect of non-abated assessments (i.e. the assessments that have concluded on the date of initiation of search), the assessments shall be made on the basis of incriminating material unearthed during the course of search.

Further reliance can also be placed on the few of following recent judgments amongst many others:

- Pr. *CIT Vs. Meeta Gutgutia,[2017] 82 taxmann.com 287 (Delhi).* The SLP of the revenue against the judgment of the Delhi High Court

was dismissed and reported as *PCIT v. Meeta Gutgutia [2018] 96 taxmann.com 468 (SC)*

- *Principal Commissioner of Income Tax, Central-4 v. Jignesh P. Shah [2018] 99 taxmann.com 111 (Bombay)*

- *HBN Dairies & Allied Ltd. v.Assistant Commissioner of Income Tax, Central Circle-4, New Delhi [2018] 96 taxmann.com 353 (Delhi - Trib.) (TM)*

- *Principal Commissioner of Income Tax v. Caprihans India Ltd. [2020] 114 taxmann.com 104(Bombay)*

To summarize the legal position, for the concluded assessment years which have not been abated by virtue of second proviso to Section 153A(1) of the act, assessments u/s 153A has to be essentially based on the documents unearthed during the course of search and seizure operations and a completed assessment becomes final unless some incriminating material is found in the course of search. To the contrary, pending assessments on the date of search shall merge with the assessment u/s 153A only one assessment for each assessment year shall be made separately on the basis of the findings of the search and any other other issue which may be existing before the Assessing Officer.

Whether the assessee is entitled to claim a new expenses or deduction or carry forward of losses which have not been claimed in the original return of income filed u/s 139 of the act:

Having discussed the brief framework of Section 153A and its applicability in concluded and abated assessment years respectively, now a question arises as to whether the assessee is entitled to claim a new expenses or deduction or carry forward of losses which have not been claimed in the original return of income filed u/s 139 of the act. This is a controversial issue.

From the department perspective, it is seen that the department resist to any new and /or subsequent claim in the return filed u/s 153A of the act primarily on the plea that the Search Assessments are for the benefit of the revenue rather assessee. It has been seen in professional practice over the years, that during the course of search assessments, the assessing authority primarily declines to accept such a claim as the assessee had made no such claim in the returns of income filed originally under Section 139 of the Act. The predominant view of the department in this regard is the returns are filed u/s 153A of the act are as a consequence of action taken under Section 132 of the Act on a assessee and thus can't be advantageous for the assessee and moreover the proceedings u/s 153A are analogous to proceedings under Section 147 of the Act to the extent that these are proceedings for the benefit of Revenue and not that of the assessee. The assessee cannot be permitted, to convert these reassessment proceedings as his appeal or revision in disguise and seek relief in respect of items earlier not claimed in the original return of income. Reliance is usually placed on the the judgment rendered by the ***Hon'ble Bombay High Court in K. Sudhakar S. Shanbhag v . ITO [2000] 161 CTR (Bom) 391 : [2000] 241 1TR 865 (Bom)*** which was rendered by taking notice of the principle laid by the Hon'ble apex Court in ***CIT v . Sun Engineering Works (P) Ltd. [1992] 107 CTR (SC) 209 : [1992] 198 ITR 297 (SC)*** to the effect that in reassessment proceedings, an assessee can neither claim nor be allowed a deduction that was not claimed in the original return. As such the assessment proceedings initiated on the basis of an action under Section 132 of the Act also cannot be utilised by the assessee to seek relief not claimed earlier.

Further, it is seen in some cases that a fresh claim is disallowed by the assessing officer on the pretext that since Chapter XTV-B has been replaced by new provisions of ss. 153A to 153C, the object of legislation is to assess undisclosed income. New clauses of deduction or exemption cannot be allowed to such searched persons. If it is so allowed, then the same shall become discriminatory to the other regular assessees who have lost a right

as such to claim deduction by efflux of time or by mandate of the Act.

Further while disallowing such claims, the department also places reliance on the case of ***Goetze (India) Ltd. v . CIT [2006] 204 CTR (SC) 182 : [2006] 284 ITR 323 (SC)*** wherein it has been laid that the AO cannot entertain a claim for deduction otherwise than by filing a revised return. Since, the assessee neither made any such claim in the original return filed under Section 139(1) of the Act nor in regular assessment proceedings by way of filing any revised return therefore returns filed in response to notice under Section 153A of the Act are not substitute of revised return for making claim of such benefits. Having regard to the provisions of s. 139(5) of the Act and since the assessments under s. 153A are in relation to undisclosed income, it is precisely for this reason that new claim of deduction or allowance cannot be made in the completed assessments. It is a settled principle of law that what cannot be done directly can also not be done indirectly. Reference can be made on the judgment rendered by Hon'ble Allahabad High Court in ***Anupam Sushil Garg v. CIT [2003] 185 CTR (All) 505 : [2004] 265 ITR 474 (All).***

The department also makes reliance on the rules of interpretation of law so far as when rules of interpretation are applied it would not allow making of fresh claims as such. Principle of interpretation laid by Hon'ble apex Court in ***Poppatlal Shah v. State of Madras AIR 1953 SC 274*** reads as under:

"It is a settled rule of construction that to ascertain the legislative intent, all the constituent parts of a statute are to be taken together and each word, phrase, or sentence is to be considered in the light of the general purpose and object of the Act itself. The title and preamble, whatever their value might be as aids to the construction of a statute, undoubtedly throw light on the intent and design of the legislature and indicate the scope and purpose of the legislation itself."

It has been observed by the Hon'ble Supreme Court in ***K.P. Varghese v. ITO [1981] 131 ITR 597/7 Taxman 13*** that "it is well recognized rule of construction that a statutory provision must be so construed, if possible that absurdity and mischief may be avoided." From the perspective department, if a assessee is

allowed to claim a allowance, deduction etc. u/s 153A not claimed earlier than it would mean that even in cases where the appeal arising out of the completed assessment has been decided by the CIT(A), ITAT and the High Court, on a notice issued under Section 153A of the Act, the AO would have power to undo what has been concluded up to the High Court. Any interpretation which leads to such conclusion has to be repelled and/or avoided as held by the Hon'ble Supreme Court in the case of K.P. Varghese (supra).

Few of the cases are mentioned herein under wherein the it was held that the search proceedings under section 153A are for the benefit of the revenue and therefore any fresh claim is not allowable u/s153A of the act:

- Jai Steel (India), Jodhpur *v.* Assistant Commissioner of Income-tax [2013] 36 taxmann.com 523 (Rajasthan)

- Charchit Agarwal *v.*Assistant Commissioner of Income-tax, Central Circle 12, New Delhi [2009] 34 SOT 348 (Delhi)

- Suncity Alloys Pvt. Ltd. V Asstt CIT (2009) 124 TTJ 674 (Jodhpur)

From the assessee perspective, the primary contention to substantiate such fresh claim is that Section 153A mandates that the assessments or re-assessments pending on the date of initiation of search would stand abated and return of income filed by the person concerned for the six assessment years in terms of Section 153-A(1)(*a*) would be construed to be a return of income under section 139 of the Act. Therefore, in view of the second proviso to section 153A of the said Act, once assessment got abated, it meant that it was open for both the parties, *i.e.* the assessee as well as revenue to make claims for allowance or to make disallowance, as the case may be. That apart, assessee could lodge a new claim for deduction etc. which remained to be claimed in his earlier/regular return of income. This is so because assessment was never made in the case of the assessee in such a situation. It is fortified that once the assessment gets abated, the

original return which had been filed loses its originality and the subsequent return filed under section 153A of the said Act (which is in consequence to the search action under section 132) takes the place of the original return. In such a case, the return of income filed under section 153A(1) of the said Act, would be construed to be one filed under section 139(1) of the Act and the provisions of the said Act shall apply to the same accordingly. A return filed under Section 153A takes the place of the original return under Section 139, for the purposes of all other provisions of the Act. Once the A.O. accepts the revised return filed under Section 153A, the original return under Section 139 abates and becomes non-est.

In other words, in view of the second proviso to section 153A(1) of the said Act, once assessment gets abated, it is open for the assessee to lodge a new claim in a proceeding under section 153A(1) which was not claimed in his regular return of income, because assessment was never made/finalised in the case of the assessee in such a situation.

It can also be argued that the law has declared that all the provisions of the Income-tax Act will apply to the returns filed by an assessee in response to a notice issued by the Assessing Officer under section 153A as if such return filed by the assessee was a return filed under section 139(1), there cannot be a clash of interpretation between the character of section 139(1) and section 139 adopted in section 153A(1)(a). It is to be seen that the law stated in section 153A starts with a non obstante clause. It overrides all other provisions stated in the Act in matters of filing of return of income consequent to a search. By declaring through a non obstante clause when section 153A adopts section 139 for the purpose of completing the assessment under section153A, there is no scope for drawing a dividing line between section 139 provided in section 153A and section 139(1) .

Additionally, department reliance on on the case ***Goetze (India) Ltd. v . CIT [2006] 204 CTR (SC) 182 : [2006] 284 ITR 323***

(SC) can also be distinguished as being not applicable in case of raising a fresh claim in the return of income filed u/s 153A of the act since the return filed u/s 153A of the act shall be treated as a return filed u/s 139 of the act. Though in such a scenario, it shall be really important to give due adherence to timeline to furnish return u/s 153A in due time as mentioned in the notice for filing return u/s 153A of the act failing which the assessee shall not able to claim such carry forward of losses and deductions in view of Section 80 and 80AC respectively in harmonious reading with Section 153A and 139 of the act.

Further from the angle of the assessee, the reliance of department on the judgment of the Hon'ble Supreme Court in the case of ***CIT v. Sun Engg. Works (P) Ltd.[1992] 198 ITR 297/64 Taxman 442*** is also misconceived. The reason for the same is that in that case the Hon'ble Supreme Court was considering the provisions of Section 147 and it was held that once an assessment is validly reopened it is not open to an assessee to seek a review of concluded items unconnected with the escapement of income. Here it is pertinent to note that the conditions for taking action under Section 147 vis-a-vis under Section 153A are altogether different. Even though assessment under Section 147 is made r/w section 143(3), but the initiation of assessment or reassessment under Section 147 originates from the belief of the AO, on the basis of some tangible material, that income chargeable to tax has escaped assessment. After forming such belief, the AO is called upon to record reasons for the reopening of the assessment before issuing mandatory notice under Section 148. If the foundation of reassessment, being the reasons about the escapement of some income does not exist, then it is impermissible to go ahead with the assessment under Section 147. It is sine qua non that some escaped income must be brought to charge in order to make a fresh assessment under Section 147. On the contrary, the search action itself mandates on the AO to pass orders under Section 153A computing total income for all the relevant six assessment years, irrespective of the fact whether some concealed income has surfaced as a result of search or not. It is thus apparent that the

ambit of assessment under Section 147 cannot be imported into the scope of Section 153A.

It is further important to note that the provisions of assessment in the case of search under Section 153A etc. have been inserted by the Finance Act, 2003 w.e.f. 1st June, 2003. These provisions are successor of the special procedure for assessment of search cases under Chapter XIV-B starting with Section 158B. Whereas Chapter XIV-B required the assessment of "undisclosed income" as a result of search, which has been defined in Section 158B(b), Section 153A dealing with assessment in case of search w.e.f. 1st June, 2003 requires the AO to determine "total income" and not "undisclosed income". Further it is worthwhile to mention that the Assessing Officer has to compute the total income of the assessee on the basis of return filed u/s 153A of the act after considering the submissions made during the course of hearing before him, therefore there cannot be any scope for arguing that the assessee has been rendered powerless to even lodge a claim in respect of which deduction was not allowed earlier. Here it is important to note that the total income is not reduced simply on the basis of making a claim. The AO is fully empowered to consider the question of deductibility as per the provisions of the Act. If after going through such claim, he feels that addition is called for, he will obviously make addition and *vice versa*.

Further it can also be argued that when the appellate authorities standing at a much higher rank are not debarred from entertaining such a claim during appellate proceedings than as to why the Assessing Officer should not entertain such a claim. The right of an assessee to raise a fresh claim before the Appellate Authorities is no longer a res-integra in view of the decision of this ***Court in CIT v. Pruthvi Brokers & Shareholders[2012] 349 ITR 336/208 Taxman 498/23 taxmann.com 23 (Bom.)*** wherein it has been held that there is no prohibition in the Tribunal to entertaining additional ground/claims which was not placed before the lower Authorities. The Hon'ble Supreme Court in the case of ***National***

Thermal Power Co. Ltd. v. CIT[1998] 229 ITR 383 has held that the Tribunal has the jurisdiction to examine a question of law which arises from the facts as found by the authorities below and having a bearing on tax liability of the assessee notwithstanding the fact that it was not raised before the learned CIT(A). The purpose of assessment proceedings is to assess correctly the tax liability of an assessee in accordance with law.

Few of the illustrative cases are mentioned herein under wherein it was held that the assessee is entitled to raise a claim of expenses, deduction and carry forward of losses etc. in the return of Income filed u/s 153A of the act:-

- PCIT V JSW Steel Ltd. [2020] 115 taxmann.com 165 (Bombay)
- ACIT V Splendor Landbase Limited (ITA No. 246/Del/2016)
- CIT V. B G Shirke Construction Technology (P) Ltd. (2017) 246 Taxman 300 (Bombay)
- ACIT V. V N DevaDoss (2013) 32 Taxmann.com 133
- Naresh T Wadhwani V DCIT (2014) 68 SOT 235 (Pune-Trib)
- ITO V. Gajraj Constructions (2015) 62 Taxmann.com 18
- Malpani Estates V ACIT (2014) 44 Taxmann.com 242
- DCIT V. Eversmile Construction Co.(P.) Ltd. [2013] 33 taxmann.com 657 (Mumbai - Trib.)

In ***Shrikant Mohta v. Commissioner of Income Tax [2018] 95 taxmann.com 224 (Calcutta)***, it was held that for the purpose of carrying forward the loss in terms of Section 72 read with Section 80 of the Act, in a case where search operations have been conducted under Section 132 of the Act, the time to file the return within the meaning of Section 139(3) of the Act has to be regarded as the reasonable time afforded by the consequent notice under

Section 153A (1)(a) of the Act. When search operations are conducted under Section 132 of the Act, the obligation of the assessee to file any return remains suspended till such time that a notice is issued for such purpose under Section 153A(1)(a) of the Act. If the return is filed by the assessee within the reasonable time permitted by such notice under Section 153A(1)(a) of the Act, such return would then be deemed to have been filed within the time permitted under Section 139 (1) of the Act for the benefit under Section 139(3) of the Act to be availed of by the assessee.

The facts of the case were as under:-

- A search and seizure operation was carried out at the offices of the assessee. As a consequence of the search and seizure operations and in view of Section 153A, no return for assessment year 2004-05 was filed within the statutorily mandated date of 31-10-2004.

- According to assessee, the notice under Section 153A(1)(a) was received by the assessee on 27-3-2006 and the return for the assessment year 2004-05 was filed on or about April 26, 2006. It was also the appellant's case that the relevant notice under Section 153A(1)(a) of the Act required the assessee to file his return for assessment year 2004-05 within a month of the receipt thereof.

- In respect of assessment year 2004-05, the assessee claimed a loss that the assessee intended to carry forward in a subsequent year. However, in the order of assessment passed on the assessee's return filed pursuant to the receipt of the notice under Section 153A(1)(a) of the Act, the Assessing Officer did not expressly record that the losses in the relevant year were to be carried forward in subsequent years.

- The Assessing Officer received the subsequent return for assessment year 2006-07. Such Assessing Officer allowed the carrying forward of the previous loss and permitted appropriate deductions from the income in such assessment year on his understanding that his earlier order had permitted the assessee to carry forward the losses incurred in assessment year 2004-05. Indeed, the relevant Assessing Officer sought to

suo motu rectify his earlier order by expressly incorporating the permission therein to carry forward the loss.

- The Commissioner went on a completely different line in discovering that the assessee was not entitled to the benefit of carrying forward his loss incurred in assessment year 2004-05 since the assessee had not filed the return pertaining to such period in terms of Section 139(1) within October 31, 2004. He, thus, passed a revisional order setting aside the Assessment.

- The Tribunal endorsed the view of the Commissioner.

- On appeal:

The Hon'ble Court held as under:-

"

- *The non obstante clause at the beginning of Section 153A (1) suspends, for the purpose and to the extent as indicated in such provision, the operation of several other provisions of the Act, including Section 139 and even Section 147 in course of any reassessment. In other words, when a search is initiated under Section 132, the assessee is not required to file the assessee's return till such time that the assessee receives a notice under Section 153A(1)(a) thereof. Once such notice is received the liability fastens on the assessee to file the return within the reasonable time specified in the relevant notice. [Para 13]*

- *To boot, the second proviso to Section 153A(1) insofar as it is material for the present purpose, mandates that any "assessment or reassessment ... relating to ... the relevant assessment year or years ... pending on the date of initiation of the search under Section 132. ... shall abate". [Para 14]*

- *It goes without saying that since the search operations in this case were initiated on 2-9-2004, it was no longer necessary for this assessee to file his regular return by 31-10-2004 notwithstanding the mandate of Section 139(1) of the Act. The obligation to file the return remained suspended, in view of the clear opening words of Section 153A(1) till such time*

that a notice was issued to him under clause (a) of such sub-section. If such is the meaning of Section 153A(1), the operation of Section 139(3) qua the time available for filing a return in order to avail of the benefit of carrying forward any loss stands extended till a return is called for under Section 153A(1)(a) and such return is filed, provided the return is filed within the time indicated in the relevant notice under Section 153A(1)(a) of the Act. There can be no dispute to such being the effect of Section 153A(1)(a). [Para 15]

- *Unfortunately, the notice issued under Section 153A(1)(a) is not available in the records relied upon by the parties nor is there any reference to the date of such notice in any of the orders appended to the papers. Indeed, the time permitted by the relevant notice under Section 153A(1)(a) for the assessee to file the return is also not available. As recorded above, it is the submission of the assessee that such notice was received by the assessee on 27-3-2006 and it afforded a month's time to the assessee to file the assessee's return and the assessee's return for the assessment year 2004-05 was filed on 26-4-2006. The date when the return was filed, however, is verifiable from the orders available. [Para 16]*

- *Thus, a definitive final order cannot be passed without being sure of the date of issuance of the notice under Section 153A(1)(a) and the time afforded by such notice for the assessee to file the return. For such purpose, the orders impugned passed by the Tribunal requires to be set aside and the matters remitted back to the Tribunal for the Tribunal to ascertain the details as to the date of the notice and the time afforded to file the return and pass an order in the light of the views expressed herein on the questions of law and it is ordered accordingly. [Para 17]*

- *For the purpose of carrying forward the loss in terms of Section 72 read with Section 80 in a case where search operations have been conducted under section 132 the time to file the return within the meaning of section 139(3) has to be regarded as the reasonable time afforded by the consequent notice under Section 153A(1)(a). [Para 18]*

- *When search operations are conducted under Section 132, the obligation of the assessee to file any return remains suspended till such time that a notice is issued for such purpose under Section 153A(1)(a). If the return is filed by assessee within reasonable time permitted by such notice under Section 153A(1)(a), such return would then be deemed to have been filed within time permitted under section 139(1) for benefit under Section 139(3) to be availed of by assessee. [Para 19]*

"

Conclusion

Though tilt of the majority view of the courts is in favour of the assessee, rightly also since the law of equity should prevail more particularily in case of abated assessment years so far as when the department is open to make all kind additions (i.e. based on both regular issues and also based on the incriminating material unearthed during the course of search) the assessee should also be allowed to raise claims in the return of income u/s 153A of the act. Though having said so, it shall be really important to give due adherence to timeline to furnish return u/s 153A in due time as mentioned in the notice for filing return u/s 153A of the act failing which the assessee shall not able to claim such carry forward of losses and deductions in view of Section 80 and 80AC respectively in harmonious reading with Section 153A and 139 of the act.

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