

IN THE HIGH COURT OF KARNATAKA AT BANGALORE

Dated this the 25th day of July, 2014

PRESENT

THE HON'BLE MR. JUSTICE N KUMAR

AND

THE HON'BLE MR. JUSTICE B MANOHAR

ITA No. 38/2014

BETWEEN:

M/s. Canara Housing Development Company
No.10/1, Lakshminarayana Complex,
Palace Road,
Bangalore 560 052.

...Appellant

(By Sri J. Balachander, Adv.)

AND:

The Deputy Commissioner of Income Tax
Central Circle I(1),
III Floor, C.R. Buildings,
Queens Road,
Bangalore 560 001.

...Respondent

(By Sri K.V. Aravind, Adv.)

This ITA filed under Section 260-A of I.T. Act, 1961 arising out of order dated 06.09.2013 passed in ITA No.692/Bang/2013, for the Assessment year 2008-2009, praying to (i) formulate the substantial questions of law stated therein; (ii) allow the appeal and set aside the order passed by the ITAT, 'B' Bench, Bangalore in ITA No.692/Bang/2013 dated 06.09.2013.

This ITA coming on for admission this day, **N. KUMAR J** delivered the following:

J U D G M E N T

The assessee has preferred this appeal against the order passed by the Tribunal partly upholding the order of the Commissioner of Income Tax exercising his powers under Section 263 of the Income Tax Act, 1961 (for short hereinafter referred to as 'the Act') and partly finding fault with him for invoking the said provision.

2. The assessee is a Firm carrying on real estate business. The assessee filed its return for the assessment year 2008-09. The case of the assessee was taken up for scrutiny. An order under Section 143(3) of the Act came to be passed on 31.12.2010. Subsequently, a search took place in the premises of the assessee under Section 132 of the Act on 12.04.2011. In the course of search, incriminating

material leading to undisclosed income was seized. The proceeding was initiated under Section 153A of the Act calling upon the assessee to file return of income under Section 153A(1)(a) of the Act. A notice came to be issued on 13.01.2012.

3. In pursuance of the said notice, the assessee filed a return on 03.02.2012 for six years as required under the said provision. When the said return was under consideration, on 14.03.2013, the Commissioner of Income Tax initiated proceedings under Section 263 of the Act on the ground that the order dated 31.12.2010 passed under Section 143(3) of the Act is erroneous and prejudicial to the interest of the revenue. The assessee filed his objection. However, the Commissioner proceeded to pass an order on 28.03.2013 directing the assessing authority to enhance the total income as mentioned in the said order. Aggrieved by the said order, the assessee preferred an appeal to the Tribunal.

4. Before the Tribunal, it was contended that the proceedings initiated under Section 263 of the Act is one without jurisdiction because by virtue of the proceedings initiated under Section 153A of the Act, the assessment for six years stood reopened and it is for the assessing authority to pass appropriate order on the basis of the return filed under Section 153A(1)(a) of the Act. Rejecting the said contention, the Tribunal held, if an order of assessment had already been passed before initiating proceedings under Section 153A of the Act, the said order does not abate. In the proceedings initiated under Section 153A of the Act, the assessing authority has to confine the assessment to the incriminating material found during search. He cannot take into consideration other materials while making an assessment order. Therefore, it is open to the Commissioner to invoke his powers under Section 263 of the Act, if the said assessment order is erroneous and prejudicial to the interest of the revenue, otherwise the revenue will be without any remedy. In coming to the said conclusion the Tribunal relied on the judgment of the Special Bench of ITAT, Mumbai in

the case of **ALL CARGO GLOBAL LOGISTICS LIMITED - (2012) 16 ITR (TRIBUNAL) 380 (MUM)(SB)** and therefore, it held, in such cases, it would be open to the revenue to explore remedies open to it in law under Section 263 of the Act, subject to satisfaction of the condition precedent for exercise of jurisdiction under that provision even after the initiation of search under Section 132 of the Act. Thereafter, he proceeded to consider the case on merits in respect of two items. It was held the revisional power has been wrongly exercised in respect of other two instances and the matter was remanded to the assessing authority. It is against the said order the assessee is before this Court.

5. Learned counsel appearing for the assessee assailing the impugned order contended that once proceedings under Section 153A is initiated, though the order of assessment passed in respect of six years do not abate, the effect is it stands reopened. Therefore, in law there is no valid order of assessment which is a condition precedent for the Commissioner to exercise his power under Section 263 of the Act and therefore, he submits the order

passed by the Commissioner is one without jurisdiction and the Tribunal was not justified in upholding the said order.

6. Per contra, learned counsel appearing for the revenue submitted in view of the judgment of the Special Bench of Mumbai the subject matter of proceedings under Section 153A would be only the undisclosed income which is the subject matter of search. No other materials can be taken into consideration by the assessing authority. In that view of the matter, the Commissioner was justified in invoking his powers under Section 263 of the Act and therefore, he submits no case for interference is made out.

7. In the light of the aforesaid facts and rival contentions, the substantial question of law that arise for consideration in this case is as under:

“When once the proceedings under Section 153A of the Act is initiated, whether the Commissioner of Income Tax can invoke the power under Section 263 of the Act to review the order of assessment passed by the Assessing Authority?”

8. **Section 153A reads as under:**

(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) asses 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.”

9. The Delhi High Court interpreting this provision in the case of **COMMISSIONER OF INCOME TAX vs. ANIL KUMAR BHATIA (2012) 82 CCH 113 DelHC** held as under:

18. A perusal of Section 153A shows that it starts with a non obstante clause relating to normal assessment procedure which is covered by Sections 139, 147, 148, 149, 151 and 153 in respect of searches made after 31.5.2003. These Sections, the applicability of which has been excluded, relate to returns, assessment and reassessment provisions. Prior to the introduction of these three Sections, there was Chapter XIV-B of the Act which took care of the assessment to

be made in cases of search and seizure. Such an assessment was popularly known as “block assessment” because the Chapter provided for a single assessment to be made in respect of a period of a block of ten assessment years prior to the assessment year in which the search was made. In addition to these ten assessment years, the broken period up to the date on which the search was conducted was also included in what was known as “block period”. Though a single assessment order was to be passed, the undisclosed income was to be assessed in the different assessment years to which it related. But all this had to be made in a single assessment order. The block assessment so made was independent of and in addition to the normal assessment proceedings as clarified by the Explanation below Section 158BA(2). After the introduction of the group of Sections namely, 153A to 153C, the single block assessment concept was given a go-by. Under the new Section 153A, in a case where a search is initiated under Section 132 or requisition of books of account, documents or assets is made under Section 132A after 31.5.2003, the Assessing Officer is obliged to issue notices calling upon the searched person to furnish returns for the six assessment years immediately preceding the assessment year relevant to the previous year in which the search was conducted or requisition

was made. The other difference is that there is no broken period from the first day of April of the financial year in which the search took place or the requisition was made and ending with the date of search/requisition. Under Section 153A and the new scheme provided for, the AO is required to exercise the normal assessment powers in respect of the previous year in which the search took place.

19. Under the provisions of Section 153A, as we have already noticed, the Assessing Officer is bound to issue notice to the assessee to furnish returns for each assessment year falling within the six assessment years immediately preceding the assessment year relevant to the previous year in which the search or requisition was made. Another significant feature of this Section is that the Assessing Officer is empowered to assess or reassess the "total income" of the aforesaid years. This is a significant departure from the earlier block assessment scheme in which the block assessment roped in only the undisclosed income and the regular assessment proceedings were preserved, resulting in multiple assessments. Under Section 153A, however, the Assessing Officer has been given the power to assess or reassess the "total income" of the six assessment years in question in separate

assessment orders. This means that there can be only one assessment order in respect of each of the six assessment years, in which both the disclosed and the undisclosed income would be brought to tax.

20. A question may arise as to how this is sought to be achieved where an assessment order had already been passed in respect of all or any of those six assessment years, either under Section 143(1)(a) or Section 143(3) of the Act. If such an order is already in existence, having obviously been passed prior to the initiation of the search/requisition, the Assessing Officer is empowered to reopen those proceedings and reassess the total income, taking note of the undisclosed income, if any, unearthed during the search. For this purpose, the fetters imposed upon the Assessing Officer by the strict procedure to assume jurisdiction to reopen the assessment under Sections 147 and 148, have been removed by the non obstante clause with which sub section (1) of Section 153A opens. The time-limit within which the notice under Section 148 can be issued, as provided in Section 149 has also been made inapplicable by the non obstante clause. Section 151 which requires sanction to be obtained by the Assessing Officer by issue of notice to reopen the assessment under Section 148 has also been excluded in a case covered by Section 153A. The time-limit prescribed for completion of an assessment or

reassessment by Section 153 has also been done away with in a case covered by Section 153A. With all the stops having been pulled out, the Assessing Officer under Section 153A has been entrusted with the duty of bringing to tax the total income of an assessee whose case is covered by Section 153A, by even making reassessments without any fetters, if need be.”

10. Section 153A of the Act starts with a non obstante clause. The fetters imposed upon the Assessing Officer by the strict procedure to assume jurisdiction to reopen the assessment under Sections 147 and 148, have been removed by the non obstante clause with which sub section (1) of Section 153A opens. The time-limit within which the notice under Section 148 can be issued, as provided in Section 149 has also been made inapplicable by the non obstante clause. Section 151 which requires sanction to be obtained by the Assessing Officer by issue of notice to reopen the assessment under Section 148 has also been excluded in a case covered by Section 153A. The time-limit prescribed for completion of an assessment or reassessment by Section 153 has also been done away with in a case covered by Section 153A. With all

the stops having been pulled out, the Assessing Officer under Section 153A has been entrusted with the duty of bringing to tax the total income of an assessee whose case is covered by Section 153A, by even making reassessments without any fetters, if need be. Therefore, it is clear even if an assessment order is passed under Section 143(1) or 143(3) of the Act, the Assessing Officer is empowered to reopen those proceedings and reassess the total income taking note of the undisclosed income, if any, unearthed during the search. After such reopening of the assessment, the Assessing Officer is empowered to assess or reassess the total income of the aforesaid years. The condition precedent for application of Section 153A is there should be a search under Section 132. Initiation of proceedings under Section 153A is not dependent on any undisclosed income being unearthed during such search. The proviso to the aforesaid section makes it clear the assessing officer shall assess or reassess the total income in respect of each assessment year falling within such six assessment years. If any assessment proceedings are pending within the period of six assessment

years referred to in the aforesaid sub-section on the date of initiation of the search under Section 132, the said proceeding shall abate. If such proceedings are already concluded by the assessing officer by initiation of proceedings under Section 153A, the legal effect is the assessment gets reopened. The block assessment roped in only the undisclosed income and the regular assessment proceedings were preserved, resulting in multiple assessments. Under Section 153A, however, the Assessing Officer has been given the power to assess or reassess the "total income" of the six assessment years in question in separate assessment orders. The Assessing Officer is empowered to reopen those proceedings and reassess the total income, taking note of the undisclosed income, if any, unearthed during the search. He has been entrusted with the duty of bringing to tax the total income of an assessee whose case is covered by Section 153A, by even making reassessments without any fetters. This means that there can be only one assessment order in respect of each of the six assessment years, in which both the disclosed and the

undisclosed income would be brought to tax. When once the proceedings are initiated under Section 153A of the Act, the legal effect is even in case where the assessment order is passed it stands reopened. In the eye of law there is no order of assessment. Re-opened means to deal with or begin with again. It means the Assessing Officer shall assess or reassess the total income of six assessment years. Once the assessment is reopened, the assessing authority can take note of the income disclosed in the earlier return, any undisclosed income found during search or and also any other income which is not disclosed in the earlier return or which is not unearthed during the search, in order to find out what is the "total income" of each year and then pass the assessment order. Therefore, the Commissioner by virtue of the power conferred under Section 263 of the Act gets no jurisdiction to initiate proceedings under the said provision because the condition precedent for initiating proceedings under Section 263 is any order passed under the Act by the Assessing officer is erroneous insofar as it is prejudicial to the interest of the revenue. Once the order passed by the

Assessing officer gets reopened, there is no order which can be said to be erroneous insofar as it is prejudicial to the interest of the revenue which confers jurisdiction on the Commissioner to exercise the power of the jurisdiction.

11. The Tribunal has proceeded on the assumption by virtue of the judgment of the special bench of the Mumbai, the scope of enquiry under Section 153A is to be confined only to the undisclosed income unearthed during search and if there is any other income which is not the subject matter of search, the same cannot be taken into consideration. Therefore, the revisional authority can exercise the power under Section 263. In the entire scheme of 153A of the Act, there is no prohibition for the assessing authority to take note of such income. On the contrary, it is expressly provided under Section 153A of the Act the Assessing Officer shall assess or reassess the "total income" of six assessment years which means the said total income includes income which was returned in the earlier return, the income which was unearthed during search and income which is not the subject matter of aforesaid two income. If

the commissioner has come across any income that the assessing authority has not taken note of while passing the earlier order, the said material can be furnished to the assessing authority and the assessing authority shall take note of the said income also in determining the total income of the assessee when the earlier proceedings are reopened and that income also shall become the subject matter of said proceedings. In that view of the matter the reasoning given by the Tribunal is not justified. The Commissioner did not have jurisdiction to initiate any proceedings under Section 263 of the Act.

12. For the aforesaid reasons the substantial question of law framed is answered in favour of the assessee and against the revenue. Hence, we pass the following:

ORDER

- (a) The appeal is allowed.
- (b) The impugned order as well as the order passed by the Commissioner are hereby set aside.
- (c) The Assessing Authority is at liberty to proceed with the assessment proceedings

under section 153A of the Act keeping in mind the observations made above.

- (d) The assessing authority shall determine the total income of the assessee taking into consideration the materials which was the subject matter of earlier return and the undisclosed income unearthed during search and also any other income which comes to his notice.
- (e) No costs.

**SD/-
JUDGE**

**SD/-
JUDGE**

VP