OD-2 & 3

IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction (Income Tax)
ORIGINAL SIDE

ITAT No.19 of 2015
GA No.246 of 2015

SHRIKANT MOHTA
VS.
COMMISSIONER OF INCOME TAX, CENTRAL II, KOLKATA

AND

ITAT No.20 of 2015
GA No.247 of 2015

SHRIKANT MOHTA
VS.
COMMISSIONER OF INCOME TAX, CENTRAL II, KOLKATA

BEFORE:

The Hon'ble JUSTICE SANJIB BANERJEE

The Hon'ble JUSTICE ABHIJIT GANGOPADHYAY

Date: June 25, 2018

Appearance
Mr. J. P. Khaitan, Sr. Adv.

Mr. P. K. Bhowmick, Adv.

The Court : These two matters are connected and arise out of a common search and seizure operation carried out in respect of the same assessee. The essential facts are not in dispute, but the matter turns on a particular date. Unfortunately, the relevant date is not indicated in the several orders of the Income Tax Appellate Tribunal or the Commissioner or the Assessing Officer that are included in the papers.

On September 2, 2004, search and seizure operations were carried out at the offices of the assessee. It is not in dispute that

substantial documents were seized under Section 132 of the Income Tax Act, 1961. As a consequence of the search and seizure operations and in view of Section 153A of the Act, no return for assessment year 2004-05 was filed within the statutorily mandated date of October 31, 2004.

According to the appellant, the notice under Section 153A(1)(a) was received by the assessee on March 27, 2006 and the return for the assessment year 2004-05 was filed on or about April 26, 2006. It is 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.

During the time that several of the assessees's books and records remained seized by the income tax authorities pursuant to the search and seizure operations of September 2, 2004, the assessee purported to file his return for assessment year 2004-05 on March 31, 2005. However, it does not appear that any contemporaneous cognizance was taken of such return. At any rate, such return was not assessed at any point of time.

After the issuance of the notice under Section 153A(1)(a) of the Act and the filing of the return pursuant thereto, an order of assessment was passed on December 21, 2006.

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 same 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 of December 21, 2006 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 order of December 21, 2006 by expressly incorporating the permission therein to carry forward the loss.

The Commissioner, in exercise of his authority under Section 263 of the Act, found the rectification which was carried out by the assessing officer to an order of assessment passed earlier was not proper. In the same breath, the Commissioner noticed the principle that whether the carried forward loss from a previous year could be adjusted against the income of a subsequent year would be a matter of consideration in course of the relevant subsequent year and not at any other stage. However, by a further order passed under Section 263 of the Act, the Commissioner set aside the order of assessment pertaining to the assessee for the year 2006-07 wherein the carried forward loss from the assessment year 2004-05 was permitted to be set off against the assessee’s income in assessment year 2006-07. Such order of the Commissioner passed under Section 263 of the Act was not as a consequence of the order of assessment for the assessment year 2004-05 dated December 21, 2006 not carrying a sentence to the effect that the assessee had been permitted to carry forward his losses. 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) of the Act within October 31, 2004.

Such order of the Commissioner bears no reference to the search and seizure operations conducted by the income tax authorities. Such order merely takes cognizance of the return filed by the assessee on March 31, 2005 pertaining to assessment year 2004-05 and the impermissibility of carrying forward losses of assessment year 2004-05 in the light of what is contained in Section 139(3) of the Act. It may bear repetition that no order of assessment had ever been passed in respect of the return for the assessment year 2004-05 that was filed on March 31, 2005.

Section 139(3) of the Act mandates that when loss is sought to be carried forward from a previous year, the return of the relevant previous year should have been filed within the date stipulated in Section 139(1) of the Act. It cannot be disputed that the date stipulated in Section 139(1) of the Act is October 31 falling within the relevant year.

The Appellate Tribunal endorsed the view of the Commissioner in respect of both the orders passed under Section 163 of the Act. Hence the two appeals.

The principal questions that arise in these two matters have been framed by the appellant :

(1) Whether a loss return filed within the time specified in the notice under Section 153A(1)(a) of the Income Tax Act, 1961 is required to be treated as a return filed in accordance with the provisions of Section 139(3) for the purpose of carrying forward of the loss in terms of Section 72 read with Section 80 of the Act;

(2) In a case where Section 153A of the Income Tax Act, 1961 applies, whether a return filed in response to the notice under

Section 153A(1)(a) is required to be treated as a return under Section 139 and that any other return is of no consequence and non est; and

(3) Whether the consideration that the loss in any year may be carried forward to the subsequent year and set off against the profits and gains in the subsequent year is a question that has to be determined by the assessing officer who deals with the assessment of the subsequent year.

The third issue is answered first since both the Commissioner and the Appellate Tribunal noticed a judgment of this Court reported at 273 ITR 119 (*TSAI Tea Enterprises v. CIT*). Indeed, on the basis of the reasoning as indicated in *TSAI Tea Enterprises*, the Commissioner dealing with the order of rectification passed by the Assessing Officer observed that the rectification was redundant since the issue as to whether the carried forward loss could be availed of by way of any deduction had to be considered while considering the return for the relevant assessment year in which the carried forward loss is put up as a deduction and is not a matter that can be gone into at any other time. The third question is, thus, answered in the affirmative.

Before venturing to answer the first two questions, the relevant part of Section 153A(1) of the Act needs to be noticed:

> "**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 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 other particulars as may be prescribed and the provisions of this Act shall, so far as it may be, apply accordingly as if such return were a return required to be furnished under section 139;

(b) …

Provided …

Provided further that assessment or reassessment, if any, relating to any assessment year falling within the period of six assessment years and for the relevant assessment year or 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 :

… ”

The *non obstante* clause at the beginning of Section 153A (1) of the Act 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 of the Act, 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.

To boot, the second proviso to Section 153A(1) of the Act, 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".

It goes without saying that since the search operations in this case were initiated on September 2, 2004, it was no longer necessary for this assessee to file his regular return by October 31, 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) of the Act, 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) of the Act, the operation of Section 139(3) of the Act 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) of the Act 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) of the Act.

Unfortunately, the notice issued under Section 153A(1)(a) of the Act 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) of the Act 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 March 27, 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 April 26, 2006. The date when the return was filed, however, is verifiable from the orders available.

In the light of the substantial questions of law being answered herein, a definitive final order cannot be passed without being sure of the date of issuance of the notice under Section 153A(1)(a) of the Act and the time afforded by such notice for the assessee to file the return. For such purpose, the orders impugned passed by the Appellate Tribunal require 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.

The first question of law indicated above is answered thus :

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.

The second question is answered thus :

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.

ITAT No.19 of 2015 and ITAT No.20 of 2015 together with GA No.246 of 2015 and GA No.247 of 2015 are disposed of as above.

It is hoped that the final order on the basis of this order is passed by the Income Tax Appellate Tribunal within three months of the receipt of a copy of this order.

There will be no order as to costs.

(SANJIB BANERJEE, J.)

(ABHIJIT GANGOPADHYAY, J.)

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