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THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : ITA/10/2019

PRINCIPAL COMMISSIONER OF INCOME TAX, JORHAT
AAYKAR BHAWAN, THANA ROAD, JORHAT.

VERSUS

M/S. SHYAMA POWER INDIA LTD.,
(PAN- AAHCS6024L), NAGA COTTAGE, CIRCULAR ROAD, DIMAPUR,
NAGALAND.

Advocate for the Petitioner : MR. S SARMA

Advocate for the Respondent : MR G N SAHEWALLA

BEFORE
HONOURABLE THE CHIEF JUSTICE
HONOURABLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

JUDGMENT

Date : 02-08-2023

(S.P. Khaund, J)

1. Heard Mr. S. Chetia, learned Senior Standing Counsel, Income Tax Department and Mr. G.N. Sahewalla, learned Senior Counsel for the respondent assisted by learned counsel Mr. M. Sahewalla.

2. This is an appeal u/s 260A of Income Tax Act, 1961 (the I.T. Act for short) against the order dated 14.11.2018 passed by the Income Tax Appellate Tribunal 'E' Court,

Kolkata/Guwahati (ITAT for short) in ITA No. 07/Gau/2017 for the assessment year 2011-12. The appellant is the Principal Commissioner of Income Tax Department, Jorhat and the respondent is the assessee under the jurisdiction of the Assistant Commissioner of Income Tax, Circle Dimapur, Nagaland.

3. The substantial questions of law framed in this case are :-

"(i) Whether the Hon'ble ITAT, Guwahati was justified in deleting the disallowances of Rs. 15,46,46,174/- u/s 40(a)(ia) of the I.T. Act, by holding that processing u/s 143(I) is an assessment which is concluded and unabated which cannot be disturbed in the absence of incriminating material found in the course of search.

(ii) Whether the Hon'ble ITAT was justified in holding that the inference drawn from the ledger and books of accounts found during the course of search and statement recorded during search do not constitute incriminating material for addition u/s 40(a)(ia) for Rs. 15,46,46,174/- during assessment/s 153A r/w 143(3).

(iii) Whether the Hon'ble ITAT was justified in holding that the facts of the present case where inference was drawn from the ledger/books of accounts found during the course was similar to the facts in the case of CIT Vs. Kabul Chawla 380 ITR 573(Del) where addition was made u/s 2(22)(e) of the I.T. Act, 1961 and admittedly no incriminating material was found during the search?"

4. The genesis of the case was that, there was a search and seizure operation u/s 132 of the I.T. Act in the case of the respondent Shyama Power Group India Ltd. from 25.02.2014 upto 18.03.2014. The respondent/assessee had already filed its original return of income for the Assessment Year 2011-2012 in time and time limit for issuance of notice u/s 143(2) of the Act for the Assessment Year 2011-12 had expired on the date of search. Hence the date of search of the said assessment year falls under the category of unabated assessment. It is submitted on behalf of the Appellant that during the course of search, the ledger account of sub-contractor expenditure which is also a part of the regular Books of Accounts was found and examined by the search team. Upon analysis of the Ledger Account, the Investigation Wing found entry pertaining to an account of M/s Meitei Electricals Motor Works (hereinafter

referred as M/s Meitei) in the books of the assessee for the financial year 2007-08 to 2013-14 showing total credit of Rs. 19,59,14,860/-. The respondent had paid M/s Meitei Rs. 6,37,71,766/- and the balance amount of Rs. 13,21,43,094/- was outstanding as on 31.03.2014. During the course of search and investigation, it was found that the assessee failed to deduct tax at source in respect of the amount which remained outstanding as on 31.03.2014. The credit balance of Rs. 13,21,43,094/- in the account of M/s Meitei in the books of the assessee represented the credit but the same was not paid. As per Section 194C of the I.T. Act, tax is to be deducted at the time of credit of any sum to the account of the sub-contractor or at the time of payment of any sum to a sub-contractor (M/s. Meitei in this case). The amount had already been credited by the respondent in the account of M/s Meitei and the same had been claimed as expenditure in the relevant years. Notice u/s 153A was issued to the assessee to show-cause as to why the amount which was credited in the account of M/s Meitei should not be disallowed u/s 40(a)(ia) of the Act of 1961.

5. The respondent submitted a reply vide letter dated 24.08.2018 stating *inter alia* that a reference was given regarding the Ledger Account, which is a part of the regular Books of Accounts maintained by the Assessee Company on his day to day business and the results were duly declared while filing the I.T. Returns, Balance Sheet, Audit Reports etc. since 2007-08 upto 2013-14.

6. It is submitted that the power to be exercised u/s 153A is carried out only if any incriminating material is found during search. If no such incriminating material is found in relation to the period referred to in the notice, then proceedings under the provisions of Section 153A of the I.T. Act cannot be initiated. The copy of the Ledger Account of M/s. Meitei Electricals Motor Works as referred to in the Notice cannot be considered as

incriminating material in so far as Section 153A is concerned rendering the notice redundant. The respondent (assessee) vide the same letter dated 24.08.2015 had furnished explanation for non-deduction of tax at source for the Assessment Year 2011-12. It is submitted that there were eight (8) Naga sub-contractors who had independently carried-out the works and the bills were raised by the sub-contractors through M/s Meitei Electricals Motor Works as agents-cum-contractors of the assessee company. The amount of Rs. 15,94,88,694/- pertaining to AY 2011-12 in fact was the amount for the sub-contractors. The man power in the tribal areas was sourced by M/s Meitei Electricals Motor Works who also worked as an agent of the sub-contractors and the aforementioned amount was credited to its account. This fact was clearly revealed by the Proprietor of M/s Meitei Electricals Motor Works namely Sri Mohendra Singh Lurembam in the post search proceedings and also by submitting various documents during the course of post search enquiry. The sub-contractors belong to the Naga community and are exempted from income tax u/s 10(26) of the I.T. Act, therefore, as their income itself is exempted from taxability under the I.T. Act, then any deduction/collection of income tax at source would be beyond the power conferred by the provisions of the I.T. Act.

7. The AO, in order to verify the correctness of submissions summoned the 8 Naga parties and the Proprietor of M/s Meitei Sri Mohendra Singh Lurembam produced four sub-contractors and their statements were recorded. The Investigation Wing (AO) held that the respondent's claim that the contract work was executed by individuals belonging to the scheduled tribes and not by M/s Meitei was held to be incorrect and it was noted that the accounts claimed to be audited and certified to be true by the Auditors belies the claim of the respondent as the actual facts were different from what is apparent from the Books of Account maintained by them which proves that M/s Meitei was a sub-contractor of the

assessee and not an agent. It is alleged that the claim of the actual payees that the sub-contractors belong to the Naga community was an afterthought. Hence, the Assessing Officer disallowed the amount of Rs. 15,46,46,174/- u/s 40(a)(ia) of the Act and added the same to the total income of the assessee.

8. The respondent assessee had filed an appeal being Appeal No. DMP-82 of 2015-16 before the learned Commissioner of Income Tax (Appeals), Jorhat against the order of the Assessing Officer dated 11.09.2015. The finding of the AO was overturned by the CITA Jorhat as the AO failed to disprove the claim of the Naga parties, (sub-contractors) by bringing anything on record during the assessment. The learned Commissioner of Income Tax (Appeals), Jorhat vide its order dated 20.10.2016 deleted the disallowance of Rs. 15,46,46,174/- u/s 40(a) (ia) of the Act, made by the Assessing Officer in the Assessment order passed u/s 143(3) of the Act.

9. Thereafter the present appellant authorized the Assessing Officer to file an appeal before the Income Tax Appellate Tribunal, Guwahati Bench against the order of the learned CIT(Appeals), Jorhat, on the ground that the learned CIT erred in law by deleting the disallowance of Rs. 15,46,46,174/- u/s 40(a)(ia) of the Act under the head of non-deduction of TDS on the amount credited but not paid. The respondent assessee had also filed a petition under Rule 27 of the Income Tax Appellate Tribunal Rules, raising a question of law.

10. The Income Tax Appellate Tribunal, Guwahati Bench, vide order dated 14.11.2018 passed in I.T.A. No. 07/Gau/2017 for the Assessment Year 2011-12 dismissed the appeal filed by the appellant and allowed the Rule 27 petition filed by the respondent assessee.

11. It was held by the ITAT that the assessment framed u/s 143(1) of the Act for the A.Y.

2011-12 which was unabated/concluded assessment, on the date of search deserves to be undisturbed in the absence of any incriminating materials found in the course of search and accordingly deleted the disallowance u/s 40(a)(ia).

12. It was held by the ITAT that the provisions of Section 132 of the Act relied upon by the learned DR would be relevant only for the purpose of conducting the search action and initiating proceeding u/s 153 A of the Act. Once the proceeding u/s 153A of the Act are initiated, which are special proceedings, the legislature in its wisdom bifurcates differential treatment for abated assessment and unabated assessment. In respect of abated assessment (i.e. pending proceedings on the date of search) fresh assessments are to be framed by the learned AO u/s 153A of the Act which should have a bearing on the determination of the total income by considering all the aspects wherein the existence of incriminating material does not have any relevance. However, in respect of unabated assessments, the legislature had conferred power on the learned AO to just follow the assessment already concluded unless incriminating material is found in the search to disturb the said concluded assessment. It was held that in the case at hand, the assessment framed u/s 143(1) of the Act of the assessment Year 2011-12 which was unabated/concluded assessment on the date of search deserves to be undisturbed in the absence of any incriminating material found in the course of search and accordingly the disallowance made u/s 40(a)(ia) of the Act requires to be deleted. Since the issue was addressed on preliminary ground, the merits of disallowance u/s 40(a)(ia) of the Act for the Assessment Year 2011-12 were not dealt with.

13. It was held by the Tribunal that the scheme of act provides for abatement of pending proceedings as on date of search. It is not in dispute that the assessment for the year 2011-12 was originally completed u/s 143(1) of the Act and the time limit for issuance of notice u/s

143(2) of the Act had expired and hence it falls under concluded proceedings as on the date of search.

14. The Legislature does not differentiate whether the assessments originally were framed u/s 143(1) or 143(3) or 147 of the Act. Hence unless there is any incriminating material found during the course of such concluded year, the statute does not confer any power on the learned AO to disturb the findings even thereon and the income determined thereon as finality has already been reached thereon and such proceeding was not pending on the date of search to get itself abated.

15. The ITAT also notably relied on the decision of the High Court of judicature at Delhi in the case of *CIT v. Kabul Chawla, 380 ITR 573 (Del)*.

16. In view of the foregoing discussions it can safely be concluded that the assessee had not kept his income undisclosed for the assessment year 2011-12. The statements of the sub-contractors belonging to the Naga tribe were recorded and their statements have not been contradicted or controverted by the Assessing Officer. It was also not controverted that since the work was done by the Naga sub-contractors, therefore there was no requirement of deduction of tax at source, as their income is exempted u/s 10(26) of the I.T. Act. The sub-contractors, through their statements both oral and written, have affirmed that the work was done by them for the assessee through M/s Meitei with the understanding to pay 2% commission from the payment of the assessee. Through concurrent decisions by CITA as well as by the ITAT, it was held that no incriminating material was found in the course of search. It was also held that the assessment framed u/s 143(1) of the Act for the assessment year 2011-12, which was unabated/concluded assessment, deserves to be undisturbed in the

absence of any incriminating material found in the course of search.

17. It has been observed by the Hon'ble Supreme Court in the case of *Principal Commissioner of Income Tax, Central-3 v. Abhisar Buildwell P. Ltd.* in Civil Appeal No. 6580 of 2021 and other connected appeals filed by the revenue that:-

"**11. As per the provisions of Section 153A, in case of a search under Section 132 or requisition under Section 132A, the AO gets the jurisdiction to asses or reassess the 'total income' in respect of each assessment year falling within six assessment years. However, it is required to be noted that as per the second proviso to Section 153A, the assessment or re-assessment, 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 Section 132 or making of requisition under Section 132A, as the case may be, shall abate. As per sub-section (2) of Section 153A, 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 subsection (1), shall stand revived with effect from the date of receipt of the order of such annulment by the Commissioner. Therefore, the intention of the legislation seems to be that in case of search only the pending assessment/reassessment proceedings shall abate and the AO would assume the jurisdiction to assess or reassess the 'total income' for the entire six years period/block assessment period. The intention does not seem to be to re-open the completed/unabated assessments, unless any incriminating material is found with respect to concerned assessment year falling within, last six years preceding the search. Therefore, on true interpretation of Section 153A of the Act, 1961, in case of a search under Section 132 or requisition under Section 132A and during the search any incriminating material is found, even in case of unabated/completed assessment, the AO would have the jurisdiction to assess or reassess the 'total income' taking into consideration the incriminating material collected during the search and other material which would include income declared in the returns, if any, furnished by the assessee as well as the undisclosed income. However, in case during the search no incriminating material is found, in case of completed/unabated assessment, the only remedy available to the Revenue would be to initiate the reassessment proceedings under sections 147/148 of the Act, subject to fulfilment of the conditions mentioned in sections 147/148, as in such a situation, the Revenue cannot be left with no remedy. Therefore, even in case of block assessment under section 1534 and in case of unabated/completed assessment and in case no incriminating material is found during the search, the power of the Revenue to have the reassessment under 147/148 of the Act has to be saved, otherwise the Revenue would be left without remedy.**

12. If the submission on behalf of the Revenue that in case of search even where no incriminating material is found during the course of search, even in case of unabated/completed assessment, the AO can assess or reassess the income/total income taking into consideration the other material is accepted, in that case, there will be two assessment which shall not be permissible under the law. At the cost of repetition it is observed that the assessment under Section 153A of the Act was linked with the search and requisition under Sections 132 and 132A of the Act. The object of Section 153A is to bring under tax the undisclosed income which is found during the course of search or pursuant to search or requisition. Therefore, only in a case where the undisclosed income is found on the basis of incriminating material, the AO would assume the jurisdiction to assess or reassess the total income for the entire six years block assessment period even in case of completed/unabated assessment, As per the second proviso to Section 153A, only pending assessment/reassessment shall stand abated and the AO would assume the jurisdiction with respect to such abated assessments. It does not provide that all completed/unabated assessments shall abate. If the submission on behalf of the Revenue is accepted, in that case, second proviso to section 153A and subsection (2) of Section 153A would be redundant and/or re-writing the said provisions, which is not permissible under the law.

13. For the reasons stated hereinabove, we are incomplete agreement with the view taken by the Delhi High Court in the case of *Kabul Chawla (supra)* and the Gujarat High Court in the case of *Saumya Construction (supra)* and the decisions of the other High Courts taking the view that no addition can be made in respect of the completed assessments in absence of any incriminating material

14. In view of the above and for the reasons stated above, it is concluded as under:

i) that in case of search under Section 132 or requisition under Section 132A, the AO assumes the jurisdiction for block assessment under section 153A;

ii) all pending assessments/reassessments shall stand abated;

iii) in case any incriminating material is found/unearthed, even, in case of unabated/completed assessments, the AO would assume the jurisdiction to assess or reassess the 'total income' taking into consideration the incriminating material unearthed during the search and the other material available with the AO including the income declared in the returns; and

iv) in case no incriminating material is unearthed during the search, the AO cannot assess or reassess taking into consideration the other material in respect of completed assessments/unabated assessments. Meaning thereby, in respect of completed/unabated assessments, no addition can be made by the AO in absence of any incriminating material found during the course of search under Section 132 or requisition under Section 132A of the Act, 1961. However, the completed/unabated assessments can be re-opened by the AO in exercise of powers under Sections 147/148 of the Act, subject to fulfilment of the conditions as envisaged/mentioned under sections 1471/148 of the Act and those powers

are saved.

The question involved in the present set of appeals and review petition is answered accordingly in terms of the above and the appeals and review petition preferred by the Revenue are hereby dismissed. No costs."

18. The view taken by the Delhi High Court in the case of *Kabul Chawla (supra)* has also been endorsed by the Hon'ble Apex Court. The third substantial question of law raised in this appeal that whether the ITAT was justified in holding that in the facts of the present case where inference drawn from the Ledger/Books of Accounts found during the search is similar to the case of *CIT v. Kabul Chawla (supra)* is thus answered in the affirmative. It is also held that the ITAT, Guwahati Bench was justified in deleting the disallowance of Rs. 15,46,46,174/- u/s 40(a)(ia) of the I.T. Act, by holding that the proceeding u/s 143(1) is an assessment which is concluded and unabated and it cannot be disturbed as the Ledger/Books of Accounts and the statements recorded, during the search do not constitute incriminating material.

19. As the issue was addressed on preliminary grounds, the merits of disallowance u/s 40(a)(ia) of the Act for the assessment year 2011-12 was not dealt with by the Tribunal (ITAT). In the light of the decision of the Hon'ble Supreme Court in the case of *Principal Commissioner of Income Tax, Central-3 v. Abhisar Buildwell P. Ltd. (supra),* the decision of the ITAT is upheld.

20. The appeal thus does not involve any substantial question of law and being bereft of merits and is hereby dismissed.

JUDGE

Comparing Assistant