(2014) 01 GUJ CK 0094

In the Gujarat High Court

Case No : Tax Appeals Nos. 344, 346, 347, 348 and 349 of 2013

Commissioner of Income Tax APPELLANT

Vs

Ramesh D. Patel RESPONDENT

Date of Decision : 21-01-2014

Acts Referred:
Income Tax Act, 1961 — Section 115WD, 115WE, 115WF, 115WH, 120

Citation : (2014) 269 CTR 285 : (2014) 362 ITR 492 : (2014) 225 TAXMAN 411

Hon'ble Judges : Sonia Gokani, J;Akil Abdul Hamid Kureshi, J

Bench : Division Bench

Advocate : K.M. Parikh, Advocate for the Appellant; R.K. Patel, Advocate for the Respondent

Judgement

Akil Kureshi, J.—These tax appeals are filed by the Revenue calling in question the common judgment of the income tax Appellate Tribunal dated September 21, 2012. Since the facts are similar, we may notice them as they arise in Tax Appeal No. 344 of 2013. The following question has been presented for our consideration:

Whether the income tax Appellate Tribunal was justified in law and in facts in annulling the assessment finalised u/s 153A(1)(b) on technical ground that in the absence of search warrant, no order can be passed u/s 153A(1)(b) of the Act, without appreciating the fact that the assesses did not challenge the issue of statutory notice calling for return u/s 153A of the income tax Act, 1961, within the stipulated time or before the completion of assessment, in view of section 124(3) of the income tax Act, 1961?

2. As is apparent from the question itself, the issue pertains to the validity of the assessment orders passed by the Assessing Officer for different assessment years u/s 153A of the income tax Act, 1961 ("the Act" for short). The assessee''s contention was that he was never subjected to search proceedings and, accordingly, the Assessing Officer had no jurisdiction to pass any order u/s 153A of the Act against him. Even when the matter ultimately reached the Tribunal, it

allowed the assessee''s appeals making the following observations:

2. At the very outset, it was submitted by the learned authorised representative of the assessee that no search was carried out in the case of the assessee and, therefore, all the assessment orders passed by the Assessing Officer for the assessment years 2001-02 to 2004-05 should be annulled. The learned Departmental representative of the Revenue could not bring on record copy of the search warrant for carrying out of search in this case although several opportunities were provided to him for doing so. In the assessment order for the assessment year 2001-02, passed by the Assessing Officer u/s 147 read with section 144 on December 22, 2006, it is stated by the Assessing Officer that a survey u/s 133A was conducted at the office premises of the assessee on January 19, 2006, and there is no mention of any search having been carried out in this case. In the assessment order for the same year which was completed by the Assessing Officer on the same date, i.e., August 14, 2008, u/s 153A(1)(b) read with section 143(3) of the Act, it is stated by the Assessing Officer that a search u/s 132 was carried out in the case of M/s. J.K. Securities Group of cases and in the case at the assessee on January 19, 2006. Hence, we find that the observation made by the Assessing Officer in these two assessment orders for the same assessment year are contrary because in the first assessment order dated December 22, 2006, it is stated by the Assessing Officer that survey was conducted u/s 133A at the office premises of the assessee on January 19, 2006, and in the second order passed by the Assessing Officer on. August 14, 2008, he stated that search was carried out on, January 19, 2006, in the case of M/s. J.K. Securities Group of cases and in the case of this assessee also. In view of these contrary statements of the Assessing Officer in these two orders passed by him for the same assessment year and in the absence of search warrant having been brought on record by the learned Departmental representative of the Revenue in spite of allowing several opportunities as recorded in the order-sheet, we are of the considered opinion that the assessment completed by the Assessing Officer u/s 153A(1)(b) for the assessment year 2001-02 to the assessment year 2004-05 are liable to be annulled because in the absence of search, no assessment can be made u/s 153A(1)(b). Therefore, all these appeals are allowed, i.e., I.T. (SS) A No. 115-118/Ahd./2009.

3. It is this order of the Tribunal which the Revenue has challenged in these appeals.

4. Having heard the learned counsel for the parties, we find from the record that the Assessing Officer had made contradictory statements with respect to the assessee being subjected to search. In one order, he noted that no search warrant was issued against the assessee, while in another order, he recorded that not only M/s. J.K. Securities Group but the assessee was also subjected to search. To clear this confusion, the Tribunal gave multiple opportunities to the Revenue to produce the record of search and authorisation. Despite sufficient opportunities, the Revenue could not produce the same. The Tribunal, therefore,

concluded that there was no search warrant against the assessee. The Tribunal, therefore, held that in the absence of any search warrant, the orders passed by the Assessing Officer u/s 153B of the Act were invalid.

5. We have no reason to interfere with the order passed by the Tribunal. Section 153A of the Act pertains to assessment in case of search or requisition. Subsection (1) thereof provides that notwithstanding anything contained in sections 139, 147, 148, 149, 151 and 153 of the Act, in the case of a person where a search is initiated u/s 132 or books of account, other documents or any assets are requisitioned u/s 132A after the 31st day of May, 2003, the Assessing Officer shall issue a notice to such person requiring him to furnish the return of income and 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. Section 153B of the Act provides for time limit for completion of the assessment u/s 153A.

6. Learned counsel for the assessee has rightly relied on a decision of the Orissa High Court in the case of Siksha "O" Anusandhan Vs. Commissioner of Income Tax and Others, in which it was held that the provisions of section 153A make it clear that only in the case of a person where a search was initiated u/s 132 or books of account or other documents or any assets were requisitioned u/s 132A after March 31, 2002, the Assessing Officer could, after issuing a notice, assess or reassess the total income of such person for six assessment years immediately preceding the assessment year relevant to the previous year in which such search was conducted or requisition was made.

7. In the present case, the Tribunal came to a factual finding that no search authorisation was produced. This was necessary because the Assessing Officer had made contradictory references to the assessee being subjected to search or not. In the absence of a search authorisation, the Tribunal correctly held that the assessment orders u/s 153A could not have been passed. Reliance of the Revenue to section 124(3) of the Act would be of no avail. Section 124 pertains to the jurisdiction of the Assessing Officers. Subsection (1) thereof concerns the situation where, by virtue of any order or direction under subsection (1), or (2) of section 120, the Assessing Officer has been vested with jurisdiction over any area within the limits of such area. Subsection (2) of section 124 provides, inter alia, that where a question arises under the said section as to whether an Assessing Officer has jurisdiction to assess any person, the question shall be determined by the Director General or the Chief Commissioner, etc. Subsection (3) thereof provides as under:

(3) No person shall be entitled to call in question the jurisdiction of an Assessing Officer--

(a) Where he has made a return under subsection (1) of section 115WD or under subsection (1) of section 139, after the expiry of one month from the date on which he was served with a notice under subsection (1) of section 142 or subsection (2) of section 115WE or subsection (2) of section 143 or after the completion of the assessment, whichever is earlier;

(b) where he has made no such return, after the expiry of the time allowed by the notice, under subsection (2) of section 115WD or subsection (1) of section 142 or under subsection (1) of section 115WH or u/s 148 for making of the return or by the notice under the first proviso to section 115WF or under the first proviso to section 144 to show cause why the assessment should not be completed to the best of the judgment of the Assessing Officer, whichever is earlier.

8. Thus, section 124 of the Act pertains to the territorial jurisdiction of an Assessing Officer vested under subsection (1) or subsection (2) of section 120. An objection to such jurisdiction can be raised in terms of section 124(2). In terms of subsection (3) of section 124, right to raise such objection shall be foregone beyond the stages mentioned therein. The said provisions are clearly concerning with the dispute of the assessee with respect to the territorial jurisdiction of the Assessing Officer and has no relevance in so far as the inherent jurisdiction for passing an order of assessment u/s 153A of the Act is concerned, when no search authorisation u/s 132 was issued or requisition u/s 132A of the Act was made.

9. Before closing, we notice that in Tax Appeal No. 349 of 2013, for the assessment year 2005-06, the Revenue has also raised an additional question of limitation which arose out of the judgment of the Tribunal. However, since we confirm the decision of the Tribunal on the limited question of validity of assessment u/s 153A of the Act, this question need not be gone into and is kept open. In the result, the tax appeals are dismissed.