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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ ITA 13/2014

COMMISSIONER OF INCOME TAX (C)-I Appellant
Through: Mr. N.P. Sahni, Senior Standing
Counsel with Mr. Nitin Gulati, Advocate

versus

MGF AUTOMOBILES LTD. Respondent
Through: Ms. Premlata Bansal, Senior Advocate
with Mr. Sunil Magon, Advocate

with

+ ITA 14/2014

COMMISSIONER OF INCOME TAX (C)-I Appellant
Through: Mr. N.P. Sahni, Senior Standing
Counsel with Mr. Nitin Gulati, Advocate

versus

MGF AUTOMOBILES LTD. Respondent
Through: Ms. Premlata Bansal, Senior Advocate
with Mr. Sunil Magon, Advocate

CORAM:

HON'BLE DR. JUSTICE S.MURALIDHAR

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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13.08.2015

Dr. S. Muralidhar, J.

1. These two appeals by the Revenue under Section 260A (1) of the

Income Tax Act, 1961 ('Act') are directed against the common order dated 28th June, 2013 passed by the Income Tax Appellate Tribunal (ITAT) in ITA Nos. 4212 and 4213/DEL/2011 for the Assessment Years (AYs) 2004-05 and 2005-06.

2. The Respondent Assessee is a company dealing in the business of car dealership and service station. During the AY 2004-2005 it entered into amalgamation agreement with Compact Motors Limited (CML). Pursuant to an order passed by the High Court on 27th September 2004, the amalgamation of CML with the Assessee was made effective from 1st April, 2003.

3. In terms of Section 72A of the Act it was permissible for the losses of the amalgamating company (i.e. CML) to be set off or carried forward in the assessment of the amalgamated company (i.e. the Assessee) subject to the fulfilment of conditions stipulated in Section 72A(2) of the Act. Relevant to the present appeals is the condition under Section 72A(2)(b)(i) which requires the amalgamated company to hold continuously for a minimum period of five years from the date of amalgamation "at least three fourths of the book value of fixed assets of the amalgamating company acquired in a scheme of amalgamation."

4. For AY 2004-05 returns were to be filed on or before 30th October 2004. The Assessee filed its return on 30th October 2004 under Section 139 (1) of the Act declaring Nil income. For the AY 2005-06,

it filed its return on 27th October 2005 declaring an income of Rs.50,04,700. The last dates by which the Revenue could resort to Section 143(3) of the Act were 31st March, 2007 and 31st March 2008 respectively. In the return for AY 2004-05, the Assessee had set off the losses of CML to the extent of Rs.1,65,09,929.93 against the Assessee's business income pursuant to the amalgamation as ordered by the High Court. In the AY 2005-06, the Assessee set off the balance unadjusted carried forward loss of the earlier year.

5. A search took place in the Assessee's premises on 12th September, 2007. During the search cash of Rs.48lakhs was seized. The Court had been shown by Mr. N.P. Sahni, learned Senior Standing counsel for the Revenue, a photocopy of the *panchnama* and the inventory prepared at the time of search. The inventory prepared includes books of accounts, some bunch of loose papers, an external hard disk, a computer server etc.

6. It is not in dispute that on 6th October, 2007 a major fire took place at Mayur Bhawan which houses the offices of the Income Tax Department. It is stated by Mr. Sahni that in the said fire whatever was seized by the Department in the form of the books of accounts, bunch of loose papers etc. were completely burnt and destroyed. In other words, none of the materials seized during the search from the premises of the Assessee could be retrieved or salvaged.

7. Consequent upon the search, the Assessing Officer (AO)

proceeded with the assessment and passed separate assessment orders dated 23rd December, 2009 for the two AYs in question. The AO disallowed the set off of the losses of CML against the business income of the Assessee for the AYs in question on two grounds. One, since neither the Assessee nor CML was an ‘industrial undertaking’ within the meaning of Section 72 A (7) (aa) of the Act. Secondly, the Assessee failed to retain three-fourths of the book value of the fixed assets as required by Section 72 A (2) (b) (i) of the Act since it had during AY 2007-2008 sold the land of CML valued at Rs.37,93,375.

8. The Commissioner of Income Tax (Appeals) [CIT (A)], by orders dated 18th July 2011 for each of the two AYs, dismissed the Assessee’s appeals.

9. The ITAT has by the impugned order dated 28th June 2013 allowed the Assessee’s appeals. Relying on the decision of this Court in *CIT v. Anil Kumar Bhatia (2013) 352 ITR493 (Del)* and of the Rajasthan High Court in *Jai Steel (India) Jodhpur v. Asst. Commissioner of Income Tax (2013) 36 taxmann.com 523 (Raj)*, the ITAT came to the conclusion that the additions could have been made by the AO “only if some incriminating document was found during search.” The ITAT recorded in its order that: “In the present case it is apparent that on the date of search on 12/09/07, the assessments for assessment year 2004-05 & 2005-06 were already completed. There was no incriminating material found during search for these years as is apparent from arguments of Ld. AR and from

records and Ld. Departmental Representative did not bring to our notice regarding any incriminating material having been found during search.” The ITAT also noted: “During proceedings before us the bench had asked a question to Ld. AR as to whether any statement u/s 132 (4) was recorded during search to which the Ld. AR replied in negative and Ld. Departmental Representative also showed his ignorance about such statement. This question was asked because the view of the Bench is that if during course of search some statement is recorded u/s 132(4) and in that statement certain facts are recorded from the interpretation of which Assessing Officer could conclude that there was some undisclosed income then that statement can be considered as incriminating material.”

10. By order dated 12th May 2014 the following two questions were framed by the Court:

(i) Did the ITAT fall into an error in deleting the additions made in the case of the Respondent Assessee for AYs 2004-05 and 2005-06 on the ground that no incriminating material was found during the search conducted in Assessee's premises on 12th September 2007, in respect of its claims?

(ii) Were the additions made by the AO which were directed to be deleted by the ITAT and are stated to be based on post search enquiries, warranted in the circumstances of the case?

11. This Court has heard the submissions of Mr. N.P. Sahni, learned Senior Standing Counsel for the Revenue and Mrs. Prem Lata Bansal, learned Senior counsel for the Respondent Assessee.

12. To begin with, what is striking is the fact that nowhere in the Assessment Orders for the AYs in question has the AO noted the stark fact that the material purportedly seized by the Revenue during the search was completely and irretrievably destroyed in a fire that took place on 6th October 2007 in Mayur Bhawan. While a photocopy of the *panchnama* showing what was seized is available, the material itself is not and in fact was not available with the AO when the assessment proceedings, consequent upon the search, took place. Further, as noted by the ITAT, no statement under Section 132(4) was recorded during the search. Therefore, there was no material, much less any incriminating material, recovered during the search which could form the basis of the AO's assessment order in terms of Section 153 A of the Act.

13. Consequently, the Court is unable to appreciate on what basis the AO has in the assessment orders for the AYs in question proceeded to discuss the facts relating to the sale of land by the Assessee in the AY 2007-08 and conclude that the Assessee as an amalgamated company failed to comply with the requirements of Section 72-A (2) (b) (i) of the Act. The court enquired from Mr. Sahni whether there is any indication anywhere in the assessment orders that the information

regarding the land of CML having been sold by the Assessee during the AY 2007-2008 was obtained as a result of any material gathered during the search or any information obtained during the search. Mr. Sahni candidly answered in the negative.

14. Mr. Sahni volunteered that it should have been possible for the Revenue to resort to Sections 147/148 of the Act and re-opened the assessments on the basis of the information received regarding the sale by the Assessee of the land of CML during AY 2007-08. The Court considers the said submission to be hypothetical since the fact remains that the Revenue has thought it fit to resort to a search in terms of Section 132 of the Act followed by proceedings under Section 153A(1) of the Act. As far as the Court is concerned, in these proceedings, it is called upon to decide the legality of the assessment orders passed under Section 153A of the Act.

15. The inescapable conclusion therefore is that the AO proceeded to frame assessments under Section 153 A of the Act relying on some information not unearthed during the search. Further, whatever was recovered during the search having been destroyed in a fire was not available with the AO when he framed the assessments. Consequently, the assessment orders passed with reference to Section 153 A (1) of the Act were unsustainable in law.

16. Question (i) framed by the Court is answered in the affirmative, i.e. in favour of the Assessee and against the Revenue. Question (ii) is

answered in the negative, i.e. by holding that additions as ordered by the AO were not warranted in the facts and circumstances.

17. The appeals are accordingly dismissed.

S.MURALIDHAR, J

VIBHU BAKHRU, J

AUGUST 13, 2015

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