

Genom Biotech Private Limited

(CROSS BORDER TAX EVASION AND INFLATION OF TAX EXPENSE: HELD VALID GROUND FOR SEARCH U/S 132 AND PROVISIONAL ATTACHMENT ORDER U/S 281B)

In this case, BHC has dismissed assessee's writ petition challenging the validity of search action u/s 132 of the Income Tax Act (Act) and has upheld that provisional attachment order passed by revenue u/s 281B of the Act (which attachment was made simultaneously with issue of notice u/s 153A asking assessee to file returns thereunder). In this case, BHC while upholding search validity has interalia observed/ruled as under:

- a. ***Where the information is that the tax due to the revenue has been evaded by furnishing fake or exaggerated bills, it would be reasonable to believe that the assessee would not disclose the actual modus operandi adopted for such tax evasion. Similarly, if the information received is that the assessee has received undisclosed income, then it would be reasonable to believe that the assessee would not disclose details of the undisclosed income received. In the present case, the information received was that the assessee has been manufacturing fake / exaggerated invoices and, therefore, the designated authority was justified in forming a belief that conditions set out in clause (b) of section 132(1) of the Act is satisfied.***

Similarly, the information received was that the investments made out of the funds brought to India represented the undisclosed income of the petitioner No.2 (assessee company chairman) and, therefore, the designated authority was justified in forming a belief that conditions set out in clause (c) of section 132(1) of the Act are satisfied.

- b. ***The argument that the marketing and advertisement expenses have been allowed in the past by the Transfer Pricing Officer / CIT(A) after detailed enquiry would not affect the reasonable belief formed by the designated authority to initiate search and seizure action, because, neither the Transfer Pricing Officer nor the CIT(A) had occasion to consider the genuineness of the transaction from the point of the petitioner No.2 (assessee company chairman) being the ultimate recipient of the amounts remitted by the petitioner No.1 (Assessee company) as marketing and advertisement expenses.***

In other words, the enquiry in the past related to the existence of the foreign customers and actual remittance of the amount by the petitioner No.1 to the said foreign customers. The enquiry in the past did not relate

to the foreign customers in turn crediting the amounts received from the petitioner No.1 in the private bank accounts of petitioner No.2. Therefore, the fact that the remittances made to the foreign companies in the past were through the banking channel after obtaining requisite permission from R.B.I. and that the Transfer Pricing Officer / CIT(A) had allowed the claim after investigation would not affect the reasonable belief formed by the designated authority on the basis of the confidential information that search and seizure action is necessary in the present case

- c. In other words, the information received was that the companies in Cyprus and U.K. were used as a conduit for transferring the taxable income of the petitioner No.1 (assessee company) to the petitioner No.2 (its chairman). By claiming deduction of Rs.170 crores as marketing and advertisement expenses paid to the foreign companies, the petitioner No.1 has not paid the tax on the said amount of Rs.170 crores. However, the said amounts have been received by the petitioner No.2 from the aforesaid Cyprus & U.K. based companies which represents the undisclosed income of the petitioner No.2. ...
- d. *It is true that attaching the properties of an assessee even before the crystallization of the demand is a drastic step and has to be exercised only in extreme circumstances.*
- e. The fact that the notice under section 153A of the Act as well as the order under section 281B of the Act have been issued on the same date i.e. on 24/7/2008 would not affect the validity of the provisional attachment, because, under section 132 of the Act it is not mandatory that the proceedings must be pending on the date of invoking section 281B of the Act.

Provisional attachment can be levied even in cases where the proceedings are yet to be initiated.

Therefore, issuing 153A notice and invoking section 281B of the Act on the same day would not affect the validity of the order passed under section 281B of the Act on 24/7/2008."