

Survey can be conducted at factory premises to obtain info. with regard to TDS proceedings

Summary – The Delhi ITAT in a recent case of Nokia India (P.) Ltd., (the Assessee) held that Survey conducted at Nokia India's factory premises for obtaining information in regard to TDS on software downloads was legally valid, statements recorded during survey had been provided to assessee during proceedings before Assessing Officer hence, plea of cross examination of statements was not sustainable

Facts

- The assessee Nokia India was 100 per cent subsidiary of Nokia Corporation, Finland. It had its registered office at Delhi and corporate office at Gurgaon and manufacturing plant at Chennai. The assessee had three SEZ undertakings.
- Survey under section 133A was conducted on the Gurgaon Corporate office and Chennai factory premises of assessee on 8-1-2013.
- During the course of survey it was found that assessee had made payments to Nokia Corporation for software required to be installed in the mobile handsets during manufacturing. The Assessing officer observed that these payments were made without deduction of tax at source.
- As per the Assessing Officer there was a deliberate endeavour with the purpose of camouflaging payment for use/right to use the software downloads in manufacture as purchase of raw material goods. The Assessing Officer took into consideration various e-mails, agreements, invoices and statements recorded during the course of survey and concluded that payments made to Nokia Corporation were towards royalty. Thus, the Assessing Officer passed order under section 201/201(1A), treating assessee in default under section 195 on 15-3-2013.
- On appeal, the Commissioner (Appeals) confirmed the action of the Assessing Officer.
- On further appeal to Tribunal, the assessee challenged the legality of survey made in TDS proceedings. Assessee further challenged revenue's reliance on the evidence collected during survey proceedings and submitted that principles of natural justice were violated while framing the order under section 201/201(1A)

Held

- The first issue is with regard to the legal validity of the survey. Though there is no specific ground to this effect but the assessee did assail Commissioner(Appeals) finding in holding that the DDIT (Inv.), Chennai had territorial jurisdiction over the assessee under section 133A(1). The assessee has also assailed the finding of Commissioner (Appeals) in holding that the employees of the assessee did cooperate during survey proceedings and, therefore, statement recorded under section 131 taken by the survey parties at Chennai were not in accordance with law. The assessee has also assailed the findings of Commissioner (Appeals) in holding that the statements of employees/ex-employees and auditors recorded under section 131 had evidentiary value. Therefore, though assessee has not very

specifically taken ground that for TDS purpose, the resort could not be had to survey proceedings, particularly in view of the amendment being made under section 133A by inserting sub-section (2A) by the Finance (No. 2) Act, 1914 with effect from 1-10-2014 but assessee did challenge the actions taken in course of survey proceedings.

- Be that as it may, this being purely legal issue, leave is granted to the assessee to raise this issue under rule 11 of the ITAT Rules.
- The preposition advanced by the revenue that Tribunal was not entitled to go into the legality of the survey proceedings, being purely an administrative action and under section 253 no appeal lies against administrative action taken by authorities was not acceptable as Tribunal under section 253(1)(a) entertains the appeals filed against order of Commissioner (Appeals) under section 246(1)(i). The appealable orders before the Commissioner (Appeals) include an order passed under section 201. When an order under section 201 has been passed solely on the basis of survey being carried out, it cannot be held that Tribunal is not entitled to examine the validity of actions taken during the course of survey, which ultimately culminated in the passing of the order under section 201. All the incidental actions taken by the revenue authorities are subject matter of challenge before Tribunal and, therefore, Tribunal, while deciding appeals against the orders passed by Commissioner (Appeals) in appeals against the order under section 201, is fully empowered to examine these issues. The powers of Tribunal for examination of incidental issues flows from the appeal provided under section 253(1)(a) against the Commissioner (Appeals) order passed under section 201. The term 'order' encompasses within its ambit consideration of all actions taken by authorities which culminated into the *lis* and, therefore, while passing the order all such actions have to be taken into consideration.
- In the instant case the validity of survey has been challenged on the ground that there was no provision for carrying out survey for ensuring compliance with TDS provisions. The power for survey *per se* has been challenged on the ground of being without authority of law. Power of search and seizure of Income-tax authorities cannot be equated with the power of survey, because search can be carried out only if the specific authorities mentioned under section 132 have information in their possession, on the basis of which they have reason to believe that if a person who is required to do certain acts as contemplated under clauses (a) and (b) of section 132(1), would not comply with the directions and has in his possession certain money, bullion, jewellery or other valuables or things, which had not been or would not be disclosed. Whereas, in case of survey under section 133A, designated authorities can enter into the business premises for checking and verification purpose of cash, stock, documents, books of account etc.
- Therefore, it is evident that survey is part and parcel of proceedings which include assessment proceedings as well as the action taken under section 201/201(1A). Accordingly, the revenue was not correct in holding that the validity of survey action cannot be examined while deciding the correctness of the order passed under section 201. Therefore, Tribunal is well within its powers to examine the challenge to validity of survey.

- As regards objection of assessee regarding validity of survey that under the Income-tax Act, there was no power conferred on Income-tax authorities for conducting survey to verify whether the tax has been deducted or collected at source in accordance with the provisions under sub-heading 'B' of chapter XVII or under sub-heading 'BB' of Chapter XVII, as the case may be. The submission is that this power has been conferred on income-tax authorities by the Finance (No. 2) Act, 2014 with effect from 1-10-2014 by inserting section 133A(2A). On examination of the entire scheme of the Act, it was observed that the plea advanced by the assessee deserves to be rejected for the simple reason that the term 'proceeding', defined under section 133A, includes the TDS proceedings also. The survey, thus, could be conducted for obtaining information in regard to TDS proceedings also as mandated under section 133A(1)(iii). The revenue was correct in holding that this amendment has been inserted by way of abundant precaution so as to ensure that while carrying out the survey proceedings, for ensuring compliance with TDS provisions, cash and stock is not examined. Further, it is found from the case laws relied by the revenue that survey was carried out for TDS purposes even prior to introduction of sub-section (2A) to section 133A and Supreme Court has also taken cognizance of the same. Accordingly, it was held that the survey could be conducted even prior to insertion of sub-section (2A) of section 133A.
- Further, as regards objection of assessee regarding authorization to DDIT, Chennai for conducting the survey. In this regard, on examination of the provisions of section 133A, it is found that there is no requirement under this section read with rules for issuing of authorisation. As per proviso to section 133A, the survey can be carried out by the authorities mentioned in the section itself and only if the survey is carried out by an Asstt. Director or a Dy. Director or Assessing Officer, or tax recovery officer or Inspector of Income-tax, then the approval of the Joint Director or the Joint Commissioner, as the case may be, is required. In the instant case, the DDIT Chennai was authorized by the Addl. Director of Income-tax (Inv.), which was in accordance with the CBDT Notification No. S.O. 1189(E), dated 3-12-2001.
- Therefore, it cannot be said that DDIT, Chennai was not duly authorized to carry out the survey. A bare reading of section 133A(1) makes it clear that survey can be carried out at the place where business or profession is carried on irrespective of the fact whether the place of business or profession is separate from its registered office. The object of survey is to gather information in regard to the proceedings under the Act which is enumerated in clauses (i), (ii) & (iii) to section 133A(1), as reproduced above and, therefore the powers cannot be restricted in any manner, particularly when sufficient safeguards have been provided by legislature itself while drafting section 133A, as is evident from bare reading of various clauses of section 133A.
- The survey at Gurgaon was duly authorized by Addl. Director of Income-tax (International Taxation), New Delhi. Therefore, both these authorities, i.e., DDIT Chennai as well as ITO, TDS could enter the premises occupied by the company to conduct survey on the strength of authorization issued to them.

- Further the DDIT, Chennai has clearly demonstrated that there was non-cooperation of employees in furnishing the information and, therefore, under section 133A(6), DDIT, Chennai had powers to record statements under section 131. Even otherwise under section 131(1A), the DDIT, Chennai could exercise the powers.
- These powers are given to specific authorities for making any inquiry or investigation relating to income concealed. In the instant case main thrust of entire enquiry was to find out true import of payments made by assessee to Nokia Corporation and, accordingly, to find out the tax deductible at source.
- Thus, once the powers are exercised under section 131(1A) in order to gather the information, the designated authorities could issue summons to any person. DDIT is one of the designated authority and, therefore, no irregularity/illegality can be imputed.
- Accordingly, it is to be held that there was no illegality in carrying out survey and the statements recorded under section 131 at Chennai were validly recorded.
- Thus, as has been already held that survey was validly conducted, therefore, objection of assessee regarding evidentiary value of statements recorded during survey does not survive. However, even otherwise, it is well settled law, as held in the case of *Pooran Mal v. Director of Inspection* [1974] 93 ITR 505 (SC) and *Dr. Pratap Singh v. Director of Enforcement* [1985] 155 ITR 166/22 Taxman 30 (SC), that evidence collected during illegal surveys also can be relied upon. Even otherwise this plea cannot be accepted on the ground of breach of fundamental right of privacy because of the decision of Supreme Court in above cases.
- The next objection of the assessee is that statement on oath could not be recorded in course of survey. This issue is covered by the decision of the Bombay High Court in the case of *Dr. Dinesh Jain v. ITO* [2014] 363 ITR 210/226 Taxman 27/45 taxmann.com 442 and, therefore, this objection raised by assessee does not survive.
- The last objection of assessee is regarding cross-examination being not provided in respect of various statements used in framing the order under section 201/201(1A). The challenge is on the ground that there was denial of principles of natural justice.
- The submission of revenue is that statements had only corroborative value and the conclusion was not drawn solely relying upon the said statements and, therefore, there is no need for cross examination of employees.
- Rules of natural justice traditionally comprised of the rules *audi alterm partem* and *nemo judex in causa sea*. Rule of *audi alterm partem* requires the maker of a judicial or quasi judicial decision to give prior notice of the decisions to persons affected by it and an opportunity for those persons to make representations. No man is to be deprived of his property without his having an opportunity of being heard. The object is that authority must do its best to act justly and to reach just ends by just means. This rule is of universal application and founded upon the plainest natural justice. There is no gain saying that Assessing Officer must act in good faith and give fair hearing to assessee, for that is a duty cast upon every authority who decides anything. Authorities under the Act have been given

powers under various sections viz. 131, 132, 133A, 133B etc. in the manner prescribed by law. All the information obtained by the authorities are required to be provided to assessee and also the statements and further to provide opportunity to assessee as well as persons whose statements were recorded for correcting or contradicting any relevant statement prejudicial to their view. The underlying principle is that there should be fair play in the process of decision making. Whenever a challenge is made to the non-adherence to principles of natural justice, two basic issues are involved:—

- (a) Does the rule applied to a particular situation; and
 - (b) If so, what is the precise content of the rule in the situation.
- It is to be examined, whether a rule has been observed with reference to above two issues or not. The function of Court is to examine the actions of authorities to find out whether, in the given circumstances, the principles of natural justice have been complied by authorities or not, but the court cannot impose its own method on administrative or executive authorities, else it would amount to usurpation of powers of authorities. The authority is the best judge to decide the extent to which the principles of natural justice have to be applied in the given circumstances, the function of court being limited to examine whether substantial justice has been imparted or not. It entirely depends on the nature of issue to be determined.
 - As has been already discussed earlier that whether cross-examination is to be provided or not depends upon the facts of each case and there is no thumb rule or straight tight jacket formula for arriving at this conclusion. It all depends on facts of each case whether principles of natural justice have been complied with or not. If decision making authority has provided due opportunity to the person complaining of non-observance of principles of natural justice then it is for the person so complaining to demonstrate the same and show the prejudice caused to him. Mere bald assertion of non-observance of the principles of natural justice is of no consequence.
 - In course of survey it was found that assessee had made payments to Nokia Corporation for software required to be installed in the mobile handsets during manufacturing. It was found that the accounts of assessee were maintained in the SAP erp system. The main server and the administrative rights of this system were located at Finland. The employees of assessee were given user right of need base. In course of survey the reports were generated from the system at Chennai in regard to the payments made by assessee to Nokia Corporation. These reports were cross checked and verified by the employees of assessee in course of survey. The invoices were also impounded which were raised by Nokia Corporation of software payments at Chennai Factory. These invoices were raised at Chennai factory. The Assessing Officer examined the various details with respect to commercial agreement submitted by the assessee. All these preliminary details led to the Assessing Officer's belief that payments were made for downloads made by assessee under the agreement for use in manufacture of mobile phones. He, therefore, examined the TP documentation software supply agreement dated 1-1-2006 and R&D sub-contract agreement between Nokia Corporation Finland and assessee to find out the true nature of payment made by

assessee to Nokia Corporation. He also noticed one important aspect that the invoices were prepared manually by employees of assessee on behalf of Nokia Corporation. The assessee's claim was that the payments made for software was on account of purchase of raw-material and, therefore, it was not covered under section 195, attracting TDS provisions.

- In the backdrop of above facts the role of statements recorded by the survey authorities in arriving at Assessing Officer's conclusion particularly in the backdrop of assessee's plea that entire addition made by the Assessing Officer is based on statements is to be examined.
- To find out the manufacturing process at the factory premises, the Assessing Officer relied upon the statements of technical experts, the extracts from which demonstrate that there was no contradiction between statements of various top ranking technical experts of assessee-company. The assessee never pointed out any factual inaccuracy in any of the statements and never came out with any material to prove otherwise. Further, the employees only stated about the manufacturing process and about their role in the same and these statements have been utilized as a corroborative evidence by the Assessing Officer in arriving at his conclusion. Therefore, here it is not a case where only on the basis of statements of employees any conclusion has been drawn by the Assessing Officer. He has taken support from these statements for arriving at his conclusion on the basis of agreements, E-mails, invoices, technical expert's report etc. It is well settled law that before the plea of cross examination is advanced, it has to be shown that the party seeking cross examination is an adversely affected party by the evidence (in instant case statements of employees) placed on record. In the instant case the contents of statements have not at all been disputed by assessee and, therefore, it cannot be said that assessee is an adversely affected party by these statements.
- Further, coming to the issue regarding timing for raising the plea regarding cross-examination by assessee it is found that all the statements were duly provided to assessee and during the proceedings before the Assessing Officer, the assessee never asked for cross-examination.
- On going through the proceedings from inception it was found that authorities below have acted justly to assessee by providing statements of all employees, ex employees, CFL reports etc. Having regard to the nature of dispute, it is opined that principles of natural justice have been complied with by affording fair hearing to assessee. The assessee has been imparted substantial justice on this count. In course of hearing assessee fairly accepted that the witnesses were not hostile. This was so because they were the assessee's employees and were occupying the senior most position in the operation. Considering all these aspects, there is considerable force in the contention of the revenue that timing of raising this plea at such a later stage of proceedings is not justified. If the assessee was very serious about this plea then it should have been taken on the very first date of hearing and not when revenue was replying to the detailed submissions advanced by assessee on merits.
- Therefore, taking an holistic view of the entire gamut of proceedings, it is opined that no irregularity has crept in during course of proceedings before the Assessing Officer/Commissioner (Appeals) and, therefore, the orders of both the lower authorities are not required to be set aside, as the matter is

not required to be restored to the Assessing Officer/Commissioner(Appeals) to correct any irregularity. However, keeping in view the submissions of assessee, noted above, in order to impart substantial justice to both the parties, a supplementary report should be submitted by the Assessing Officer on various issues pointed out by the assessee in his written submissions placed on record, if necessary, after seeking clarifications from employees. If so required by the Assessing Officer, the assessee will provide the Assessing Officer, complete details of employees, from whom clarification is to be sought. The onus will be solely on assessee to produce them before the Assessing Officer, if so required by him, on the date fixed by him.