

**SURYAIN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "G", NEW DELHI**

**BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
&
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER**

I.T.A. No.6792/DEL/2014
Assessment Year:2007-08

Shanti Lal Wadhwa C/o M/s RRA Taxindia D-28, South Extension Part I New Delhi	v.	DCIT Central Circle 8 New Delhi
TAN/PAN:AAGPW9693M		
(Appellant)		(Respondent)

Appellant by:	Shri Rakesh Gupta, Advocate		
Respondent by:	Shri S.S. Rana, CIT (DR)		
Date of hearing:	26	10	2017
Date of pronouncement:	26	10	2017

ORDER

PER AMIT SHUKLA, J.M.:

The aforesaid appeal has been filed by the assessee against impugned order dated 9/10/2014 passed by the ld. CIT (Appeals)-XXXII, New Delhi for the quantum of assessment passed under section 153A r.w.s. 143(3) of the Income Tax Act, 1961 for assessment year 2007-08.

2. Before us, the ld. counsel for the assessee, Shri Rakesh Gupta, raised a preliminary objection regarding the scope of addition made under assessment passed under section 153A r.w.s. 143(3) on the ground that the additions made by the Assessing Officer are not based on incriminating materials found during the course of search, as the assessment for impugned

assessment year was unabated at the time of search. Highlighting the chronology of events, he submitted that in this case return of income was filed on 31/10/2010 and in support of the same he filed a copy of acknowledgement of return of income which is duly stamped and acknowledged on the date of 31/10/2007. He pointed out that the last date for issuance and service of notice under section 143(21) was 31/10/2008, however, no such notice under section 143(2) was issued and accordingly, the returned income stood finally assessed, which had attained finality. The search and seizure action was conducted at the business and residential premises of the assessee on 19/10/2010 and on that date assessment for assessment year 2007-08 was not pending and hence will fall within the scope of 'unabated assessment' in terms of *second proviso* to section 153A. Shri Rakesh Gupta further pointed out that the additions, which have been roped in, in the impugned assessment order, is *firstly*, income from rent which has been treated as business income by the assessee has been taxed under the head income from house property by the Assessing Officer who has treated rent amount of Rs.1,03,750/- as income from house property; and *secondly*, addition of Rs.30,69,374/- by way of ad-hoc disallowance on account of various expenses claimed under the head purchase, labour charges; and various expenses. None of these additions are based on any document or material found during the course of search. Thus, such an addition is beyond the scope of addition under section 153A. In support, he relied upon the judgment of Hon'ble Delhi High Court in the case of **CIT vs. Kabul Chawla reported in [2016] 380 ITR 573 (Delhi)** and has been reiterated in the case of **Pr. CIT vs. Meeta Gutgutia reported in [2017] 152 DTR 153 (Delhi)**.

3. The ld. counsel for the assessee further pointed out that this issue has been raised before the ld. CIT(A) also vide grounds No.2 to 7, however, the ld. CIT(A) has decided this issue against the assessee after following certain Tribunal decisions. His relevant finding has been incorporated at para 9 from pages 7 to 12 of the appellate order. Now, in the wake of decision of the Hon'ble jurisdictional High Court, the view taken by the ld. CIT(A) cannot be upheld.

4. On the other hand, the ld. CIT (DR) relied upon the order of the ld. CIT (A) and submitted that once search has taken place, assessment has to be completed under section 153A wherein the Assessing Officer has power to assess and re-assess the income of the assessee for entire six years preceding the year in which search has taken place. There is no such requirement under the Act that additions made in unabated assessment should be on the basis of any incriminating material. Thus, he submitted that this issue should be decided on merits.

5. We have heard the rival submissions and perused the relevant finding given in the impugned order. Here in this case, the original return of income was filed on 31/10/2007 and last date for issuance and service of notice under section 143(2) was 31/10/2008. When search took place on 19/10/2010, then assessment for assessment year 2007-08 had attained finality and was not pending in terms of *second proviso* to section 153A. From the impugned assessment order, it is seen that the additions made by the Assessing Officer are not based on any material or document found or seized during the course of search relating to the assessee *qua* the assessment year impugned

before us. This is clearly evident from the order of the Assessing Officer as well as this fact has not been disputed by the Id. CIT(A) also. In the absence of any rebuttal that any incriminating material or document was found for the impugned assessment year *qua* the addition made, then no addition can be made over and above income originally assessed. Now it is quite settled law in the jurisdiction of Hon'ble High Court that for making any addition for the unabated assessment covered under section 153A, it is *sine-qua-non* that some incriminating material or documents should have been found at the time of search *qua* that assessment year which warrants additions while reassessing the completed assessments for those years. This proposition of law has been well settled and reiterated by the Hon'ble Delhi High Court in the case of **CIT vs. Kabul Chawla reported in [2016] 380 ITR 573 (Delhi)** and has been reiterated in the case of **Pr. CIT vs. Meeta Gutgutia reported in [2017] 152 DTR 153 (Delhi)**.

6. In the case of CIT vs. Kabul Chawla (supra), the Hon'ble High Court, after discussing various judgments and analysing section 153A *in-extenso*, have laid down the following legal proposition:-

i. Once a search takes place under Section 132 of the Act, notice under Section 153A(1) will have to be mandatorily issued to the person searched requiring him to file returns for six AYs immediately preceding the previous year relevant to the AY in which the search takes place.

ii. Assessments and reassessments pending on the date of the search shall abate. The total income for such AYs will have to be computed by the AOs as a fresh exercise.

iii. *The AO will exercise normal assessment powers in respect of the six years previous to the relevant AY in which the search takes place. The AO has the power to assess and reassess the 'total income' of the aforementioned six years in separate assessment orders for each of the six years. In other words there will be only one assessment order in respect of each of the six AYs "in which both the disclosed and the undisclosed income would be brought to tax".*

iv. *Although Section 153 A does not say that additions should be strictly made on the basis of evidence found in the course of the search, or other post-search material or information available with the AO which can be related to the evidence found, it does not mean that the assessment "can be arbitrary or made without any relevance or nexus with the seized material. Obviously an assessment has to be made under this Section only on the basis of seized material."*

v. In absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made. The word 'assess' in Section 153 A is relatable to abated proceedings (i.e. those pending on the date of search) and the word 'reassess' to completed assessment proceedings.

vi. *Insofar as pending assessments are concerned, the jurisdiction to make the original assessment and the assessment under Section 153A merges into one. Only one assessment shall be made separately for each AY on the basis of the findings of the search and any other material existing or brought on the record of the AO.*

vii. Completed assessments can be interfered with by the AO while making the assessment under Section 153A only on the basis of some incriminating material

unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment.”

[Emphasis supplied by us]

7. The Hon'ble High Court has also taken note of the judgment of their earlier judgment in the case of CIT vs. Anil Kumar Bhatia reported in [2013] 352 ITR 493 (Del) and observe that this was not the issue before the Court. Again in the case of Pr. CIT Vs. Meeta Gutgutia's (supra), their Lordships have again reiterated the same principle in a very detailed manner and have also distinguished one of their earlier judgment in the case of Smt. Dayawanti Gupta reported in 390 ITR 496. The relevant observations made by their Lordships are as under:-

“56. Section 153A of the Act is titled "Assessment in case of search or requisition". It is connected to Section 132 which deals with 'search and seizure'. Both these provisions, therefore, have to be read together. Section 153A is indeed an extremely potent power which enables the Revenue to re-open at least six years of assessments earlier to the year of search. It is not to be exercised lightly. It is only if during the course of search under Section 132 incriminating material justifying the re-opening of the assessments for six previous years is found that the invocation of Section 153 A qua each of the AYs would be justified.

57. The question whether unearthing of incriminating material relating to any one of the AYs could justify the re-opening of the assessment for all the earlier AYs was considered both in Anil Kumar Bhatia {supra} and Chetan Das Lachman Das {supra}. Incidentally, both these decisions

were discussed threadbare in the decision of this Court in *Kabul Chawla* {supra}. As far as *Anil Kumar Bhatia* {supra} was concerned, the Court in paragraph 24 of that decision noted that "we are not concerned with a case where no incriminating material was found during the search conducted under Section 132 of the Act. We therefore express no opinion as to whether Section 153A can be invoked even under such situation". That question was, therefore, left open. As far as *Chetan Das Lachman Das* {supra} is concerned, in para 11 of the decision it was observed:

"11. Section 153A (1) (b) provides for the assessment or reassessment of the total income of the six assessment years immediately preceding the assessment year relevant to the previous year in which the search took place. To repeat, there is no condition in this Section that additions should be strictly made on the basis of evidence found in the course of the search or other post-search material or Information available with the Assessing Officer which can be related to the evidence found. This, however, does not mean that the assessment under Section 153A can be arbitrary or made without any relevance or nexus with the seized material. Obviously an assessment has to be made under this Section only on the basis of seized material."

58. In *Kabul Chawla* {supra}, the Court discussed the decision in *Filalex India Ltd.* {supra} as well as the above two decisions and observed as under:

"31. What distinguishes the decisions both in *CIT v. Chetan Das Lachman Das* {supra}, and *Filatex India Ltd. v. CIT-IV* {supra} in their application to the present case is that in both the said cases there was some material unearthed during the search, whereas in the present case there admittedly was none. Secondly, it is

plain from a careful reading of the said two decisions that they do not hold that additions can be validly made to income forming the subject matter of completed assessments prior to the search even if no incriminating material whatsoever was unearthed during the search.

32. Recently by its order dated 6th July 2015 in ITA No. 369 of 2015 {Pr. Commissioner of Income Tax v. Kurele Paper Mills P. Ltd.}, this Court declined to frame a question of law in a case where, in the absence of any incriminating material being found during the search under Section 132 of the Act, the Revenue sought to justify initiation of proceedings under Section 153A of the Act and make an addition under Section 68 of the Act on bogus share capital gain. The order of the CIT (A), affirmed by the ITAT, deleting the addition, was not interfered with."

59. In Kabul Chawla {supra}, the Court referred to the decision of the Rajasthan High Court in Jai Steel (India) v. Assn. CIT [2013] 36 taxmann.com 523/219 Taxman 223. The said part of the decision in Kabul Chawla {supra} in paras 33 and 34 reads as under:

'33. The decision of the Rajasthan High Court in Jai Steel (India), Jodhpur v. A CIT {supra} involved a case where certain books of accounts and other documents that had not been produced in the course of original assessment were found in the course of search. It was held where undisclosed income or undisclosed property has been found as a consequence of the search, the same would also be taken into consideration while computing the total income under Section 153A of the Act. The Court then explained as under:

"22. In the firm opinion of this Court from a plain reading of the provision along with the purpose and purport of the said provision, which is intricately linked with search and requisition under Sections 132 and 132A of the Act, it is apparent that:

(a) the assessments or reassessments, which stand abated in terms of II proviso to Section 153A of the Act, the AO acts under his original jurisdiction, for which, assessments have to be made;

(b) regarding other cases, the addition to the income that has already been assessed, the assessment will be made on the basis of incriminating material; and

(c) in absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made."

34. The argument of the Revenue that the AO was free to disturb income de hors the incriminating material while making assessment under Section 153A of the Act was specifically rejected by the Court on the ground that it was "not borne out from the scheme of the said provision" which was in the context of search and/or requisition. The Court also explained the purport of the words "assess" and "reassess", which have been found at more than one place in Section 153A of the Act as under:

"26. The plea raised on behalf of the assessee that as the first proviso provides for assessment or reassessment of the total income in respect of each assessment year falling within the six assessment years, is merely reading the said provision in isolation and not in the context of the entire section. The words 'assess' or 'reassess'-have been used at more than one

place in the Section and a harmonious construction of the entire provision would lead to an irresistible conclusion that the word assess has been used in the context of an abated proceedings and reassess has been used for completed assessment proceedings, which would not abate as they are not pending on the date of initiation of the search or making of requisition and which would also necessarily support the interpretation that for the completed assessments, the same can be tinkered only based on the incriminating material found during the course of search or requisition of documents."

8. Thus, the Hon'ble High Court after detail analysis concluded that, whence there is no incriminating material qua each of the assessment year roped in under section 153A, then no addition can be made while framing the assessment under section 153A.

9. The aforesaid principle and ratio are clearly applicable on the facts of the present case also, as admittedly no incriminating material relating to this assessment year was found during the course of search and accordingly, the originally assessed income, i.e., income disclosed by the assessee in the original return of income and reiterated in the return filed in response to notice u/s 153A deserves to be accepted and the same has to be reckoned as assessment of the income in terms of section 153A and no further addition can be made by the Assessing Officer over and above the returned income. Accordingly, the additions made by the AO are deleted on the ground that they are beyond the scope of assessments u/s 153A.

10. Thus, on the preliminary issue raised by the ld. counsel for the assessee, the appeal of the assessee is allowed and other grounds raised in the grounds of appeal are treated as infructuous, as the same have become academic in nature.

11. In the result, appeal of the assessee is allowed.

Order pronounced in the open Court on 26th October, 2017.

Sd/-
[PRASHANT MAHARISHI]
ACCOUNTANT MEMBER

Sd/-
[AMIT SHUKLA]
JUDICIAL MEMBER

DATED:30th October, 2017

JJ:2710

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