IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'A', NEW DELHI

BEFORE SH. AMIT SHUKLA, JUDICIAL MEMBER
AND
SH. O.P. KANT, ACCOUNTANT MEMBER

ITA No. 424/Del/2015
Assessment Year: 2007-08

Asha Rani Lakhotia (Through Legal Heir Sh. R.N. Lakhotia), S-228, Greater Kailash ï II, New Delhi	**Vs.**	ACIT, Central Circle-9, New Delhi
PAN : AAAPL0591K		
(Appellant)		**(Respondent)**

Appellant by	Sh. P.C. Yadav, Adv.
Respondent by	Smt. Aparna Karan, CIT(DR)

Date of hearing	18.12.2017
Date of pronouncement	16.01.2018

ORDER

PER O.P. KANT, A.M.:

This appeal by the assessee is directed against order dated 27/11/2014 passed by the learned Commissioner of Income-tax (Appeals)-XXVII, New Delhi [in short the Ld. CIT-(A)] for assessment year 2007-08.

2. In the grounds of appeal, the assessee has challenged the action of the lower authorities in making/sustaining the addition, both on legal grounds as well as on merit.

3. The briefly stated facts of the case are that consequent to search action under section 132 of the Income-tax Act, 1961 (in short ôthe Actõ) at the premises of the assessee on 10/02/2012, notice under section 153A of the Act was issued on 30/09/2013. The legal heir of the assessee submitted that return filed under section 139(1) of the Act on 27/07/2007 might be treated as return filed under section 153A of the Act. Thereafter, statutory notices under section 143(2) and 142(1) of the Act were issued and complied with. The Assessing Officer noted that on the basis of material seized in search action on óAEZ Groupõ, it was observed that assessee invested a sum of Rs.39,35,850/- in Nehru Vikas Minar Project of M/s Celebration City Project Private Limited. In the seized documents, breakup of the investment of Rs.39,35,850/- was recorded as cheque of Rs.7,50,000/- and cash of Rs.31,85,850/-. The Assessing Officer further noted that on similar evidences found during the search action at the AEZ Group, one of the investors ôSh. I.E. Soomarõadmitted the cash amount invested amounting to Rs.6.64 crores and paid taxes on the said amount. In the submission filed, the assessee denied any investment in cash. The Ld. Assessing Officer, rejected the contention of the assessee and added a sum of Rs.31,85,850/- to the total income of the assessee.

3.1 Aggrieved, the assessee filed appeal before the Ld. CIT-(A) and made detailed submissions challenging the addition. The assessee submitted that not a single incriminating paper or document or any type of evidence or agreement was found during the course of search at the premises of the assessee to prove the existence of any cash unaccounted money payment for the purchase of the office space in Nehru Vikas Minar Project, Gaziabad. The assessee submitted that merely on the basis of the information found from the premises of third party, no addition could be made in the hands of the assessee. The Ld.

CIT-(A), however, was of the opinion that the material found from the premises of third-party also constituted an incriminating material so far as the assessee was concerned and accordingly, he rejected the objection of the assessee on legality of the assessment and upheld the addition relying mainly on the statement of Sh.IE Soomar i.e. another investor who admitted the cash and investment of Rs. 664 crores on the basis of document seized from the premises of the AEZ group. Aggrieved with the finding of the learned CIT-(A), the assessee is in appeal before the Tribunal challenging the impugned order both on the ground of legality of the addition made as well as the merit of the addition.

4. We have heard the rival submission of both the parties and perused the relevant material on record. As far as legal grounds of the assessee are concerned, the issue in dispute before us is, whether any addition could have been made in proceedings under section 153A of the Act in the instant assessment year, without any incriminating material found from the premises of the assessee, relying on the decision of the Hon'ble Delhi High Court in the case of Kabul Chawla reported in 380 ITR 573. The fact that no incriminating material was found in the course of search at the premises of the assessee, has not been disputed before us by the Ld. CIT(DR). The Ld. CIT-(A) in para-6.1.1 of the impugned order has given details of the material seized from the premises of the assessee. The relevant para is extracted as under:

> *"6.1.1 During the course of search at the residence of lakhotia group on 10.02.2012, several post dated cheques or its details issued in the name of lakhotia family who made booking in respective projects were found and seized. Such details of post dated cheques (PDC) were seized as Annexure A-7 and A-8.*

5. Further, both the Assessing Officer as well as the Ld. CIT-(A) has noted that the fact of cash investment was recorded in two documents found during the course of search action at the óAEZ Groupô Those two documents are as under:

(i) Excel file named ñdown payment booking details.xls printed from the hard disk found during search on 17/08/2011 from the corporate office of the AEZ group at 301/303, Bakshi house, Nehru Place, New Delhi

(ii) Excel file named ñdown payment booking details.xls retrieved from the hard disk found and seized as Annexure A-27 from the corporate office of AEZ group

6. The Ld. CIT-(A) has mentioned that in both these óExcel filesôname of the assessee as purchaser, covered area, sale price, cheque amount and cash amount received by the seller are recorded.

7. The Ld. CIT-(A) in para-6.1.2 of the impugned order has mentioned that on the basis of the óExcel sheetô, the amount received from the assessee by way of cheque and cash was shown at Rs.7,90,000/- and Rs.31,85,850/- respectively aggregating to Rs.39,35,850/- and the balance of Rs.40,000 was again shown to have been received by cheque.

8. In view of the above factual information, it is clear that during the course of search action at the premises of the assessee, which attracted proceedings under section 153A of the Act, no incriminating material was found.

9. The Ld. CIT-(A), however, has based his finding on the conclusion that the material found during the course of search at the premises of the third-party constituted an incriminating material. The finding of the Ld. CIT-(A) on the issue in dispute is reproduced as under:

"6.1.1 During the course of search at the residence of lakhotia group on 10.2.2012, several post dated cheques or its details issued in the names of lakhotia family who made booking in respective projects were found and seized. Such details of post dated cheques (PDC) were seized as Annexure A-7 and A-8.

6.1.2 On perusal of the details of sales pertaining to Nehru Vikas Minar, it was found that the appellant is related to lakhotia family and is one of the purchaser of 500 sq. ft. super area for a total consideration of Rs. 39,35,850/-. As per the details in excel sheet, the amount received from the appellant by way of cheque and cash was shown at Rs.7,90,000/- and Rs.31,85,850/- respectively aggregating to Rs.39,35,850/- and the balance of Rs.40,000/- was again shown to have been received by cheque. On the basis of the information contained in the excel sheet, the Assessing Officer gave an opportunity to the appellant to explain the source of cash payment amounting to Rs.31,85,850/- made for purchase of 500 sq. ft. super area in the Nehru Vikas Minar. Except for the denial of cash payment, the appellant did not deny the other details mentioned in the excel sheet against her name. When all other contents pertaining to the appellant mentioned in the excel sheet were not disputed, I do not find any reason as to why the appellant denied the cash transaction. ***No doubt the material relied upon by the Assessing Officer was found during the course of search at the premises of the third party, but the same also constitutes an incriminating material so far as the appellant is concerned in respect of its income that was not disclosed and earned through undisclosed sources.*** *There is a reasonable belief regarding the specific information that was available on the excel sheet to be true and correct as few persons admitted to have made the investment in cash. The appellant's name appeared in the said list which it admitted to the extent of cheque payments that endorses its link with some degree of certainty that cannot be ignored or overlooked. The "DP correction sheet.xls" threw light on the reliability of information, specific and intimate facts, and corroboration of the same by admission of few persons mentioned in the list. This sheet also described every day or common transactions that could have accrued at that time.*

6.1.3 For Indirapuram Habitat Centre Project, one person by named Sh. I E Soomar invested Rs.5,00,00,000/- in cash and Rs. 1,54,00,000/- by way of cheque out of the total cheque amount of Rs.1,88,70,000/-. It was found that till the date 30.6.2007 Rs.1,54,00,000/- was paid by cheques in addition to the cash. In the said file, the column "remarks" at point 5 of the table in the data showed "Buy back option upto 30.6.2007 for repurchase of Rs.6,54,00,000/-". It was found that this buy back amount was exactly similar to the total investment made by Sh. I E Soomar as he appeared and admitted that cash investment of 6.54 crores was made and taxes thereon was paid.

6.1.4 The overall balance of the evidence is a matter how decisively any data would tell in favour of a proposition. The AR of the appellant did not furnish any evidence to support the contention that no payment in cash was made against the property to be purchased. The evidence that was deciphered and linked to few persons cannot be denied as they did admit to have paid cash in addition to the said cheque payment. When a probable cause of action was undertaken by the department, and evidence was found, the appellant cannot take the leverage of admitting what suits it and keep silent about the rest. The appellant cannot shut the eye to a pointing needle without bringing some evidence to contradict the proposition of the Assessing Officer. Therefore, Sh. I E Soomar case is a witness to other persons appearing in the list which is not only credible but definitive. The finding in this case is based on evidence where an inference was drawn on an undisputed fact. The findings do not rest on partial admission of the details given by the appellant, but on an evaluation of documentary evidence and credibility of information by the person who was an approver or a witness through transaction found recorded in the data. In such transactions, it is not necessary that any evidence is to be found from the premises of the investor, but the evidence found in the premises of the other parties is also relevant as it is linked to the appellant as a cogent piece of evidence in respect of the undisclosed investment.

6.1.5 It is also surprising to note that inspite of the above documentary evidence in the form of data available on the hard disk mentioned above, the AR of the appellant is asking the department to provide documentary evidence as it thinks that the department is making "allegation without any basis."

Needless to say, the cheque payments made by the lakhotia family as reflected in the file named "D P Correction Sheet.xls" and "Down payment booking details.xls" matched exactly with the cheques paid in the name of each family member of lakhotia family. Based on this definitive evidence, it can be concluded that cash payment is also definitive as no prudent person would maintain the record for no reasons otherwise. This was found contrary to the statement given on oath on 10.2.2012 at the time of search. No plausible explanation was filed by the appellant in the course of the assessment proceedings accept to state/narrate the history of the case and put forth a single line argument as under:

> *"No addition can be made to its income as cash investment made in immovable property on the basis of an excel sheet found at the premises of a third party, especially because no single piece of evidence is available to prove our investment of alleged cash amount in the property."*

Other than the above contention, the appellant did not file any supporting evidence pertaining to the above denial. However, the AR of the appellant has relied on the judicial pronouncement of various case laws where addition cannot be made on the basis of the material found at the third party premises. I do not find any merit in the argument of the appellant because the facts are entirely different and are distinguishable from the facts of the cases referred. Here, the evidence found at the third party premises is a probable cause that can be linked to the transactions of the appellant where a part of them were admitted by the appellant. Therefore, this is not a case where the evidence found at the third party is not related to the appellant and that no subsequent evidence was found at her place when the search took place. Attention is drawn to the post dated cheques found at the residential premises of the lakhotia family where the cheques are in agreement with the details found in the data. In the absence of any evidence furnished by the appellant in support of his contentions, I do not find any reason to interfere and disturb the impugned addition made by the Assessing Officer. Accordingly, the addition of Rs.31,85,850/- made by the Assessing officer on the basis of the evidence found in the course of search pertaining to the cash payment against the property is upheld and confirmed."

(emphasis supplied externally)

10. In our opinion, the learned CIT-(A) has not appreciated the provisions related to search assessments in Act . It is clearly manifested in section 153C of the Act that if any money bullion, jewellery or other valuable article or thing or belonging to the assessee or any document pertaining to the assessee, is found during the course of search action at third-party, then action in the hands of assessee can be considered under section 153C of the Act .

11. In the case of the assessee proceedings under section 153A of the Act have been conducted, on the basis of the search action at the premises of the assessee on 10/02/2012 and thus the issue before us is that, whether in proceedings under section 153A, any addition could have been made in absence of any incriminating material found during the course of search. The Hon'ble Delhi High Court in the case of Kabul Chawla (supra) has held that in case of completed assessments, no addition could have been made without any incriminating material found in search action. Thus we have to examine whether both the conditions of completed assessment and no incriminating material are satisfied in the case of the assessee.

12. In the case of the assessee, the original return of income was filed on 27/07/2007. As it appears from the orders of the lower authorities, no assessment under section 143(3) of the Act was made. The limitation for issue of notice under section 143(2) of the Act had also expired on or before the rate of the search. Thus, evidently no assessment proceedings were pending in the instant assessment year as on the date of the search. We may like to mention that this condition of completed assessment, was anyway not disputed by the Ld. CIT(DR).

13. As far as the second condition of the incriminating material is concerned, we have already analyzed the material seized from the premises of the assessee and the material seized from the premises of óAEZ Groupôin above paragraphs. In view of the analysis, we are of the considered opinion that during the search action at the premises of the assessee, which is basis of taking action under section 153A of the Act , no incriminating material was found .

14. Before us, the Ld. counsel of the assessee also relied on the decision of the Hon'ble High Court of Delhi dated 25/07/2017 in the case of Principal CIT, Central-2, New Delhi Vs. Subhash Khattar in ITA 60/2017. In the said case, the Tribunal in ITA No. 902/Del/2015 observed as under:

> *"8. Considering the above submissions, we find that the Learned CIT(Appeals) has upheld the addition in question mainly on the basis of (i) the details written on the hard disc found during the course of search from the premises Aerens Group, wherein payment through cheque and cash have been mentioned against the name of assessee at Sr. No.32; Shri I.E. Soomar appearing at Sr. No. 39 of the said hard disc had admitted the cash investment of Rs.6.64 crores being made in the said project and had paid the taxes on the same; (iii) the said hard disc cannot be relied upon in part as the assessee has admitted the payment through cheque but denied the cash payment shown therein etc. In our view, a huge addition of Rs.3,21,00,000 cannot be made in a casual manner without having corroborative evidence in support. It is a prevailing practice in the dealings of immoveable properties that cash amount, if any, out of the agreed consideration is paid during the course of execution/registration of the sale deed and admittedly in the present case no sale deed or other mode of transfer has been effected. Merely because name of the assessee is appearing in the said hard disc and amongst other investors are investor Shri I.E. Soomar appearing in the said hard disc has admitted payment of cash amount, cannot be a basis for arriving at a definite conclusion, in absence of*

corroborative evidence in, support, that the assessee had also paid the amount of Rs.3,21,00,000 in cash. The Hon'ble jurisdictional High Court of Delhi in the case of CIT vs. Prem Prakash Nagpal (supra) wherein Assessing Officer had made certain additions under sec. 69 of the Act on the basis of the documents found during search at a place of third party which indicated that assessee had purchased a plot by paying consideration in cash, it was held by the Hon'ble High Court that the Assessing Officer could not prove by evidence that said documents belonged to the assessee and thafany on money transaction had taken place. The documents at the best only showed tentative/projected purchase consideration held the Hon'ble High Court. Again, in the case of CIT vs. Alpha Impact Pvt. Ltd. (supra), the Hon'ble Bombay High Court has been pleased to hold that addition to assessee's income in respect of additional sales consideration received in sale of land merely on the basis of Email recovered during the course of search action at the premises of another person and there being no independent material available supporting such additions, was not justified. Besides, we also find substance in the contention of the Learned AR that assessment under sec. 153 A of the Act in absence of incriminating material found during the course of search at the premises of the assessee and in absence of abatement of assessment on the date of search, cannot be made in the present case as per the above cited decisions including the decision of Hon'ble jurisdictional Delhi High Court in the case of CIT vs. Kabul Chawla (supra). Under the circumstances, we are of the view that the Assessing Officer was not justified in assuming jurisdiction under section 153 A and authorities below were also not justified in making and sustaining the addition in question merely on the basis of a hard disc found during the course of search at the premises of Aerens Group without any corroborative evidence in support. We thus hold that the assessee/appellant succeeds on both The above issues i.e. on validity of assumption of jurisdiction under sec. 153A and the addition in question. The grounds involving the above issues are accordingly allowed."

15. We find that the Tribunal, both on the validity of addition under section 153A of the Act and merit of the addition in question has decided

the issue in favour of the assessee. In the instant case, also the Assessing Officer has relied on the statement of Sh. I.E. Soomar for making addition in the hands of the assessee.

16. On further challenge of the decision of the Tribunal in above case, the Hon'ble Delhi High Court upheld the order of the Tribunal with following observations:

> *"7. A question was posed to the learned counsel for the Revenue whether in the present case anything incriminating has been found when the premises of the Assessee was searched. The answer was in the negative. The entire case against the Assessee was based on what was found during the search of the premises of the AEZ Group. It is thus apparent on the face of it, that the notice to the Assessee under Section 153 A of the Act was misconceived since the so-called incriminating material was not found during the search of the Assessee's premises. The Revenue could have proceeded against the Assessee on the basis of the documents discovered under any other provision of law, but certainly, not under Section 153A. This goes to the root of the matter.*
>
> *8. Consequently, the impugned order of the ITAT calls for no interference of this Court. The question framed by this Court on 7th February, 2017 is answered in negative, that is, in favour of the Assessee and against the Revenue.*

17. Since the facts and circumstances in the instant case are identical to the facts and circumstances in the case of Subhash Khattar (supra), thus, respectfully relying on the decision of the Hon'ble Delhi High Court in the above case, we are of the opinion that no addition could have been made in the instant assessment year in absence of any incriminating material found from the premises of the assessee.

18. The facts and circumstances of the case being identical to the facts and circumstances of Sh. Subhash Khattar (supra), the addition on merit also deserve to be deleted following the finding of the Tribunal in ITA

902/Del/2015. We hold accordingly. The grounds of the appeal are allowed.

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

The decision is pronounced in the open court on 16th Jan., 2018.

Sd/-	Sd/-
(AMIT SHUKLA)	**(O.P. KANT)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 16th January, 2018.
RK/-(D.T.D)
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi