

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH FRIDAY 'A' NEW DELHI**

**BEFORE SHRI B.P. JAIN, ACCOUNTANT MEMBER  
AND  
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER**

**ITA No. 3127/Del /2016  
Assessment Year: 2004-05**

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|---|-----------|---|
| <b>Getamber Anand,<br/>C-226, Sector 44,<br/>Noida-110019<br/>(PAN: ACHPA0868K)</b> | <b>vs</b> | <b>DCIT,<br/>Central Circle,<br/>Noida.</b> |
| <b>(Appellant)</b>  |           | <b>(Respondent)</b>                         |

Appellant by : Shri Ved Jain, Advocate  
Respondent by : Shri Amit Jain, Sr. DR

**Date of Hearing : 23.02.2018  
Date of Pronouncement: 27.02.2018**

**ORDER**

**PER SUDHANSHU SRIVASTAVA, J.M.**

This appeal has been preferred by the assessee against the order dated 29.03.2016 passed by the Ld. CIT(A)-IV, Kanpur for assessment year 2004-05 wherein the Ld. Commissioner of Income Tax(A) has confirmed penalty of Rs.3,30,000/- imposed u/s 271(1)(c) of the Income Tax Act, 1961 (hereinafter called 'the Act').

2. Brief facts of the case are that the assessee is the Managing Director and major shareholder in M/s ATS Infrastructure Ltd. During the year under consideration, the assessee had shown income from salary received from M/s ATS Infrastructure Ltd. amounting to Rs. 17,80,000/-. A search operation was carried out on the various residential and other premises of the assessee including premises at C-226, Sector 44, Noida on 15.02.2008. A search warrant in respect of Locker No. 439, HDFC Bank, Sector 18, Noida in the name of the assessee was also issued and the said locker was searched on 20.02.2008. During the course of search, the following cash was found and seized:-

(i) Cash from residence at C-226, Sector 44, Noida -

found Rs. 2,56,95,000/- and seized Rs.2,22,00,000/-

(ii) Cash from Locker No. 439, HDFC Bank -

found Rs. 1,20,00,000/- and seized Rs. 1,20,00,000/-

2.1 The assessee was subsequently issued a notice u/s 153 of the Act calling for return of income and the return of income was filed declaring income of Rs. 17,58,440/-.

During the course of assessment proceedings, the Assessing Officer noticed that the assessee had shown loans received amounting to Rs. 7,12,000/- and the assessee was required to prove the genuineness of the transaction as well as the identity and creditworthiness of the creditors. As the assessee, as per the Assessing Officer, could not prove the loan credits, an addition of Rs. 5,12,000/- was made on this account. Similarly, the assessee had claimed to have received gifts totalling to Rs. 68,48,315/- from various persons and the assessee could not prove the identity, genuineness, creditworthiness of four of the donors. The Assessing Officer proceeded to add back an amount of Rs. 15,00,000/- u/s 68 of the Act. The Assessing Officer also made an addition of Rs. 2,00,550/- as income from undisclosed sources which the assessee had shown as miscellaneous income. The assessment was completed at an income of Rs. 38,09,481/-.

2.2 Subsequently, on appeal, the addition pertaining to unexplained gifts amounting to Rs. 15,00,000/- was

confirmed to the extent of Rs. 10,00,000/- by the Ld. Commissioner of Income Tax(A).

2.3 Thereafter, the Assessing Officer imposed a penalty of Rs. 3,30,000/- u/s 271(1)(c) of the Act on the addition so confirmed by the Ld. Commissioner of Income Tax(A). This penalty was upheld by the Ld. Commissioner of Income Tax (A) and now the assessee is in appeal before the ITAT against the upholding of this penalty.

3. Ld. AR submitted that the impugned addition was not based on any incriminating material found during the course of search. It was further submitted that in the present case, the search was conducted on 22.02.2008 and the assessment year under consideration is 2004-05. Ld. AR submitted that the limitation period for issuance of statutory notice u/s 142(1) of the Act had already expired and, therefore, the assessment was already completed and not abated. It was also submitted that it is undisputed that the addition on account of gift/s received was not based on any material found during the course of search. It was submitted that it is a settled law that in absence of any incriminating material

found during the course of search, no addition can be made u/s 153A of the Act.

4. Ld. Sr. DR placed reliance on the orders of both the lower authorities and submitted that even the Ld. Commissioner of Income Tax (A) had confirmed the quantum as well as the penalty and, therefore, the assessee should not be allowed to take refuge behind a mere technical ground as the assessee had failed to prove the genuineness of gifts amounting to Rs. 10,00,000/-.

5. We have heard the rival submissions and perused the material available on record. The facts in this case are undisputed. It is undisputed that the addition of Rs. 15,00,000/-, sustained to the extent of Rs. 10,00,000/- by the Ld. Commissioner of Income Tax(A), in respect of unexplained gifts was not based on any incriminating material found during the course of search. This fact is evident from Para 2, page 3 of the Assessing Officer's order itself wherein the Assessing Officer has mentioned that the assessee has shown to have received various gifts totalling to Rs. 68,48,315/- from various persons.

However, there is no reference, whatsoever, to any seized/incriminating material found during the course of search which led the Assessing Officer to inquire about these gifts having been received from the assessee. The Hon'ble Delhi High Court in the case of CIT vs. Kabul Chawla reported in 380 ITR 573 (Del) has held that although section 153A does not say that additions should be strictly made on the basis of evidence found during the course of search or other post search material or information available with the Assessing Officer 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. The Hon'ble Delhi High Court went on to hold that the assessment has to be made under this section only on the basis of seized material. In the case before us, it is very much evident from the perusal of the assessment order that the addition in respect of unexplained gifts was not made with any reference to any seized/incriminating material found during the course of search but was rather based on the inquiries made by

the AO during the course of assessment. As such, the quantum addition itself was not sustainable. However, since the assessee is not in appeal before us against the quantum addition and has accepted the adjudication by the Ld. Commissioner of Income Tax (A) confirming the quantum to the extent of Rs. 10 lakh, the same cannot be disturbed. However, since the quantum addition itself is not legally sustainable, we are of the considered opinion that the penalty on such quantum addition also cannot be sustained. Therefore, we set aside the order of the Ld. Commissioner of Income Tax (A) on this issue and direct the Assessing Officer to delete the penalty.

6. In the result, the appeal of the assessee stands allowed.

The order is pronounced in the open court on 27.02.2018.

**Sd/-**

**(B.P. JAIN)**  
**ACCOUNTANT MEMBER**

**Sd/-**

**(SUDHANSHU SRIVASTAVA)**  
**JUDICIAL MEMBER**

Dated: 27<sup>th</sup> FEBRUARY, 2018

‘GS’

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT

TRUE COPY

By Order

**ASSISTANT REGISTRAR**