

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'G', NEW DELHI**

Before Sh. N. K. Saini, AM and Sh. Bhavnesh Saini, JM

ITA No. 4593/Del/2016 : Asstt. Year : 2007-08

ITA No. 4594/Del/2016 : Asstt. Year : 2009-10

ACIT, Central Circle-26, New Delhi	Vs	S P Singla Construction P. Ltd., D/10, Flat No. 22, 1 st Floor, DDA Flats, Sector-7, Rohini, New Delhi
(APPELLANT)		(RESPONDENT)
PAN No. AAGCS5773B		

Assessee by : Sh. Ashwani Kumar, CA

Revenue by : Sh. S. S. Rana, CIT DR

Date of Hearing : 10.01.2018

Date of Pronouncement : 27.02.2018

ORDER

Per N. K. Saini, AM:

These two appeals by the department are directed against the separate orders each dated 31.05.2016 of Id. CIT(A)-29, New Delhi.

2. Since, the issues involved in these appeals are common and the appeals were heard together so these are being disposed off by this consolidated order for the sake of convenience and brevity.

3. First we will deal with the appeal in ITA No. 4593/Del/2016 for the assessment year 2007-08. Following grounds have been raised in this appeal:

“1. On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in law in deleting the additions made by the AO on account of undisclosed income by relying on the decision of Hon’ble Delhi

High Court in the case of Kabul Chawla Vs CIT(Central)-3 and holding that the satisfaction note recorded by the AO is not able to explain how much seized material is incriminating in nature and how such documents lead to disclose of any income of the appellant.

2. That the order of the CIT(A) is perverse, erroneous and is not tenable on facts and in law.

3. That the grounds of appeal are without prejudice to each other.

4. That the appellant carves leave to add, amend, later or forgo any grounds of appeal either before or at the time of hearing of the appeal.”

4. From the above grounds, it is gathered that only grievance of the department relates to the deletion of addition made by the AO on account of undisclosed income in the absence of any incriminating material found during the course of search by relying the decision of Honøble Delhi High Court in the case of Kabul Chawla Vs CIT.

5. Facts of the case in brief are that the assessee filed the original return of income on 30.10.2007 declaring an income of Rs.8,08,76,320/- which was processed u/s 143(1) of the Income Tax Act, 1961 (hereinafter referred to as the Act). Later on, the assessment was completed u/s 143(3) of the Act on 08.12.2009 at the returned income of Rs.8,08,76,320/-. Subsequently, the assessment was reopened by issuing the notice u/s 148 of the Act and again the assessment was completed u/s 147/143(3) of the Act at the returned income of Rs.8,08,76,320/-. Later on, a search and

seizure operation u/s 132 of the Act was carried out on 10.12.2012 in the case of the assessee and the premises of the assessee were covered. Consequently, a notice u/s 153A of the Act was issued on 10.10.2013 and served upon the assessee. In response, the assessee filed the return of income on 10.05.2014 declaring the same income of Rs.8,08,76,322/- which was declared in the original return of income u/s 139 of the Act and assessed u/s 143(3) & 147/143(3) of the Act. However, the AO made the addition of Rs.2,50,00,000/- u/s 68 of the Act.

6. Being aggrieved the assessee carried the matter to the Id. CIT(A) and submitted that the assessment was completed before the date of search and the addition was not based on any incriminating material found during the course of search and that the statement of the persons recorded by the Investigation Wing regarding bogus transaction of the shares had not been provided during the assessment proceedings. The Id. CIT(A) vide letter dated 24.04.2016 asked the AO to inform the followings:

“(i) The date of receipt of investigation report and the relevant portion of the same with regard to the additions made.

(ii) Is there any documents found/seized or unexplained investment etc. discovered or any admission made by the appellant during the course of search proceeding in its case, based on which this addition has been made.

(iii) The reason for reopening the assessment under section 148 of the Act for the AY 2007-08, as it is found that no additions have been made in the order under section 148/147 of the Act.

(iv) Copy of Panchnama for search in the case of the appellant, showing any such incriminating material etc., based on which the addition has been made....."

7. In response, the AO vide letter dated 16.03.2016 stated as under:

".....Reply to query no.1: The information about the accommodation entries taken by M/s SP Singla Construction P. Ltd. was received from ACIT, Circle-22(1), New Delhi vide letter dated ACIT/Circle-22(1)/2014-15/162 dated 10.03.2015 which they received the said information from DCIT, Circle-24(1). Thus the findings of the investigation wing was conveyed to the AO vide above letter though the investigation report was not enclosed.

Reply to query no.2: The addition was not made only on the basis of report received from ACIT, Circle 22(1). Though no documents was found/seized nor there was any admission by the assessee during the course of search but addition was made as the assessee failed to establish the identity and creditworthiness and genuineness of the share capital/premium.

Reply to query no.3: The reason for reopening the assessment under section 148 of the IT Act for the AY 2007-08 and assessment order are enclosed.

Reply to query no.4: As no addition was made on the basis of any incriminating document found during the search, hence reply to this query may kindly be treated as NIL.

2. In addition to the above, it is submitted that with respect of addition made under section 68 of the IT Act in this case, the assessee vide order sheet entry dated 16.03.2015 was asked as to why the amount of share capital/premium should not be added under section 68 of the IT Act to the income of the assessee. In response

to the said notice, the assessee vide letter dated 19.03.2015 submitted its reply. Therefore, vide this office letter 25.03.2015 the assessee was informed about the same.

3. Perusal of the reply filed by the assessee was not found satisfactorily as mentioned in the assessment order and addition under section 68 of the IT Act was made in the income of the assessee. Addition was not made on the basis of investigation report. It was made by the AO as the assessee was not able to establish identity and creditworthiness of share applicants and genuineness of the transaction....”

8. The Id. CIT(A) provide the said report of the AO to the assessee who in its reply submitted as under:

“.....(1) At the outset the submissions made vide letter dated 16.02.2016 and 24.02.2016 before your Honour are again being reiterated.

(2) Further a review of the Remand Report would reveal that the Learned Assessing Officer has himself admitted that the additions have not been made on the basis of any seized/incriminating documents found during the course of search. The Ld. Assessing Officer has vide reply to query No. 4 had duly affirmed the fact that no documents was found/seized in this regard during the course of search. It may also be mentioned here that the assessment proceedings for the year under appeal had already been completed vide order dated 08-12-2008 passed u/s 143(3) of the Act by the Ld Addition Commissioner of Income-tax Range-7, New Delhi and subsequently vide order dated 03.12.2012 passed u/s 143(3)/147 of the Act by the Ld Deputy Commissioner of Income-tax, Circle 7(1), New Delhi.

(3) In view of the said fact it is submitted that since there is no cause for the issue of notice u/s 153A of the

Act, the notice issued is void ab initio and the consequent assessment made non-est and bad in law.

(4) In this connection reliance is also placed on the following decisions, including those of the jurisdictional High Court, wherein the above position of law has been clearly affirmed:

- *Commissioner of Income-tax vs Anil Kumar Bhatia [(2013) 352 ITR 493 (Delhi)];*
- *Commissioner of Income-tax vs Chetan Das Lachman Das [(2012) 254 CTR 392 (Del)];*
- *Sanjay Aggarwal vs Deputy Commissioner of Income tax, Central Circle -5, New Delhi [(2014) 150 ITD 692 (Delhi-Trib)];*
- *Smt. Rashmi Wadhwa vs. DCIT, Central Circle-8, New Delhi [order dated 18.01.2016 in ITA No. 5184/Del/2014 passed by the Hon'ble ITAT Delhi Bench', New Delhi;*
- *M/s Siriago Pharma (P) Ltd. vs. DCIT, Central Circle-3, Jaipur [order dated 13.01.2016 in ITA No. 1010/JPI/2013 passed by the Honble ITAT Jaipur Bench, Jaipur;*
- *Dy. Commissioner of Income Tax, Central Circle 23 us. Sh. Himanshu B. Kanakia [order dated 18.01.2016 in ITA No. 3187/Mum/2014 passed by the Honble ITAT "H" Bench, Mumbai*
- *Commissioner of Income-Tax (Central) -III vs. Kabul Chawla [(2016) 380 ITR 573 (Delhi)].....”*

9. The Id. CIT(A) after considering the submissions of the assessee deleted the addition made by the AO and the relevant findings have been given in paras 8 & 9 as under:

“8. Facts emerging in this case are that the appellant submitted original return of income declaring total income of Rs.8,08,76,320/- on 30.10.2007. The same was selected for scrutiny and assessment completed under section 143(3) of the Act on 08.02.2009, at the returned income and no additions made. The

assessment was reopened by issuance of notice under section 148 of the Act, as there was a survey conducted in the premises of the appellant on 24/25.02.2010. The same was finalized vide order under section 147/143(3) of the Act on 03.12.2012 on the returned income and no additions made. A search under section 132 of the Act was carried out on 10.12.2012, in the case of the appellant. Accordingly, notice under section 153A of the Act was issued on 10.10.2013 to submit return of income. The appellant submitted its return on 10.05.2014 declaring income at Rs.8,08,76,320/-, which is same as declared earlier and assessed. It is observed from the above that on the date of search i.e.10.12.2012, the assessment was completed and no proceedings were pending and hence there is no abatement of assessment proceedings.

8.1 The appellant company is stated to have been engaged in the business of civil contractor. During assessment proceedings, appellant raised objection against the issuance of notice under section 153A, however the AO disposed off the same, as discussed elaborately in the assessment order stating that assessment proceedings are correctly initiated.

8.2 During the assessment proceedings under section 153A, it was observed by the AO that the appellant has received share capital /premium from various companies as follows:

S No.	Name	Amount of Share Application	Amount of Share of premium	Total amount invested
1.	<i>M/s Campari Fiscals Services (P) Ltd</i>	5,00,000	45,00,000	50,00,000
2.	<i>M/s Countrywise Credit and Securities Pvt. Ltd</i>	5,00,000	45,00,000	50,00,000
3.	<i>Taurus Iron & Steel Pvt. Ltd</i>	5,00,000	45,00,000	50,00,000
4.	<i>M/s Tajasvi Investment (P) Ltd</i>	5,00,000	45,00,000	50,00,000

5.	M/s Thar Steel (P) Ltd	5,00,000	45,00,000	50,00,000
	TOTAL	25,00,000	2,25,00,000	2,50,00,000

8.3 Accordingly, vide questionnaire dated 11.11.2014, appellant was asked to furnish details of share holder to establish their identity, creditworthiness and genuineness. The appellant submitted details of share holders showing name and address, number of shares, face value, premium and total amount etc.

8.4 In the meanwhile an information received by the AO from investigation wing which transpires that the appellant has taken accommodation entries from various parties in the form of share capital, based on the search action carried out in the case of one Mr. Tarun Goel, who is alleged to be an entry operator and the appellant was shown as actual beneficiary of those accommodation entries. It was replied by the appellant that the assessment was completed earlier under section 143(3) of the Act and due to the passage of time appellant is not able to locate further details pertaining to the said transactions and certain records are not traceable or lost.

8.5 The reply was not found satisfactory and looking to the information received and in the absence of any proper justification/details it was concluded that the appellant has not discharged its onus to prove the identity, creditworthiness and genuineness of the transaction and hence additions have been made as unexplained cash credit, by invoking the provisions of section 68 of the Act.

8.6 As mentioned earlier, on the date of search, no proceedings were pending in this case. Further it is clearly brought out by the AO in her report that addition was not made on the basis of any incriminating document/material found during the course of search. This fact is also emanating from the assessment order. Therefore the facts of this case are

similar to that of various cases relied upon by the appellant, including the case of M/s Kabul Chawla 380 ITR 573 (Delhi).

8.7 However before preceding further, it is expedient to examine the issue related to the investigation report as mentioned in the assessment order. One of the basis of addition was the information received from the Investigation Wing with respect to the search carried out in case of one Mr. Tarun Goel, wherein it was alleged that through various bogus companies these share capital has been taken as Hawala entry by the appellant. As per the report of AO and the documents furnished, following sequence of events emerged:-

- (a) DCIT Circle-24(1), New Delhi sent a letter dated 09.03.2015 to the DCIT Circle 22(1), New Delhi mentioning that an information has been received from Addl. DIT (Investigation) Unit-IV, Delhi wherein a list of companies has been provided who have taken accommodation entries from Tarun Goel group during FY 2007-08 relevant to AY 2008-09. In this list the name of appellant company was mentioned and since jurisdiction of the appellant company was vested with DCIT-22(1), the list was sent for necessary action. However, no report of Addl. DIT, nor any statement of Mr. Tarun Goel or the said list has been brought on record.*
- (b) ACIT Circle 22(1), Delhi vide his letter dated 10.03,2015 sent the same information to the DCIT Central Circle -26, New Delhi for necessary action as the case was transferred to the DCIT Central Circle -26.*
- (c) The DCIT Central Circle-26, based on such letter have made additions, without having and going through the report of Addl. DIT or any statement of Mr. Tarun Goel. Obviously no opportunity was*

provided to the appellant by providing such report to defend its case. The addition has been made without having such report or statement in his possession and cannot be considered as sufficient basis.

8.8 It is clearly mentioned by the present AO that no investigation report was enclosed, thus not received in this charge. It was also mentioned that the addition was not made only on the basis of report but also due to the failure of the appellant to discharge its onus to prove the identity, creditworthiness and genuineness of the transaction.

8.9 In this regard, it is to be mentioned that the assessment was already completed twice, earlier and no such addition has been called for and the share capital received during the year has been duly accepted. Here it is pertinent to mention that appellant have stated in his submission as reproduced earlier that Hon'ble ITAT, Chandigarh in the case of M/s AP Refinery P. Ltd. (Supra) has deleted the addition on the identical grounds, where addition was made pursuant to the search carried out on Sh. Tarun Goel and money had been received from the same companies alleged to be a bogus entry transaction. It is also observed that the AO has categorically mentioned that addition was not made on the basis of investigation report. Thus, it is a case of re-examination of the share capital received by the appellant during the year, independently and afresh, which has no bearing to the search proceedings or any incriminating material found during the course of search. Accordingly, the legality of the addition needs to be decided in view of the judgment by Hon'ble Delhi High Court as pronounced in various cases including the cases of Kabul Chawla (supra).

8.10 As evident, neither any proceedings were pending nor abated on the date of search nor additions are made on the basis of any incriminating material, information or unexplained investment, cash etc., found during search, therefore the ratio laid down in the case law

relied upon by the appellant, especially the judgment of jurisdictional High Court in the case of CIT vs. Kabul Chawla (Supra) is applicable in the case of appellant. Here it is pertinent to mention that in the case of Raj Kumar Arora (2014) 52 Taxmann.com 172 (Allahabad), the Hon'ble Allahabad High Court had held that when an assessment has been initiated under section 153A of the Act, then the AO has jurisdiction and powers to take up the issues, which are not only related to or based on search proceedings but also with regard to material that was available at the time of original assessment. There is no bar or nothing in this regard has been mentioned in the statute that AO has to only confine with the documents or material found and seized during the search proceedings.

8.3 However, the jurisdictional high court has laid down the ratio in the case of Kabul Chawla (Supra) that in a completed proceedings, the AO can only disturb/interfere with the income of the appellant where it is based on any incriminating material found and seized during the course of search. Since, the facts of this case is similar to that and the ratio laid down is applicable in the case of the appellant and being the decision of Hon'ble Delhi High Court, which is binding in nature, respectfully following the same, it is held that the additions made are not called for and deserves to be deleted. Here it is to be pointed out that since it is mandatory to initiate proceedings under section 153A of the Act, the proceedings initiated under section 153A by the AO are in accordance with law, however the additions are not called for as mentioned earlier. Accordingly, the AO is directed to delete the addition amounting to Rs.2,50,00,000/- as unexplained cash credit. The appellant gets a total relief of Rs.2,50,00,000/-.

9. Since, the issue has been decided on the legal grounds regarding jurisdiction of AO to make such additions under section 153A of the Act and the addition has not been sustained, the 2nd ground of appeal relating to the merit of this case has become infructuous, though the

appellant has made detailed submission disputing the additions made.”

10. Now the department is in appeal. During the course of hearing, the ld. CIT DR reiterated the observation made by the AO in the assessment order dated 31.03.2015 and the remand report dated 16.03.2016 and submitted that the AO has power to reassess the income of the assessee not only for undisclosed income found during the course of search operation but also with regard to the material that was available at the time of original assessment. The reliance was placed on the judgment of the Allahabad High Court in the case of CIT(Central), Kanpur Vs Raj Kumar Arora (2014) 52 Taxmann.com 172.

11. In his rival submission, the ld. Counsel for the assessee reiterated the submissions made before the authorities below and further submitted that the additions u/s 153A r.w.s. 143(3) of the Act had been made by the AO even when no incriminating material was found during the course of search. A reference was made to paras 6.3 & 6.4 of the impugned order. Reliance was placed on the judgment of the Honøble Jurisdictional High Court in the case of CIT Vs Kabul Chawla (2016) 380 ITR 573.

12. We have considered the submissions of both the parties and carefully gone through the material available on the record. In the present case, it is an admitted fact that the original assessment was framed by the AO vide order dated 08.12.2009 u/s 143(3) of the Act, thereafter, the case was reopened and the assessment was

framed u/s 147/143(3) of the Act vide order dated 03.12.2012. After it, a search and seizure operation u/s 132 of the Act was carried out on 10.12.2012. During the course of search, no incriminating material was found and the AO made the addition on account of increase in share capital which was recorded in the books of accounts. The assessee had taken a plea before the Id. CIT(A) that the assessment was completed before the date of search and the addition was not based on any incriminating material found during the course of search. The Id. CIT(A) specifically asked the remand report of the AO on the aforesaid contention of the assessee. In response, the AO in his remand report dated 16.03.2016 admitted that though no documents were found/seized nor there was any admission by the assessee during the course of search but the addition was made as the assessee failed to establish the identity, creditworthiness and genuineness of the share capital/premium. From the above observation of the AO, it is crystal clear that no incriminating material was found during the course of search relating to the impugned addition.

13. On a similar issue the Hon^{ble} Jurisdictional High Court in the case of CIT Vs Kabul Chawala (2016) 380 ITR 573 (Del.) held as under:

"The legal position that emerges on a perusal of section 153A and section 132 of the Income-tax Act, 1961, is as under : (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 in respect of whom search was conducted requiring him to file returns for six assessment years immediately preceding the previous year relevant to the assessment year in which the search takes

place, (ii) Assessments and reassessments pending on the date of the search shall abate. The total income for such assessment years will have to be computed by the Assessing Officers as afresh exercise. (Hi) The Assessing Officer will exercise normal assessment powers in respect of the six years previous to the relevant assessment year in which the search takes place. The Assessing Officer has the power to assess and reassess the "total income" of the 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 assessment years in which both the disclosed and the undisclosed income would be brought to tax. (iv) Although section 153A 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 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. Obviously, an assessment has to be made under this section only on the basis of the seized material (v) In the 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 153A is relatable to abated proceedings (i.e., those pending on the date of search) and the word "reassess" to completed assessment proceedings, (vi) In so far 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 assessment year on the basis of the findings of the search and any other material existing or brought on the record of the Assessing Officer, (vii) Completed assessments can be interfered with by the Assessing Officer 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."

It has further been held that

“On the date of the search the assessments already stood completed. Since no incriminating material was unearthed during the search, no additions could have been made to the income already assessed.”

14. We, therefore, by keeping in view the ratio laid down by the Hon~~o~~ble Jurisdictional High Court, do not see any valid ground to interfere with the findings given by the Id. CIT(A).

15. In ITA No. 4594/Del/2016 for the assessment year 20091-10, the facts are identical as were involved in ITA No. 4593/Del/2016 for the assessment year 2007-08. Therefore, our findings given in the former part of this order shall apply *mutatis mutandis*.

16. In the result, the appeals of the department are dismissed.

(Order Pronounced in the Court on 27/02/2018)

Sd/-

(Bhavnesb Saini)

JUDICIAL MEMBER

Sd/-

(N. K. Saini)

ACCOUNTANT MEMBER

Dated: 27/02/2018

Subodh

Copy forwarded to:

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2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR