IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES : B : NEW DELHI

BEFORE SHRI R.S. SYAL, VICE PRESIDENT
AND
SHRI K. NARASIMHA CHARY, JUDICIAL MEMBER

ITA No.2051/Del/2016
Assessment Year : 2007-08

DCIT, Central Circle-30, New Delhi.	Vs.	M/s Saluja Construction Co. Ltd., 30, Commercial Community Centre, 1st Floor, Basant Lok, Vasant Vihar, New Delhi – 110057. PAN: AABCS3788H

ITA Nos.2052 & 2053/Del/2016
Assessment Year : 2006-07 & 2007-08

DCIT, Central Circle-30, New Delhi.	Vs	Shri Vinod Saluja, 9A, Jeevan Jyoti Farm, The Green Rajkori, New Delhi. PAN: BEIPS9920L
(Appellant)		(Respondent)

Assessee By	:	Shri R.S. Ahuja, CA
Department By	:	Ms Rachna Singh, CIT, DR

Date of Hearing : 04.07.2018
Date of Pronouncement : 05.07.2018

ORDER

PER R.S. SYAL, VP:

This batch of three appeals by the Revenue comprises of one appeal in the case of Saluja Construction Company Ltd. for the assessment year 2007-08 and two appeals in the case of Sh. Vinod Saluja for the assessment years 2006-07 and 2007-08. The Revenue has assailed the legal tenability of the impugned orders passed by the ld. CIT(A) on 25.01.2016. Since all these appeals are based on similar facts and identical grounds, we are, therefore, proceeding to dispose them off by this consolidated order for the sake of convenience.

2. Briefly stated, the facts concerning the appeal in the case of Saluja Construction Company Ltd. are that a search and seizure action u/s 132(4) of the Income-tax Act, 1961 (hereinafter also called 'the Act') was taken up on 12.02.2012. The assessee was called upon to file return u/s 153A of the Act, which was furnished with the originally declared income of Rs.47,93,380/- as against the income assessed u/s 143(3) at Rs.50,33,380/-. During the course of assessment proceedings, the Assessing Officer found

that the assessee had shown to have taken unsecured loans from different persons/parties. In order to ascertain their identity and capacity, the Assessing Officer required the assessee to produce such persons. The assessee could produce only three parties. Invoking the provisions of section 68, the Assessing Officer held that the assessee had failed to prove the three limbs of section 68, namely, identity, capacity and genuineness of the transactions. He, therefore, made an addition of Rs.24,39,70,000/- to the originally assessed income at Rs.50,33,380/-. The assessee carried the matter to the learned first appellate authority. A remand report was called for from the Assessing Officer. After considering the relevant material, the ld. CIT(A) deleted the addition by observing that no incriminating material was found during the course of search. The Revenue has approached the Tribunal against such deletion of addition.

3. We have heard both the sides and perused the relevant material on record. It is seen that the search was conducted u/s 132 of the Act on 12.02.2012. The assessment year under consideration is 2007-08. Obviously, neither any assessment was pending at the time of search nor time was available for making assessment. In fact, the assessment in this

case stood completed earlier u/s 143(3) of the Act determining total income at Rs.50.33 lac. In such circumstances, the assessment for the year under consideration cannot be construed as that of an `abated assessment'.

4. The ld. CIT(A) has relied on the judgment of the Hon'ble jurisdictional High Court in the case of *Kabul Chawla vs. CIT (2016) 380 ITR 573 (Del)* to delete the addition. The factual matrix of the case is that a search was carried out u/s 132 on 15.11.2007 on BPTP Ltd., a leading real estate developer operating all over India and some of its group companies including the premises of the assessee, who owned and controlled the group. No assessment proceedings were pending for the assessment years 2002-03, 2005-06 and 2006-07 as on the date of the search. The assessments for such assessments years had already been made u/s 143(1) of the Act. The assessee filed returns for the three assessment years declaring certain income. The assessments were completed u/s 153A for the concerned assessment years making additions, *inter alia*, on account of low household withdrawals and deemed deduction u/s 2(22)(e) of the Act. It was submitted before the ld. CIT(A) that no evidence was found during the course of search so as to warrant an addition u/s 2(22)(e) of the Act.

The ld. CIT(A) held that the additions need not be restricted only to the seized material. The Tribunal concluded that: 'If some incriminating material is found in respect of such assessment years for which the assessment is not pending, then, the total income would be determined by considering the originally determined income plus income emanating from the incriminating material found during the course of search'. That is how, the additions made u/s 2(22)(e), which were not based on any incriminating material found during the course of search, were held to be unsustainable in law and, hence, deleted. The Hon'ble High Court approved the view taken by the Tribunal. It summarized the legal position in para 37 of its judgment as under :-

> `On a conspectus of Section 153A(1) of the Act, read with the provisos thereto, and in the light of the law explained in the aforementioned decisions, the legal position that emerges is as under:
> i. Once a search takes place under Section 132 of the Act, notice under Section 153 A (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 153 A 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.'

5. It is evident from the *ratio* of the above judgment that once a search takes place u/s 132 of the Act, the assessee is obliged to file returns for the six assessment years immediately preceding the previous year relevant to the assessment year in which the search took place. In so far as the

completed assessments as on the date of the search are concerned, the same are to be repeated as increased by additions, only if, based on incriminating material found during the course of search. In other words, if no incriminating material is found during the course of search, then, the amount of total income determined under the earlier completed assessments is to be adopted in a fresh assessments u/s 153A without making any further addition.

6. Adverting to the facts of the instant case, we find that the assessment year 2007-08 under consideration falls in the category of `completed assessments'. It is an admitted position that no incriminating material was found during the course of search concerning the addition made u/s 68 of the Act. In that view of the matter, the assessment cannot embrace any fresh disallowance otherwise than that supported by any incriminating material found during the course of search. In such a situation, the originally determined income has to be repeated in the assessment u/s 153A of the Act.

7. The ld. DR controverted the finding returned by the ld.CIT(A) that no incriminating material was found during the course of search by referring to the remand report dated 14.12.2015 submitted by the Assessing Officer which has been incorporated on page 16 of the impugned order. She harped on the observations contained in such remand report : "In this connection it is submitted that during the search dated 12.01.2012, on the basis of seized documents (page 101, Annexure A-22) the assessee group made disclosure of additional income on account of undisclosed loans/advances." In our considered opinion, this contention does not take the case of the Revenue any further. What has been written by the Assessing Officer in the remand report is that there were certain undisclosed loans and advances for which the assessee group made disclosure of additional income. This exhibits that the assessee group voluntarily made disclosure of certain undisclosed loans/advances and offered additional income to that extent. It implies that the creditors which have been instantly added u/s 68 of the Act do not form part of the undisclosed loans/advances which were surrendered by the assessee group for which some incriminating material was found. Be that as it may, it is

apparent from the assessment order itself, as has been candidly admitted by the ld. DR as well, that there is no reference to any incriminating material in the assessment order *qua* these creditors/advances in respect of which addition of Rs.24.39 crore was made. Respectfully following the judgment of the Hon'ble jurisdictional High Court in *Kabul Chawla (supra),* we hold that the ld. CIT(A) was justified in deleting the addition of Rs.24.93 crore and odd.

8. In so far as the appeals of the other assessee, namely, Shri Vinod Saluja for the assessment years 2006-07 and 2007-08 are concerned, it is found that the additions were made on the same pattern u/s 68 of the Act to the tune of Rs.12.98 crore and Rs.3.75 crore for the assessment years 2006-07 and 2007-08 respectively. The ld. CIT(A) deleted such additions by relying on the judgment delivered in the case of *Kabul Chawla (supra)* after noting that no incriminating material was found during the course of search *qua* these credits.

9. Both the sides are in agreement that the facts and circumstances of these two appeals are *mutatis mutandis* similar to those of Saluja

Construction Co. Ltd. (ITA No.2051/Del/2016), which we have disposed of hereinabove. Following such view, it is held that the ld. CIT(A) was justified in deleting the additions. We, therefore, countenance the impugned orders.

10. In the result, all the appeals stand dismissed.

The order pronounced in the open court on 05.07.2018.

Sd/-	Sd/-
[K. NARASIMHA CHARY] JUDICIAL MEMBER	[R.S. SYAL] VICE PRESIDENT

Dated, 05th July, 2018.

dk

Copy forwarded to:

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

AR, ITAT, NEW DELHI.