

आयकर अपीलिय अधीकरण, न्यायपीठ – “C” कोलकाता,
*IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH “C” KOLKATA*

Before **Shri S.S.Godara, Judicial Member** and
Shri, M. Balaganesh, Accountant Member

ITA No.1994/Kol/2018
Assessment Year :2012-13

Smt. Nita Sethia 5, Janki Shah Road, 1 st Floor, Hastings, Kolkata-700022 [PAN No.AJWPS 8335 H]	V/s.	DCIT, Central Circle- 3(3), 110, Shanti Pally, Aayakar Bhavan, Poorva, E.M. Bye Pass, Nr. Ruby Hospital, Kolkata-107
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

अपीलार्थी की ओर से/By Appellant	Shri S.M. Surana, Advocate
प्रत्यर्थी की ओर से/By Respondent	Shri P.K. Srihari, CIT-DR
सुनवाई की तारीख/Date of Hearing	12-11-2018
घोषणा की तारीख/Date of Pronouncement	30-11-2018

आदेश /ORDER

PER S.S.Godara, Judicial Member:-

This assessee's appeal for the assessment year 2012-13 arises against Commissioner of Income Tax (Appeals)-21, Kolkata's order dated 31.08.2018 passed in case No.930/ACIT,CC-3(3)/CIT(A)-21/KOL/2015-16, involving proceedings u/s 153A r.w.s.143(3) of the Income Tax Act, 1961; in short 'the Act'.

Heard both the parties. Case file perused.

2. The assessee raises two substantive grounds in her instant appeal. Her former legal grievance challenges validity of sec. 153A proceedings in absence of any incriminating material found or seized during the course of search. This follows her latter substantive ground on merits that the Assessing Officer and the CIT(A) have erred in law as well as on facts in treating Long

Term Capital Gains (LTCG) in question of ₹61,62,460/- from sale of shares in M/s Dignity Suppliers P Ltd. as bogus giving rise to sec. 68 addition in issue.

3. This assessee is assessed as an individual. She filed her regular return on 30.07.2012. The same stood summarily processed. There can hardly be any dispute that the last date of issuance of u/s 143(2) of notice in her case was 30.09.2013 i.e. within six months from the end of the financial year of filing return. This followed the department's search action in her case on 19.03.2014. The Assessing Officer initiated sec. 153A proceedings vide notice(s) dated 7.14/09/2015. The assessee filed her response that the dated 28.08.2015 that her original return (supra) stating income of ₹8,23,163/- be treated as the one filed in furtherance to sec 153A proceeding. She further objected to the impugned proceeding for lack of any incriminating material found or seized during the course of search conducted in her case. The Assessing Officer rejected the same quoting hon'ble Delhi high court's decision in *CIT vs. Anil Kumar Bhatia* (2012) 24 taxmann.com 98 (Del). He held that it is not mandatory to assess or reassess any undisclosed income in sec. 153 proceedings since the same are meant to assess or reassess an assessee's total income. He thereafter treated the assessee's impugned LTCG to be bogus in the nature of unexplained cash credits in assessment order dated 10.03.2016.

4. The assessee preferred an appeal same very twin substantive grounds. The CIT(A) holds that Assessing Officer has sufficiently dealt with both the issues. He has therefore affirmed Assessing Officer's findings. All this leaves the assessee aggrieved.

5. We have heard both the learned representatives reiterating their respective stands against and in support of lower authorities' action initiating sec. 153A proceedings. First and foremost question that arises for our apt adjudication is as to whether sec. 153A proceedings could be initiated against the assessee in absence of any incriminating material found or seized during the course of search. The Revenue's case as per assessment findings is that sec. 153A is meant to assess or reassess in assessee's total income rather

than only undisclosed income. It seeks to highlight the fact that assessee's LTCGs have indicated a collusion with various entry operators providing bogus entries in the nature of LTCG. There is no such specific material forthcoming from the case file during the course of hearing. It is therefore a case wherein the Assessing Officer is himself very clear that no such incriminating material or evidence found or seized during the course of search is required for initiating the impugned proceedings. We find no merit in Revenue's instant arguments. This tribunal co-ordinate bench's decision in **IT(SS)A No. 01 & 02/Kol/2018** in M/s Sethia Fiscal Pvt. Ltd. vs. ACIT, CC-3(3) Kol decided on 05.10.2018 reads as under:-

"5. We also notice that the CIT(A)'s findings extracted in preceding paragraphs have made it clear that the said seized documents were not in the nature of incriminating material which could be used against the instant taxpayer. We make it clear that the assessee's stand time and again in furtherance to sec. 153C notice has disputed the said documents' nature to be incriminating as per copies of necessary correspondence in this regard dated 14.10.2015, 13.11.2015 & 04.03.2016 filed in paper book at pages 93 to 126. It is therefore clear that both the lower authorities have framed impugned assessment in the absence of any incriminating materials found or seized during the course of search in issue. This tribunal's co-ordinate bench's decision in ACIT vs. M/s Sethia Agrotech Ltd. **IT(SS)A No.91/Kol/2017** decided on 01.12.2017 pertaining to the very search has quashed similar assessments to be unsustainable as under:-

"8. We have heard the rival submissions. We find it would be necessary to address the preliminary issue of whether the addition could be framed u/s 153A of the Act in respect of a concluded proceeding without the existence of any incriminating materials found in the course of search. The scheme of the act provides for abatement of pending proceedings as on the date of search. It is not in dispute that the assessment for the Asst Year 2010-11 was originally completed u/s 143(1) of the Act and the time limit for issuance of notice u/s 143(2) of the Act had expired and hence it falls under concluded proceeding, as on the date of search. We hold that the legislature does not differentiate whether the assessments originally were framed u/s 143(1) or 143(3) or 147 of the Act. Hence unless there is any incriminating material found during the course of search relating to such concluded year, the statute does not confer any power on the Id AO to disturb the findings given thereon and income determined thereon, as finality had already been reached thereon, and such proceeding was not pending on the date of search to get itself abated. The provisions of section 153A of the Act are reproduced hereunder for the sake of convenience:-

"[Assessment in case of search or requisition

153A. [(1)] Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, in the case of a person where a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A after the 31st day of May, 2003, the Assessing Officer shall—

- (a) issue notice to such person requiring him to furnish within such period, as may be specified in the notice, the return of income in respect of each assessment year falling within six assessment years referred to in clause (b), in the prescribed form

and verified in the prescribed manner and setting forth such other particulars as may be prescribed and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139;

- (b) assess or reassess the total income of six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made :

Provided that the Assessing Officer shall assess or reassess the total income in respect of each assessment year falling within such six assessment years:"

8.1. We find that the Co-ordinate Bench of Delhi Tribunal in the case of *Dy. CIT v. Aggarwal Entertainment (P.) Ltd* reported in [\[2016\] 72 taxmann.com 340 \(Delhi - Trib.\)](#) had addressed this aspect. The relevant headnotes is reproduced below:-

"Section 153A, read with section 143, of the Income-tax Act, 1961-Search and seizure - Assessment in case of (in case of section 143(1) assessment)-Assessment year 2004-05- Whether assessment in respect of which return has been processed under section 143(1), cannot be regarded as pending for purpose of section 153A as Assessing Officer is not required to do anything further about such a return and, thus, said assessment cannot be reopened in exercise of power of section 153A-Held yes (Paras 10 and 12) (In favour of assessee)."

8.2. We find that the Co-ordinate Bench of this tribunal in the case of *ACIT vs Kanchan Oil Industries Ltd* in **ITA No. 725/Kol/2011** dated 9.12.2015 reported in 2016-TIOL-167-ITAT-KOL had explained the aforesaid provisions as below:-

"6.4 In our opinion, the scheme of assessment proceedings should be understood in the following manner pursuant to the search conducted u/s. 132 of the Act :-

- (a) Notice u/s. 153A of the Act would be issued on the person on whom the warrant of authorization u/s. 132 of the Act was issued for the six assessment years preceding the year of search and assessments thereon would be completed u/s. 153A of the Act for those six assessment years.
- (b) In respect of the year of search, notice u/s. 143(2) of the Act would be issued and assessment thereon would be completed u/s. 143(3) of the Act.
- (c) In respect of concluded assessments prior to the year of search, no addition could be made in the relevant assessment year unless any incriminating material is found during the course of search with respect to the relevant assessment year.
- (d) Pursuant to the search u/s. 132 of the Act, the pending proceedings would get abated. In respect of abated assessments, the total income needs to be determined afresh in accordance with the provisions of section 153A and other provisions of the Act.

6.4.1 The concluded assessments for the purpose of section 153A of the Act shall be -

- (i) assessment years where assessments are already completed u/s. 143(1) and time limit for issuance of notice u/s. 143(2) of the Act has expired or;
- (ii) assessment years where assessments are already completed u/s. 143(3) of the Act ;

unless they are reopened u/s. 147 of the Act for some other purpose in both the scenarios stated above.

6.4.2 The scheme of assessment proceedings contemplated u/s. 153A of the Act are totally different and distinct from the proceedings contemplated u/s. 147 of the Act and

these procedures of assessment operate in different fields and have different purposes to be fulfilled altogether.

6.4.3 The expression 'assess or reassess' stated in section 153A(1)(b) has to be understood as below:-

'**assess**' means assessments to be framed in respect of abated assessment years irrespective of the fact whether there are any incriminating materials found during the course of search with respect to relevant assessment years ;

'**reassess**' means assessments to be framed in respect of concluded assessment years where incriminating materials were found during the course of search in respect of the relevant assessment year."

8.3. We also find that recently the Hon'ble Delhi High Court in the case of CIT vs Kabul Chawla reported in (2016) 380 ITR 573 (Del) held as under:-

37. 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 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 LD AOs as a fresh exercise.
- (iii) The LD AO will exercise normal assessment powers in respect of the six years previous to the relevant AY in which the search takes place. The LD 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 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 LD 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 complete 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 LD AO.
- (vii) Completed assessments can be interfered with by the LD 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."

38. The present appeals concern AYs 2002-03, 2005-06 and 2006-07, on the date of the search the said assessments already stood completed. Since no incriminating

material was unearthed during the search, no additions could have been made to the income already assessed.

8.4. We find that the decision relied upon by the Id DR in the case of CIT vs Anil Kumar Bhatia reported in (2013) 352 ITR 493 (Del) does not in any manner advance the case of the revenue as admittedly the Hon'ble Delhi High Court in para 24 of its order had held as under:-

“24. 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 in such a situation. That question is therefore left open.”

8.5. The Id DR also relied on the recent decision of the Hon'ble Kerala High Court in the case of E.N.Gopakumar vs CIT reported in (2016) 75 taxmann.com 215 (Kerala) in support of his contentions. We find that the decision of Hon'ble Delhi High Court in the case of CIT vs Kabul Chawla reported in (2016) 380 ITR 573 (Del) had duly considered the decisions of CIT vs Anil Kumar Bhatia reported in (2013) 352 ITR 493 (Del) ; CIT vs Chetan Das Lachman Das reported in (2012) 211 Taxman 61 (Del HC) ; Madugula Venu vs DIT reported in (2013) 215 Taxman 298 (Del HC) ; Canara Housing Development Co. vs DCIT reported in (2014) 49 taxmann.com 98 (Kar HC) ; Filatex India Ltd vs CIT reported in (2014) 229 Taxman 555 (Del HC) ; Jai Steel (India) vs ACIT reported in (2013) 219 Taxman 223 (Del HC) ; CIT vs Murlji Agro Products Ltd reported in (2014) 49 taxmann.com 172 (Bom HC) ; CIT vs Continental Warehousing Corporation (Nhava Sheva) Ltd reported in (2015) 374 ITR 645 (Bom HC) and All Cargo Global Logistics Ltd vs DCIT reported in (2012) 137 ITD 287 (Mum ITAT) (SB).

We also find that against the decision of the Hon'ble Delhi High Court in 380 ITR 573 (Del) , the revenue preferred Special Leave Petition before the Hon'ble Supreme Court and the same was dismissed by the apex court which is reported in 380 ITR (St.) 4 (SC). Hence it could be safely concluded that the decision of Hon'ble Delhi HC in the case of Kabul Chawla supra would have to be considered on the impugned issue and in any case, the Hon'ble Supreme Court in the case of CIT vs Vegetable Products Ltd reported in 88 ITR 192 (SC) had held that if two reasonable constructions of a taxing provision are possible, that construction which favours the assessee must be adopted.

8.6. We also find that the Hon'ble Jurisdictional High Court recently in the case of Principal CIT vs M/s Salasar Stock Broking Ltd in G.A.No. 1929 of 2016 ITAT No. 264 of 2016 dated 24.8.2016 had endorsed the aforesaid view of Hon'ble Delhi High Court in Kabul Chawla's case and also placed reliance on its own decision in the case of CIT vs Veerprabhu Marketing Ltd reported in (2016) 73 taxmann.com 149 (Cal HC).

8.7. We find that the provisions of section 132 of the Act relied upon by the Id DR would be relevant only for the purpose of conducting the search action and initiating proceedings u/s 153A of the Act. Once the proceedings u/s 153A of the Act are initiated, which are special proceedings, the legislature in its wisdom bifurcates differential treatments for abated assessments and unabated assessments. At the cost of repetition, we state that in respect of abated assessments (i.e pending proceedings on the date of search) , fresh assessments are to be framed by the Id AO u/s 153A of the Act which would have a bearing on the determination of total income by considering all the aspects, wherein the existence of incriminating materials does not have any relevance. However, in respect of unabated assessments, the legislature had conferred powers on the Id AO to just follow the

assessments already concluded unless there is an incriminating material found in the search to disturb the said concluded assessment. In our considered opinion, this would be the correct understanding of the provisions of section 153A of the Act, as otherwise, the necessity of bifurcation of abated and unabated assessments in section 153A of the Act would become redundant and would lose its relevance. Hence the arguments advanced by the Id DR in this regard deserves to be dismissed.

8.8. In view of the aforesaid findings and respectfully following the judicial precedents relied upon hereinabove, we hold that the assessment framed u/s 143(1) of the Act for the Asst Year 2010-11, which was unabated / concluded assessment, on the date of search, deserves to be undisturbed in the absence of any incriminating material found in the course of search and accordingly the addition made on account of share capital u/s 68 of the Act is hereby directed to be deleted. Since the issue is addressed on preliminary ground of absence of incriminating materials, we refrain to give our findings on the merits of the addition u/s 68 of the Act for the Asst Year 2010-11. Accordingly the grounds raised by the revenue in this regard are dismissed.”

We adopt the above detailed issue mutatis mutandis to quash the impugned assessment in assessee's legal ground. This render her latter substantive ground on merits as rendered infructuous.

5. This assessee's appeal is allowed.

Order pronounced in the open court 30/11/2018

Sd/-
(लेखा सदस्य)
(M.Balaganesh)
(Accountant Member)
Kolkata,
*Dkp, Sr.P.S

Sd/-
(न्यायिक सदस्य)
(S.S.Godara)
(Judicial Member)

दिनांक:- 30/11/2018 कोलकाता ।

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. अपीलार्थी/Appellant-Smt. Nita Sethia, 5, Janki Shah Rd, 1st Fl, Hastings, Kolkat-22
2. प्रत्यर्थी/Respondent-DCIT, CC-3(3), 110, Shanti Pally, Aayakar Bhavan, Poorva, E.M Bye Pass, NR. Ruby Hospital, Kolkata-107
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

/True Copy/

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
कोलकाता ।