

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

**BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER
AND
SHRI L.P. SAHU, ACCOUNTANT MEMBER**

ITA No. 5073/DEL/2016
[Assessment Years: 2008-09]

AERENS BUILDWELL LTD.,
C/O BGJC & ASSOCIATES,
RAJ TOWER, G-1, ALAKHNANDA
COMMUNITY CENTRE,
NEW DELHI - 110 019
(PAN: AACCA3045N)
[Appellant]

Vs.

ACIT, CC-18,
NEW DELHI

[RESPONDENT]

Assessee by : Shri Vivek Bansal, Adv.
Revenue by : Shri Sanjay Goel, CIT(DR)

ORDER

PER H.S. SIDHU, JM

This appeal filed by the assessee is preferred against the order of the Ld. Commissioner of Income Tax [Appeals]-25, New Delhi dated 28.6.2016 relating to assessment year 2008-09. The assessee has filed the following revised grounds:-

1. That under the facts and circumstances of the case Ld.CIT(A) has erred in law as much as in fact in not following the instruction No.20/2003 dated 23-12-2003 issued by CBDT regarding issue of appellate order within 15 days of last hearing of case.

2. That under the facts and circumstances of the case Ld.CIT(A) has erred in law as much as in fact in rejecting the ground raised by the assessee that the Ld AO has erred on facts and in law in making an assessment u/s 153 A without execution of proper search warrant u/s 132 of the income Tax Act, 1961.
3. That under the facts and circumstances of the case Ld.CIT(A) has erred in law as much as in fact in rejecting the ground raised by the assessee that in absence of incriminating material having been found during the course of search, addition could not have been made by the AO in respect of a completed assessment. While holding so he has failed to appreciate that:-
 - a) the impugned assessment has been made in respect of a completed assessment as earlier assessment order for A.Y 2008-09 was passed u/s 143(3) on 10-12-2010 and it was not an abated assessment.
 - b) That even the AO has not referred to any seized material (constituting incriminating material for making impugned addition) found during the course of search based upon which the impugned addition could be made.
 - c) That even Ld.CIT(A) could not refer or pin-point to any seized material (constituting incriminating material for making

impugned addition) on the basis of which impugned addition could be made.

Therefore, rejection of this ground is contrary to the law laid down by the existing decision of Hon'ble Jurisdictional High Court in the case of CIT Vs. Kabul Chawla (2016) 380 ITR 573(Del).

4. That under facts and circumstance of the case Ld.CIT(A) has erred in law as much as in fact in holding that request of the appellant to file additional evidence under Rule 46A of IT Rules is not maintainable. The criteria laid down in Rule 46A has been shown to have been fulfilled and the additional evidence sought to be filed by the assessee was liable to be admitted.

4.1. Without prejudice to the above, Ld. CIT(A) has erred in law as much as in fact in relying upon the additional evidence after rejection of the same as such course adopted by CIT(A) would be contrary to rule of natural justice.

5. That under the facts and circumstances of the case Ld. CIT(A) has erred in law as much as in fact in making the impugned addition under section 68 of the Income Tax Act, 1961 by treating share capital and share premium received as unexplained credit amounting to Rs. 2,13,00,000/-. The learned CIT (A) has failed to take into consideration the request of Appellant for examination of all relevant facts by the Ld. AO on its own.

6. That under the facts and circumstances of the case Ld.CIT(A) has erred in law as much in fact in passing the order without examination of facts either by himself or by the Ld. AO.

7. That under the facts and circumstances of the case Ld.CIT(A) has erred in law as much as in fact in not appreciating the fact that impugned addition made by the AO is contrary to the law of natural justice as the AO did not allow the assessee with an opportunity to cross examine evidences on which the Ld. AO has relied upon.

8. That under the facts and circumstances of the case Ld.CIT(A) has erred in law as much as in fact in not appreciating that the provisions of section 234B are not applicable in the case of the appellant.

9. That each of the above grounds is independent and without prejudice to each other.

10. That the appellant craves leave to add, alter, modify withdraw, amend, substitute any ground(s) of appeal either before or at the time of hearing.

2. Brief facts of the case are that assessee company belongs to the Aerens Group. Search & Seizure and Survey operations under section 132 / 133A of the Income Tax Act, 1961 were conducted on 17.08.2011 in the case of the Assessee Company alongwith other cases of the group at various residential & business premises. The jurisdiction over the Assessee Company was transferred from the ACIT, Circle 1(1), New Delhi to Central Circle-9, New Delhi vide order F.No.CIT-I/Centralization/2012-

13/3042 issued by the office of Commissioner of Income Tax, Delhi-I, New Delhi under section 127 of the Act on 06.03.13. Return declaring Loss of Rs. 64,01,255/- was filed. During the course of the Search AO has found that the Assessee Company has shown receipt of Rs. 4,77,00,000/- as Share Capital and Share Premium in F.Y. 06-07, 07-08 and 08-09, relevant for A.Y. 07-08, 08-09 and 09-10. In post Search enquires it was also found that the receipt of the Share Premium and Share Capital shown are from Persons (including 6 Companies and 1 Individual, all of which were not traceable, neither the Individual could be traced nor the Companies were in existence at their registered offices). On the basis of various Documents seized, Statements recorded, Enquiries conducted, Information gathered and consideration of the Submissions of the Assessee Company, it was concluded by the Assessing Officer that the Share Capital (Rs. 79,50,000/-) @ Rs. 100/- per Share and Share Premium (Rs.3,97,50,500/-) @ Rs. 500/- per Share was claimed, were from bogus and non- existing Companies and bogus receipts has also been claimed from the Individual and that the Assessee Company had taken the shelter of these Persons for its unaccounted money. For the instant year, addition of Rs. 2,13,00,000/- (Rs. 35,50,000/- as Share Capital plus Rs.1,77,50,000/- as Share Premium), claimed to be received from 2 persons (including 1 company and 1 individual) was made. AO made the additions amounting to Rs. 2,13,00,000/- (Rs. 35,50,000/- as share capital plus Rs. 1,77,50,000/- as share premium) by assessing the income of the assessee at Rs. 2,77,01,255/- vide order dated 30.3.2014

passed u/s. 153A read with section 143(3) of the I.T. Act, 1961. Against the action of the AO, assessee appealed before the Ld. CIT(A), who vide his impugned order dated 28.6.2016 has dismissed the appeal of the assessee. Aggrieved with the impugned order dated 28.6.2016, assessee is in appeal before us.

3. At the time of hearing, Ld. counsel for the assessee stated that the addition in dispute has been made in respect of the share capital receipt received by the assessee which was subscribed by the Corporate Entity except (one individual) at premium. He draw our attention towards the details of the same. He further stated that the original assessment in respect of each of the year in dispute has been completed u/s. 153A/143(3) of the Act on 30.3.2014. The only addition made with reference to the share capital and share premium received in the respective assessment year which fact has already been accepted in the original assessment. He further stated that at the time of search and seizure no incriminating material was found inspite of the fact that the AO had made the addition in dispute on the basis of post search enquiry and on the evidence already available on record which was produced by the assessee at the time of filing the return. He draw our attention towards the order of the AO at Page 3 and stated that the addition has been made on the basis of the material already on record and not on the basis of any incriminating material. It is only for the reason of making enquiries after the conduct of search and during the course of assessment proceedings carried out in pursuance to section 153A, the AO formed an

opinion expressing his doubt regarding genuineness of share capital and creditworthiness of entities which have invested share capital with the assessee, therefore, the same has been added to the income of the assessee. He further submitted that the addition otherwise is not maintainable even on merits as there exists sufficient documentary evidence to prove the genuineness of share application money, it is also the case of the assessee that these assessments being completed assessments, addition on account share application money could not be made in absence of any incriminating material having been found during the course of search. In support of contention, he filed a Paper Book containing pages 1 to 335 in which he has attached the copy of various documentary evidences which were available before the authorities below i.e. show cause notice u/s. 153A /143(2) dated 19.11.2013; reply to show cause notice dated 19.11.2013; assessment orders u/s. 143(3) for AY 2007-08 to 2009-10; entity wise and assessment year wise evidence of share capital and share premium (AY 2007-08) confirmation of M/s Poddar Aircom Pvt. Ltd.; Application form for equity shares of M/s Poddar Aircon Pvt. Ltd; Memorandum and Articles of Association of M/s Poddar Aircom Pvt. Ltd; Certificate of Incorporation of M/s Poddar Aircom Pvt. Ltd; Board Resolution of M/s Poddar Aircom Pvt. Ltd.; Auditor's Report of M/s Poddar Aircom Pvt. Ltd With Balance Sheet & P&L A/C; Share Certificate M/s Poddar Aircom Pvt. Ltd; M/s Saraosi Commercial Pvt. Ltd.; Confirmation of M/s Saraogi Commercial Pvt. Ltd. Application Form For Equity Shares of M/s Saraogi Commercial Pvt. Ltd.; Certificate of

Incorporation of M/s Saraogi Commercial Pvt. Ltd.; Cheques Issued By M/s Saraogi Commercial Pvt. Ltd. to Assessee Ledger Report of M/s Saraogi Commercial Pvt. Ltd.; Acknowledgment of e-return of M/s Saraogi Commercial Pvt. Ltd.; Auditor's report with balance sheet & P&L A/C of M/s Saraogi Commercial Pvt. Ltd.; Share Certificate of M/s Saraogi Commercial Pvt. Ltd.; M/s Hooslv Vinimay Pvt. Ltd.; Confirmation by M/s Hoogly Vinimay Pvt. Ltd.; Courier details of reply to notice u/s 131 of M/s Hoogly Vinimay Pvt. Ltd.; Form of application for equity shares for M/s Hoogly Vinimay Pvt. Ltd.; Transaction statement of M/s Hoogly Vinimay Pvt. Ltd.; ITR for A.Y 2007-08 of M/s Hoogly Vinimay Pvt. Ltd.; Director's report of M/s Hoogly Vinimay Pvt. Ltd.; Auditors report of M/s Hoogly Vinimay Pvt. Ltd. with balance sheet p& L A/C; Certificate of registration by RBI of M/s Hoogly Vinimay Pvt. Ltd.; Memorandum & Articles Of Association of M/s Hoogly Vinimay Pvt. Ltd.; Share Certificate of M/s Hoogly Vinimay Pvt. Ltd.; M/s NKP Holdings Pvt. Ltd; Furnishing Information u/s 131 of M/s NKP Holdings Pvt. Ltd; Courier Receipt of reply to section 131 Notice by M/s NKP Holdings Pvt. Ltd; Transaction Statement of M/s NKP Holdings Pvt. Ltd; Form of Application of M/s NKP Holdings Pvt. Ltd; Memorandum And Article of Association of M/s NKP Holdings Pvt. Ltd; Certificate of Registration of M/s NKP Holdings Pvt. Ltd; Certificate of Incorporation of M/s NKP Holdings Pvt. Ltd; Courier Details of M/s NKP Holdings Pvt. Ltd; ITR of M/s NKP Holdings Pvt. Ltd For A.Y 2007-08; Directors report of M/s NKP Holdings Pvt. Ltd; Auditors report of M/s NKP Holdings Pvt. Ltd Balance Sheet and P & L A/C; Account

statement of M/s NKP Holdings Pvt. Ltd; Share Certificate of M/s NKP Holdings Pvt. Ltd; (ASSESSMENT YEAR 2008-09) M/s Disha Medical Systems Pvt. Ltd.- Applications of shares by M/s Disha Medical Systems Pvt. Ltd.; Auditors report of M/s Disha Medical Systems Pvt. Ltd. With Balance Sheet and P & L A/C; Account statements of M/s Disha Medical Systems Pvt. Ltd.; Confirmation of Accounts of M/s Disha Medical Systems Pvt. Ltd.; Letters of allotment of shares to M/s Disha Medical Systems Pvt. Ltd.; List of allotment of shares to M/s Disha Medical Systems Pvt. Ltd.; Share Certificate of M/s Disha Medical Systems Pvt. Ltd.; Memorandum And Article Medical Systems Pvt. Ltd; (Sh. Ram Pal) Share application forms of Sh. Ram Pal; Confirmation from Sh. Ram Pal along with affidavits; Share Certificate of Sh. Ram Pal (ASSESSMENT YEAR 2009-10) M/s Disha Medical Systems Pvt. Ltd. Confirmation of M/s Disha Medical Systems Pvt. Ltd.; Application form for shares from M/s Disha Medical Systems Pvt. Ltd.; Bank statement of M/s Disha Medical Systems Pvt. Ltd.; ITR of M/s Disha Medical Systems Pvt. Ltd. for A.Y 2009- 10 With Balance Sheet and P & L A/C; Auditors report of M/s Disha Medical Systems Pvt. Ltd; Confirmation of accounts of M/s Disha Medical Systems Pvt. Ltd; Letter of allotment of shares of M/s Disha Medical Systems Pvt. Ltd; Reply of notice u/s 131 of the Income Tax Act 1961 by M/s Shevin Advisory Services Pvt. Ltd. along with courier receipt; Form of application for equity shares of M/s Shevin Advisory Services Pvt. Ltd; Share Certificate of M/s Disha Medical Systems Pvt. Ltd. M/s Shevin Advisory Services Pvt. Ltd.; Bank statement of M/s Shevin Advisory

Services Pvt. Ltd; Computation of Income of M/s Shevin Advisory Services Pvt. Ltd; Auditors report and directors report of M/s Shevin Advisory Services Pvt. Ltd along with balance sheet and P & L A/C; ITR of M/s Shevin Advisory Services Pvt. Ltd for A.Y. 2009-10 and share Share Certificate of M/s Shevin Advisory Services Pvt. Ltd. In support of his contention, he stated that the legal issue in dispute viz. absence of incriminating material having been found during the course of search, addition could not have been made by the AO which is squarely covered by the decision of the Hon'ble Delhi High Court in the case of CIT vs. Kabul Chawla (2015) 61 taxmann.com 412 (Delhi) vide order dated 28.8.2015, wherein the Hon'ble High Court has held that if the additions are made, but not based on any incriminating material found during search operation, then these additions are not sustainable in the eyes of law. Ld. counsel for the assessee also submitted a copy of Case Status of the Supreme Court Of India in the case of CIT vs. Kabul Chawla wherein, it has been mentioned that Civil Appeal No. 6415 of 2016 has been dismissed vide order dated 17.9.2018.

6. On the contrary, Ld. CIT(DR) relied upon the orders of the authorities below, but could not controvert the arguments advanced by the Ld. Counsel for the assessee on the issue of incriminating material and also not cited any decision contrary to the decision of CIT vs. Kabul Chawla decided in the Honble High Court of Delhi as well as Hon'ble Supreme Court of India. He however, stated that the provision of section 153A has rightly been applied in the case of the assessee on the material

available with them. Hence, the appeal of the Assessee may be dismissed. He also placed reliance on the following decisions:-

- i) CIT vs. Durga Prasad More (1971) 82 ITR 540 (SC).
- ii) CIT vs. Nipun Builders & Developers (P) Ltd. Delhi High Court 2013 30 taxmann.com 292.
- iii) CIT vs. Nova Promoters & Finlease (P) Ltd., Delhi High Court 2013, 18 taxmann.com 217
- iv) CIT vs. Navodaya Caste Pvt. Ltd., Delhi High Court, 2014, (2014) 50 taxmann.com 110 (Delhi).
- v) CIT vs. Bikram Singh, Delhi High Court, 2017, ITA 55/2017.
- vi) CIT vs. NR Portfolio Pvt. Ltd. Delhi High Court 2012, 29 taxmann.com 291.
- vii) CIT vs. Empire Buildtech (P) Ltd. Delhi High Court 2014, 366 ITR 110.
- viii) CIT vs. MAF Academy (P) Ltd. Delhi High Court, 2013, 42, taxmann.com 377.
- ix) CIT vs. Ultra Modern Exports (P) Ltd. Delhi High Court 40 taxmann.com 458.

- x) Amtrac Automobiles India Pvt. Ltd. vs. ACIT ITA No. 2920/Del/09
- xi) Dhingra Global Credence (P) Ltd. vs. ITO, ITAT, Delhi, 2009 1 ITR(T) 529.

5. We have heard both the parties and perused the records, especially the assessment as well as impugned order and the submissions and case laws filed by both the parties. We find that the case laws relied upon by the Ld. DR are on the merits of the case, however, the ground argued before the Tribunal by the Ld. Counsel for the assessee is relating to absence of incriminating material having been found during the course of search, addition could not have been made by the AO, hence, the case laws relied upon by the Ld. CIT(DR) are on distinguished facts and does not help the Revenue. Though the Ld. counsel for the assessee has argued the case on legal ground as well as on merits of the case, but we are only dealing with legal issue i.e. absence of incriminating material during the search. We have also gone through the Paper Book containing pages 1 to 335, as discussed above. We find that the additions made by the AO are beyond the scope of section 153A of the Income Tax Act, 1961, because no incriminating material or evidence had been found during the course of search so as to doubt the transactions. It was noticed that as on the date of search i.e. 17.8.2011, no assessment proceedings were pending for the year under consideration and the AO was not justified in disturbing the concluded assessment without there

being any incriminating material being found in search. In fact, in the entire assessment order, the AO has not referred to any seized material or other material for the year under consideration having being found during the course of search in the case of assessee, leave alone the question of any incriminating material for the year under appeal. Perusal of the assessment orders framed u/s. 153A r.w.s. 143(3) dated 30.3.2014 would reveal that the addition made in respect of share capital and premium does not pertain to any incriminating material found during the course of search. It is only for the reason of making enquiries after the conduct of search and during the course of assessment proceedings carried out in pursuance to section 153A, the AO formed an opinion expressing his doubt regarding genuineness of share capital and creditworthiness of entities which have invested share capital with the assessee, therefore, the same has been added to the income of the assessee. Therefore, in our considered opinion, the action of the AO is based upon conjectures and surmises and hence, the additions made is not sustainable in the eyes of law, because this issue in dispute is now no more res-integra, in view of the decision dated 28.8.2015 of the Hon'ble Delhi High Court in the case of *Commissioner of Income Tax vs. Kabul Chawla* (2016)380 ITR 573(Del.) and appeal filed before the Hon'ble Supreme Court Of India by the Department in the case of CIT vs. Kabul Chawla has been dismissed in Civil Appeal No. 6415 of 2016 vide order dated 17.9.2018. The relevant finding of the Hon'ble Delhi High Court in the case of *CIT vs. Kabul Chawla* are reproduced 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 ITA Nos. 707, 709 and 713 of 2014 of 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 ITA Nos. 707, 709 and 713 of 2014 of 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.*

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."

6. Respectfully following the precedent of the Hon'ble Jurisdictional High Court in the case of CIT vs. Kabul Chawla, as aforesaid, we allow the appeal of the Assessee, because AO has completed the assessment and made the addition in dispute without any incriminating material found during the search and seizure operation and the addition in this case

was purely based on the material already available on record. Hence, the addition in the case is deleted and the grounds raised by the assessee in the appeal are allowed.

7. In the result, the appeal filed by the assessee is allowed.

The order pronounced on 21.12.2018.

Sd/-
(L.P. SAHU)
ACCOUNTANT MEMBER

Sd/-
[H.S. SIDHU]
JUDICIAL MEMBER

Dated: 21.12.2018

SR BHATNAGAR

Copy forwarded to:

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

Asstt. Registrar,
ITAT, New Delhi