IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "B", NEW DELHI
BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER
AND
SHRI L.P. SAHU, ACCOUNTANT MEMBER

	I.T.A. No. 3996/DEL/2011	
	A.Y. : 2003-04	
ACIT, CC-2 NEW DELHI	VS.	M/S DELHI HOSPITAL SUPPLY PVT. LTD., 101, PAL MOHAN SADAN, 26/32, EAST PATEL NAGAR, NEW DELHI (PAN: AAACD2901Q)
(APPELLANT)		(RESPONDENT)

Department by : Md. Mohsin Alam, CIT(DR)
Assessee by : Sh. Salil Aggarwal, Adv. &
Sh. Shailesh Gupta, Adv.

Date of Hearing : 10-09-2015

Date of Order : 01-10-2015

ORDER

PER H.S. SIDHU : JM

The Revenue has filed the present appeal against the impugned Order dated 06/6/2011 passed by the Ld. Commissioner of Income Tax (Appeals)-III, New Delhi for the asstt. year 2003-04 on the following grounds:-

1. On the facts and in the circumstances of the case, the CIT(A) has erred in law and on facts in deleting the addition of Rs.14,98,653/- made by the Assessing Officer on account of unexplained investment in office flat.
2. On the facts and in the circumstances of the case, the CIT(A) has erred in law and on facts in deleting the disallowance of Rs.4,400/-

made by the Assessing Officer u/s 40A(3) out of medical allowances.

3. On the facts and in the circumstances of the case, the CIT(A) has erred in law and on facts in deleting the disallowance of Rs.36,200/- made by the Assessing Officer out of conveyance expenses.

4. On the facts and in the circumstances of the case, the CIT(A) has erred in law and on facts in deleting the disallowance of Rs.50,611/- made by the Assessing Officer out of travelling expenses.

5. On the facts and in the circumstances of the case, the CIT(A) has erred in law and on facts in deleting the disallowance of Rs.15,250/- made by the Assessing Officer out of miscellaneous expenses.

6. On the facts and in the circumstances of the case, the CIT(A) has erred in, law and on facts in deleting the disallowance of Rs.19,100/- made by the Assessing Office 'out of telephone and telex expenses.

7. On the facts and in the circumstances of the case, the CIT(A) has erred in law and on facts in deleting the disallowance of Rs.17,000/- made by the Assessing Officer out of Vehicle running and maintenance expenses.

8. On the facts and in the circumstances of the case, the CIT(A) has erred in law and on facts in deleting the disallowance of Rs.20,000/-

made by the Assessing Officer out of vehicle depreciation expenses.

9. On the facts and in the circumstances of the case, the CIT(A) has erred in law and on facts in holding that no disallowance can be made to the income of the appellant u/s 153A of the Act which is not based on any incriminating material found and seized during the search.

10. The order of the Ld. CIT(A) is erroneous and is not tenable on facts and in law.

11. The appellant craves leave to add, alter or amend any / all of the grounds of appeal before or during the course of the hearing of the appeal."

2. The brief facts of the case are that the assessee is a private limited company incorporated on 20.2.1995 and, is engaged in the business of trading, servicing and indenting of hospital equipments. For the instant assessment year 2003-04, assessee had filed return declaring an income of Rs. 15,30,710/- on 2.12.2003 which was as such accepted. Thereafter, search was carried on 14.2.2008 at the business premises of the assessee company and, notice u/s. 153A of the Act was issued on 15.1.2009. In compliance, a return of income was filed by the assessee company on 9.2.2009 declaring income of Rs. 15,30,710/-. The AO however, vide order u/s. 143(3)/153A dated 29.12.2009 determined the income of the assessee company at Rs. 31,91,924/-.

3. Against the aforesaid assessment order dated 29.12.2009, assessee preferred an appeal before the Ld. CIT(A), who vide impugned order dated 6.6.2001 has allowed the appeal of the assesee.

4. Aggrieved with the order of the Ld. CIT(A), the Revenue is in appeal before us.

5. At the time of hearing, Ld. DR relied upon the order of the AO and reiterated the contentions raised in the Grounds of Appeal.

5.1 On the contrary, Ld. Counsel of the assessee stated that the issue in dispute is squarely covered in favor of the assessee by the decision dated 28.8.2015 of the Hon'ble Jurisdictional High Court passed in the case CIT(Central)-III vs. Kabul Chawla in ITA No. 707, 709, 713/Del/2014 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.

6. We have heard both the counsel and perused the relevant records available with us, especially the orders of the revenue authorities. We find that Ld. CIT(A) had adjudicated the legal issue as well as the issues on merits vide para no. 7 to 7.5 at pages 9 to 15. For the sake of convenience, we are reproducing the relevant findings of the Ld. CIT(A) as under:-

> *"7. I have considered the facts of the appellant, material placed on record and, order of assessment. It is evident from the assessment order that the AO has made the. impugned disallowances which is not based on any incriminating document/ material found during the course of search. On this issue the Kolkata Bench of ITAT has held the following in the case of LMJ International Ltd. vs. DCIT .119 TTJ 214, which is as under:-*
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> *"Where nothing incriminating is found in the course of search relating to any assessment years, the*

assessments for such years cannot be disturbed; items of regular assessment cannot be added back in the proceeding under s. l53C when no indiscriminating documents were found in respect of the disallowed amounts in the search proceedings."

Also, Visakhapatnarn Bench in the case of KGR Exports vs. JCIT in ITA No. 494IV /2007 held as under:-

"Since section 153A overrides provisions of section 147 of and 148 can it be the intention of the legislature to give enormous powers on the Assessing Officer for opening a completed assessment time and again? In our opinion, the legal restrictions and conditions prescribed for reopening the assessment still applies to the cases reopened u/s 153A. The intention of the legislature could not have been otherwise lest it should lead to unnecessary harassment upon the assessee's. Though the completed assessments can be reopened under Section 153, the issues which have already been concluded in the earlier assessments should not be subject matter of reassessment unless some incriminating material concerning those issues were found during the course of search. Otherwise, in the concluded assessments which have been reopened u/s 153A, the assessing officer should restrict himself with the additions arising out of the incriminating materials found during the course of search."

Ahmadabad bench in the case of Meghmani Organics Ltd. has held as under:-

"The meaning of assessment/reassessment does not always mean taking recourse to the whole procedure laid down in the Act for computing the tax liability. It is possible to effect reconciliation of the two provisos appended to s. 153A by restricting the meaning of the term 'assess or reassess' appearing in the first proviso. After the search, the total income of the assessee is to be recomputed on the basis of the undisclosed income unearthed during search and the same is to be added with the regular income assessed under s. 143(3) or computed under s. 143(1) for each of the six preceding assessment years. Where any prepaid taxes are there, the same are required to be given credit, for computing the further tax payable by the assessee. The assessee is also required to pay interest under ss. 234A and 234B on the tax due on the basis of new calculation. Where nothing incriminating is found in the course of search relating to any assessment years, the assessments for such years cannot be disturbed. The construction that the Department seeks to place on the impugned provisions would lead to serious hardship, inconvenience, injustice, absurdity and anomaly. Suppose, in the course of a search, nothing incriminating was found. Does this mean that an honest citizen be unduly harassed by facing automatic reopening of the concluded assessments merely because there was search action against him? The absurdity of the construction gets all the more pronounced when say, no incriminating material is found relating to the 'other person' but the material found indicates disclosed income. Suppose, loan confirmations relating to loans duly disclosed in the return of income of

A are found at the time of search in the premises of B, Should the assessments of A be reopened for all the six preceding years merely because search action has been initiated against B? In selecting out of different interpretations, the Courts shall adopt that which is just, reasonable and sensible rather than that which is none of those things. One may also refer to CBDT Circular No. 7 of 2003, dt. 15th Sept., 2003. A reading of the circular clearly indicates that the appeal, revision etc. arising out of earlier assessments shall not abate. In other words, there is no merger of the earlier assessments with the assessments done under the new scheme, i.e., s. 153A or 153C."

Further, following the decision of Delhi Bench of Tribunal in the case of Anil Kumar Bhatia vs. ACIT, it has been held by Murnbai Bench in the case of Anil P. Khemani as under:

"13. A perusal of the assessment orders in all these cases, clearly demonstrate that the sole addition in question is on account of low withdrawals. This had not been made, based on any material found either during the course of search or during the course of assessment proceedings. Under the circumstances, we examine the legal position. The Delhi Bench of the Tribunal in the case of Anil Kurnar Bhatia vs. AC[T held as follows:-

> *"S. 153A provides that where a search is initiated uls 132 the AO shall "assess or reassess the total income of six assessment years immediately preceding the assessment year" relevant to the*

previous year in which the search is conducted or requisition is made. The first proviso states that the AO shall "assess or reassess the total income in respect of each assessment year falling within such six assessment years" while the second proviso state that the assessment or reassessment relating to the said six assessment years "pending" on the date of initiation of the search under section 132 shall "abate". In the assessee's case, search action was initiated and assessments under s. 153A were framed for six assessment years making various additions. The assessee claimed that the additions were not tenable regular returns had been filed where the particulars relating to the additions had been disclosed and the and the same had been accepted uls 143(I) and also that no material had been found during the search to justify the additions. The revenue claimed that the effect of the provisos to s. 153A was that all assessments abate and there had to be a de novo assessment in which the AO was not confined to the material found during the search. Held rejecting the claim of the Revenue.

(i) S. 153A does not authorize the making of a de novo assessment. While under the 1st Proviso, the AO is empowered to frame assessment for six years, under the 2nd Proviso, only the assessments which are pending on the date of initiation of search abate. The effect is that complete assessments do not abate. There can be two assessments for the

same assessment year. Assessments which are not pending before the AO on the date of search but are pending before an appellate authority will survive.

(ii) An assessment can be said to be "pending" only if the AO is statutorily required to do something further. If a s.143(2) notice has been issued, the assessment is pending. However, the assessment in respect of a return processed u/s 143(I) is not "pending" because the AO is not required to do anything further about such a return.

(iii) The power given by the Proviso to "assess" income for six assessment years has to be confined to the undisclosed income unearthed during search and cannot include items which are disclosed in the original assessment proceedings.

(iv) On facts, s the returns had been processed u/s 143(I), the assessments were not "pending" and as no material was found during the search, the additions could not be sustained. "

Respectfully following the same, we delete all the additions made and allow the appeals of the assessee."

Finally, Mumbai Bench in the case of Guruprerna Enterprises vs. Asstt. CIT in ITA No. 255, 256 and 257/Mum/20 I 0 for Assessment Years 2003-04, 2004-05 and 2005-06 dated 07.01.20 11 after noticing the case of M/s Viraj Forgins Ltd. vs. DCIT in ITA No. 1945/M/200S

and, M/s Viraj Impoexpo Ltd. vs. DCIT in ITA No. 1949/M/200S held as follows:

> *"4.2 We have perused the records and considered the rival contentions carefully. The legal dispute raised in this ground is whether issues considered and decided in the regular assessment can be re-considered in an assessment proceedings initiated under section 153A. In case of search, the AO under section 153A is empowered to issue notices to the searched person requiring him to furnish the return of income in, respect of each assessment year falling within the six assessment years immediately preceding the assessment year relevant to the previous year in which search is conducted or requisition is made. Further the second proviso to section 153A also provides that assessment or re-assessment relating to any assessment year falling within the period of six assessment years referred to above pending on the date of initiation of search under section 132 or making of requisition under section 132A as the case may be shall abate. Normally, the assessments which are pending in appeal or in revision cannot be said to be complete and therefore assessment/re-assessment pending in appeal/revision could also to be considered as pending on the date of search but the CBDT in the circular NO.7 of2003 dated 5.9.2003 has clarified that appeal, revision or rectification proceedings pending on the date of initiation of search under section 132 will not abate. In other words, only the*

assessments pending before the Assessing Officer for completion shall abate. In this case there is no dispute that on the date of search, the assessment in the case of assessee had already been completed by the AO and in terms of the Circular of the CBDT, the regular assessment made in the case of the assessee will not abate. Therefore, in our view the points/ issues decided in the assessment cannot be re-considered in the proceedings under section 153A unless there is some fresh material found during the course of search in relation to such points/ issues.

4.3 In this case the claim of deduction under section 80HHC had already been decided by the Tribunal in the appeal against regular assessment for A. Y .2001-02 and no fresh material had been found during the course of search in relation to allowability of deduction under section 80HHC. Therefore we agree with the submission of the Learned AR that the claim of deduction under section 80HHC cannot be considered afresh in the proceedings under section 153A. The Learned DR has relied on the decision of the Tribunal in case of Shivnathrai Harnarayan India (Pvt) Ltd. (supra) but the said case in our view is distinguishable. In that case, the Tribunal held that any assessment or reassessment proceedings initiated by the AO which are pending on the date of initiation of search, the same shall abate and AO cannot proceed with such pending assessment. Thus as per the decision of the

Tribunal, only the assessment/reassessment .proceedings pending before AO shall abate. The issue whether the assessment already completed by AO and pending in appeal or revision will also abate was not before the Tribunal."

In view of above decisions of the coordinate Bench, we have to necessarily hold that only the assessments pending before the AO for completion shall abate and that under section 153A the issues decided in the assessment cannot be reconsidered and readjudicate, unless there is some fresh material found during the course of search in relation to such points. As in this case, the undisputed fact is that, there is no incriminating material found or seized in the search, the ground of the assessee has to be accepted by respectfully following the order of the Coordinate Bench. Though on the legal issue, we have decided in favour of the assessee, as the case was heard at length on merits we adjudicate the same."

7.1 From the aforesaid decision, it is evident that, it has been consistently held that, in absence of any material found as a result of search, no disallowance/addition can be made in assessment u/s 153A of the Act. In the instant case too, all the disallowances made are routine disallowances for which no material was found even as a result of search. Therefore, respectfully following the above decisions. the total addition made for Rs. 16,61,214/- is directed to be deleted.

7.2 Also, even addition of Rs. 14,98,653/- representing alleged unexplained investment in flat

has been made without referring to any material found as a result of search and as such even the same is without jurisdiction. Apart from the above, event otherwise, the same is based on factual misconception, as would be evident from the tabular chart hereunder:

Sr. No.	*Particulars*	*Amount (In Rs.)*
i)	*Transfer from factory building as cost debited the factory building account in the preceding year.*	*4,74,950/- (page 16 of the Paper)*
ii)	*Transfer from head advance for flat as cost debited in advance for flat account in the preceding year.*	*4,74,950/- (page 16 of the Paper)*
iii)	*Fresh investment during the year.*	*4,29,275/- (Page 54 of the Paper Book)*
	Total	*14,98,653/*

7.5 I am in agreement with the submission of the counsel that, the above transfer entries have been accepted by Assessing Officer while computing depreciation on factory building/loss on sale of flat. Hence, it is held that, investment made stands duly explained, and as such, the addition made for Rs. 14,98,653/- is not tenable and therefore is directed to be deleted.

Regarding the disallowances made totaling to Rs. 1,62,561/- under the head medical allowance, conveyance expenses, travelling expenses, miscellaneous expenses, telephone and telex expenses, vehicle running and maintenance expenses and vehicle depreciation is concerned, the appellant has submitted that the AO has made all these disallowances holding that no proof in form of vouchers in support of such claim has been produced with respect to these expenses debited in the books of accounts. The appellant has in his paper book inter alia stated that complete details of such expenses duly supported by necessary bills / vouchers had been filed before the AO in the course of assessment proceedings. Copy of ledger accounts of these expenses have also been filed through the paper book and has submitted that in the absence of any basis given by the AO for making the disallowances, the same is not tenable. Reliance in this regard has been placed on the decision in case of State of Orissa vs. Maharaja Shri BP Singh Deo 76 ITR 690 (SC); Goodyear India Ltd. vs. ITO 73 ITD 189 (Del.); Hughes Escorts Communications Ltd. vs. JCIT 106 TTJ 1065 (Del.) among other cases. The appellant has placed a comparative chart to establish that expenditure has been incurred for the purpose of business of the appellant company in each of the year under consideration and no disallowance has been made in the past that is prior to framing of the impugned assessments for AY 2002-03 to 2008-09. Further it is settled law that a company does not have any personal expenditure as held in the cases of DCIT vs. Haryana Oxygen ltd., 76 ITD 32 (Del); Sayaji Iron and Engg. Co. vs.

CIT 253 ITR 749 (Guj.); Dinesh Mills Ltd. vs. CIT 173 478 (Guj.)

I have carefully gone through the submissions and the copy of the ledger account and comparative chart filed by the appellant who has contested the disallowance made as also the case laws relied upon by the appellant. It is noted that no specific instance has been pointed out by the AO for making the disallowances, which makes the disallowances adhoc in nature. In view of the above the total disallowance made for Rs. 1,62,561/- is directed to be deleted as it is not sustainable even on merits."

7. Keeping in view of the aforesaid findings given by the Ld. CIT(A), we are of the considered view that Ld. CIT(A) has rightly held that in the absence of any material found during the search, as a result, no disallowance / additions can be made in the assessment u/s. 153A of the I.T. Act. Even otherwise, we find force in the Ld. Counsel's submissions that the issue in dispute is also covered by the decision of the Hon'ble Jurisdictional High Court in the case of CIT(Central)-III vs. Kabul Chawla in ITA No. 707, 709, 713/Del/2014 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 were not sustainable in the eyes of law. In our considered opinion, the Ld. CIT(A) has rightly adjudicated the issue in dispute and accordingly rightly deleted the additions in dispute. Keeping in view of the above discussion, we uphold the Ld. CIT(A)'s order which is a well reasoned order and therefore, the same does not need any interference on our part and also by respectfully following the decision of the Hon'ble Jurisdictional High Court in the case of CIT(Central)-III vs. Kabul Chawla (Supra), we are of the view that Ld. CIT(A) has rightly

deleted the additions in dispute. Accordingly, the issues in dispute are decided against the Revenue and in favour of the Assessee.

8. In the result, the appeal of the Revenue is dismissed.

Order pronounced in the Open Court on 01/10/2015.

Sd/- Sd/-

[L.P. SAHU] [H.S. SIDHU]
ACCOUNTANT MEMBER JUDICIAL MEMBER

Date 01/10/2015

"SRBHATNAGAR"

Copy forwarded to: -

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

TRUE COPY

By Order,

Assistant Registrar, ITAT, Delhi Benches