

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'D' NEW DELHI**

**BEFORE SHRI G.D.AGRAWAL, VICE PRESIDENT
&
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER**

**ITA No.-2840-41/Del/2015
(Assessment Year: 2008-09, 2009-10)**

Asian Colour Coated Ispat Ltd. 403, Nirmal Tower, Barakhamba Road, New Delhi PAN : AAFCA1873K	Vs.	DCIT Cent. Circle II Faridabad
Appellant		Respondent

**Assessee by: Sh. Ved Jain, Adv, Miss Umang Luthra, Adv.
Ms. Surbhi Goyal, CA.**

Revenue by : Shri J.K.Mishra, CIT-DR

Date of Hearing	08.01.2019
Date of Pronouncement	15.03.2019

ORDER

PER SUDHANSHU SRIVASTAVA, J.M.:

These two appeals filed by the assessee challenge the order passed by the Ld. Commissioner of Income Tax (Appeals) {CIT (A)} for Assessment Years 2008-09 & 2009-10. Since both these appeals relate to identical issues, they were

heard together and they are being disposed through this common order for the sake of convenience.

2.0 First we take up appeal bearing ITA No. 2840/Del/2015 for A.Y. 2008-09. The brief facts leading to the present appeal are that the assessee had filed its return of income on 30.09.2008 declaring a loss of Rs.55,55,572/-. The assessment was completed under section 143(3) of the Income Tax Act, 1961 (hereinafter called 'the Act') vide order dated 27.12.2010. Thereafter, a search and seizure operation was carried out on the assessee on 28.01.2011. Consequent to the issuance of notice under section 153A of the Act post search, the assessee filed the return of income on 30.03.2012. The Assessing Officer (AO) thereafter passed the assessment order dated 28.03.2013 wherein he made the following additions:-

- a) Rs. 5,40,00,000/- on account of share capital u/s 68 of the Income Tax Act apart from the Commission paid @ 1% thereon of Rs. 5,40,000/-*
- b) Rs. 49,17,124/- on account of bogus purchase apart from the Commission paid @ 0.25% thereon of Rs.12,292/-*

2.1 Aggrieved by the order of the AO, the assessee filed appeal before the Ld. CIT (A). The Ld. CIT (A) vide order dated 27.02.2015 dismissed the appeal of the assessee. Aggrieved

by the order of the Ld. CIT (A), the assessee is in appeal before us and has raised the following grounds of appeal:-

1. On the facts and circumstances of the case, the order passed by the learned Commissioner of income Tax (Appeals) [CIT (A)] is bad both in the eye of law and on facts.

2. On the facts and circumstances of the case, the learned CIT (A) has erred in ignoring the fact that the order passed by AO is illegal, without jurisdiction and in violation of the statutory requirement of the Act.

3. On the facts and circumstances of the case, learned CIT(A) has erred both on facts & in law in rejecting the contention of the assessee that the order passed by the learned AO under Section 153A is bad and liable to be quashed as the same has been framed consequent to a search which itself was unlawful and invalid in the eye of law.

4. On the facts and circumstances of the case, learned CIT(A) has erred both on facts & in law in rejecting the contention of the assessee that the proceedings initiated under Section 153A are bad in law in the absence of any incriminating material belonging to the assessee being found during the course of the search.

5. On the facts and circumstances of the case the learned CIT(A) has erred both on facts and in law in rejecting the contention of the assessee that the AO has erred in going ahead with the reassessment order and not closing the reassessment proceedings, despite the fact that no incriminating material belonging to the assessee was found and has been subject matter of addition in any of the reassessment under section 153A for all the six years.

6(i) On the facts and circumstances of the case, the learned CIT(A) has erred in sustaining the additions/disallowances of Rs.5,94,69,416/- made by the AO to the returned income of Rs. NIL.

(ii) That the additions and disallowance sustained by the learned CIT (A) are against the facts on record as well as against the statutory provisions of the Act.

7. On the facts and circumstances of the case the learned CIT(A) has erred both on facts and in law in confirming the addition of an amount of Rs.5,40,00,000/- made by AO on account of share capital under Section 68 of the Act.

8. That the said addition has been confirmed rejecting the detailed explanation and evidences brought on record by the assessee to prove the identity and creditworthiness of the shareholders as well as the genuineness of the transaction.

9. On the facts and circumstances of the case the learned CIT (A) has erred both on facts and in law in ignoring the fact that the addition of Rs5,40,00,000/- made by the AO are otherwise untenable since the same is not arising from the any incriminating material seized during the course of search and reassessment under Section 153A/ 153A consequent to search is to be confined only to the incriminating material belonging to the assessee found during the course of the search.

10(i) That the abovesaid addition has been confirmed despite the same having been made on the basis of material collected at the back of the assessee without giving it an opportunity to rebut the same.

(ii) That the abovesaid addition has been confirmed despite the same having been made on the basis of statement recorded without giving assessee an opportunity to cross examine.

11(i) On the facts and circumstances of the case the learned CIT(A) has erred both on facts and in law in making addition of an amount of Rs.5,40,000/- made by AO on account of commission.

12. On the facts and circumstances of the case the learned CIT (A) has erred both on facts and in law in confirming the addition of an amount of Rs.49,17,124/- on account of bogus purchases.

13. On the facts and circumstances of the case the learned CIT (A) has erred both on facts and in law in confirming the abovesaid addition on the basis of AO's allegation that the firm M/s GGL Steel & Strips Pvt. Ltd. is not engaged in the actual business despite the fact that in the statement recorded it has been admitted that the firm is engaged in actual business.

14(i) That the learned CIT (A) has erred in confirming the abovesaid addition ignoring the fact that there being a complete tally of the quantity purchased and sold, the allegation that the assessee has not made purchases cannot sustain.

(ii) That the learned CIT (A) has erred in confirming the above said addition arbitrarily rejecting the material and evidences brought on record to show that the purchases were made in regular course of business and material so purchased was sold in regular course of business.

15. That the learned CIT (A) has erred both facts and in law in confirming the addition made on the basis of statement recorded, without giving assessee an opportunity of cross examine the same.

16(i) On the facts and circumstances of the case the learned CIT (A) has erred both on facts and in law in confirming the addition of Rs. 12,292/- made by AO on account of commission.

(ii) That the addition has been confirmed despite the same being made arbitrarily at the rate of 0.25% without there being any basis for the same.

(iii) That the abovesaid addition has been confirmed, despite the same being made arbitrarily at the rate of 1% without there being any basis for the same.

17. The respondent craves leave to add, amend or alter any of the grounds of appeal.”

3.0 It was submitted by the Ld. AR that the issue involved in the appeal is squarely covered in favour of the assessee by the order of this Tribunal in assessee's own case for previous years being ITA Nos. 2838 and 2839/Del/2015 dated 19.03.2018 in respect of Assessment Years 2006-07 and 2007-08 wherein the Tribunal has relied on the judgment given by Hon'ble jurisdictional High Court in the case of CIT v. Kabul Chawla [2016] 380 ITR 573 (Del) wherein it has been held that no addition can be made in absence of any incriminating material found during the course of search.

3.1 It was submitted by the Ld. AR that a search operation was conducted at the registered as well as office premises of M/s. Asian Colour Coated Ispat Ltd. group of cases on 28.01.2011 and no incriminating material found during the course of search. It was submitted that, thus, the

main issue in the appeal is the validity of assessment made under section 153A read with section 143(3) of the Income Tax Act, 1961, in the absence of any incriminating material found during the course of search. The Ld. AR submitted that this issue was raised before the Ld. CIT (A) who rejected this contention. The Ld. AR submitted that the Ld. CIT (A), while dismissing the assessee's appeal, relied on the decision given by him in assessee's case for A.Y. 2006-07, wherein he, relying on the judgment in the case of Canara Housing Development Company of the Hon'ble Karnataka High Court, decided the issue against the assessee by holding that the AO can travel beyond incriminating material. The Ld. AR submitted that now post the above judgment of the Hon'ble Karnataka High Court, this issue has been settled by the Hon'ble Jurisdictional Delhi High Court as well as various other High Courts. The Ld AR relied on the judgment of Hon'ble Delhi High Court in the case of CIT v. Kabul Chawla 380 ITR 573 (Del). The Ld. AR also placed further reliance on following judgments:-

- PCIT-Vadodara-1 versus RSA Digi Prints 2017(9) TMI 530-Gujarat High Court;

- PCIT-2, Kolkata versus M/s Salasar Stock Broking Limited.
Calcutta High Court 2016 (8) TMI 1131;

- Pr. CIT v. Best Infrastructure (India) Pvt. Ltd. [2017] 397 ITR
82- - **Delhi High Court;**

- **PR. CIT-Central-3 versus Baba Global Ltd. 2017 (2) TMI
346 - Delhi High Court;**

- **Pr. CIT (Central) – 3 versus DharampalPremchand Ltd. -
[2017 \(8\) TMI 958 - Delhi High Court;](#)**

- **CIT- (Central) -I versus Jakson Engineers Ltd 2015 (12)
TMI 1523 - Delhi High Court;**

- **CIT-7 vs. RRJ Securities Ltd. [2016] 380 ITR 612 (Del);**

3.2 It was contended by the Ld. AR that even otherwise, on merits, the additions were unsustainable. It was submitted that the assessee, during the course of assessment proceedings, had submitted complete details with regard to the share capital raised during the year and this fact had been duly taken note of by the AO as well as the Ld. CIT (A) in their respective orders. The Ld. AR submitted that the AO, as well as Ld. CIT (A), however, without pointing out any discrepancy in any of the documents filed by the assessee and

without carrying out any further enquiry, have held that the transaction/s relating share capital were not genuine.

3.3 The Ld. AR pointed out that the AO, during the assessment proceedings, issued show cause notice dated 20.03.2013 asking the assessee to show cause as to why the alleged bogus share capital received should not be added to the income u/s 68 of the Act and in response to said show cause notice, the assessee had submitted all the relevant documents to prove identity and creditworthiness of the parties as well as the genuineness of the transactions. It was submitted that the AO, without pointing out any defect in any of the documents filed by the assessee and even without making any enquiry on his own, had, merely on the basis of his whims and fancies, made the impugned addition. The Ld. AR submitted that the AO, in the assessment order, has not at all dealt with any of the evidences filed by assessee and has merely relied on the information received in the shape of enquiry report prepared by DDIT (Inv.)-6(2), New Delhi in case of search & seizure conducted on Shri S.K Jain on 04.09.2010 by the Investigation Wing. The Ld. AR submitted that the the assessee had duly complied with all the three

requirements of section 68 of the Act in as much as the identity was established by submitting Copy of Acknowledgment of ITR, MOA, PAN Card, bank statement, audited financial statements and resolution of Board of Directors. The genuineness of the transaction was established by submitting confirmation, bank statement and Share application form. The creditworthiness was established by submitting Copy of Acknowledgment of ITR, bank statement and audited financial statements. The Ld. AR invited attention to the paper book pages 154 to 417 wherein the copies of the above said documents in respect of each of the shareholders have been placed. The Ld. AR contended that the three ingredients were established by the assessee beyond doubt and the same is further corroborated from the fact that the AO, after having gone through the above documents, has not pointed out even a single error/discrepancy in the said documents. It was submitted further that all the transactions of receiving the share capital had been carried out through proper banking channels.

3.4 As regards the reference to the statement of Mr. SK Jain in the assessment order, it was submitted by the Ld. AR

that the AO made the addition on the basis of information received in the shape of enquiry report prepared by DDIT (Inv.)-6(2), New Delhi in case of search & seizure conducted on Mr. S.K Jain on 04.09.2010 by the Investigation Wing. It was submitted that in the assessment order there is no reference of any material found in the search of the assessee establishing the reason for the impugned addition. The Ld. AR pointed out that it is settled law that any adverse inference on the basis of material collected behind the back of the assessee, without affording any opportunity of cross examination or rebuttal is not admissible as valid evidence and, therefore, cannot be the basis for making any addition. In support thereof, the Ld. AR placed reliance on the judgment of the Hon'ble Apex Court in the case of Andaman Timber Industries v. CCE in Civil Appeal No. 4228 of 2006 dated 02.09.2015. Further, reliance was placed on the following judgments: - Prakash Chand Nahata vs. Union of India 163 CTR 310 (SC);

- Kishan Chand Chellaram vs. CIT 125 ITR 713 (SC);
- CIT vs. SMC Share Brokers Ltd. 288 ITR 345 (Del.);
- Alok Aggarwal vs. DCIT (2000) 67 TTJ 109 (Del.);

3.5 As regards the addition of Rs. 49,17,124/- on account of bogus purchases and Commission paid @ 0.25% thereon of Rs.12,292/-, it was contended by the Ld. AR that the AO, on the basis of statement of Mr. Sahil Sharma, Director of M/s GGL Steel and Strips Pvt. Ltd., which was recorded behind the back of the assessee, has alleged that the assessee had indulged in the bogus purchase transactions amounting Rs. 49,17,124 /- with M/s GGL Steel and Strips Pvt. Ltd. The Ld. AR submitted that this statement of Mr. Sahil was recorded on 15.02.2011, behind the back of the assessee and not during the search conducted on its premises and, thus, it cannot be considered as material found during the course of the search. It was further submitted that the statement *per se* cannot be considered as incriminating material, more so when the opportunity to cross examine had not been allowed to the assessee. The Ld. AR emphasized that the AO had recorded the statement of Mr. Sahil on three occasions without confronting the same to the assessee. It was pointed out this issue was raised by the assessee before the Ld. CIT (A), as is evident from the Page 44 of the order of

the Ld. CIT (A), wherein the assessee had specifically pointed out that the addition had been made without affording an opportunity of cross examination.

3.6 The Ld. AR, in support of his above contention, placed reliance on the judgment of the Hon'ble Delhi High Court wherein a similar issue had come in the case of Pr. CIT v. Best Infrastructure (India) Pvt. Ltd. [2017] 397 ITR 82 (Del) and wherein it had been held that statements recorded under section 132(4) do not by themselves constitute incriminating material.

3.7 On merits, it was contended that the assessee, during the course of assessment proceedings, had submitted complete details with regard to the Purchase/s made during the year from M/s GGL Steel and Strips Pvt. Ltd and this fact has also been duly noted by the AO as well as the Ld. CIT (A) in their respective orders. It was further submitted that the AO, as well as Ld. CIT (A), however, without pointing out any discrepancy in any of the documents filed by the assessee and without carrying out any further enquiry in this regard, have held that the transactions of Purchase were not genuine. The Ld. AR contended that the AO had failed to appreciate that

the assessee had entered into actual purchase and sale transactions with M/s GGL Steel and Strips Pvt. Ltd. in the regular course of business, which had been duly reflected in books of accounts. The Ld. AR invited attention to the reply dated 30.01.2013 submitted before the AO whereby all the documents in support of the Purchases made from with M/s GGL Steel and Strips Pvt. Ltd. were submitted which included copy of Ledger A/c of assessee in the books of M/s GGL Steel and Strips Pvt. Ltd. (Paper Book Pg.99), Ledger A/c of M/s GGL Steel and Strips Pvt. Ltd in the books of assessee (Paper Book Pg.100-101), Sales invoices raised by M/s GGL Steel and Strips Pvt. Ltd (Paper Book Pg. 102-114) and Sales Tax Returns (Paper Book Pg. 115-120).

3.8 The Ld. AR invited our attention to the purchase invoices issued by M/s GGL Steel and Strips Pvt. Ltd. placed at Paper Book Pgs 94-104 of Assessment Year 2008-09 to point out that all these purchases were excise paid and details of gate passes challans and previous supplier/s and manufacturer/s details were also available on the invoice. Making reference to page 94, it was submitted by the Ld. AR that this invoice clearly showed that the goods had been

manufactured by Bokaro Steel Plant at Bokaro Steels City and goods had moved from Bokaro Steel City to Lakshmi Industrial Corporation, Faridabad and then to M/s GGL Steel & Strips Pvt. Ltd. and from there to the Assessee. It was submitted that, thus, there was a complete trail available of the movement of the goods and the AO and CIT (A) had failed to take cognizance of the same.

3.9 As regards the adverse inference drawn by the AO on the basis of the statement of Mr. Sahil Sharma, it was submitted by the Ld. AR that there were three statements of Mr. Sahil Sharma. In his first statement on 28.01.2011 (at Paper Book Pg. 57), Mr. Sahil Sharma had confirmed that M/s GGL Steel and Strips Pvt. Ltd. is having office at B-20, Nehru Ground, Faridabad and all the business activities were performed from this address. Thereafter, another statement of Mr. Sahil Sharma was recorded on 28.01.2011 wherein he has provided details of shop No B-20, Nehru Ground, NIT, Faridabad from where he has been carrying on the business. It has been stated that this shop has been taken on rent at Rs.12,000/-per month and is owned by Mr. Arun Bhatia. Even the mobile number of the landlord was provided. In the

statement he explained the business of sale purchase of Iron and Steel and also the details of the sales and purchases and the payment received against such sales and purchases. It was contended by the Ld. AR that these statements clearly confirm that Mr. Sahil Sharma was carrying on the business of Steel and that he has explained all the facts relating to the business. The Ld. AR submitted that there was nothing adverse against the assessee in these statements and on the contrary, it confirmed the nature of business being carried on by M/s GGL Steel and Strips Pvt. Ltd. It was submitted that this company is in trading and has bought the material from the suppliers, as was evident from the invoices, and had sold the goods to the assessee. The Ld. AR submitted that the AO had, accordingly, gone wrong in ignoring these statements. It was further submitted that there being nothing incriminating in these statements, the AO could not have drawn adverse inference and made the addition as the assessment have not abated. It was contended that the reliance placed by the AO on the statement dated 15.02.2011 ignoring the above statements is bad. It was further submitted that even otherwise this statement could not be used against the

assessee without allowing opportunity of cross examination to the assessee. The Ld. AR submitted that the AO had merely relied on an oral statement which was not backed or corroborated by any material.

3.10 It was further contended by the Ld. AR that the issue of cross examination has been considered by the various authorities and the right of cross-examination has been held to be an essential ingredient of reasonable opportunity to be afforded to an assessee. The Ld. AR, in support of his contention, placed reliance on the judgment in the case of K.T. Shaduli vs State of Kerala 29 STC 44 (SC) wherein the view of the Hon'ble Kerala High Court was upheld by the Hon'ble Supreme Court. The Ld. AR also placed reliance on the judgment in the case of Vasanji Ghela & Co. vs Commissioner of Sales Tax 40 STC 544 (Bom.).

4.0 In reply, the Ld. DR supported the order passed by the AO and the Ld. CIT (A). It was contended that the AO has passed a detailed and reasoned order. It was submitted that the assessee had received share capital from entry operators as was evident from the facts stated in the assessment order. It was submitted by the Ld. DR that the Investigation

Department had carried out a detailed investigation on the basis of which a detailed report was forwarded to the Assessing Officer along with the document/s seized from entry operators wherein there was a clear reference to the entry provided to the assessee by the entry providers. The Ld. DR invited our attention to page 11 of the assessment order wherein the name of Mr. Satish Goyal is appearing through which an entry of Rs. 54,00,000/- has been provided to the assessee. The Ld. DR also invited our attention to pages 12 to 16 of the assessment order which is a list of the companies/entities by whom cheques had been issued to the assessee company. The Ld. DR also invited our attention to the fact that the AO had issued a show-cause notice dated 28.03.2013 on this aspect calling for explanation from the assessee. The Ld. DR further submitted that the reply of the assessee received in response thereto had been duly considered and had rightly been found to be not acceptable for the reasons stated on page 25 to 30 of the assessment order. The Ld. DR place reliance on the following judgments in support of his contention:

1. *Mukundray K Shah – 290 ITR 433 (SC)*

2. *S. Ajit Kumar – Civil Appeal No. 10164 of 2010 – Order dated 02.05.2018(SC)*
3. *Surya Financial Services Ltd. – ITA no. 2915/D/2017-order dated 08.01.2018*
4. *Surya Jyoti Software P. Ltd.- ITA no. 2158/D/2017-Order dated 25.10.2017*
5. *PCIT Vs. Paramount Communication (P.) Ltd. (2017-TIOL- 253-SC-IT)*
6. *PCIT Vs. Paramount Communication (P.) Ltd. [2017] 79 taxmann.com 409 (Delhi)/[2017]392 ITR 444 (Delhi)*
7. *Aradhna Estate (P.) Ltd. Vs. DCIT [2018] 91 taxmann.com 119 (Gujarat)*
8. *Pushpak Bullion (P.) Ltd. Vs. DCIT [2017]85 taxmann.com 84 (Gujarat)*
9. *Ankit Financial Services Ltd. Vs. DCIT [2017] 78 taxmann.com 58 (Gujarat)*
10. *Aaspas Multimedia Ltd. Vs. DCIT [2017] 83 taxmann.com 82 (Gujarat)*
11. *Ankit Agrochem (P.) Ltd. Vs. JCIT [2018] 89 taxmann.com 45 (Rajasthan)*
12. *Mona Mahesh Bhojani Vs. ITO (2017-TIOL-345-SC-IT)*
13. *Indu Lata Rangwala Vs. DCIT [2017] 80 taxmann.com 102 (Delhi)/[2016] 384 ITR 337 (Delhi)/ [2016] 286 CTR 474 (Delhi)*
14. *Krishna Developers and Co. vs. DCIT (2018-TIOL-51-SC-IT)*
15. *Vasudev Fatandas Vaswani Vs. ITO (2018-TIOL-2305-HC-AHM-IT)*
16. *Thakorbbhai Maganbbhai Patel Vs. ITO [2017]78 taxmann.com 201 (SC)/[2017] 245 Taxman 333 (SC)*

17. *Thakorbbhai Maganbbhai Patel Vs. ITO [2017] 79 taxmann.com 409 (Delhi)/[2017] 392 ITR 444 (Delhi)*
18. *Smt. S Rajalakshmi Vs. ITO (2018-TIOL-2324-HC-MUM-IT)*
19. *Mohammedally Noorbhoy Bandukwala Trust Vs. ITO (2017-TIOL-341-HC-MUM-IT)*
20. *Aravali Infrapower Ltd. Vs. DCIT (2017-TIOL-42-SC-IT)*
21. *Aravali Infrapower Ltd. Vs. DCIT [2017] 77 taxmann.com 322 (Delhi)/[2017] 390 ITR 456 (Delhi)*
22. *Yogendrakumar Gupta Vs. ITO (51 taxmann.com 383) (SC)/ [2014] 227 Taxman 374 (SC)*
23. *Raymond Woollen Mills Ltd. v. ITO And Others [236 ITR 34]*
24. *R.K. Malhotra ITO Vs. Kasturbhai Lalbbhai [1977] 109 ITR 537 (SC)*
25. *CIT Vs. P.V.S. Beedies (P.) Ltd. [1999] 103 Taxman 294 (SC)/[1999] 155 CTR 538 (SC)*
26. *ACIT vs. Rajesh Jhaveri Stock Brokers (P.) Ltd. [2007] 161 Taxman 316 (SC)/[2007] 291 ITR 500 (SC)/[2007] 210 CTR 30(SC)*
27. *Yuvraj V. Union of India [315 ITR 84] (SC)*
28. *Paramount Intercontinental Pvt. Ltd. Vs. ITO (2017-TIOL-376-HC-DEL-IT)*
29. *Ajanta Pvt. Ltd. Vs. ACIT (2017-TIOL-126-HC-AHM-IT)*
30. *Murlibbbhai Fatandas Sawlani Vs. ITO (2016-TIOL-370-HC-AHM-IT)*
31. *Greenwell Orchard Vs. ITO [2017] 82 taxmann.com 461 (Gujarat)*
32. *Dr. Chhangur Rai Vs. CIT (2017-TIOL-660-HC-ALL-IT)*

33. *Amsa India Pvt. Ltd. Vs. CIT (2017-TIOL-603-HC-DEL-IT)*
34. *Prem Castings (P.) Ltd. Vs. CIT [2017] 88 taxmann.com 189 (Allahabad)*
35. *Prem Castings (P.) Ltd. Vs. CIT 2018-TIOL-274-SC-IT*
36. *CIT Vs. MAF Academy (P.) Ltd. (361 ITR 258)*
37. *CIT Vs. Navodaya Castle Pvt. Ltd. [2014] 367 ITR 306 (Del.)*
38. *Navodaya Castle Pvt. Ltd. Vs. CIT (2015-TIOL-314-SC-IT)*
39. *Konark Structural Engineering (P.) Ltd. Vs. DCIT [2018] 96 taxmann.com 255 (SC)*
40. *Konark Structural Engineering (P.) Ltd. Vs. DCIT [2018] 90 taxmann.com 56 (Bombay)*
41. *DRB Exports (P.) Ltd. Vs. CIT [2018] 93 taxmann.com 490 (Calcutta)*
42. *CIT Vs. Nipun Builders & Developers (P.) Ltd. (30 taxmann.com 292, 214 Taxman 429, 350 ITR 407, 256 CTR 34)*
43. *CIT Vs. Nova Promoters & Finlease (P) Ltd. (18taxmann.com 217, 206 Taxman 207, 342 ITR 169, 252 CTR 187)*
44. *CIT Vs. Ultra Modern Exports (P.) Ltd. (40 taxmann.com 458, 220 Taxman 165)*
45. *CIT Vs. Frostrair (P.) Ltd. (26 taxmann.com 11, 210 Taxman 221)*
46. *CIT Vs. N R Portfolio Pvt. Ltd. [2014] 42 taxmann.com 339 (Delhi) / [2014] 222 Taxman 157 (Delhi) (MAG)/[2014] 264 CTR 258 (Delhi)*

47. *CIT vs. Empire Builtech (P.) Ltd. (366 ITR 110)*
48. *CIT Vs. Focus Exports (P.) Ltd. (51 taxmann.com 46 (Delhi / [2015] 228 Taxman 88)*
49. *PCIT Vs. Bikram Singh [ITA No. 55/2017] (Delhi)*
50. *Rick Lunsford Trade & Investment Ltd. Vs. CIT [2016] 385 ITR 399 (Cal)*
51. *Rick Lunsford Trade & Investment Ltd. Vs. CIT [2016-TIOL-207-SC-IT] (Supreme Court)*
52. *M/s. Pebble Investment and Finance Ltd. Vs. ITO [2017-TIOL-238-SC-IT] (Supreme Court)*
53. *CIT Vs. Kuwer Fibers (P.) Ltd. [2017] 77 taxmann.com 345 (Delhi)*
54. *Nokia India (P.) Ltd. Vs. DCIT [2015] 59 taxmann.com 212 (Delhi-Trib.)*
55. *ITO Vs. M. Pirai Choodi ([2012] 20 taxmann.com 733 (SC)/[2011] 334 ITR 262 (SC)/[2011]245 CTR 233 (SC) (Supreme Court)*
56. *CIT Vs. Sonal Construction [2012-TIOL-851-HC-DEL-IT] (Delhi)*
57. *GTC Industries Ltd. Vs. ACIT [1998] 65 ITD 380 (BOM)*
58. *N K Proteins Ltd. Vs. CIT (2017-TIOL-23-SC-IT)*
59. *N K Proteins Ltd. Vs. CIT (2016-TIOL-3165-HC-AHM-IT)*
60. *N.K.Industries Ltd. Vs. DCIT [2016] 72 taxmann.com 289 (Gujarat)/[2017] 292 CTR 354 (Gujarat)*
61. *CIT vs. Arun Malhotra 47 taxmann.com 385 (Delhi)/[2014] 363 ITR 195*
62. *CIT Vs. La Medica [2001] 117 Taxman 628 (Delhi)/[2001] 250 ITR 575 (Delhi)/[2001]168 CTR 314 (Delhi)*

63. *Vijay Proteins Ltd. Vs. ACIT [2015] 58 taxmann.com 44 (Gujarat)*
64. *Sanjay Oilcake Industries Vs. CIT [2009] 316 ITR 274 (Gujarat)*

4.1 On the issue of incriminating material, it was submitted that it was not necessary that incriminating material should be found during the search from the assessee itself. The Ld. DR submitted that once an assessment has been reopened consequent to the search under section 153A, the AO is entitled to take into consideration all the material available to him at the time of completion of assessment under section 153A. The Ld. DR submitted that despite no material having been found in the search on the assessee, the fact is that the AO received a report from the investigation wing on 18.03.2013, that is before the completion of assessment on 28.03.2013 and as such the AO was justified in taking into consideration such material while framing assessment under section 153A.

4.2 On the issue of the statement having been recorded at the back of the assessee and the opportunity of cross examination having not been provided, it was contended that

it is not the absolute right of the assessee to have an opportunity of cross examination. The Ld. DR submitted that the report of the Investigation Wing is a detailed report prepared after thorough investigation and the assessing officer is entirely justified in taking cognizance of the same and making the addition and, accordingly, it cannot be contended that any prejudice has been caused to the assessee by not allowing opportunity of cross examination.

4.3 On the issue of addition on account of allegation of bogus purchases by the assessee from GGL Steel and Strips Pvt. Ltd., it was contended by the Ld. DR that the Director of this company Mr. Sahil Sharma, in his statement recorded on 15.02.2011, has clearly stated that no actual material was delivered by him or his company to the assessee. It was further submitted that the reply of the assessee submitted in response to the show cause by the AO had been duly considered and had rightly been rejected in view of the statement made by Mr. Sahil Sharma on 15.02.2011. The Ld. DR further placed reliance on the order of the AO in support of his contention.

5.0 We have duly considered the rival submissions and have also perused the record.

5.1 Ground nos.1 and 17 are general in nature and hence need no adjudication.

5.2 Ground nos. 2 and 3 are dismissed as not pressed.

5.3 Ground nos.4 and 5 pertain to the issue of addition being unsustainable in absence of any incriminating material being found in the course of search on the assessee as the assessment for the year under consideration has not abated. The issue whether addition can be made in absence of any incriminating material having been found during the course of the search has been the subject matter before the Hon'ble jurisdictional Delhi High Court in the case of CIT vs. Kabul Chawla 380 ITR 573 (Delhi) wherein it has been held that no addition can be made in absence of any incriminating material having been found during the course of the search. This judgment has been respectfully followed thereafter in a number of cases and as such we are in agreement with the contention of the Ld. AR that in absence of any incriminating material having been found, no addition could be made in the

assessment proceedings under section 153A of the Act, if, the assessment proceedings were not pending as on the date of search. In the present case, the assessee had originally filed its return of income on 30.09.2008. The same was taken up for scrutiny and the assessment of the same was completed under section 143(3) vide order dated 27.12.2010. Thereafter, a search had been carried out on 28.01.2011. Thus, on the date of the search this assessment for the year under consideration stood completed and was not pending and hence not abated accordingly.

5.4 Now the next question is whether any incriminating material or document was found during the course of the search. The contention of the Ld. DR on this issue is that incriminating material need not be restricted to the material found during the course of the search on the assessee and that it will include the information, if any, received by the AO during the pendency of the assessment proceedings under section 153A. The Ld. DR was fair enough to accept that no incriminating document was found during the course of the search in relation to the assessment year under consideration. However, the Ld. DR. has supported the order

of the AO on the basis of the subsequent information received by the AO and the statement of Mr. Sahil Sharma, Director of GGL Steel & Strips Pvt. Ltd. As regards the subsequent information being received by the AO, this issue had come up for consideration in assessee's own case for the the preceding assessment years 2006-07 and 2007-08 in ITA Nos.2838 & 2839/Del/2015. In these assessment years, based on the same information received by the AO after the search, the additions were made. The ITAT, vide order dated 19.03.2018, held that it is only the incriminating material found during search which gives jurisdiction to the AO to make addition. The finding of the ITAT in this order reads as under:-

“6. We have considered the rival submissions and have perused the material on record. The only question requiring consideration is whether the AO could have made any addition de hors the material found during the course of the search in those assessment years which have not abated. In the present case, it is an admitted fact that on the date of the search i.e. on 28th January, 2011, the assessment for these years was not pending. It is also an admitted fact that nothing incriminating was found during the course of the search. The Ld. DR was fair enough to accept out that no

incriminating material was found during the course of the search. The contention of the Ld. DR was with reference to the information which AO got during the pendency of the assessment proceedings under Section 153A. It was the contention of the Ld. DR that the AO in such cases is entitled to use the same and make the addition. At this juncture, reference may be made to the judgment of the Hon'ble Delhi High Court in the case of Kabul Chawla (Supra). In Para 37 of this judgement, the Hon'ble Delhi High Court has summarized the legal position 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 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.”

6.1 As per Para iv above it has been held that though Section 153A does not say that addition should be strictly made on the basis of the 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 ITA No. 2838./D/2015 ITA No.2839/D/2015 Assessment year 2006-07, 2007-08 Page | 12 assessment can be made without any reference or establishing any nexus with the seized material. Thus, as per this judgment, the existence of the seized material found during search is a must for making addition in those assessment years which have not abated.

6.2 The importance of the seized material being found during the course of the search has also been explained in the subsequent judgment of the Hon'ble Delhi High Court in the case of Pr. Commissioner of Income Tax. vs. Meeta Gutgutia reported in 395 ITR 526 (Delhi). In this case, the Revenue had relied upon the judgment of the Hon'ble Delhi High Court in the case of Smt. Dayawanti Gupta vs. CIT reported in 390 ITR 496 (Delhi), wherein it was held that material seized which is relevant to one particular assessment year is sufficient to infer a certain modus operandi adopted by the assessee for all the assessment years in question. It was held that the judgment in

the case of Smt. Dayawanti Gupta vs. CIT (supra) was rendered in the peculiar facts of that case, whereby it was held that the material seized for one particular assessment year could lead to an inference regarding the modus operandi of the assessee for the other assessment years. It was explained that in the case of Dayawanti Gupta vs. CIT (supra), the assessee herself had made a statement admitting that the documents seized during the course of the search could pertain even to other assessment years. Thus, it was a case of documents found during search and admission by the assessee that such document/s could pertain to other assessment years as well.

6.3 In the present case, as stated hereinabove, the Ld. DR was fair enough to accept that no incriminating material, whatsoever, was found during the course of the search. The addition/s have been made on the basis of the subsequent information received by the AO. Such information, had it been related to the incriminating material found during the course of the search, the AO could well have been within its jurisdiction to take into consideration such information and make additions relating to the search material found during the search. However, in absence of any incriminating material being found during the course of the search, as held by the jurisdictional Delhi High

Court, the AO will be without jurisdiction in making such additions. It is the incriminating material found during search which gives jurisdiction to the AO to make additions in the assessment proceedings under Section 153A of the Act in respect of assessments which have not abated. In the absence of incriminating material in such cases, as held by the Hon'ble Delhi High Court in the case of Kabul Chawla in Para 37 (v) quoted hereinabove, the completed assessment is not to be disturbed.

6.4 In view of the above, we are of the considered opinion that the Ld. CIT(A) was not justified in rejecting the contentions of the assessee company on this issue and we hold that the additions made in both the assessment years under consideration are beyond jurisdiction and accordingly direct the AO to delete the same.

6.5 Since we have decided the issue in favour of the assessee on the legal ground, the other grounds raised by the assessee company become academic in nature and hence are not being adjudicated upon.”

5.5 In view of the above findings of the ITAT in the case of the assessee itself, the first contention of the Ld. DR that the AO will be well within its jurisdiction to take into

consideration such information and make addition without there being any incriminating material relating to such information being found during the search cannot be accepted and the same is rejected.

5.6 As regards the second contention of the Ld. DR regarding the statement of Mr. Sahil Sharma, the Director of GGL Steel & Strips Pvt. Ltd., it is also an admitted fact that no incriminating material regarding purchases by the assessee from GGL Steel & Strips Pvt. Ltd. was found during the course of the search on the assessee. We have perused the statements of Mr. Sahil Sharma. On going through the same we note that the statement recorded is not related to any incriminating material found during the course of the search on the assessee. In fact, in the statement recorded on 28.01.2011-the day on which search was carried out on the assessee, there is nothing adverse in the statement. It is only later that Mr. Sahil Sharma, in his statement, has stated adversely about the assessee. However, what he has stated in this statement also is not related to any incriminating material found during the course of search on the assessee. It may be relevant to point out that the Hon'ble jurisdictional

Delhi High Court in the case of CIT vs Kabul Chawla 380 ITR 573(Delhi) has held that addition cannot be made without any reference or establishing any nexus with the seized material. As per this judgment, existence of the seized material found during the course of the search is a must for making addition in those assessment years which have not abated. The importance of the seized material being found during the course of the search on the assessee has also been explained by the Hon'ble Jurisdictional Delhi High Court in the case of Pr. CIT vs Meeta Gutgutia 395 ITR 526 (Delhi). In view of the above facts, we are of the opinion that the Ld. CIT (A) was not justified in rejecting the contention of the assessee that in the absence of any incriminating material the various additions made by the AO were beyond jurisdiction and bad in law and, accordingly, we hold that the addition made by the AO were beyond jurisdiction and direct the AO to delete the same.

5.7 In the result, ground nos.4 & 5 are allowed.

5.8 Since we have decided the issue in favour of the assessee on the legal ground, the other grounds raised by the assessee- company become academic in nature and hence are not being adjudicated upon.

6.0 In the result, the appeal of the assessee is allowed.

7.0 Now, we take up the appeal for the A.Y. 2009-10. It was agreed by both the sides that the facts in this appeal are identical to the facts in ITA No.2840/Del/2015 for the A.Y. 2008-09 except that in the assessment year 2008-09, the additions were made on account of share capital and bogus purchases whereas in this appeal for the A.Y. 2009-10 the additions are only with regard to bogus purchases. In the appeal for A.Y. 2008-09, we have held that the Ld. CIT (A) was not justified in rejecting the contention of the assessee that in absence of any incriminating material, the various additions made by the AO were beyond jurisdiction and bad in law and, accordingly, directed the AO to delete the same. We, therefore, following the above order, on identical facts, hold that the various additions made by the AO were beyond jurisdiction and bad in law and accordingly, direct the AO to delete the same.

7.1 Since, we have decided the issue in favour of the assessee on the legal ground, the other grounds raised by the assessee-company become academic in nature and hence are not being adjudicated upon.

8.0 In the result, the appeal of the assessee is allowed.

9.0 In the final result, both the appeals of the assessee stand allowed.

Order pronounced in the open court on 15.03.2019.

Sd/-

**(G.D.AGRAWAL)
VICE PRESIDENT**

Sd/-

**(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER**

Dated: 15.03.2019

Copy forwarded to:

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

TRUE COPY

ASSISTANT REGISTRAR

ITAT NEW DELHI

Date of dictation	Dictated on dragon
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	