

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'E' : NEW DELHI)**

**BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
and
SHRI KULDIP SINGH, JUDICIAL MEMBER**

**ITA No.5223/Del./2015
(ASSESSMENT YEAR : 2007-08)**

ACIT, Central Circle 13, vs. M/s. Dhansafal Vyapaar Ltd.,
New Delhi. A-15, Ashok Vihar, Phase I,
New Delhi.

(PAN : AAACD8957C)

**ITA No.5224/Del./2015
(ASSESSMENT YEAR : 2008-09)**

**ITA No.5225/Del./2015
(ASSESSMENT YEAR : 2007-08)**

ACIT, Central Circle 13, vs. M/s. Whiteline Barter Ltd.,
New Delhi. A-15, Ashok Vihar, Phase I,
New Delhi.

(PAN : AAACD8957C)

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : Shri Salil Aggarwal, Advocate
Shri Shailesh Gupta, Advocate
Shri Madhur Aggarwal, Advocate
REVENUE BY : Ms. Pratima M. Biswas, CIT DR

Date of Hearing : 11.04.2019

Date of Order : 24.04.2019

ORDER

PER KULDIP SINGH, JUDICIAL MEMBER :

Since common questions of facts and law have been raised in the aforesaid appeals, the same are being disposed off by way of composite order to avoid repetition of discussion.

2. The Appellant, ACIT, Central Circle 13, New Delhi (hereinafter referred to as the 'Revenue') by filing the present appeals sought to set aside the impugned orders all dated 05.06.2015 passed by the Commissioner of Income-tax (Appeals)-25, New Delhi, qua the assessment years 2007-08, 2007-08 & 2008-09 on the identical grounds, except the difference in addition, inter alia that :-

“1. The Ld. CIT(A) has erred in law as well as on facts of the case in deleting the addition (Rs.4,53,40,000/- in ITA No.5223/Del/2015, Rs.5,00,00,000/- in ITA No.5224/Del/2015 & Rs.4,25,00,000/- in ITA No.5225/Del/2015) made by the AO on account of unexplained cash credit u/s 68 of the IT Act, 1961.

2. The Ld. CIT(A) has erred in law as well as on facts in deleting the addition (Rs.2,26,700/- in ITA No.5223/Del/2015, Rs.2,50,000/- in ITA No.5224/Del/2015 & Rs.2,12,500/- in ITA No.5225/Del/2015) on account of commission paid to entry operators.”

2. Briefly stated the facts necessary for adjudication of the controversy at hand are similar in the aforesaid appeals. For the sake of brevity, the facts in ITA No.5224/del/2015 for AY 2008-09 are taken to decide the issues in question. Initially original return of income was processed under section 143 (3) of the Income-tax Act, 1961 (for short 'the Act') on 29.04.2009. Thereafter, assessment

was completed u/s 147/143 (3) of the Act vide order dated 23.04.2010. Subsequently, on the basis of search and seizure operation conducted on 10.01.2012 at the business and residential premises of Minda Group, notice u/s 153A of the Act was issued on 24.12.2013 to which assessee has filed copy of return on 17.01.2014 declaring income of RS.22,140/-. Thereafter, on the basis of notice dated 22.01.2014 u/s 143(2)/142(1) of the Act along with questionnaire, assessment proceedings were initiated. AO made addition of Rs.5,00,00,000/- as unexplained cash credit u/s 68 of the Act on account of share capital and share premium received by the assessee on various companies and also on the ground that the source of investment in the companies has not been explained. AO also made addition of Rs.2,50,000/- being the commission charged by the entry operator ranging from 0.5% to 1% of the accommodation entry given by them and thereby assessed the total income at Rs.5,02,72,140/-.

3. Assessee carried the matter by way of appeals before the Id. CIT (A) who has partly allowed the same. Feeling aggrieved, the Revenue has come up before the Tribunal by way of filing the present appeals.

4. We have heard the Id. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

5. Assessee by filing applications under Rule 27 of the Income-tax Appellate Tribunal Rules, 1963 (for short 'the Rules') in all the aforesaid appeals sought to raise legal ground as under :-

"That the learned Commissioner of Income Tax (Appeals) has erred in law and on facts in overlooking the basic fact that the incriminating material was found during the course of search and the assessment as contemplated under section 153 is not a de novo assessment and as such, the additions so made by assessing officer are beyond the scope of assessment under section 153A of the Act and are liable to be deleted in totality".

on the grounds inter alia that while deciding the appeals, the Id. CIT (A) has upheld the initiation of proceedings u/s 153A of the Act, however deleted the addition on merit; that this legal ground was taken as grounds no.1 & 2 before the Id. CIT (A); that proceedings initiated u/s 153A of the Act were bad in law; that the Id. CIT (A) has decided this issue against the assessee.

6. Id. DR for the Revenue opposed the application filed by the assessee under Rule 27 of the Rules by relying upon the decision viz. ***CIT vs. Jindal Polyester Ltd. 397 ITR 282 (All.), Divine***

Infracon Pvt. Ltd. vs. CIT – 2015-TIOL-1914-HC-DEL-IT, CIT vs. Edward Keventer (Successors) (P.) Ltd. (1980) 123 ITR 200 (Del.), IAC vs. Avis International (P.) Ltd. – (1990) 33 ITD 217 (Del.), Self Knitting Works vs. CIT – (2014) 51 taxmann.com 137 (P&H), CIT vs. Jamnadas Virji Shares & Stock Brokers (P.) Ltd. (2012) 21 taxmann.com 27 (Bombay) and DCIT vs. Sandip M. Patel (2012) 137 ITD 104 (Ahd.), submitted in the form of written submissions without throwing lights on the facts and circumstances of the case.

7. Coordinate Bench of the Tribunal in case of *ITO vs. Gurinder Kaur 102 ITD 189 (Del)* decided the issue in controversy after discussing the decision rendered by the Hon'ble Deli High Court as well as Hon'ble Supreme Court, in favour of the assessee by holding that, “*it is open to the Respondent in an appeal before the Tribunal to raise new grounds in defence of the order appealed against under Rule 27 of the Rules.*”

8. Hon'ble Allahabad High Court in case of *CIT vs. Jindal Polyester Ltd. 397 ITR 282 (All.)* held that, “*the assessee can advance arguments before the Tribunal even though it had not filed cross objections against the findings, in accordance with Rule 27 of the Rules.*”

9. Keeping in view the settled principles of law that the Respondents/assesseees are entitled to support the order of the appellate authority even on a ground which has been decided against it even without filing the appeal against such order. We hereby allow the application filed by the assessee under Rule 27 of the Rules being necessary for complete adjudication of the controversy at hand. The decisions relied upon by the Id. DR are not applicable to the facts and circumstances of these cases.

10. Undisputedly, the Id. CIT (A) has decided the issue as to the initiation of proceedings u/s 153A of the Act against the assessee as per findings returned under grounds no.1 & 2. It is also not in dispute that the assessments in this case was completed u/s 147/143(3) of the Act vide order dated 23.04.2010 much prior to the search conducted in this case on 10.01.2012 as has been discussed by the Id. CIT (A) at page 4 and 5 of the impugned order. It is also not in dispute that no incriminating material qua the assessee in question has come on record. It is also not in dispute that as per order passed by the AO u/s 147/143(3) of the Act dated 23.04.2010 that genuineness of the share capital of the assessee was duly examined and no addition has been made by returning following findings :-

“During the Financial year 2007-08, the authorized capital of the assessee company was raised from Rs.4,55,00,000/- to Rs.50,500,000/- and the assessee enhanced its paid up share capital by Rs.50,00,000/- from Rs.4,54,08,000/- to Rs.5,04,08,000/-. Along with this enhancement in its paid up share capital, the share premium of the assessee company increased by Rs.4,50,00,000/- from Rs.15,99,39,000/- to Rs.20,49,39,000/-. Inquiries were conducted with the fresh shareholders of the assessee company by issuing notices u/s 133(6) and verifying their response with details submitted by the AIR of the assessee.

From the perusal of the above para of the assessment order it is established beyond doubt that the Assessing officer was satisfied about the genuineness of the share capital allotted by the assessee and as such no action have been taken by the Assessing officer while passing the order u/s 1471143(3) of the Income Tax Act. As such the addition made by the Assessing officer in respect of share capital while passing the order u/s 153A is contrary and is against the provision contained in the act and may please be deleted.”

11. It is also not in dispute that the addition in this case u/s 143(3)/153A was made merely on the basis of statement of Shri Santosh Kumar Jain recorded during the search operation carried out at the premises of Minda Group of companies which was subsequently retracted, without bringing on record any material to corroborate the said statement that he has provided accommodation entries to the assessee.

12. In the backdrop of the aforesaid facts and circumstances of the case, when we examine the legal issue raised by the assessee

that in the face of the fact that no “incriminating material” was found during the course of search, the initiation of assessment proceedings u/s 153A is not maintainable because assessment u/s 143(3)/147 was already framed “*prior to the date of search*” is to be answered in affirmative in view of the decision rendered by the Hon’ble jurisdictional High Court in case of *CIT vs. Kabul Chawla – 380 ITR 173 (Del.)*.

13. Identical issue has come up before the Hon’ble jurisdictional High Court in the case cited as *Kabul Chawla* (supra) wherein all the earlier decisions delivered by the Hon’ble High Courts have been considered and legal position decided by the Hon’ble jurisdictional High Court is summarized for ready reference 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.*

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.”*

14. So, in view of the law laid down by Hon’ble jurisdictional High Court in *Kabul Chawla* (supra), we are of the considered view that when no incriminating material has come on record during the search and seizure operation conducted at the premises of the assessee rather assessment has been based upon mere statement of Shri Santosh Kumar Jain which was later retracted without any further corroborating material on record.

15. More so, Santosh Kumar Jain in answer to Question No.11 has categorically replied that, “*we have given accommodation entries to Minda Group of companies through assessee company*” and has not stated that he has provided accommodation entries to the assessee company. So, in view of the matter, Id. CIT (A) has

erred in dismissing the legal ground raised by the assessee that in the absence of incriminating material, if any, unearthed during the course of search initiation of assessment proceedings u/s 153A is not maintainable and the assessment made by the AO is beyond the scope of section 153A of the Act. Consequently, legal ground raised by the assessee is determined in favour of the assessee/respondents. Consequently, since the very initiation of assessment proceedings u/s 153A are not maintainable, the present appeals filed by the Revenue are liable to be dismissed. Even, on merits, additions made by the AO u/s 153A/143(3) are not sustainable, hence rightly deleted by the Id. CIT (A).

15. Resultantly, all the aforesaid three appeals filed by the Revenue are hereby dismissed.

Order pronounced in open court on this 24th day of April, 2019.

**Sd/-
(R.K. PANDA)
ACCOUNTANT MEMBER**

**sd/-
(KULDIP SINGH)
JUDICIAL MEMBER**

Dated the 24th day of April, 2019

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Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT(A)-25, New Delhi.
- 5.CIT(ITAT), New Delhi.

**AR, ITAT
NEW DELHI.**