IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'E' NEW DELHI

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

ITA No.4134/Del/2016
Assessment Year: 2008-09

Mount Everest Trading & Investment Ltd. (Now merged with Monnet Ispat & Energy Ltd.,), 11, Masjid Moth, Greater Kailash-II, New Delhi. (PAN: AAACM0501D)	**vs**	Dy.Commissioner of Income Tax, Central Circle-8, New Delhi.
Appellant		Respondent

Assessee by : Shri V.K. Jain, CA
Shri Vikas singh, CA
Department by: Ms Deepika Mittal, CIT DR

Date of hearing: 27.02.2019
Date of pronouncement:

O R D E R

PER SUDHANSHU SRIVASTAVA, JM :

This appeal has been preferred by the assessee against the order of the Ld. Commissioner of Income Tax (Appeals) – 2 {CIT (A)}, New Delhi vide order dated 31.3.2016 for assessment year 2008-09 and the sole issue under challenge before us is the confirmation of disallowance of Rs. 18,78,416/- made u/s 14A of the Income Tax Act, 1961 (hereinafter called 'the Act') read with

Rule 8D of the income Tax Rules, 1962(hereinafter called 'the Rules').

2.0 Brief facts of the case are that a search and seizure action u/s 132 of the Act was conducted in Monnet Group of cases on 19.11.2010. In this search and seizure operation, certain documents belonging to the assessee company were also found and seized. Subsequently, a statutory notice u/s 153C of the Act was issued to the assessee for assessment years 2005-06 to 2010-11. The assessee objected to invocation of section 153C which was rejected by the Assessing Officer (AO). During the course of assessment proceedings, it was observed by the AO that the assessee had claimed dividend income of Rs. 45,72,740/- as exempt income. The assessee was issued show cause notice and was required to explain as to why a disallowance u/s 14A of the Act r/w Rule 8D of the Rules not be made in respect of interest income. Subsequently, a total disallowance was computed at Rs. 23,08,347/- and after giving deduction of Rs. 4,29,931/-, which had been disallowed by the assessee itself, the balance amount of Rs. 18,78,416/- was added back to the income of the assessee.

2.1 Aggrieved, the assessee approached the learned first appellate authority and challenged the invocation of provisions of

section 153C of the Act contending that no undisclosed income for the year under consideration was detected on the basis of seized material found during the course of search and, further, that the disallowance u/s 14A did not have any nexus with the seized material. However, the assessee's contentions did not find favour with the Ld. Commissioner of Income Tax (A) who observed that since papers and documents relating to the assessee were found during the course of search in the Monnet Group of cases, the assessee's case was covered under the provisions of section 153C of the Act. On merits also, the Ld. Commissioner of Income Tax (A) upheld the disallowance.

2.2 Now, the assessee is before this Tribunal and has raised the following grounds of appeal:-

> *"1. That on the fact and in the circumstances of the case the order passed by the Ld. CIT (A) is bad in law, violative of principles of natural justice and void-ab-initio.*
>
> *2(a) That the Ld. CIT(A) has erred in confirming the action of the Ld. AO in invoking the provisions of Section 153C of the Income Tax Act particularly when the satisfaction note is absolutely devoid of any categorization / specification of undisclosed income with reference to the documents mentioned therein which is a legal pre-requisite for invoking provisions of section 153C of the Income Tax Act.*
>
> *b) That on the fact and in the circumstance of the case the Ld. CIT (A) has failed to appreciate that in the*

impugned assessment order framed u/s 153C of the Act the issues on which disallowance has been made has no nexus with the alleged material unearthed during the course of search operations and thereby making a denovo assessment which needs to be deleted.

3(a) That the CIT(A) has erred in law in confirming disallowance of Rs.18,78,416/- u/s 14A r.w.r. 8D of the Income Tax Act.

(b) The Ld. CIT (A) had not appreciated the fact that a disallowance of Rs.4,29,931/- has been duly made on a scientific and systematic basis by applying the ratio of exempted turnover to total turnover on total expense claimed in the computation of income and further disallowance has been made without rejecting the basis adopted by the company."

3.0 The Ld. Authorised Representative (AR) submitted that a perusal of the assessment order passed u/s 153C of the Act would show that the disallowance made u/s 14A of the Act does not relate to any material which was found and seized during the course of search and, therefore, relying on the judgment of the Hon'ble Delhi High Court in the case of Pr. C.I.T. vs. Kabul Chawla reported in 380 ITR 573 (Del.), the disallowance could not be sustained. The Ld. AR emphasised that if during the course of search, no incriminating material is found, then no addition u/s 153A/153C of the Act could be made. The Ld. AR also drew our attention to the working of disallowance amounting to Rs. 4,29,931/- which had *suo moto* been made by the assessee

u/s 14A of the Act and submitted that even on merits, the disallowance *suo moto* made by the assessee was correct and no further interference/disallowance was called for.

4.0 In response, the Ld. C.I.T. Departmental Representative (CIT DR) vehemently argued that once material pertaining to the assessee had been seized, the Assessing Officer was within his powers to assume jurisdiction u/s 153C of the Act. The Ld. C.I.T. DR also submitted that it is not necessary that the disallowance should relate to any incriminating material found and seized during the course of search. The Ld. C.I.T. DR also placed reliance on the findings of the Ld. C.I.T. (A) in upholding the disallowance on merits and submitted that the disallowance made by the Assessing Officer was rightly upheld because the assessee had not been able to furnish evidence to demonstrate that the entire investment in the shares was out of interest free /own funds of the assessee.

5.0 We have heard the rival submissions and perused the material available 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 an assessment year which have not abated. In the present case, it is

an admitted fact that on the date of the search i.e. on 19th November, 2010 the assessment for the year under consideration was not pending. It is also an admitted fact that nothing incriminating was found during the course of the search which could be related to the disallowance made by the AO u/s 14A of the Act. The Assessment Order does not make any reference to any incriminating material found and seized during the course of search which could establish some kind of nexus with the 14A disallowance. 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 have 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."

5.1 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 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. Although the judgment of the Hon'ble Delhi High Court was rendered in a case falling under section 153A, but

essentially the provisions of sections 153A and 153C are identical and *pari materia* and the ratio of the judgment of the Hon'ble Delhi High Court will apply equally to a case under section 153C of the Act also.

5.2 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).

5.3 In the present case, as stated hereinabove, there is no reference to any incriminating material, whatsoever, which was found during the course of the search and which could be related to the disallowance u/s 14A of the Act. Therefore, 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 an addition. It is the incriminating material found during search which gives jurisdiction to the AO to make additions in the assessment proceedings 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.

5.4 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 addition made in the assessment year under consideration was beyond jurisdiction and accordingly direct the AO to delete the same.

5.5 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.

6. In the final result, the appeal of the assessee stands allowed.

Order pronounced in the open court on 17.05.2019.

Sd/-	**Sd/-**
(G.D. AGRAWAL)	**(SUDHANSHU SRIVASTAVA)**
VICE PRESIDENT	**JUDICIAL MEMBER**

Dated: 17th MAY, 2019
'GS'

Copy forwarded to: -

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

By Order

ASSTT. REGISTRAR

Date of dictation	
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	