

आयकर अपीलिय अधीकरण, खंडपीठ गुवाहाटी ,
*IN THE INCOME TAX APPELLATE TRIBUNAL
GUWAHATI BENCH, GUWAHATI*

Before **Shri S.S.Godara, Judicial Member** and
Dr. A.L. Saini, Accountant Member

ITA No.83 & 84/Gau/2017
Assessment Years :2006-07 & 2007-08

DCIT, Circle-3 Ayakar Bhawan, 7 th Floor, G.S. Road, Guwahati-781005	V/s.	M/s Satyam Ispat (North East) Ltd., NH-52, Banderwa, Dist. Papumpare, Arunachal Pradesh-791123 [PAN No.AAICS 9640 K]
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

आवेदक की ओर से/By Assessee	Shri Ramesh Goenka, Sr. Advocate & Shri Amit Goenka, Advocate
राजस्व की ओर से/By Respondent	Shri M. Haokip, JCIT-DR
सुनवाई की तारीख/Date of Hearing	05-07-2019
घोषणा की तारीख/Date of Pronouncement	02-08-2019

आदेश /ORDER

PER BENCH:-

These two Revenue's appeals for assessment year(s) 2006-07 & 2007-08 arise against the Commissioner of Income Tax (Appeals)-2 Guwahati's separate orders all dated 23.02.2017 passed in case No. Guwa-140, 141/2013-14, involving proceedings u/s 143(3) r.w.s 153C of the Income Tax Act, 1961; in short 'the Act'.

Heard both the parties. Case file(s) perused.

2. Both the learned representatives are fair enough during the course of hearing that all issues raised in the instant appeal(s) are identical in nature except amount variance. We have heard the instant “**lis**” together. The same is disposed of by our detailed adjudication.

3. The Revenue’s identical first and second substantive grievances challenge correctness of CIT(A)’s order reversing Assessing Officer’s action deleting share capital / share application money of Rs.8,00,000/-, Rs.1,72,41,870 in former and latter case of Rs.10,43,47,500 and Rs.4,43,47,500/- (assessment year-wise); respectively vide following detailed discussion:-

“4.2 I have considered the submissions made by the appellant before me. I have also perused the assessment order as well as the remand report sent by the Assessing Officer on this issue. In his remand report the Assessing Officer has simply stated that the addition was made on the basis of findings recorded in the assessment order. He has further stated that he has no objection to the admission of any fresh or additional evidence if it is considered to be relevant for disposal of the issue. Apart from this, the Assessing Officer has not given any comment on certain legal issues raised by the appellant in its written submissions.

4.3 In its written submissions the appellant has raised a legal issue regarding the nature of additions that could be made in an assessment that is to be made u/s.153A/153C read with section 143(3) of the Income Tax Act, 1961 in the case of a “**non abated assessment**”.

According to the appellant it is now a well settled proposition that in respect of non-abated assessment, i.e. where the proceedings have reached finality, the assessments u/s.153A read with Section 143(3) of the Act, has to be made as was originally made/assessed and in case where certain incriminating documents have been found indicating undisclosed income, then the addition shall only be restricted to those documents/incriminating material and clubbed only to the assessment framed originally. It is submitted that the appellant's assessment for the year under appeal had already attained finality and hence it was a “**non abated assessment**”. Hence, the addition should have been confined to any incriminating material found during the search. In support of its contention, the appellant has relied upon the following case laws:-

i) All Cargo Global Logistics Ltd. V/s. DCIT (2012) 137 I.T.D. 287 (Mumbai)(S.B.)

(ii) C.I.T. V/s. Continental Warehousing Corpn. (Ngava Sheva) Ltd. (2015) 374 ITR 645 (Bom.)

(iii) Marigold merchandise Pvt. Ltd. V/s. D.C.I.T. (2014)164 TTJ 448 (Delhi "F" Bench)

(iv) Jai Steel (India) V/s. A.C.I.T. (2013) 259 CTR 281 (Rajasthan)

- (v) A.C.I.T. V/s. Pratibha Industries Ltd. (2013) 141 I.T.D. 151 (Mumbai)
- (vi) A.C.I.T. V/s. Kamal Kumar S. Agarwal (2010) 133 TTJ 818 (Nagpur)
- (vii) C.I.T. V/s. Kabul Chawla (2016) 380 I.T.R. 573 (Del.)
- (viii) Jaipuria Infrastructure Developers (P) Ltd. V/s. A.C.I.T. I.T.A. Nos. 5522 & 5523/Del/2015 decided by Hon'ble ITAT, Delhi Bench "B", Delhi on 27-06-2016
- (ix) Principal C.I.T. V/s. Kurele Paper Mills (P) Ltd. (2016) 380 I.T.R. 571 (Delhi) (SLP filed by the Department against this judgment dismissed (2016) 380 I.T.R. St.64)

It is further submitted by the appellant that no incriminating document/material relating to the share capital/share premium was found and/or seized in the case of the appellant. The Assessing Officer has neither referred to nor relied upon any such document while making the assessment.

4.4 As far as merits of the case is concerned, the appellant has submitted the following documents with a prayer under Rule 46A of the Income Tax Rules 1962 for admission of these documents as additional evidences:

- (i) Chart showing name and address of the shareholders/applicants, No. of shares applied for/allotted face value of shares, premium paid, mode of payment, PAN No., CIN Nos. of the applicant companies.
- (ii) Copies of the appellants statements with the following banks showing the receipt of share capital/application money:
 - (a) HDFC Bank, H.B. Road, Guwahati
 - (b) HDFC Bank, Guwahati
 - (c) Standard Chartered Bank, Guwahati
- (iii) Copies of Memorandum & Articles of Association and audited balance sheet in respect of corporate shareholders/applicants.
- (iv) Copies of annual return filed by the appellant showing the list of shareholders.

4.5 A perusal of the case laws relied upon by the appellant show that in the case of a non-abated assessment i.e. where the assessment proceedings have reached finality, the assessments u/s.153A/153C read with Section 143(3) of the Income Tax Act, 1961 has to be made as was originally made/assessed and in case where certain incriminating documents have been found indicating undisclosed income, then the addition shall only be restricted to those document/incriminating material and clubbed to the assessment made originally. Thus, the scope of additions to be made in the case of a non-abated assessment is well defined.

4.6 In the case of C.I.T. V/s. Kabul Chawla (supra), Hon'ble Delhi High Court held as follows:

At page 589, 590

"Summary of the legal position

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 153A 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."

While so holding, Hon'ble Delhi High Court has taken note of the judicial pronouncements made in All Cargo Global Logistics Ltd. V/s. DCIT (supra), C.I.T. V/s. Continental Warehousing Corpn. (Ngava Sheva) Ltd. (supra), Jai Steel (India) V/s. ACIT (supra) and Principal C.I.T. V/s. Kurele Paper Mills (P) Ltd. (supra) and a number of other case laws.

4.7. In the case of Principal C.I.T. V/s. Kurele Paper Mills (P) Ltd. (supra), Hon'ble Delhi High Court held as follows:-

At page 572

"1. The Revenue has filed the appeal against an order dated 14.11.2014 passed by the Income Tax Appellate Tribunal (ITAT) in 3761/Del/2011 pertaining to the Assessment Year 2002-03. The question was whether the learned CIT (Appeals) had erred in law and on the facts in deleting the addition of Rs.89 lacs made by the Assessing Officer under Section 68 of the Income Tax Act, 1961 ('ACT') on bogus share capital. But, the issue was whether there was any incriminating material whatsoever found during the search to justify initiation of proceedings under Section 153A of the Act.

2.The Court finds that the order of the CIT (Appeals) reveals that there is a factual finding that "no incriminating evidence related to share capital issued

was found during the course of search as is manifest from the order of the AO." Consequently, it was held that the AO was not justified in invoking Section 68 of the Act for the purposes of making additions on account of share capital.

3. As far as the above facts are concerned, there is nothing shown to the court to persuade and hold that the above factual determination is perverse. Consequently, after considering all the facts and circumstances of the case, the Court is of the opinion that no substantial question of law arises in the impugned order of the ITAT which requires examination.

4.The appeal is, accordingly, dismissed."

Hon'ble Supreme Court has dismissed the special leave petition filed by the Department against this judgment as reported at (2016) 380 I.T.R. (St.) 64.

5.8 In the case of Jaipuria Infrastructure Developers (P) Ltd. V/s. ACIT (I.T.A. Nos. 5522 & 5523/Del/2015) which was decided by Hon'ble ITAT, Bench "B" Delhi on 27-06-2016, Hon'ble Tribunal has held as follows:-

"21. However, in the backdrop of aforesaid undisputed facts discussed in the preceding paras and law laid down by Hon'ble jurisdictional High Court in the case cited as Kabul Chawla (supra), we are of the considered view that completed assessment interfered with by the AO u/s.153A and confirmed by the Id. CIT (A) are not sustainable in the eyes of law for the following reasons:-

(i) that in the instant case, undisputedly the AO has not made assessment on the basis of incriminating material unearthed during search and seizure operation conducted u/s.132 rather proceeded u/s 153A of the Act on the basis of some pre-search enquiries to make an addition as has specifically been recorded in para 6 of the assessment order that, "Pre search enquiries revealed that MIS Jaipuria Infrastructure Developers Pvt. Ltd., the flagship company involved in the real estate business of the S.K. Jaipuria group is indulged in inflating the cost of the project by debiting bogus expenses by raising bills from the non-existing parties or the entry providers."

(ii) that the ratio of the judgment in case of Kabul Chawla (supra) is required to be extracted by perusing the judgment in entirety and not by picking up the favourable sentences and by ignoring the unfavorable one. Highlighted portion of Para 37 (iv), (v), (vi) & (vii) of Kabul Chawla (supra) is crux of the issue involved which is applicable to the facts and circumstances of the case;

(ii) that the ratio of the judgment Kabul Chawla (Supra) is that in all circumstances, completed assessment can be interfered with by the AO u/s 153A only on the basis of incriminating material unearthed during the course of search;

(iv) that not on this, the addition in this case has been made by the AO u/s 153A on the sole ground that assessee has failed to produce the parties with whom the assessee company has transacted during the year under assessment who have failed to turn up despite the issue of notice u/s 133 (6) of the Act;

(v) that the contention of the Id DR that the assessment qua the AY 2006-07 was pending as on date of search as mere issuances of

acknowledgement by the ministerial staff does not imply that assessment has been completed, is not tenable in the face of undisputed fact that when within the prescribed period, no notice u/s 143 (2) has been issued prior to the date of search, assessment is deemed to be completed;

(vi) that there is not an iota of material with the AO to initiate proceedings u/s 153A what to talk of incriminating seized material;
(vii) that the Id. CIT (A) affirmed the assessment order by relying upon the decisions relied upon by Hon'ble jurisdictional High Court in the case cited as Filatex India Ltd. Vs. CIT-IV - (2014) 49 Taxman.com 465(Delhi) which has been distinguished in the Kabul Chawla (supra) on the ground that in the said case, there was some material unearthed during the search whereas in the instant case there is admittedly no incriminating material unearthed during the search to proceed u/s 153A.

In view of what has been discussed above, we are of the considered view that without entering into the merits of this case, addition made in both the cases u/s 153A read with section 143(3) is not sustainable in the eyes of law, hence deleted. Consequently, both the appeals filed by the assessee are hereby, allowed."

4.9 An analysis of the above case laws relied upon by the appellant clearly show that the completed assessments i.e. the non-abated assessments can be tinkered with only on the basis of any incriminating material found during the course of search and not otherwise. In view of what has been discussed above, I am of the considered view that the additions of Rs.6,69,71,870/-, Rs.11,95,78,050/- and Rs.7,24,50,080/- made on account of share capital, share premium and share application respectively are not sustainable in the eyes of law. Hence, these are deleted.

5. Even on the merits also, I find that the addition made by the Assessing Officer is not sustainable.

5.1 I find that the appellant had submitted the details of share capital and share premium in course of the assessment proceedings vide its letter dated 18.02.2015. This fact has been noted by the Assessing Officer in para 11(a) of his order. The appellant could not submit the documents in support of share capital/premium as these were not readily traceable at the time of assessment proceedings. The appellant has further contended that it was not given proper and meaningful opportunity of being heard to produce the documents in support of share capital/premium. The appellant has submitted before me the following details/documents in support of the share capital /premium: -

- (i) Chart showing name & address of the shareholders/applicants, No. of shares applied for/allotted face value of shares, premium paid, mode of payment, PAN No., CIN Nos. of the applicant companies.
- (ii) Copies of the appellant's statements with the following banks showing the receipt of share capita [/application money: -

(a) HDFC Bank, Guwahati

(iii) Copies of Memorandum & Articles of Association and audited balance sheets in respect of corporate shareholders/applicants, bank statements etc.

(iv) Copies of annual return filed by the appellant showing the list of shareholders.

A prayer under Rule 46A of the Income Tax Rules, 1961 was made by the appellant for admission of these documents as additional evidence. These documents were sent to the assessing officer while calling for his remand report. As stated above, the Assessing Officer has not objected to the admission of these additional evidences. Considering the facts and circumstances of the case, I admit the additional evidences now produced by the appellant as these are required to be admitted for doing substantial justice in the matter.

5.2 The appellant has filed complete details of shareholder companies viz. - their names & addresses, No. of shares applied for/allotted, face value of shares, premium paid, mode of payment, their PAN No., CIN No., copies of Memorandum & Articles of Association, audited balance sheets and copy of return of allotment. A perusal of the bank statements filed by the appellant show that all the transaction have taken place through banking channels. On examination of these details/documents, I do not find any reason to doubt the identity of the share holders, their credit worthiness and the genuineness of the transactions.

It is settled law that once an assessee provides details regarding identity of the share applicants/holders, their permanent account numbers, bank details, balance sheets, A/D receipt in support of filing of income tax returns, copies of Memorandum & Articles of Association etc., the share application money/capital cannot be treated as unexplained in the hands of the assessee. This view has been taken in the following cases:

- (i) Principal CIT. V/s. Soft-line Creations Pvt. Ltd. (2016) 387 ITR 636 (Delhi)
- (ii) C.I.T. V/s. Kamdhenu Steel & Alloys Ltd. (2014) 361 ITR 220 (Delhi)
- (iii) C.I.T. V/s. Lovely Exports Pvt. Ltd. (2009) 319 ITR (St.) 5 (S.C.)
- (iv) C.I.T. V/s. Sameer Bio-Tech Pvt. Ltd. (2010) 325 ITR 294 (Delhi)
- (v) C.I.T. V/s. Five Vision Promoters Pvt. Ltd. (2016) 380 ITR 289 (Delhi)
- (vi) C.I.T. V/s. Dwarkadhish Investment Pvt. Ltd. (2011) 330 ITR 298 (Delhi)
- (vii) C.I.T. V/s. Divine Leasing & Finance Ltd. (2008) 299 ITR 268 (Delhi)

In view of the above also, the addition made in respect of share capital and share premium cannot be sustained. This ground of appeal is, therefore, **allowed.**"

3. Learned departmental representative vehemently contends during the course of hearing that the CIT(A) has erred in law and on facts in holding that sec. 153A proceedings arise only if any incriminating material has been found or seized during the course of search in case of various judicial precedents. He quotes *E.N. Gopakumar vs. CIT* (2016) 75 taxmann.com 215 (Ker) and *CIT vs. Kesarwani Zarda Bhandar ITA No.270 of 2014* (Allhabad) that such an assessment bar to assessee as the searched assessee's total taxable income than that based on the alleged incriminating material only. We are informed by both parties very fairly that hon'ble jurisdictional high court is yet

to adjudicated upon this legal issue involving varying judicial prepositions by hon'ble non-jurisdictional high courts (supra). We therefore quote hon'ble apex court's landmark decision in *CIT vs. Vegetable Products* (1973) 88 ITR 192(SC) to decide this legal issue in assessee's favour. We reiterate that the search herein had not yielded any incriminating material against the assessee. We thus affirm the CIT(A)'s findings under challenge on the foregoing legal issue.

4. These two Revenue's appeals are dismissed.

Order pronounced in accordance with Rule 34(3) of the ITAT Rules by putting on Notice Board on 02/08/2019

Sd/-
(लेखा सदस्य)
(A.L.Saini)
(Accountant Member)
Guwahati,

Sd/-
(न्यायिक सदस्य)
(S.S.Godara)
(Judicial Member)

*Dkp

दिनांक:- 02/08/2019 गूवाहाठी ।

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. आवेदक/Assessee-M/s Satyam Ispat (North East) Ltd., NH-52, Banderdewa, Dist. Papumpare, Arunachal Pradesh-791123
2. राजस्व/Revenue-DCIT, Cir-3, Aayakar Bhawan, G.S. Road, 7th Fl, Guwahati-781005
3. संबंधित आयकर आयुक्त गूवाहाठी / Concerned CIT Guwahati
4. आयकर आयुक्त- अपील / CIT (A) Guwahati
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, गूवाहाठी खंडपीठ / DR, ITAT, Guwahati
6. गार्ड फाइल / Guard file.

/True Copy/

By order/आदेश से,

Sr. Private Secretary (on tour)
आयकर अपीलीय अधिकरण,
गूवाहाठी ।