

**THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCHES 'G', NEW DELHI**

**Before Sh. H. S. Sidhu, Judicial Member**

**Dr. B. R. R. Kumar, Accountant Member**

**ITA No. 2378/Del/2014 : Asstt. Year : 2008-09**

Vinod Gupta, C/o Raj Kumar & Associates, CAs, 4435/7, Ansari Road, Daryaganj, New Delhi-110002	Vs	DCIT, Central Circle-7, Jhandewalan, New Delhi
<b>(APPELLANT)</b>		<b>(RESPONDENT)</b>
<b>PAN No. AAOPG8867H</b>		

**ITA No. 3200/Del/2014 : Asstt. Year : 2008-09**

ACIT, Central Circle-7, Jhandewalan, New Delhi	Vs	V.K. Gupta 119, FIE Indl. Area, Patparganj, Delhi-110092
<b>(APPELLANT)</b>		<b>(RESPONDENT)</b>
<b>PAN No. AAOPG8867H</b>		

**Assessee by : Sh. Raj Kumar Gupta, CA**

**Revenue by : Sh. S. S. Rana, CIT DR**

**Date of Hearing: 04.07.2019**

**Date of Pronouncement: 28.08.2019**

**ORDER**

**Per Dr. B. R. R. Kumar, Accountant Member:**

The assessee has raised following grounds of appeal:

*"1. That the Asstt. Order passed u/s. 153 A/ 143 (3) is unsustainable in law as well as on merits.*

*2A. That the impugned Asstt. is unsustainable in law and without jurisdiction as it has been framed in pursuance to notice u/s. 153A dtd. 21.04.2010 issued by ACIT, CC-3, New Delhi, which notice did not survive after issuance of fresh notice u/s. 153A dtd. 06.06.2011 issued by ACIT, CC-17, New Delhi, after the jurisdiction stood t.f.d. and conferred on him vide order u/s. 127 dtd. 21.02.2011.*

*B. That under the facts, findings of CIT (A) that issuance of second notice u/s. 153A is clerical mistake and curable u/s. 292B are un-sustainable. Also, Sec. 292B is not at all applicable to the facts of the case and does not cover such kind of situations and jurisdictional aspects.*

*3. That the complete additions since made on the basis of seized material found and seized from Sh. S.K. Gupta, brother of the assessee and since, no satisfaction has been recorded u/s. 153C(1) of the Act in the absence of which no cognize of seized material found from a 3<sup>rd</sup> party can be taken and thereafter in the absence of complying with the mandatory requirements of Sec. 153C, no cognize of said material could had been taken. Therefore, the use of said seized material for the impugned Asstt. is without jurisdiction and illegal and the addition made on the basis of such material needs to be deleted threshold.*

*4A. That under the facts and circumstances, Ld. CIT (A) erred in law as well as on merits in not altogether deleting the addition of Rs. 3,07,28,994/- made on protective basis as alleged interest income.*

*B. That the Ld. CIT (A) further erred in sustaining addition of Rs. 82,48,662/- on substantive basis out of protective addition of Rs.3,07,28,994/- and further erred in estimating alleged total such interest income at Rs.2,06,21,655/- and also erred in holding that 40% thereof i.e. Rs.82,48,662/- belongs to assessee on substantive basis, which all findings have been given in the case of Sh. S.K. Gupta (brother of the assessee) on the basis of submissions made by Sh. S.K. Gupta in his own case and the way the same have been appreciated by the Ld. CIT (A) and stands imported and applied in the case of assessee without making assessee a party to the proceedings undertaken in the case of Sh. S.K. Gupta.*

*C. That even on merits the relevant findings given in the case of Sh. S.K. Gupta, so far as and to the extent the same relates and affects the assessee are un-sustainable and erroneous.*

*D. That without prejudice, under the facts and circumstances, no loan and no interest thereon belongs to and is related to assessee.*

*E. That without prejudice, after making substantive addition in the hands of S.K. Gupta, there remains no occasion for making protective addition by the AO in the hands of assessee and in that case, there would not had been any occasion for this issue in appeal in the case of assessee.*

*F. That without prejudice, in the absence of issuing any show cause notice and without giving any opportunity of hearing on this specific issue, the Ld. CIT (A) erred in transferring the protective addition into substantive addition. Further, to make substantive addition tentamounds to enhancement and in the absence of notice u/s. 251 (2), this transformation is illegal.*

*5A. That under the facts and circumstances, Ld. AO erred in law as well as on merits in making protective addition of Rs4,87,60,500/- for alleged receipt of "on-money" for sale of property no. R-57, G.K. -1, New Delhi and the Ld. CIT (A) further erred in sustaining the said addition to the extent of Rs. 3,39,60,000/- on substantive basis.*

*B. That without prejudice, under the facts and circumstances, Ld. CIT (A) erred in law and on merits in holding that the share of assessee in "on - money" is 40%, while the share of the assessee in the property was only 1/6" i.e. 16.67%, therefore, in no case, the amount exceeding 16.67% of the alleged "on -money" can be examined in the hands of the assessee.*

*C. That without prejudice, concession and NOC given by S.K. Gupta, brother of the assessee for allocating the alleged "on-money" in the hands of assessee and S.K. Gupta in the ratio of 40::60 respectively cannot be binding on assessee, more so as he never gave any such NOC and he was not a party to the concession given by S.K. Gupta, who is not legally competent and authorized to give such NOC for and on behalf of assessee.*

*D. That without prejudice, the assessee has never been aware of any "on-money" deal in the sale of said property and also never received, enjoy and utilized any part of said alleged "on-money, therefore, no part of alleged "on-money" can be attributed and assessed in the hands of the assessee.*

*E. That Without prejudice, the findings given in the case of S. K. Gupta, on the basis of Submissions given by S. K. Gupta, to which the assessee was never a party and was also never confronted, cannot be imported in the case of assessee and the findings of S.K. Gupta's CIT(A) appeal order cannot be a basis for findings in the case of assessee.*

*F. That without prejudice, after making substantive addition in the hands of S.K. Gupta, there remains no occasion for making protective addition by the AO in the hands of assessee and in that case, there would not had been any occasion for this issue in appeal in the case of assessee.*

*G. That without prejudice, in the absence of issuing any show cause notice and without giving any opportunity of hearing on this specific issue, the Ld. CIT (A) erred in transferring the protective addition into substantive addition. Further, to make substantive addition tentamounts to enhancement and in the absence of notice u/s. 251 (2), this transformation is illegal.*

*H. That without prejudice, in any case, this alleged "on - money" is assessable as long term capital gain (LTCG), therefore, should be taxable at a special rate u/s. 112 of the I.T. Act.*

*6. That under the facts and circumstances, no interest u/s. 234A and 234B should have been charged. Without prejudice, in any case, the calculations are erroneous and excessive."*

2. Ground No. 1 is general in nature. The assessee V.K. Gupta in his brother Sh. S. K. Gupta have been conducting the business operations together and vide CLV order dated 13.01.2009 in CP No. 24(ND)/08 and as mentioned the order of the Id. CIT (A)-3, New Delhi in appeal No. 397/2013-14 dated 28.10.2013, the properties have been shared in the ratio of 60:40.

3. In ground of appeal no. 2, the assessee has challenged the initiation of proceedings under section 153A and the assessment order passed under section 153A/143(3) being bad in law and without jurisdiction. The assessee claimed that the assessment is null and void on the ground that the notice issued by the ACIT, Central Circle-3 dated 21.04.2010 after the issue of fresh notice u/s 153A of the Act 06.06.2011.

4. The Ld CIT(A) has dismissed this ground and has held that the order passed by Assessing Officer is valid. It was held the similar grounds were dismissed by the Id. CIT (A) for the assessment year 2006-07.

5. Further, during the hearing, before us, it was also fairly brought to our notice that the ITAT vide order dated 30.06.2017 in ITA No.

6764/Del/2013 and 1696/Del/2014 in the case of the assessee has held as under:

*"7. Ground no. 1 of the assessee's appeal relates to the validity of the notice issued under section 153A of the Act. In this connection, the assessee submitted before the Commissioner of Income Tax (Appeals) that initially a notice under section 153A dated 21.4.2010 was issued by the ACIT, Central Circle 3, in response to which the assessee wrote a letter to ACIT, Central Circle 3 to provide copies of certain seized material. Later on the CIT, Central Circle 2 transferred the case of the assessee-appellant to ACIT, Central Circle 17. The ACIT, Central Circle-17, again issued a notice under section 153A dated 6.6.2011 to file the return within 15 days. In response to this notice, the assessee again requested to provide copies of the seized materials and ultimately on 24.8.2011 the DCIT, Central Circle 17, wrote a letter to attend the office, and inspect the seized material as required and immediately after the receipt of the seized material, the assessee-appellant filed a letter on 23.9.2011 challenging the validity of the second notice and also filed the return as required u/s 153A of the Act on 26.9.2011.*

*8. On the above facts, so far as the validity of notice u/s 153A of the Act is concerned, the assessee submitted before the Commissioner of Income Tax (Appeals) as under:-*

*"(i) Notice u/s 153A is a statutory notice. Second notice in suppression of the first notice cannot be issued as there is no provision in the Act. It will imply that the first notice was issued in a casual manner and the A.O. was not satisfied that at the time of issue of this notice, all the conditions required for then issue of this notice were fulfilled.*

*(ii) The A.O. has completed the assessment on the basis of the first notice i.e. 21.4.2010 whereas as per above para by way of issue of the second notice he has already discarded the first notice."*

*In view of the above submissions, a request was made by the assessee that as the assessment has been completed on the basis of first notice and by way of issue of the second notice, he has already discarded the sanctity of the first notice and consequently the assessment framed on the basis of the first notice also becomes illegal and bad in law.*

9. *The learned Commissioner of Income Tax (Appeals), after considering the submissions of the assessee in the light of the facts of the case, observed that as the A.O. has completed the order on the basis of first notice issued under section 153A, there is no substance in the contention of the appellant. Moreover, issuance of second notice under section 153A is a clerical mistake which is curable under section 292B of the Act.*

10. *Against the above finding of the Commissioner of Income Tax (Appeals), the assessee is in appeal before the Tribunal on the legal issue of issuance of another notice u/s 153A of the Act.*

11. *Before us, the learned counsel for the assessee reiterated the submissions made before the authorities below and further submitted that as the notice u/s 153A of the Act is a statutory notice, this cannot be issued in a casual manner. He further submitted that the second notice in suppression of the first notice cannot be issued as there is no provision in the Act. It will imply that the first notice was issued in a casual manner and by way of issue of second notice, the Assessing Officer has discarded the sanctity of the first notice and as such the assessment framed on the basis of first notice becomes illegal and bad in law and is liable to be quashed. He further submitted that the finding of the Commissioner of Income Tax (Appeals) that the issuance of the second notice is a clerical mistake curable u/s 292B is not sustainable in law as it is a jurisdictional notice and goes to the very root of the matter which cannot be treated as a clerical mistake. He also submitted that there is no estoppel against the validity of the statutory notices which determines the jurisdiction. In support of his submissions, the learned counsel for the assessee placed reliance on the following judgments.*

*(i) Spice Infotainment Ltd. vs. CIT; Delhi High Court*

*(ii) CIT vs. Dimensions and Apparels Pvt. Ltd. Delhi High Court*

12. *On the other hand, the learned DR strongly supported the order of the Commissioner of Income Tax (Appeals) with the submission that on the basis of the first notice u/s 153A of the Act, the assessment framed by the Assessing Officer was legal one. So far as the issuance of second notice is concerned, the learned DR submitted that if the second notice was not valid in*

*the eyes of law then it can be held as not tenable but on the basis of the second notice, the assessment framed on the basis of first notice cannot be brushed aside. The learned DR, therefore, prayed that the order of the Commissioner of Income Tax (Appeals) deserves to be maintained.*

*13. We have heard both the parties and have carefully gone through the material 'available on record and the case laws cited before us. In our considered opinion, as the Assessing Officer has completed the assessment on the basis of the first notice for which the learned counsel for the assessee has not raised any legal objection with regard to its validity, there is no defect in the validity of the assessment as held by the Commissioner of Income Tax (Appeals). So far as the issuance of the second notice is concerned, it may be treated as having been issued by way of clerical mistake covered u/s 292B of the Act and it cannot discard the sanctity of the first notice. If the Assessing Officer had completed the assessment on the basis of the second notice then the position would have been different. Although there is no direct authority with regard to the issue involved in this case, we can take the shelter of the decisions, as relied upon by the learned DR, which have been pronounced in the cases of section 148 proceedings viz. KLM Royal Dutch Airlines v. Assistant Director of Income Tax; 292 ITR 49 and CIT vs. K.M. Panchayappan; 304 ITR 264. The judgments relied upon by the learned AR are not applicable to the facts of the case. In these judgments only one notice was issued and the same also was not as per the procedure prescribed under the Act whereas in the present case there is no defect in the first notice and the assessment has been completed on the basis of the first notice. We, therefore, find no force in this legal ground of the assessee and accordingly reject the same."*

6. Since, the matter stands adjudicated by this Tribunal in the absence of any material change in facts, we hereby dismiss the appeal of the assessee on this ground.

7. Ground No. 3 relates to the additional ground taken up before the Tribunal for the first time. Since, the ground is purely legal and goes to the root of the matter keeping in view the judgment in the case of

National Thermal Power Corporation 229 **ITR** 383 (SC) the additional ground is admitted. This issue has been dealt by the Co-ordinate Bench of ITAT for the assessment year 2007-08 in ITA No. 2377/Del/2014. The relevant portion is as under:

*"54. Ground no. 3 of the assessee :- Apropos this ground, the learned counsel for the assessee submitted that when the additions have been made on the basis of seized material, found and seized from Shri S.K. Gupta, brother of the assessed, and no satisfaction has been recorded u/s 153C of the Act in the case, of Shri V.K. Gupta and in the absence of which no cognizance of the seized material found in the case of third party (Shri V.K. Gupta) may be taken in the case of Shri V.K. Gupta u/s 153A of the Act. The learned counsel for the assessee submitted that as per the mandatory requirements of section 153C of the Act, no cognizance of such material could have been taken for making the addition in the case of the present assessee. The learned counsel for the assessee lastly submitted that the use of seized material for the impugned assessment is without jurisdiction and illegal and the addition made on the basis of such material needs to be deleted at the threshold.*

*55. Replying to the above, the learned DR submitted that the common warrant of authorization was issued in the name of Shri S.K. Gupta and Shri V.K. Gupta, therefore, there was no need of invoking provisions of section 153C of the Act separately.*

*56. Placing rejoinder to the above, the learned counsel for the assessee submitted that the material seized from the premises of Shri S.K. Gupta cannot be taken as a valid basis, for making the addition in the hands of the present assessee. On being asked by the Bench, the learned counsel for the assessee in all fairness accepted that the warrant of authorisation for search was issued jointly in the names of Shri S.K. Gupta and Shri V.K. Gupta.*

*57. On careful consideration of the rival submissions, we are of the view that when there is a search and seizure operation against two persons simultaneously then the material documents, etc. seized there from can be used validly against both the searched persons without taking the aid of*

*section 153C of the Act. Therefore, the legal ground taken by the assessee, being de void of any merit, is dismissed."*

8. Further, the same issue has already been adjudicated by the Hon'ble High Court of Delhi in ITA 1003/2017 High Court Delhi-41767-41768-2017 against the assessee. The relevant portion is as under:

*"The question of law framed in this appeal is as follows:  
"Was the addition – upheld by the impugned order, on the basis of statements made by Sh. Suresh Kumar Gupta and the materials seized from his premises justified in the facts and circumstances of the case given that the premises were separate, though a common warrant under Section 132 of the Income Tax Act, 1961 was issued in respect of both?"*

9. The Hon'ble High Court held in favour of the Revenue at para 17 of the order.

*"It is held that the question of law framed has to be and is answered in favour of the Revenue and against the assessee. The appeal is consequently dismissed but without any order as to costs."*

10. Since, the matter stands adjudicated by this Tribunal in the absence of any material change in facts we hereby dismiss the appeal of the assessee on this ground.

11. Ground No. 4 of the assessee pertains to addition of Rs.82,48,662/- on substantive basis being the 40% share of the assessee along with his brother. This issue of determining of interest income and apportionment among the two brother and the ratio of 40:60 has been covered by the order of the ITAT in the case of S.K. Gupta, the brother of the assessee in the order dated 30.06.2017 in ITA No. 6764/Del/2013 and 1696/Del/2014. For the sake of brevity the relevant portion of the order of the ITAT is reproduced is as under:

*"21. On careful consideration of the above rival submissions and vigilant and careful perusal of the material available on*

*record and on respectful consideration of the case laws cited at bar before us, we observe that the documents and consolidated balance sheet, as available in the assessee's paper book-1 from pages 196 to 221, it is vivid that these consolidated balance sheets reflect the assets in the shape of bank balance, investment in properties in the names of various group members and companies relating to the present assesseees i.e. Shri S.K. Gupta and Shri V.K. Gupta. We further observe that the debtors, stock, loans, advances and creditors of various group companies belonging to the present assesseees and bank borrowings show that the loans have been taken in the names and Smt. Madhu Gupta wife of Shri S.K. Gupta and Smt. Meena Gupta wife of Shri V.K. Gupta. Therefore, the income arising on account of these assets cannot be exclusively attributed or held as belonging to late Shri Suraj Bhan Gupta only. The charging section 4 of the Income Tax Act provides that the tax is to be charged on the income of a person to the extent it belongs to him. In the present case, the income belongs to various individuals and group companies from the assets, investments, etc. which cannot be held as exclusively belonging to late Shri Suraj Bhan Gupta and the same belongs to various family members including the present assesseees, their wives and children. We may also point out that as the seized documents are cash book, ledger account, consolidated balance sheets and other documents and these have been maintained just to briefly record the assets and liabilities of the family members and group companies, therefore, various complexity and uncertainties are there in the identification of exact income, which belongs to the individual members of the group companies and thus it is not possible to allocate the income there from person wise and company wise. Therefore, we are inclined to agree with the findings of the Commissioner of Income Tax (Appeals) that the income should be allocated between Shri S.K. Gupta and V.K. Gupta as they are the key players after the death of late Shri Suraj Bhan Gupta and they also agreed before the Company Law Board vide order dated 13.1.2009 to divide the assets of the family and group companies in the ratio of 60 : 40 respectively among them. Hence, we decline to agree with the contention of the assessee that the entire income discernible from the consolidated balance sheets should be assessed in the hands of late Shri Suraj Bhan Gupta.*

*22. So far as the alternative prayer of the assessee is concerned that the income should be assessed in the hands of AOP is concerned, we do not find any force in this contention as there was no AOP in existence during the relevant assessment years and it is also not clear as to which AOP the income should be assessed. At this juncture, we again point out that vide Company Law Board order dated 13.1.2009 both the assesseees have agreed to divide the assets of the group which was headed by late Shri Suraj Bhan Gupta between them in the ratio of 60 : 40 and being a beneficiary of the assets in such ratio, the authorities below were right in taxing the income there from in the same ratio in the hands of respective assessed-appellant. Consequently, ground no. 3, of the assessee is dismissed."*

12. Since, the similar matter stands adjudicated by this Tribunal, in the absence of any material change in facts, we hereby dismiss the appeal of the assessee on this ground.

13. Ground No. 5 deals with the addition of Rs.4,87,60,500/- on account of receipt of own money for the sale of property. During the assessment, the Assessing Officer has held that the assessee has received on money of Rs.8,44,99,000/-. This amount has been assessed on substantive basis in the hands of Sh. S.K. Gupta the brother of the assessee and protective basis in the hands of the assessee. The Id. CIT (A) reduced addition to Rs.3,39,60,000/- being the 40% of the total amount received and reduced the amount of Rs.1,48,00,500/- received by way of cheque from the total amount. The assessee is in appeal for the addition of Rs.3,39,60,000/- and the Revenue is in appeal for the deletion of Rs.1,48,00,500/- vide ground no. 3 of the appeal in ITA No. 3200/Del/2014.

14. Before us, the assessee argued that the property was owned by four persons which is evident from registered sale deed and the share of the assessee Vinod Gupta is only 1/6<sup>th</sup> of the total value of the property. This matter has already been covered by the ITAT in the case of Sh. S.K. Gupta

brother of the assessee in ITA No.2038/Del/2014 For the sake of brevity the relevant portion of the order of the ITAT is reproduced is as under:

*"27. We have considered the rival submissions and perused the orders of the authorities below. Exhibit 125 to 128, 129 to 132 , 133 to 136 and 137 to 140 are sale deed of the impugned property. We find that in each off the sale deed, it has been specifically mentioned that the assessee is having only 1/6<sup>th</sup> share in the impugned property. Exhibits 141 to 147 is the sale deed wherein 1/6<sup>th</sup> share of Shri V.K. Gupta is mentioned. There is no denying that the on money has been received on the sale of the impugned property. It is equally true that the undisclosed sale consideration has been treated as undisclosed income of the assessee. Considering the fact that the assessee was only holding 1/6<sup>th</sup> of the undisclosed sale consideration should be added in the hands of the assessee. Exhibit 210 shows that the assessee has incurred expenditure of Rs.14,91,407/- on the said property and Exhibit 213 shows that expenditure of Rs.7,16,961/- has been incurred. After deducting these expenses, the Assessing Officer is directed to add 1/6<sup>th</sup> share from the balance undisclosed consideration to the income of the assessee. To this extent, grievance of the assessee is allowed."*

15. Since, the matter stands adjudicated by this Tribunal in the absence of any material change in facts, we hereby dismiss the appeal of the assessee on this ground.

### **ITA No. 3200/Del/2014 : (Revenue Appeal)**

16. The Revenue has raised following grounds of appeal:

*"1. That the Commissioner of Income Tax (Appeals) erred in law and on facts and circumstances of the case in deleting the addition of Rs. 14,75,08,306/- on account of undisclosed loan and advances.*

*2. That the Commissioner of Income Tax (Appeals) erred in law and on facts and circumstances of the case in deleting the addition of Rs. 2,24,80,332/- on account of undisclosed interest.*

*3. That the Commissioner of Income Tax (Appeals) erred in law and on facts and circumstances of the case in deleting the addition of Rs. 1,48,00,500/- on account of sale of property.*

*4. That the Commissioner of Income Tax (Appeals) erred in law and on facts and circumstances of the case in deleting the addition of Rs. 3,00,000/- on account of amount received without consideration.*

*5. That the Commissioner of Income Tax (Appeals) erred in law and on facts and circumstances of the case in directing to compute the interest u/s 234A from the date of which assessee received copy of seized material.*

*6. (a) The order of the CIT (A) is erroneous and not tenable in law and on facts."*

17. Ground No. 1: Pertaining to deletion of Rs.14.75 crores on account of undisclosed loans & advances and Ground No.2 Pertaining to deletion of Rs.2.24 crores on account of undisclosed interest have already stands adjudicated by the order of the ITAT in the case of the assessee's brother S.K. Gupta vide page 21 para 25 to 29 and V.K. Gupta ITAT assessment year 2006-07 para 37.

*"25. Ground no. 1 of revenue:- This ground relates to deletion of addition made by the Assessing Officer on account of loans advanced from undisclosed sources.*

*26. We have heard both the sides and have carefully perused the material available on record of the Tribunal including respective paper books. The learned DR submitted that on the basis of consolidated balance sheets for the period 1.1.2005 to 31.12.2005, the Assessing Officer made the addition on account of undisclosed loans and advances out of total loans and advances of Rs. 10,26,24,154/- outstanding as on 31.12.2005 given to nine parties after allowing credit of Rs.4,77,03,044/- on account of overdraft liability of bank availed by Smt. Madhu Gupta and Smt. Veena Gupta which was appearing in the balance sheet under the head "bank overdraft account" under the liability side. The learned DR*

*further submitted that the assessee could not establish the source of surplus amount of loans and advances which were given, over and above the overdraft account. Therefore, the Assessing Officer was right in making the addition in this regard. The learned DR pointed out that the Commissioner of Income Tax (Appeals) granted relief to the assessee by taking hyper-technical approach without any reasoning, therefore, the order of the Commissioner of Income Tax (Appeals) may kindly be set aside and that of the Assessing Officer be restored.*

*27. Replying to the above, the learned counsel for the assessee submitted that during the course of search and seizure operation, consolidated balance sheets for the period 1.4.2001 to 30.9.2008 were found and seized wherein opening capital shown in the consolidated balance sheet from 1.1.2005 to 31.12.2005 was identical to the closing balance of the capital shown in the balance sheet for the period 1.4.2004 to 31.12.2004 viz. Rs. 18,03,11,952/- and the opening balance of consolidated balance sheet for the period 1.4.2004 to 31.12.2004 was the closing capital of the balance sheet for the period 1.4.2003 to 31.3.2004 i.e. Rs. 17,21,15,718/-. Therefore, it is clear that during the year, under consideration, new loans advanced, if any, have been given out of the same opening capital which was continuously coming as opening balance from earlier years and the income earned during the year. The learned counsel for the assessed vehemently contended that the allegation of the Assessing Officer is not correct and the same is baseless that the assessee is not able to explain and prove the contents and recording the funds in the consolidated balance sheet. The learned counsel for the assessee also drew our attention paras 9.3 to 9.12 of the first appellate order and submitted that undisputedly the basis of the balance sheet as on 31.12.2005, the Assessing Officer found that the assessee has given loan of Rs.10,26,24,154/- to 9 parties and he also gave benefit of the credit amount of bank overdraft. The learned counsel for the assessee submitted that the Assessing Officer was not correct and justified in holding that the balance amount of loans and advances have been given by the assessee from the sources not disclosed to the department. The learned counsel for the assessee lastly submitted that there is no infirmity in the first appellate order and, therefore, the same may kindly be upheld.*

28. *On careful consideration of the above rival submissions, at the very outset we observe that admittedly and undisputedly during search and seizure operation on the premises of the assessee, cash book, pay book, ledger account and consolidated balance sheet, etc. were found and seized for the period 1.4.2001 to 3.9.2008 and the amount of opening capital, loans and advances and other assets and liabilities in the beginning of the year and at the end of the year, have been shown therein. It is also not in dispute that the closing balance of previous year was brought forward as opening balance of the next year, therefore, there was a clear-cut link between the closing balance and opening balance of each financial period. On this issue first of all, we decline to accept the contention of the learned DR that balance sheet and profit and loss account seized from Dariyaganj office, Delhi, has been planted by the assessee, as vide Panchnama dated 24.8.2009, the balance sheet, profit and loss account, trading account and other number of documents have been seized. Therefore, the Assessing Officer was not logical and correct in presuming that these documents should have been seized from the residence and not from Dariyaganj office and they should have been accompanied by the books like day book, ledger account, etc. which were found at the residential premises of the assessee. We further observe that there is no positive evidence on record to establish that there has been any untoward event or the seals fixed on Dariyaganj office premises have been tampered with during the period of restraint order passed u/s 132(3) of the Act which was in operation from 30.3.2009 to 24.8.2009 i.e. till it was revoked, We also decline to accept the allegation of the Assessing Officer that these seized papers might have been pushed from below the door and have been plants through back door entry and in our considered opinion all these findings are only based on the whims and fancies of the Assessing Officer wherein he was recording findings solely on the basis of his own perspective and imagination. Therefore, the conclusion drawn by the Assessing Officer cannot be held as correct and sustainable and thus the same is dismissed in the absence of any positive adverse material or evidence against the assessee.*

29. *At this juncture we find it appropriate to consider the proposition laid down by the Hon'ble Delhi High Court in the*

*case of CTT vs. Indigo Airways Pvt. Ltd. dated 31.2.2012 in ITA Nos. 1620 to 1322/2010 wherein their Lordships held that full effect should be given to such presumption and it is not permissible to accept one part of document as true and another part as untrue. In the present case, the Assessing Officer has not given the credit for the opening capital but has picked up the amount of loans and advances shown therein for making the addition which is not a correct and justified approach. We, therefore, respectfully following the proposition laid down by the Hon'ble Delhi High Court in the case of CIT vs. Indigo Airlines Pvt. Ltd. (supra) hold that the Commissioner of Income Tax (Appeals) was right in allowing credit of opening capital as on 1.4.2005 and in setting aside the conclusion drawn by the Assessing Officer. Furthermore, as we have noted above, the loans and advances of Rs.5,29,20,710/- were financed out of the undisclosed capital of Rs.11,05,26,899/- was not acquired during the period under consideration and, therefore, the Commissioner of Income Tax (Appeals) was right in allowing relief to the assessee on this count. In our considered opinion, the Commissioner of Income Tax (Appeals) has drawn sustainable and reasonable conclusion that the documents in the form of consolidated balance sheet, P&L account, etc. for the period 1.4.2001 to 31.12.2004 have to be considered while making any addition or disallowance and the opening and closing balance should be taken into consideration discernible from the entries recorded therein. We are in full agreement that the basis taken by the Commissioner of Income Tax (Appeals) that one part of entries cannot be brushed aside for allowing credit of opening balance brought forward from earlier years and thus the loans and advances of Rs. 5,29,20,710/- have to be taken as financed out of opening capital of Rs. 17.21 crores recorded in the consolidated balance sheet as on 1.4.2003. Therefore, we are unable to see any ambiguity, perversity or any other reason to interfere with the findings of the Commissioner of Income Tax (Appeals) on this issue and thus, we uphold the same. Consequently, ground no. 1 of the revenue being de void of any merit, is dismissed."*

18. Ground No. 3 already dealt with while dealing with the ground no. 5 of the assessee's appeal.

19. Ground No. 4 relates to receipt of Rs.3 crores based on seized material. During the assessment proceedings, the Assessing Officer held as under:

8. A katcha ledger marked Annexure A-10 was seized from the residence of Sh. S.K. Gupta during search. On Page No. 163 (back) (Page No. 332 as originally marked), it is mentioned that the assessee has received the following amount in cash from two different parties during the F.Y. 2007-08 as per the following details.

S. No.	Date of receipts	Name of para from whom received	Name of Amount
1.	31.01.2008	M/s SRS	2,00,00,000
2.	29.02.2008	M/s HDPL	1,00,00,000
		Total	3,00,00,000/-

*On this page is the account of the assessee in the ledger maintained by Sh. S.K. Gupta and these amounts are debited to the assessee. The name written here is "VKG" which stands for Sh. V.K. Gupta a show cause notice dated 21.11.2011 was issued to the assessee to explain why this amount of Rs. 3,00,00,000/- should not be added to these total income. The assessee filed the reply vide his letter dated 25.11.2011.*

*It is contended by him that this document is not seized from the assessee but seized from Sh. S.K. Gupta owned. It is further contended that the assessee not accountable for any such notice done by 3<sup>rd</sup> party without his knowledge the order information. Another contention is that the amount written on this page is not three crores but Rs. 3,00,000/-.*

*The contention of the assessee is considered. First of all it may be mentioned that all these katcha ledgers seized from the brother of the assessee Sh. S.K. Gupta are written in coded figures. He is habit of recording transactions in hundreds i.e. by placing decimals before the last two digits of amounts written in figures. Sh. S.K. Gupta has also agreed to this in his statement recorded during search. As such the amount written is Rs. 3,00,00,000/- and not Rs.3,00,000/-. With regard to other contention that "VKG" does not stand for Sh. V.K. Gupta*

*it may be mentioned that Sh. S.K. Gupta the assessee also identify the "VKG" as short name of Sh. V.K. Gupta. This reply of the assessee is an evasive reply. With regard to his contention that this is the document seized from a third party, it may be mentioned here that the assessee has in his statement recorded during search on 30.07.2009 at his residence, himself stated that all the records/books of accounts relating to the family of two brothers and their group companies are maintained by his brother Sh. Suresh Kr. Gupta. As such Sh. Suresh Kr. Gupta cannot be said to be a stranger to him. As such the contention of the assessee is not accepted. Since the assessee has received the above amount of Rs.3,00,00,000/- from M/s SRS and M/s HDPL without consideration, the same is treated as his income u/s 56(2) of the I. T. Act as this amount is received by the assessee without consideration."*

20. The Id. CIT (A) held that from the perusal of cash book seized (vide annexure A-20 page 36) and ledger seized (vide A-10 page 332) and cash book seized (vide Annexure A-29 page 52) that the amount of Rs.3 crores which the Assessing Officer has added being loan received outside the books, the source of this fund is, out of the part of the loan received bank which was given to SRS (refer to cash book Annexure A-11 page 76) and HDPL (Rs.5,24,71,992 seized balance sheet annexure A-1 page 66 and 67) and both of these loans were shown as loans and advances in the seized balance sheet as on 31.03.2007. Hence, when the addition on account of source has already been considered while adjudicating the appeal for assessment year 2007-08, accordingly the source of loan given in the year stands explained.

21. Before us, the Id. AR argued that in view of the clear finding of the Id. CIT (A) that the amounts have already been taxed in the assessment year 2007-08, no further addition in the current year is required to be made. The Id. DR relied on the assessment order.

22. Having perused the record, we find that the amounts have already been added in the hands of the assessee in the earlier year 2007-08. Since, it amounts to double addition of the similar amount based on seized material, we hereby delete the addition made by the Assessing Officer during this year.

23. In the result, both the appeal of the assessee and revenue are hereby dismissed.

(Order Pronounced in the Open Court on 28/08/2019).

Sd/-

**(H. S. Sidhu)**  
**Judicial Member**

**Dated: 28/08/2019**

\*Subodh\*

Copy forwarded to:

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

Sd/-

**(Dr. B. R. R. Kumar)**  
**Accountant Member**

**ASSISTANT REGISTRAR**