INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH C: NEW DELHI
BEFORE MS SUCHITRA KAMBLE, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 5696/Del/2014 & 3128/Del/2016
(Assessment Year: 2005-06)

Mr Geetamber Ananad C-226, Sector 44 Noida UP PAN: ACHPA0868K	Vs.	The Assistant Commissioner of Income tax Central Circle Meerut
(Appellant)		(Respondent)

ITA No. 5982/Del/2014 & 2216/Del/2014
(Assessment Year: 2005-06 & 2006-07)

DCIT, Central Circle Meerut	Vs.	Mr Geetambar Ananad C-226, Sector 44 Noida UP PAN: ACHPA0868K
(Appellant)		(Respondent)

Assessee by :	Shri Ved jain, Advocate
Revenue by:	Shri Samar Bhadra CIT
Date of Hearing	07/08/2019
Date of pronouncement	05/11/2019

O R D E R

PER PRASHANT MAHARISHI, A. M.

1. These are the bunch of four appeals pertaining to one assessee for two assessment years i.e. assessment year 2005 – 06 and 2006 – 07, therefore they are disposed of by this common order.

2. ITA number 5696/del/2014 for assessment year 2005 – 06 is filed by the assessee against the order of The Commissioner of Income Tax (Appeals), Meerut dated 19/8/2014. The brief facts of the case show that search and seizure operation u/s 132 of the income tax act 1961 was carried out at the residence of the assessee on 15/2/2008. Subsequently locker number 439 at HDFC bank Noida in the name of assessee was also searched on 20/2/2008. Therefore, the learned assessing officer issued notice u/s 153A of the income tax act on 11/8/2009. The assessee filed return on 22/9/2009 declaring an income of INR 5 142771/–. The assessment u/s 143 (3) of the act read with section 153A of the act was passed on 29/12/2009 wherein several additions were made and the income of the assessee was assessed at INR 1 4536692/–. The assessee preferred an appeal before the learned CIT – A. The learned CIT – A passed an order dated 17/3/2011 against which the cross appeals were filed before the coordinate bench. The coordinate bench per order dated 28/6/2012 set aside the appeal back to the file of the learned CIT – A holding that admission of the additional evidence in rule 46A has not been complied with and the learned CIT – A has not decided about the genuineness of the memorandum of understanding which is refuted by the learned assessing officer. Consequently, the learned CIT – A passed an order dated 19/8/2014 partly allowing the appeal of the assessee. Therefore, the assessee has challenged the above order in ITA number 5696/del/2014 and the learned AO has challenged that order in ITA number 5982/del/2014.

3. In ITA number 5696/del/2014, the assessee has challenged in the 1st ground of appeal that the learned assessing officer has failed to appreciate that no incriminating document was found in search in respect of assessment year 2005 – 06, and therefore no addition could have been made by the learned assessing officer in terms of the decision of the honourable Bombay High Court in case of All Cargo And Global Logistics Ltd vs. Deputy Commissioner Of Income Tax and other leading

cases u/s 153A with section 143 (3) of the income tax act in absence of any incriminating material.

4. Adverting the 1st ground of appeal, the learned authorised representative submitted that there is no incriminating material found during the course of search based on which these additions have been made which are contested in the appeal of the assessee as well as in the appeal of the learned assessing officer. He therefore submitted that in view of the decision of the honourable Delhi High Court in case of CIT vs. Kabul Chawla [2016] 380 ITR 573 (Del) in concluded assessment no addition can be made without any incriminating material found during the course of search. He extensively read the orders of the learned assessing officer as well as the learned CIT – A and stated that both these additions have been made without reference to any incriminating material found during the course of search. Therefore, such additions could not have been made by the learned assessing officer in the 1st place itself.

5. The learned departmental representative relied upon the order of the learned assessing officer and the learned CIT – A and submitted that no such ground has been raised by the assessee before the lower authorities and therefore now the assessee cannot challenge the same. He submitted the copy of the panchanama and submitted that there are certain documents found in search.

6. We have carefully considered the rival contention and perused the orders of the lower authorities. Admittedly, in this case, the search operation was carried out on 15/2/2008 and the last search was on the locker on 20/2/2008. The impugned assessment year before us is assessment year 2005 – 06. Thus on the date of search, no proceedings with respect to assessment year 2005 – 06 were pending. Hence, it was concluded assessment. Honourable Delhi High Court in para number 37 of the decision in case of CIT vs Kabul Chawla (supra) has held 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 153A(1) will have to be mandatorily issued to the person searched requiring him to file returns for six assessment years immediately preceding the previous year relevant to the assessment year in which the search takes place.

(ii) Assessments and reassessments pending on the date of the search shall abate. The total income for such assessment years will have to be computed by the Assessing Officers as a fresh exercise.

(iii) The Assessing Officer will exercise normal assessment powers in respect of the six years previous to the relevant assessment year in which the search takes place. The Assessing Officer 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 assessment years "in which both the disclosed and the undisclosed income would be brought to tax".

(iv) Although section 153A 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 Assessing Officer 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 the seized material."

(v) In the 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 153A is relatable to abated pro ceedings (i.e., those pending on the date of search) and the word "reassess" to the completed assessment proceedings.

(vi) In so far as the pending assessments are concerned, the jurisdic tion to make the original assessment and the assessment under section 153A merges into one. Only one assessment shall be made separately for each assessment year on the basis of the findings of the search and any other material existing or brought on the record of the Assessing Officer.

(vii) Completed assessments can be interfered with by the Assessing Officer 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.

7. Thus, completed assessments can be interfered with by the assessing officer only based on some incriminating material unearthed during the course of search. In the present case addition in dispute before the learned CIT – A in the 2nd round of proceedings is (1) addition of INR 2,500,000 on account of the unexplained loan u/s 68 of the income tax act received from Mr Prem Sheth. (2) the addition of INR 6,500,000 under section 2 (22) (e) of the income tax act taken as a loan from ATS infrastructure Ltd, (3) taxability of long-term capital gain of INR 3 525645/–. On careful reading of the order of the learned assessing officer passed u/s 153A read with section 143 (3) of the income tax act on 29/12/2009 all 3 additions are made without any reference to any incriminating material found during the course of search. The first addition of INR 2,500,000 on account of loan from Mr. Prem Sheth, there is no reference of any material found during the course of search. With respect to the amount of loan received from Messer ATS Infrastructure Ltd as deemed dividend was also not made on account of any incriminating material found during the course of search. The memorandum of understanding referred by the learned assessing officer was also not found during the course of search. The third edition of the short-term capital gain of INR 3 525645/– on sale of shares was also made on account of search on Messer's DN Kansal securities private limited. However, during the course of search on assessee, there is no incriminating material found with respect to the above transaction. Even otherwise, the assessee has shown the above sum as short-term capital gain whereas the learned assessing officer has taxed this as income from other sources. This is evident from the computation made by the learned assessing officer on the last page of the assessment order. However, it is apparent that there is no reference of any incriminating material found during the course of search with respect to all the three additions. The panchanam shown to us, was peruse and ld

DR was asked specifically that what are those documents, however no such documents were shown to us. Coming to the order of the learned CIT – A or as well as in the remand report obtained by the learned CIT – A there is no reference to any material seized during the course of search on the assessee. Therefore, respectfully following the decision of the honourable jurisdictional High Court in case of CIT vs. Kabul Chawla (supra), all the three additions made by the learned assessing officer in the concluded assessment for assessment year 2005 – 06 were without any incriminating material found during the course of search. Therefore, all these three additions deserve to be deleted. The learned CIT – A has already deleted the addition of INR 2,500,000 under section 68 as well as the addition of INR 6,500,000 on account of deemed dividend on merits against which the learned assessing officer is in appeal before us. With respect to the addition of INR 3 525645/–, the learned CIT – A has upheld the addition and held that the benefit of long-term capital gain will not be available to the assessee on the sum of INR 3 525645/- to the assessee and the above sum should be taxed under the head income from other sources. Against the confirmation of this addition, the assessee is in appeal. As the addition is involved in the appeal of the assessee as well as in the appeal of the learned assessing officer are not made on the basis of any incriminating material found during the course of search, all these 3 additions deserves to be deleted. Accordingly, we allow ground number 1 of the appeal of the assessee holding that no incriminating document was found during the course of search and therefore not all these additions made by the learned assessing officer could be made in the hands of the assessee.

8. As we have already deleted the addition made in the hands of the assessee as no incriminating material found during the course of search, the treatment of the long-term capital gain of INR 3 525645/– as income from other sources also deserves to be allowed in favour of the assessee for the reasons given by us while adjudicating ground number

1 of the appeal of the assessee. Accordingly, Ground no 2 is also allowed.

9. Accordingly, ground number 1 and 2 of the appeal of the assessee are allowed.

10. With respect to the appeal of the learned assessing officer, wherein the deletion of 2 additions with respect to addition u/s 68 of the income tax act of INR 2,500,000 and addition of deemed dividend of INR 6,500,000 in the hands of the assessee by the learned CIT – A are under challenge, while deciding the ground number 1 of the appeal of the assessee we have already held that with respect to the above two additions there is no incriminating material found during the course of search. Therefore, these two additions could not have been made in the hands of the assessee. Accordingly, ground numbers 1 – 5 of the appeal of the learned assessing officer are dismissed.

11. In the result ITA number 5696/del/2014 filed by the assessee for assessment year 2005 – 06 is allowed and ITA number 5982/del/2014 for the same Assessment Year filed by the learned assessing officer is dismissed.

12. ITA number 3128/del/2016 for assessment year 2005 – 06 is filed by the assessee against the order of the learned CIT – A –IV, Kanpur dated 17/3/2016 wherein, the penalty levied by the learned Joint Commissioner of income tax, central circle, Merrut u/s 271 (1) (c) of the income tax act of INR 7 91155/– is confirmed.

13. As the assessment proceedings for assessment year 2005 – 06 in the case of the assessee has already been described while deciding the appeals of the assessee and quantum proceedings for the above said assessment year. Consequently the learned assessing officer initiated penalty u/s 271 (1) (c) of the income tax act for intentionally concealing the particulars of true income and also furnishing inaccurate particulars of income and therefore the penalty proceedings were initiated in the assessment proceedings. Consequent to that, as addition with respect

to INR 3 525645/– was upheld, the penalty proceedings on the same were also initiated. Therefore the learned joint Commissioner of income tax (OSD), central circle, passed an order u/s 271 (1) (C) of the act on 23/3/2012 levying penalty u/s 271 (1) (C) of the act after considering explanation by the assessee. While levying the penalty the learned AO noted that assessee has furnished inaccurate particulars of his income and also concealed the particulars of his income and thereby has committed an offence within the meaning of section 271 (1) (C) of the act.

14. Assessee aggrieved with the order of the learned assessing officer preferred an appeal before the Commissioner of income tax (appeals) – IV, Kanpur who passed an order dated 17/3/2016 dismissing the appeal of the assessee and thus confirming the penalty levied by the learned assessing officer.

15. As the penalty has been levied on the addition of INR 3 525645/– being disclosure made by the assessee under the head short-term capital gain on sale of shares whereas the learned assessing officer treated the same as income from other sources, the above addition has already been deleted in the quantum of appeal of the assessee for assessment year 2005 – 06 relying upon the decision of the honourable Delhi High Court as the addition was not made on the basis of the incriminating material found during the course of search, the penalty on this issue now do not survive. Accordingly ground number 1 of the appeal of the assessee challenging the levy of the penalty u/s 271 (1) (C) of the act is allowed.

16. Accordingly ITA number 3128/Del/2016 filed by the assessee is allowed.

17. Now we come to the appeal of the learned assessing officer for assessment year 2006 – 07 in ITA number 2216/del/2014 against the order of the learned CIT (Appeals) dated 13/1/2014 challenging the deletion of the addition of INR 7,000,000 as deemed dividend and INR 2 804022/– u/s 41 (1) of the income tax act not treating it as a trading liability. The claim the assessee filed his return of income on

29/9/2009 declaring income of INR 1 994253/– in response to notice u/s 153A of the act issued on 11/8/2009. Assessment u/s 143 (3) of the act read with section 153A of the act was passed on 29/12/2009 determining total income of the assessee at INR 1 1824060/–. Assessee preferred appeal against that order before the Commissioner of income tax- A. He passed an order dated 17/3/2011 partly allowing the appeal of the assessee. He deleted the addition of Rs 2804022/– u/s 41 of the income tax act. He also deleted the addition of INR 7 0 lakhs as deemed dividend holding that transaction between the assessee and the company were business transactions. Assessee preferred an appeal before the coordinate bench. The coordinate bench passed the Consolidated order for assessment year 2004 – 05, 2005 – 06 and 2008 – 09 coordinate bench as per para number 6.4 of its order set aside all the appeal back to the file of the learned CIT – A to decide the issue in accordance with the law. In accordance with the direction of the coordinate bench, the learned CIT – A passed an order on 13/1/2014 deleting the addition of INR 7,000,000 on account of deemed dividend and INR 2 804022/– on account of cessation of liability u/s 41 of the act. Therefore, revenue is in appeal before us.

18. The learned authorised representative at the time of commencement of hearing made an application under rule 27 of The Income Tax Appellate Tribunal Rules, 1963 stating that though the assessee has got relief before the learned CIT – A and therefore it has not referred any appeal against the order of the learned CIT – A, But, as the revenue has come in appeal, the assessee intends to support the order of the learned CIT – A invoking the provisions of rule 27 on the ground that in absence of any incriminating material being found during the course of search for the assessment year under consideration, the assessing officer could not have made the additions which have been deleted by the learned CIT – A. He further submitted that the above issue is squarely covered by the decision of the honourable jurisdictional Delhi High Court in case of

CIT vs. Kabul Chawla in ITA number 707 dated 28/8/2015. He further supported his argument that in the present case as assessee has not filed any appeal but he is entitled to support the decision of the CIT – A on any ground but he is not entitled to raise a ground which will work adversely to the appellant. He further stated that assessee can raise a ground which may be a totally new ground, if it is purely 1 of law, and does not necessitate regarding of any evidence, even though the nature of the objection may be such that it is only a defense to the appeal itself but was further and may affect the validity of the entire proceedings miserably. He supported the above argument by placing reliance on the decision of the jurisdictional High Court in 123 ITR 200. Even otherwise on merits he relied upon the order of the learned CIT – A.

19. The learned departmental representative vehemently objected to the argument of the learned authorised representative and stated that as the assessee has not filed an appeal, he cannot raise this additional ground by invoking the provisions of rule 27 of The Income Tax Appellate Tribunal Rules 1963. ON the merits, he supported the order of the LD AO.

20. We have carefully considered the rival contention and perused the orders of the lower authorities. Admittedly in this case the assessee has not filed any appeal against the order of the learned CIT – A. Even otherwise, the issue is not decided against the assessee but in favour of the assessee. Therefore, there was naturally no reason for assessee to file the appeal. In the present case assessee is saying that even otherwise the addition deleted by the learned CIT – A is valid but altogether on another ground. Thus assessee supporting the order of the learned CIT – A in deletion of the above addition. Honourable Delhi High Court in 123 ITR 200 has held so when the learned assessing officer did not file an appeal against the order of the learned CIT – A but assessee filed an appeal before the ITAT and ITAT did not allow revenue to support the order of the learned CIT – A, the honourable Delhi High

Court has held that principles of natural justice are violated. Even without getting any support from rule 27 of the ITAT rules, the assessee can submit, even if No appeal is filed against the order of the first appellate authority that the addition even otherwise is not tenable/sustainable. In the present case the assessment year 2006 – 07 is a concluded assessment as the date of search was 20/2/2008 and on that date no proceedings for the impugned assessment year were pending. Additions made by the learned AO were without finding any incriminating material during the course of search. Therefore for the reasons given in deciding the appeals of the said assessee for assessment year 2005 – 06, we also hold that even otherwise in absence of incriminating material there is no infirmity in the order of the learned CIT – A in deleting the above addition. Accordingly, ground numbers 1 – 4 of the appeal of the learned assessing officer are dismissed.

21. In the result ITA number 2216/del/2014 filed by the learned assessing officer for assessment year 2006 – 07 is dismissed.

22. Accordingly, all the four appeals in this bunch of appeals are disposed of.

Order pronounced in the open court on 05/11/2019.

Sd/-	-Sd/-
(SUCHITRA KAMBLE)	(PRASHANT MAHARISHI)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Dated: 05/11/2019
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi