IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'F' BENCH, NEW DELHI

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND MS. SUCHITRA KAMBLE, JUDICIAL MEMBER

ITA Nos. 3988 to 3994/DEL/2019
[A.Ys 2009-10 to 2014-15]

Param Dairy Ltd 11/5B, 2nd Floor, Param Tower Pusa Road, New Delhi	Vs.	The A.C.I.T Central Circle – 14 New Delhi

PAN: AACCP 8066 C

ITA Nos. 5023 to 5027/DEL/2019
[A.Ys 2008-09 to 2012-13]

The Dy.C.I.T Central Circle – 14	Vs.	Param Dairy Ltd 11/5B, 2nd Floor, Param Tower Pusa Road, New Delhi New Delhi PAN: AACCP 8066 C
(Applicant)		(Respondent)

Assessee By : Shri Shri Ajay Vohra, Sr. Adv
Shri Rohit Jain, Adv
Shri Deepesh Jain, CA
Shri Divyam Mittal, CA

Department By : Shri Sulekha Verma, CIT- DR

Date of Hearing : 07.11.2019
Date of Pronouncement : .11.2019

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER,

The above captioned bunch of cross appeals by the assessee and Revenue are preferred against the separate orders of the Commissioner of Income Tax [Appeals] - XXVI, New Delhi pertaining to assessment years 2008-09 and 2014-15. Since all these appeals pertaining to same assessee were heard together and involve common issues, these are being disposed of by this common order for the sake of convenience and brevity.

2. Briefly stated, the facts of the case are that the assessee is a manufacturer and exporter of milk and milk products like skimmed milk powder, full creamd milk powder, dairy whitener, milk fat, paneer, liquid milk and desi ghee. The assessee supplies its products under the brand name of "Param Premium".

3. A search and seizure operation u/s 132 of the Income-tax Act, 1961 [hereinafter referred to as 'The Act'] was carried out in the case of Param and Rama Group on 28.02.2014. Pursuant to the search,

notice u/s 153A of the Act was issued and served upon the assessee asking the assessee to file return of income.

4. In its reply, the assessee stated that the return of income already filed be treated as return filed in response to the notice u/s 153A of the Act.

5. Pursuant to the response of the assessee, assessment proceedings were commenced. Assessment order was framed u/s 143(3) r.w.s 153A of the Act after making several additions, which are as under:

a) Addition on account of treating the purchase of milk in cash under the head 'Milk Purchases Tanki";
b) Disallowance made u/s 37 of the Act towards payment of commission;
c) Disallowance on account of alleged unexplained balances of sundry creditors alleging the same to be suppressed profit element; and
d) Addition on account of recharacterizing agricultural income as income from other sources.

6. In respect of all these additions, wherever part relief is given by the ld. CIT(A), the Revenue is in appeal before us.

7. The representatives of both the sides were heard at length, the case records carefully perused and with the assistance of the ld. Counsel, we have considered the documentary evidences brought on record in the form of Paper Book in light of Rule 18(6) of ITAT Rules.

8. The first challenge relates to the validity of the assessment order framed u/s 143(3) r.w.s 153A of the Act.

9. Before us, the ld. counsel for the assessee vehemently stated that the assessment orders passed by the Assessing Officer are void ab initio, bad in law and without jurisdiction as the additions are not based on any incriminating material found at the time of search. Strong reliance was placed on the decision of the Hon'ble High Court of Delhi in the case of Kabul Chawla 380 ITR 573 and of the Hon'ble Supreme Court in the case of Singhad Technical Educational Society 397 ITR 344. It is the say of the ld. counsel for the assessee that the additions made in the impugned assessment orders are not at all based

on any incriminating material/documents found during the course of search conducted.

10. The ld. counsel for the assessee stated that it is the settled position of law that any addition made de hors any material/document found during the course of search is clearly outside the Act and thus illegal and bad in law. The ld. counsel for the assessee further stated that it is not open to the Assessing Officer to reconsider the issues in proceedings u/s 153A of the Act, in as much as, such proceedings are undertaken as a consequence of search u/s 132 of the Act and has to be necessarily confined to material found during the course of search in cases where assessment had already been completed prior to the date of search.

11. Per contra, the ld. DR, supporting the order of the lower authorities, stated that it is incorrect to say that no incriminating material was found during the course of search. It is the say of the ld. DR that soft copies were found and on perusal of the same, the Assessing Officer unearthed various transactions and such transactions could see the day light only because of the search operations.

Therefore, the assessment orders are valid assessment orders as per the provisions of law.

12. We have given thoughtful consideration to rival contentions. Past history of the returns and assessments can be understood from the following chart:

ITA No.	AY	Date of Filing ITR u/s 139(1)	Date of Intimation u/s 143(1)	Limitation for issuance of notice u/s 143(2)	Date of Assessment framed, if any, u/s 143(3)	Whether 143(3) pending on the date of search?
3988/Del/2019	2008-09	24.09.2008	13.07.2009	30.09.2009	28.07.2010	NO
3989/Del/2019	2009-10	29.09.2009	-	30.09.2010	31.05.2011	NO
3990/Del/2019	2010-11	06.10.2010	24.01.2011	30.09.2011	-	NO
3 991/Del/2019	2011-12	23.09.2011	27.01.2012	30.09.2012	-	NO
3992/Del/2019	2012-13	22.09.2012	17.05.2013	30.09.2013	-	NO

13. As mentioned elsewhere, search took place on 28.02.2014 and last authorisation was executed on 22.04.2014. The return of income for A.Ys 2008-09 to 2012-13 were already filed before the date of search. Assessments for A.Ys 2008-09 and 2009-10 were framed u/s 143(3) of the Act vide orders dated 28.07.2010 and 31.05.2011 respectively.

14. A perusal of the assessment order for A.Y 2008-09 reveals that the first and main addition is on account of milk purchase tanki. The Assessing Officer has extracted the details of purchase of milk under different ledger heads from F.Ys. 2007-08 to 2013-14 at page 18 of his order from which it can be seen that purchase of milk under the head "Milk Tanki" are clearly mentioned. Copy of the assessment order framed u/s 143(3) of the Act dated 28.07.2010 for A.Y 2008-09 is placed at pages 42 to 43 of the paper book and audited financial statements are at pages 2 to 29 of the paper book.

15. In the Schedule the Profit and Loss Account under the head 'Purchases" a detailed bifurcation of milk purchases under different heads have been mentioned and milk purchase tanki is specifically found in the details. Purchases have been shown at Rs. 17,27,01,506.74. It is the same amount which has been added by the Assessing Officer while framing assessment order u/s 143(3) r.w.s 153A of the Act. In our considered opinion, when the entries have been duly made in the books of account, which have been subjected to audit and the audited financial statements of account were part of the return of income filed much before the date of search, which have been used by the Assessing Officer while framing the assessment order dated

28.07.2010 as mentioned hereinabove, such additions and such assessment orders cannot be accepted as the same are devoid of any incriminating material/documents found at the time of search.

16. Next addition is on account of commission paid at Rs. 11,72,488/. Again, on a perusal of the details of administrative expenses, same commission expense is found to be charged in the profit and loss account. Once again, this addition has nothing to do with any incriminating material/document found at the time of search.

17. Similarly, other additions have been made on account of details already forming part of audited financial statement of account.

18. The ld. DR has vehemently stated that soft copies were seized at the time of search and the extracts from soft copies have been made basis for framing the impugned assessments and the same are found at the time of search and therefore, are incriminating material.

19. A perusal of the audited report in Form No. 3CD, which is placed at page 31 of the paper book shows that under the details “Books of account maintained”, it is mentioned “Cash Book, ledger, stock

register, bank book", etc. Books are maintained on tally accounting software. It seems that this tally accounting software was seized during the search and the same has been treated as incriminating material. In our considered opinion, regular books of account of the assessee, by any stretch of imagination, cannot be treated as incriminating material forming basis of framing assessment u/s 153A r.w.s 143(3) of the Act.

20. Having said all that, let us now examine the ratio of the decision laid down by the Hon'ble Delhi High Court in the case of Kabul Chawla [supra] which reads 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."

21. Clause vii) is most relevant for the quarrel under consideration. As mentioned elsewhere, assessment for Assessment Years 2008-09 and 2009-10 were completed u/s 143(3) of the Act vide order dated 28.07.010 and 31.05.2011 respectively and audited books of account were thoroughly examined and details of purchases of milk tanki must have been scrutinized as the same is part of the audited financial statement of account as mentioned elsewhere. Therefore, in the light of the ratio laid down by the Hon'ble Delhi High Court [supra], completed assessments can be interfered only on the basis of some incriminating material unearthed during the course of search.

22. In so far as the Assessment Years 2010-11 to 2012-13 are concerned, where no assessment was framed u/s 143(3) of the Act, it can be safely concluded that the period of limitation for issuing notice u/s 143(2) of the Act expired much before the date of search.

23. The Hon'ble Delhi High Court in the case of Chintels India Limited 397 ITR 416 has held that once an assessee does not receive a notice u/s 143(2) of the Act within the stipulated period, such an assessee can take it that the return filed by him has become final and no

scrutiny proceedings are to be stated in respect of that return. This is also abundantly clear from the Circular No. 549 dated 31.10.1989.

24. The Hon'ble High Court was seized with the following substantial question of law:

> "Did the Income Tax Appellate Tribunal (ITAT) fall into error in holding that the assessments for Assessment Year 2008-09 were pending, on the date of the search i.e. 25.03.2010, in the circumstances of the case?"

25. The relevant findings of the Hon'ble High Court read as under:

> *19. The above submissions have been considered. As far as AY 2008- 09 is concerned, the fact that there was no notice sent to the Assessee under Section 143(3) of the Act before the deadline, i.e., 30 th September, 2009, is not in dispute. The CBDT Circular No. 549 dated 31st October, 1989 deals with such a situation. Para 5.13 thereof reads as under:*
>
> *"5.13 A proviso to sub-section (2) provides that a notice under the sub-section can be served on the assessee only during the financial year in which the return is furnished or within six months from the end of the month in which the return is furnished, whichever is later. This means that the Department*

must serve the said notice on the assessee within this period, if a case is picked up for scrutiny. It follows that if an assessee, after furnishing the return of income does not receive a notice under section 143(2) from the Department within the aforesaid period, he can take it that the return filed by him has become final and no scrutiny proceedings are to be started in respect of that return."

20. In Vipan Khanna v. Commissioner of Income Tax (supra), the Punjab and Haryana High Court referred to the same circular and observed that in case where the AO chose to verify the return and frame an assessment he has to issue a notice under Section 143(2) of the Act requiring the Assessee to produce his books of accounts and other material in support of his return. The High Court proceeded to observe:

"....Thereafter he can make an assessment under sub-section (3) of section 143 of the Act. Another important change incorporated in sub-section (2) of section 143 of the Act is that the notice under this sub-section cannot be served on an assessee after the expiry of 12 months from the end of the month in which the return is furnished. Therefore, in a case where a return is filed and is processed under section 143(1)(a) of the Act and no notice under sub-section (2) of section 143 of the Act thereafter is served on the assessee within the stipulated period of 12 months, the assessment proceedings under section 143 come to an end and the matter becomes final.

Thus, although technically no assessment is framed in such a case, yet the proceedings for assessment stand terminated."

21. In the present case, the facts speak for themselves. The Assessee filed its return on 21st October, 2008. The return was processed under Section 143(1) of the Act on 27th March, 2010. It has held by this Court in Indu Lata Rangwala v. Deputy Commissioner of Income Tax (supra) that the mere processing of a return under Section 143(1) of the Act and the sending of an intimation to the Assessee will not make it an 'assessment'. At the same time, the consequences of the Department not issuing a notice under Section 143(2) of the Act within the time stipulated as far as the filing of the return in normal course is concerned was not examined either in Commissioner of Income Tax v. Kabul Chawla (supra) or Indu Lata Rangwala v. Deputy Commissioner of Income Tax (supra). As notice by the Punjab & Haryana High Court in Vipan Khanna v. Commissioner of Income Tax (supra), the CBDT circular makes it abundantly clear that once an Assessee does not receive a notice under Section 143(2) of the Act within the period stipulated then such an Assessee "can take it that the return filed by him has become final and no scrutiny proceedings are to be started in respect of that return."

22. The inevitable conclusion, therefore, in the present case, is that the ITAT was in error in holding that the assessment for AY 2008-09 should be treated as 'pending' whereas in terms of

the above CBDT circular it should be treated as final in respect of which no scrutiny are to be started.

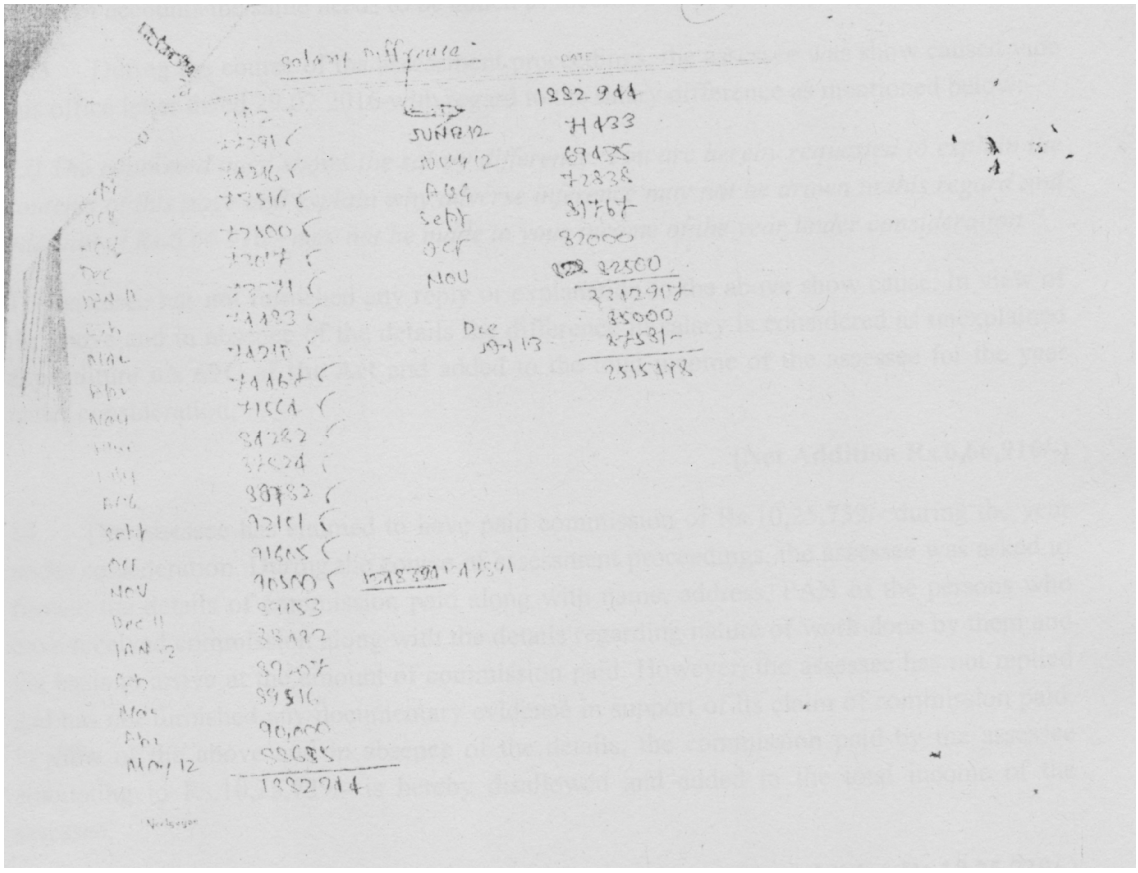
23. Consequently as far as ITA No. 581/2016 is concerned the question framed by this Court on 27th January, 2017 is answered in the affirmative, i.e., in favour of the Assessee and against the Revenue. The impugned order of the ITAT to the extent it negatives the plea of the Assessee is hereby set aside and the appeal is allowed.

26. The aforementioned decisions of the Hon'ble High Court of Delhi, one in the case of Kabul Chawla [supra] and another in the case of Chintels India Ltd [supra] clearly settle down the quarrel in favour of the assessee and against the revenue. Respectfully following the same, we are of the considered opinion that the assessment orders framed u/s 143(3) r.w.s 153A of the Act are bad in law and deserve to be quashed.

27. Since we have quashed the assessment orders we do not find it necessary to dwell into the merits of the case and other issues raised.

28. In ITA No. 3991/DEL/2019 for Assessment Year 2011-12, the assessee has challenged the addition of Rs. 6,66,916/- made u/s 69C of the Act on account of alleged unexplained salary expenditure.

29. During the course of assessment proceedings, on perusal of page 50 of Annexure A-7, seized from the party at corporate office, Param Tower, New Delhi, the Assessing Officer found that there was a salary difference in the document found which is exhibited at page 25 of the assessment which is as under:



30. The Assessing Officer was of the opinion that the details mentioned in the page do not match with the books of account. The assessee was asked to explain the same. On receiving no plausible reply, the Assessing Officer made addition of Rs. 6,66,916/- as unexplained expenditure u/s 69C of the Act.

31. The assessee carried the matter before the ld. CIT(A) but without any success.

32. Before us, the ld. counsel for the assessee vehemently stated that on perusal of the impugned seized document, it would clearly show that it is a dumb document and from which no logical inference can be drawn. Further, the ld. counsel for the assessee stated that for making addition u/s 69C of the Act, before making an addition on account of unexplained expenditure, the Assessing Officer has to bring on record material to show that on evidence found as a result of search, there is an undisclosed expenditure represented by debits appearing in the books of account. It is the say of the ld. counsel for the assessee that from the document, it is not possible to know the author of the same.

33. The ld. DR, on the other hand, challenged this contention of the ld. counsel for the assessee by stating that u/s 292C of the Act, the onus is upon the assessee as the said provision clearly raises a presumption as to the assets, books of account, etc found in the possession or control of any person belong to the said person.

34. We have given thoughtful consideration to the rival contentions and have carefully perused the impugned document vis a vis the assessment order. In our considered opinion, what is postulated in section 69C of the Act is that first of all, the assessee must have incurred that expenditure and thereafter, if the explanation offered by the assessee about the source of such expenditure is not found satisfactory by the Assessing Officer, the amount may be added to his income. We find that no independent material or evidence had been brought on record by the Assessing Officer to establish that the notings/jottings recorded on the loose sheet of paper represented unaccounted transaction.

35. It is true that the initial onus is upon the assessee as the said document was found from his possession but at the same time, some logical inference has to be drawn from the seized document which, in the present case we are unable to draw. In our humble view, the said

document can only be considered as a dumb document as the said document does not contain full details about the dates of payments and the recipient of the payments nor there is mention of any name of the employee. For want of details, the impugned document can only be considered as a dumb document.

36. Considering the nature of document and jotting/notings made thereon, we are of the view that no addition can be made on the basis of such dumb document and addition is, accordingly directed to be deleted.

37. In the result, all the appeals of the assessee in ITA Nos. 3988 to 3994/DEL/2019 are allowed and those of the revenue in ITA Nos. 5023 to 5027/DEL/2019 stand dismissed.

The order is pronounced in the open court on 19.11.2019.

Sd/-	**Sd/-**
[SUCHITRA KAMBLE**]**	**[N.K. BILLAIYA]**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: **19**th November, 2019

VL/

Copy forwarded to:

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

Asst. Registrar,
ITAT, New Delhi

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	