

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D" NEW DELHI**

**BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND SHRI M. BALAGANESH, ACCOUNTANT MEMBER**

आ.अ.सं./I.T.A Nos.5163 to 5165/Del/2015

निर्धारणवर्ष/Assessment Years:2007-08 to 2009-10

Diageo Distilleries Pvt. Ltd. (formerly known as Diageo Radico Distilleries Pvt. Ltd.) No. 1, 2 nd Floor, D-2, Southern Park, Saket Palace, New Delhi.	बनाम Vs.	DCIT Central Circle 31, Room No. 319, 3 rd Floor, ARA Centre, Jhandewalan Extn., New Delhi.
PAN No. AAKCS4614F		
अपीलार्थी Appellant		प्रत्यर्थी/Respondent

निर्धारितकीओरसे /Assessee by	Sh. Vijay Vaidya, CA Sh. Ajit Korde, Adv.
राजस्वकीओरसे /Revenue by	Sh. J.K. Mishra, CIT DR

सुनवाईकीतारीख/ Date of hearing:	20.01.2020
उद्घोषणाकीतारीख/Pronouncement on	27.05.2020

आदेश /O R D E R

PER AMIT SHUKLA, J.M.:

The aforesaid appeals have been filed by the assessee against common order dated 13.03.2015, passed by the Ld. CIT (Appeals)-30, New Delhi for the quantum of assessment passed u/s 153A/143(3) of the Act for the AYs 2007-08, 2008-09 & 2009-10 respectively. Since common issues are involved in all

the appeals, therefore, same were heard together and are being disposed of by way of this consolidated order.

2. In all the appeals, the assessee has raised additional ground challenging that, Ld. CIT (A) has erred in law in upholding the disallowance/additions made by the AO which were not based on any incriminating material found during the course of search and are contrary to the law laid down by the Hon'ble Jurisdictional High Court. On merits, the assessee has challenged disallowance of brand launch expenses, marketing expenses, discounts and incentives in all the appeals.

3. At the outset, Ld. Counsel for the assessee submitted that herein this case, the search and seizure action u/s 132 was carried out in the Radico Khaitan group of cases including the assessee company. During the course of search and seizure operation no incriminating material was found qua the additions made in impugned assessment order i.e. relating to advertising, publicity, sales promotion and disallowance u/s 40(a)(i) on account of other marketing expenses. On the date of search the assessments for the AYs 2007-08, 2008-09 & 2009-10 had attained finality and were not pending on the date of search and, therefore, in terms of *second proviso* to section 153A of the Act,

the assessment for these assessment years have to be treated as unabated. Now it is a well settled law especially in the jurisdiction of Hon'ble Delhi High Court that in case of unabated assessment no addition can be made without any incriminating material or evidence found during the course of search. Therefore, these additions need to be deleted.

4. On the other hand, Ld. CIT DR submitted that the legal ground raised in additional ground was not raised either before the AO or before the CIT (A) and, therefore, the same should not be admitted.

5. After considering the relevant material on record and the additional ground raised by the assessee in all the impugned appeals, we find that these grounds are purely legal ground challenging the validity of additions made within the scope of assessment framed u/s 153A/143(3) of the Act as per the law laid down by the Hon'ble Jurisdictional High Court in the case of **CIT Vs. Kabul Chawla (2013) 352 ITR 493 (Del) & Pr. CIT Vs. Meeta Gutgutia (2018) 257 Taxman 441(SC)**. Since the additional ground is purely a legal ground and goes to the very root of the matter, therefore, the same is admitted, because does not require any investigation of facts.

6. As pointed out by the Ld. Counsel, on the date of the search, i.e., 15.02.2011 the assessment for the AYs 2007-08, 2008-09 & 2009-10 and attained finality and were not pending and, therefore, they cannot be reckoned as abated assessment in terms of *second proviso* to section 153A. From a bare perusal of the assessment order as well the appellate order, it is seen that there are majorly two kinds disallowances/additions; *firstly*, brand launch expenses including the advertisement/publicity and sales promotion and *secondly*, the disallowance of expense u/s 40(a)(i) on account of various discounts and incentives. Both these additions admittedly are not based on any seized document or material and neither there is any whisper in the impugned orders. The addition has been made on the ground that incurring of such expenditure is for enduring benefit and not revenue expenditure or the assessee has not deducted tax at source of discounts and incentives given. Now it is a well established jurisprudence that in the case of unabated assessment which had attained finality on the date of search, no addition can be made unless any incriminating material or evidence has been found during search qua that addition and for that particular assessment year. Admittedly, no such incriminating material or

evidence has been found on such disallowance/addition during the course of search and, therefore, following the ratio laid down in the judgment of Hon'ble Delhi High Court in the case of **CIT Vs. Kabul Chawla (2013) 352 ITR 493 (Del) & Pr. CIT Vs. Meeta Gutgutia (2018) 257 Taxman 441(SC)** the additions are deleted.

7. In the result, the appeals of the assessee are allowed on the legal ground.

Order pronounced in the open court on 27th May, 2020.

Sd/-
(M. BALAGANESH)
ACCOUNTANT MEMBER

Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER

Dated: 27/05/2020

**Kavita Arora, Sr. P.S.*

Copy of order sent to- Assessee/AO/Pr. CIT/ CIT (A)/ ITAT
(DR)/Guard file of ITAT.

By order

Assistant Registrar, ITAT: Delhi Benches-Delhi