IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "B" NEW DELHI

BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

I.T.A. No.5565/DEL/2012
Assessment Year: 2006-2007

Golf Technologies Pvt. Ltd., GK House-187A, Flat No-102, Sant Nagar East of Kailash, New Delhi.	Vs.	Asstt. Commissioner of Income Tax, Central Circle-II, New Delhi.
TAN/PAN: AACCG4538J		
(Appellant)		(Respondent)

I.T.A. No.5566/DEL/2012
Assessment Year: 2007-2008

Golf Technologies Pvt. Ltd., GK House-187A, Flat No-102, Sant Nagar East of Kailash, New Delhi.	Vs.	Asstt. Commissioner of Income Tax, Central Circle-II, New Delhi.
TAN/PAN: AACCG4538J		
(Appellant)		(Respondent)

Appellant by:	Shri R.S. Ahuja, CA		
Respondent by:	Ms. Sunita Singh, CIT-DR		
Date of hearing:	16	07	2020
Date of pronouncement:	27	08	2020

O R D E R

PER AMIT SHUKLA, JUDICIAL MEMBER:

The aforesaid appeals have been filed by the assessee against separate impugned orders of even date, 28.08.2012 for the quantum of assessment passed u/s.153A/143 (3) for

the Assessment Years 2006-07 and 2007-08. Besides various grounds taken on merits, one of the common legal ground raised in both the appeals are that all the additions made by the Assessing Officer additions made, firstly, on account of unaccounted purchases; secondly, addition on account of undisclosed income from professional services; and lastly, disallowances of preliminary expenses are beyond the scope of assessment u/s.153A, as these additions are not based on any incriminating material found during the course of search.

2. Since, similar issues and grounds has been raised in Assessment Year 2006-07 and 2007-08 and facts are identical, therefore, same were heard together and are being disposed of by this consolidated order.

3. The facts in brief are that, a search and seizure action was carried out in the case of the assessee on 24.09.2009. Prior to the date of search, the return of income filed for the Assessment Years 2006-07 and 2007-08 had attained finality and assessment for these two Assessment Years were not pending and hence same are reckoned as unabated assessment in terms of 2nd proviso to Section 153A. On a perusal of the assessment order, it is seen that the Assessing Officer, first of all, on perusal of balance-sheet noted that there are preliminary expenses have been debited and observed that the assessee company since incorporation was claiming deduction of an amount equal to 1/10 of incorporation expenses u/s.35D which was Rs.123 per year.

He noted that the assessee company has wrongly claimed deduction of Rs. 12,508 including the amount of expenses incurred during later years which is not allowable in terms of provision of Section 35D. Accordingly, he has disallowed sum of Rs.11,085 in both the years and added back to the income.

4. Apart from that, the Assessing Officer observes that in the course of assessment proceeding the assessee company was required to furnish details of purchases made during the relevant year and in the Assessment Year 2006-07 the assessee has made purchases of Rs.1,01,53,430/- from M/s. Jay Enn, Infotech Pvt. Ltd., New Delhi; and in Assessment Year 2007-08, it has made purchases from 8 parties for sums aggregating to Rs.6,61,13,490/- which are bogus. The reason for arriving on such a conclusion was that, during the course of search proceedings u/s.132, statement of Lt. Colonel, H.S. Bedi who was the CMD of the Tulip Group was recorded, in which he has admitted that the group companies were involved in making bogus purchases from various entities and has also made a declaration of Rs.75 crores on account of bogus purchases made by different group companies made in the Assessment Year 2009-10 and this amount was surrendered in names of various companies. Assessing Officer has also noted the relevant extract of the statement and mentioned about the inquiries conduced for the purchases during Financial Years 2007-08 and 2008-09 relevant to Assessment Years 2009-10 and 2010-11. However, there is no iota of any reference or material that anything incriminating

was found regarding purchases qua the Assessment Years 2006-07 and 2007-08 nor there is any such thing in the statement recorded u/s.132(4) and in the subsequent inquiry conducted that anything incriminating was found relating to these assessment years. Based on inquiries and statements which were relevant for the Assessment Years 2009-10 onwards, Assessing Officer has made adverse inference in the Assessment Year 2006-07 and 2007-08.

5. Ld. CIT (A) has confirmed the addition mainly on the ground that during the course of statement, the CMD has declared Rs.75 crores on account of bogus purchases in various group companies made from various entities in the subsequent assessment years and the assessee company itself, in the Assessment Year 2009-10 has offered bogus purchases of Rs.21 crore in its return of income.

6. Before us the ld. counsel for the assessee submitted that from a bare perusal of the assessment order as well as appellate order it can be seen that all the observations and reference of the statement have been made which were relevant for the Assessment Years 2009-10 and 2010-11 and there is no whisper about any incriminating material or documents found during the course of search that purchases made during the year from the parties are bogus. It is a well settled law by the Hon'ble Jurisdictional High Court in the case of **CIT vs. Kabul Chawla, 380 ITR 573 (Del.),** and **PCIT vs. Meeta Gutgutia, (2017) 325 ITR 526**, that where the

assessment has attained finality before the date of search and which are not pending at the time of search, the addition can be made on the basis of incriminating material found during the course of search qua that assessment year. If no such incriminating material has been found then the additions cannot be made within the scope of Section 153/143(3).

7. On the other hand, ld. CIT-DR strongly relied upon the order of the Assessing Officer and Ld. CIT(A) and submitted that here in this case not only during the course of statement u/s 132(4) recorded during the course of search, the CMD of the group company admitted that he has taken accommodation entry of bogus purchases from various entities, but some of the entities were found to be non existence or not having business. Even though these inquiries and statement related to subsequent assessment years, but even for these assessment years these are to reckoned as incriminating material found during the course of search. Thus, the additions on account of bogus purchases are within the scope and ambit of assessment framed u/s. 143(3)/153A.

8. We have heard the rival submissions and perused the relevant finding given in the impugned orders as well as material referred to before us. As stated above, none of these additions which have been made are based on any material or evidence found during the course of search relevant for the Assessment Years 2006-07 and 2007-08. Neither there is any incriminating material found during the course of search for

preliminary expenses or for payment of profession services or alleged bogus purchases. The Assessing Officer himself observed that all these issues were raised during the course of assessment proceedings and there is no specific material pertaining to Assessment Years 2006-07 and 2007-08. In the entire assessment order especially in the assessment order for the Assessment Year 2007-08, Assessing Officer has referred to the statement of CMD, wherein he has admitted that bogus purchases were debited during the Financial Year 2009-10 and 2010-11 in various companies and he has also made surrender of Rs.75 crores in various group companies on account of bogus purchases. He has also referred to certain inquiry conducted subsequently upon the entities from where the group companies have made purchases in the subsequent years were found to be non genuine. Only an inference has been drawn based on subsequent inquiries relevant for the Assessment Years 2009-10 and 2010-11 in the impugned Assessment Year, otherwise there is no whisper of any incriminating material qua these assessment years. It is a well settled within the jurisdiction of the Delhi High Court that where for any of the assessment years falling within 6 years preceding the year in which search took place, the assessments which are not pending or had attained finality before the date of search, the additions can be made only on the basis of incriminating material found during the course of search qua that assessment year, i.e., the material should pertained to that Assessment Year. If no such material has

been found pertaining to Assessment Years 2006-07 and 2007-08, then no such additions can be roped in the Assessment Year framed u/s.153A/143(3). The relevant observation and the principle reiterated by the Hon'ble Jurisdictional High Court in the case of **Meeta Gutgutia (supra)** are reproduced hereunder:

"53. At this stage, it is also to be noticed that an elaborate argument was made by Mr. Manchanda on the aspect of the security deposits accepted by the Assessee. These were of two kinds - one was of refundable security deposits and the other for non-refundable security deposits. As far as the refundable security deposits were concerned, the AO himself in his remand report accepted them as having been disclosed. This has been noticed by the CIT(A) in para 7.2.1 of his order for AY 2004-05. As regards non- refundable security deposit, the CIT(A) accepted the AO"s findings that treating the sum as „goodwill written off on deferred basis" was not correct, hence the addition of Rs. 5,09,343 was held to be justified and correct. It was duly accounted for under „liabilities" and transferred to income in a phased manner. This was not done by manipulating the account books of the Assessee as alleged by the Revenue. This would have been evident had the return been picked up for scrutiny under Section 143(3) of the Act. This, therefore, was not material which was subsequently unearthed during the search which was not already available to the AO. Consequently, the additions sought to be made by the AO on account of security deposits were rightly deleted by the CIT(A).

54. For all of the aforementioned reasons Question (ii) framed above is answered in the affirmative i.e., in favour of the Assessee and against the Revenue.

Invocation of Section 153A for AYs 2000-01 to 2003-04

55. On the legal aspect of invocation of Section 153A in relation to AYs 2000-01 to 2003-04, the central plank of the Revenues submission is the decision of this Court in Dayawanti Gupta (supra). Before beginning to examine the said decision, it is

necessary to revisit the legal landscape in light of the elaborate arguments advanced by the Revenue.

56. Section 153A of the Act is titled "Assessment in case of search or requisition". It is connected to Section 132 which deals with 'search and seizure'. Both these provisions, therefore, have to be read together. Section 153A is indeed an extremely potent power which enables the Revenue to re- open at least six years of assessments earlier to the year of search. It is not to be exercised lightly. It is only if during the course of search under Section 132 incriminating material justifying the re-opening of the assessments for six previous years is found that the invocation of Section 153A qua each of the AYs would be justified.

57. The question whether unearthing of incriminating material relating to any one of the AYs could justify the re-opening of the assessment for all the earlier AYs was considered both in CIT v. Anil Kumar Bhatia (supra) and CIT v. Chetan Das Lachman Das (supra). Incidentally, both these decisions were discussed threadbare in the decision of this Court in Kabul Chawla (supra). As far as CIT v. Anil Kumar Bhatia (supra) was concerned, the Court in paragraph 24 of that decision noted that "we are not concerned with a case where no incriminating material was found during the search conducted under Section 132 of the Act. We therefore express no opinion as to whether Section 153A can be invoked even under such situation". That question was, therefore, left open. As far as CIT v Chetan Das Lachman Das (supra) is concerned, in para 11 of the decision it was observed:

"11. Section 153A (1) (b) provides for the assessment or reassessment of the total income of the six assessment years immediately preceding the assessment year relevant to the previous year in which the search took place. To repeat, there is no condition in this Section 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. This, however, does not mean that the assessment under Section 153A 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."

58. In Kabul Chawla (supra), the Court discussed the decision in Filatex India Ltd. v. CIT (supra) as well as the above two decisions and observed as under:

"31. What distinguishes the decisions both in CIT v. Chetan Das Lachman Das (supra), and Filatex India Ltd. v. CIT-IV (supra) in their application to the present case is that in both the said cases there was some material unearthed during the search, whereas in the present case there admittedly was none. Secondly, it is plain from a careful reading of the said two decisions that they do not hold that additions can be validly made to income forming the subject matter of completed assessments prior to the search even if no incriminating material whatsoever was unearthed during the search.

32. Recently by its order dated 6th July 2015 in ITA No. 369 of 2015 (Pr. Commissioner of Income Tax v. Kurele Paper Mills P. Ltd.), this Court declined to frame a question of law in a case where, in the absence of any incriminating material being found during the search under Section 132 of the Act, the Revenue sought to justify initiation of proceedings under Section 153A of the Act and make an addition under Section 68 of the Act on bogus share capital gain. The order of the CIT(A), affirmed by the ITAT, deleting the addition, was not interfered with."

59. In Kabul Chawla (supra), the Court referred to the decision of the Rajasthan High Court in Jai Steel (India), Jodhpur v. ACIT (2013) 36 Taxman 523 (Raj). The said part of the decision in Kabul Chawla (supra) in paras 33 and 34 reads as under:

"33. The decision of the Rajasthan High Court in Jai Steel (India), Jodhpur v. ACIT (supra) involved a case where certain books of accounts and other documents that had not been produced in the course of original assessment were found in the course of search. It was held where undisclosed income or undisclosed property has been found as a consequence of the search, the same would also be taken into consideration while computing the total income under Section 153A of the Act. The Court then explained as under:

"22. In the firm opinion of this Court from a plain reading of the provision along with the purpose and purport of the said provision, which is intricately linked with search and requisition under Sections 132 and 132A of the Act, it is apparent that:

(a) the assessments or reassessments, which stand abated in terms of II proviso to Section 153A of the Act, the AO acts under his original jurisdiction, for which, assessments have to be made;

(b) regarding other cases, the addition to the income that has already been assessed, the assessment will be made on the basis of incriminating material; and

(c) in absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made."

34. The argument of the Revenue that the AO was free to disturb income de hors the incriminating material while making assessment under Section 153A of the Act was specifically rejected by the Court on the ground that it was "not borne out from the scheme of the said provision" which was in the context of search and/or requisition. The Court also explained the purport of the words "assess" and "reassess", which have been found at more than one place in Section 153A of the Act as under:

"26. The plea raised on behalf of the assessee that as the first proviso provides for assessment or reassessment of the total income in respect of each assessment year falling within the six assessment years, is merely reading the said provision in isolation and not in the context of the entire section. The words 'assess' or 'reassess'-have been used at more than one place in the Section and a harmonious construction of the entire provision would lead to an irresistible conclusion that the word assess has been used in the context of an abated proceedings and reassess has been used for completed assessment proceedings, which would not abate as they are not pending on the date of initiation of the search or making of requisition and which would also necessarily support the interpretation that for the completed assessments, the same can be tinkered only based on the incriminating material found during the course of search or requisition of documents."

60. In Kabul Chawla (supra), the Court also took note of the decision of the Bombay High Court in Commissioner of Income Tax v. Continental Warehousing Corporation (Nhava Sheva) Ltd. [2015] 58 taxmann.com 78 (Bom) which accepted the plea that if no incriminating material was found during the course of search in respect of an issue, then no additions in respect of any issue can be made to the assessment under Section 153A and 153C of the Act. The legal position was thereafter summarized in Kabul Chawla (supra) 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."

61. It appears that a number of High Courts have concurred with the decision of this Court in Kabul Chawla (supra) beginning with the Gujarat High Court in Principal Commissioner of Income Tax v. Saumya Construction Pvt. Ltd. (supra). There, a search and seizure operation was carried out on 7th October, 2009 and an assessment came to be framed under Section 143(3) read with Section 153A(1)(b) in determining the total income of the Assessee of Rs. 14.5 crores against declared income of Rs. 3.44 crores. The ITAT deleted the additions on the ground that it was not based on any incriminating material found during the course of the search in respect of AYs under consideration i.e., AY 2006-07. The Gujarat High Court referred to the decision in Kabul Chawla (supra), of the Rajasthan High Court in Jai Steel (India), Jodhpur v. ACIT (supra) and one earlier decision of the Gujarat High Court itself. It explained in para 15 and 16 as under:

"15. On a plain reading of section 153A of the Act, it is evident that the trigger point for exercise of powers thereunder is a search under section 132 or a requisition under section 132A of the Act. Once a search or requisition is made, a mandate is cast upon the Assessing Officer to issue notice under section 153A of the Act to the person, requiring him to furnish the return of income in respect of each assessment year falling within six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made and assess or reassess the same. Since the assessment under section 153A of the Act is linked with search and requisition under sections 132 and 132A of the Act, it is evident that the object of the section is to bring to tax the undisclosed income which is found during the course of or pursuant to the search or requisition. However, instead of the earlier regime of block assessment whereby, it was only the undisclosed income of the block period that was assessed, section 153A of the Act seeks to assess the total income for the assessment year, which is clear from the first proviso thereto which provides that the Assessing Officer shall assess or reassess the total income in respect of each assessment year falling within such six assessment years. The second proviso makes the intention of the Legislature clear as the same provides that assessment or reassessment, if any, relating to the six assessment years referred to in the sub-section pending on the

date of initiation of search under section 132 or requisition under section 132A, as the case may be, shall abate. Sub- section (2) of section 153A of the Act provides that if any proceeding or any order of assessment or reassessment made under sub-section (1) is annulled in appeal or any other legal provision, then the assessment or reassessment relating to any assessment year which had abated under the second proviso would stand revived. The proviso thereto says that such revival shall cease to have effect if such order of annulment is set aside. Thus, any proceeding of assessment or reassessment falling within the six assessment years prior to the search or requisition stands abated and the total income of the assessee is required to be determined under section 153A of the Act. Similarly, sub- section (2) provides for revival of any assessment or reassessment which stood abated, if any proceeding or any order of assessment or reassessment made under section 153A of the Act is annulled in appeal or any other proceeding.

16. Section 153A bears the heading "Assessment in case of search or requisition". It is "well settled as held by the Supreme Court in a catena of decisions that the heading or the Section can be regarded as a key to the interpretation of the operative portion of the section and if there is no ambiguity in the language or if it is plain and clear, then the heading used in the section strengthens that meaning. From the heading of section

153. the intention of the Legislature is clear, viz., to provide for assessment in case of search and requisition. When the very purpose of the provision is to make assessment In case of search or requisition, it goes without saying that the assessment has to have relation to the search or requisition, in other words, the assessment should connected With something round during the search or requisition viz., incriminating material which reveals undisclosed income. Thus, while in view of the mandate of sub-section (1) of section 153A of the Act, in every case where there is a search or requisition, the Assessing Officer is obliged to issue notice to such person to furnish returns of income for the six years preceding the assessment year relevant to the previous year in which the search is conducted or requisition is made, any addition' or disallowance can be made only on the basis of material collected during the search or requisition, in case no incriminating material is found, as held by the Rajasthan High Court in the case of Jai Steel (India) v. Asst. CIT (supra), the earlier assessment would have to be reiterated, in

case where pending assessments have abated, the Assessing Officer can pass assessment orders for each of the six years determining the total income of the assessee which would include income declared in the returns, if any, furnished by the assessee as well as undisclosed income, if any, unearthed during the search or requisition. In case where a pending reassessment under section 147 of the Act has abated, needless to state that the scope and ambit of the assessment would include any order which the Assessing Officer could have passed under section 147 of the Act as well as under section 153A of the Act.

xxx

19. On behalf of the appellant, it has been contended that if any incriminating material is found, notwithstanding that in relation to the year under consideration, no incriminating material is found, it would be permissible to make additions and disallowance in respect of an the six assessment years. In the opinion of this court, the said contention does not merit acceptance, inasmuch as. the assessment in respect of each of the six assessment years is a separate and distinct assessment.

Under section 153A of the Act, assessment has to be made in relation to the search or requisition, namely, in relation to material disclosed during the search or requisition. If in relation to any assessment year, no incriminating material is found, no addition or disallowance can be made in relation to that assessment year in exercise of powers under section 153A of the Act and the earlier assessment shall have to be reiterated. In this regard, this court is in complete agreement with the view adopted by the Rajasthan High Court in the case of Jai Steel (India) v. Asst. CIT (supra). Besides, as rightly pointed out by the learned counsel for the respondent, the controversy involved in the present case stands concluded by the decision of this court In the case of CIT v. Jayaben Ratilal Sorathia (supra) wherein it has been held that while it cannot be disputed that considering section 153A of the Act, the Assessing Officer can reopen and/or assess the return with respect to six preceding years ; however, there must be some incriminating material available with the Assessing Officer with respect to the sale transactions in the particular assessment year."

62. Subsequently, in Principal Commissioner of Income Tax- 1 v. Devangi alias Rupa (supra), another Bench of the Gujarat High Court reiterated the above legal position following its earlier decision in Principal Commissioner of Income Tax v.

Saumya Construction P. Ltd. (supra) and of this Court in Kabul Chawla (supra). As far as Karnataka High Court is concerned, it has in CIT v. IBC Knowledge Park P. Ltd. (supra) followed the decision of this Court in Kabul Chawla (supra) and held that there had to be incriminating material qua each of the AYs in which additions were sought to be made pursuant to search and seizure operation. The Calcutta High Court in CIT-2 v. Salasar Stock Broking Ltd. (supra), too, followed the decision of this Court in Kabul Chawla (supra). In CIT v. Gurinder Singh Bawa (supra), the Bombay High Court held that:

"6...once an assessment has attained finality for a particular year, i.e., it is not pending then the same cannot be subject to tax in proceedings under section 153A of the Act. This of course would not apply if incriminating materials are gathered in the course of search or during proceedings under section 153A of the Act which are contrary to and/or not disclosed during the regular assessment proceedings."

63. Even this Court has in CIT v Mahesh Kumar Gupta (supra) and The Pr. Commissioner of Income Tax-9 v. Ram Avtar Verma (supra) followed the decision in Kabul Chawla (supra). The decision of this Court in Pr. Commissioner of Income Tax v. Kurele Paper Mills P. Ltd. (supra) which was referred to in Kabul Chawla (supra) has been affirmed by the Supreme Court by the dismissal of the Revenue's SLP on 7th December, 2015.

The decision in Dayawanti Gupta

64. That brings us to the decision in Dayawanti Gupta (supra). As rightly pointed out by Mr. Kaushik, learned counsel appearing for the Respondent, that there are several distinguishing features in that case which makes its ratio inapplicable to the facts of the present case. In the first place, the Assessees there were engaged in the business of Pan Masala and Gutkha etc. The answers given to questions posed to the Assessee in the course of search and survey proceedings in that case bring out the points of distinction. In the first place, it was stated that the statement recorded was under Section 132(4) and not under Section 133A. It was a statement by the Assessee himself. In response to question no. 7 whether all the purchases made by the family firms, were entered in the regular books of account, the answer was:

"We and our family firms namely M/s Assam Supari Traders and M/s Balaji Perfumes generally try to record the transactions made in respect of purchase, manufacturing and sales in our regular books of accounts but it is also fact that some time due to some factors like inability of accountant, our busy schedule and some family problems, various purchases and sales of Supari, Gutka and other items dealt by our firms is not entered and shown in the regular books of accounts maintained by our firms."

65. Therefore, there was a clear admission by the Assessees in Dayawanti Gupta (supra) there that they were not maintaining regular books of accounts and the transactions were not recorded therein.

66. Further, in answer to Question No. 11, the Assessee in Dayawanti Gupta (supra) was confronted with certain documents seized during the search. The answer was categorical and reads thus:

"Ans:- I hereby admit that these papers also contend details of various transactions include purchase/ sales/ manufacturing trading of Gutkha, Supari made in cash outside Books of accounts and these are actually unaccounted transactions made by our two firms namely M/s Asom Trading and M/s. Balaji Perfumes."

67. By contrast, there is no such statement in the present case which can be said to constitute an admission by the Assessee of a failure to record any transaction in the accounts of the Assessee for the AYs in question. On the contrary, the Assessee herein stated that, he is regularly maintaining the books of accounts. The disclosure made in the sum of Rs. 1.10 crores was only for the year of search and not for the earlier years. As already noticed, the books of accounts maintained by the Assessee in the present case have been accepted by the AO. In response to question No. 16 posed to Mr. Pawan Gadia, he stated that there was no possibility of manipulation of the accounts. In Dayawanti Gupta (supra), by contrast, there was a chart prepared confirming that there had been a year-wise non-recording of transactions. In Dayawanti Gupta (supra), on the basis of material recovered during search, the additions which were made for all the years whereas additions in the present case were made by the AO only for AY 2004-05 and not any of the other years. Even the

additions made for AYs 2004-05 were subsequently deleted by the CIT(A), which order was affirmed by the ITAT. Even the Revenue has challenged only two of such deletions in ITA No. 306/2017.

68. In para 23 of the decision in Dayawanti Gupta (supra), it was observed as under:

"23. This court is of opinion that the ITAT's findings do not reveal any fundamental error, calling for correction. The inferences drawn in respect of undeclared income were premised on the materials found as well as the statements recorded by the assessees. These additions therefore were not baseless. Given that the assessing authorities in such cases have to draw inferences, because of the nature of the materials - since they could be scanty (as one habitually concealing income or indulging in clandestine operations can hardly be expected to maintain meticulous books or records for long and in all probability be anxious to do away with such evidence at the shortest possibility) the element of guess work is to have some reasonable nexus with the statements recorded and documents seized. In tills case, the differences of opinion between the CIT (A) on the one hand and the AO and ITAT on the other cannot be the sole basis for disagreeing with what is essentially a factual surmise that is logical and plausible. These findings do not call for interference. The second question of law is answered again in favour of the revenue and against the assessee."

69. What weighed with the Court in the above decision was the "habitual concealing of income and indulging in clandestine operations" and that a person indulging in such activities "can hardly be accepted to maintain meticulous books or records for long." These factors are absent in the present case. There was no justification at all for the AO to proceed on surmises and estimates without there being any incriminating material qua the AY for which he sought to make additions of franchisee commission.

70. The above distinguishing factors in Dayawanti Gupta (supra), therefore, do not detract from the settled legal position in Kabul Chawla (supra) which has been

followed not only by this Court in its subsequent decisions but also by several other High Courts.

71. For all of the aforementioned reasons, the Court is of the view that the ITAT was justified in holding that the invocation of Section 153A by the Revenue for the AYs 2000-01 to 2003-04 was without any legal basis as there was no incriminating material qua each of those AYs.

Conclusion

72. To conclude:

(i) Question (i) is answered in the negative i.e., in favour of the Assessee and against the Revenue. It is held that in the facts and circumstances, the Revenue was not justified in invoking Section 153A of the Act against the Assessee in relation to AYs 2000-01 to AYs 2003-04.

(ii) Question (ii) is answered in the affirmative i.e., in favour of the Assessee and against the Revenue. It is held that with reference to AY 2004-05, the ITAT was correct in confirming the orders of the CIT (A) to the extent it deleted the additions made by the AO to the taxable income of the Assessee of franchise commission in the sum of Rs. 88 lakhs and rent payment for the sum of Rs. 13.79 lakhs."

9. Thus, respectfully the ratio and the principle laid down by the Hon'ble Jurisdictional High Court, we hold that none of the additions made by the Assessing Officer in the impugned Assessment Years 2006-07 and 2007-08 are based on any incriminating material found during the course of search pertaining to these assessment years, and therefore, we hold that these additions are beyond the scope of assessment framed u/s.153A/143(3). On this legal ground alone, the additions made by the Assessing Officer are deleted.

8. In the result, the appeals of the assessee are allowed.

Order pronounced in the open Court on 27th August, 2020

Sd/-	Sd/-
[PRASHANT MAHARISHI]	**[AMIT SHUKLA]**
[ACCOUNTANT MEMBER]	**JUDICIAL MEMBER**

DATED: 27/08/2020

PKK: