IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : E : NEW DELHI

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
AND
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER

ITA Nos.2540 & 2541/Del/2019
Assessment Years: 2009-10 & 2010-11

Mahalaxmi Buildwell India Pvt. Ltd., C/o Kapil Goel, Advocate, F-26/124, Sector-7, Rohini, Delhi.	Vs	DCIT, Central Circle, Dehradun.

PAN :AAFCM4474J

(Appellant) (Respondent)

Assessee by	:	Shri Kapil Goel, Advocate
Revenue by	:	Shri S.K. Chatterjee, Sr. DR
Date of Hearing	:	25.09.2020
Date of Pronouncement	:	13.10.2020

ORDER

PER R.K. PANDA, AM:

The above two appeals filed by the assessee are directed against the separate orders dated 28th January, 2019 of the CIT(A)-4, Kanpur, relating to assessment years 2009-10 & 2010-11, respectively. Since common issues are involved in both these appeals, therefore, these were heard together and are being disposed of by this consolidated order.

2. Facts of the case, in brief, are that the assessee is a company engaged in the business of real estate, developers and promoters, etc. The company was incorporated on 4th March, 2008. The return for assessment year 2009-10 was filed on 30th September, 2009 declaring the total income at Rs.37,130/-. A search and seizure operation was conducted in the Mahalaxmi Buildwell group of cases on 31st October, 2014. During the course of search, certain information/documents belonging to the assessee were also found. In response to notice u/s 153A which was issued on 25th May, 2015, the assessee filed its return of income on 20th August, 2016 declaring nil income.

3. The AO noted that during the course of search proceedings certain documents including documents Ann. A-14, Page No. 1 to 17 and A-22, Page No. 19 to 24 were found and seized. As per these documents the assessee purchased the following land which are as follows:-

S.No.	Name of the seller	Particular of land	sale consideration	Date of transaction
1.	Rakesh Aggarwal	211.8 Sq. Mt	8,48,000/-	30.05.2008
2.	Sunil Joshi	178.438 Sq.Mt.	6,75,000/-	17.06.2008

4. During the course of assessment proceedings, the AO asked the assessee to furnish the source of investment in purchase of above land/properties with documentary evidence. It was submitted that the payments made for purchase of the land is duly accounted for in the books of account and investments have been made out of raising unsecured loans. The AO specifically asked the assessee to

furnish copy of confirmation of loan, identity with assessment details/PAN of the parties and credit worthiness of the parties in case of the following:-

S. No.	Name of the Party	Amount of unsecured loan
1.	Archit Aggarwal	202983
2.	Banwari Lal	125000
3.	Lion Auto Components	400000
4.	Nirmala Devi	75000
5.	Puran Mal Verma	75000
6.	Sartaj Infra Developers	800000
Total		16,77,983/-

5. However, the AO noted that the ld. Counsel of the assessee failed to furnish the requisite documents. He noted that in the case of Archit Aggarwal, from whom unsecured loan of Rs.1,90,000/- was raised, the assessee failed to furnish the identity of the party and credit worthiness of the party. It only filed photo copy of confirmation of loan. The assessee also failed to produce the party for confirmation of the loan. So far as unsecured loan received from Banwari Lal and Shri Puran Mal Verma are concerned, he noted that the assessee failed to furnish any documents. Similarly, in the case of Lions Auto Components and Sartaj Infra Developer, the AO observed that the assessee furnished only unsigned confirmation. The AO further noted from the copy of acknowledgement of return of M/s Lion Auto Components and Sartaj Infra Developers that they have shown income of Rs.10,230/- and Rs.91,800/-, respectively for A.Y. 2009-10. Therefore,

the credit worthiness of these parties remained unproved. Since the assessee failed to produce the parties from whom loan has been taken for his verification, the AO made addition of Rs.16,77,983/-. Since the assessee, in the original return declared income of Rs.37,130/-, but, in the return filed in response to notice u/s 153A no income has been declared and the reason for not showing income of Rs.37,130/- was not filed, the AO made addition of Rs.37,130/- to the total income of the assessee. Accordingly, he determined the total income of the assessee at Rs.17,15,110/- against nil income shown by the assessee.

6. Similarly, for A.Y. 2010-11, the original return was filed on 4th March, 2008 declaring total income at Rs.4,09,960/-. In response to notice u/s 153A the assessee filed the return on 20th August, 2016 declaring the income at Rs.4,09,960/-. During the course of assessment proceedings, the AO noted that the assessee has shown reserves and surplus of Rs.3,74,85,000/- against Rs.1,12,50,000/- shown in the assessment year 2009-10. He asked the assessee to give complete list of the persons to whom shares have been allotted with number of shares. From the various details furnished by the assessee, the AO noted that the assessee failed to substantiate the identity and credit worthiness of the following persons from whom an amount of Rs.30 lakhs has been received as share capital/share premium:-

S.No.	Name of the Party	Number of Share	Amount @ Rs. 10 Per Share and Rs.90 Per Share Premium (Rs. 100)
1.	ABU Commerce International Foods Pvt. Ltd.	5000	500000
2.	Higrow Ploymenrs Pvt. Ltd.	10000	1000000
3.	Opti View Pvt. Ltd.	10000	1000000
4.	Sar Stiches Pvt. Ltd.	5000	500000
Total		30000	30,00,000

7. He, therefore, made an addition of Rs.30 lakhs to the total income of the assessee and determined the income at Rs.34,09,960/-

8. Before the CIT(A), the assessee, apart from challenging the addition on merit, challenged the validity of the assessment proceedings u/s 153A. It was submitted that since no incriminating material was found during the course of search, therefore, in view of the decisions of the Honøble Delhi High Court in the case of CIT vs. Kabul Chawla, 380 ITR 573 and PCIT vs. Meeta Gutgutia, 82 taxmann.com 287 and various other decisions, the order passed u/s 153A should be held as invalid.

9. So far as the merit of the case is concerned, the assessee filed certain additional evidences in the form of confirmation letter, copies of income-tax

returns and bank statement of some of the parties. The ld.CIT(A) admitted the additional evidences. However, he decided both the grounds against the assessee for both the years. So far as the argument of the assessee that in absence of any incriminating material found during the course of search the assessment proceedings should be treated as invalid is concerned, the ld. CIT(A), following the decision of the Honøble Kerala High Court in the case of E.N. Gopakumar vs. CIT, reported in 75 taxmann.com 215, the decisions of the Honøble Allahabad High Court in the case of CIT vs. Raj Kumar Arora, 367 ITR 517 and CIT vs. Kesarwani Zarda Bhandar Sahson Alld., ITA No.270 of 2014 and various other decisions decided the issue against the assessee. According to the CIT(A), as per the decision of Honøble Delhi High Court in the case of CIT vs. Anil Kumar Bhatia, 352 ITR 493, the jurisdiction of AO u/s 153A is to assess the total income for the year and not restricted to seized material. Post search reassessment in respect of all six years can be made even if original returns are already processed u/s 143(1)(a) and the AO has power u/s 153A to make assessment for all six years and compute total income of the assessee including the undisclosed income notwithstanding that returns of these years have already been processed u/s 143(1)(a). Even if assessment order had already been passed in respect of all or any of those six assessment years either u/s 143(1)(a) or section 143(3) prior to initiation of search/requisition, still, the AO is empowered to reopen those proceedings u/s 153A without any fetters and reassess the total income taking note of undisclosed income, if any, unearthed during the search.

10. So far as the merit of the case is concerned, he decided the issue against the assessee on the ground that the assessee failed to substantiate the credit worthiness of the loan creditors/share applicants and genuineness of the transaction especially when the lenders have disclosed meager income in their returns and each credit of share capital/unsecured loans to the assessee company is preceded by the equivalent or more amount of deposit on credit on the same date or on the prior date. Further, the assessee also failed to produce these creditors for examination by the AO during assessment proceedings.

11. Aggrieved with such order of the CIT(A), the assessee is in appeal before the Tribunal by raising the following grounds:-

> <u>ITA No.2540/Del/2019 (A.Y. 2009-10)</u>
>
> õ1. That on the facts and in the circumstances of the case and in law, Id CIT-A erred in sustaining the order passed by Ld AO u/s 153A/143(3) without appreciating that assumption of jurisdiction u/s 153A was by Ld AO was in violation of mandatory jurisdictional conditions stipulated under the Act;
>
> 1.1 That on the facts and in the circumstances of the case and in law, Id CIT-A erred in sustaining the order passed by Ld AO u/s 153A/143(3) without appreciating that for making valid assessment of unabated year u/s 153A as on date of search that is 31.10.2014 (here for AY 2010-2011 return was filed on 15.10.2010 which u/s 143(2) was barred on 30.09.2011 and on date of search that is 31.10.2014 said proceedings were barred u/s 143(2)) without corresponding valid incriminating material being brought on records for addition in question assumption of jurisdiction u/s 153A is plainly incorrect and unlawful;
>
> 1.2 That on the facts and in the circumstances of the case and in law, Id CIT-A erred in sustaining the order passed by Ld AO u/s 153A/143(3) without appreciating that assessment is not done on basis of valid approval u/s 153D as evident from bare reading of letter dated 28/12/2016 where approval is not given to final order and approval itself seems to be incomplete which makes the entire proceedings as void ab initio.

1.3 That on the facts and in the circumstances of the case and in law, Id CIT-A erred in sustaining the order passed by Ld AO u/s 153A/143(3) as none of the assessee submission is appreciated while adjudicating the appeal;

2. That on the facts and in the circumstances of the case and in law, Id CIT-A erred in sustaining the order passed by Ld AO u/s 153A/143(3) without appreciating that on basis of prodigious evidences on records burden u/s 68 lying on assessee has been fully discharged and met so addition made by Ld AO (Rs 30,00.000 and confirmed by CIT-A in impugned order deserves to be deleted

2.1 That on the facts and in the circumstances of the case and in law, Id CIT-A erred in sustaining the order passed by Ld AO u/s 153A/143(3) without appreciating that there is no basis of any of the addition of Rs 30,00,000 as there is no remote trait of any accommodation entry , no meaningful enquiry is done at any stage by Ld AO/Ld CIT-A to dislodge the case of assessee, no adversarial statement or smoke screen is established in extant facts, due to which entire addition makes invalid ;

2.2 That on the facts and in the circumstances of the case and in law, Id CIT-A erred in sustaining the order passed by Ld AO u/s 153A/143(3) without appreciating even no meaningful/valid and objective enquiry is made from share holder's bank or income tax officer of share holder etc which is sufficient to delete the additions made; Even no summon u/s 131 /enquiry letter u/s 133(6) of the Act was issued to share holder to enforce their personal attendance which is in exclusive domain of Ld AO ;

2.3 That on the facts and in the circumstances of the case and in , law, Id CIT-A erred in sustaining the order passed by Ld AO u/s 153A/143(3) without appreciating that, while making addition u/s 68 Ld AO has not issued required show cause notice nor Ld AO has considered detailed reply filed by the assessee;

2.4 That on the facts and in the circumstances of the case and in law, Id CIT-A erred in sustaining the order passed by Ld AO u/s 153A/143(3) without appreciating that while making addition u/s 68 position of net worth of companies is suitably ignored;

2.5 That on the facts and in the circumstances of the case and in law, Id CIT-A erred in sustaining the order passed by Ld AO u/s 153A/143(3) without appreciating that none of evidence filed by assessee is overruled in accordance with law

2.6 That on the facts and in the circumstances of the case and in law the ld.CIT(A) erred in sustaining the order passed by the ld. AO u/s 147/143(3) without appreciating that shareholder companies who are giving share

application money /share capital to assessee herein, their existence is never called in question as the companies are nowhere found untraceable;

3. That on the facts and in the circumstances of the case and in law, Id CIT-A erred in not restoring the returned income declared by assessee in its return of income .

That the appellant craves leave to add add/alter any/all grounds of appeal before or at the time of hearing of the appeal.ö

ITA No.2541/Del/2019 (A.Y. 2010-11)

õ1. That on the facts and in the circumstances of the case and in law, Id CIT-A erred in sustaining the order passed by Ld AO u/s I53A/143(3) without appreciating that assumption of jurisdiction u/s 153A was by Ld AO was in violation of mandatory jurisdictional conditions stipulated under the Act;

1.1 That on the facts and in the circumstances of the case and in law, Id CIT-A erred in sustaining the order passed by Ld AO u/s 153A/143(3) without appreciating that for making valid assessment of unabated year u/s 153A as on date of search that is 31.10.2014 (here for AY 2009-2010 return was filed on 30.09.2009 which u/s 143(2) was barred on 30.09.2010 and on date of search that is 31.10.2014 said proceedings were barred u/s 143(2)) without corresponding valid incriminating material being brought on records for addition in question assumption of jurisdiction u/s 153A is plainly incorrect and unlawful;

1.2 That on the facts and in the circumstances of the case and in law, Id CIT-A erred in sustaining the order passed by Ld AO u/s 153A/143(3) without appreciating that assessment is not done on basis of valid approval u/s 153D as evident from bare reading of letter dated 28/12/2016 where approval is not given to final order and approval itself seems to be incomplete which makes the entire proceedings as void ab initio.

1.3 That on the facts and in the circumstances of the case and in law, Id CIT-A erred in sustaining the order passed by Ld AO u/s 153A/143(3) as none of the assessee submission is appreciated while adjudicating the appeal;

2. That on the facts and in the circumstances of the case and in law, Id CIT-A erred in sustaining the order passed by Ld AO u/s 153A/143(3) without appreciating that on basis of prodigious evidences on records burden u/s 68 lying on assessee has been fully discharged and met so addition made by Ld AO (Rs 16,77,983 and confirmed by CIT-A in impugned order deserves to be deleted

2.1 That on the facts and in the circumstances of the case and in law, Id CIT-A erred in sustaining the order passed by Ld AO u/s 153A/143(3) without appreciating that there is no basis of any of the addition of Rs 16,77,983 as there is no remote trait of any accommodation entry , no meaningful enquiry is done at any stage by Ld AO/Ld CIT-A to dislodge the case of assessee, no adversarial statement or smoke screen is established in extant facts, due to which entire addition makes invalid ;

2.2 That on the facts and in the circumstances of the case and in law, Id CIT-A erred in sustaining the order passed by Ld AO u/s 153A/143(3) without appreciating even no meaningful/valid and objective enquiry is made from lenderøs bank or income tax officer of lender etc which is sufficient to delete the additions made; Even no summon u/s 131 /enquiry letter u/s 133(6) of the Act was issued to share holder to enforce their personal attendance which is in exclusive domain of Ld AO ;

2.3 That on the facts and in the circumstances of the case and in law, Id CIT-A erred in sustaining the order passed by Ld AO u/s 153A/143(3) without appreciating that while making addition u/s 68 Ld AO has not issued required show cause notice nor Ld AO has considered detailed reply filed by the assessee;

2.4 That on the facts and in the circumstances of the case and in law, Id CIT-A erred in sustaining the order passed by Ld AO u/s 153A/143(3) without appreciating that while making addition u/s 68 position of financial capacity of lenders is suitably ignored;

2.5 That on the facts and in the circumstances of the case and in law, Id CIT-A erred in sustaining the order passed by Ld AO u/s 153A/143(3) without appreciating that none of evidence filed by assessee is overruled in accordance with law ;

2.6 That on the facts and in the circumstances of the case and in law, Id CIT-A erred in sustaining the order passed by Ld AO u/s 147/143(3) without appreciating that lender who are giving loan to assessee herein, their existence is never called in question as the lenders are nowhere found untraceable;

3. That on the facts and in the circumstances of the case and in law, Id CIT-A erred in not restoring the returned income declared by assessee in its return of income .

That the appellant craves leave to add add/alter any/all. grounds of appeal before or at the time of hearing of the appeal.ö

12. The ld. counsel for the assessee made three fold argument that is (a) validity of reassessment proceedings in absence of any incriminating material, (b) approval given by the JCIT under section 153D is not in accordance with law; and (c) the addition on merit. So far as the validity of the assessment u/s 153A/143(3) in absence of any incriminating material is concerned the ld. counsel drew the attention of the Bench to the decision of the Hon'ble Delhi High Court in the case of PCIT vs. M/s SMC Power Generation Ltd., vide ITA 406/2019, order dated 23rd July 2019 and submitted that the Hon'ble High Court after considering the decision of the Hon'ble Supreme Court in the case of CIT vs Singhad Technical Education Society (2017) 397 ITR 344, has held that the requirement that the incriminating material to have the correlation to the particular addition sought to be made is a logic that will hold good not only for Section 153C of the Act but in relation to Section 153A of the Act as well. Relying on various other decisions, he submitted that since the addition made by the AO is not based on any incriminating material found during the course of search, therefore, the assessment made under section 153A/143(3) by making the addition is not in accordance with law.

13. So far as the second plank of his argument is concerned the ld. counsel drew the attention of the Bench to the copy of approval given by the JCIT under section 153D in case of Mahalaxmi Group of cases on 28th December 2016. The ld. counsel drew the attention of the Bench to Para 3 of the said approval which reads as under:-

õ3. A approval is accorded to pass assessment orders in the drafts assessment years in reference years. You are directed to ensure taking into account the seized documents/papers and comments in the appraisal report pertaining to AYs. The fact of initiation of penalty proceedings, wherever, applicable, must also be incorporated in the last para of the order. The initiation of correct penalty provisions of I.T. Act u/s 271(l)(c)/ 271AAB, as per facts of the case, must be ensured.ö

14. Referring to the decision of the Delhi Bench of the Tribunal in the case of Rishabh Buildwell P. Ltd., and batch of appeals vide order dated 4th July 2019, he submitted that the Tribunal has held that where the approving authority has given the approval in a technical manner and has directed the DCIT to ensure the seized materials and the findings of the appraisal report to be incorporated in the final assessment order, approval given by the JCIT is not a final approval as required under section 153D of the Act but a conditional approval subject to modification by the DCIT after receiving of the approval which makes it an invalid, qualified, uncertain approval. Accordingly, the assessment orders held to be null and void. He submitted that here also the approval is a conditional one and, therefore, the assessment orders should be treated as null and void.

15. So far as the merit of the case is concerned the ld. counsel submitted that the assessee has discharged the initial onus cast on it by filing the requisite documents. The AO has not issued any notice under section 131 to the concerned parties or called for information from them under section 133(6) and merely on the basis of low income of the creditors, has made the addition which has been sustained by the CIT(A). He submitted that once the assessee has discharged the

initial onus by filing the primary details, the burden shifts to the AO which he has failed. Therefore, the addition so made by the AO and sustained by the CIT(A) should be deleted.

16. The ld. DR on the other hand heavily relied on the order of the AO. He submitted that the decision of Honøble Kerala High Court in the case of E.N. Gopakumar (supra) is squarely applicable to the present case and, therefore, the assessment order cannot be held to be null and void. So far as the approval given under section 153D is concerned, the ld. DR submitted that the same is perfectly in order and the decision of the Delhi Bench of the Tribunal in the case of Rishabh Buildwell cannot be applied to the facts of the present case. He submitted that in that case in the approval given under section 153D the JCIT has mentioned that a õtechnical approvalö is accorded to pass the assessment order whereas in the present case the JCIT has not mentioned technical approval and he has given the approval as per law. He submitted that there is nothing wrong in the approval given by the JCIT in the instant case and it is not at all a conditional approval and therefore the argument of the ld. counsel is devoid of any merit.

17. So far as the merit of the case is concerned the ld DR submitted that for accepting any cash credit as genuine the onus is always on the assessee to substantiate with evidence to the satisfaction of the AO regarding the identity and credit worthiness of the loan creditors/share applicants and the genuineness of the transaction. In the instant case, despite repeated reminders the assessee did not

produce the loan creditors/share applicants and has not discharged the onus cast on it by proving the identity and creditworthiness of the loan creditors and genuineness of the transaction. When the assessee did not discharge the onus cast on it, the counsel cannot argue that the AO did not issue summons under section 131 or called for details under section 133(6) of the Act. Relying on various decisions as relied on by the CIT(A), he submitted that the addition was rightly sustained by the CIT(A).

18. We have considered the rival arguments made by both the sides, perused the orders of the AO and the CIT(A) and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find, the AO, in the instant case, has made addition of Rs.17,15,113/- for assessment year 2009-10 and Rs.30 lacs for assessment year 2010-11 in the orders passed u/s 153A r.w. section 143(3). A perusal of the assessment order shows that the addition of Rs.16,77,983/- out of the total addition of Rs.17,15,110/- for A.Y. 2009-10 and Rs.30 lacs in A.Y. 2010-11 is not based on any incriminating material found during the course of search. The addition has been made on the basis of post search enquiries. W e find the Honøble Delhi High Court in the case of PCIT vs. SMC Power Generation Limited (supra) had an occasion to decide an identical issue where the addition was made not on the basis of incriminating material found during the course of search, but, addition was made on the ground that the assessee had not established the genuineness, identity and credit worthiness of the entities

from whom it had received share premium. The Honøble High Court, following the decision of the Honøble Supreme Court in the case of CIT vs. Singhad Technical Education Society, 397 ITR 344, held that the requirement that the incriminating material to have the correlation to the particular addition sought to be made is a logic that will hold good not only for Section 153C of the Act, but, in relation to Section 153A of the Act as well. The relevant observation of the Honøble High Court at para 9 and 10 of the order reads as under:-

> õ9. The fact remains that the Revenue itself is not disputing that in respect of the share capital no incriminating documents were found in the search proceedings. The Courtøs attention has been drawn to the decision of the Supreme Court in CIT v. Singhad Technical Education Society (2017) 397 ITR 344 (SC) where in the context of Section 153C of the Act it was held that the incriminating material which was seized had to pertain to the AY in question. It is further held that documents seized had to establish a co-relation documents wise with the assessment years for which the addition was sought to be made.
>
> 10. The requirement that the incriminating material to have the co-relation to the particular addition sought to be made is a logic that will hold good not only for Section 153 C of the Act but in relation to Section 153A of the Act as well. Consequently, this Court does not find any error having been committed by the ITAT in accepting the plea of the Assessee that there is no incriminating document which was seized in the course of search relating to the addition sought to be made on account of the share capital. Therefore, the jurisdictional requirement of Section 153 A of the Act was not satisfied.

19. So far as the decision relied on by the ld.CIT(A) in the case of E.N. Gopakumar is concerned, no doubt, the Honøble Kerala High Court has held that assessment proceedings generated by issuance of a notice under section 153A(1)(a) can be concluded against the interest of the assessee including making addition even without any incriminating material being available against the assessee in

search under section 132 on the basis of which notice was issued under section 153A(1)(a). However, there is no decision against the assessee of the jurisdictional High Court. It is the settled proposition of law that when there are divergent views on a particular issue the view which is favorable to the assessee has to be followed as held by the Honøble Supreme Court in the case of CIT vs Vegetable Products Ltd. 88 ITR 192. Therefore, respectfully following the decision of the Honøble Delhi High Court in the case of SMC Power Generation Ltd. cited (supra), we hold that additions made under section 153A in the orders passed under section 153/143(3) of the Act are not in accordance with the law and, therefore, the addition of Rs.16,77,983/- for 2009-10 and Rs.30 lacs for assessment year 2010-11 are directed to be deleted.

20. So far as the order for assessment year 2009-10 is concerned,, the assessee had filed the original return declaring Rs.31,133/- which it has not disclosed in the return in response to notice under section 153A. We do not find any reason as to why the assessee has not disclosed such income in the return filed in response to notice under section 153A. Therefore, the addition to the tune of Rs.37,133/- for assessment year 2009-10 is upheld.

21. Since we are allowing the appeal on legal ground in absence of any incriminating material found during the course of search, the other arguments made by the assessee challenging the validity of the order in absence of proper

approval under section 153D or on merit are not being adjudicated being academic in nature.

22. In the result the appeal filed by the assessee for assessment year 2009-10 is partly allowed and the appeal for assessment year 2010-11 is allowed.

The decision was pronounced in the open court on 13.10.2020.

Sd/-	Sd/-
(SUDHANSHU SRIVASTAVA) JUDICIAL MEMBER	(R.K. PANDA) ACCOUNTANT MEMBER

Dated: 13th October, 2020.

dk

Copy forwarded to

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

Asstt. Registrar, ITAT, New Delhi