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

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

I.T.A. No.281 & 282/DEL/2015
Assessment Years: 2009-10 & 2010-2011

Dy. Commissioner of Income Tax, Central Circle-31, New Delhi.	vs.	M/s. Aakriti Hotels Pvt. Ltd., 3rd Floor, Community Centre Saket, New Delhi.
TAN/PAN: AABCA0207D		
(Appellant)		(Respondent)

Appellant by:	Shri Satpal Gulati, CIT-DR.		
Respondent by:	Shri Rakesh Joshi, CA		
Date of hearing:	10	08	2021
Date of pronouncement:	17	08	2021

O R D E R

PER AMIT SHUKLA, JM:

The aforesaid appeals have been filed by the Revenue against common order dated 29.09.2014, passed by Ld. CIT (Appeals)-XIII, New Delhi for the quantum of assessment passed u/s.153A for the Assessment Years 2009-10 and 2010-11. In the grounds of appeal, the Revenue has raised following grounds:-

*"**A.Y. 2009-10***

1. On the facts and in the circumstances of the case, the CIT(A) has erred in deleting addition of Rs. 73,47,29,400/- made u/s. 68 of the IT Act on account of unexplained share capital and premium.

2. On the facts and in the circumstances of the case and in law, the CIT(A) has erred in holding that on the prevailing facts of the case the onus on the part of the assessee u/s 68 of the Act stands discharged.

3. The order of the CIT(A) is erroneous and is not tenable on facts and in law.

4. The appellant craves leave to add, alter or amend any/all of the grounds of appeal before or during the course of the hearing of the appeal.

A.Y. 2010-11

"1. On the facts and in the circumstances of the case, the CIT(A) has erred in deleting addition of Rs. 9,00,00,000/- made u/s 68 of the IT Act on account of unexplained share capital and premium.

2. On the facts and in the circumstances of the case, the CIT(A) has erred in deleting addition of Rs. 7,64,22,000/- made u/s 68 of the IT Act on account of unexplained investment in property.

3. On the facts and in the circumstances of the case and in law, the CIT(A) has erred in holding that on the prevailing facts of the case the onus on the part of the assessee u/s 68 of the Act stands discharged.

4. The order of the CIT(A) is erroneous and is not tenable on facts and in law.

5. The appellant craves leave to add, alter or amend any/all of the grounds of appeal before or during the course of the hearing of the appeal."

2. The ld. counsel for the respondent-assessee had raised following legal ground as additional ground under Rule 27 of ITAT Rules, challenging the validity of the addition made by the Assessing Officer within the scope of Section 153A which reads as under:

> *"Filing of Ground under Rule 27 of the Income Tax (Appellate Tribunal) Rules, 1963:*
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> *"On the facts and circumstances of the case as well as in Law, the Ld CIT(A) erred in rejecting the assessee's submission that the provision for assessment pursuant to proceeding under s. 153A cannot be invoked unless there was material seized during search operations suggesting concealed income and the income sought to be assessed is relatable to such materials"*
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> *The appellant prays to Your Honours, kindly allow to raise the above ground, which is purely legal in the nature and matter of interpretation of the law."*

3. Thus, being purely a legal ground going to the very root of the addition and as admitted by both the parties, this legal plea is arising out of facts and material on record which does not require any investigation on facts, therefore, the same is being admitted for the purpose of adjudication.

4. The facts in brief are that the assessee was incorporated on 19.06.1995 and since then was regularly assessed to tax. The return of income for the Assessment Year 2009-10 was filed on 30.09.2009; and for the Assessment Year 2010-11 was filed on 2.09.2010. A search and seizure operation was

carried out on 22.11.2011 at the office premises of the assessee company and also at different places of the group concern including blank lockers and the person related to the assessee company in the business activities. Accordingly, notices u/s.153A was issued for six years on 06.05.2013 requiring the assessee to furnish the return of income u/s.153A. In response the assessee has filed its return of income on 17.07.2013. The ld. Assessing Officer without even referring to any seized document or any incriminating material found during the course of search, has proceeded to make the assessment on the basis of perusal of the audited balance sheet as discussed by him in paragraph 3 of the assessment order. He has noted that on perusal of the audited balance sheet of the assessee as on 31.03.2009, it is seen that the assessee has subscribed share capital which has increased to Rs.3,58,10,060/- from Rs.27177120/-. During the year under consideration, the assessee has issued 863294/- equity shares of the value of Rs.10/- at a premium of Rs.1790/- per share. Thus, the assessee company has shown receipt of Rs.154,52,96,260/- as security premium. During the course of assessment proceedings, the assessee company was requested to furnish details of person to whom new shares were issued. As per the details received, Assessing Officer noticed that the assessee has shown receipt of share capital and share premium from Kolkata, Guwahati and Mumbai based companies.

5. Thereafter, in the entire assessment order there is neither reference nor whisper about that these companies are based on any documents found during the course of search in the case of the assessee company.

6. Ld. CIT(A) has deleted the addition on merits and after detailed discussion, has deleted the addition made u/s.68 on the plea that the assessee has explained identity, genuineness and creditworthiness of the parties and Assessing Officer has failed to make further enquiry in the case and addition of unexplained investment in property was deleted on the plea that there is no evidence found which suggest that the unaccounted payment was made by the assessee-company for purchase of property and in therefore, in absence of any adverse material or evidence, no unaccounted investment in the property can be computed on the basis of market valuation of registration authority. The assessee also took ground before the Ld. CIT (A) that the addition is not sustainable as the same is made without any incriminating document found during the course of search and both the year are unabated assessment years. However, Ld. CIT(A) relying on the decision of Hon'ble Delhi High Court in case of **Shri Anil Bhatia (211 Taxman 453) (Delhi)** held that AO have authority to assess income of last six years u/s. 153A of the Act and rejected this legal contention of the Assessee. Relevant finding of Ld. CIT (A) is given on page 7 of his order on this issue which for sake of ready reference is reproduced here under:-

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7. Before us, ld. counsel for the assessee submitted that both the Assessment year i.e. A.Y. 2009-10 & A.Y. 2010-11 is non-abated assessment year as per 2ND *proviso* to section 153A of the Act, which is clear from the following chart summarizing the various events : -

	Particulars of Event	*A Y 2009-10*	*A Y 2010-11*
1	Search on Akriti Hotels Pvt Ltd	22/11/2011	22/11/2011
2	Notice Issued U/s 153A	06/05/2013	06/05/2013
3	Return filed U/s 139	29/09/2009	23/09/2010
4	Last Date of issue Notice U/s 143(2)	30/09/2010	30/09/2011

8. From the above chart, he submitted that it is clear that notice u/s 143(2) of the Act could have been served upon the assessee till 30/09/2010 & 30.09.2011 for A Y 2009-10 & 2010-11 respectively as per the law prevailing on the said date, but no such notice was given. Since no assessment was made thereafter u/s 143(3)/144 of the Act within the time allowed for the same, the assessment thus completed u/s 143(1) and had became final assessment before the date of search. On taking up proceedings u/s 153A, the assessments for A.Y. 2009-10 & A.Y. 2010-11 did not abate as per 2nd proviso to Section 153A. Legally speaking, no addition could be made, which was not based on incriminating material seized during search in the case of a concluded assessment.

Thus, from the order itself and from records, it is very clear that on the date of search is 22/11/2011 both the assessment years are unabated as per second proviso to section 153A of the Act.

9. During the course of search, admittedly no incriminating documents relating to addition made was found. Therefore, no addition could have been made in the assessment order passed U/s 153A of the Act. Ld AO has made addition U/s 68 on account of issue of share capital of Rs. 73.47 crore and Rs. 9 crore in AY 2009-10 & AY 2010-11 respectively. In addition to this, in A Y 2010-11 AO also made addition for unexplained investment of Rs. 7.64 crore on account of difference between stamp duty value and transaction value for purchase of property during the year. There was no incriminating document found during the course of search for both the addition. In case of unexplained investment the purchase deed of property was seized but it cannot be treated as incriminating document as merely difference in stamp duty value and transaction value does not lead to any unexplained investment. Under such circumstances the said registered deed cannot be treated as incriminating document. Further provisions of section 56(2) Is not applicable to company assessee during the relevant year. Therefore, there is no specific provision under the Act to deal with such transaction. Hence action of the Assessing Officer otherwise is also not sustainable.

10. Further Ld. CIT(A) has not accepted the contention of the assessee on the plea that Hon'ble Delhi High Court in case of **Shri Anil Bhatia (211 Taxman 453) (Delhi)** held that the jurisdiction of assessing officer u/s. 153A is to assess total income for the year and not restricted to seized material.

11. On the other hand, ld. CIT-DR though admitted that none of the addition are based on any incriminating material, however, strongly relied upon the order of the Assessing Officer and submitted what is required to be seen is, whether the addition which has been made by the Assessing Officer are justified on the basis of inquiry and information on record and assessee was unable to discharge the onus.

12. We have heard the rival submissions and also perused the relevant finding given in the impugned orders as well as the material placed on record. It is an admitted fact that on the date of search, the assessment for the Assessment Years 2009-10 and 2010-11 had attained finality and were not pending on the date of search. Hence, the assessment for the Assessment Years 2009-10 and 2010-11 cannot be treated as abated assessments. Further, it is also an admitted position that the additions which have been made by the Assessing Officer u/s.68 is neither based on any seized documents or any incriminating material found during the course of search. He has proceeded with the assessment on the basis of facts and material already on record and duly disclosed in the return of income which had attained finality. Ld. counsel has

already explained that none of the additions are based on incriminating material/document which has not been rebutted by the ld. CIT-DR also, therefore, these additions needs to be seen whether they can be roped in, e within the scope of section153A in the light of the judicial principles laid down by the Hon'ble Jurisdictional High Court and Hon'ble Apex Court. Even the ld. CIT (A) has admitted that there was no incriminating material *albeit* has heavily relied upon the Hon'ble Delhi High Court judgment in the case of **Shri Anil Bhatia (supra)**.

13. In our opinion, Ld. CIT (A) has wrongly interpreted the decision of Hon'ble Delhi High Court in the case of Shri Anil Bhatia (supra). In this case in para 23 the Hon'ble Court itself have clarified this aspect in the following manner:

> ***"23. 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 in such a situation. That question is therefore left open."***

Thus from the above finding it is clear that their Lordships in the above decision has not adjudicated the issue when no incriminating document found during the course of search.

14. However, Ld. CIT (A) has mentioned that in the post search proceeding, the AO has conducted enquiry about the shareholders on the basis of shareholders details found

during the course of search. For A.Y. 2010-11 additions for unexplained investment, the sale deed was seized during the search. Hence, in his opinion, the addition is based on seized material.

15. Such a reasoning of Ld. CIT (A) cannot be sustained, because, mere details of shareholders found during the course of search and registered sale deed cannot be termed as incriminating material so as to warrant any addition within the scope of Section 153A. Details of shareholders and share capital were already disclosed in the audited accounts and were part of return of income which stood assessed and attained finality. Once the addition has been made without any incriminating documents or incriminating material especially for unabated assessments, then in view of principle laid down by the Hon'ble Delhi High Court in case of **CIT Vs. Kabul Chawla, reported in 380 ITR 573 (Delhi)** such additions cannot be roped in the assessments made u/s 153A. It has been held that completed assessments can be interfered with by the AO while making the assessment under Section 153A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment. In the case of assessee, the balance sheet was part of return filed by the assessee, hence it cannot be said the same was not available with AO in original assessment

and the same can be no way termed as incriminating document unearthed during the course of search. Hence contention of Ld CIT (A) cannot be accepted in view the decision of jurisdictional High Court.

16. Further, Hon'ble Jurisdictional High Court in the case of **Principal Commissioner of Income-tax, Central -2, New Delhi v. Meeta Gutgutia [2017] 395 ITR 526 (Delhi)** has held as under:

> *...the legal position, as will be discussed shortly, is that there can be no addition made for a particular assessment year without there being an incriminating material qua that assessment year which would justify such an addition...the court is unable to accept the submissions of revenue that there was incriminating material other than what has been discussed in the orders of the assessing officer, commissioner (appeals) and the tribunal for the assessment years in question...[paras 38 & 39]*
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> *It was also noted by the assessing officer - and this has not been disputed by the assessee - that a sum of rs. 1.10 crores was offered by the assessee as income in the year of search, although it was repeatedly urged by that the documents seized and furnished by pertained to the assessment years other than the year of search, clearly, no such question was put to it should have been easy for the investigating officer to ask 'pa' of the particular assessment year to which the document related to, however, that was not done, therefore, only the statement makes a disclosure about the earlier undisclosed income and stating that the offer of*

such income was being made "to buy peace of mind", therefore, the statement recorded under section 133A can hardly be said to be incriminating material. [para 44]

...in the circumstances, it is not possible to accept the plea of the revenue now made that the so-called additional incriminating material qua each of the assessment years could not be verified and, therefore, not discussed by the assessing officer because the assessee did not produce its books of account. It appears that the revenue did have access to the entire books of account of the assessee which were also shown to have also been maintained in soft form on the computers of the assessee which were already seized by the revenue during search operations. [para 46]

In the remand proceedings, the assessing officer could not dispute the above information. As already noticed, the assessee had brought with herself all the franchisee agreements to substantiate submission made in her affidavit. It is for this reason that in the commissioner (appeals) for assessment year 2004-05, it held: "no evidence to dispute the affirmations in the affidavit have been brought on record by the assessing officer in the remand proceedings'. the estimated additions were therefore held to be unsustainable in law as they were based on a misconception as to the factual position with regard to the number of outlets in existence during the relevant previous year as well as on the suspicion that the assessee must have earned undisclosed income during the year under appeal. It has been categorically found by the commissioner (appeals) on facts that no incriminating material in relation to the assessment years in question i.e., 2001-02 to

2003-04 had been brought on record which could support such presumption. [para 48]"

...as rightly pointed out by assessee that nothing was brought on record by the assessing officer to show that there was failure on part of the assessee to make a disclosure as regards the franchisee income in any of the earlier years. The incriminating material had to be in relation to any income that was not disclosed in the earlier returns. There was no such incriminating material to show that there was a failure by the assessee to disclose any franchisee income for those earlier years. The disclosure by the assessee on account of 'undisclosed franchisee commission' was relevant only for the year of search and not for the earlier years. [paras 49 & 50]

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 assessment years would be justified. [paras 56 & 57]

The court is of the view that the tribunal was justified in holding that the invocation of section 153a by the revenue for the assessment years 2000-01 to 2003-04 was without any legal basis as there was no incriminating material qua each of those assessment years. [para 71]"

17. Further, Hon'ble Supreme Court in case of **CIT Vs. Sinhgad Technical Education Society (397 ITR 344) (SC)** wherein exactly similar legal/technical ground was taken for the first time before the ITAT. Further, the Hon'ble Apex Court upheld the order of the Tribunal that addition cannot be made for the assessment years for which there are no incriminating documents found during the course of search in the assessments framed u/s 153C. The Hon'ble Court upheld the order of the Tribunal in the following manner:-

> *16) In these appeals, qua the aforesaid four Assessment Years, the assessment is quashed by the ITAT (which order is upheld by the High Court) on the sole ground that notice under Section 153C of the Act was legally unsustainable. The events recorded above further disclose that the issue pertaining to validity of notice under Section 153C of the Act was raised for the first time before the Tribunal and the Tribunal permitted the assessee to raise this additional ground and while dealing with the same on merits, accepted the contention of the assessee.*
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> *17) First objection of the learned Solicitor General was that it was improper on the part of the ITAT to allow this ground to be raised, when the assessee had not objected to the jurisdiction under Section 153C of the Act before the AO. Therefore, in the first instance, it needs to be determined as to whether ITAT was right in permitting the assessee to raise this ground for the first time before it, as an additional ground.*

18) The ITAT permitted this additional ground by giving a reason that it was a jurisdictional issue taken up on the basis of facts already on the record and, therefore, could be raised. ***In this behalf, it was noted by the ITAT that as per the provisions of Section 153C of the Act, incriminating material which was seized had to pertain to the Assessment Years in question and it is an undisputed fact that the documents which were seized did not establish any co-relation, document-wise, with these four Assessment Years. Since this requirement under Section 153C of the Act is essential for assessment under that provision, it becomes a jurisdictional fact. We find this reasoning to be logical and valid, having regard to the provisions of Section 153C of the Act.*** *Para 9 of the order of the ITAT reveals that the ITAT had scanned through the Satisfaction Note and the material which was disclosed therein was culled out and it showed that the same belongs to Assessment Year 2004-05 thereafter. After taking note of the material in para 9 of the order, the position that emerges therefrom is discussed in para 10. It was specifically recorded that the counsel for the Department could not point out to the contrary. It is for this reason the High Court has also given its imprimatur to the aforesaid approach of the Tribunal. That apart, learned senior counsel appearing for the respondent, argued that notice in respect of Assessment Years 2000-01 and 2001-02 was even time barred.*

19) We, thus, find that the ITAT rightly permitted this additional ground to be raised and correctly dealt with the same ground on merits as well. Order of the High Court affirming this view of the Tribunal is, therefore, without any blemish. Before us, it was argued by the respondent that notice in respect of the Assessment Years 2000-01 and 2001-02 was time barred. However, in view of our aforementioned findings, it is not necessary to enter into this controversy.

18. The sequitur of the judgment which can be culled out is that, seized incriminating material has to pertain to the assessment year in question and have co-relation, document-wise, with the assessment year.

19. Recently, Hon'ble Delhi High Court in case of **PCIT Vs. Allied Perfumes P Ltd. (2021) 431 ITR 237 (Delhi)** held as under:-

"13. Upon reading of the aforesaid extracted portion of the impugned order, it is clearly discernable that the ITAT has given a finding of fact that the assessments make no reference to the seized material or any other material for the years under consideration, that was found during the course of search, in the case of the assessee. Mr. Maratha is also unable to point out any incriminating material related to the assessee which could justify the action of the Revenue.

Merely because a satisfaction note has been recorded, cannot lead us to reach to this conclusion, especially when the Revenue has not laid any foundation to support their contention. In the factual background as explained above, the assumption of jurisdiction under section 153C cannot be sustained in view of the decision of this Court in the case of Kabul Chawla (supra)"

20. Thus, considering the facts and circumstances of the case as above and in view of aforesaid binding judicial pronouncements, we hold that the additions made in the order passed U/s. 153A, for the captioned assessment years which are unabated assessments, cannot be made, because same are beyond the scope of assessments u/s. 153A as the same are without any incriminating documents found during search. Hence on legal grounds the impugned additions are deleted.

21. In the result Revenue's appeals are dismissed.

Above decision was announced on conclusion of Virtual Hearing in the presence of both the parties on 17/08/2021.

Sd/-
[PRASHANT MAHARISHI]
[ACCOUNTANT MEMBER]

Sd/-
[AMIT SHUKLA]
JUDICIAL MEMBER

DATED: 17/08/2021

PKK: