IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'D' NEW DELHI

BEFORE DR. B. R. R. KUMAR, ACCOUNTANT MEMBER
AND
SH. YOGESH KUMAR U.S., JUDICIAL MEMBER

I.T.A. No. 5182/Del/2015 (A.Y 2007-08)

Sanjay Jain C/o. Rajiv Saxena & Co. (Advocate & Solicitors), Ho. No. 318, D, Mayur Vihar Phase-II Delhi-AAGPJ1372G **(APPELLANT)**	Vs	DCIT Central Circle-1 New Delhi **(RESPONDENT)**

Appellant by	**Sh. Rajeev Saxena and Ms. Sumangla Saxena, Adv**
Respondent by	**Sh. Binod Kumar, CIT-DR**

Date of Hearing	**17.05.2022**
Date of Pronouncement	**20.05.2022**

ORDER

PER YOGESH KUMAR U.S., JM

The present appeal is preferred by the assessee for the assessment year 2007-08 against the order dated 18/03/2015 passed under Section 250(6) of the Income-Tax Act, 1961 ("the Act") by the Commissioner of Income-Tax(Appeals)-25, New Delhi.

2. The grounds of appeal are as under:-

1. *That the learned Commissioner of Income Tax (Appeals) has grossly erred both in law and on facts in upholding the order of assessment framed under section 153A/143(3) of the Income Tax Act, determining the total income of the appellant company at Rs. 5,75,25,440/- as against Rs. 1,48,20,440/-.*

2. *That the learned Commissioner of Income Tax (Appeals) has erred both in law and on facts in failing to appreciate that during the course of search, admittedly no incriminating material was found as a result of search conducted under sectionJ32(l) of the Act, as such, learned Deputy Commissioner of Income Tax has no jurisdiction to initiate the proceedings under section 153A of the Act.*

a. That the learned Commissioner of Income Tax (Appeals) has erred in upholding the order of assessment failing to appreciate that since-for valid initiation of proceedings under section 153A of the Act, the preconditions as envisaged u/s 153A of the Act has not been satisfied, as such, initiation of proceedings u/s 153 A of the act as also the assessment made u/s 153A/143(3) of the Act are without jurisdiction.

b. That while upholding the order of assessment, learned Commissioner of Income Tax (Appeals) has failed to appreciate that since no incriminating material was found as a result of search, as such, addition made is outside the scope of section 153A of the Act.

3. That the learned Commissioner of Income Tax (Appeals) has grossly erred in law as well as on facts in making additions of Rs. 1,15,00,000/- on account of sale of shares to SRD Resources Pvt. Ltd. u/s 69 of the Act because:

The investment was fully explained and the same was held to be genuine in the earlier assessment made u/s 153A/143(3) and no addition was made.

a. *No fresh material or any evidence found to conclude different stand.*

b. *Section 69 cannot be applied on the investments already recorded*

in the books of accounts.

c. *The assessee is not required to explain source of the source.*

d. *The assessing officer has not made any enquiry on its own.*

e. *No addition can be made merely on surmises and guess work.*

f. *Assessment u/s 153 A cannot be made merely on change of opinion.*

4. That the learned Commissioner of Income Tax (Appeals) has grossly erred in law as well as on facts in making additions of Rs. 3,00,00,000/- on account of sale of shares to Kimsuk Krishna Sinha u/s 69 of the Act because:

a. *The investment was fully explained and the same was held to be genuine in the earlier assessment made u/s 153A/143(3) and no addition was made.*
b. *No fresh material or any evidence found to conclude different stand.*
c. *Section 69 cannot be applied on the investments already recorded in the books of accounts.*
d. *The assessee is not required to explain source of the source.*
e. *The assessing officer has not made any enquiry on its own.*
f. *No addition can be made merely on surmises and guess work.*
g. *Assessment u/s 153 A cannot be made merely on change of opinion.*

It is therefore, prayed that it be held that the assessment so made is without jurisdiction. It be further held that additions made and upheld by the learned Commissioner of Income Tax (Appeals) is not in accordance with law and therefore the additions so made along-with interest levied be kindly deleted and appeal of the" appellant company be kindly allowed."

3. Brief facts of the case are that, the assessee has filed its return of income at Rs. 1,48,20,440/- on 31/03/2008. And the same was processed u/s 143(1) of the Act. The scrutiny assessment order 153A/143(3) was passed on 24/12/2009 at Rs. 12,75,76,500/-. Subsequently, search and seizure operation u/s 132 of the Act were carried out on 03/03/2011 in the Surya Vinayak Group of cases and also in the case of the assessee. Notice u/s 153A of the Act dated 08/02/2012 was issued, in response assessee filed return of income on 11/06/2012 declaring a net taxable income at Rs. Rs.1,48,20,440/-. As against the original assessment order dated 24/12/2009, assessee preferred an appeal before CIT(A), wherein the income of the assessee has been reduced by allowing the appeal of the assessee to Rs. 1,60,25,440/- as against the same, the Revenue has filed the appeal before the Tribunal and the assessee has also filed Cross Objection in ITA No. 5325/Del/2013 and C.O No. 01/Del/2015 respectively. The Coordinate Bench of this Tribunal has quashed the original assessment order dated 24/12/2019 vide order dated 06/10/2015.

4. The impugned assessment order dated 28/03/2013 has been passed u/s 153A/143(3) of the Act by making addition of Rs. 4,15,00,000/- after giving appeal effect to the CIT(A) order against the original assessment. As against the assessment order dated 28/03/2013, the assessee has filed appeal before the CIT(A). The Ld.CIT(A) vide order dated 18/03/2015 dismissed the appeal filed by the assessee.

5. Aggrieved by the order dated 18/03/2015, the assessee is before the Tribunal on the grounds mentioned above.

6. The Ld. Counsel for the assessee submitted that the assessment order dated 28/03/2013 is illegal since during the course of search u/s 132(1) of the Act, admittedly no incriminating material was found, therefore, the addtioins made by the A.O. which has been confirmed by the CIT(A) deserves to be

deleted. The Ld. Counsel has relied on the judgment of the Jurisdictional High Court in the case of CIT vs. Kabul Chawla, 380 ITR 573 (Del.)

7. Per contra, the Ld. DR relied on the order of the A.O and CIT(A) and submitted that the order of the lower authorities are well reasoned and no interference is required by this Tribunal.

8. We have heard the parties, perused the material on record and gave our thoughtful consideration.

9. It is found from the records that, the second search has been conducted on 03/03/2011. As per the Panchnama, no material were found and seized and following material were found but not seized i.e. the jewellery of Rs. 32,25,706/- and cash of Rs. 1,80,500/-have been found and released. On going through the impugned assessment order, it is further found that the addition was made on the ground that, the purchase and sale of shares between assessee and SRD Resources are not genuine to the extent of Rs 1,15,00,000/- and another addition made on the ground that, the assessee has not submitted the required documents as asked for regarding Rs. 3,00,00,000/- deposited from one Kismu Krishna Sinha in his bank account, therefore, the same have been treated as unexplained u/s 69 of the Act.

10. In view of the above facts, it is clear that second assessments order passed u/s 153A dated 28/03/2013 is made not based on any incriminating material found during the search, hence the decision of the Delhi High Court in case of CIT vs. Kabul Chawla, 380 ITR 573 (Del.) is squarely applicable, wherein it is held as under:

> ***"Summary of the legal position"***
>
> *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 postsearch 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 6 ITA Nos. 1351 & 2155/Del/2015 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.

Conclusion

38. The present appeals concern AYs, 2002-03, 2005-06 and 2006-07.On the date of the search the said assessments already stood completed. Since no incriminating material was unearthed during the search, no additions could have been made to the income already assessed."

Since no incriminating material was found in the assessee's case, no addition can be made in the present case. Besides this, the assessee has made investment in prior period and sold the said investment in this particular year which was clearly set out from the submissions and the evidences produced before the Assessing Officer and the CIT(A). Therefore, the appeal of the assessee being ITA No. 2155/Del/2015 for Assessment Year 2005-06 is allowed."

11. In the present case the addition made by the Assessing Officer in the absence of incriminatory material seized during the search, therefore, respectfully following the ratio laid down in the case of Kabul Chawla (supra), ie: in the absence of incriminating material seized during the search from the assessee no addition can be made, we inclined to allow the grounds of appeal and quash the Orders passed by the lower authorities, resultantly, the addition stands delted.

12. In the result, the appeal of the assessee is allowed.

Order pronounced in the Open Court on this 20th Day of May, 2022

Sd/-	**Sd/-**
(B. R. R. KUMAR)	**(YOGESH KUMAR U.S.)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 20/05/2022
*R. Naheed **

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI