

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'E', NEW DELHI**

Before Sh. Aakash Deep Jain, Vice President

Dr. B. R. R. Kumar, Accountant Member

**ITA Nos. 1927 & 1928/Del/2019
Asstt. Years : 2010-11 & 2011-12**

ACIT, Central Circle-5, New Delhi	Vs.	N. M. Agro Pvt. Ltd, 1818, Naya Bazar, New Delhi-110006
(APPELLANT)		(RESPONDENT)
PAN No. AABCN1713D		

Assessee by : Sh. C. S. Anand, Adv.

Revenue by : Sh. Bhavnesh Kulshshtha, CIT DR

Date of Hearing: 12.05.2022

Date of Pronouncement: 30.06.2022

ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeals have been filed by the revenue against the order of the Id. CIT(A)-24, New Delhi dated 26.12.2018.

2. Since, the issues involved in both the appeals are identical, they were heard together and being adjudicated by a common order.

3. In ITA 1927/Del/2019, following grounds have been raised by the Revenue:

"1. The order of Ld. CIT(A) is not correct in law and facts.

2. Whether on the facts & in the circumstances of the case, Ld. CIT(A) is justified in deleting the addition of

Rs. 5,34,173/- made by assessing officer on account of unrecorded sales, when loose papers seized during search indicated unrecorded cash sales, no cash memos were maintained for cash sales & on being confronted even the supervisor of the retail counter of assessee company admitted in his statement that all cash sales are not recorded in books of account.

3. Whether on the facts in the circumstances of the case, Ld. CIT(A) is justified in deleting the addition made by assessing officer on account of unrecorded sales & lower G.P ratio declared, when consistent modus operandi was followed during the entire block period w.r.t. unrecorded cash sales, the supervisor of the retail counter of assessee company admitted in his statement that all cash sales are not recorded in books of account & evidentiary value of the statement recorded u/s. 133A is same as that of statement recorded u/s 132(4) of the Act.

4. Whether on the facts of the case, Ld. CIT(A) is justified in deleting the addition of Rs. 5,00,00,000/- made on account of bogus share capital which was supported by the documents seized during search proceedings and related post search verification/enquiries conducted by the assessing officer.

5. Whether on the facts of the case, Ld. CIT(A) is justified in deleting the addition made on account of bogus share capital even when during post search verification those applicants were found nonexistent on given addresses & on being provided with specific opportunity to substantiate its claim regarding the receipt of share capital from different persons during the previous year, assessee could not discharge its onus u/s. 68 of the I. T. Act, 1961.

6. Whether on the facts of the case, Ld. CIT(A) is justified in deleting the addition made on account of bogus share capital even loose sheets indicating expenses incurred on share capital were found during the search action & on verification such expenses were

not found to have been recorded in the books of accounts of assessee.

7. Whether on the facts of the case, Ld. CIT(A) is justified in relying on the decisions in cases of Kabul Chawla and Meeta Gutgutia in the current case when these decisions are distinguishable on facts.

8. Whether on the facts and circumstances of the case, the Ld. CIT(A) has erred in, not upholding the assessment order passed u/s. 153A of the Act on the ground that no incriminating material was found during the search on the basis of which additions have been made by the assessing officer as held in the case of Kabul Chawla even when, the principal laid down in the Judgement of Hon'ble High Court in the case of Kabul Chawla has not been accepted by the Revenue & S.L.P. there against has been filed which is pending for adjudication before the Hon'ble Apex Court.

9. Whether on the facts and circumstances of the case, the Ld. CIT(A) has erred in deleting the addition made on the ground that the addition has not been made on the basis of incriminating material found during the search, even when incriminating evidences w.r.t. the unrecorded cash sales were found, non disclosure of cash sales in books was confessed by the supervisor in his statement recorded on oath, incriminating details relating to claim of share capital was found during the search which on verification could not be substantiated & assessee could not discharge its onus u/s 68 of the Act."

4. A search and seizure action u/s 132 of the Income Tax Act, 1961 was carried out on 30.09.2013. The assessee filed the regular return of income which has been assessed u/s 143(3) of the Act vide order dated 31.03.2010 for the A.Y. 2010-11 and on 30.03.2011 for the A.Y. 2011-12 accepting the returned income.

5. During the assessment u/s 153A, the Assessing Officer has enquired with regard to the receipt of the share capital from three parties namely, Bhumiputra India Ltd., Shri Bhawani India Pvt. Ltd. and Alpna Gases Ltd. As per the Assessing Officer, the details of these parties were mentioned and retrieved from hard disk named A-9/6 found and seized from the premises of the assessee. As per the AO, the companies who contributed to the share capital were found to be non-existing and hence the seized material was considered to be incriminating in nature. While making addition, the AO has also relied on the statement of one Mr. Anand Sharma who purportedly and entry operator. The AO held that in view of the pre and post search proceedings, it was established that the assessee has sourced share capital from the paper companies having no profit generating apparatus and creditworthiness. Before the AO, the assessee has contested that the share capital received has been a matter of examination during the assessment u/s 143(3) in the regular course and hence in the absence of any incriminating material found and seized pertaining to the same share capital, no addition can be made. Disregarding the arguments of the assessee, the AO (4.11 of the order) held that as the deposits in the shape of share capital was appearing in its books, the assessee was legally under obligation to prove the basic ingredients i.e. identity of the person, capacity to interest and genuineness of the transaction as per requirement of Section 68 and as held by various courts. The AO further held that it is worthwhile to mention that the decision of Hon'ble Delhi High Court in the case of Kabul Chawla has not been accepted by the department and special leave petition against that order has been filed before the Hon'ble Supreme Court. Therefore, the ratio

laid down in that case is not binding upon the department at present.

6. At this juncture, we would like to mention that the said SLP has been dismissed summarily by the Hon'ble Apex Court.

7. Aggrieved the assessee filed appeal before the Id. CIT(A).

8. The main argument taken up by the assessee before the Id. CIT(A) was that there was no seized incriminating material found based on which the assessment was completed and also that during the regular assessment, the receipt of the share capital has been duly examined and accepted.

9. The Id. CIT(A) forwarded the written submission of the assessee on 03.12.2018 on these issues. The AO submitted remand report on 10.12.2018 wherein it was reported that the Annexure A-9 mentions the names of the shareholder and it acquired incriminating character in view of Annexure A-6 which shows the expenditure incurred on arrangement to introduce share capital. The AO relied on the judgments in the case of E.N. Gopa Kumar Vs. CIT 75 Taxmann 215, CIT Vs. Raj Kumar Arora 52 Taxmann 172 (All.), CIT Vs. Kesharwani Zarda Bhandar in ITA 270/2014 (All.), Dayawanti Vs. CIT 75 Taxmann 308 and Anil Kumar Bhatia 352 ITR 493, Harish Textile Engineers Limited Vs. DCIT [379 ITR 160-Bom], Filatex India Limited Vs. CIT [49 Taxmann. Com 465-Del]

10. The Id. CIT(A) followed the judgment of Hon'ble jurisdictional High Court in the case of PCIT Vs. Meeta Gutgutia

390 ITR 496 (Del) and CIT Vs. Kabul Chawla 380 ITR 573 (Del).
The comments accepted by the Id. CIT(A) are as under:

<i>Title Name</i>	<i>Date of Order</i>	<i>Remarks</i>
<i>Smt. Dayawanti Vs. CIT [390 ITR 496-Del]</i>	<i>27.10.2016</i>	<i>This order was passed prior to the date of order in the case of Meeta Gutgutia (which was passed by the Hon 'ble Jurisdictional High Court 25.05.2017).</i>
<i>CIT Vs. Anil Kumar Bhatia [352 ITR 493-Del]</i>	<i>07.08.2012</i>	<i>This order was passed prior to the date of order in the case of Kabul Chawla and Meeta Gutgutia (which were passed by the Hon'ble Jurisdictional High Court on 28.08.2015 and 25.05.2017 respectively).</i>
<i>Filatex India Limited Vs. CIT [49 Taxmann. Com 465-Del]</i>		<i>This order was passed prior to the date of order in the case of Kabul Chawla and Meeta Gutgutia (which were passed by the Hon'ble Jurisdictional High Court on 28.08.2015 and 25.05.2017 respectively).</i>
<i>Harish Textile Engineers Limited Vs. DCIT [379 ITR 160-Bom]</i>	<i>30.10.2015</i>	<i>It was a case, where the party had admitted receipt of on money with regard to sale of Textile Machineries. The addition was made vide assessment order passed u/s 158B(b), 150BC, on the basis of such admission. The facts of the case of the assessee are clearly distinguishable with the facts of this case.</i>

11. Rebutting the arguments of the Assessing Officer that Sh. Anand Sharma, the entry operator has routed the amounts through a web of companies, the assessee has pointed out in the written submission that the company had not received any share capital/premium after 31.03.2011 and therefore, there is no link between the share capital/ premium subscribed by Bhumi Putra India Limited (Rs. 3,25,00,000/-), Shri Bhawani India Private Limited (Rs. 1,00,00,000/-) & Alpana Gases Limited (Rs.

75,00,000/-) and to the "3cr." found mentioned in the sheet i.e. Page no. 10 of Annexure A-6. The assessee has also pointed out that it had never received any share capital/premium from M/s Jagprem Vypaar Pvt. Ltd., M/s Sundaram Distributors Pvt. Ltd., M/s Genius Distributors Pvt. Ltd. and M/s Chamundaji Sales Pvt. Ltd. the companies allegedly controlled by Sh. Anand Sharma as per statement.

12. Further, the ITR of the assessee for A.Y. 2010-11 was taken up for scrutiny and during the course of such scrutiny proceedings, the then A.O. had made direct inquiries from the above named parties. After getting himself fully satisfied, the then A.O. had passed the assessment order u/s 143(3). It may be worth pointing out that the said assessment had attained finality, in as much as neither proceedings u/s 263 nor proceedings u/s 148 were initiated against the assessee for A.Y.2010-11. Further, during the course of proceedings initiated by the Investigation Wing, New Delhi, no document of incriminating nature apropos such share capital /premium received by the assessee from the above named parties was unearthed. This fact could be read from the assessment order passed by the DCIT, Central Circle- 05 New Delhi u/s 153A/143(3) on 31.03.2016 (para 4.4), the DCIT, Central Circle- 05 New Delhi had mentioned about the share holding pattern of the assessee as on 31.03.2010 (A-9). Preparing list of shareholders as on the year end, as per the balance sheet, is a routine and normal phenomenon and such document cannot be termed as an incriminating document.

13. In the remand report dated 10.12.2018, the AO, when specifically requested by the Id. CIT(A) to point out incriminating

seized material found during the search action relating to AY 2010-11, the Assessing Officer has reiterated that the addition on account of share capital has been made on the basis of document retrieved from the Hard Disk named A-9 found which contained names of parties investing in share capital.

14. Based on the entire facts, the Id. CIT(A) on due consideration of the assessment order as well as remand report dated 10.12.2018 held that the list of share holders as on 31.03.2010 available in Hard Disk named A-9 cannot be considered incriminating in nature. The Id. CIT(A) held that the list of share holders as on 31.03.2010 found during the search action can be treated as incriminating material. There was no relation between the seized material and the share capital receipt. The AO could not point out to any incriminating material found during the search action on the basis of which the addition has been made.

15. The case laws relied upon by the Assessing Officer have already been differentiated in the table mentioned above

16. In view of the above, in the absence of any incriminating material relating to AY 2010-11 and following the ratio of judgement of the jurisdictional High Court in the cases of CIT (Central-III) vs. Kabul Chawla 380 ITR 573 (Del) and PCIT (Central-II), New Delhi vs. Meeta Gutgutia 390 ITR 496 (Del) the action of the AO in assuming jurisdiction u/s 153A and thereafter framing assessment u/s 153A/143(3) of the Act is not justified. The AO failed to appreciate that the assessment for AY 2010-11 had already attained finality and the proceedings for AY 2010-11

were not abated and therefore fresh assessment proceedings u/s 153A were not justified when no incriminating material relating to AY 2010-11 was found during the search action. We decline to interfere with the order of the Id. CIT(A).

17. With regard to the addition made on account of extra profit, the Id. CIT(A) after obtaining the remand report dated 10.12.2018 categorically held that the AO has failed to point out any incriminating material found during the search on the basis of which addition on account of extra profit was made. The AO has stated in the remand report that goods sold in cash were not recorded in the books of accounts and this was extrapolated for all the Assessment Years falling in the block period. Thus, it is clear that there was no incriminating material found in course of search action relating to Assessment Year in question. Hence, we decline to interfere with the order of the Id. CIT(A). Similar, ratio applies to the addition made under the same head for the A.Y. 2011-12.

18. In the result, the appeals of the revenue are dismissed.

Order Pronounced in the Open Court on 30/06/2022.

Sd/-

(Aakash Deep Jain)
Judicial Member

Sd/-

(Dr. B. R. R. Kumar)
Accountant Member

Dated: 30/06/2022

Subodh Kumar, Sr. PS
Copy forwarded to:

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

ASSISTANT REGISTRAR