IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'C' BENCH, NEW DELHI

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND SHRI KUL BHARAT, JUDICIAL MEMBER

ITA No. 736/DEL/2021 [A.Y 2012-13]

The D.C.I.T Central Circle - 30 New Delhi	Vs.	M/s Kuber Khadyan Pvt Ltd 1/8 West Patel Nagar New Delhi PAN: AABCK 0600 L

ITA No. 738/DEL/2021 [A.Y 2013-14]

The D.C.I.T Central Circle - 30 New Delhi	Vs.	M/s Kuber Khaini Pvt Ltd 32 K, Siraspur, Godown No. 6 G.T. Karnal Road, Siraspur Delhi PAN: AABCK 0469 M
(Applicant)		(Respondent)

Assessee By	:	Shri P.C. Yadav, Adv.
Department By	:	Shri K.M. Mahesh, CIT- DR

Date of Hearing	**:**	**23.11.2022**
Date of Pronouncement	**:**	**25.11.2022**

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER:-

The above captioned two separate appeals by the Revenue are preferred against two separate orders of the ld. CIT(A) - 30, New Delhi dated 11.03.2021 pertaining to A.Ys 2012-13 and 2013-14 in respect of two different assessees.

2. Since common issues are involved and the underlying facts in issues are identical, both the appeals are disposed of by this common order for the sake of convenience and brevity, for which we are considering the facts of ITA No. 736/DEL/2021/

3. The grievances of the Revenue read as under:

"1. The CIT(A) has erred in law and on the facts in deleting the addition of Rs. 4,91,50,000/- made u/s 68 of the IT Act 1961

2. The CIT(A) has erred in law and on the facts of the case that Kuber Group is shown to have taken share application money/ capital/ premium/ unsecured loans from paper/jamakharchi companies.

3. The Ld. CIT(A) has erred in law and on the facts relying on the judicial pronouncement of the Jurisdictional High Court as well as other HCs that Hon'ble Supreme Court has admitted SLP vide Diary No. 37848/2015 in the case of APAR Industries Ltd. decided by Hon'ble Bombay High Court in ITA No. 1669 of 2013 dated 08.05.2015 which is a lead cases tagged with more than 115 issues on the issue of restriction of additions only to incriminating materials found during search.

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

5. That the grounds of appeal are without prejudice to each other

6. That the applet craves leave to add, amend, alter or forgo any ground(s) of appeal either before or at the time of hearing of the appeal."

4. Briefly stated, the facts of the case are that a search and seizure action u/s 132 of the Income-tax Act, 1961 [hereinafter referred to as 'The Act'] was conducted on 09.10.2014 at various business and residential premises of M/s Kuber Group of cases including the premises of the captioned assessee. Statutory notices u/s 153 of the Act were issued and served upon the assessee, in response to which, return of income was filed by the assessee.

5. During the course of scrutiny assessment proceedings, basis the statement of Shri Mul Chand Malu, recorded u/s 132(4) of the Act and post search investigation relating to unsecured loan, the Assessing Officer made addition of Rs. 4,91,50,000/- which is the subject matter

of appeal in ITA No. 736/DEL/2021 and addition of Rs. 6,65,00,000/- which is the subject matter of appeal in ITA No. 738/DEL/2021.

6. Additions were challenged before the ld. CIT(A) before whom it was vehemently argued that the additions are devoid of any incriminating material. It was challenged that addition cannot be made merely on the basis of statement made by a person who was neither a Director nor an employee in the appellant company. No surrender or disclosure was made relating to unsecured loan for captioned assessees.

7. It was strongly argued that a statement, that is not relatable to any incriminating document or material, found during the course of search and seizure operation cannot be used for making assessment u/s 143 of the Act.

8. After considering the facts and submissions, the ld. CIT(A) was convinced that the ratio laid down by the Hon'ble High Court of Delhi in the case of Kabul Chawla 380 ITR 573, Meeta Gutgutia 395 ITR 526 and Harjeev Agrawal 241 Taxman 199 squarely apply on the facts of the case holding that since no incriminating documents found during

the course of search pertaining to the said addition made by the Assessing Officer not being based on any seized material or incriminating material found during the course of search is not sustainable.

9. Aggrieved by this, the Revenue is before us.

10. The ld. DR strongly relied upon the findings of the Assessing Officer. It is the say of the ld. DR that the first appellate authority ought to have considered the facts of the case. The ld. DR strongly stated that in post search investigation, the Assessing Officer has conclusively brought on record that the companies from whom loans have been taken were not existing companies at the given address and the assessee has grossly failed in discharging the onus cast upon it by provisions of section 68 of the Act.

11. Per contra, the ld. counsel for the assessee brought to the notice of the Tribunal the orders of the co-ordinate bench in assessee's own case and in the case of group concerns in ITA Nos. 4223, 4225 and 4226/DEL/2018 for Assessment Years 2009-10, 2011-12 and 2013-14

and in ITA Nos. 1123 and 1124/DEL/2019 for Assessment Years 2012-13 and 2013-14.

12. It is the say of the ld. counsel for the assessee that in all these appeals on identical set of facts, additions have been made basis the statement of Shri Mul Chand Malu and the co-ordinate benches have deleted the additions holding that the statement of Shri Mul Chand Malu does not constitute any incriminating material to trigger provisions of section 153A of the Act

13. After carefully perusing the material on record, we are convinced that the assessments are devoid of any incriminating material and it is now well settled by the decision of the Hon'ble High Court of Delhi in several cases, namely, Kabul Chawla and Meeta Gutgutiya [supra] where it has been held that:

> ***"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(l) will have to be mandatorily issued to the person searched requiring him to file returns for six A Ys immediately preceding the previous year relevant to the A Y in which the search takes place.***

ii. ***Assessments and reassessments pending on the date of the search shall abate. The total income for such A Ys 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 r datable 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. "

14. On finding parity of facts, respectfully following the binding decisions of the Hon'ble jurisdictional High Court [supra] read with the decisions of the co ordinate benches, we decline to interfere with the findings of the ld. CIT(A).

15. In the result, the appeals of the Revenue in ITA Nos. 736/DEL/2021 and 738/DEL/2021 are dismissed.

The order is pronounced in the open court on 25.11.2022.

Sd/-	**Sd/-**
[KUL BHARAT**]**	**[N.K. BILLAIYA]**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 25th November, 2022.

VL/

Copy forwarded to:

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

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
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Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	