

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'F' : NEW DELHI)**

**SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER
and
MS. ASTHA CHANDRA, JUDICIAL MEMBER**

**ITA No.1931/Del./2020
(ASSESSMENT YEAR : 2011-12)**

ACIT, Central Circle 28,
New Delhi. vs. Atul Kumar Gupta,
C-26, Opp. Pamposh Public School,
GK Enclave – I,
New Delhi – 110 048.

(PAN : AAJPK0068P)

**ITA No.1164/Del./2020
(ASSESSMENT YEAR : 2011-12)**

ACIT, Central Circle 28,
New Delhi. vs. Rajiv Gupta,
W-106, FF, Kailash Part I,
New Delhi – 110 048.

(PAN : AAHPG2571M)

**ITA No.205/Del./2021
(ASSESSMENT YEAR : 2014-15)**

**ITA No.206/Del./2021
(ASSESSMENT YEAR : 2015-16)**

**ITA No.1395/Del./2021
(ASSESSMENT YEAR : 2016-17)**

Atul Kumar Gupta,
C-26, Pamposh Public School,
GK Enclave – I,
New Delhi – 110 048. vs. ACIT, Central Circle 28,
New Delhi.

(PAN : AAJPK0068P)

(APPELLANT)

(RESPONDENT)

ITA No.1931/Del./2020
ITA No.1164/Del./2020
ITA Nos.205 & 206/Del/2021
ITA No.1395/Del/2021

ASSEESSEE BY : Shri Ajay Wadhwa, Advocate
 Ms. Ragini Handa, CA
 Shri Ujjwal Jain, CA
 REVENUE BY : Shri T. Kipgen, CIT DR

Date of Hearing : 06.02.2023
 Date of Order : 17.02.2023

ORDER

PER SHAMIM YAHYA, ACCOUNTANT MEMBER :

These are appeals filed by the assessee and Revenue arising out of respective orders passed by the Id. CIT (A).

2. First we deal with the Revenue's appeals for AY 2011-12 in case of Atul Kumar Gupta and Rajiv Gupta. It was submitted that issues in both the appeals are common and connected. Both the parties are agreed that orders of authorities below in both the cases are in common lines.

We refer to the grounds of appeal raised in both the appeals as under :-

“ITA No.1931/Del/2020 **(REVENUE'S APPEAL IN ATUL KUMAR GUPTA CASE)**

“1. On the facts and in the circumstances of the case, the Ld CIT(A) has erred in deleting addition of Rs.7,99,55,358/- on account of unexplained profit/investment u/s 69A on the ground that no incriminating documents were found in the search proceedings without appreciating the facts that on the basis of information from the seized documents i.e. (A4 to A9) of soft data, Annexure B & Annexure C of soft data etc. the post search enquiries were conducted which has thrown up the material relating to the investments in shares made by assessee in certain companies in which he was the director during the year under consideration.

2. On the facts and in the circumstances of the case, the Ld CIT (A) has erred in deleting the addition of Rs.26,14,151/- on the account of

unexplained HDFC credit card payment on the ground that no incriminating documents were found in the search proceedings without appreciating the fact that the scan copy of the incriminating information was clearly apprised by the investigation wing in the appraisal report.

3. Whether on facts and in the circumstances of the case, Ld. CIT(A) was legally justified in allowing relief relying on the decision of Hon'ble Delhi High Court in the case of Kabul Chawla (2015) 380 ITR 573 restricting additions only related to the incriminating documents found during search and seizure operations u/s 132 of the Income Tax Act, 1961 whereas 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 case tagged with more than 115 cases on the issue of restriction of additions only to incriminating material found during search.

4. That the order of Ld 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.”

ITA No.1164/Del/2020
(REVENUE'S APPEAL IN RAJIV GUPTA CASE)

“1. On the facts and in the circumstances of the case, the Ld CIT(A) has erred in totally deleting the addition of Rs 7,36,99,291/- on account of unexplained profit/investment u/s 69A on the ground that no incriminating documents were found in the search proceedings without appreciating the facts that on the basis of information from the seized documents A (A4 to A9) of soft data, Annexure B & Annexure C of soft data etc. the post search enquiries were conducted which has thrown up the material relating to the investments in shares made by assessee in certain companies in which he was the director during the year under consideration.

2. On the facts and in the circumstances of the case, the Ld CIT(A) has erred in totally deleting the addition of Rs 7,36,99,291/- on the account of unexplained profit/investment u/s 69A on the ground that no incriminating documents were found in the search proceedings without appreciating the fact that the scan copy of the incriminating information was clearly written in the appraisal report.

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

4. That the ground of appeal are without prejudice to each other.”

3. Since the contention is that the issues are common and connected, we are adjudicating with reference to orders of authorities below in the case of Atul Kumar Gupta in ITA No.1931/Del/2020.

4. In this case, AO noted in assessment framed u/s 153A read with section 143 (3), AO noted that original return of income was filed u/s 139 of the Act for the year under consideration on 31.03.2012 declaring an income of Rs.15,38,400/-. That after demonetization, a search & seizure operation was carried out on 21.03.2017 on group cases of Agson Global and others including the assessee. The case of the assessee was centralized by PCIT, Delhi 2. Notice u/s 153A of the Act was issued on 06.08.2018. However AO noted that there was no cooperation from the assessee. He held that since there was no response from the assessee, he was constrained to decide as per the material available on record and finding of the Investigation Officer contained in the appraisal report.

5. AO noted that during the course of search and post-search, it is found that assessee and Shri Rajiv Gupta are co-directors in many companies. In many of these companies, there were substantial amount in the share premium reserves which have been utilized for making investment in immovable and movable properties. AO noted that the facts of companies owned by the assessee wherein substantial

investments have been made by the assessee were confronted during the course of assessment proceedings vide questionnaire. Assessee responded only that Rajiv Gupta is not my brother. It was further stated that there was substantial amount of premium in various companies referred to. It was submitted that the question is also not relevant so far as 153A assessment is concerned. AO opined that from the submissions, it is clear that assessee has nothing to explain. Further, assessee has not denied his shareholdings in the companies. Hence AO was of the opinion that a part of assessee in the shareholdings in those companies is held to be unexplained in the absence of any explanation and documentary evidence supplied by the assessee during the course of assessment proceedings despite providing sufficient opportunities. Thereafter, the AO made various additions on this ground of suppression of purchase price in various investments as under :-

“a) Investment in the shares of M/s Orion Packwell Pvt. Ltd:
AAAC08029Q:

The company has received, share premium of Rs.4.9 Crs from various entities and the same has been invested in properties located at A-20SB, Sushant Lok, Part-1, Gurgaon and farm House No. 789/949 Village- Kadar pur , Rakba Bhondasi, The. Sohria , Gurgaon.

Thereafter, the shares were acquired by the assessee & Sh . Rajiv Gupta in 2010-11 at Rs.10 per share. The book value of per share works out at Rs.91.88 (Capital + Reserve) / No. of shares).

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These companies had only charged the face value. This defies any rationale. This is the means resorted to introduce own unaccounted money through layering.

10000 shares were already with Shri Rajiv Gupta and Atul Kumar. Remaining 489000 shares have been acquired at Rs.10/- per share (Rs.4890000/-). The actual worth of these shares as per book value is Rs.449,30,789/- the differential amount of Rs.400,40,789/- which represents unaccounted / unexplained investment by the assessee and Shri Rajiv Gupta business associate.

During the course of assessment proceedings, the assessee was required to explain as to why Rs.200,20,395/- [i.e. 50% of Rs.400,40,789/-) may not be considered to be your Income from unexplained sources for A.Y. 2011-12 which represents to unaccounted investment.

In response, assessee furnished no reply. Under the circumstances and in view of the facts of the case, it is concluded that Rs.200,20,395/- is being treated to be unexplained investment within the meaning of provisions of section 69 of the IT Act 1961 of the IT Act 1961.

(Addition of Rs. 200,20,395/-)

Since the assessee has failed to comply with the contents of the notices & questionnaires issued from time to time and the assessee failed to disclose his true and correct income which tantamount to concealment of particulars of his income, therefore, a penalty proceedings u/s 271(1)(c) is being initiated separately.

b] Investment in the shares of M/s Orion Freight Solutions Pvt. Ltd.: AAAC07310C:-

The company has share premium of Rs.3.86 Crs which were invested in unquoted govt. securities. Shares were allotted to dubious entities at premium of Rs.90/- per share.

In A.Y. 2010-11, share of the company were acquired by the assessee and his business associate sh. Rajiv Gupta. The company now owns the properties located at Triton Mall Commercial Complex, F-40A, First Floor, Khasra No. 1/1 Village Bassi, Sitarampura, Tehsil Sawal Jaipur, Jhotwara Road, Jaipur and Mitral's Mega Mall, M-3, Sector 25, Part II, HUDA Panipat.

The shares from dubious entities went acquired by assessee & Shri Rajiv Gupta in 2010-11 at Rs. 10 per share. The book value of per share works out at Rs.90.77.

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The dubious entities have only charged the face value. This is the means resorted to introduce own unaccounted money through layering 326000 shares have been acquired Rs.10/- per share (Rs.3260000/-). The actual worth of these shares as per the books value of these shares in Rs.295,92,228/-. The differential amount of Rs.263,32,228/- represents unaccounted investment by the assessee.

During the course of assessment proceedings, the assessee was asked to explain as to why Rs.131,66,114/- (i.e. 50% of Rs.263,32,228/-) may not be considered to be your income for A.Y. 2011-12 on account of unaccounted investment.

In response, assessee furnished no reply. Under the circumstances and in view of the facts of the case, it is concluded that Rs.131,66,114/- is being treated to be unexplained investment within the meaning of provisions of section 69 of the IT Act 1961 of the IT Act 1961.

(Addition of Rs.131,66,114/-)

Since the assessee has failed to comply with the contents of the notices & questionnaires issued from time to time and the assessee failed to disclose his true and correct income which tantamount to concealment of particulars of his income, therefore, a penalty proceedings u/s271(l)© is being initiated separately.

c) Investment in the shares of M/s Iris Infrabuild Pvt. Ltd.:
AABCI7766H: (share premium Rs.1.35 Crs);

The company has share premium Rs.1.35 Crs. 150000 shares of the company were allotted to 5 companies at a premium of Rs. 90 /- per share. On 19.05.2010 (AY-2011-12), the shares were transferred to the assessee and Shri Rajiv Gupta at Rs.10 per shares.

The book value of per share works out at Rs.95.12/-.

These 5 companies have only charged the face value. This is the means resorted to introduce own unaccounted money through layering. 150000 shares have been acquired at Rs. 10/ - per share (Rs.1500000/-). The actual worth of these shares as per the books value of these share is Rs.142,66,834/-. The differential amount of Rs.127,60,834/- represents unaccounted investment made by the assessee,

During the course of assessment proceedings, the assessee was asked to explain as to why Rs.63,83,834/- [i.e. 50% 127,66,834/-) may not be considered to be your income from Undisclosed sources which represents to unaccounted investment for the AY-2011-12.

In response, assessee furnished no reply. Under the circumstances and in view of the facts of the case, it is concluded that Rs.63,83,834/- is being treated to be unexplained investment within the meaning of provisions of section 69 of the IT Act 1961.

(Addition of Rs.63,83,834/-)

Since the assessee has failed to comply with the contents of the notices & questionnaires issued from time to time and the assessee failed to disclose his true and correct income which tantamount to concealment of particulars of his income, therefore, a penalty proceedings u/s 271(1)(c) is being initiated separately.

d) Investment in the shares of M/s Micro Spacematrixs Solution P. Ltd. AAECM3093L:

As per ROC data shows that on 24/03/2008, shares were allotted at a premium of Rs.90 per share to the various entitles. Thereafter, the shares were transferred to Cham Gupta and Atul Gupta in 2010. The book value of per share works out at Rs.137.5.

These shares were acquired at Rs. 10 per share. These entities have charged only face value. This is the way, Cham Gupta & Atul Gupta have introduced their unaccounted money through layering.

195000 shares acquired at Rs. 10/- per share, total investment was of Rs.1950000/-. The actual worth of these shares as per book value is Rs.268,16,200/-. Thus the differential amount of Rs.248,66,200/- represents to unaccounted investment made by the assessee and Charu Gupta.

During the course of assessment proceedings the assessee was specifically asked to explain as to why Rs.124,33,000/- may not be considered unaccounted investment in each case.

In response, assessee furnished no reply. Under the circumstances and in view of the facts of the case, it is concluded that Rs.124,33,000/- is being treated to be unexplained investment within the meaning of provisions of section 69 of the IT Act 1961.

(Addition of Rs.124,33,000/-)

Since the assessee has failed to comply with the contents of the notices & questionnaires issued from time to time and the assessee failed to disclose his true and correct income which tantamount to concealment

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of particulars of his income, therefore, a penalty proceedings u/s 271(1)(c) is being initiated separately.

c) Investment in the share of shares of M/s Sigma Supply Chain Solutions Pvt. Ltd. AALCS3787J :

As per ROC Database, on 02.06.2008, shares were allotted to 4 dubious entities at a premium of Rs.50 per share. The entities were M/s Saksons Investment & Finance Pvt. Ltd., M/s Hercules Builders (Coimbatore) Pvt. Ltd, ANG Finvest Pvt. Ltd. and Visit India Voyages Pvt. Ltd. These entities invested Rs.65.4 lacs.

On 21.05.2010 (AY-2011-12), 109000 shares were acquired by the assessee and Shri Rajiv Gupta in 50:50 ratios at Rs.10/0 per share.

The book value of per share works out at Rs.227.21/-.

These companies have only charged the face value. This is only a means to introduce own unaccounted money through layering, 109000 shares have been acquired at Rs.10/- per share (Rs.10,90,000/-). The actual worth of these shares as per the book value of these share is Rs.24765459/ -. The differential amount of Rs.23675459/- represents unaccounted investment made by the two individuals.

During the course of assessment proceedings, the assessee was asked to explain as to why Rs.118,37,729/- (i.e. 50% 236,75,459/-) may not be considered to be your income from undisclosed sources which represents to unaccounted investment.

Addition of Rs.118,37,729/-

Since the assessee has failed to comply with the contents of the notices & questionnaires issued from time to time and the assessee failed to disclose his true and correct income which tantamount to concealment of particulars of his income, therefore, a penalty proceedings u/s 271(1)(c) is being initiated separately.

f) Investment in the shares of M/s Radical Infratech Pvt. Ltd. AADCR8849Q

The company has shown share premium reserves of Rs.3.375 crore. Out of this, Rs.3.25 crore has been given to related parties as loan and advances.

There are no operations in the company. As per the ROC Database in March 2008 and 2009, shares were allotted at a premium of Rs.90 per share to various entities.

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Thereafter, in 2010-11 (AY 2011-12) the shares were acquired by you & Ruth Rengma at Rs.10/- per share. The book value of per share works out Rs.97.66.

These companies had only charged the face value. This is only a means to introduce own unaccounted money through layering 375000 shares have been acquired at Rs.10/- per share (Rs.3750000/-). The actual worth of these shares going by the book value of these share is Rs.36623377/-. The differential amount of Rs.32873377/- represents unaccounted investment of the two individuals.

With regard to the above, you are therefore, required to explain as to why Rs.161,14,286/- [i.e. 50% 328,73,377/-) may not be considered to be your income from undisclosed sources which represents to unaccounted investment for AY-2011-12.

Addition of Rs.161,14.286/-

Since the assessee has failed to comply with the contents of the notices & questionnaires issued from time to time and the assessee failed to disclose his true and correct income which tantamount to concealment of particulars of his income, therefore, a penalty proceedings u/s 271(1)(c) is being initiated separately.

4. Perusal of AIR/ITS data revealed that the assessee had made HDFC credit card payment of Rs.6,14,151/- and Rs.20,00,000/- towards purchase of mutual funds. Assessee was required to explain the sources of these payments vide questionnaire dated 28/08/2018 and subsequent questionnaires; but, he failed to explain the same. It is therefore, held that these payments were made by the assessee out of his undisclosed sources of income and hence the addition of Rs.26,14,151/- [614151+2000000] is liable to be added to the income of the assessee.

(Addition of Rs. 26,14,151/-)

Since the assessee has failed to comply with the contents of the notices & questionnaires issued from time to time and the assessee failed to disclose his true and correct income which tantamount to concealment of particulars of his income, therefore, a penalty proceedings u/s 271(1)(c) is being initiated separately.

5. Subject to above facts and findings, the total income of the assessee is being computed hereunder:-

Income as per revised computation of income	:	Rs.15,38,400/-
Addition as discussed on Para-3.1(a)	:	Rs.2,00,20,395/-
Addition as discussed on Para-3.1(b)	:	Rs.1,31,66,114/-

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Addition as discussed on Para-3.1(c)		Rs.63,83,834/-
Addition as discussed on Para-3.1(d)		Rs.1,24,33,000/-
Addition as discussed on Para-3.1(e)		Rs.118,37,729/-
Addition as discussed on Para-3.1(f)		Rs.161,14,286/-
Addition as discussed on Para-4		Rs.26,14,151/-
Total income	:	Rs.8,41,07,909/-
Taxable Income (Rounded off to)	:	Rs.8,41,07,910/-

6. The income of assessee is assessed at an income of Rs.8,41,07,910/-. Issued necessary forms, notice of demand u/s 156 and challan and charged interest as per provisions of the Income Tax Act, 1961.”

6. Against the above order, assessee appealed before the Id. CIT (A). After reproducing the assessee’s submission, Id. CIT (A) observed that the AO has made the additions relating to unaccounted profits or investments made in respect of M/s Orion Packwell Pvt. Ltd., M/s Orion Freight Solutions Pvt. Ltd., M/s Iris Infrabuild Pvt. Ltd., Micro Spacematrixs Solution Pvt. Ltd., M/s Sigma Supply Chain Solutions Pvt. Ltd. and M/s Radical Infratech Pvt. Ltd. totaling to Rs.7,99,55,358/-. He noted that according to the AO, the assessee has purchased shares of the said companies at a price which is much less than the book value and, therefore, the differential amount, i.e. the difference between the book value and the purchase price represent the unaccounted investment made by the assessee. Ld. CIT (A) noted that assessee has submitted that during the course of search, no incriminating evidence or in fact any other evidence was found to even suggest that the assessee had paid any money

over and above the purchase price paid by the assessee through account payee cheques. The assessee relied upon the decision of Hon'ble Delhi High Court in the case of Kabul Chawla (2016) 380 ITR 573 (Delhi) for the proposition that the proceedings for the impugned assessment year on the date of search were deemed to have been completed and, therefore, unless and until any incriminating documents were found relating to the addition, no addition could be made in the assessment. The assessee has also stated that seized documents were found from the premises of Rajiv Gupta and, therefore, it was outside the scope of assessment u/s 153A of the Act. Ld. CIT (A) noted that AO had stated that he has provided the soft copies of seized material containing incriminating documents to the assessee and other than mentioning the transmission of soft copies of the seized material, the AO has not dealt with this contention of the assessee at all. That he has not provided any specific document which is suggestive of undisclosed income relating to the transactions of purchase of shares in respect of which the addition of Rs.7,99,55,358/- has been made. Ld. CIT (A) noted that the submissions of the assessee were forwarded to the AO wherein it was specifically asked to provide copies of any incriminating documents found during the course of search relating to the addition made by him in the assessment order. Ld. CIT(A)

referred to AO's remand report that AO has stated that on the basis of information from seized documents i.e. Annexure A (A4 to A9) of soft data, Annexure B and Annexure C of soft data, etc., the post search enquiries were conducted which has thrown up materials relating to the investment in shares made by the assessee in certain companies in which he was Director during the year under consideration. Ld. CIT (A) noted that assessee in the rejoinder stated that AO has not furnished or described any specific document which indicates any undisclosed income resulting due to the transaction of purchase of shares. As per the assessee, the AO has simply relied upon the documents seized in which there was no incriminating material whatsoever. Assessee has also reiterated that seized material was obtained from the premises of Rajiv Gupta and assessment is outside the scope of section 153A. Ld. CIT(A) gave a finding that assessee has filed Annexures A, B & C on which AO has relied upon for his contention that the said documents contained information because of which, post search enquiries resulted in undisclosed income. Ld. CIT (A) noted that it is to be mentioned that AO himself has stated that it is the post search enquiries which led to the determination of this income. Ld. CIT (A) gave a finding that he has perused the documents referred to by the AO before him by the assessee.

That none of the documents relate to the purchase of shares in respect of which addition of Rs.7,99,55,358/- has been made. He noted that AO has not furnished any document post search which can be held to be incriminating and indicative of undisclosed income in respect of purchase of shares made by the assessee. Hence, Id. CIT (A) observed that all the facts on record of the AO were placed before him including AO's remand report and these have no reference to any document that is suggestive of any undisclosed income having resulted consequent to this transaction of purchase of shares. Hence, he held that neither the assessment order nor the remand report mentioned that the addition regarding the undisclosed investments in shares has been made in this case on the basis of incriminating document seized during the course of search. Thereafter, Id. CIT (A) referred to the ratio of judgment of Hon'ble jurisdictional High Court in the case of *Kabul Chawla* (2016) 380 ITR 573 (Delhi). Referring to the above, he held that this decision has lucidly pronounced that in the case of completed assessments, it may be interfered only on the basis of some incriminating material found during the course of search. Id. CIT (A) also referred to the decision of Hon'ble Delhi High Court in the case of *Pr.CIT (Central)-I vs. M/s. SMC Power Generation Ltd.* ITA 406/2019. Id. CIT (A) concluded as under :-

“ Respectfully following the aforesaid judgments, I hold that since no incriminating document(s) pertaining to the transactions of purchase of shares, showing that the appellant has made undisclosed/unaccounted investments which was over and above the value of the shares as per records in the investments made in respect of M/s Orion Packwell Pvt. Ltd., M/s Orion Freight Solutions Pvt Ltd., M/s Iris Infrabuild Pvt. Ltd., M/s Micro Spacematrixs Solution Pvt. Ltd, M/s Sigma Supply Chain Solutions Pvt Ltd and M/s Radical Infratech Pvt. Ltd., was found during the course of search relating to the addition made amounting to Rs.7,99,55,358/-, therefore this addition made by the AO stands deleted.”

7. Thereafter, ld. CIT (A) dealt with the addition in relation to credit card. In this regard also, the ld. CIT (A) noted the assessee's submission that during the course of search, no incriminating material or in fact any other evidence was sought to even suggest that the assessee has any undisclosed income. In this regard also, ld. CIT (A) referred to the decision of Hon'ble jurisdictional High Court in the case of Kabul Chawla (supra). Ld. CIT (A) observed that it has been stated in para 4 of the assessment order that queries relating to credit card payments and purchase of mutual funds were raised during assessment proceedings. That infact, the AO has stated in his order that perusal of the AIR/ITS data revealed that the assessee has made credit card payments and purchased mutual funds of Rs. 6,14,151/- and Rs.20,00,000/- respectively totaling to Rs.26,14,151/-. That the Assessing Officer has therefore accepted that nothing relating to these payments have been seized during search. That the AO has not provided any specific document which is

suggestive of undisclosed income relating to credit card payments and mutual fund purchases in respect of which, the addition of Rs.26,14,151/- has been made. Ld. CIT (A) noted that in the appellate proceedings, the submissions of the assessee were furnished to the AO. Ld. CIT (A) observed that AO has stated that there were no incriminating documents found during the course of search relating to the addition made by the AO about the credit card payments and mutual fund purchases in respect of which addition of Rs.26,14,151/- was made. Thereafter, after referring to the documents, ld. CIT (A) gave a finding that no incriminating document was found, hence ld. CIT (A) concluded as under :-

“ I have perused the documents referred to by the AO filed before me by the appellant. None of the documents relates to credit card payments or mutual fund purchases in respect of which, addition of Rs.26,14,151/-has been made. The AO has also not furnished any document post search which can be held to be incriminating and indicative of undisclosed income. The AO has stated in his order that perusal of the AIR/ITR data revealed that the appellant has made credit card payments and mutual fund purchases.

7.21. Hence, the assessment order and the remand report have no reference to any document that is suggestive of any undisclosed income relating to credit card payments and mutual fund purchases in respect of which, addition of Rs.26,14,151/- has been made.

Hence, respectfully following the aforesaid judgments, I hold that there is no incriminating document found during the course of search relating to the addition regarding payments made through HDFC Credit card and mutual fund purchases totaling to Rs.26,14,151/- and, therefore, the said addition stands deleted and Ground No.9 is allowed.”

8. Against this order, Revenue has filed an appeal being ITA No.1931/Del/2020 before us. We have heard both the parties and perused the records.

9. Ld. DR for the Revenue relied upon the orders of AO and submitted that purchase of investments have been heavily suppressed and AO had brought adequate material to prove that there was suppression of investment value and pleaded that the order of AO be sustained.

10. Per contra ld. Counsel for the assessee elaborately referred to the orders of the AO as well as ld. CIT (A). His submissions was that this is an assessment pursuant to search u/s 153A and it is a settled law that addition u/s 153A cannot be done *de hors* any incriminating material found during the search. He submitted that there is no effective incriminating material found during the course of search which can be said to be leading to the conclusion that the purchase price of the investment was suppressed. No incriminating material has been found. That AO has himself not mentioned what post search enquiries have thrown up. Nothing has been brought on record to show that the purchase price has been passed in a clandestine manner other than that recorded in the books of account. Further, ld. Counsel of the assessee reiterated that there is no relation of the assessee with the Agson Global group. He

submitted that ld. CIT (A) has duly dealt with the issue and have obtained remand report asking AO to refer to incriminating documents but no incriminating documents have been mentioned by the AO in the remand report.

11. Thereafter, ld. Counsel of the assessee submitted that these additions in the hands of two persons are made on surmises only. He submitted that the AO made addition of Rs.7,36,99,291/- in the hands of Rajiv Gupta and Rs.8,25,69,509 in the hands of Atul Kumar on the ground that the assessee had purchased shares of 6 companies at the face value of Rs.10 whereas the book value of those shares on date of purchase was much higher. Ld. Counsel for the assessee submitted that this addition is untenable in view of the decision of the Hon'ble Supreme Court in the case of K.P. Varghese v. Income-Tax Officer [1981] 131 ITR 597 (SC) [para 18] wherein it was held that there must be evidence to show that the actual consideration was more than the consideration shown in the books. He submitted that this proposition is also held in the following cases “

- a. CIT v. Gulshan Kumar [2002] 257 ITR 703 (Delhi High Court)-para 21
- b. CIT v. Naresh Khattar, HUF [2003] 261 ITR 664 (Delhi High Court)-para 8

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- c. JCITv. Sri Bithalnath Malia ITA No. 15/KOL/2013 (Kolkata Tribunal)-para 10
- d. DCIT v. Smt Nirmal Rani ITA No. 2786/ DEL /2010 (Delhi ITAT)-para 15 to 22
- e. Dilavar S Lakhani v.ITO ITA No. 5158/MUM/2019 (Mumbai ITAT)-para 6,7
- f. DCIT v. Kalawatl Aggarwal ITA No. 112/DEL/2010 (Delhi ITAT)-para 11
- g. ACIT v. Sharad Chaudhary [2015] 55 taxmann.com 324 (Delhi-Trlb.)-para 28
- h. Omega Estates v. Income-tax Officer [2007] 106 ITD 427 (Chennai ITAT)-para 18
- i. ITO v. Dua Auto Components (P.) Ltd. [2011] 16 taxmann.com 58 (Delhi) -para 6.4 and 6.5

12. Ld. Counsel further submitted that there is also a settled law that the AO cannot substitute the selling price determined between a willing buyer and a willing seller merely based on book value or fair market value. In this regard, reliance is placed on the following case laws :-

- a. CIT v. Smt. Nilofer I. Singh [2009] 309 ITR 233 (Delhi HC)-para 4,7,10
- b. Dev Kumar Jain v. Income-tax Officer [2009] 309 ITR 240 (Delhi HC)-para 8
- c. Arjun Malhotra v. Commissioner of Income-tax [2018] 403 ITR 354 (Delhi HC)-para 22,23,24,28

13. Ld. Counsel for the assessee further submitted that without prejudice to the aforesaid, Hon'ble Delhi High Court decision in the case of CIT v. Kabul Chawla [2016] 380 ITR 573 applies squarely because no

incriminating evidence was found during search. He submitted that the ld. CIT(A) went through every piece Of paper and did not find anything incriminating and also called for remand report on this issue.

14. Ld. Counsel for the assessee submitted that the order passed in case of Rajiv Gupta is under section 143(3) whereas the order should have been under section 153A of the Act since date of search is 21.03.2017 and the AY 2011-12 is completed assessment. Reliance in this regard is placed on the following case laws:

- a. Shri Om Prakash Jalkhotia v. ACIT ITA Nos.968, 969, 970 & 971/Del./2021 (Delhi ITAT)
- b. Mikado Realtors P. Ltd. vide ITA no. 50/DEL/2021 (Delhi Tribunal)-para 11
- c. Sanjay Thakur v. The DCIT (Central Circle) In ITA no.3559/DEL/2015 (Delhi Tribunal)-para 9
- d. DCIT v Vinod Kumar in ITA no. 2550/DEL/2015; order dated 09.08.2019-para 14, 15

15. We have carefully considered the submissions and perused the records. We note that in these cases, the assessee has made some investments and according to AO, the purchases have been suppressed and the investments have been acquired at a much lower price and hence AO has made addition of suppressed income in the hands of the assessee. The basis for this given by the AO is incriminating material found during search and post search enquiry. Ld. CIT (A) has given a categorical

finding that no incriminating material was found during search which can in fact show that assessee has actually invested more and shown less. Ld. CIT (A) asked from the AO to give remand report and indicate the copies of seized material & incriminating documents but AO has not dealt with this aspect. Ld. CIT (A) duly forwarded the entire submissions of the assessee to the AO but AO could not put-forth any seized material which can indicate that assessee has suppressed the purchase consideration. Merely stating that seized materials are there and post search enquiry has shown that the purchase prices have been suppressed, cannot alone prove the case of the AO unless supported by necessary corroborating evidences. In the present case, we note that ld. CIT (A) has given a categorical finding that there is nothing on record which suggest that assessee has incurred higher expenditure on purchase than reflected in the books of account. In this regard, ld. CIT (A) placed strong reliance upon the decision of Hon'ble jurisdictional High Court in the case of Kabul Chawla (supra) which is fully applicable.

16. Apart from the above, another limb of the case is that ld. Counsel of the assessee has referred to the decision of Hon'ble Apex Court in the case of K.P. Varghese (supra). The submission in this regard is that AO made these additions in the hands of Rajiv Gupta and Atul Kumar Gupta

on the ground that the assessee has purchased share of 6 companies at the face value of Rs.10 whereas the book value of these shares on the date of purchase was much higher. Now, in this regard, mere such submission cannot fortify the case of the assessee. In the case of K.P. Varghese (supra), Hon'ble Apex Court duly expounded that there must be evidence to show that the actual consideration was more than the consideration shown in the books. In this regard, ld. Counsel of the assessee referred to catena of case laws. We find that this aspect is fully applicable in the assessee's case. No evidence whatsoever is on record that actual consideration paid is any how suppressed. Hence, the assessee's case is covered on the touchstone of Hon'ble Apex Court in the case of K.P. Varghese (supra).

17. Apart from the value of investment, another addition made by the AO is with regard to credit card payments. In this aspect, ld. CIT (A) has given a finding that there is no incriminating material and in this view of the matter, addition is not sustainable on the touchstone of Hon'ble Delhi High Court in the case of Kabul Chawla (supra).

18. In our considered opinion, ld. CIT(A) passed a well-reasoned order and the case laws are duly germane, hence we do not find any infirmity in the order of ld. CIT (A). Accordingly, we uphold the same and both the

ITA No.1931/Del./2020
ITA No.1164/Del./2020
ITA Nos.205 & 206/Del/2021
ITA No.1395/Del/2021

Revenue's appeals for AYs 2011-12 in the cases of Atul Kumar Gupta and Rajiv Gupta are dismissed.

ITA NO.205/DEL/2021

ITA NO.206/DEL/2021

19. These appeals are against the orders of Id. CIT (A) wherein following additions have been sustained by the Id. CIT (A) :-

- (i) ITA No.205/Del/2021 for AY 2014-15 Rs.10,50,000/-
- (ii) ITA No.206/Del/2021 for AY 2015-16 Rs.16,40,000/-
- (iii) ITA No.1395/Del/2021 for AY 2016-17 Rs.16,41,000/-

20. The above appeals are against the respective orders of Id. CIT (A) for AYs 2014-15, 2015-16 & 2016-17. The issues are similar and the adjudication of the authorities below are on similar lines. Hence, for the sake of reference, we are referring to the facts of ITA No.205/Del/2021 for AY 2014-15. The grounds of appeal read as under :-

“1. That on the facts and circumstances of the case and in law, the order dated 6.03.2020 passed by the Learned Commissioner of Income tax Appeals ("Ld. CIT(A)") is erroneous and bad in law.

2. That on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in confirming addition of Rs.10,50,000/- made by the Learned Assessing Officer ("Ld. AO") even though no incriminating material was found during search of the Assessee.

3. That on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in confirming the addition of Rs.10,50,000 made by the Ld. AO on the basis of unconnected, unrelated documents found in search of others. The Ld. CIT (A) erred in confirming the addition on assumption and generalities.

4. That the grounds of appeal are independent and without prejudice to each other.”

21. Brief facts on this issue are as under :-

Assessment u/s 153A rws 143(3) of the IT Act has been completed by the Assessing Officer at an income of Rs.30,45,120/- as against returned income of Rs.13,42,260/-. Facts of the case are that there was a search upon the assessee on 21/3/2017 and during the course of search cash, jewellery and some foreign currency was found. The Assessing Officer on the basis of the appraisal report and AIR ITS data had treated payments made on account of credit card of Rs.6,52,857/- as income of the assessee u/s 153A assessment. During the course of search of Agson group and Rajiv Gupta annexure A4 to A9 was seized, page 24 of the annexure contained a ledger account of Dildar (atul sir) which contains payment received by the assessee during the year under consideration of Rs.10,50,000/- in cash. The appellant had taken the plea before the AO that the paper was in the name of dildar and it also did not relate to the appellant. It was also stated in the reply by the appellant before the AO that in any case this paper was not found during his search and therefore this cannot be considered in his assessment us 153A. The AO rejected the submissions by holding that Rajiv Gupta and assessee were common directors and therefore it could be said that this paper has been found during the search of the assessee. The AO has held that any paper found either in the hands of Rajiv Gupta or in the hands of assessee was

immaterial. Rejecting the arguments of the assessee the AO had treated the amount of Rs.10,50,000/- as income of the assessee. The Assessing Officer has stated that such payments have been made out of his undisclosed income and hence treated the same as undisclosed income. In this way total income has been computed at Rs.30,45,120/-.

22. Against the above order, assessee filed an appeal before the ld. CIT (A). Before ld. CIT (A), it was elaborately submitted that no incriminating material has been found to warrant the addition. The decision of Hon'ble jurisdictional High Court in the case of Kabul Chawla (supra) was duly referred to. It was submitted that no reference to any seized material is there to support the addition. Several other case laws were also relied upon and it was submitted that documents were seized from search operation on Rajiv Gupta and not from the assessee. Moreover, the name mentioned in the seized material is Dildar (Atul sir). It was submitted that without any corroborating material, the same should be treated as Atul Kumar Gupta. Ld. CIT (A) despite noting the submissions opined that these are all part of search conducted on Agson group and Atul Kumar Gupta & Rajiv Gupta are business associates, hence he was of the opinion that it does not make any difference from where the material was found. He referred to the investment by Atul

Kumar Gupta and Rajiv Gupta in various companies and was of the opinion that both operated together. He held that the plea of the assessee is acceptable if there is no relation between the Atul Kumar Gupta and Rajiv Gupta.

23. Against this order, assessee is in appeal before us. We have heard both the parties and perused the material.

24. Ld. Counsel of the assessee reiterated that no incriminating document has been found from the premises of Atul Kumar Gupta and this assessment has been done u/s 153A of the Act. He reiterated that as per section 153A, no addition can be made *de hors* corroborating material found during search. Ld. Counsel of the assessee submitted that a separate independent search was conducted on the assessee and assessment cannot be made u/s 153A because of documents found from Rajiv Gupta. Hence it has been pleaded that as no document was found from the assessee, assessment u/s 153A does not stand. Further, Ld. Counsel of the assessee reiterated that authorities below are in mistaken belief that assessee and Agson Global are related parties which is not correct. It has been pleaded that Rajiv Gupta and the assessee have no relationship with Agson Group. He claimed that since independent searches were conducted in the case of assessee and Rajiv Gupta and the

materials were found from Rajiv Gupta, these cannot be taken as material u/s 153A in the hands of the assessee. He further submitted that AO has been in the mistaken belief that Atul Kumar Gupta is the brother of Rajiv Gupta. He pleaded that Rajiv Gupta is a separate entity and separate search was conducted on him. Hence, Id. Counsel of the assessee pleaded that the material found from the premises of Rajiv Gupta cannot be directly considered u/s 153A in the hands of assessee. If at all, the assessment should have been conducted u/s 153C after due satisfaction which has not at all been done. Ld. Counsel of the assessee placed reliance on catena of case laws. Further, it has been submitted that documents found from possession of third person, presumption u/s 132(4A)/292C is available only in the case of the person from whom possession and control the documents were found. Since these documents were found from the premises of Rajiv Gupta, it cannot be taken to have evidentiary value u/s 132 (4A) in the hands of the assessee. Further, it has been submitted that no opportunity was given to cross examine. Furthermore, assessee's plea is that assessment has been done on the basis of dumb documents and these documents do not contain the name of the assessee but only mentioned Dildar (Atul sir). Ld. Counsel submitted that *de hors* any material, these code words cannot be taken to

mean Atul Kumar Gupta and on that basis, addition cannot be sustained.

In this regard, ld. Counsel of the assessee further referred to catena of case laws.

24.1 Ld. Counsel for the assessee summarized his submissions in the following manner :-

- a. That this amount could have been added under section 153C and not under section 153A, if at all in the hands of the Assessee.
- b. No material has been found from the Assessee, therefore, no addition under section 153A can be made.
- c. The presumption under section 132(4A) has not been discharged and, therefore, the document belongs to Rajiv Gupta and nobody else.
- d. That whenever a document is found from a third party, there needs to be a corroborative evidence and onus is on the departmental to establish that the documents belongs to the other person, i.e. in this case the Assessee. In such a case, where the document is found in the premises of a person who is searched and the document is purportedly belonging to a third person, it is mandatory for the department to first establish that the document does not belong to the person who has been searched and thereafter, further establish that the document belongs to the third party.
- e. Very importantly even in the remand proceedings, the Ld. CIT (A) gave full opportunity to the Ld. AO by forwarding the written submissions filed by the Assessee. The Ld. AO reiterated what he stated in the assessment order and, therefore, consciously decided not to respond to any of the contentions raised by the Assessee.

25. Ld. DR of the Revenue relied upon the orders of the authorities below.

26. Upon careful consideration, we note that addition has been made on the assessee u/s 153A assessment on the basis of documents found from a separate search at Rajiv Gupta. Hence, the plea of the assessee is

quite correct that the assessment should have been done under section 153C and not under section 153A. Section 153C permits documents found from another search to be sent to the AO of that person after due satisfaction and then on the basis of those documents assessment u/s 153C can be done. In the present case, material found at the premises of Rajiv Gupta has been taken as if they are material found during search at the assessee, Atul Kumar Gupta, which is not at all correct. Hence, the very basis of addition is missing. The assessment has been made u/s 153A and not u/s 153C, and this has led to a fatal error in the assessment order which is not curable. Moreover, as rightly contended by the Id. Counsel of the assessee that the presumption u/s 132 (4A) cannot be extended to material found at somebody else place and de hors corroborating documents, these cannot be linked to the assessee. Furthermore, the assessee's plea that assessee's name is nowhere directly mentioned in these documents found at Rajiv Gupta place whereas it is mentioned as Dildar (Atul sir) which ipso facto cannot mean the assessee. Hence, in the background of the elaborate submission of the assessee's counsel and discussion herein above, we set aside the order of the authorities below and delete the addition in this regard.

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27. Our above order applies *mutatis mutandis* to other two appeals also being ITA Nos.206/Del/2021 & 1395/Del/2021 for AYs 2015-16 & 2016-17 respectively.

28. In the result, Revenue's appeals for AYs 2011-12 in the cases of Atul Kumar Gupta and Rajiv Gupta are dismissed and appeals filed by the assessee (Atul Kumar Gupta) for AYs 2014-15, 2015-16 & 2016-17 are allowed.

Order pronounced in the open court on this 17th day of February, 2023.

Sd/-
(ASTHA CHANDRA)
JUDICIAL MEMBER

sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Dated the 17th day of February, 2023
TS

Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT(A)
- 5.CIT(ITAT), New Delhi.

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