

**IN THE INCOME TAX APPELLATE TRIBUNAL
 [DELHI BENCH : "F" NEW DELHI]**

BEFORE DR. B. R. R. KUMAR, ACCOUNTANT MEMBER

AND

SH. YOGESH KUMAR US, JUDICIAL MEMBER

I.T.A. No. 7993/DEL/2019 (A.Y 2011-12)

Ms. Poonam Malhotra, Prop. M/s. Poonam Deep Buillions and Jewellers, D-58, Upper Ground Floor, Kamla Nagar, Delhi - 110 007. PAN No. AAJPM4153D	Vs.	DCIT, Central Circle : 4, New Delhi.
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AND

I.T.A. No. 8079/DEL/2019 (A.Y 2011-12)

ACIT, Central Circle : 4, New Delhi. (APPELLANTS)	Vs.	Ms. Poonam Malhotra, 5562/4, New Chandrawal, Gali No. 4, Delhi-110 006. PAN No. AAJPM4153D (RESPONDENTS)
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Appellant by	Shri Ved Jain, Advocate; & Shri Aman Garg, C. A.;
Respondent by	Shri T. Kipgen, [CIT] - D. R.;

Date of Hearing	30.11.2022
Date of Pronouncement	23 .02.2023

ORDER**PER YOGESH KUMAR U.S., JM**

These two cross appeals are filed by the assessee and the Revenue for assessment year 2011-12 against the common order of the ld. Commissioner of Income Tax (Appeals)-23, New Delhi, dated 31.07.2019 respectively.

I. T. A. No. 7993/DEL/2019 (by the Assessee)**Assessment Year : 2011-12**

2. The assessee has raised the following substantive grounds of appeal :-
 1. *On the facts and circumstances of the case, the order passed by the learned Commissioner of Income Tax (Appeals) [CIT(A)] is bad both in the eye of law and on facts.*
 2. *On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in rejecting the contention of the assessee that the proceedings initiated under Section 153A and order passed by the learned Assessing Officer (AO) under Section 153A/143(3) is without jurisdiction.*
 3. *On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in rejecting the contention of the assessee that the order passed by the learned AO under Section 153A is bad and liable to be quashed as the same has been framed consequent to a search which itself was unlawful and invalid in the eye of law.*

4. *On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in rejecting the contention of the assessee that the additions made under Section 153A are bad in law in the absence of any incriminating material belonging to the assessee being found during the course of the search.*
5. *On the facts and circumstances of the case, learned CIT(A) has erred both on facts and in law in confirming the addition of Rs.1,77,887/- on account of suppressed of profit in the purchases made by the assessee.*
 - (ii) *That the above addition has been confirmed arbitrarily estimating the profit percentage 1% without there being any basis of the same.*
 - (iii) *That the above addition has been confirmed rejecting the detailed submissions and explanations made by the assessee in this regard.*
6. *On the facts and circumstances of the case, learned CIT(A) has erred both on facts and in law in rejecting the contention of the assessee that the AO has erred in making the addition without taking the enquiry initiated by him by issue of notices to a logical end.*
7. *On the facts and circumstances of the case, the learned CIT(A) has erred, both on facts and in law in rejecting the contention of the assessee in ignoring the fact that the quantity purchased and sold being completely tallying, the allegation that the assessee has not made purchases cannot be sustained.*

8. (i) *On the facts and Circumstances of the case, learned CIT(A) has erred both on facts and in law in confirming the addition of Rs.11,00,000/- on account of loan received from Shashi Bala.*

(ii) *That the above addition has been confirmed rejecting the detailed submissions and explanations made by the assessee in this regard.*

9. On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming the above additions by indulging in surmises without bringing on any direct evidence against the assessee, only on the basis of presumption and assumption.”

I. T. A. No. 8079/DEL/2019 (by the Revenue)
Assessment Year : 2011-12

3. The assessee has raised the following substantive grounds of appeal :-

“1. That the order of the Ld. CIT (Appeals) is not correct in law and on facts.

2. The Ld. CIT (Appeals) has erred in deleting the addition of bogus purchase of Rs.1,76,10,846/- on account of unverified parties which were remained unverifiable at remand stage also.

3. The Ld. CIT (Appeals) erred in ignoring the facts mentioned in Assessment Order as well as in remand report that purchases of Rs.1,77,88,733/- remained unverified.

4. The Ld. CIT (Appeals) erred in not upholding the entire addition on account of unverified bogus purchases and applying estimation of profit out of bogus purchases. “

I.T.A. No. 7993/DEL/2019 (A.Y 2011-12) (Assessee)

I.T.A. No. 8079/DEL/2019 (A.Y 2011-12) (Revenue)

4. Brief facts of the case are that, a search u/s 132 of the Income Tax Act ('Act' for short) was conducted on 29/11/2016 at the residential premises of the assessee, wherein certain papers/documents belonging to the assessee were found and seized. A notice u/s 153A of the Act was issued requiring the assessee to furnish return of income for the year under consideration. In response to notice u/s 153A of the Act, the assessee stated that the original return already filed may be treated as return of income u/s 153A of the Act. A notice u/s 143(2) of the Act was issued which was duly complied by the assessee, the questionnaire u/s 142(1) was issued and the representative of the assessee has represented the assessee in the assessment proceedings. The assessment order came to be passed on 31/12/2018 by making additions of Rs. 11,00,000/- in the hands of the assessee u/s 68 of the Act, an amount of Rs. 20,00,000/- has also been made as unexplained credit u/s 68 of the Act and an amount of Rs. 1,62,45,48,561/- was made on account of bogus purchases. As against the assessment order, the assessee has preferred an appeal before the CIT(A) and the CIT(A) vide order dated 31/07/2019, deleted the addition of bogus purchase of Rs. 1,76,10,846/- further confirmed the addition of Rs. 1,77,887/- on account of suppressed profit in the purchases made by the assessee and further confirmed addition of Rs. 11,00,000/- on account of loan received from one Shashi Bala.

5. Aggrieved by the order of the Ld.CIT(A) dated 31/07/2019 in deleting the addition the Revenue has preferred appeal in ITA No. 8079/Del/2019 and as against the sustaining the addition, the assessee has preferred the appeal in ITA No. 7993/Del/2019 on the grounds mentioned above.

6. The grounds No. 1 of the assessee is general in nature which requires no adjudication.

GROUND NO. 2 TO 4 of Assessee's Appeal

7. The Ld. Counsel for the assessee submitted that the proceedings u/s 153A of the Act and order passed by the A.O. u/s 153A/143(3) of the Act are without jurisdiction, the Ld.CIT(A) has erred in rejecting the contention of the assessee that addition made u/s 153A of the Act are bad in law in the absences of any incriminating material belongs to the assessee being found during the course of the search. The Ld. Counsel has relied on the order of the Jurisdictional High Court in the case of CIT Vs. Kabul Chawla in ITA No. 707/709/ & 713/2014 and other judicial pronouncements and submitted that the order of the Lower Authorities are liable to be quashed.

8. Per contra, the Ld. DR relied on the order of the Lower Authorities.

9. We have heard the parties perused the material available on record and gave our thoughtful consideration.

10. In the instant case, the search u/s 132 of the Act was conducted on 29/11/2016 at the residential premises of the assessee where certain papers/documents belonging to the assessee were found and seized. It is admitted fact that there was no pending assessment for the Assessment Year 2011-12. The Ld. A.O. made additions u/s 68 of the Act as under:-

“5. During the assessment proceedings, it was found that the assessee has taken unsecured loan from Smt Shashi Bala. The assessee vide point No.2 of the questionnaire dated 21.12.2018 was asked to show cause as “From the submission made on 10.12.2018 you have stated that for the year under consideration you have taken a loan of amount of Rs 93,50,000- and R.s 11,00,000 - from Shri Sanjay Malhotra and Smt Shashi Bala respectively. You are hereby asked to show cause why the amount of Rs. 1,09,50,000/- should not be added back to your income as unexplained unsecured loan for the year under consideration. ”In response, neither the assessee replied nor he submitted any reply.

Again the assessee was provided final opportunity to furnish the details vide final show cause and was asked vide pointno. 2 of the notice u/s 142(1) dated 26.12.18 as "From the submission made on 10.12.2018, you have stated that for the year under consideration you have taken a loan of amount of Rs 93,50,000/- and Rs 11,00,000/- from Shri Sanjay Malhotra and Smt Shashi Bala respectively. You are hereby asked to show cause why the amount of Rs 1,04,50,000/- should not be added back to your income as unexplained unsecured loan for the year under consideration.

5.2. Though several opportunities were provided to the assessee, Assessee did not file ITR and Bank Statement of Ms Shashi Bala from whom the assessee received Rs 11,00,000/- during the year. A bare reading of section 68 of the Act suggests that there has to be credit of amounts in the books maintained by an assessee; such credit has to be as sum during the previous year and if the assessee offers no explanation about the nature and source of such credit or the explanation offered is not satisfactory, then the sums so credited

can be treated as income of the assessee for that previous year. The expression 'no explanation is offered' or the explanation offered is not satisfactory' puts an onus on the assessee to offer a lucid, reasonable and acceptable explanation. In present case, the assessee has failed to prove identity, credit worthiness and genuineness of the credit of Rs 11,00,000/- in her books of accounts.

In view of the above, an addition of Rs 11,00,000/- is made in the hands of the assessee u/s 68 of IT Act.

I am satisfied that the assessee has concealed the income, therefore, Penalty proceedings / 271(1)(c) of the Income Tax Act, 1961 is to be initiated separately.

(Addition; Rs. 11,00,000/-)

Unexplained credit u/s 68 of IT Act:

During the assessment proceedings, it was found that the assessee has made addition of Rs 20,00,000/- in her capital account. The assessee vide point No.3 of the questionnaire dated 21.12.2018 was asked to show, cause as "From perusal of Balance sheet for the year under consideration, you have made addition of Rs 20,00,000/- in your proprietors capital account. You are hereby asked to show cause why the amount of Rs. 20,00,000/- should not be added back to your income as unexplained credit for the year under consideration. In response, neither the assessee replied nor she submitted any reply.

6.1. *Again the assessee was provided final opportunity to furnish the details vide final show cause and was asked vide point no. 3 of the notice u/s 142(1) dated 26.12.18 as "From perusal of Balance*

sheet for the year under consideration, you have made addition of Rs 20,00,000/- in your proprietors capital account. You are hereby asked to show cause why the amount of Rs. 20,00,000/- should not be added back to your income as unexplained credit for the year under consideration, “.In response, the AR of assessee replied that “the assessee has made additions of Rs 20 lacs in the capital a/c from saving account to firm account out of her balances.”

6.2. The reply of the assessee was considered and found to be non acceptable as the assessee has not submitted the requisite documents to prove the addition of Rs 20lacs has been made from saving account. A bare reading of section 68 of the Act suggests that there has to be credit of amounts in the books maintained by an assessee; such credit has to be as sum during the previous year and if the assessee offers no explanation about the nature and source of such credit or the explanation offered is not satisfactory, then the sums so credited can be treated as income of the assessee. for that previous year. The expression ‘no explanation is offered’ or the explanation offered is not satisfactory’ puts an onus on the assessee to offer a lucid, reasonable and acceptable explanation. In present case, the assessee has failed to prove identity, credit worthiness and genuineness of the credit of Rs 20,00,000/- in her books of accounts.

6.3. In view of the above, an addition of Rs 20,00,000/- is made in the hands of the assessee u/s 68 of IT Act.

I am satisfied that the assessee has concealed the income, therefore, Penalty proceedings u/s 271 (l)(c) of the Income Tax Act, 1961 is to be initiated separately. (Addition:..Rs,20,00,000/-)

11. Thus, it is evident that the above additions made by the A.O. are not emanating from any incriminating material found during the search. But the additions were made on the basis of the documents produced during the assessment proceedings.

12. The Hon'ble Delhi High Court in the case of CIT Vs. Kabul Chawla in ITA No. 707, 709 and 713/2014 dated 28/08/2015 held that in the absence of any incriminating material no addition can be made in the assessment order passed u/s 153A/143(3) of the Act in following manners:-

“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 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 relatable 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.

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.

39. The question framed by the Court is answered in favour of the Assessee and against the Revenue.”

13. By respectfully following the above ratio laid down by the jurisdictional High Court in the case of Kabul Chalwa (supra) we allow the Ground No. 2 to 4 of the assessee and the addition sustained by the Ld.CIT(A) thereon is hereby set aside.

14. Since we have allowed the appeal on the legal issue by following the ratio laid down in the case of Kabul Chalwa (supra), at the stage we refrain from going into the issues involved in the Ground No. 5 to 9 of the Assessee and Ground No. 2 to 4 of the Revenue and the same is kept open.

15. In the result, the appeal of the assessee in ITA No. 7993/Del/2019 is partly allowed and the Appeal of the Revenue in ITA No. 8079/Del/2019 is dismissed.

Order pronounced in the Open Court on : 23.02.2023.

Sd/-
(B. R. R. KUMAR)
ACCOUNTANT MEMBER
Dated : 23 /02/2023

Sd/-
(YOGESH KUMAR U.S.)
JUDICIAL MEMBER

MEHTA/R.N Sr. PS

Copy forwarded to :

1. Appellants;
2. Respondents;
3. CIT
4. CIT (Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI