

| आयकर अपीलीय अधिकरण न्यायपीठ, गुवाहाटी|
IN THE INCOME TAX APPELLATE TRIBUNAL
“GUWAHATI” BENCH, GUWAHATI
BEFORE SHRI RAJPAL YADAV, HON’BLE VICE PRESIDENT
&
DR. MANISH BORAD, HON’BLE ACCOUNTANT MEMBER

I.T.A. No. 172/GTY/2018
Assessment Year: 2012-13

Assistant Commissioner of Income Tax, Circle-3, Guwahati	Vs	M/s. Anupam Nirman Private Limited 1 st Floor, Kabita Mansion Rajgarh Link Road Chandmari Guwahati - 781003 [PAN : AAICA 4965 B]
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अपीलार्थी/ (Appellant)	प्रत्यर्थी/ (Respondent)
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Assessee by :	Shri Kishor Jain, FCA
Revenue by :	Shri N.T. Sherpa, JCIT

सुनवाई की तारीख/Date of Hearing : 20/12/2022
घोषणा की तारीख /Date of Pronouncement: 22/02/2023

आदेश/ORDER

PER DR. MANISH BORAD, ACCOUNTANT MEMBER :

The present appeal is directed at the instance of the revenue against the order of the learned Commissioner of Income Tax (Appeals) - Guwahati-2, Guwahati, (hereinafter the “ld. CIT(A)”) dt. 27/03/2018, passed u/s 250 of the Income Tax Act, 1961 (“the Act’), for Assessment Year 2012-13.

2. The revenue has raised the following grounds of appeal:-

“(i) That on the facts and circumstances of the case as well as on the points of law, the Ld. CIT(A) has erred in deleting the addition of Rs. 1,20,77,310/- on account estimation of the net profit @ 7% of total turnover for the year.

(ii) That on the facts and circumstances of the case as well as on the points of law, the Ld. CIT(A) erred in deleting the addition of Rs. 49,05,724/- on account of disallowance towards interest expense against loan under section 40(a)(ia) of the Income Tax Act, 1961.

(iii) That on the facts and circumstances of the case as well as on the points of law, the Ld. CIT(A) erred in deleting the addition of Rs. 11,26,247/- on

account of disallowance towards service tax under section 43B of the Income Tax Act, 1961.

(iv) That on the facts and circumstances of the case as well as on the points of law, the Ld. CIT(A) erred in quashing the assessment order for the year.

(v) For these and such other grounds that may be urged at the time of hearings, the Hon'ble ITAT may please set aside the order of the Ld. CIT(A) and restore the order of the Assessing Officer."

3. At the outset, ld. Counsel for the assessee stated that the additions made by the ld. Assessing Officer in the proceedings carried out u/s 153C/143(3) of the Act, are not based on any incriminating material found during the course of search and, therefore, in view of the settled precedents including the judgment of the Hon'ble Delhi Court in the case of *CIT vs Kabul Chawla (2016) 380 ITR 573*, and several other judgments, the additions made by the Assessing Officer deleted by the ld. CIT(A). Though the ld. D/R supported the order of the ld. CIT(A), he could not controvert the fact that the additions in question are no have any nexus with any incriminating material found during the course of search.

4. We have heard rival contentions and perused the record placed before us.

5. Search and seizure proceedings in the case of Anupam Sarma and Group, was carried out u/s 132 of the Act on 20/10/2014. So far as the assessee is concerned, the proceedings was carried out by issuing notice u/s 153C of the Act. In compliance, the assessee filed the return on 07/04/2016 declaring income of Rs.4,33,50,880/-. The additions were made by the Assessing Officer towards estimating of profit @ 7% as against 5.47% declared by the assessee, disallowance u/s 40(a)(ia) of the Act and disallowance of service tax. We notice that all these additions made by the ld. Assessing Officer did not have any nexus with incriminating material

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found during the course of search. So far the estimation of net profit, turnover declared by the assessee has been accepted and only the rate of net profit has been estimated at 7% against 5.47% declared by the assessee. So far the disallowance u/s 40(a)(ia) of the Act is concerned, the same is arising only out of the expenses declared in the regular books of accounts. Similarly, the service tax has been disallowed alleging that the same has not been deposited with the due date. It remains an admitted fact that all these additions have been made only on the basis of financial statements filed by the assessee in the books of accounts regularly maintained and there is no whisper whatsoever, of any incriminating material. Considering the fact, that search u/s 132 of the Act, was carried out on 20/10/2014, return of income was filed on 12/01/2013 and the year under appeal i.e., Assessment Year 2012-13 comes in the category of completed assessment as the time limit for issue of notice u/s 143(2) of the Act i.e., 30/09/2013, stood expired before the date of search and there was no proceedings pending u/s 143(3)/147 of the Act, at the time of conducting of search. Since Assessment Year 2012-13 is a completed non abated assessment, additions could have been made only on the basis of incriminating material. For this proposition, Id. CIT(A) has rightly placed reliance on the judgment of the Hon'ble Delhi Court in the case of *CIT vs. Kabul Chawla (supra)*, decision of the Special Bench of ITAT, Mumbai in the case of *All Cargo Global Logistics Limited vs. DCIT* and on the decision of the Hon'ble Calcutta High Court in the case of *CIT vs. Veerprabhu Marketing Ltd. (2016) 73 Taxmann.com 149 (Cal)*.

6. Though the ratio of law is well settled, still we would like to reproduce the findings of the Hon'ble Delhi High Court in the case of *Kabul*

Chawla (supra), which is directly applicable on the issue in dispute before us and the relevant finding of the ld. CIT(A):-

"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.

7. In the case of Commissioner of Income Tax vs. Kurele Paper Mills P. Ltd. [2015 (9) TMI 115; (2016) 380 ITR 571, it was held as follows, by the Hon'ble Delhi High Court:

"The Court finds that the order of the CIT(Appeals) reveals that there is a factual finding that "no incriminating evidence related to share capital issued was found during the course of search as is manifest from the order of the AO." Consequently, it was held that the AO was not justified in invoking Section 68 of the Act for the purposes of making additions on account of share capital."

The present legal position is that there can be no addition under Section 153C for a particular assessment year, in which the assessment is complete and is not pending, without there being some "incriminating material" qua that assessment which would justify such an addition. Hence in an assessment under Section 153C, in absence of any "incriminating material", the completed assessment has to be reiterated. In other words, the completed assessment cannot be disturbed in the absence of "incriminating material". Therefore, there may be documents available and pertaining to the assessment year in question, but that does not satisfy the requirement of law that "there must be incriminating material" and not merely some material.

8. Similarly, the Hon'ble Bombay High Court in the case of Commissioner of Income Tax vs. Continental Warehousing Corporation (Nhava Sheva) Ltd. [(2015) 58 taxmann.com 78 (Bom)] accepted the plea of the Appellant that if no incriminating material was found during the course of search in respect of any issue, then no additions in respect of any issue can be made to the assessment under Section 153A and 153C of the Act.

9. The ratio of the judgment of the Hon'ble Delhi High Court in the case of Kabul Chawla (supra) was followed in the cases of Principal Commissioner of Income Tax vs. Saumya Construction Pvt. Ltd. [(2016) 387 ITR 529 (Guj)], Principal Commissioner of Income Tax 1 vs. Devangi alias Rupa [2017-TIOL-319-HC-AHM-IT], CIT vs. IBC Knowledge Park Pvt. Ltd. [(2016) 385 ITR 346 (Kar)], Pr. CIT 2 vs. Salasar Stock Broking Ltd. [2016-

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TIOL-2099-HC-KOL-IT] and CIT vs. Gurinder Singh Bawa [(2016) 386 ITR 483 (Bom)]. Reference was also made to the two decisions of that Court in the case of Pr. CIT vs. Mahesh Kumar Gupta [2016-TIOL-2994-HC-Del] and the decision, dated 7th February, 2017 in ITA Nos. 61/2017 and 62/2017 (The Pr. Commissioner of Income Tax-9 vs. Ram Avtar Verma) where the decision in Kabul Chawla (supra) was followed. Also, very recently in the case of Pr. CIT vs. Meeta Gutgutia [in ITA 306/2017 dated 25.05.2017], the same ratio was followed by the Hon'ble Delhi High Court.

10. Respectfully following the judgment of the Hon'ble Courts and as the order of the Id. CIT(A) is based on the same, we find no reason to interfere with the same. Thus, grounds of appeal raised by the revenue are dismissed.

11. In the result, appeal of the revenue is dismissed.

Order pronounced in the Court on 22nd February, 2023 at Guwahati.

Sd/-

**(RAJPAL YADAV)
VICE-PRESIDENT**

Sd/-

**(DR. MANISH BORAD)
ACCOUNTANT MEMBER**

Kolkata, Dated 22/02/2023

SC S.P.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. संबंधित आयकर आयुक्त / Concerned Pr. CIT
4. आयकर आयुक्त (अपील)/ The CIT(A)-
5. विभागीय प्रतिनिधि ,आयकर अपीलीय अधिकरण, गुवाहाटी /DR,ITAT, Guwahati,
6. गार्ड फाईल /Guard file.

आदेशानुसार/ BY ORDER,
TRUE COPY

Assistant Registrar
आयकर अपीलीय अधिकरण
ITAT, Guwahati