

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

**BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER
AND
SHRI M. BALAGANESH, ACCOUNTANT MEMBER**

ITA Nos.4362 to 4366/Del/2019
Assessment Years: 2005-06 to 2009-10

M/s. Kundan Rice Mills Ltd., E-4, Industrial Area, Panipat, Haryana	Vs.	ACIT, Central Circle, Karnal
PAN :AAACK7098P		
(Appellant)		(Respondent)

And

ITA Nos.5172 to 5176/Del/2019
Assessment Years: 2005-06 to 2009-10

ACIT, Central Circle, Panipat	Vs.	M/s. Kundan Rice Mills Ltd., E-4, Industrial Area, Panipat, Haryana
PAN :AAACK7098P		
(Appellant)		(Respondent)

Assessee by	Sh. Ashwani Kumar, CA Sh. Aditya Kumar, CA Sh. Hitesh Minhas, CA
Department by	Ms. Sapna Bhatia, CIT (DR)

Date of hearing	08.05.2023
Date of pronouncement	16.05.2023

ORDER

PER BENCH:

Captioned cross appeals by the assessee and the Revenue arise out of separate orders of learned Commissioner of Income Tax (Appeals)-3, Gurgaon, pertaining to assessment years 2005-06, 2006-07, 2007-08, 2008-09 and 2009-10.

2. Since the appeals relate to the same assessee and involve identical issues, they have been clubbed together and disposed of in a consolidated order, for the sake of convenience.

3. The only common issue arising in all these appeals relate to addition/deletion made on account of estimation of profit on alleged bogus sales.

4. Briefly the facts are, the assessee is a resident corporate entity. As stated by the Assessing Officer, the assessee is engaged in the business of import and export of precious stones, import and export of pulses, pharma, polymers, dyes and chemicals. The assessee is also a manufacturer, trader and exporter of rice. For the assessment years under dispute, the assessee had filed its return of income under section 139(1) of the Income-tax Act, 1961 (for short 'the Act') in regular course. For assessment years 2005-06, 2006-07 and 2008-09, the assessments were originally completed under section 143(3) of the Act. Whereas, for assessment years 2007-08 and 2009-10, there were no scrutiny assessment but returns were processed under section 143(1) of the Act. Be that as it may, a search and seizure operation under section 132 of the Act was conducted in case of the assessee and other related parties on 16.03.2011. Consequent to search and

seizure operation proceedings under section 153A of the Act were initiated for the impugned assessment years. In course of assessment proceedings under section 153A of the Act, the Assessing Officer, based on materials available on record, found that in the relevant assessment years, amongst others, the assessee had sold chemicals/polymers and wax to M/s. Dee Kay Trade Centre and M/s. J.S. Enterprises. He further found that on the date of search and seizure operation conducted in case of the assessee, a survey authorization was also issued in the name of M/s. Dee Kay Trade Centre but the party was not found in existence at the given address. He further observed that as per the information available with the department, huge cash deposits were made in various bank accounts of the aforesaid two parties and same or equal amount were transferred on the same day or next day to the account of the assessee company. He further noted that on the date of search, the books of account of the assessee company relating to the assessment years 2004-05 to 2007-08 were not found in the business premises of the assessee. Even, the assessee did not produce the books of account for this purpose before the Investigation Wing during post search inquiry. As observed by the Assessing Officer, in

course of assessment proceeding, he called upon various banks for information under section 133(6) of the Act regarding the bank accounts held by M/s. Dee Kay Trade Centre and M/s. J.S. Enterprises. On perusal of the information supplied by the concerned banks, the Assessing Officer found that both M/s. Dee Kay Trade Centre and M/s. J.S. Enterprises are proprietary concern of Sh. Ram Kishan. He observed that the address given on the two bank accounts are bogus and not real address of the concerned person. The Assessing Officer observed that the photograph of Sh. Ram Kishan attached to the bank account does not indicate that he is a business man having turnover of more than Rs. 70 crores. The Assessing Officer observed, independent inquiry carried out by him to ascertain the existence of M/s. Dee Kay Trade Centre and M/s. J.S. Enterprises did not bear any result as the letters/summons issued returned back undelivered. In view of the aforesaid, the Assessing Officer called upon the assessee to produce the proprietor of M/s. Dee Kay Trade Centre and M/s. J.S. Enterprises. However, the assessee failed to produce them. From the sale invoices relating to these two entities, the Assessing Officer observed that such invoices do not bear vehicle number, GR number, date of discharge etc. No gate

pass was also produced. Thus, based on the aforesaid facts available before him, the Assessing Officer concluded that the amount received from the aforesaid two parties towards sale of products are in the nature of unexplained cash credit under section 68 of the Act. Thus, after rejecting the books of account, the Assessing Officer proceeded to compute the profit of the assessee. From the materials placed before him, the Assessing officer noticed that the gross profit rate shown by the assessee in different assessment years are as under:

<i>Assessment Year 2005-06</i>	<i>3.41%</i>
<i>Assessment Year 2006-07</i>	<i>2.59%</i>
<i>Assessment Year 2007-08</i>	<i>4.09%</i>
<i>Assessment Year 2008-09</i>	<i>3.70%</i>
<i>Assessment Year 2009-10</i>	<i>3.43%</i>

5. The Assessing Officer observed, as per data collected from capitaline database, the GP rate in respect of chemical industries comes to 6.75%. Thus, applying the said GP rate of 6.75% on entire sales turnover of the assessee, the Assessing Officer computed the profit of the assessee and made additions in different assessment years, as under:

<i>Assessment Year 2005-06</i>	<i>3,49,06,000/-</i>
<i>Assessment Year 2006-07</i>	<i>5,88,14,000/-</i>
<i>Assessment Year 2007-08</i>	<i>3,80,14,000/-</i>
<i>Assessment Year 2008-09</i>	<i>6,08,84,000/-</i>
<i>Assessment Year 2009-10</i>	<i>5,32,26,000/-</i>

6. Being aggrieved with the aforesaid additions, the assessee filed appeals before learned Commissioner (Appeals). After considering the submission of the assessee in the context of facts and materials on record, learned Commissioner (Appeals) observed that the doubt regarding genuineness of sales is only with regard to two parties, viz., M/s. Dee Kay Trade Centre and M/s. J.S. Enterprises. Insofar as sales effected to other parties are concerned, there is no adverse material brought on record by the Assessing Officer. Thus, he concluded that the GP rate of 6.75% is to be applied only in respect of sales effected to M/s. Dee Kay Trade Centre and M/s. J.S. Enterprises. As a result of the aforesaid direction of learned Commissioner (Appeals), the additions made by the Assessing Officer got reduced as under:

<i>Assessment Year 2005-06</i>	<i>19,95,817/-</i>
<i>Assessment Year 2006-07</i>	<i>1,08,79,648</i>
<i>Assessment Year 2007-08</i>	<i>48,06,806/-</i>
<i>Assessment Year 2008-09</i>	<i>54,99,242/-</i>
<i>Assessment Year 2009-10</i>	<i>18,36,657/-</i>

7. Being aggrieved with aforesaid decision, both assessee and the Revenue are before us. While the assessee is seeking deletion of the additions sustained by learned Commissioner (Appeals), the Revenue is aggrieved with partial relief granted by learned

Commissioner (Appeals) qua the additions made by the Assessing Officer.

8. Before us, learned counsel appearing for the assessee submitted that the additions made by the Assessing Officer and partly sustained by learned First Appellate Authority are not based on any incriminating material found in course of search and seizure operation conducted on the assessee. Drawing our attention to the assessment orders, he submitted, there is no reference to any incriminating material while making additions. He submitted, the Assessing Officer has made the additions purely on estimate basis by substituting the GP rates disclosed by the assessee. Thus, he submitted, the additions made in absence of any incriminating material in unabated assessment proceedings are unsustainable. In support of such contention, learned counsel relied upon a decision of the Hon'ble Supreme Court in case of PCIT Vs. Abhisar Buildwell Pvt. Ltd., Civil Appeal No.6580 of 2021 and others, judgment dated 24th April, 2023.

9. Without prejudice, he submitted, the additions are unsustainable on merits as well. He submitted, the Assessing Officer as well as the first appellate authority have treated the sales made to M/s. Dee Kay Trade Centre and M/s. J.S.

Enterprises by raising doubt that both the entities are non-existent/untraceable. He submitted, when the proprietor of the concerned entities was having a valid PAN, filing return of income and has a number of bank accounts, doubt regarding the existence of the parties, cannot be entertained. He submitted, even assessments in case of the proprietary concerns have been made under section 144 of the Act for assessment years 2006-07 and 2007-08, which establishes the fact that the parties are in existence. Proceeding further, he submitted, when the first appellate authority has accepted the GP rate shown by the assessee in respect of sales effected to all other parties, there is no valid reason to apply a different GP rate to the sales effected to the two parties, when the closing stock has been accepted. Thus, he submitted, the additions sustained by learned Commissioner (Appeals) should be deleted.

10. Learned Departmental Representative submitted that simultaneously with the search and seizure operation conducted on the assessee, a survey authorization was also issued in case of M/s. Dee Kay Trade Centre. However, the party was not found at the given address. She submitted, efforts of the Assessing Officer to trace the proprietor of M/s. Dee Kay Trade Centre and M/s.

J.S. Enterprises did not bear any result despite issuance of notice under section 133(6) as well as summons under section 131 of the Act, as, the concerned parties were never found. Thus, she submitted, the identity of the parties remained unverifiable. She submitted, since, the survey operation was carried out along with search operation, wherein genuineness of sales made to M/s. Dee Kay Trade Centre and M/s. J.S. Enterprises could not be established, they constitute incriminating material. Therefore, the Assessing Officer was justified in making the additions on account of bogus sales. In support of such contention, she relied upon a decision of the Hon'ble Supreme Court in case of CIT Vs. S. Ajit Kumar, [2018] 404 ITR 526.

11. As regards the merits of the addition, learned Departmental Representative submitted, the assessee failed to furnish any evidence to establish on record that the transactions with M/s. Dee Kay Trade Centre and M/s. J.S. Enterprises are genuine. She submitted, the inquiry conducted by the Assessing Officer clearly revealed that both the aforesaid entities are not in existence. Therefore, the sales effected by the assessee to the concerned parties are non-genuine. She submitted, when the assessee indulged in the activity of bogus sales and the books of

account have been rejected, the GP rate adopted by the Assessing Officer has to be applied to the entire sales turnover. Thus, she submitted, the additions made by the Assessing Officer may be restored.

12. We have considered rival submissions and perused the materials on record. Insofar as factual aspect of the issue is concerned, there is no dispute that as on the date of search on 16.03.2011, assessments for the assessment years under dispute stood concluded. In other words, as on the date of search, no assessment has abated. It is trite law, in respect of any assessment year for which assessment has not abated on the date of search, no addition can be made in absence of any incriminating material found in search relating to such addition. In a recent decision of the Hon'ble Supreme Court in case of PCIT Vs. Abhisar Buildwell Pvt. Ltd. (supra), the following ratio has been laid down:

“11. As per the provisions of Section 153A, in case of a search under Section 132 or requisition under Section 132A, the AO gets the jurisdiction to assess or reassess the 'total income' in respect of each assessment year falling within six assessment years. However, it is required to be noted that as per the second proviso to Section 153A, the assessment or re-assessment, if any, relating to any assessment year falling within the period of six assessment years pending on the date of initiation of the search under Section 132 or making of requisition under Section 132A, as the case may be, shall abate. As

per sub-section (2) of Section 153A, if any proceeding initiated or any order of assessment or reassessment made under sub-section (1) has been annulled in appeal or any other legal proceeding, then, notwithstanding anything contained in sub-section (1) or section 153, the assessment or reassessment relating to any assessment year which has abated under the second proviso to subsection (1), shall stand revived with effect from the date of receipt of the order of such annulment by the Commissioner. Therefore, the intention of the legislation seems to be that in case of search only the pending assessment/reassessment proceedings shall abate and the AO would assume the jurisdiction to assess or reassess the 'total income' for the entire six years period/block assessment period. The intention does not seem to be to re-open the completed/unabated assessments, unless any incriminating material is found with respect to concerned assessment year falling within last six years preceding the search. Therefore, on true interpretation of Section 153A of the Act, 1961, in case of a search under Section 132 or requisition under Section 132A and during the search any incriminating material is found, even in case of unabated/completed assessment, the AO would have the jurisdiction to assess or reassess the 'total income' taking into consideration the incriminating material collected during the search and other material which would include income declared in the returns, if any, furnished by the assessee as well as the undisclosed income. However, in case during the search no incriminating material is found, in case of completed/unabated assessment, the only remedy available to the Revenue would be to initiate the reassessment proceedings under sections 147/48 of the Act, subject to fulfilment of the conditions mentioned in sections 147/148, as in such a situation, the Revenue cannot be left with no remedy. Therefore, even in case of block assessment under section 153A and in case of unabated/completed assessment and in case no incriminating material is found during the search, the power of the Revenue to have the reassessment under sections 147/148 of the Act has to be saved, otherwise the Revenue would be left without remedy.

12. If the submission on behalf of the Revenue that in case of search even where no incriminating material is found during the course of search, even in case of unabated/completed assessment, the AO can assess or reassess the income/total income taking into consideration the other material is accepted, in that case, there will be two assessment orders, which shall not be permissible under the law. At the cost of repetition, it is observed that the assessment under Section 153A of the Act is linked with the search and requisition under Sections 132 and 132A of the Act. The object of Section 153A is to bring under tax the undisclosed income which is found during the course of search or pursuant to search or requisition. Therefore, only in a case where the undisclosed income

is found on the basis of incriminating material, the AO would assume the jurisdiction to assess or reassess the total income for the entire six years block assessment period even in case of completed/unabated assessment. As per the second proviso to Section 153A, only pending assessment/reassessment shall stand abated and the AO would assume the jurisdiction with respect to such abated assessments. It does not provide that all completed/unabated assessments shall abate. If the submission on behalf of the Revenue is accepted, in that case, second proviso to section 153A and subsection (2) of Section 153A would be redundant and/or rewriting the said provisions, which is not permissible under the law.

13. For the reasons stated hereinabove, we are in complete agreement with the view taken by the Delhi High Court in the case of *Kabul Chawla (supra)* and the Gujarat High Court in the case of *Saumya Construction (supra)* and the decisions of the other High Courts taking the view that no addition can be made in respect of the completed assessments in absence of any incriminating material.

14. In view of the above and for the reasons stated above, it is concluded as under:

i) that in case of search under Section 132 or requisition under Section 132A, the AO assumes the jurisdiction for block assessment under section 153A;

ii) all pending assessments/reassessments shall stand abated;

iii) in case any incriminating material is found/unearthed, even, in case of unabated/completed assessments, the AO would assume the jurisdiction to assess or reassess the 'total income' taking into consideration the incriminating material unearthed during the search and the other material available with the AO including the income declared in the returns; and

iv) in case no incriminating material is unearthed during the search, the AO cannot assess or reassess taking into consideration the other material in respect of completed assessments/unabated assessments. Meaning thereby, in respect of completed/unabated assessments, no addition can be made by the AO in absence of any incriminating material found during the course of search under Section 132 or requisition under Section 132A of the Act, 1961. However, the completed/unabated assessments can be re-opened by the AO in exercise of powers under Sections 147/148 of the Act, subject to fulfilment of the conditions as envisaged/mentioned under sections 147/148 of the Act and those powers are saved.

The question involved in the present set of appeals and review petition is answered accordingly in terms of the above and the appeals and review petition preferred by the Revenue are hereby dismissed. No costs.”

13. As could be seen from the aforesaid observations of Hon’ble Supreme Court, in case, no incriminating material is unearthed during the search, the Assessing Officer cannot assess or reassess income taking into consideration the other materials in respect of completed unabated assessments. Keeping in perspective the aforesaid ratio laid down by Hon’ble Supreme Court, if we examine the facts involved in the present appeals, it can be seen that the addition made by the Assessing Officer by estimating the GP rate is not with reference to any incriminating material found as a result of search and seizure operation conducted on assessee. At least, there is no reference of such material in the assessment orders. Though, before us, learned Departmental Representative made a valiant attempt to establish a link between the search and seizure operation conducted in case of the assessee and the survey authorization issued in the name of M/s. Dee Kay Trade Centre, however, we are not convinced. Merely because simultaneously with the search and seizure operation conducted in case of the assessee, a survey

authorization was issued in the name of M/s. Dee Kay Trade Centre, it will not mean that the survey authorization was based on any incriminating material found during the search and seizure operation. At least, the aforesaid fact is not borne out from the assessment orders.

14. In any case of the matter, out of the entire sales turnover of the assessee in the relevant assessment years, the doubt/suspicion of the Assessing Officer is only with regard to sales effected to two parties, viz., M/s. Dee Kay Trade Centre and M/s. J.S. Enterprises. As regards the other purchasing parties, no adverse material or information has been collected by the Assessing Officer. Even, with regard to these two parties also, there is no incriminating material found as a result of search. Because of this fact only, the Assessing Officer instead of disallowing the entire sales effected to the parties, has proceeded to make additions enhancing the GP rate. In any case of the matter, the additions made by the Assessing Officer by enhancing the GP rate is purely based on estimation and guess work and not as a result of any incriminating material found during search and seizure operation. That being the factual position emerging on record, applying the ratio laid down by the Hon'ble Supreme

Court in case of PCIT Vs. Abhisar Buildwell Pvt. Ltd. (supra), no addition can be made in the assessment under section 153A of the Act. Thus, on the aforesaid reasoning alone, the additions made by the Assessing Officer would not be sustainable.

15. Even otherwise also, in our view, the assessee has a strong case on merits as well. As discussed earlier, the additions made by estimating the GP rate is based on the reasoning that two parties to whom the assessee had effected sales are not traceable and appear to be non-genuine. It is evident, though, the Assessing Officer has stated that the parties were not found at the given address, however, it is a fact on record that the proprietor of both the concerned parties is having PAN issued by the department. Thus, it is a fact that the concerned part is on the rolls of the department. It is further evident, in course of assessment proceeding, the Assessing Officer has issued notices under section 133(6) of the Act to various banks, wherein, the concerned purchasing parties were having their accounts. In response to the notices issued under section 133(6) of the Act, the concerned banks have provided details of bank accounts of the concerned parties/entities. On verifying these bank accounts statements, the Assessing Officer has noticed that just prior to

issuance of cheques to the assessee, cash deposits have been made in bank accounts. The Assessing Officer has further stated that from the photograph of the proprietor in the bank account, it does not appear that party will be having a turnover of more than Rs.70 crores. The aforesaid reasonings of the Assessing Officer are totally irrelevant. When the concerned parties are having so many bank accounts, it has to be believed that the parties were in existence at the relevant point of time, as the bank accounts reveal regular transaction. In any case of the matter, though, the Assessing Officer has disbelieved the sales effected by the assessee to the aforesaid two parties, however, consciously, he has not disallowed the entire sales made to the parties but has estimated the GP rate. This presupposes that, to some extent, the Assessing Officer believed that sales were, indeed, effected by the assessee, though, the parties to whom the assessee sold goods remained unverified.

16. Be that as it may, ultimately, the Assessing Officer has applied GP rate of 6.7% to entire sales turnover of the assessee. This, in our view, is unacceptable, as, except two parties, the Assessing Officer has not found anything adverse in respect of sales made to others. Therefore, he should not have applied the

GP rate of 6.75% to entire sales turnover. To that extent, learned Commissioner (Appeals) was justified in reversing the decision of the Assessing Officer. However, insofar as the applicability of the GP rate of 6.75% to sales effected to M/s. Dee Kay Trade Centre and M/s. J.S. Enterprises are concerned, there is no difference in the products sold by the assessee to all the parties. Therefore, if the GP shown by the assessee in respect of sales effected to other parties is acceptable, there is no reason why the same GP rate will not apply to the sales effected to M/s. Dee Kay Trade Centre and M/s. J.S. Enterprises. This is so because, when there is similarity in the products sold, there cannot be much difference in the GP rate. For the aforesaid reasons, we hold that the additions sustained by learned Commissioner (Appeals) in different assessment years under dispute deserves to be deleted. Accordingly, we do so.

17. In the result, assessee's appeals are allowed, whereas, Revenue's appeals are dismissed.

Order pronounced in the open court on 16th May, 2023

Sd/-
(M. BALAGANESH)
ACCOUNTANT MEMBER

Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER

Dated: 16th May, 2023.
RK/-

ITA Nos.4362 to 4366/Del/2019
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Copy forwarded to:

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

Asst. Registrar, ITAT, New Delhi