

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

Before Sh. C. M. Garg, Judicial Member

Dr. B. R. R. Kumar, Accountant Member

ITA No. 4279/Del/2017 : Asstt. Year : 2009-10

ACIT, Central Circle-5, New Delhi	Vs	M/s N. M. Industries Pvt. Ltd., R/o 108-109, Vardhman City Plaza, Asaf Ali Road, New Delhi-110002
(APPELLANT)		(RESPONDENT)
PAN No. AACCN7246G		

CO No. 46/Del/2021 : Asstt. Year : 2009-10

M/s N. M. Industries Pvt. Ltd., R/o 108-109, Vardhman City Plaza, Asaf Ali Road, New Delhi-110002	Vs	ACIT, Central Circle-5, New Delhi
(APPELLANT)		(RESPONDENT)
PAN No. AAHCM2933Q		

ITA No. 1262/Del/2018 : Asstt. Year : 2012-13

DCIT, Circle-16(1), New Delhi	Vs	M/s N. M. Industries Pvt. Ltd., Old No. 1889 & New No. 3957-58, Lahori Gate, Delhi-110006
(APPELLANT)		(RESPONDENT)
PAN No. AACCN7246G		

CO No. 194/Del/2022 : Asstt. Year : 2012-13

M/s N. M. Industries Pvt. Ltd., Old No. 1889 & New No. 3957-58, Lahori Gate, Delhi-110006	Vs	ACIT, Central Circle-5, New Delhi
(APPELLANT)		(RESPONDENT)
PAN No. AAHCM2933Q		

ITA No. 4280/Del/2017 : Asstt. Year : 2011-12

ACIT, Central Circle-5, New Delhi	Vs	Mohit Nidhi Agro Oil Pvt. Ltd., 56, Chawla Complex, Vikas Marg, Shakarpur, New Delhi-110092
(APPELLANT)		(RESPONDENT)
PAN No. AAHCM2933Q		

CO No. 47/Del/2021 : Asstt. Year : 2011-12

Mohit Nidhi Agro Oil Pvt. Ltd., 56, Chawla Complex, Vikas Marg, Shakarpur, New Delhi-110092 (APPELLANT)	Vs	ACIT, Central Circle-5, New Delhi (RESPONDENT)
PAN No. AAHCM2933Q		

Assessee by : Sh. C. S. Anand, CA

Revenue by : Sh. Subhra J. Chakraborty, CIT-DR

Date of Hearing: 12.09.2023

Date of Pronouncement: 17.10.2023

ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeals have been filed by the assessee and the Revenue against the orders of Id. CIT(A)-25, New Delhi dated 28.03.2017 and 01.12.2017. Since, the issue involved in all these appeals are similar, they were heard together and being adjudicated by a common order.

2. In ITA No. 4279/Del/2017, following grounds have been raised by the Revenue in this appeal:

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

2. On the facts and circumstances of the case, the CIT(A) has erred in deleting the addition of unexplained share capital amounting to Rs. 3,20,00,000/-.

3. On the facts and circumstances of the case, the CIT(A) has erred in ignoring the findings of inquiry conducted during search and assessment proceedings, wherein it was established that the investor companies were mere paper companies.

4. On the facts and circumstances of the case, the CIT(A) has erred in holding that the seized document which shows expenses related to share-capital is not relevant for this year."

3. In ITA No. 4280/Del/2017, following grounds have been raised by the Revenue in this appeal:

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

2. On the facts and circumstances of the case, the CIT(A) has erred in deleting the addition of unexplained share capital amounting to Rs. 21,10,75,120/-.

3. On the facts and circumstances of the case, the CIT(A) has erred in ignoring the findings of inquiry conducted during search and assessment proceedings, wherein it was established that the investor companies were mere paper companies.

4. On the facts and circumstances of the case, the CIT(A) has erred in holding that the seized document which shows expenses related to share-capital is not relevant for this year."

4. In ITA No. 1262/Del/2018, following grounds have been raised by the Revenue in this appeal:

"1. The order of the Ld. CIT(A) is not correct in law and on facts.

2. Whether on the facts & circumstances of the case, the Ld. CIT(A) has erred in deleting the addition of Rs. 10,00,00,000/- made on account of share capital u/s 68 on the facts and circumstances of the case?

3. Whether on the facts & circumstances of the case, the Ld. CIT(A) has erred in ignoring the findings of inquiry conducted during search and assessment proceedings, wherein it was established that the investor companies were mere paper companies?

4. "Whether on the facts & circumstances of the case, the Ld. CIT(A) has erred in holding that the seized document which shows expenses related to share capital is not relevant for this year?

5. Whether on the facts & circumstances of the case, the Ld. CIT(A) has erred in holding that no search was conducted on the appellant and holding that the assessment order passed u/s 153A/143(3) in case of the assessee for AY 2012-13 are not in accordance with law and thus are liable to be quashed ignoring the facts that

the assessee was also covered under the search as mentioned in para-1' of the AO order itself?

6. Whether on the facts & circumstances of the case, the Id. CIT(A) has erred in relying on the judgment of Hon'ble Delhi High Court in the case of Kabul Chawla in holding that the assessment order passed by u/s 153A/143(3) in case of the assessee for AY 2012-13 are not in accordance with law and thus are liable to be quashed ignoring the fact that issue of absence of incriminating document for additions made u/s 153A/153C is pending before Hon'ble Supreme Court?"

5. Facts as taken from the record and arguments are as under:

6. The assessee is a company, which was incorporated on 20.03.2008. The assessee had filed its return of income declaring total income of Rs. 3,16,34,340/- on 31.01.2013. The proceedings initiated u/s 153A were dropped by the Assessing Officer. Thereafter, the proceedings u/s 153C were initiated by the A.O. Accordingly, the A.O. issued notice u/s 153C on 05.11.2015, which were served on 09.12.2015. Thereafter, the proceedings u/s 153C were dropped by the A.O. Thereafter, the proceedings u/s 153A were once again initiated by the Assessing Officer by issuing notice u/s 153A on 04.01.2016.

Addition u/s 68:

7. The Assessing Officer made addition u/s 68 on account of share capital received of Rs.10 Cr. Before the Id. CIT(A), the assessee submitted that the A.O. had made addition of the entire amounts received from outside parties towards share capital u/s 68, while not entertaining the assessee's claims that (i) no incriminating document relating to the share capital received by the assessee, was seized during the course of search & seizure operation; (ii) Sh. Anand Sharma of Kolkata

was not the director in any of the companies, who had subscribed the share capital of the assessee and (iii) its case is squarely covered by the recent decision of the jurisdictional high court i.e. Hon'ble Delhi High Court in the case of Sh. Kabul Chawla.

8. The Id. CIT(A) has observed as under:

1. That a survey operation u/s 133A was conducted on the appellant's premises (the one & only premises of the appellant) on 30.09.2013 and during such survey operation certain papers were impounded.
2. That it may be worth mentioning here that on the same day i.e. 30.09.2013, a search & seizure operation u/s 132 was carried out at the business premises of M/s N.C.M.L. Industries Ltd. at 108-109, Vardhman City 2 Plaza, Asaf Ali Road, Delhi-06.
3. The case of the appellant alongwith the case of M/s N.C.M.L. Industries Ltd. & others was centralized in Central Circle-5, New Delhi, as per order dt. 15.04.2014 passed by the Id. CIT, Delhi-V, New Delhi vide F. No. CIT-V/Centralization/2013-14/17.
4. Thereafter the Id ACIT, C.C.-5, New Delhi had issued notice u/s 153A on 30.12.2014 / 07.01.2015.
5. Subsequently the Id ACIT, C.C.-5 , New Delhi had dropped such proceedings.
6. Thereafter the Id DCIT, C.C-5, New Delhi had issued notice u/s 153C on 05.11.2015.
7. Subsequently ACIT, C.C.-5 , New Delhi had dropped such proceedings too.
8. Thereafter the DCIT, C.C-5, New Delhi had once again issued notice u/s 153A on 04.01.2016.

9. That such conduct of the Id DCIT, C.C-5, New Delhi clearly shows that he was in a fix, as to whether the proceedings initiated u/s 153A were in accordance with law or not.

9. For the sake of ready reference and brevity, the operative part of the order of the Id. CIT(A) is reproduced as under:

"I have considered the assessment order, the grounds of appeal raised by the appellant, facts of the case and the appellant's submissions. I am also guided by the order of my Ld. Predecessor in the case of the assessee appellant on similar issues for the earlier period. It is seen that that the AO nowhere stated in the assessment order that a search & seizure action u/s 132 was carried out on the appellant's premises no. 115 Vardhman City-2 Plaza, Asaf Ali Road, Delhi. The AO also did not bring on record any documentary evidence to show that appellant was maintaining its business premises at 108-109 Vardhman City-2 Plaza, Asaf Ali Road, Delhi. I therefore, hold that since no search & seizure action was conducted on the appellant at its only premises no. 115 Vardhman City-2 Plaza, Asaf Ali Road, Delhi, the proceedings initiated u/s 153A and the assessment order passed by the AO u/s 153A / 143(3) in the case of the appellant for A.Y. 2012-13 are not in accordance with law and thus are liable to be quashed. Even otherwise, the AO made addition of Rs. 10,00,00,000/- u/s 68 on account of share capital, without having any incriminating seized document. Even if the document, which was seized during the search and seizure operation carried out at 108-109 Vardhman City-2 Plaza, Asaf Ali Road, Delhi, where NCML Industries Limited was maintaining its business premises, is taken into consideration, then also addition of Rs. 10,00,00,000/- made by the AO u/s 68 in the hands of appellant cannot be sustained because on top of the said sheet, "From 01/01/2012" is written.

The AO himself mentioned that the share capital of Rs. 10,00,00,000/- was received by the appellant in November 2011, means prior to 01.01.2012. The assessment proceedings for A.Y. 2012-13 were not pending on 30.09.2013 and thus were not abated. Respectfully following the order of the Delhi High Court, which is the Jurisdictional High Court, in the case of Kabul Chawla (supra), I do not find any justification to uphold the addition of Rs. 10,00,00,000/-. I have also noticed that under identical circumstances, my predecessor had allowed the appellant's appeal for A.Y. 2009-10, wherein same legal issues and addition of Rs. 3,20,00,000/- made u/s 68 on account of share capital, was involved. The AO may initiate reopening proceedings accordingly in the relevant period based on facts as per the seized documents and as per law."

10. Having heard the submissions, we find that there are two issues involved in this appeal.

- a. Whether a search has been conducted u/s 132A of the Income Tax Act, 1961 or not?
- b. Whether there was any incriminating material found and seized during the search based on which the addition has been made in the year before us?

11. We find that a warrant of authorization has been issued in the name of the assessee and also a panchanama has been duly drawn. Hence, it cannot be said that no search has been conducted. To that extent, the Id. CIT(A) has fallen into error.

12. With regard to the addition made on the seized material, we have gone through the list of inventory of the books and documents found and seized during the action u/s 132A and also impounded during the action u/s 133A. There was no mention of any material found and seized or impounded which

led to the addition made by the AO. Even from the Assessment Order did not refer to any material found during the search. Further, we are in agreement with the finding of the Id. CIT(A) that the AO himself mentioned that the share capital of Rs. 10,00,00,000/- was received by the appellant in November 2011, means prior to 01.01.2012. The assessment proceedings for A.Y. 2012-13 were not pending on 30.09.2013 and thus were not abated.

13. On these given facts, reliance is being placed on the following case laws:

- CIT v. Kabul Chawla (2016] 380 ITR 573
- Cargo Global Logistics Limited Vs. DCIT 18 ITR 106
- ACIT vs. Vinita Chaurasia in ITA No. 5957/DEL/2015 dated 05.10.2018
- ACIT vs. M/s. Moolchand Steels Pvt. Ltd. in ITA No. 2544/DEL/2015 dated 10.10.2018 etc.

14. The Hon'ble Delhi High Court in the case of CIT Vs. Kabul Chawla (supra) held as under:

"vii. Completed assessments can be interfered with by the A.O. while making the assessment under section 153A 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"

15. The Hon'ble Delhi High Court in the case of Pr. CIT vs. Meeta Gutgutia (2017) 395 ITR 526 in paras 69 to 72 has held as under:

"69. What weighed with the Court in the above decision was the "habitual concealing of income and indulging in clandestine operations" and that a person indulging in such activities "can hardly be accepted to maintain meticulous books or records for long." These factors are absent in the present case. There was no justification at all for the AO to proceed on surmises and estimates without there being any incriminating material qua the AY for which he sought to make additions of franchisee commission.

70. The above distinguishing factors in *Dayawanti Gupta (supra)*, therefore, do not detract from the settled legal position in *Kabul Chawla (supra)* which has been followed not only by this Court in its subsequent decisions but also by several other High Courts.

71. For all of the aforementioned reasons, the Court is of the view that the ITAT was justified in holding that the invocation of Section 153A by the Revenue for the AYs 2000-01 to 2003-04 was without any legal basis as there was no incriminating material qua each of those AYs.

Conclusion

72. To conclude:

(i) Question (i) is answered in the negative i.e., in favour of the Assessee and against the Revenue. It is held that in the facts and circumstances, the Revenue was not justified in invoking Section 153A. of the Act against the Assessee in relation to AYs 2000-01 to AYs 2003-04."

16. The decisions of the Hon'ble Jurisdictional High Court are squarely applicable to the facts and circumstances of the case as no assessment was pending on the date of search and the addition has been made merely on the basis of the book entries already disclosed to the department. Further, reliance is also placed on the decision of the Hon'ble Jurisdictional High Court

in the case of PCIT Vs. Subhash Khattar in ITA No. 60/2017 dated 25.07.2017.

17. The entire issue stands settled by the judgment of Hon'ble Apex Court in the case of M/s. Abhisar Buildwell P. Ltd. in Civil Appeal No. 6580 of 2021 dated 24.04.2023 wherein the Hon'ble Apex Court held that 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. Hence, respectfully following the judgment of Hon'ble Apex Court, we hold that no addition can be made in the case of the assessee sans seized material u/s 153A.

18. Hence, keeping in view, the pertinent facts of the case, we affirm the order of the Id. CIT(A) to the extent of non-availability of relevant seized material which could have lead to the addition by the AO, hence, the appeal of the revenue stands dismissed.

19. Owing to adjudication in the Income Tax Appeals, the Cross Objections becomes infructuous and hence dismissed.

20. In the result, the appeals of the Revenue are dismissed and the COs of the assessee are also dismissed.

Order Pronounced in the Open Court on 17/10/2023.

Sd/-

(C. M. Garg)
Judicial Member

Dated: 17/10/2023

Subodh Kumar, Sr. PS

Sd/-

(Dr. B. R. R. Kumar)
Accountant Member