IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'B', NEW DELHI

Before Sh. Kul Bharat, Judicial Member

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

ITA No. 1644/Del/2023 : Asstt. Year : 2011-12
ITA No. 1645/Del/2023 : Asstt. Year : 2012-13

DCIT, Central Circle-1, Noida-201301	Vs.	Dynamic Infraplanners Pvt. Ltd., 30/27, 1st Floor, East Patel Nagar, New Delhi-110008
(APPELLANT)		**(RESPONDENT)**
PAN No. AACCD2264Q		

Assessee by : Dr. Shashwat Bajpai, Adv.
Revenue by : Sh. N. G. Joseph Gangte, CIT-DR

Date of Hearing: 13.03.2024		**Date of Pronouncement: 15.03.2024**

ORDER

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

The present appeals have been filed by the Revenue against the orders of ld. CIT(A)-4, Kanpur dated 23.03.2023.

2. Since, the issue involved in both the appeals are similar, they were heard together and being adjudicated by a common order. In 1644/Del/2023, following grounds have been raised by the Revenue:

> *"I. On facts and circumstances of the case, the Ld. CIT(A)-IV, Kanpur has erred in deleting the addition of Rs.24,47,472/- out of total disallowance of Rs. 26,55,351/- being 10% of the expenses claimed in profit and loss account, despite the fact that the assessee failed to produce the necessary bills/vouchers and its books of accounts for verification inspect of providing numerous opportunities to produce the same. It is a normal practice of the businesses to inflate expenses to reduce profit. Hence, onus was on the assessee to furnish the bills/vouchers corresponding to the expenses claimed and*

to produce its books of accounts for verification of genuineness of claim of huge expenses.

2. On facts and circumstances of the case, the Ld. CIT(A)-IV, Kanpur has erred in deleting the addition of Rs.58,93,500/- u/s 68 of IT Act on account of advances from the customers without appreciating the fact that the assessee failed to furnish the confirmation from customers, their ledger accounts or any necessary documentary evidence to establish the genuineness of the advances shown in the books. The claims of the assessee without documentary evidence cannot be accepted. Thus the addition was rightly made.

3 On facts and circumstances of the case, the Ld. CIT(A)-IV, Kanpur has erred in deleting the addition of Rs.1,10,40,000/- u/s 68 of IT Act on account of unexplained cash credit u/s 68 of the Act with regard to unsecured loans, even though the assessee failed to furnish the confirmation from lenders, their ledger accounts or any necessary documentary evidence to establish the genuineness of the advances shown in the books. The claims of the assessee without documentary evidence cannot be accepted. Thus the addition was rightly made.

4. On facts and circumstances of the case, the Ld. CIT(A)-IV, Kanpur has erred in admitting the additional evidences at the stage of appeal ignoring the fact that during the course of assessment proceedings the assessee failed to furnish any reply to the queries despite providing numerous opportunities."

3. Heard the arguments of both the parties and perused the material available on record.

4. The pertinent facts of the case are as under:

- Assessment Year : 2010-11
- Date of search : 12.11.2013
- Due date for issue of notice u/s 143(2) : 30.09.2011

5. Hence, there is no dispute that the assessment is not an abated assessment. Hence, the provisions of Section 153A of the Income Tax Act, 1961 are squarely applicable to the cases before us. On this issue, we are guided by the judgments of Hon'ble Jurisdictional High Court as well as Hon'ble Supreme Court.

6. The Hon'ble Delhi High Court in the case of CIT vs Kabul Chawla, 380 ITR 573 held as under:

> *"37. On a conspectus of Section 153(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 153A(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. The Hon'ble Delhi High Court in the case of Pr. CIT vs. Meeta Gutgutia, 395 ITR 526(Delhi), order dated 25.05.2017 held as under:

"58. In Kabul Chawla (supra), the Court discussed the decision in Filatex India Ltd. (supra) as well as the above two decisions and observed as under:

"31. What distinguishes the decisions both in CIT v. Chetan Das Lachman Das (supra), and Filatex India Ltd. v. CIT-IV (supra) in their application to the present case is that in both the said cases there was some material unearthed during the search, whereas in the present case there admittedly was none. Secondly, it is plain from a careful reading of the said two decisions that they do not hold that additions can be validly made to income forming the subject matter of completed assessments prior to the

search even if no incriminating material whatsoever was unearthed during the search.

32. Recently by its order dated 6th July 2015 in ITA No. 369 of 2015 (Pr. Commissioner of Income Tax v. Kurele Paper Mills P. Ltd.), this Court declined to frame a question of law in a case where, in the absence of any incriminating material being found during the search under Section 132 of the Act, the Revenue sought to justify initiation of proceedings under Section 153A of the Act and make an addition under Section 68 of the Act on bogus share capital gain. The order of the CIT (A), affirmed by the ITAT, deleting the addition, was not interfered with."

59. In Kabul Chawla (supra), the Court referred to the decision of the Rajasthan High Court in Jai Steel (India) v. Asstt. CIT (2013) 36 taxmann.com 523/219 Taxman 223. The said part of the decision in Kabul Chawla (supra) in paras 33 and 34 reads as under:

"33. The decision of the Rajasthan High Court in Jai Steel (India), Jodhpur v. ACIT (supra) involved a case where certain books of accounts and other documents that had not been produced in the course of original assessment were found in the course of search. It was held where undisclosed income or undisclosed property has been found as a consequence of the search, the same would also be taken into consideration while computing the total income under Section 153A of the Act. The Court then explained as under:

"22. In the firm opinion of this Court from a plain reading of the provision along with the purpose and purport of the said provision, which is intricately linked with search and requisition under Sections 132 and 132A of the Act, it is apparent that:

(a) the assessments or reassessments, which stand abated in terms of Il proviso to Section 153A of the Act, the AO acts under his original jurisdiction, for which, assessments have to be made;

(b) regarding other cases, the addition to the income that has already been assessed, the assessment will be made on the basis of incriminating material; and

(c) in absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made."

34. The argument of the Revenue that the AO was free to disturb income de hors the incriminating material while making assessment under Section 153A of the Act was specifically rejected by the Court on the ground that it was "not borne out from the scheme of the said provision" which was in the context of search and/or requisition. The Court also explained the purport of the words "assess" and "reassess", which have been found at more than one place in Section 153A of the Act as under:

"26. The plea raised on behalf of the assessee that as the first proviso provides for assessment or reassessment of the total income in respect of each assessment year falling within the six assessment years, is merely reading the said provision in isolation and not in the context of the entire section. The words 'assess' or 'reassess'-have been used at more than one place in the Section and a harmonious construction of the entire provision would lead to an irresistible conclusion that the word assess has been used in the context of an abated proceedings and reassess has been used for completed assessment proceedings, which would not abate as they are not pending on the date of initiation of the search or making of requisition and which would also necessarily support the interpretation that for the completed assessments, the same can be tinkered only based on the incriminating material found during the course of search or requisition of documents."

60. In Kabul Chawla (supra), the Court also took note of the decision of the Bombay High Court in CIT v. Continental Warehousing Corpn (NhavaSheva) Ltd. 2015] 58 taxmann.com 78/232. Taxman. 270/374 ITR 645 (Bom.) which accepted the plea that if no incriminating material was found during the course of search in respect of an issue, then no additions in respect of any issue can be made to the assessment under Section 153A and 153C of the Act. The legal position was thereafter summarized in Kabul Chawla (supra) as under:

"37. On a conspectus of Section 153(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."

61. It appears that a number of High Courts have concurred with the decision of this Court in Kabul Chawla (supra) beginning with the Gujarat High Court in Saumya Construction (P.) Ltd. (supra). There, a search and seizure operation was carried out on 7th October, 2009 and an assessment came to be framed under Section 143(3) read with Section 153(1)(b) in determining the total income of the Assessee of Rs. 14.5 crores against declared income of Rs. 3.44 crores. The ITAT deleted the additions on the ground that it was not based on any incriminating material found during the course of the search in respect of AYs under consideration i.e., AY 2006-07. The Gujarat High Court referred to the decision in Kabul Chawla (supra), of the Rajasthan High Court in Jai Steel (India) (supra) and one earlier decision of the Gujarat High Court itself. It explained in para 15 and 16 as under:

"15. On a plain reading of section 153A of the Act, it is evident that the trigger point for exercise of powers thereunder is a search under section 132 or a requisition under section 132A of the Act. Once a search or requisition is made, a mandate is cast upon the Assessing Officer to issue notice under section 153A of the Act to the person, requiring him to furnish the return of income in respect of each assessment year falling within six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made and assess or reassess the same. Since the assessment under section 153A of the Act is linked with search and requisition under sections 132 and 132A of the Act, it is evident that the object of the section is to bring to tax the undisclosed income which is found during the course of or pursuant to the search or requisition. However, instead of the earlier regime of block assessment whereby, it was only the undisclosed income of the block period that was assessed, section 153A of the Act seeks to assess the total income for the assessment year, which is clear from the first proviso thereto which provides that the Assessing Officer shall assess or reassess the total income in respect of each assessment year falling within such six assessment years. The second proviso makes the intention of the Legislature clear as the same provides that assessment or reassessment, if any,

relating to the six assessment years referred to in the sub-section pending on the date of initiation of search under section 132 or requisition under section 132A, as the case may be, shall abate. Sub-section (2) of section 153A of the Act provides that if any proceeding or any order of assessment or reassessment made under sub-section (1) is annulled in appeal or any other legal provision, then the assessment or reassessment relating to any assessment year which had abated under the second proviso would stand revived. The proviso thereto says that such revival shall cease to have effect if such order of annulment is set aside. Thus, any proceeding of assessment or reassessment falling within the six assessment years prior to the search or requisition stands abated and the total income of the assessee is required to be determined under section 153A of the Act. Similarly, sub-section (2) provides for revival of any assessment or reassessment which stood abated, if any proceeding or any order of assessment or reassessment made under section 153A of the Act is annulled in appeal or any other proceeding.

16. Section 153A bears the heading "Assessment in case of search or requisition". It is "well settled as held by the Supreme Court in a catena of decisions that the heading or the Section can be regarded as a key to the interpretation of the operative portion of the section and if there is no ambiguity in the language or if it is plain and clear, then the heading used in the section strengthens that meaning. From the heading of section 153. the intention of the Legislature is clear, viz., to provide for assessment in case of search and requisition. When the very purpose of the provision is to make assessment In case of search or requisition, it goes without saying that the assessment has to have relation to the search or requisition, in other words, the assessment should connected With something round during the search or requisition viz., incriminating material which reveals undisclosed income. Thus, while in view of the mandate of sub-section (1) of section 153A of the Act, in every case where there is a search or requisition, the Assessing Officer is obliged to issue notice to such person to furnish returns of income for the six years preceding the assessment year relevant to the previous year in which the search is conducted or requisition is made, any addition' or disallowance can be made only on the basis of material collected during the search or requisition, in case no incriminating material is found, as held by the Rajasthan High Court in the case of Jai Steel (India)v. Asst. CIT (supra), the earlier

assessment would have to be reiterated, in case where pending assessments have abated, the Assessing Officer can pass assessment orders for each of the six years determining the total income of the assessee which would include income declared in the returns, any, furnished by the assessee as well as undisclosed income, if any, unearthed during the search or requisition. In case where a pending reassessment under section 147 of the Act has abated, needless to state that the scope and ambit of the assessment would include any order which the Assessing Officer could have passed under section 147 of the Act as well as under section 153A of the Act.

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19. On behalf of the appellant, it has been contended that if any incriminating material is found, notwithstanding that in relation to the year under consideration, no incriminating material is found, it would be permissible to make additions and disallowance in respect of an the six assessment years. In the opinion of this court, the said contention does not merit acceptance, inasmuch as the assessment in respect of each of the six assessment years is a separate and distinct assessment. Under section 153A of the Act, assessment has to be made in relation to the search or requisition, namely, in relation to material disclosed during the search or requisition. If in relation to any assessment year, no incriminating material is found, no addition or disallowance can be made in relation to that assessment year in exercise of powers under section 153A of the Act and the earlier assessment shall have to be reiterated. In this regard, this court is in complete agreement with the view adopted by the Rajasthan High Court in the case of Jai Steel (India) v. Asst. CIT (supra). Besides, as rightly pointed out by the learned counsel for the respondent, the controversy involved in the present case stands concluded by the decision of this court In the case of CIT v. JayabenRatilalSorathia (supra) wherein it has been held that while it cannot be disputed that considering section 153A of the Act, the Assessing Officer can reopen and/ or assess the return with respect to six preceding years; however, there must be some incriminating material available with the Assessing Officer with respect to the sale transactions in the particular assessment year."

62. Subsequently, in Devangi alias Rupa (supra), another Bench of the Gujarat High Court reiterated the above legal position following its earlier decision in Saumya

Construction (P.) Ltd. (supra) and of this Court in Kabul Chawla (supra). As far as Karnataka High Court is concerned, it has in IBC Knowledge Park (P.) Ltd. (supra) followed the decision of this Court in Kabul Chawla (supra) and held that there had to be incriminating material qua each of the AYs in which additions were sought to be made pursuant to search and seizure operation. The Calcutta High Court in Salasar Stock Broking Ltd. (supra), too, followed the decision of this Court in Kabul Chawla (supra). In Gurinder Singh Bawa (supra), the Bombay High Court held that:

"6. ..... once an assessment has attained finality for a particular year, i.e., it is not pending then the same cannot be subject to tax in proceedings under section 153A of the Act. This of course would not apply if incriminating materials are gathered in the course of search or during proceedings under section 153A of the Act which are contrary to and/or not disclosed during the regular assessment proceedings."

63. Even this Court has in Mahesh Kumar Gupta (supra) and Ram AutarVerma (supra) followed the decision in Kabul Chawla (supra). The decision of this Court in Kurele Paper Mills (P.) Ltd. (supra) which was referred to in Kabul Chawla (supra) has been affirmed by the Supreme Court by the dismissal of the Revenue's SLP on 7th December, 2015."

8. In view of consideration of the judgement of Hon'ble Delhi High Court in case of CIT vs Kabul Chawla (supra), it has been held that 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.

9. Further, the Hon'ble Supreme Court in the case of Meeta Gutgutia 96 taxmann.com 468 upheld the decision of the Hon'ble High Court of Delhi.

10. The aforesaid judgments have lucidly pronounced that the case of completed assessment can be interfered only on the

basis of some incriminating material found during the course of search. The case of the assessee for the assessment years before us are completed assessments and there were no proceedings pending on the date of the search conducted i.e. 20.04.2017. In the case of the assessee, the AO has not referred to any incriminating document which was seized, during the course of search proceedings and the additions made in the Assessment Orders are not based upon any incriminating material or documents found during the course of search.

11. Further, we also find that the Hon'ble Supreme Court in the case of Pr. CIT Vs. Abhisar Buildwell Pvt. Ltd. in Civil Appeal No. 6580 of 2021 vide order dated 24.04.2023 has affirmed the ratio of the Hon'ble Delhi High Court laid down in the case of Kabul Chawla (supra). Since, the revenue has not brought anything on record to prove that the additions have been made on the basis of the material found and seized during the search conducted u/s 132 of the Income Tax Act, 1961, we find no reason to interfere with the order of the ld. CIT(A).

12. In the result, the appeals of the Revenue are dismissed.

Order Pronounced in the Open Court on 15/03/2024.

Sd/-	Sd/-
(Kul Bharat)	**(Dr. B. R. R. Kumar)**
Judicial Member	**Accountant Member**

Dated: 15/03/2024

Subodh Kumar, Sr. PS

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR