INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "A": NEW DELHI

BEFORE SHRI I.C. SUDHIR, JUDICIAL MEMBER
SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER

ITA Nos. 4715, 4716 & 4717/Del/2011
Assessment Year: 2003-04, 2004-05 & 2005-06

Brij Mohan Mahajan, 2, Avenue Cassia, Westend Greens, Rajokari New Delhi	Vs	ACIT, Central Circle-22, New Delhi

ITA Nos. 4675, 4676 4677,/Del/2011
Assessment Years: 2003-04, 2004-05, 2005-06,

Sanjeev Mahajan, 2, Avenue Cassia, Westend Greens, Rajokari New Delhi	Vs	ACIT, Central Circle-22, New Delhi

ITA No.4860/Del/2011
Assessment Year: 2003-04

ACIT, Central Circle-22, New Delhi	Vs	Sanjeev Mahajan, 2, Avenue Cassia, Westend Greens, Rajokari New Delhi

ITA Nos. 4864/Del/2011
Assessment Year: 2003-04,

ACIT, Central Circle-22, New Delhi	Vs	Brij Mohan Mahajan, 2, Avenue Cassia, Westend Greens, Rajokari New Delhi.

(Appellant) (Respondent)

Appellant by	Shri Salil Kapoor CA and Ms.Ananya, Advocate
Respondent by	Shri Ravi Jain, CIT DR
Date of hearing	05.10.2016
Date of pronouncement	07.10.2016

O R D E R

PER: PRADIP KUMAR KEDIA, AM

The above captioned appeals are filed by interconnected assessees as well as by the Revenue against the separate orders of the CIT(A) New Delhi, relevant to different assessment years noted above. Since the issues involved in all these cases are similar, all these appeals were heard together and disposed of by this common order for the sake of brevity. The appeal filed by Assessee Shri Brijmohan Mahajan and corresponding revenue appeal relevant to assessment year 2003-04 has been taken as a lead appeal for the purposes of adjudication.

ITA No.4715/Del/2011: AY 2003-04

2. The relevant grounds of appeal raised by the assessee against the order of the CIT(A) dated 18.8.2011 reads as under:-

> "1. That the Learned CIT(A) erred in dismissing the appeal as per Ground of Appeal No. 2, wherein he calculated the addition of Rs. 1,09,660/-, by taking into consideration land rates as per Valuation Officer (DVO), which is determined by him by reducing the cost of construction. The rate so determined by the Ld. CIT

(A) was applied to determine the cost of purchase of agriculture land, known as 2A, Avenue Cassia, Westend Green, Village Rajokari, New Delhi, which was purchased by the appellant, in three different financial years, jointly with his son Mr. Sanjeev Mahajan.

2. That the Learned CIT (A) further erred in law and on facts ignoring the fact that the prices paid for purchase of agriculture land was higher than the rates prescribed by the State Government for the purpose of stamp duty, and misguided himself with extraneous consideration that since the agriculture land is an adjacent to the agriculture land already owned by the appellant, the appellant must have paid the price of land at the rates determined by the DVO for 2, Avenue Cassia,Westend Greens, Village Rajokari, New Delhi. The Ld. CIT (A) also Ignored the fact that this land was purchased by the appellant group in three consecutive financial year in small parts, having 66KVA and 220 KVA electricity line, adjacent to Gram Sabha Land.

3. The appellant craves leave to add to, alter, vary, modify or otherwise amend the grounds of appeal before the appeal is finally disposed of."

3. The assessee has also raised additional grounds of appeal in terms of Rule 11 of Income Tax (Appellate Tribunal) Rules,1963 vide petition dated 17.2.2014, wherein it was contended that the additional grounds of appeal are purely legal in nature and no new facts are required to be investigated to adjudicate this appeal as all the relevant facts are available on record. Reliance was placed on the decision of the Apex Court in the case of NTPC vs. CIT 229 ITR 383 (SC) for admission of the additional grounds which are legal in nature. We find merit in the aforesaid plea of the assessee and accordingly, the additional grounds stands admitted for adjudication which read as under:-

"4. That the addition made and the assessment order passed by the AO, are illegal and bad in law and is also without jurisdiction, as no incriminating material was found during the course of search. Hence, the addition made on account of alleged unaccounted investment in the property is liable to be deleted.

5. That the reference to the Department Valuation Officer (DVO) is illegal and bad in law. That the addition made on the basis of such valuation report is uncalled for. In any case the addition made u/s 69B of the Income Tax Act, is wrongly and illegally made."

4. Briefly stated, the assessee is an individual. A search and seizure action was initiated on the assessee together with other connected parties on 6.11.2008 u/s 132 of the Income Tax Act, 1961 ('the Act') and a search warrant was also issued and executed in the name of the assessee. The original return of income was earlier filed under section 139 of the Act by the assessee on 4.8.2003 prior to search. Thereafter, pursuant to the search, as noted above, a notice under section 153A of the Act was issued on 8.7.2009. The assessee filed the return of income u/s 153A of the Act on 4.8.2009 and stated to have declared the income as reported in the original return. During the year under appeal, the assessee had derived income from salary form partnership firm, profits from partnership and also interest income. Return declaring income of Rs.2,45,000/- was filed on 4.8.2009 under section 153A of the Act. The assessing officer, however, computed the assessed income at Rs.4,57,34,195/-. A perusal of the assessment order reveals that certain additions were made to the returned income u/s 153A towards unaccounted investment in property bearing No.2, Avenue Cassia, Westend, Greens, Rajokari, New Delhi, on the basis of certain bank

valuations of the property. Similar additions were made towards unaccounted investments in another property bearing No.2A, Avenue Cassia, Westend Greens, Rajokari, New Delhi, for an amount of Rs.3,64,695/-. Yet another additions were made on account of estimated household withdrawals of Rs.3,74,500/-. Thus, income was thus assessed at Rs.4,57,34,195/- as noted above.

5. The assessee assailed the action of the AO before the CIT(A) in first appeal. The CIT(A) granted substantial relief towards additions so made on account of unaccounted investment in property and retained some minor additions which has been carried in second appeal by the assessee before the Tribunal. Likewise, the CIT(A) granted relief as sought towards low household withdrawals.

6. Aggrieved by the partial relief given in respect of property No.2A, Avenue Cassia, Westend Greens, Rajokari, New Delhi noted above, the assessee has preferred an appeal before the Tribunal.

7. Similarly, the Revenue is also in appeal against the substantial relief granted by the CIT(A) towards unaccounted investment in Property. The relevant grounds of appeal raised by the Revenue are reproduced hereunder:-

> "1. On the facts and in the circumstances of the case, the CIT(A) has erred in law and on facts in deleting the addition of Rs.4,47,50,000/- made by the Assessing Officer on account of unaccounted investment in the property namely 2, Avenue Cassia, Westend Greens, Rajokari, New Delhi.
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> 2. On the facts and in the circumstances of the case, the CIT(A) has erred in law and on facts in restricting the addition to Rs.

109,660/- out of total addition of Rs.3,64,695/- made by the Assessing Officer u/s 69B of the Income tax Act, 1961 on account of unaccounted investment in the property namely 2A, Avenue Cassia, Westend Greens, Rajokari, New Delhi.

3. On the facts and in the circumstances of the case, the CIT(A) has erred in law and on facts in deleting the addition of Rs.3,74,500/- made by the Assessing Officer on account of lower household withdrawals.

4. The order of the CIT(A) is erroneous and is not tenable on facts and in law

5. The appellant craves leave to add, alter or amend any/all of the grounds of appeal before or during the course of the hearing of the appeal."

8. The Ld. AR for the assessee, at the outset, submitted that the appeal of the assessee as well as that of revenue requires to decided in the light of question as to whether the impugned additions and disallowances in appeal can be sustained in the absence any incriminating documents found as a result of search in a 153A assessment. On this premise, the Ld. AR questioned the legality of additions made in the return of income filed pursuant to section 153A on the ground that no incriminating material was found during the search. He adverted our attention to the order of the CIT(A) at page 26, para 14 and contended that the CIT(A) has recorded a categorical finding of fact that no incriminating documents in respect of purchase of property No.2, Avenue Cassia, Westend, Greens, Rajokari, New Delhi, with reference to impugned addition towards unaccounted investment in the said land purchased were found/seized during the course of search. The Ld. AR thereafter canvassed that none of the additions made in the return filed pursuant to search action is sustainable in law owing to the

fact that in spite of search no incriminating documents/material were found against the assessee. The additions and disallowances have been made of the assessments which were completed either under S. 143(1) or under S. 143(3) on the basis of material already available on record which is already entered in the books of account and return filed pursuant thereto. The Ld. AR next asserted that the additions were made on the basis of some DVO report on mere reappreciation of existing facts which is not tenable in law in so far as the impugned assessment under S. 153A is concerned. The ld. AR also contended on merits that reference to DVO is illegal and bad in law and additions made on the basis of the said report under S. 69B is also bad in law. The Ld. AR submitted that the AO is under statutory obligation to record a finding and is obligated to prima facie satisfy himself that some unaccounted investment has been made by the assessee over and above the amount reflected in the sale deed before making the reference to the DVO in this regard. The Ld. AR for the assessee contended that as per the additional grounds of appeal raised by the assessee, the additions made are illegal and bad in law and is without jurisdiction as no incriminating material was found during the course of search. The Ld. AR asserted that the issue is squarely covered in favour of the assessee by the decision of the jurisdictional High Court passed in the case of CIT (Central)-III vs. Kabul Chawla, reported in 380 ITR 573 (Del), wherein the Hon'ble High Court has held that if the additions are made, but, not based on any incriminating material found as a result of search operations, then, such additions are not sustainable in the eyes of law. The Ld. AR further stated that the impugned additions / disallowances have no relation with any incriminating material found or

undisclosed income or property discovered in the course of search and, as such, the impugned action is bad in law being beyond the scope of jurisdiction under section 153A of the Act. The Ld. AR submitted that co-ordinate benches of Tribunal are consistently taking view in favour of the assessee having regard to the decision of Jurisdictional High court in the case of Kabul Chawla (supra). The Ld. AR also pointed out that the co-ordinate Bench of the ITAT has also deleted the addition made by the AO on the basis of the bank valuation report in the case of ACIT vs. Express Earth Movers and Equipments Pvt. Ltd. In ITA No.505 & 506/Del/2012 (copy placed on record) vide order dated 29th June, 2015 which is also squarely applicable to the facts of the case. Similarly, reliance was also placed on the case ACIT vs. Anita Rani decided by the Delhi ITAT in ITA No.5212/Del/2011 vide order dated 18.8.2016 (copy placed on record). He accordingly, prayed for granting relief in terms of grounds of appeal raised by the assessee and sought dismissal of revenue appeal in toto.

9. The Ld. DR appearing for the Revenue, on the other hand, relied upon the order of the authorities below and submitted that the provisions of section 153A were rightly applied in the case of the assessee on the basis of material available before them.

10. We have carefully considered the rival submissions and perused the assessment order passed by the Assessing officer and appellate order passed by the CIT(A). The appeal of the assessee as well as the revenue hinges around only one pertinent point as to whether, while making assessment under S. 153A, the revenue is entitled to interfere with the assessment completed either under S.143(1) or under S. 143(3)

and not pending at the time of search in the absence of any incriminating documents unearthed as a result of search or not. On facts, on perusal of order of the CIT(A), we notice that the CIT(A) with reference to addition of Rs.4,47,50,000/- towards unaccounted investment on the basis of bank valuation of the property, has given a categorical finding at para No.4 at page 26 of his order that no incriminating document with reference to the aforesaid unaccounted investment was found during the course of search. Similar observations were made at page 31 and 38 of the order of the CIT(A). The aforesaid finding of the CIT(A) of the total absence of incriminating document has remained uncontested by the Revenue. Thus, as a corollary, it is manifest that the additions/disallowances have been made without reference to any incriminating material/document found as a result of the search and seizure action under 132 of the Act. We also note that the income-tax return for the relevant assessment year was filed prior to the search in the normal course *suo motu* disclosing the purchase consideration of the property in question. The return so filed in the ordinary course were accepted u/s 143(1) of the Act and, as such, no assessment was pending on the date of initiation of search which may abate in consequence of search. Accordingly, we are of the view that various additions/ disallowances made by the AO are clearly beyond the scope of authority vested under section 153A of the Act owing to absence of any incriminating material or evidence detected as a result of search. No reference to such incriminating material is found in the orders of the authorities below for the purposes of making various additions and disallowances. This legal issue emanating in the present case that in the absence of any incriminating document or material, no

addition can be sustained under 153A proceedings is no longer *res integra* in view of the decision of the Hon'ble Delhi High Court in the case of *CIT vs. Kabul Chawla (supra),* wherein the Hon'ble Delhi High Court has held as under:-

> "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 ITA Nos. 707, 709 and 713 of 2014 of 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 ITA Nos. 707, 709 and 713 of 2014 of 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.
> 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."

11. Thus, the Hon'ble High Court has underscored the need for revenue to unearth material as a result of search justifying the

assessment sought to be made. Respectfully following the binding precedent of the Hon'ble jurisdictional High Court in the case of Kabul Chawla (supra), the legal issue stands adjudicated in favour of the assessee. Accordingly, the additions and disallowances made without reference to incriminating material are not sustainable in law in the facts of the present case. Accordingly, we allow the appeal of the assessee. In the similar vain, the appeal filed by the Revenue contesting the action of the CIT(A) required to be dismissed in view of proposition of law in Kabul Chawla (supra).

12. In view of the direct decision of the Hon'ble Delhi High Court in Kabul Chawla (supra) which impugns the legal validity of additions made u/s 153A proceedings, we do not consider it expedient to examine the issues raised on merits.

13. In the result, the appeal of the assessee is allowed and the appeal of the Revenue is dismissed.

ITA Nos.4675, 4676, 4677/Del/2011 (Assessee's appeals for AYs 2003-04, 2004-05 & 2005-06); ITA No.4860/Del/2011 (Revenue's appeal for AY 2003-04); and ITA Nos.4716 & 4717/Del/2011 (Assessee's appeals for AYs 2004-05 & 2005-06).

14. Both the sides consented that identical legal issues are involved in all these appeals too. Thus, for parity of reasons noted above, our view in ITA No. 4715 & 4864 / Del. / 2011 above shall apply mutatis mutantis to all the remaining appeals captioned above. As a consequence, the additions and disallowances made without any reference to any

incriminating material found as a result of search is not sustainable in law.

15. In the result, the all the appeals of the assessee are allowed and all the appeals of the revenue are dismissed.

Order pronounced in the open Court on 07/10/ 2016

Sd/- Sd/-

(I.C. SUDHIR) (PRADIP KUMAR KEDIA)
JUDICIAL MEMBER ACCOUNTANT MEMBER

Dated: 07/10/2016

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Copy of the order forwarded to :

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- CIT(A)
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By Order,

ASSISTANT REGISTRAR