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

Before Sh. Amit Shukla, Judicial Member

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

ITA No. 6345/Del/2017 : Asstt. Year: 2005-06
ITA No. 6346/Del/2017 : Asstt. Year: 2006-07
ITA No. 6347/Del/2017 : Asstt. Year: 2007-08
ITA No. 6348/Del/2017 : Asstt. Year: 2008-09
ITA No. 6349/Del/2017 : Asstt. Year: 2009-10

Abhishek Tiwari, 6, Southern Avenue, Maharani Bagh, New Delhi-110065	Vs	DCIT, Central Circle-13, New Delhi
(APPELLANTT		**(RESPONDENT)**
PAN No. ADCPT9874A		

Assessee by : None
Revenue by : Sh. Satpal Gulati, CIT DR

Date of Hearing: 12.07.2021		**Date of Pronouncement: 12 .07.2021**

ORDER

Per Amit Shukla, Judicial Member:

The present appeals have been filed by the assessee against the orders of ld. CIT (A)-35, New Delhi dated 03.02.2017.

2. Since, the issues involved in all these appeals are common which were heard together.

3. In ITA No. 6345/Del/2017, following grounds have been raised by the assessee:

"That an appeal against the impugned order of the learned A.O. was filed before C1T (Appeals) on 26th

April 2013 but CIT (Appeals) has passed an Ex-Parte order by confirming the demand of Ld. A.O. on 02.02.2017 without taking into consideration the reasons due to which the appellant could not provide the necessary documents and evidence and could not attend the hearings before the CIT (Appeals). Some of the reasons are provided below:-

(a) That Mr. Abhieshek Tewari, Appellant was himself suffering from various illnesses and had also been fractured in body of right scapula and his elder brother Mr. Anand Tiwari of the suffering from a chronic liver disease for the past 5-6 years. On account of his severe illness he has been admitted/treated in various hospitals in India as well as abroad on innumerable occasions and has been bed-ridden for most of the time during these years.

(b) That Mr. Abhieshek Tewari, appellant was himself suffering from various illnesses and had also been incarcerated during the relevant time. Due to financial crisis, the company had started making defaults in paying installments to various banks and also in fulfilling other financial obligation. Consequently, the banks had filed false & frivolous complaints with the Central Bureau of Investigation (C.B.I.). The C.B.I. officials had started making inquiries not only from the directors, but also from the family/staff members etc. The C.B.I. officials had also started calling not only the directors, but also the staff members, to their office. The C.B.I. officials had started making visits to the office of the company. Mr. P.K. Tiwari was incarcerated in connection with the CBI cases from July, 2012 to October, 2012 and from September 2014 to March 2015. The Appellant Company was going through severe financial crunch during all these years, due to which most of the company staff left the company as their salaries could not be paid. On the other hand, Mr. P.K. Tiwari could not devote time to pursue the appeals on account of the aforementioned reasons. On account of his advance age, frequent incarceration and the extra ordinary financial crises and other adverse conditions, Mr. P.K. Tiwari was

under acute depression and could not therefore, focus on the matter.

(c) That the authorized representative, representing the appellant before the respondent extracted huge money from the appellant but did not properly put forward the case before the respondent. They should at least have represented the difficulties being faced by the appellant and ought to have defended the appellant to the best of their capacity on the basis of records which were within their possession and knowledge. But most unfortunately they failed to perform their professional duty, resulting in passing of the impugned order.

(d) That the respondent ought to have considered the aforementioned bona fide reasons and extra ordinary circumstances and should have granted further time to the appellant to satisfy the respondent on the aspect that the demand raised by the Ld. A.O. was illegal and unwarranted. The ex-parte order passed by the respondent is unwarranted and has resulted in extreme prejudice to the appellant.

(e) That the appellant is entitled for hearing instead of the case being decided unheard.

(f) That the failure on part of the appellant in pursuing its appeal was neither deliberate nor intentional and the same was occasioned due to reasons mentioned above.

(g) That the extra-ordinary adverse situation suffered by the appellant entitles it for a fair hearing before this Tribunal so that the case can be decided on merits instead of being thrown out on account of non representation.

(h) The appellant did everything within its power by engaging professionals to represent it before the respondent but the said professionals failed to perform

their duty by not advising the company in the matter and by not representing it in bona-fide manner.

(i) That the appellant sought a number of adjournments and tried to present its case.

(j) That due to lack of funds and non availability of documents as explained above, the company, inspite of taking many adjournments, was not able to defend its case before CIT (Appeals).

(k) That no reasonable opportunity was provided to the Company to present its case and to justify the grounds for quashing the impugned order of the learned A.O.

(l) That the impugned order, confirming the order of A.O., was passed by the CIT (Appeals) without considering the grounds provided by the appellant or the documents or evidences to be provided on part of the Company and the order was passed ex parte.

(m) That the appellant has valid grounds and will be able to establish that the impugned order passed by the learned A.O. was bad in law and was based only on presumptions, if a reasonable opportunity is provided to the appellant.

(n) That the grounds provided by the appellant in the appeal before the CIT (Appeals) which were not considered by it before confirming the impugned order of learned A.O. are provided below.

2. That the assessment order dated 18.03.2013, passed by the Ld. A.O. U/s 144 r.w.s. 153A, is bad in law.

3. That the assessment order dated 18.03.2013 passed u/s 144 r.w.s. 153A, deserves to be quashed, because natural justice has been denied by the Ld. A.O. to the assessee.

4. That on the facts of the case and under the law, the Ld. A.O. has erred in not taking into consideration the

assessee's reply, vide letter dated 23.02.2013 (filed on 28.02.2013).

5. That on the facts of the case and under the law, the Ld. A.O. has erred in altogether ignoring the assessee's reply, vide letter dated 15.03.2013(dispatched through postal authorities vide their receipt dated 15.03.2013 and also on the Dark Counter vide their receipt dated 18.03.2013).

6. That on the facts of the case and under the law, the Ld. A.O has erred in treating the entire deposit of Rs.6,27,377/- appearing in the saving bank a/c with corporation bank, as unexplained deposits and thus making an addition of Rs.6,27,377/- in the hands of the assessee.

The observation of the Ld. A.O. are either factually incorrect or are legally untenable.

7. That the total income assessed at Rs. 16,58,577/- is arbitrary, unjust, illegal & highly excessive.

8. That the additional income tax liability created at Rs. 2,11,175/- is arbitrary, unjust, illegal & highly excessive.

9. That on the facts of the case and under the law, the Ld. A.O. has erred in charging interest u/s 234A. Without prejudice, the interest charged is highly excessive.

10. That on the facts of the case and under the law, the Ld. A.O. has erred in charging interest u/s 234B, Without prejudice, the interest charged is highly excessive."

4. The assessee company has filed its original return of income u/s 139(1) as under:

S.No.	Assessment Year	Date of filing of the return u/s 139(1)	Returned income
1.	2005-06	29.07.2005	Rs.10,31,200
2.	2006-07	19.12.2006	Rs.18,25,675
3.	2007-08	21.10.2007	Rs.27,64,972
4.	2008-09	21.10.2008	Rs.34,93,607
5.	2009-10	06.02.2010	Rs.59,35,868

5. Later on, a search and seizure operation was carried u/s 132 on 11.03.2011 on M/s Century Communication Group (M/s Mahuaa Media Group) and accordingly, a notice u/s 153A was issued. At the time of search the assessment for the assessment years 2005-06, 2006-07, 2007-08, 2009-10 and 2010-11 respectively has attained finality and accordingly in terms of second proviso to section 153A such an assessment is to be treated as unabated and without any reference to any seized material or incriminating evidence found during the course of search. In the impugned proceedings, we find that the additions made by the Assessing Officer are not based on any material found and seized during the course of search and seizure action. The fact of which has not been disputed by the revenue.

6. Before the Ld. CIT (A), the assessee has challenged that the said additions, however, the ld. CIT (A) confirmed the action of the Assessing Officer as the hearings have been defaulted by the assessee.

7. Before us, none appeared on behalf of the assessee and the matter is being adjudicated on hearing the arguments of ld. DR and based on the record available before us. On perusal of the record, we find that it is an admitted fact that no addition has been made in any of the years which was based on

incriminating material or evidence was found during the course of search.

8. Thus, no addition can be twined in the present proceedings u/s 153A. We have examined the findings of the AO and Ld. CIT(A) and find that it is an undisputable fact that the addition made by the AO is not based on seized material / documents found during the course of search. In such a situation, addition is beyond the scope of section 153A and we rely upon the following judgments for adjudicating the matter:

- *PCIT Vs. Meeta Gutgutia [2017] 82 taxmann.com 287 (Delhi)*
- *CIT Vs. Kabul Chawla [2016] 380 ITR 573 (Delhi)*
- *CIT Vs. Lancy Constructions [2016] 237 Taxman 728 (Karnataka).*
- *DCIT Vs. Kurele Paper Mills Pvt. Ltd. in ITA No.3761/Del/2011.*
- *Pr.CIT vs. Kurele Paper Mills Pvt. Ltd. in ITA No.369/2015 (Del HC).*
- *Pr. CIT VS. Kurele Paper Mills Pvt. Ltd. [2016] 380 ITR 65 (SC)*
- *CIT Vs. Saumya Construction P. Ltd. [2016] 387 ITR 529 (Guj)*

9. On the other hand, the ld. DR though could not controvert the contention that there is no incriminating material found at the time of search, but he submitted that, once notice u/s 153(3) is issued to the assessee then it is incumbent upon the assessee to file the return of income and AO has all the powers to assess and reassess the total income for the year and same cannot be restricted to the seized material. He relied upon the judgment of Hon'ble High Court in the case of CIT vs. Anil Kumar Bhatia.

10. After considering the aforesaid submissions and on perusal of the orders before us, we find that it is an admitted fact that the time for completion of original assessments has ended and the assessment proceedings attained finality at the time of search for these years. It is also undisputed that additions made by the AO is not based on incriminating material found during the course of search, albeit it is based on the assessment record only.

11. In such a situation, additions made are beyond the scope of 153A proceedings. This proposition of law has been well settled and reiterated by the Hon'ble Delhi High Court in the case of CIT vs. Kabul Chawla reported in [2016] 380 ITR 573 (Delhi) and has been reiterated in the case of Pr. CIT vs. Meeta Gutgutia reported in [2017] 152 DTR 153 (Delhi).

12. In the case of CIT vs. Kabul Chawla (supra), the Hon'ble High Court, after discussing various judgments and analyzing section 153A, have laid down the following legal proposition:

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 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."

13. The Hon'ble High Court has also taken note of the judgment of their earlier judgment in the case of CIT vs. Anil Kumar Bhatia reported in [2013] 352 ITR 493 (Del) and observe that this was not the issue before the Court. Again in the case of Pr. CIT Vs. Meeta Gutgutia's (supra), their Lordships have again reiterated the same principle and have also considered the case of Smt. Dayawanti Gupta reported in 390 ITR 496.

14. The relevant observations made by their Lordships are as under:

"56. Section 153A of the Act is titled "Assessment in case of search or requisition". It is connected to Section 132 which deals with 'search and seizure'. Both these provisions, therefore, have to be read together. Section 153A is indeed an extremely potent power which enables the Revenue to reopen at least six years of assessments earlier to the year of search. It is not to be exercised lightly. It is only if during the course of search under Section 132 incriminating material justifying the re-opening of the assessments for six previous years is found that the invocation of Section 153A qua each of the AYs would be justified.

57. The question whether unearthing of incriminating material relating to any one of the AYs could justify the reopening of the assessment for all the earlier AYs was considered both in Anil Kumar Bhatia (supra) and Chetan Das Lachman Das (supra). Incidentally, both these decisions were discussed threadbare in the decision of this Court in Kabul Chawla {supra). As far as Anil Kumar Bhatia (supra) was concerned, the Court in paragraph 24 of that decision noted that "we are not concerned with a case where no incriminating material was found during the search conducted under Section 132 of the Act. We therefore express no opinion as to whether Section I53A can be invoked even under such situation".

That question was, therefore, left open.

15. As far as case law Chetan Das Lachman Das is concerned, in para 11of the decision it was observed:

"11. Section 153A (1) (b) provides for the assessment or reassessment of the total income of the six assessment years immediately preceding the assessment year relevant to the previous year in which the search took place. To repeat, there is no condition in this Section 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 Assessing Officer which can be related to the evidence found. This, however, does not mean that the assessment under Section 153A 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."

16. In Kabul Chawla (supra), the Court discussed the decision in Filalex 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 I53A 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."

17. In Kabul Chawla (supra), the Court referred to the decision of the Rajasthan High Court in Jai Steel (India) v. Assn. 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. A CIT (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."

18. 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 II 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."

19. Thus, the Hon'ble High Courts after detail analysis concluded that, whence there is no incriminating material qua each of the assessment year roped in under section 153A, then,

no addition can be made while framing the assessment under section 153A.

20. The aforesaid principle and ratio are clearly applicable on the facts of the present case also, as admittedly no incriminating material relating to these assessment years or as a matter of fact for any of the assessment years were found during the course of search.

21. In the result, all the appeals of the assessee are allowed. Order Pronounced in the Open Court on 12/07/2021.

Sd/-
(Dr. B. R. R. Kumar)
Accountant Member

Sd/-
(Amit Shukla)
Judicial Member

Dated: 12/07/2021
Subodh

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

ASSISTANT REGISTRAR