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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **ITA No. 512/2016**
\+ **ITA No. 513/2016**
\+ **ITA No. 514/2016**

PR. COMMISSIONER OF INCOME TAX (CENTRAL) – 3 ..... Appellant

Through: Mr. Zoheb Hossain, Senior Standing Counsel for the Revenue.

versus

DHARAMPAL PREMCHAND LTD. ..... Respondent

Through: Mr. Salil Agarwal, Ms. Bina Gupta & Ms. Surbhi Kapoor, Advocates.

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE PRATHIBA M. SINGH

O R D E R

% 21.08.2017

Dr. S. Muralidhar, J.:

1. These are three appeals directed against a common judgment dated 8th January 2016 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA Nos. 5079-5081/Del/2013 for Assessment Years ('AY') 2005-06, 2006-07 & 2007-08 respectively. While admitting these appeals by the order dated 14th December 2016, this Court framed the following question for consideration:

> "Whether the ITAT fell into error in holding that the additions made in the course of proceedings under Section 153A/143(3) of the Income Tax Act, 1961 were not warranted having regard to the judgment of this Court in CIT v. Kabul Chawla 380 ITR 573?"

2. It is not in dispute that, for the AYs in question, the assessments by were completed by the Assessing Officer (AO) under Section 143(3) of the Income Tax Act, 1961 ('Act').

3. On 2nd January 2012 a search under Section 132 of the Act was carried out in the Dharampal Satyapal Group, which is engaged in the business of manufacturing and trading of chewing tobacco, and premium *paan masala*. In response to the notice dated 9th January 2012 issued to it under Section 153A of the Act, the Assessee filed its return of income on 16th January, 2012 declaring an income of Rs. 5,70,32,680/-. This was the income which was declared when the return was filed in the first place.

4. The Assessee was claiming deduction under Section 80-IB and 80-IC of the Act in respect of its units located at Himachal Pradesh and Agartala. As for the Noida unit of the Assessee, which was not eligible for deduction under Section 80-IB and 80-IC of the Act, it is stated that it was transferring silver flakes to the various eligible units.

5. During the course of the assessment proceedings under Section 143(3) of the Act, the Assessee submitted the certificate of the Auditor in Form 10CCB claiming deduction in respect of the profits of the eligible units. The case of the Revenue is that, in the Form 10CCB submitted by the Assessee, no disclosure was made regarding the transfer of material from the Noida unit to the eligible units.

6. In the assessment order dated 28th March 2013passed under Section 153A of the Act, the AO discussed in some detail the report of the auditor in Form 10CCB. After noting the failure by the Assessee to disclose in the said form the transaction involving transfer of silver flakes from the Noida unit to the other units, the AO rejected the said report submitted in Form 10CCB. It is important to note that, as far as the assessment order of the AO is concerned, it failed to discuss whether the documents seized in the course of search constituted incriminating material *qua* the AYs in question or whether it reflected a *modus operandi* adopted by the Assessee which could lead to an inference *qua* each of the AYs in question even though the material seized did not pertain to those AYs.

7. Before the Commissioner of Income Tax (Appeals) ['CIT (A)'], the question of assumption of jurisdiction under Section 153A of the Act was squarely raised. In para 3.3 of the order dated 21st June 2013, the CIT (A) noted that "a perusal of the reply filed before the Assessing Officer shows that there are large number of documents were seized, which has nexus of for quantifying deduction u/s 80IB/80IC." The CIT (A) then set out the entire list of documents seized and noted that the Assessee had filed an explanation on the said documents. It was noted that, "though Assessing Officer has not referred these seized documents in the assessment order but these explanations were present before the Assessing Officer to arrive at the conclusion that goods/raw material is purchased at head office and goods are transferred to eligible unit claiming deduction u/s 80IB/80IC." According to the CIT (A), since at

the time of passing of the assessment order under Section 153A of the Act, the above facts came to the knowledge of the AO due to the seized documents, the disallowance of the deduction under Section 80IB/80IC was justified. The CIT (A) concluded that "presence of seized documents and its extracts has definitely played a role to arrive at the decision for disallowing deduction."

8. In the further appeal filed by the Assessee before the ITAT, the central question that arose was again whether the assumption of jurisdiction under Section 153A of the Act *qua* the Assessee for the AYs in question was justified. A submission was made before the ITAT by the Department Representative [DR] that "these documents are seized during the course of search and are incriminating material, which was not before the AO at the time of making original assessment." According to the DR, "though the dates of the documents are pertaining to FY 20 10-11 but this shows the modus operandi of the assessee by the transfer of the goods and therefore the assessment under Section 153A made by the AO is purely on the basis of seized material found during the course of search."

9. The ITAT took it upon itself to analyse the seized material in great detail. This entire analysis is to be found in para 23 of the impugned order. At the end of the analysis the ITAT came to the following conclusions in para 24:

> "24. Based on this we have come to conclusion that:
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> a. None of the material seized during the search relates to the year under appeal.

b. None of the material found relate to the goods transfer to one unit from other for the period.

c. None of the material relates to the purchases from sister concerns.

d. None of the material suggest that the material transferred to eligible undertaking is less than the market rate.

e. None of the material suggest that the eligible units are not carrying out manufacturing activity, which is stated by assessee.

f. None of the material shows that there is inflation of the profit by assessee of eligible undertakings.

g. None of the material suggest that appropriation of profit made by the assessee to drive the income of eligible undertaking is incorrect.

h. None of the material suggest that eligible units earn 'more than Ordinary profits'."

10. Mr. Zoheb Hossain, learned Senior Standing Counsel for the Revenue, placed considerable reliance on the decision of the Division Bench of this Court in ***Smt. Dayawanti Gupta v. CIT [2017] 390 ITR 496 (Del)*** where it was held that material seized which is relevant to one particular AY is sufficient to infer a certain *modus operandi* adopted by the Assessee for all the AYs in question, although there may not be specific incriminating material *qua* each of the AYs. He submitted that the subsequent decision of this Court in ***Principal Commissioner of Income Tax v. Meeta Gutgutia Prop. M/s Ferns 'n' Petals [2017] 395 ITR 526 (Del)***, which takes a contrary view, is inconsistent with said decision and, therefore, the entire issue should be

referred to a larger Bench of this Court. Mr Hossain further submitted that although the seized material may have pertained only to FY 2010-11, since it could lead to an inference regarding the same modus operandi adopted by the Assessee, for all the AYs in question, it constituted sufficient incriminating material to justify the assumption of jurisdiction under Section 153A of the Act.

11. In reply, Mr. Salil Agarwal, learned counsel appearing for the Assessee, pointed out that the decision in ***Smt. Dayawanti Gupta v. CIT*** *(supra)*, in fact, did not contradict the decision of this Court in ***Commissioner of Income Tax v. Kabul Chawla [2015] 380 ITR 573 (Del)***. He pointed out that although an appeal by the Revenue against the said decision in ***Kabul Chawla*** is pending before the Supreme Court, there is no stay of the said judgment and, therefore, as far as this Court is concerned, the decision in ***Commissioner of Income Tax v. Kabul Chawla*** *(supra)* is still good law. That decision explicitly holds that there has to be incriminating material to justify the assumption to jurisdiction under Section 153A of the Act *qua* each of the AYs for which assessment is sought to be reopened. Mr Aggarwal submitted that, in the present case, even *de hors* this question, the ITAT has analysed the material seized and in fact found it to be not incriminating even for FY 2010-11. That being the position, the further question as to whether such material could constitute incriminating material with respect to other AYs simply did not arise.

12. Indeed, the Court finds that *de hors* the question whether the material seized, which admittedly pertains to FY 2010-11, can

constitute sufficient material to reopen the assessments for the other AYs in question, it is seen that, even for FY 2010-11, the ITAT, after undertaking a detailed analysis, found that what was seized was not incriminating material. The categorical factual findings by the ITAT, which have not been shown by the Revenue to be perverse, are *inter alia* that the material seized does not show inflation of the profit of the eligible undertakings; or that the eligible undertakings are not carrying out manufacturing activities or that the material transferred to the eligible undertakings is less than the market value and that "none of the material relates to the purchases from sister concerns." All of this is *de hors* the fact that the material pertains only to FY 2010-11.

13. If, even for FY 2010-11, what was seized did not constitute incriminating material, then the essential jurisdictional fact for justifying the assumption of jurisdiction under Section 153A of the Act did not exist. Learned counsel for the Assessee is therefore right in submitting that, in view of the above factual findings of the ITAT, the further question as to whether the said material was sufficient to reopen the assessments for the other AYs, with which these appeals are concerned, does not really arise.

14. Nevertheless, the Court is of the view that the decision of this Court in ***Commissioner of Income Tax v. Kabul Chawla*** *(supra)*, which has been reiterated in ***Principal Commissioner of Income Tax v. Meeta Gutgutia Prop. M/s Ferns "N" Petals*** *(supra)*, is still good law as far as this Court is concerned. As explained in ***Principal Commissioner of Income Tax v. Meeta Gutgutia Prop. M/s Ferns 'n' Petals*** *(supra)*, the

decision of this Court in ***Smt. Dayawanti Gupta v. CIT*** *(supra)* is not contrary to the ratio of the decision of this Court in ***Commissioner of Income Tax v. Kabul Chawla*** *(supra)*. This Court has, in ***Principal Commissioner of Income Tax v. Meeta Gutgutia Prop. M/s Ferns 'n' Petals*** *(supra)*, explained the factual background and circumstances under which the decision in ***Smt. Dayawanti Gupta v. CIT*** *(supra)* was rendered and how in the peculiar facts of that case that it was held that the material seized for one particular AY could lead to an inference regarding the *modus operandi* of the Assessee for the other AYs. Further, as pointed out in ***Principal Commissioner of Income Tax v. Meeta Gutgutia Prop. M/s Ferns 'n' Petals*** *(supra)*, the facts in ***Smt. Dayawanti Gupta v. CIT*** *(supra)* were that the Assessees themselves made statements under Section 133A admitting to not maintaining proper books of accounts and admitting that the documents seized during the course of search could pertain even to the other AYs. These distinguishing features do not exist in the present case and were not also present in ***Principal Commissioner of Income Tax v. Meeta Gutgutia Prop. M/s Ferns 'n' Petals*** *(supra)*. In the present case too there was no incriminating material seized *qua* each of the AYs the assessments for which were sought to be reopened. Consequently, the Court perceives no conflict in these decisions that warrants reference of the issue to a larger Bench.

15. For the above reasons, the question framed is answered in the negative i.e. against the Revenue and in favour of the Assessee.

16. The appeals are accordingly dismissed.

S. MURALIDHAR, J.

PRATHIBA M. SINGH, J.

AUGUST 21, 2017
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