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

\+ ITA 231/2022 & CM APPL. 32873/2022

PRINCIPAL COMMISSIONER OF INCOME TAX, DELHI-20
..... Appellant

Through: Ms. Vibhooti Malhotra, Sr. Standing Counsel for Revenue.

versus

MR. SHIV KUMAR AGARWAL ..... Respondent

Through: None.

% Date of Decision: 28th July, 2022

CORAM:
HON'BLE MR. JUSTICE MANMOHAN
HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

J U D G M E N T

MANMEET PRITAM SINGH ARORA, J (ORAL):

CM APPL. 32873/2022

Exemption allowed, subject to all just exceptions.

Accordingly, this application is disposed of.

ITA 231/2022

1. The present Income Tax Appeal arises out of the impugned order dated 30th June, 2021 passed by the Income Tax Appellate Tribunal (hereinafter referred to as 'ITAT'), Delhi in ITA 5280/Del/2018. The facts, in brief are that the Investigation Wing of the Income Tax Department conducted a search & seizure and survey operations under Section 132/133A

of the Income Tax Act, 1961 (hereinafter referred to as the 'Act') on 8th July, 2015 against M/s K.R. Pulp & Papers Ltd. and its group at various residential and business premises. During post-search investigations, Sh. Madho Gopal Agarwal, Managing Director of M/s K.R. Pulp & Papers Ltd. made a statement. It is the case of the Revenue that Sh. Madho Gopal Agarwal, Managing Director of M/s K.R. Pulp & Papers Ltd. admitted that undisclosed income has been routed in the books through bogus entries of Long Term Capital Gains (LTCG) by way of sale of shares. It is also the case of the Revenue that during the course of the search operations and post-search investigation, various incriminating documents were found and seized which disclosed that income from sale of shares of penny stock companies was disclosed as LTCG by its beneficiaries, and the LTCG earned by the promoters and family members has been used for personal use.

2. In this regard reliance has been placed on the statement of Sh. Madho Gopal Agarwal recorded on oath under Section 132(4) of the Act on 3rd August, 2015 and letter dated 31st July, 2015 issued by Sh. Madho Gopal Agarwal. The case was centralised as per the orders passed under Section 127 of the Act and a notice under Section 153A of the Act was issued on 6th September, 2016, which was duly served. Upon receipt of notice the assessee filed his return for the relevant assessment year 2011-12 declaring an income of Rs. 5,41,130/- on 2nd March, 2017. During the year under consideration, the assessee declared income under the head *'income from salary', 'income from capital gains'* and *'income from other sources'*. With respect to the income from capital gains, the assessee submitted in his reply to state that he had purchased 400 shares of one M/s KGN Industries Ltd. for

a total consideration of Rs. 4,000/- at Rs. 10/- per share subsequently dematerialised the shares and sold the shares on 13th October, 2010 i.e., in Financial Year (FY) 2010-11 for a sum of Rs. 3,62,996/-. It is submitted that the assessee had earned capital gain of Rs. 3,61,496/- on the sale of the said shares. However, LTCG of Rs. 3,61,496/- was claimed by the assessee as an exempt income under Section 10(38) of the Act. The Assessing Officer (AO) relying upon the letter dated 31st July, 2015 and statement by Sh. Madho Gopal Agarwal dated 3rd August, 2015 held that the amount of gain of Rs. 3,61,496/- is an accommodation entry, therefore, rejected the return filed by the assessee and treated the amount of Rs. 3,61,496/- as an unexplained credit received by the assessee under Section 68 of the Act and added the same to the total income of the assessee.

3. The assessee filed an appeal against the aforesaid order of the AO dated 28th December, 2017 before CIT(A). The assessee raised a specific ground that the assessment with respect to the AY 2011-12 stood completed as on the date when notice under Section 153A of the Act was issued to the assessee. The assessee submitted that no incriminating evidence or document was found during the search proceedings for the relevant assessment year. The assessee further contended that the statement of Sh. Madho Gopal Agarwal recorded under Section 132(4) of the Act during the search proceedings does not constitute as incriminating material. The assessee further relied upon the judgment of this Court in the case of ***Commissioner of Income Tax vs. Kabul Chawla (2016) 380 ITR 573*** to contend that the order of the AO was contrary to law and liable to be set aside.

However, CIT(A) relying upon the statement of Sh. Madho Gopal

Agarwal confirmed the addition made by the AO and dismissed the appeal vide order dated 8th June, 2018. The assessee being aggrieved by the dismissal filed an appeal before ITAT. The order of the ITAT is a common order which has been passed in respect of six assesses pertaining to same search. The lead appeal determined by the ITAT is in the case of Shri Gopal Agarwal, however, no challenge to the said appeal is pending before this Court. It is stated by the learned counsel that the appeal may be in the process of filing or listing before the Registry.

4. The ITAT after determining the appeal of Shri Gopal Agarwal has on same reasoning allowed the appeal of the respondent/assessee since it contained identical grounds for challenge. The ITAT concluded that the additions made by the AO for the assessment under consideration is not based on any incriminating material found during the course of search from the premises of the assessee. The ITAT concluded that the AO had made the additions solely relying on the disclosures made by the Managing Director, Sh. Madho Gopal Agarwal. The ITAT after finding that there was no incriminating material found as a result of the search conducted against the assessee on record, allowed the appeal and set aside the addition made by the AO. The ITAT has relied upon the judgment of this Court in ***PCIT v. Anand Kumar Jain (HUF) 432 ITR 384 Del*** and ***CIT v. Best Infrastructure India Pvt. Ltd reported in (2017) 397 ITR 82, Delhi*** wherein this Court has held that statements recorded under Section 132(4) of the Act do not themselves constitute as incriminating material in the absence of any corroborative evidence. The ITAT placed reliance on *para 35* of ***CIT v. Best Infrastructure India Pvt. Ltd. (supra)*** as reproduced hereinbelow:-

"35. Turning to the facts of the present case, it requires to be noted

that the statements of Mr. Anu Aggarwal, portions of which have been extracted hereinbefore, make it plain that the surrender of the sum of Rs. 8 crores was only for the AY in question and not for each of the six AYs preceding the year of search. Secondly, when Mr. Anu Aggarwal was confronted with A-1, A-4 and A-11 he explained that these documents did not pertain to any undisclosed income and had, in fact been accounted for. Even these, therefore, could not be said to be incriminating material qua each of the preceding AYs."

5. The appellant has filed the present appeal aggrieved by the aforesaid order of the tribunal.

6. It is contended before us that the ITAT fell in error in holding that there was no corroborative material in support of the statement made by Sh. Madho Gopal Agarwal, in this regard, it was contended that in pursuance to the statement made by Sh. Madho Gopal Agarwal, various other members of the family disclosed LTCG and did not claim exemption under Section 10(38) of the Act and paid taxes on the said amount. It was, thus, submitted that in view of the statement of Sh. Madho Gopal Agarwal and the corroborative conduct of the other family members, the ITAT fell in error and the reliance placed on the judgment of this Court in ***CIT v. Best Infrastructure India Pvt. Ltd. (supra)*** is erroneous.

7. The addition has been made by the AO with respect to the LTCG earned on sale of shares of M/s KGN Industries Limited.

8. We have perused the statement dated 3rd August, 2015 and the contents of the letter dated 31st July, 2015, both authored by Sh. Madho Gopal Agarwal. There is no reference to M/s KGN Industries Ltd. in either of the said documents. No other material found during search pertaining to M/s KGN Industries Ltd. has been placed on record. The Revenue has not placed on record any incriminating material which was found as a result of the

search conducted on the assesee herein. It is also the contention of the assessee that there was no surrender by him unlike Sh. Madho Gopal Agarwal and he, therefore, specifically disputed that any notice under Section 153A of the Act could have been initiated against him. The said facts are not disputed by the counsel for the Revenue.

9. On the date of search, admittedly, the assessment with respect to the AY under consideration 2011-12 admittedly stood completed. Since no assessment was pending for the relevant AY 2011-12 on the date of search and no incriminating material was found during the course of search, the issue is covered in favour of the assessee by the judgment of this Court in the case of ***Commissioner of Income Tax v. Kabul Chawla (supra) and Principal CIT vs. Meeta Gutgutia (2017) 395 ITR 526.*** The relevant paragraphs are reproduced hereinbelow:-

> *"10. The ITAT, therefore, concluded that since no assessment was pending for the relevant assessment year 2010-11 on the date of search and no incriminating material was found during the course of search, the issue is covered in favour of the assessee by the judgment of this Court in the case of* ***Commissioner of Income Tax vs. Kabul Chawla (2016) 380 ITR 573*** *and* ***Principal CIT vs. Meeta Gutgutia (2017) 395 ITR 526*** *as well as by the orders of the ITAT in the group cases of Madho Gopal Agarwal and M/s Kapis Impex LLP (supra).*
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> *11. A predecessor Division Bench of this Court in Kabul Chawla (supra) has held that if no incriminating material is found during the course of the search in respect of an issue, then no addition in respect of such an issue can be made in the assessment under Sections 153A and 153C of the Act. The legal position summarized in the subsequent decision of Meeta Gutgutia (supra) is reproduced hereinbelow:-*
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> > *"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 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.*
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> *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.""*

10. In this view of the matter there is no infirmity in the order passed by the ITAT. In the aforesaid facts, no substantial questions of law arise for consideration. Accordingly, the present appeal is dismissed.

MANMEET PRITAM SINGH ARORA, J

MANMOHAN, J

JULY 28, 2022/msh