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

+ ITA 389/2022

THE CHIEF COMMISSIONER OF INCOME TAX -(OSD)-
CENTRAL -1 Appellant

Through: Mr. Ruchir Bhatia, Sr. Standing
Counsel for Revenue with Ms.
Mansie Jain, Advocate.

versus

R.J. CORP. LTD. Respondent

Through: None.

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Date of Decision: 11th October, 2022

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

J U D G M E N T

MANMOHAN, J (Oral):

1. Present Income Tax Appeal has been filed challenging the order dated 21st January, 2021 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA No. No.3857/DEL/2015 & C.O. No. 53/DEL/2016 for Assessment Year ('AY') 2010-11.

2. Learned counsel for the Appellant states that the ITAT has erred in holding that the addition which was not based on incriminating material found during the search, could not be made the basis for an assessment under Section 153A of the Income Tax Act,1961 ('the Act') and accordingly, deleted the said addition without going into merits of the same. He further states that the ITAT has erred in relying upon the judgement of



this Court in the case of *CIT vs Kabul Chawla 380 ITR 573 (Del)* ignoring the fact that Revenue's SLP on similar issue is pending before the Supreme Court in the case of *M/s Apar Industries Ltd.*

3. Upon a perusal of the paper book, this Court finds that the ITAT has observed that the case of the respondent was of concluded assessment and no incriminating material was found during course of search. The relevant extract of the impugned order is reproduced herein below:-

“21. The present assessment year is also a concluded assessment year i.e. not pending as on the date of search i.e. 27th of March 2012. The disallowance on advertisement expenditure of Rs. 22,68,806/- was made in a similar manner as it was made in Assessment Year 2009-10. There is no reference of any incriminating material found during the course of search. Similarly disallowance under Section 14A of the act of Rs. 9,65,39,770/- was also made which does not have any reference of incriminating material.

22. The ld DR could not show that any of these additions/disallowances are made on the basis of incriminating material found during the course of search.

23. As the Assessment Year 2010-11 is also a concluded assessment year, which could have been tinkered with only on the basis of some incriminating material found during the course of search, which is absent in this case. Therefore, we allow the additional ground in CO raised by the assessee with similar direction as in Assessment Year 2009-10.

24. Accordingly, additional ground raised in the Cross Objection by the assessee is allowed.

25. Therefore, the grievance of the AO in ITA as well as in other grounds of the Cross Objection of the assessee becomes purely academic in nature and does not deserve to be discussed and hence dismissed.



26. *In the result, the Cross Objection of the assessee for both the years are allowed partly and appeals of the Assessing Officer are dismissed for both the years.*”

(Emphasis supplied)

4. This Court finds that the conclusion reached in *Kabul Chawla* (supra) was summarized in *PCIT vs. Meeta Gutgutia, (2017) 82 taxmann.com 287 Del.* The relevant portion of the Judgment passed in *PCIT vs. Meeta Gutgutia* (supra) is reproduced hereinbelow:-

"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.

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."

5. Even, this Court in ***Principal Commissioner of Income Tax vs. Bhadani Financiers Pvt. Ltd., 2021 SCC OnLine Del 4430*** has held that where the assessment of the respondents had attained finality prior to the date of search and no incriminating documents or materials had been found and seized at the time of search, no addition could be made under Section 153A of the Act as the cases of the respondents were of non-abated assessment.



6. Though the judgment of this Court in *Kabul Chawla* (supra) has been challenged and is pending adjudication before the Supreme Court, yet there is no stay of the said judgment till date.

7. Consequently, in view of the judgments passed by the Supreme Court in *Kunhayammed and Others vs. State of Kerala and Another*, (2000) 6 SCC 359 and *Shree Chamundi Mopeds Ltd. Vs. Church of South India Trust Association CSI Cinod Secretariat, Madras* (1992) 3 SCC 1, the present appeal is dismissed being covered by the judgment passed by this Court in *Bhadani Financiers Pvt. Ltd.* (supra) and *Kabul Chawla* (supra). However, it is clarified that the order passed in the present appeal shall abide by the final decision of the Supreme Court in the aforesaid SLP – *M/s Apar Industries Ltd.*

MANMOHAN, J

MANMEET PRITAM SINGH ARORA, J

OCTOBER 11, 2022/msh