$~20-21,3-5 (2021) and 3-6, 21(2020)

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

20

\+ ITA 81/2020

PR. COMMISSIONER OF INCOME TAX ..... Appellant

Through Mr. Ajit Sharma, Advocate.

versus

M/S BHADANI FINANCIERS PVT. LTD. ..... Respondent

Through Mr. Gautam Jain, Advocate.

21

\+ ITA 143/2020 & CM APPL. 7615/2020

PR. COMMISSIONER OF INCOME TAX ..... Appellant

Through Mr. Ajit Sharma, Advocate.

versus

M/S PRAGATI TRADECOM PVT. LTD ..... Respondent

Through Mr. Gautam Jain, Advocate.

3

\+ ITA 93/2020 & CM APPL. 5457/2020

PR. COMMISSIONER OF INCOME TAX ..... Appellant

Through Mr. Ajit Sharma, Advocate.

versus

M/S SWASTIK EXPORTS & IMPORTS PVT. LTD

..... Respondent

Through Mr. Gautam Jain, Advocate.

4

\+ ITA 94/2020 & CM APPL. 5461/2020

PR. COMMISSIONER OF INCOME TAX ..... Appellant

Through Mr. Ajit Sharma, Advocate.

versus

M/S BHADANI FINANCIERS PVT. LTD. ..... Respondent

Through Mr. Gautam Jain, Advocate.

5

\+ ITA 120/2020 & CM APPL. 6638/2020

PR. COMMISSIONER OF INCOME TAX ..... Appellant

Through Mr. Ajit Sharma, Advocate.

versus

M/S PRAGATI TRADECOM PVT. LTD ..... Respondent

Through Mr. Gautam Jain, Advocate.

3

\+ ITA 77/2020

PR. COMMISSIONER OF INCOME TAX ..... Appellant

Through Mr. Ajit Sharma, Advocate.

versus

M/S PRAGATI IMPTRADE PVT. LTD. ..... Respondent

Through Mr. Gautam Jain, Advocate.

4

\+ ITA 79/2020

PR. COMMISSIONER OF INCOME TAX ..... Appellant

Through Mr. Ajit Sharma, Advocate.

versus

M/S SWASTIK TRACOM PVT. LTD. ..... Respondent

Through Mr. Gautam Jain, Advocate.

5

\+ ITA 99/2020

PR. COMMISSIONER OF INCOME TAX ..... Appellant

Through Mr. Ajit Sharma, Advocate.

versus

M/S SWASTIK EXPORTS & IMPORTS PVT. LTD ..... Respondent

Through Mr. Gautam Jain, Advocate.

6
+ ITA 105/2020
PR. COMMISSIONER OF INCOME TAX ..... Appellant
Through Mr. Ajit Sharma, Advocate.
versus
M/S SWASTIK TRADEX PVT. LTD ..... Respondent
Through Mr. Gautam Jain, Advocate.

21
+ ITA 1027/2019 & CM APPL. 55503/2019
PR. COMMISSIONER OF INCOME TAX ..... Appellant
Through Mr. Ajit Sharma, Advocate.
versus
M/S PRAGATI IMPORTS PVT. LTD. ..... Respondent
Through Mr. Gautam Jain, Advocate.

% Date of Decision: 9th September, 2021

CORAM:
HON'BLE MR. JUSTICE MANMOHAN
HON'BLE MR. JUSTICE NAVIN CHAWLA

MANMOHAN, J. (Oral)

The hearing has been done by way of video conferencing.

BACKGROUND

1. Present appeals have been filed under Section 260A of the Income Tax Act, 1961 (for short 'the Act') challenging the order dated 30th April, 2019 passed by the Income Tax Appellate Tribunal (for short 'ITAT') for Assessment Years 2008-09, 2009-10 and 2010-11.

2. Appellant seeks framing of substantial questions of law that are proposed in the present appeals. As the questions of law are similar in

all the appeals, the questions of law proposed in one of the appeals being ITA 81/2020 are reproduced hereinbelow:-

> *"A. Whether, on the facts and the circumstances of the case and in law, the Ld. ITAT has erred in confirming the order of the Ld CIT(A) in directing the AO to delete the addition made u/s 68 on account of unexplained credits and u/s 69C on account of unexplained expenses?*
>
> *B. Whether on the facts and circumstances of the case and in law, the Ld ITAT has erred in dismissing the appeal of the Revenue and deleting the additions made by the AO u/s 68 and 69 of the Income Tax Act relying only upon the decision of Hon'ble Delhi High Court in the case of CIT vs Kabul Chawla (2016) 380 ITR 573, without adverting to the merit of the case?*
>
> *C. Whether on the facts and in circumstances of the case and in law, the Ld. ITAT has erred in deleting the additions made by the AO in the assessment framed u/s 153A of the Act without appreciating the fact that the decision of Hon'ble High Court of Delhi in the case CIT vs Kabul Chawla (supra), was not accepted by the Department and SLP filed in the Hon'ble Supreme Court was dismissed due to low tax effect and not on merit?*
>
> *D. Whether, on the facts and circumstances of the case and in law that the Tribunal was legally justified in not appreciating that Revenue has filed SLPs in various cases against the issues arising out of the decision of the Hon'ble High Court of Delhi in the case of CIT vs Kabul Chawla in Apex Court and the decisions are still pending and hence, the issue has not attained finality?*
>
> *E. Whether, on the facts and in circumstances of the case and in law, the Ld. ITAT has erred in restricting the applicability of the section u/s 153A of the Act in respect of completed assessment as in the present case, only to undisclosed income and assets detected during search u/s 132 of the Act ?*
>
> *F. Whether, on the facts and in circumstances of the case and in law, the Ld. ITAT failed to consider the mandatory provision of*

section 153A of the Act that the AO has to assess the total income of six assessment years u/s 153A of the Act and this cannot be done if the scope of Section 153A is limited to only undisclosed income?"

ARGUMENTS ON BEHALF OF APPELLANT/REVENUE

3. Learned counsel for the appellant/Revenue states that the ITAT has erred in confirming the orders of the Commissioner Income Tax (Appeal) and directing the Assessing Officers to delete the additions made under Section 68 of the Act on account of unexplained credits and under Section 69C of the Act on account of unexplained expenses. He submits that the impugned orders are perverse and passed without independently analyzing the decision of this Court in the case of ***CIT vs Kabul Chawla, (2016) 380 ITR 573*** and without adverting to the merits of the cases. He emphasises that the ITAT has erred in deleting the additions made by the AO in the assessments framed under Section 153A of the Act without appreciating the fact that the decision of this court in the case of ***CIT v. Kabul Chawla*** (supra) had not been accepted by the department and the Special Leave Petition preferred by the department had been dismissed due to low tax effect and not on merit. He submits that finality on the impugned issue of law has not been attained till date as SLPs are pending before the Apex Court impugning the same issue in the case of ***CIT V. M/s Continental Warehousing Corporation Ltd. 235 Taxmann 568*** (Bombay High Court) as well as in other cases.

4. He states that the ITAT has completely misread and misinterpreted the provision of Section 153A of the Act and has failed

to appreciate that the mandatory provision of Section 153A of the Act requires the AO to assess the total income of six assessment years under Section 153A of the Act and this cannot be done if the scope of Section 153A is limited to only undisclosed income. He submits that the mandate under Section 153A of the Act is to issue the notice for six assessment years and assess the total income irrespective of incriminating material discovered during the search.

5. Learned counsel for the appellant/Revenue contends that in the present cases incriminating documents/materials had been found during the course of the searches and consequently by virtue of Section 153A of the Act, the Assessing Officer had to assess the total income of six years under Section 153A of the Act. Learned counsel further submits that the assessments were not completed under Section 143(3) in the present cases, consequently, prior to the date of search i.e. 18th June, 2013, the assessment of the respondents had not attained finality.

COURT'S REASONING

SCOPE OF SECTION 260A OF THE ACT.

6. Section 260A of the Act provides for an appeal to the High Court against a decision of ITAT. Sub-section (1) of Section 260A of the Act provides for appeal against the order of the Tribunal only on substantial questions of law.

7. "Substantial" means "having substance, essential, real, of sound worth, important or considerable." To be "substantial", a question of law must be debatable, not previously settled. The Supreme Court and several High Courts have held that a substantial question of law is

involved if it directly or indirectly affects substantial rights of the parties or it is of general public importance, it is an open question in the sense that the issue has not been settled by a pronouncement of the Court or it is not free from difficulty or it calls for a discussion for alternate views. A High Court under Section 260A of the Act has limited jurisdiction to interfere with findings of fact recorded by the Tribunal. If findings of Tribunal are irrational, perverse or unreasonable, then only interference of court would be justified. It would also be justified if a finding of fact is arrived at by the Tribunal without any evidence. Section 260A is akin to Section 100 of the CPC, 1908. [See: ***Sampath Iyengar's Law of Income Tax***].

THE ASSESSMENT OF THE RESPONDENTS HAD ATTAINED FINALITY PRIOR TO THE DATE OF SEARCH.

8. A perusal of the paper book reveals that Income Tax Returns in the present batch of matters had been duly accepted and intimation under Section 143(1) of the Act had been issued. Neither notices under Section 143(2) of the Act nor reassessment notices under Section 148 of the Act had been issued. Consequently, the assessment of the respondents had attained finality prior to the date of search.

BOTH THE CIT (A) AS WELL AS ITAT HAVE GIVEN CONCURRENT FINDINGS OF THE FACT THAT NO INCRIMINATING MATERIALS HAD BEEN SEIZED IN THE SEARCHES. THE TRIBUNAL'S FINDING THAT "IT IS AN ADMITTED FACT THAT IN THE SEARCH ACTION UNDER SECTION 132 OF THE ACT, NO INCRIMINATING DOCUMENT/MATERIAL WAS FOUND AND SEIZED AT THE TIME OF SEARCH IS CORRECT AND SUFFERS FROM NO PERVERSITY. CONSEQUENTLY, IT IS NOT OPEN TO THE

APPELLANT TO CONTEND THAT INCRIMINATING DOCUMENTS/MATERIALS HAD BEEN FOUND AND SEIZED DURING SEARCHES.

9. As far as the contention of learned counsel for the appellant that incriminating documents/materials had been found and seized at the time of search, both the CIT (A) as well as ITAT have given concurrent findings of the fact that no incriminating materials had been seized in the searches. One of the orders passed by the CIT (A) in an appeal bearing Appeal No. 457/15-16/2434 is reproduced hereinbelow:-

> *"(a) During the period relating to A.Y. 2010-11, the appellant has received fresh share application money/premium receipts amounting to Rs. 3,00,00,000/- from the investor company, M/s Swastik Exports & Imports (P) Ltd.*
> *(b) In the return of income filed on 12.05.2015, by the appellant, in response to notice u/s 153A of the Act, dated 22.4.2015, no undisclosed income was included on account of any accommodation entry or on account of payment of any commission.*
>
> *(c) During the assessment proceedings, the appellant has furnished all the relevant details relating to the investor company, M/s Swastik Exports & Imports (P) Ltd in the form of its ITR, Bank Statements, Audited Balance Sheet, Confirmations of Investments, Copies of Share Certificates, MOA, AOA, relevant ROC records etc. Thus, the appellant has duly discharged its onus u/s 68 of the Act, by substantiating the identity, creditworthiness of the investor company and genuineness of the transactions of the receipts of share application money/premium, by furnishing various documents, in which no defects/shortcomings in relation to their authenticity and veracity were pointed out by the A.O.*
>
> *(d) The investor company has made the investments in the shares of the appellant company through proper banking*

channels. As per its bank statements and audited balance sheet, the investor company had sufficient funds in the form of share capital & reserves and out of which, the investments have been made in the shares of the appellant company.

(e) In the assessment proceedings, the A.O. has also obtained the information from the investor company directly by issuing notice u/s 133(6) of the Act, wherein the investor company has confirmed for the investments made in the appellant company and has also furnished copies of financial ledger accounts of appellant company, relevant bank statements, share application forms, audited financial accounts and acknowledgment of ITR. The investor company has discharges its onus u/s 68 of the Act, by substantiating the identity, creditworthiness and genuineness of the transactions of investment in shares application money/premium of the appellant company.

(f) All the 4 persons/directors in some of the investor companies, which have subscribed in the share capital of the investor company of the appellant, whose alleged statements were recorded during the survey action u/s 133A of the Act, on 18.6.2013 and were relied upon by the A.O. in drawing an adverse inference against the appellant, in their subsequent statements recorded by the A.O. on 22.3.2016 and sworn in affidavits dated 21.3.2016 filed during the assessment proceedings of the investor company, have categorically submitted that earlier no statements were recorded and their signatures were obtained on the print-outs of the alleged appellant. Further, they have confirmed about investment made by their companies in the investor company of the appellant.

(g)In the search action u/s 132 of the Act, no corroborative evidences were found, substantiating the alleged statements of Shri Vimal Kumar Dugar, the director in the Investor company of the appellant, recorded u/s 132(4) of the Act, on the date of search on 18.6.2013.

(h) In the search action u/s 132 of the Act, the loose papers seized and inventorized as Annexure: KLJ/KOL/2, did not belong to the appellant and the same belonged to the investor company of the appellant, M/s Swastik Exports & Imports (P)

Ltd. This is the statutory combined register (share register) (as per Companies Act, 1956) and the transactions reflected in the register, pertain to the share issue & transfer in relation to the investor company of the appellant, during the F.Y. 2007-08 to F.Y. 2009-10. These transactions are duly reported to ROC by filing various statutory forms and are also reflected in the financial statements of the investor company.

(i) The fact of issue of shares at a premium of Rs. 90/- per share by the appellant to the investor company, is fully incorporated and disclosed in the Audited Financial Statements and the relevant ROC Returns of the appellant.

(j) The assessment was not abated at the time of initiation of search action u/s 132 of the Act and as a result of search, no incriminating document/material was found, which shows that the appellant has taken any accommodation entry.

(k) In respect of alleged commission, no evidence or document was found in the search action u/s 132 of the Act, which shows payment of such alleged commission.

From the above discussion, it is clear that in the search action u/s 132 of the Act, no incriminating document/material was found and seized at the time of search and also subsequently. At the time of initiation of search action u/s 132 of the Act, the assessment or reassessment was also not abated. The additions made in assessment order u/s 153A of the Act, dated 29.3.2016, are not based on any incriminating document/material. As such, facts of the appellant are squarely covered by the ratio laid down by Hon'ble Jurisdictional High Court of Delhi, in the case of CIT Vs. Kabul Chawla(supra).”

10. This Court finds that even in the present appeals filed by the appellant/Revenue there is no specific ground that any incriminating material had been found during the search. The Tribunal’s finding that *“It is an admitted fact that in the search action under Section 132 of the Act, no incriminating document/material was found and seized at*

the time of search and also subsequently" is correct and suffers from no perversity. Consequently, it is not open to the appellant to contend that incriminating documents/materials had been found and seized during searches.

IN CIT VS KABUL CHAWLA, (2016) 380 ITR 573 IT HAS BEEN 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.

11. A learned 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 ***Kabul Chawla*** (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."

12. Though the judgment in ***Kabul Chawla*** (supra) has been challenged in connected matters and is pending before the Supreme

Court, yet there is no stay of the said judgment till date. Accordingly, this Court finds no ground not to follow the said judgment.

CONCLUSION

13. Keeping in view the aforesaid, this Court is of the opinion that the questions of law raised in present appeals have been settled by earlier Division Bench in ***Kabul Chawla*** (supra) and 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. Consequently, no addition can be made under Section 153A of the Act as the cases of respondents are of non-abated assessments.

14. Accordingly, the present appeals and applications being bereft of merit are dismissed.

15. The order be uploaded on the website forthwith. Copy of the order be also forwarded to the learned counsel through e-mail.

MANMOHAN, J

NAVIN CHAWLA, J

SEPTEMBER 9, 2021
AS