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

\+ ITA 29/2019 & CM APPL. 1733/2019

PR. COMMISSIONER OF INCOME TAX-8 ..... Appellant

Through: Mr. Sanjay Kumar, Senior Standing Counsel for Revenue.

versus

S.P. SINGLA CONSTRUCTION PVT. LTD ..... Respondent

Through: Ms. Kavita Jha, advocate, Mr. Vaibhav Kulkarni and Mr. Udit, Advocates.

% Date of decision:14th November, 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. 1733/2019 (for condonation of delay)

Keeping in view the averments in the application, the delay of 45 days in filing of the present appeal is condoned.

Accordingly, present application stands disposed of.

ITA 29/2019

1. Present Income Tax Appeal has been filed challenging the order dated 27th February, 2018 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA No. 4594/DEL/2016 for the Assessment Year ('AY') 2009-10.

2. The facts of the case relevant for deciding the present appeal are as follows:

2.1. On 27.09.2009, the Assessee filed Income Tax Return ('ITR') declaring an income of Rs. 9,93,09,210. The return filed by the Assessee was processed under Section 143(1) of the Income Tax Act, 1961 ('the Act'). The assessment under Section 143(3) was completed on 28.02.2011 at the returned income.

2.2. On 10.12.2013, a search and seizure operation under Section 132 of the Act was carried out in the case of the Assessee. During the assessment proceedings it was observed that as per the balance sheet of the Assessee, there was a substantial increase in the share capital and induction of the share premium for the AY under consideration. The Assessee was directed to furnish necessary details in support of the identity of the shareholders.

2.3. The Assessee was issued with an assessment order dated 31st March, 2015 by the Assessing Officer ('AO') resulting in an addition of Rs. 8,00,00,000/- under Section 68 of the Act. The AO noted that the details submitted by the Assessee was not found to be satisfactory.

2.4. Aggrieved by the assessment order dated 31st March, 2015, the Assessee preferred an appeal before the Commissioner of Income Tax Appeals ['CIT(A)'], whereby vide order dated 31st May, 2016, the aforesaid addition was deleted. It was noted by CIT(A) that it is clearly brought out by

the AO in her report that addition was not made on the basis of any incriminating document or material found during the course of search but the addition was made due to the failure of the appellant to discharge its onus to prove the identity, creditworthiness and genuineness of the transactions.

2.5. Aggrieved by the order dated 31st May, 2016, the Revenue preferred an appeal before the ITAT. By virtue of the impugned order, the ITAT concurred with the findings of the CIT(A) and held that no incriminating material was found during the course of the search.

3. Learned Counsel for the Appellant states that the ITAT has erred in holding that the addition which is not based on incriminating material found during the search could not be made in assessment under Section 153A of the Act and, consequently, deleted the addition without going to merits of the same. He states that the ITAT failed to appreciate that the incriminating evidence in the present case was discovered during the simultaneous search carried out on the premises of an entry operator Sh. Tarun Goel and information was received by the AO from the report of the Investigation Wing. He states that the ITAT failed to appreciate that the impugned addition under Section 68 of the Act was not based merely on the report or the statement of the entry operator Sh. Tarun Goel, these were used only as a starting point for further investigations by the AO and the same lead to be impugned addition. He states that the ITAT failed to appreciate that the scope and meaning of incriminating evidence cannot be restricted to just documentary evidence or admission by the Assessee itself.

4. He further states that the addition under Section 68 was made by the AO as the Assessee has failed to establish the identity, credit worthiness and genuineness of the share capital and premium received by the Assessee.

5. Learned counsel for the respondent relies upon the judgment of this Court in ***PCIT Vs. Meeta Gutgutia, (2017) 82 taxmann.com 287 (Del)*** which followed the decision of this Court in ***CIT Vs. Kabul Chawla (2016) 380 ITR 573 (Del)*** and reiterated that if no incriminating material was found during the course of search in respect of issue then no addition in respect of any issue can be made to the assessment under Sections 153A and 153C of the Act.

6. Upon a perusal of the paper book, this Court finds that both CIT(A) and the ITAT have given concurrent findings of fact that no incriminating material has been found during the search. The ITAT also recorded that the present case of the respondent was of non-abated assessment. In fact, the AO in his remand report filed before the CIT(A) admitted that no documents were found or seized during the course of search nor there was any admission by the Assessee. The relevant extract of the impugned order is reproduced herein below:-

> *"12. We have considered the submissions of both the parties and carefully gone through the material available on the record. In the present case, it is an admitted fact that the original assessment was framed by the AO vide order dated 08.12.2009 u/s 143(3) of the Act, thereafter, the case was reopened and the assessment was framed u/s 147/143(3) of the Act vide order dated 03.12.2012. After it, a search and seizure operation u/s 132 of the Act was carried out on 10.12.2012. During the course of search, no incriminating material was found and the AO made the addition on account of increase in share capital which was recorded in the books of accounts. The Assessee had taken a plea before the ld. CIT(A) that the assessment was completed before the date of search and the addition was not based on any incriminating*

material found during the course of search. The ld. CIT(A) specifically asked the remand report of the AO on the aforesaid contention of the Assessee. In response, the AO in his remand report dated 16.03.2016 admitted that though no documents were found/seized nor there was any admission by the Assessee during the course of search but the addition was made as the Assessee failed to establish the identity, creditworthiness and genuineness of the share capital/premium. From the above observation of the AO, it is crystal clear that no incriminating material was found during the course of search relating to the impugned addition."

(Emphasis Supplied)

7. The ITAT by relying upon the judgment of this Court in the case of ***Kabul Chawla (supra)*** held that the addition made by the AO is not called for and is liable to be deleted.

8. In this regard we may note the legal position was summarized in ***Kabul Chawla (supra)*** as under:

"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 complete 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."*

9. Even, this Court in ***Principal Commissioner of Income Tax. vs. Shiv Kumar Agarwal (2022) 143 Taxmann.com 55 (Del)*** has held where assessment of the respondent had attained finality prior to the date of search and no incriminating material of document has been found at the time of search, no addition could be made under Section 153A of the Act as the case of the respondent was of non-abated assessment.

10. Though the judgment in ***Kabul Chawla (supra)*** has been challenged by Revenue in connected matters and is pending before the Hon'ble Supreme Court, yet there is no stay of the said judgment till date. Consequently, in view of the judgment passed by the Hon'ble Supreme Court in ***Kunhayammed and Others. Vs. State of Kerala and Another, (2000) 6 SCC 359,*** the present appeal is covered by the judgment of this court in ***Kabul Chawla (supra)*** and ***Shiv Kumar Agarwal (supra).***

11. We are of the considered view that the facts and law have been correctly assessed by the CIT(A) and ITAT and, therefore, no substantial question of law arises for consideration in the present appeal. Accordingly, the present appeal stands dismissed.

12. However, it is clarified that the orders passed in the present appeal shall abide by the final decision of the Supreme Court in the aforesaid SLP.

MANMEET PRITAM SINGH ARORA, J

MANMOHAN, J

NOVEMBER 14, 2022
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