$~39 to 42 & 45

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

\+ **ITA 411/2022**

PR. COMMISSIONER OF INCOME TAX -7 ..... Appellant

Through: Mr.Puneet Rai, Sr.Standing Counsel for the Revenue.

versus

PILOT INDUSTRIES LIMITED ..... Respondent

Through: None

\+ **ITA 412/2022**

PR. COMMISSIONER OF INCOME TAX -7 ..... Appellant

Through: Mr.Puneet Rai, Sr.Standing Counsel for the Revenue.

versus

PILOT INDUSTRIES LIMITED ..... Respondent

Through: None

\+ **ITA 413/2022**

PR. COMMISSIONER OF INCOME TAX -7 ..... Appellant

Through: Mr.Puneet Rai, Sr.Standing Counsel for the Revenue.

versus

PILOT INDUSTRIES LIMITED ..... Respondent

Through: None

\+ **ITA 414/2022**

PR. COMMISSIONER OF INCOME TAX -7 ..... Appellant

Through: Mr.Puneet Rai, Sr.Standing Counsel for the Revenue.

versus

PILOT INDUSTRIES LIMITED ..... Respondent

Through: None

\+ **ITA 417/2022**

PR. COMMISSIONER OF INCOME TAX -7 ..... Appellant

Through: Mr.Puneet Rai, Sr.Standing Counsel for the Revenue.

versus

PILOT INDUSTRIES LIMITED ..... Respondent

Through: None

Date of Decision: 19th 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:

1. Present income tax appeals have been filed challenging the order dated 19th August, 2021 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA No. 3257-3261/Del./2016 for the Assessment Years 2005-06 to 2009-10.

2. Learned counsel for the Appellant states that the ITAT has erred in upholding the order of the CIT(A) and deleting the additions made on

account of gross profit ignoring the fact that the said additions have been made after rejecting the books of account which did not reflect true and correct state of affairs of the Assessee Company. He states that the ITAT has erred in concurring with the view of CIT(A) that no addition can be made on the basis of the documents found during the course of search pertaining to different assessment years.

3. He further states that the ITAT has erred in not appreciating that the statements of Mr. Vishesh Gupta recorded under Section 132(4) of the Income Tax Act 1961 ('the Act') during the course of search proceedings, in the absence of any other material, would in itself constitute 'incriminating material'.

4. He also states that the ITAT has committed an error in overlooking the legal position that the possession of incriminating material is pre-requisite condition only for those assessment years in which the assessments were completed under Section 143(3) of the Act and not in those years wherein no scrutiny assessment was carried out.

5. He submits that the ITAT has erred in relying on the judgement of this Court in ***CIT vs Kabul Chawla 380 ITR 573 (Del)*** without considering that this issue is pending before the Supreme Court.

6. A perusal of the paper book reveals that both CIT(A) and ITAT have given concurrent findings of fact that no incriminating material or corroborative material with respect to the statement of Mr. Vishesh Gupta was brought on record by the Department and that no assessment for the years under considerations were pending in the case of the assessee.

7. 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.

8. Consequently, the distinction between scrutiny assessment under Section 143 (3) of the Act and summary assessment under Section 143 (1) of the Act sought to be drawn by learned counsel for the appellant is irrelevant for the purposes of Section 153A of the Act.

9. Further, this Court in the case of ***PCIT vs Anand Kumar Jain (HUF) [2021 SCC Online Del 3174]*** following the judgements in ***PCIT v. Best Infrastructure (India) P. Ltd [2017 SCC OnLine Del 9591]*** and ***CIT v. Harjeev Aggarwal [2016 SCC OnLine Del 1512]*** has held that though the statement recorded in search has evidentiary value and relevance as contemplated under the explanation to section 132(4) of the Act, yet the same cannot, on a standalone basis, without reference to any other material discovered during search and seizure operations, empower the Assessing Officer to frame the block assessment. The relevant extract of the aforesaid judgement is reproduced herein below:

> *"7. The preliminary question under consideration before us is whether a statement under Section 132(4) constitutes incriminating material for carrying out assessment under S. 153(A) of the Act. A reading of the impugned order reveals that the statement of Mr. Jindal recorded under Section 132(4) forms the foundation of the assessment carried out under Section 153A of the Act. That statement alone cannot justify the additions made by the AO.* ***Even if we accept the argument of the Revenue that the failure to cross-examine the witness did not prejudice the assessee, yet, we discern***

from the record that apart from the statement of Mr. Jindal, Revenue has failed to produce any corroborative material to justify the additions. *On the contrary we also note that during the course of the search, in the statement made by the assessee, he denied having known Mr. Jindal. Since there was insufficient material to support the additions, the ITAT deleted the same. This finding of fact, based on evidence calls for no interference, as we cannot re-appreciate evidence while exercising jurisdiction under section 260A of the Act.*

8. Next, we find that, the assessment has been framed under section 153A, consequent to the search action. The scope and ambit of section 153A is well defined. This court, in CIT v. Kabul Chawla,1 concerning the scope of assessment under Section 153A, has laid out and summarized the legal position after taking into account the earlier decisions of this court as well as the decisions of other High Courts and Tribunals. In the said case, it was held that the existence of incriminating material found during the course of the search is a sine qua non for making additions pursuant to a search and seizure operation. ***In the event no incriminating material is found during search, no addition could be made in respect of the assessments that had become final. Revenue's case is hinged on the statement of Mr. Jindal, which according to them is the incriminating material discovered during the search action. This statement certainly has the evidentiary value and relevance as contemplated under the explanation to section 132(4) of the Act. However, this statement cannot, on a standalone basis, without reference to any other material discovered during search and seizure operations, empower the AO to frame the block assessment. This court in Principal Commissioner of Income Tax, Delhi v. Best Infrastructure (India) P. Ltd., has inter-alia held that****:*

> ***"38. Fifthly, statements recorded under Section 132(4) of the Act do not by themselves constitute incriminating material as has been explained by this Court in Harjeev Aggarwal"***

9. In Commissioner of Income Tax v. Harjeev Aggarwal, this Court had held as follows:

> *"23. In view of the settled legal position, the first and foremost issue to be addressed is whether a statement recorded under Section 132(4) of the Act would by itself be sufficient to assess the income, as disclosed by the Assessee in its statement, under the Provisions of Chapter XIV-B of the Act.*
>
> *24. In our view, a plain reading of Section 158BB(1) of the Act does not contemplate computing of undisclosed income solely on the basis of a statement recorded during the search. The words "evidence found as a result of search" would not take within its sweep statements recorded during search and seizure operations. However, the statements recorded would certainly constitute information and if such information is relatable to the evidence or material found during search, the same could certainly be used in evidence in any proceedings under the Act as expressly mandated by virtue of the explanation to Section 132(4) of the Act.* ***However, such statements on a standalone basis without reference to any other material discovered during search and seizure operations would not empower the AO to make a block assessment merely because any admission was made by the Assessee during search operation****.*
>
> *25. (…) However, as stated earlier, a statement on oath can only be recorded of a person who is found in possession of books of accounts, documents, assets, etc. Plainly, the intention of the Parliament is to permit such examination only where the books of accounts, documents and assets possessed by a person are relevant for the purposes of the investigation being undertaken. Now, if the provisions of Section 132(4) of the Act are read in the context of Section 158BB(1) read with Section*

> *158B(b) of the Act, it is at once clear that a statement recorded under Section 132(4) of the Act can be used in evidence for making a block assessment only if the said statement is made in the context of other evidence or material discovered during the search. A statement of a person, which is not relatable to any incriminating document or material found during search and seizure operation cannot, by itself, trigger a block assessment. The undisclosed income of an Assessee has to be computed on the basis of evidence and material found during search.* ***The statement recorded under Section 132(4) of the Act may also be used for making the assessment, but only to the extent it is relatable to the incriminating evidence/material unearthed or found during search. In other words, there must be a nexus between the statement recorded and the evidence/material found during search in order to for an assessment to be based on the statement recorded.****"*
>
> (emphasis supplied)

10. Though, the issue involved 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.

11. 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 issue *qua* Section 153A of the Act is covered by the judgment passed by this Court in ***Bhadani Financiers Pvt. Ltd.*** (supra) and ***Kabul Chawla*** (supra).

12. Also, both the appellate authorities below have recorded concurrent findings of facts that while calculating the GP ratio, the Assessing Officer has compared the purchase of scrap of desi led with the sale of finished goods without considering that the assessee is dealing in different types of items such as led, tin, selenium, arsenic etc. and that each of these items have different qualities having wide price fluctuation and therefore the Assessing Officer has erred in making a comparison between incomparable products. The relevant findings of the ITAT on merits in one of the cases is reproduced herein below:

> "37. *The assessee has earned the gross profit for assessment year 2005-06 at 9.53%, 2006 – 07 at the rate 7.30%, 2007 – 08 at the rate 6.81%, 2008 – 09 at the rate of 6.5% and assessment year 2009 – 10 at the rate of 6.66%. These gross profit rates are excluding the additional income offered by the assessee. The facts also placed before us shows that for assessment year 2011 – 12 onwards the gross profit rate of the company is better than earlier years. The learned assessing officer has enhanced the gross profit rate for all these years to 24.38% and made the addition. The allegations of the learned assessing officer is that as per the seized documents the gross profit rate of the assessee is much higher than what has been disclosed by the assessee. The seized materials pertain to assessment year 2010 – 11. The learned assessing officer has recorded that instances of purchase and sales are found in the tally software and documents seized during the search. The learned assessing officer computed the average of the gross profit rate of the several instances which are also stated in the chart reproduced in the order passed by the CIT – A. The AO computed the gross profit rate at 24.38%, which is derived on the basis of two gross profit rates of 11% and 37.76%, calculated by the AO on the basis of instances of sales and worked out an average of 24.38%.* ***Assessee has submitted that the assessing officer has compared the purchase of scrap of Desi led with the sale of finished goods i.e. refined led. It is undisputed that the company is dealing in different types of items such as led, tin, selenium, aresnic***

etc. Naturally even under each of these items there are so many qualities having wide price fluctuation therefore, naturally this cannot be any justification of adopting a uniform gross profit rate. *Further, in case of large quantities the gross profit earned therein is naturally less compared to smaller quantity sold. This is also demonstrated by assessee before CIT – A and therefore the* ***CIT – A has held that the assessing officer has made a comparison between two incomparable products and of different lots of trading. The fact also shows that in subsequent to the completion of assessment for assessment year 2005 – 06 to assessment year 2011 – 12 the assessing officer has accepted the gross profit ratio of the assessee ranging between 8.22% to 11.85%.***

38. The claim of the DR that when the assessee has not produced the books of accounts before the assessing officer as well as before the learned CIT – A, the CIT – A could not have deleted the addition, we find that the only addition made by the assessing officer is with respect to the gross profit rates of the assessee as per books of accounts and the gross profit rates derived ***on the basis of instances found from tally software during the course of search. The assessing officer has not disturbed the book results but has made an addition of the gross profit,*** *which the assessee should have earned according to him based on the incriminating documents found for subsequent years for the impugned years. The CIT – A as also not deleted the addition on that basis but for the reason that the comparison made by the assessing officer of different material of different lots sold at different time. The DR has agreed that the AO has computed the gross profit by taking transactions of the nearby dates.* ***However, it is not denied that the learned assessing officer has taken the highest rate of sales as well as lowest rates of purchases for computing the additional gross profit that should have been earned by the assessee.***

-The assessee has produced the copies of the paper book, which are placed before the learned CIT-A wherein he has verified the details of the material sold, quantity sold with respect to the various bills placed in those paper books and found that the comparison of the gross profit made by the learned assessing officer is not comparable.

> *39. Another argument of the DR is that the subsequent year's acceptance of the book results by the AO cannot help the case of the assessee in deleting the addition in those years, which are in appeal.*
> ***We find that the subsequent years assessments are also completed u/s 143 (3) of the act and no addition has been made by the learned assessing officer. Admittedly in subsequent years there was no seized material available and the learned assessing officer has not extrapolated the gross profit in subsequent years, which he did for the impugned years in the appeal, however the acceptance of the subsequent years gross profit shows that the books of accounts prepared by the assessee are acceptable. The gross profit ratio of the subsequent years is also not of much difference compared to the years in this appeal. In view of this we do not find any infirmity in the order of the learned CIT-A in deleting the addition on account of suppressed gross profit, which was not based on any incriminating material found during the course of search for the respective years*** *and* ***because of erroneous comparison made by the learned assessing officer****.*
>
> (emphasis supplied)

13. The appellate authorities below also noted that for the Assessment Year 2005- 06 to Assessment Year 2008- 09, there is no evidence available with respect to suppression of the gross profit by obtaining bogus purchase bills by the assessee and that the Assessing Officer has merely relied upon the documents seized during the course of search for Financial Year 2010-11 and 2011-12 even when the present batch of cases pertains to the Assessment Years 2005-06 to 2009-10.

14. The Supreme Court in the case of ***Ram Kumar Aggarwal & Anr. vs. Thawar Das (through LRs), (1999) 7 SCC 303*** has reiterated that under Section 100 of the Code of Civil Procedure the jurisdiction of the High Court to interfere with the orders passed by the Courts below is confined to

hearing on substantial question of law and interference with finding of the fact is not warranted if it involves re-appreciation of evidence. Further, the Supreme Court in ***State of Haryana & Ors. vs. Khalsa Motor Limited & Ors., (1990) 4 SCC 659*** has held that the High Court was not justified in law in reversing, in second appeal, the concurrent finding of fact recorded by both the Courts below. The Supreme Court in ***Hero Vinoth (Minor) vs. Seshammal, (2006) 5 SCC 545*** has also held that "*in a case where from a given set of circumstances two inferences of fact are possible, the one drawn by the lower appellate court will not be interfered by the High Court in second appeal. Adopting any other approach is not permissible*."

15. Consequently, this Court is of the view that no substantial question of law arises of consideration in the present appeals and accordingly, the same are dismissed.

MANMOHAN, J

MANMEET PRITAM SINGH ARORA, J

OCTOBER 19, 2022
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