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

Reserved on: 3rd May, 2017
Date of decision: 25th May, 2017

\+   **ITA 306/2017**

PR. COMMISSIONER OF INCOME TAX
CENTRAL-2 NEW DELHI ..... Appellant
Through: Mr. Ashok Manchanda, Advocate.

versus

MEETA GUTGUTIA PROP. M/S FERNS 'N' PETALS.... Respondent
Through: Mr. Piyush Kaushik, Advocate.

WITH

\+   **ITA 307/2017**

PR. COMMISSIONER OF INCOME TAX
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Through: Mr. Ashok Manchanda, Advocate.

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CORAM: JUSTICE S. MURALIDHAR
JUSTICE CHANDER SHEKHAR

J U D G M E N T

% 25.05.2017

Dr. S. Muralidhar, J.:

1. These are five appeals by the Revenue under Section 260A of the Income Tax Act 1961 ('Act') directed against a common order dated 13th May, 2016 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA Nos. 2409 to 2412/Del/12 and 2437/Del/12 for the Assessment Years ('AYs') 2000-01 to 2004-05.

2. The main contention of the Revenue in these appeals is that the decision of the Division Bench ('DB') of this Court in ***Commissioner of Income Tax (Central-III) v. Kabul Chawla (2016) 380 ITR 573 (Del)*** (hereafter ***Kabul Chawla***) as regards the assumption of jurisdiction under Section 153A of the Act requires reconsideration, particularly in light of a later decision of a co-ordinate Bench of this Court in ***Smt. Dayawanti Gupta v. CIT (2016) 390 ITR 496 (Del)*** (hereafter ***Dayawanti Gupta***). The Revenue's submission is that the invocation of Section 153A of the Act to re-open concluded assessments of the AYs earlier to the year of search is justified even in the absence of incriminating material found during the search *qua* each such earlier AY. For reasons to follow, the Court does not agree with the above submissions of the Revenue.

3. Since there are typographical errors in the memoranda of appeals, and the corresponding appeal numbers before the ITAT, the Court sets out in a tabulated form all the appeal numbers, the AY and the corresponding ITA Nos.:

S. No.	ITA No. of Revenue's appeal in this Court	Assessment Year (AY)	Corresponding ITA No. of ITAT

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(i)	306/17	2004-05	2437/Del/12- In revenue's appeal memo the ITA No. of ITAT order is inadvertently mentioned as 2413/Del/12 since that was the ITA No. of the Assessee's appeal before ITAT dismissed IA for non-prosecution.
(ii)	307/17	2003-04	2412/Del/12
(iii)	308/17	2000-01	2409/Del/12
(iv)	309/17	2001-02	2410/Del/12
(v)	310/17	2002-03	2411/Del/12

Background facts

4. The facts leading to the filing of the present appeals are that a search and seizure operation under Section 132 of the Income Tax Act, 1961 ('Act') was conducted on 23rd December, 2005 in the premises of the Ferns N Petals Group at Farm No. 9, Satya Farms, Sultanpur, New Delhi (where the warrant was issued in the name of Shri Vikas Gutgutia, Smt. Meeta Gutgutia and Shri C.K. Gutgutia, Ferns & Petals India Pvt. Ltd., M/s Ferns & Petals and M/s FNP Marketing) and at J-238, Sainik Farms, Delhi (warrants in the name of Shri Vikas Gutgutia, Smt. Bina Gutgutia, Smt. Meeta Gutgutia and Sh. C.K. Gutgutia were issued), Locker No. 1125, Standard Chartered Bank, GK-1, New Delhi (warrants were issued in the name of Shri C.K. Gutgutia, Smt. Bina Gutgutia and Smt. Meeta Gutgutia).

5. According to the Revenue, a number of documents were seized apart from cash, jewellery and valuables.

6. The Ferns 'N' Petals Group is stated to comprise of various companies, partnership firms and proprietorship concerns engaged mainly in the

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business of flowers, decoration and events management. It is stated that the promoters' group comprises Shri Vikas Gutgutia and his wife, Smt. Meeta Gutgutia, who are the directors/partners/shareholders in the group companies/concerns.

7. The Revenue claims that the documents seized pertained to the period 2002 to 2005. On the date of the search itself i.e., 23rd December, 2005, the officials of the Income Tax Department ('ITD') recorded the statement of Shri Pawan Gadia S/o Shri M.S. Gadia, a resident of Vasant Kunj. Although the statement was under Section 133A of the Act, it was recorded on oath. Shri Gadia admitted that he was working at M/s. Satya Farms as Vice-President since August, 2001. He stated that he was supervising the work of the following companies/concerns:

(i) Ferns & Petal Trading Pvt. Ltd.
(ii) FNP Pvt. Ltd.
(iii) FNP Events & Wedding Pvt. Ltd
(iv) Flowered Touch India Pvt. Ltd. &
(v) FNP Petals Pvt. Ltd.

8. The Revenue's case is that the Respondent/Assessee, Smt. Meeta Gutgutia, is the proprietor of M/s. Ferns 'N' Petals which is engaged in the sale of fresh flowers and other related products. On the basis of documents recovered during the search and seizure operation, a notice under Section 153A was issued to the Assessee on 12th December, 2006. Thereafter, notice dated 3rd October, 2007 along with questionnaire under Sections 143(2) and 142(1) of the Act were also issued.

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Assessment orders

9. On 28th December, 2007, separate assessment orders were passed by the AO in respect of the AYs 2000-01, 2001-02, 2002-03, 2003-04 and 2004-05. The AO dealt with the issue of 'franchisee commission'. He noted that as per the trading and profit and loss account ('P & L Account') for the AY 2004-05, the Assessee had claimed Rs. 60,066. It was noted that as in the preceding years, a substantial amount was claimed on account of franchisee commission which was debited to the P&L Account i.e., the franchisee commission paid to various parties, the Assessee was thus asked to furnish copies of accounts of the franchisees with their complete addresses. The AO noted that the addresses of the franchisees were not revealed and on a perusal of the copy of the accounts of the said franchisees, there were glaring discrepancies in the details filed.

10. In the assessment orders passed for AYs 2001-02 to 2003-04 also, there was a similar discussion regarding the franchisee commission payments and the AO found no justification for such payments. Consequently, the amount of the franchisee commission claimed by the Assessee in each of the years was added back to her income. For AY 2004-05, the AO made an addition on account of stock in the sum of Rs. 14,49,246.

11. During the course of search, the Assessee made a disclosure of Rs.110 lakhs on account of change in the method of accounting of franchisee fees and undisclosed franchisee fees for the Financial Year ('FY') during which the search was conducted. On the basis of the said statement, the AO surmised that the number of outlets for which franchisee fee was received

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must have more or less remained the same in all AYs from 2001-02 to 2006-07. He estimated the undisclosed income at a certain percentage of the amount of disclosure made by the Assessee in her statement under Section 132 (4) of the Act. At this stage, it must be noted that no statement was made by the Assessee herself. A statement was made under Section 133A by Shri Pawan Gadia.

12. The disclosures made of undisclosed income for various AYs were estimated by the AO as under:

"(a) AY 2001-02 @ 50% of disclosed amount Rs.55,00,000/-

(b) AY 2002-03 @ 60% of disclosed amount Rs.66,00,000/-

(c) AY 2003-04 @ 70% of disclosed amount Rs.77,00,000/-

(d) AY 2004-05 @ 80% of disclosed amount Rs.88,00,000/-

(e) AY 2005-06 @ 90% of disclosed amount Rs.99,00,000/-

(f) AY 2006-07 @ 100% of disclosed amount Rs.1,10,00,000/-"

13. There was no addition made for AY 2006-07 although the disclosure was made relevant to the said year.

Proceedings before the CIT (A)

14. Five separate appeals were filed by the Assessee before the CIT(A). The CIT(A) by five different orders relatable to each of the AYs in question partly allowed the appeals deleting most of the additions made by the AO. While the orders of the CIT(A) for the appeals pertaining to the AYs 2000-01 and 2001-02 were issued on 12th March 2012, the order in the appeal

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relating to AYs 2002-03 was issued by the CIT (A) on 13th March, 2012. Separate orders in relation to AYs 2003-04 and 2004-05 were issued by the CIT (A) on 14th March, 2012.

15. Before the CIT(A), the Assessee produced additional evidence under Rule 46A of the Income Tax Rules, 1962 (Rules). This included copies of the franchisee agreements. By a letter dated 9th July, 2010, the CIT(A) forwarded the additional evidence to the AO for his comments. The AO then submitted a report dated 3rd March, 2011 opposing the request of the Assessee for permission to lead additional evidence. The additional evidence was also contested by the AO as not supporting the Assessee's explanation regarding the payment of franchisee commission. A rejoinder was filed thereto by the Assessee.

16. It must also be noticed at this stage that on 23rd September, 2010, during the pendency of the proceedings before the CIT (A) when a remand report was sought from the AO, the Assessee offered a very detailed explanation on the following topics to the AO during the remand proceedings:

(i) Addition of Rs. 13,79,801/- on account of franchisee commission (rent);
(ii) Addition of Rs. 88 lakhs on account of undisclosed franchisee commission;
(iii) Addition of Rs. 17,32,511/- on account of security deposits;
(iv) Addition of Rs. 6,64,910/- on account of undisclosed income from self-controlled outlets; and
(v) Non-submission of books of account during the assessment

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proceedings under Section 153A /143(3).

17. In respect of last topic regarding non-submission of books of accounts, the Assessee stated as under:

> "In this context, we would like to reiterate that the assessee has been maintaining regular books of accounts on TALLY software on Computer and have filed regular Income Tax returns along with Profit & Loss Account and Balance Sheet which were audited u/s-44AB of the Act by Chartered Accountant, on the basis of the said books of accounts, prior to the Search u/s-132(1) on the Group, for the Assessment Year 2000-01 to 2005-06, and the same are being produced for your kind verification. It is informed your kind self that some of the computers have already been seized during search operation on the various premises belonging to the assessee."

18. At the request of the Assessee that the assessment records of each of the AYs should be called for verification, the CIT(A) asked the AO to be present on the hearing on 11th November, 2011. On that date, the AO appeared along with the assessment records. The Assessee's Authorized Representative ('AR') also appeared along with the originals of the Franchisee Agreements for the FYs 2001-02 to 2005-06.

Orders of the CIT (A)

19. The CIT(A) analyzed this additional evidence thoroughly. On the issue of the franchisee commission paid by the Assessee, it was noted that the accounts of the Assessee had been tax audited and no adverse comments had been made by the Tax Auditors. The AO had also not rejected the books of accounts of the Assessee. It was accordingly held that the disallowance of the franchise commission paid was not sustainable. Accordingly, the

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disallowance was deleted.

20. A separate issue concerned additions on account of 'undisclosed franchisee commission' (fee) that had been received by the Assessee. The observations of the AO that the books of accounts had not been produced by the Assessee despite specific opportunities was noted by the CIT(A). The AO's observation that the Assessee did not declare any income from the franchisee fee for any of the subsequent years till a search was conducted was also noted. The disclosure made on 24th March, 2006 regarding the admission of change in the management policy and the disclosure of Rs. 110 lakhs on account of 'unrecorded franchisee fees received during the current year' was also noticed.

21. The CIT(A) examined in detail the basis for the AO's addition of the undisclosed franchisee fee for all the years in question (other than the AY 2000-01). The CIT(A) noted that in the proceedings before the CIT(A), the originals of the franchise agreements were verified by the AO contrary to what was noted by the AO that the Assessee had admitted to have 52 owned and controlled/operating franchisee outlets, the CIT(A) noted that the AR of the Assessee had submitted that there were only 21 franchisees in FY 2003-04. In his order in the appeal for the AY 2004-05 in paragraph 6.2.3, the CIT(A) noted as under:

> "6.2.3 Since the appellant had made a request to call for the assessment record for verification of her contentions, the AO was asked to be present during hearing on 11/11/2011. On that date the AO Shri D.S.Rathi' appeared along with the assessment records and the appellant's AR also appeared along with originals of the Franchise Agreements Financial Year wise for

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> F.Y 2001-02 to 2005-06 in support of the appellant's claim that she had different number of Franchise/retail outlets in different years under appeal as stated by the appellant in her affidavit The originals were verified by the AO and copies thereof have been placed on record the AR submitted that there were only 21 franchises in F Y 2003-2004 Notings have accordingly been made by undersigned in the order sheet which has been signed by Shri Rathi, the Ld. AO, Shri Rajesh Jain, the Ld. AR of the appellant and the undersigned."

22. The additions made by the AO were found by the CIT(A) to be based on surmises and suspicion. A reference was made to the decision of the Supreme Court in ***Dhirajlal Girdharilal v. CIT (1954) 26 ITR 736 (SC)***. In each of the appeals, the CIT(A) deleted the additions.

23. It requires to be noted that on the issue of addition of undisclosed income on account of franchisee fee, even the AO did not make any such addition for AY 2000-01. It was the case of the Assessee that there was no incriminating material for any of the AYs other than the year of search. Even for that year, the material was the disclosure made by the Assessee. The specific contention of the Assessee which was accepted by the CIT(A) was that there was "no such disclosure was made for earlier years, nor was there, any evidence unearthed during the search by the Department that such franchise income was not disclosed by the appellant during these years."

24. Aggrieved by the order of the CIT(A), appeals were filed both by the Revenue and the Assessee before the ITAT. While the Assessee filed ITA Nos. 2409/Del/2012 to 2413/Del/2012, the Revenue filed ITA Nos. 2433/Del/2012 to 2437/Del/2012.

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Impugned order of the ITAT

25. A perusal of the common order of the ITAT shows that it first dealt with one common ground raised by the Assessee in all its appeals which concerned the jurisdictional issue of the validity of the invocation of Section 153A of the Act by the Revenue. It was contended that for the AYs 2000-01 to 2003-04, there was no incriminating material seized during the course of search and, therefore, the assessment order in respect of those AYs ought to be quashed. The ITAT, following the decisions of this Court in ***Kabul Chawla*** (supra) and ***Pr. CIT v. Lata Jain [2016] 384 ITR 543 (Del)***, accepted the above grounds urged by the Assessee and held that the assumption of jurisdiction under Section 153A for the said AYs was bad in law.

26. As regards AY 2004-05, the ITAT noted that the addition for the said AY was based on the seized documents. Accordingly, it was held that the assessment for the AY 2004-05 under Section 153A was valid. The ITAT then proceeded to examine the appeal filed by the Revenue for the said AY 2004-05 i.e., ITA 2437/Del/2012 on merits. The said appeal raised five grounds: one for each of the deletions ordered by the CIT(A) of the additions made by the AO as under:

(i) Deletion of the addition of Rs. 13,79,801/- made by the AO on account of expenditure not related to business (being the payment of rent);

(ii) Deletion of addition of Rs. 88 lakhs on account of undisclosed franchisee commission;

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(iii) Allowing relief of Rs. 14,04,175/- out of total addition of Rs.17,32,511/- on account of non-refundable security;

(iv) Deletion of addition of Rs. 6,64,910/- on account of suppression of income from self-controlled outlets;

(v) Allowing of relief of Rs. 12,07,705/- out of total addition of Rs. 14,49,246/- made by the AO on account of suppression of closing stock.

27. Each of the five grounds was rejected by the ITAT. Consequently, ITA No. 2437/Del/2012 filed by the Revenue for AY 2004-05 was dismissed on merits. The corresponding appeal of the Assessee for the said AY being ITA No. 2413/Del/2012 was dismissed for non-prosecution since none appeared for the Assessee before the ITAT.

The present appeals

28. It must be noticed here that before this Court, there are five appeals filed by the Revenue. ITA Nos. 308/2017, 309/2017 and 310/2017 and 307/2017 are directed against the common impugned order of the ITAT in ITA Nos. 2409/Del/2012, 2410/Del/2012, 2411/Del/2012 and 2412/Del/2012 (all of which were the Assessee's appeals before the ITAT) pertaining to AYs 2000-01, 2001-02, 2002-03 and 2003-04 respectively.

29. The 5th appeal being ITA No. 306/2017 by the Revenue is against the same impugned common order of the ITAT in ITA No. 2413/Del/2012 (the Assessee's appeal before the ITAT) for AY 2004-05. However, this is an obvious mistake since, as noticed hereinbefore, that appeal by the Assessee

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i.e., ITA No. 2413/Del/2012 was dismissed by the ITAT for non-prosecution. Going by the contents of the memorandum of appeal where the Revenue has challenged only two of the deletions that were made by the CIT(A) which were sustained by the ITAT viz., on account of undisclosed receipts for franchisee income of Rs. 88 lakhs and Rs. 13.79 lakhs with respect to rent payment (franchisee commission), it is plain that what the Revenue has in fact challenged in ITA No. 306/2017 is the impugned common order of the ITAT in relation to the Revenue's own appeal being ITA No. 2437/Del/2012 pertaining to AY 2004-05.

30. It is also significant to note that the Revenue has not challenged the dismissal of its appeals being ITA Nos. 2433/Del/2012, 2434/Del/2012, 2435/Del/2012 and 2436/Del/2012 for AYs 2000-01, 2001-02, 2002-03 and 2003-04 concerning the deletion by the CIT(A) of the additions made by the AO.

31. On its part, the Assessee has also not challenged the order of the ITAT to the extent it holds that for AY 2004-05 there was incriminating material and to the extent the ITAT rejected the Assessee's appeal for that year on the ground that invocation of Section 153A of the Act was wrong. Further, the additions made by the CIT(A) for AY 2004-05 were sustained by the ITAT. To that extent, the Assessee had filed an appeal in the ITAT being ITA No. 2143/Del/2012 for AY 2004-05. However, the dismissal of the said appeal of the Assessee by the ITAT for non-prosecution by the impugned order has not been challenged by the Assessee.

32. The net result of what is in issue in the present appeals is:

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(i) The validity of the invocation of Section 153A of the Act by the Revenue as regards the AYs 2000-01 up to AY 2003-04; and

(ii) The validity of the order of the ITAT to the extent it has affirmed the orders of the CIT(A) for 2004-05 deleting only the following additions in respect of:

(a) Franchisee Commission of Rs. 88 lakhs made by the AO on estimate basis; and

(b) Deletion of addition of Rs. 13.79 lakhs made by the AO with respect to rent payment.

Questions of law

33. Consequently, while admitting these appeals, the Court frames the following questions of law:

(i) Was the Revenue justified in invoking Section 153A of the Act in relation to AYs 2000-01 to AYs 2003-04?

(ii) With reference to AY 2004-05, was the ITAT correct in confirming the orders of the CIT(A) to the extent it deleted the additions made by the AO to the taxable income of the Assessee of franchisee commission in the sum of Rs.88 lakhs and rent payment for the sum of Rs.13.79 lakhs?

Submissions of the Revenue

34. Mr. Ashok Manchanda, learned counsel appearing for the Revenue, made the following submissions:

(a) The quashing by the ITAT of the AO's assessment orders for the AYs

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2000-01 to 2003-04 by placing reliance on the decision of this Court in ***Kabul Chawla*** (supra) on the ground that no incriminating material was found or seized relatable to the said AYs was legally and factually erroneous. Apart from the seized unaccounted cash of Rs. 14,50,000/-, which was surrendered as part of the undisclosed income by the Assessee, there were “bundles of seized documents some of which were confronted to the Assessee's representative Shri Pawan Gadia” during the recording of his statement on 23rd December, 2005.

(b) As regards the AY 2004-05, the ITAT was wrong in sustaining the deletion by the CIT(A) of the addition of Rs. 88 lakhs by the AO on account of undisclosed franchisee commission on the ground that evidence found during the search for a particular AY could not be used for other AYs of the block period. It is submitted that besides the statement admitting to the undisclosed income on the basis of the seized documents, it was plain that the *modus operandi* of the Assessee was the same in the year of search (AY 2006-07) in which the Assessee admitted an undisclosed income of Rs. 1.10 crores as well as the earlier AYs. Reliance is placed on the decision of this Court in ***Dayawanti Gupta*** and, in particular, to paragraphs 16 to 20 and 23 thereof. It is pointed out that this judgment was delivered by the DB of this Court after duly considering the decision of this Court ***Kabul Chawla***.

(c) The statement of Shri Pawan Gadia was not retracted at any stage of the proceedings. It was the statement recorded during search. The surrendered amount of Rs.1.10 crores was not related to any particular AY at the time when the said statement was made. During the course

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of the search, several other documents such as cash memos/invoices/bills of purchase/hand written papers & other documents etc. pertaining to the period from the year 2002 to 2005 were seized. It was, therefore, not as if there was no seized material for AYs other than AY 2006-07. In the memorandum of appeal in ITA No. 306/2017, it is stated that these documents were as under:

i. Pages at S.No. 12 to 27 of Annexure A-1 [comprising 258 documents] pertain to AY 2003-04.

ii. Similarly, Page No. 28 to 34 of Annexure A-3 [comprising 96 pages) pertain to AY 2005-06.

iii. Similarly, Page No. 35 to 41 of Annexure A-4 [comprising 124 pages) pertain to AY 2004-05.

iii. Similarly, Page No. 42 to 44 of Annexure A-5 [comprising 85 pages) pertain to AY 2006-07.

(d) Despite sufficient opportunities provided to the Assessee by the AO to produce the books of accounts along with bill, vouchers etc. vide Questionnaire dated 3rd October, 2007 and 6th December, 2007, such books of accounts etc. were not produced. Therefore, it was not possible for the AO to record specific findings for each of the seized documents. A good part of the information contained in the said documents was incriminating in nature i.e., “which does not appear to have been recorded or reflected in the books of account.” It is stated that it was for this reason that the Assessee did not produce its books of accounts during the assessment proceeding in spite of several opportunities. This left the AO with no alternative but to assess and estimate the Assessee's income on the basis of evidence and

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information coming on record during the search and survey operation and the subsequent investigations on an 'estimate basis'. Reliance was placed on the decisions in ***CIT v. Anil Kumar Bhatia (2013) 352 ITR 493 (Del)***; ***Filatex India Ltd. v. CIT (2015) 229 Taxman 555 (Del)*** and ***CIT v. Chetan Das Lachman Das [2012] 254 CTR 392 (Del)***. It is submitted that in each of the said cases, there was very little seized material only for one AY and yet the Court sustained additions made in other AYs even where there was no such incriminating evidence. It is pointed out that in ***Filatex India Ltd. v. CIT*** (*supra*), the addition made only on the basis of the statement of a General Manager was upheld by the Court even when no incriminating material was found during the search concerning the impugned addition. It was held that the additions did not have to be restricted or limited to the incriminating material.

(e) In ***Kabul Chawla*** (supra), there was no incriminating material found or seized during the search, while, in the present case, there was unaccounted cash seized, a surrender statement of Rs. 1.10 crores in the hands of the Assessee and of Rs. 2.50 crores in the hands of the Group and bundles of seized documents which formed the bases for the additions made in the different AYs. Therefore, the facts of the case were very much similar to the facts of the other 4 cases and in no manner similar to those in ***Kabul Chawla*** (supra).

(f) The additions made in various AYs were relatable to the evidence uncovered during the search or the consequent search proceedings.

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For instance, the factum of the franchisee commission came to light for the first time during the search proceedings. There was no disclosure/declaration of income on this score till the search was conducted. During the submissions made on 23rd September,2010, the Assessee acknowledged that there were 21 franchisees for AY 2004-05. On this basis, the CIT(A) ought to have sustained at least half of the amount added by the AO since there were 42 franchisee outlets for the AY 2004-05.

(g) As regards quashing of assessment for the AYs 2000-01 to 2003-04, by the ITAT, it is submitted that the additions made on account of franchisee commission for each of the AY were on account of undisclosed receipt of franchisee commission coming to light during the search. The addition was based on information revealed by Shri Pawan Gadia in his statement dated 23rd December, 2005 recorded at the time of search. Even otherwise, the additions were related directly or indirectly to the seized material and evidence uncovered during or after the search.

(h) Even otherwise, the quashing of assessments on the basis of the illegality attaching to the invocation of Section 153A of the Act (as a jurisdictional issue) was unsustainable since this ground had never been raised before the CIT(A). It was raised for the first time before the ITAT. Therefore, the AO or the CIT(A) had no occasion to deal with the said issue i.e., whether there was any incriminating material for each of the AYs in question. The ITAT failed to give an

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opportunity to the AO in that regard before admitting the additional ground. The ITAT, therefore, ought to have remanded the matter to the file of AO.

Submissions on behalf of the Assessee

35. Mr. Piyush Kaushik, learned counsel appearing for the Assessee, in reply, has submitted as under:

(a) The fact of the matter was that there was no incriminating material seized during the search and seizure operations for the AYs 2000-01 to 2003-04. The action under Section 153A of the Act was a consequence of the search operations under Section 132. Section 153A should not be read in isolation from Section 132 of the Act. Only a valid search and seizure satisfying all the requirements of Section 132(1)(a),(b) and (c) could form the foundation for the assumption of jurisdiction under Section 153A of the Act.

(b) The search operation under Section 132 of the Act could be initiated only against a person who is considered to be in possession of undisclosed income or property. Section 153A was not meant to provide a second or a third inning to the AO so as to complete a normal scrutiny assessment. The existence of incriminating material was therefore a *sine qua non* for the assumption of jurisdiction under Section 153A. This would have to be seen on a year-to-year basis because under the scheme of Section 153A, every AY is to be taken separately.

(c) The decision in ***Kabul Chawla*** (supra) was concurred with in the

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decisions of several other High Courts including ***Principal Commissioner of Income Tax v. Saumya Construction Pvt. Ltd. (2016) 387 ITR 529 (Guj)***; ***Principal Commissioner of Income Tax-1 v. Devangi alias Rupa 2017-TIOL-319-HC-AHM-IT; CIT v. IBC Knowledge Park Pvt. Ltd. (2016) 385 ITR 346 (Kar); Pr. CIT-2 v. Salasar Stock Broking Ltd. 2016-TIOL-2099-HC-KOL-IT*** and ***CIT v. Gurinder Singh Bawa (2016) 386 ITR 483 (Bom)***. Reference was also made to the two decisions of this Court in ***Pr. CIT v Mahesh Kumar Gupta 2016-TIOL-2994-HC-Del*** and the decision dated 7th February, 2017 in ITA Nos. 61/2017 and 62/2017 (***The Pr. Commissioner of Income Tax-9 v. Ram Avtar Verma***) where the decision in ***Kabul Chawla*** (supra)was followed.

(d) The decision in ***Dayawanti Gupta*** (supra) was distinguishable on facts. There, there was an admission by the Assessee that they were not maintaining regular books of accounts and the AO in those cases had specifically rejected the books of accounts. There was a confirmation in response to Question No. 11 in ***Dayawanti Gupta*** (supra) that there was no year-wise recording of transactions. In the present case, however, there was no such admission; the books of accounts were accepted by the AO. Further, in response to question No. 16 it was stated by the Assessee in the present case that there was no scope to manipulate profits. The surrender was made on the basis of a survey and that too to buy 'peace of mind'.

(e) It was erroneous for the Revenue to contend that the Assessee failed to furnish books of accounts. Before the CIT(A), a remand report was sought from the AO on the additional documents submitted by the

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Assessee. A personal hearing was also given to the AO and the original assessment records were verified by the CIT(A).

(f) The statement of Mr. Pawan Gadia was only made during a survey. It was not a statement made during search under Section 132 (4) of the Act. The statement made during a survey, even if mistakenly taken on oath, has no probative or binding value as was explained in ***CIT v. Dhingra Metal Works (2010) 328 ITR 384 (Del)*** and in the case of ***CIT v. S. Khader Khan Son (2008) 300 ITR 157 (Mad)***; ***CIT v Sunrise Tooling System Pvt. Ltd. 2014-TIOL-134-HC-DEL-IT*** and the decision dated 2nd January, 2013 in Tax Case No. 8/1999 of the Jharkhand High Court in ***Shree Ganesh Trading Co. v. Commissioner of Income-Tax***. Reference was also made to the instructions issued by the Central Board of Direct Taxes ('CBDT') on 10th March, 2003 and 18th December, 2014 emphasizing that the Department should "strictly avoid obtaining admission or undisclosed income under coercion/undue influence" during search and seizure operations.

36. Both counsel have filed written note of submissions to supplement their oral submissions. On the side of the Revenue, elaborate written submissions dated 26th April, 2017 (running into 26 pages) and 2nd May, 2017 (running into 13 pages) have been submitted. On the side of the Assessee, written submissions dated 26th April, 2017 (running into 11 pages) and 3rd May, 2017 (running into 3 pages) have been submitted.

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Analysis of the material recovered during search

37. At the outset, it requires to be noticed that what was actually seized from the various premises during the course of the search were the following:

Items	***Premises***		
	J-238, Sainik Farms, Delhi	Farm no. 9, Satya Farm, Sultan Pur, New Delhi	Locker No. 1125, Standard Chartered Bank, GK-I, New Delhi
Cash Found	Rs. 2,08,900/-	Rs. 13,23,810/-	Nil
Cash seized	Rs. 1,50,000/-	Rs. 13,00,000/-	Nil
Jewellery found	Nil	Nil	Rs.9,47,020/-

38. It appears that the seized cash was added to the income during the year of search and not in relation to any of the other AYs i.e., AYs 2000-01 to 2004-05. The documents as stated by the Revenue in its Memorandum of Appeal in ITA No. 306/2017 viz., Annexures A1, A3 to A5 stated to pertain to AY 2003-04, 2005-06, 2004-05, and 2006-07 respectively have neither been described as such or in any detail by the Revenue either in these appeals. They have not been referred to or discussed in any of the orders of the AO or the CIT(A). Although it was repeatedly urged by Mr. Manchanda that there were "hundreds of seized documents", what is necessary to examine is whether they were in fact 'incriminating documents'. Any and every document cannot be and is in fact not an incriminating document. The legal position, as will be discussed shortly, is that there can be no addition made for a particular AY without there being an incriminating material *qua* that AY which would justify such an addition. Therefore, the mere fact there may have been documents pertaining to the above AYs does not satisfy the

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requirement of law that there must be incriminating material. In any event, the aforementioned documents i.e., A1, A3, A4 and A5 pertain to only some of the AYs with which we are concerned i.e., AYs 2003-04, and 2004-05. The Court is unable to accept the submissions of Mr. Manchanda that there was incriminating material other than what has been discussed in the orders of the AO, CIT(A) and the ITAT for the AYs in question.

39. It requires to be noticed at this stage that for AY 2004-05, the ITAT has proceeded on the basis that there was incriminating material and that finding has become final since there is no appeal before this Court by the Assessee. It is another matter that the ITAT rejected the plea of the Revenue that for the said AY the CIT(A) wrongly deleted five of the additions made by the AO for that AY on such incriminating material. Consequently, this Court has to only examine the justification for invocation of Section 153A by the Revenue for AYs 2000-01 to 2003-04.

Distinction between statements under Sections 132 (4) and 133 A

40. The main plank of Mr. Manchanda's submission was that the disclosure made by Mr. Pawan Gadia in his statement under Section 133A was sufficient to be construed as incriminating material *qua* all the aforementioned AYs, the assessment for which could be re-opened by invoking Section 153A of the Act. It is significant that while in the written submission dated 26th April, 2017, Mr. Manchanda termed the statement of Mr. Pawan Gadia as "the statement dated 23rd December, 2005 recorded under Section 132(4) of the Act", he was careful to describe it as such in the subsequent written submission dated 2nd May, 2017. This was for a good

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reason. The statement was in fact not under Section 132(4) of the Act but under Section 133A of the Act. There is a difference between a statement made during a survey under Section 133A of the Act and that made during the course of search under Section 132 (4) of the Act. Section 132(4) of the Act states that the authorized officer may, during the course of search and seizure, "examine on oath any person who is found to be in possession or control of any books of account, documents, monies, bullion, jewellery..."and that any statement made during such examination may be used thereafter in evidence in any proceeding under the Act. On the other hand, Section 133A does not talk of the recording of any statement on oath. Under Section 133A (3) (iii), the Income Tax Authority acting under the said provision could "record the statement of any person which may be useful for, or relevant to, any proceeding under this Act." Therefore, there is a considerable difference in the nature of the statement recorded under Section 132(4) and that recorded under Section 133A(3)(iii) of the Act.

41. This distinction was noticed by this Court in ***CIT v. Dhingra Metal Works*** (*supra*). The Court there referred to the decision of the Kerala High Court in ***Paul Mathews & Sons v. Commissioner of Income Tax (2003) 263 ITR 101 (Ker)*** and of the Madras High Court in ***CIT v. S. Khader Khan Son*** (*supra*) and observed that the word 'may' occurring in Section 133A(3)(iii) of the Act "clarifies beyond doubt that the material collected and the statement recorded during the survey is not a conclusive piece of evidence by itself." Incidentally, the decision of the Madras High Court in ***CIT v. S. Khader Khan Son*** (*supra*) has been affirmed by the Supreme Court by the dismissal on 20th September, 2012 of SLP (Civil) No.

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13224/2008 filed by the Revenue against the said decision after granting leave. To the same effect is the decision of this Court in ***CIT v. Sunrise Tooling System Pvt. Ltd*** (*supra*) and of the Jharkhand High Court in ***Shree Ganesh Trading Co. v. Commissioner of Income-Tax*** (*supra*). The CBDT's instructions dated 10th March, 2003 and 18th December, 2014 have also emphasized that there should be no recording of statement during "search/seizure/other proceeding" under the Act under "undue pressure or coercion".

42. Therefore, in the present case, it would be wrong on the part of the Revenue to characterize the statement of Mr. Pawan Gadia as by itself an incriminating material that could be used for making additions in all the AYs in question apart from the year of search.

Analysis of Mr. Gadia's statement

43. The second important aspect is that there is no statement of the Assessee herself recorded even under Section 133A of the Act. In this regard, it is important to examine what exactly is stated by Mr. Pawan Gadia on the date of the search and survey operations i.e., 23rd December, 2005. Mr. Manchanda has referred to the following questions and answers:

> *Q.1 What is your identity?*
>
> *Ans: I am Pawan Gadia s/o Sh.M.S. Gadia R/o ………, New Delhi working at Satya Farm...*
>
> *Q.2 What kind of job you look after?*
>
> *Ans: I supervise the work of the companies (1) M/s Ferns" &*

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Petal Trading Pvt. Ltd., (2) M/s. FNP Pvt. Ltd. (3) M/s FNP Events &. Wedding, M/s Flowered Touch India Pvt. Ltd. & (5) M/s FNP Petals Pvt. Ltd.

...

Q4 How much salary are you drawing?

Ans:Rs.30,000/- per month.

...

Q.7 What is your financial arrangements with franchisees?

Ans: They give one time license fee which is not refundable and Further as per the terms and conditions mutually agreed franchises commission...

...

Q.19 I am showing you page 19 of Annexure A-6 which has details of sale costing. Can you show me sale bill to confirm these sales.

Ans: The paper which you have shown is a draft model for costing purposes only.

Q20 I am showing page no.13 of Annexure A-6 explain this.

Ans: This. is the various reports for management control purpose showing the variations between budgeted and actual realization.

Q21 I am showing page 80 of A-5, can you reconcile this figure with your accounts.

Ans: I am not able to recollect any details regarding this papers at present

Q.22 I am showing you page 49 to page 56 of annexure A-5, it contains the profit and loss A/c& balance sheet of Handicraft of retail division. Can you reconcile these figures with books of

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sale.

Ans: These are the current years a/c subject to finalization and therefore is reconcilable.

Q23 I am showing page 48 of annexure A-5, Please explain the figures contained therein.

Ans: These are the account receivable of FNP Market which I am not able to reconcile at this moments.

Q.24 What are the cash balances in books of different concern of whose a/cs are being maintained at this stages.

Ans: Since the books a/cs are not completed we are unable to tell the exact cash balance as on date.

Q25 In the light of the questions asked and answers given by you, do you want to offer any income to tax which is outside the books of a/c and also· keeping in mind that you do not main~ stock register of flowers.

Ans: To buy the peace of mind, we offer to declare an income of Rs.2.5 crs. in our three firms/companies which are Ferns & Petal India Pvt. Ltd.. Ferns· & Petal Prop. Mrs. Meeta Gutgutia and FNP Marketing Prop. Mr.. Vikas Gutgutia which also includes cash seized by you from their premises as well as residence of Sh. Vikas Gutgutia and Meeta Gutgutia, subject to the condition that no penalty and prosecution proceedings will be initiated under the Act.

Q.26 Do you want to say anything else?

Ans: No. I have given the above statement without any fear or under any pressure, voluntarily. I have read over the above statement and found it correctly recorded."

44. It was also noted by the AO – and this has not been disputed by the

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Assessee – that a sum of Rs. 1.10 crores was offered by the Assessee as income in the year of search. It is clarified that it had in fact been added to the income of the Assessee in the year of search. What is also significant is that in the answer to Question No. 22, Mr. Pawan Gadia was clear that the document at Annexure A-5 contained the "current year's account subject to finalization and therefore is reconcilable." Although it was repeatedly urged by Mr. Manchanda that the documents seized and furnished by Mr. Pawan Gadia pertained to the AYs other than the year of search, clearly, no such question was put to Mr. Pawan Gadia. It should have been easy for the Investigating Officer to ask Mr. Pawan Gadia of the particular AY to which the document related to. However, that was not done. Therefore, all that we have is the statement of Mr. Pawan Gadia which makes a disclosure about the earlier undisclosed income and stating that the offer of such income was being made "to buy peace of mind". Therefore, the statement recorded under Section 133A of the Act of Mr. Gadia can hardly be said to be incriminating material for all the AYs in question.

Other incriminating material?

45. Were there any other materials unearthed during the search that could be said to be incriminating *qua* each of the AYs in question? In trying to answer this question, there were two broad submissions made by Mr. Manchanda – one was a legal submission that there was no need for the existence of such incriminating material to justify the re-opening of the assessment for the earlier six years prior to the year of search. For this, reliance was placed on the decision in ***Dayawanti Gupta*** (supra). The second was that since the Assessee never produced the books of accounts, it

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was not possible for the AO to record a specific finding regarding each of the seized documents, "if the same were unaccounted for in the books of accounts or otherwise incriminating." The presumption here is that the other documents seized should be taken to be incriminating because it was only for that reason that Mr. Pawan Gadia has felt constrained to make the disclosure.

46. As regards the second submission, it must be pointed out that this submission is both factually incorrect and based on surmises. During the course of the proceedings before the CIT(A), by means of an application under Rule 46A or the Rules, the Assessee sought to produce additional evidence which was permitted by the CIT(A). That decision of the CIT(A) was never challenged by the Revenue. In any event, the dismissal of its appeal by the ITAT pertaining to the AYs 2000-01, 2001-02, 2002-03 and 2003-04 on merits was never challenged by it. What the CIT(A) did was to seek a remand report from the AO. On 23rd September, 2010, the Assessee wrote a letter to the AO offering a detailed explanation for each of the additions and the other points raised by the AO. This has also been referred to hereinbefore. That letter specifically states that the Assessee had been maintaining regular books of accounts "on TALLY software on Computer and have filed regular Income Tax returns along with Profit & Loss Account and Balance Sheet which were audited u/s-44AB of the Act by Chartered Accountant." It was added that "the same are being produced for your kind verification". Further, the AO informed that "some of the computers have already been seized during search operations on the various premises belonging to the Assessee." This has to be also seen along with the order

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passed by the CIT(A) in the appeal pertaining to the AY 2004-05 where he specifically notes in paragraphs 6.2.3 that the AO was asked to remain present in the hearing before the CIT(A) and that he verified the originals of all the franchise agreements by signing the order-sheets before the CIT(A). The fact remains that the books of accounts of the Assessee were not rejected by the AO. Even in the audit report under Section 44AB, no defect in the books of accounts maintained by the Assessee was pointed out. In the circumstances, it is not possible to accept the plea of the Revenue now made that the so-called additional incriminating material *qua* each of the AYs could not be verified and, therefore, not discussed by the AO because the Assessee did not produce its books of accounts. It appears that the Revenue did have access to the entire books of accounts of the Assessee which were also shown to have also been maintained in soft form on the computers of the Assessee which were already seized by the Revenue during search operations.

47. The offer of Rs. 1.10 crores as undisclosed franchisee fee was made only for the year of search and not for the earlier years. In fact, there was no material on the basis of which the franchisee income could have been added for the earlier years. What the AO did, as was noted by the CIT(A), was to proceed on the basis as if there should have been such undisclosed franchisee income in the earlier AYs as well because the *modus operandi* of the Assessee during those was the same. The AO also presumed that the number of outlets remained constant in all the AYs from 2000-01 to 2006-07. He proceeded to estimate the undisclosed income at a certain percentage of the amount disclosed by the Assessee in the year of search. The AO

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presumed that the Assessee had 52 owned/controlled franchisee outlets during October to December, 2007 and would have had the same numbers during the earlier years as well. A question was posed to Mr. Gadia during the assessment proceedings: “Please give the details with complete names and addresses of 46 outlets, 65 strategic alliance and 156 vendor partners outside India as mentioned in your group profile.” That question was based on the information collected from the Assessee’s website. On the other hand, the Assessee filed an affidavit dated 18th March, 2010 before the CIT(A) pointing out that there were different numbers of owned/controlled outlets and franchisee outlets during the various AYs. From that affidavit, it would be seen that for AY 2004-05, there were only 4 owned outlets and 21 franchisee outlets.

48. In the remand proceedings, the AO could not dispute the above information. As already noticed, the Assessee had brought with herself all the franchisee agreements to substantiate the above submission made in her affidavit. It is for this reason that in para 6.3 (f) of the order passed by the CIT(A) for AYs 2004-05, it was categorically held: “No evidence to dispute the affirmations in the affidavit have been brought on record by the AO in the remand proceedings.” The estimated additions made by the AO from AYs 2001-02 onwards was Rs. 55 lakhs for AY 2001-02, Rs. 66 lakhs for AY 2002-03, Rs. 77 lakhs for AY 2003-04 and Rs. 88 lakhs for AY 2004-05. All these additions were therefore held to be unsustainable in law as they were based on a misconception as to the factual position with regard to the number of outlets in existence during the relevant previous year as well as "on the suspicion that the appellant must have earned undisclosed income

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during the year under appeal". It has been categorically found by the CIT(A) on facts that no incriminating material in relation to the AYs in question i.e., 2001-02 to 2003-04 had been brought on record which could support such presumption.

49. It was on this basis that the addition made by the AO on account of franchisee commission was deleted by the CIT(A) and upheld by the ITAT, which is in conformity with the law explained by the Supreme Court in ***Dhirajlal Giridharilal v. CIT*** (*supra*) that mere suspicion would not be tantamount to evidence. In the instant case, the additions on account of franchisee commission by the AO was "on mere suspicion and not on any evidence whatsoever."

50. Mr. Manchanda was at pains to construe the statement made by Mr. Gadia as pointing to the factum of appointment of franchisees by the Assessee, which information, according to him, was not known earlier. He also pointed out to the practice of collecting a non-refundable license fee and non-refundable deposits which facts were not earlier known but for the search conducted. As rightly pointed out by Mr. Kaushik, learned counsel for the Respondent, that nothing was brought on record by the AO to show that there was failure on part of the Assessee to make a disclosure as regards the franchisee income in any of the earlier years. The incriminating material had to be in relation to any income that was not disclosed in the earlier returns. There was no such incriminating material to show that there was a failure by the Assessee to disclose any franchisee income for those earlier years. The disclosure by the Assessee on account of 'undisclosed franchisee

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commission’ was relevant only for the year of search and not for the earlier years.

51. The CIT(A) has undertaken a very exhaustive exercise in respect of each of the AYs with respect to the number of franchisee outlets operating every year. He called for a remand report from and provided a personal hearing to the AO, who also verified the original assessment records and the records brought by the Assessee. Thereafter, the CIT(A) came to the conclusion that the number of franchisee/retail outlets as disclosed by the Assessee was correct. This factual determination has not been shown by the Revenue to be perverse or contrary to the records. The entire edifice of the arguments of Mr. Manchanda that the AO was not heard and that there was a failure by the Assessee to produce the accounts and records is wholly contrary to what emerges from a reading of the detailed orders of the CIT(A).

52. For the aforementioned reasons, the deletion by the CIT(A) of the additions made by the AO for the AYs 2004-05 both as regards the franchisee fee/commission of Rs. 88 lakhs and the rent amount appears to be based on factual findings and, therefore, does not call for any interference by this Court.

53. At this stage, it is also to be noticed that an elaborate argument was made by Mr. Manchanda on the aspect of the security deposits accepted by the Assessee. These were of two kinds – one was of refundable security deposits and the other for non-refundable security deposits. As far as the refundable security deposits were concerned, the AO himself in his remand report accepted them as having been disclosed. This has been noticed by the

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CIT(A) in para 7.2.1 of his order for AY 2004-05. As regards non-refundable security deposit, the CIT(A) accepted the AO's findings that treating the sum as 'goodwill written off on deferred basis' was not correct, hence the addition of Rs. 5,09,343 was held to be justified and correct. It was duly accounted for under 'liabilities' and transferred to income in a phased manner. This was not done by manipulating the account books of the Assessee as alleged by the Revenue. This would have been evident had the return been picked up for scrutiny under Section 143(3) of the Act. This, therefore, was not material which was subsequently unearthed during the search which was not already available to the AO. Consequently, the additions sought to be made by the AO on account of security deposits were rightly deleted by the CIT(A).

54. For all of the aforementioned reasons Question (ii) framed above is answered in the affirmative i.e., in favour of the Assessee and against the Revenue.

Invocation of Section 153A for AYs 2000-01 to 2003-04

55. On the legal aspect of invocation of Section 153A in relation to AYs 2000-01 to 2003-04, the central plank of the Revenue's submission is the decision of this Court in ***Dayawanti Gupta*** (supra). Before beginning to examine the said decision, it is necessary to revisit the legal landscape in light of the elaborate arguments advanced by the Revenue.

56. Section 153A of the Act is titled "Assessment in case of search or requisition". It is connected to Section 132 which deals with 'search and seizure'. Both these provisions, therefore, have to be read together. Section

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153A is indeed an extremely potent power which enables the Revenue to re-open at least six years of assessments earlier to the year of search. It is not to be exercised lightly. It is only if during the course of search under Section 132 incriminating material justifying the re-opening of the assessments for six previous years is found that the invocation of Section 153A *qua* each of the AYs would be justified.

57. The question whether unearthing of incriminating material relating to any one of the AYs could justify the re-opening of the assessment for all the earlier AYs was considered both in ***CIT v. Anil Kumar Bhatia*** (*supra*) and ***CIT v. Chetan Das Lachman Das*** (*supra*). Incidentally, both these decisions were discussed threadbare in the decision of this Court in ***Kabul Chawla*** (supra). As far as ***CIT v. Anil Kumar Bhatia*** (*supra*) was concerned, the Court in paragraph 24 of that decision noted that "we are not concerned with a case where no incriminating material was found during the search conducted under Section 132 of the Act. We therefore express no opinion as to whether Section 153A can be invoked even under such situation”. That question was, therefore, left open. As far as ***CIT v Chetan Das Lachman Das*** (*supra*) is concerned, in para 11 of the decision it was observed:

> “11. Section 153A (1) (b) provides for the assessment or reassessment of the total income of the six assessment years immediately preceding the assessment year relevant to the previous year in which the search took place. To repeat, there is no condition in this Section 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 Assessing Officer which can be related to the evidence found. This, however, does not mean that the assessment under Section

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153A 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."

58. In ***Kabul Chawla*** (*supra*), the Court discussed the decision in ***Filatex India Ltd. v. CIT*** (*supra*) as well as the above two decisions and observed as under:

> "31. What distinguishes the decisions both in *CIT v. Chetan Das Lachman Das (supra)*, and *Filatex India Ltd. v. CIT-IV (supra)* in their application to the present case is that in both the said cases there was some material unearthed during the search, whereas in the present case there admittedly was none. Secondly, it is plain from a careful reading of the said two . decisions that they do not hold that additions can be validly made to income forming the subject matter of completed assessments prior to the search even if no incriminating material whatsoever was unearthed during the search.
>
> 32. Recently by its order dated 6th July 2015 in ITA No. 369 of 2015 (*Pr. Commissioner of Income Tax v. Kurele Paper Mills P. Ltd.*), this Court declined to frame a question of law in a case where, in the absence of any incriminating material being found during the search under Section 132 of the Act, the Revenue sought to justify initiation of proceedings under Section 153A of the Act and make an addition under Section 68 of the Act on bogus share capital gain. The order of the CIT(A), affirmed by the ITAT, deleting the addition, was not interfered with."

59. In ***Kabul Chawla*** (*supra*), the Court referred to the decision of the Rajasthan High Court in ***Jai Steel (India), Jodhpur v. ACIT (2013) 36 Taxman 523 (Raj)***. The said part of the decision in ***Kabul Chawla*** (supra) in paras 33 and 34 reads as under:

> "33. The decision of the Rajasthan High Court in *Jai Steel (India), Jodhpur v. ACIT (supra)* involved a case where certain books of accounts and other documents that had not been

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produced in the course of original assessment were found in the course of search. It was held where undisclosed income or undisclosed property has been found as a consequence of the search, the same would also be taken into consideration while computing the total income under Section 153A of the Act. The Court then explained as under:

> "22. In the firm opinion of this Court from a plain reading of the provision along with the purpose and purport of the said provision, which is intricately linked with search and requisition under Sections 132 and 132A of the Act, it is apparent that:
>
> (a) the assessments or reassessments, which stand abated in terms of II proviso to Section 153A of the Act, the AO acts under his original jurisdiction, for which, assessments have to be made;
>
> (b) regarding other cases, the addition to the income that has already been assessed, the assessment will be made on the basis of incriminating material; and
>
> (c) in absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made."

34. The argument of the Revenue that the AO was free to disturb income *de hors* the incriminating material while making assessment under Section 153A of the Act was specifically rejected by the Court on the ground that it was "not borne out from the scheme of the said provision" which was in the context of search and/or requisition. The Court also explained the purport of the words "assess" and "reassess", which have been found at more than one place in Section 153A of the Act as under:

> "26. The plea raised on behalf of the assessee that as the first proviso provides for assessment or reassessment of the total income in respect of each assessment year falling within the six assessment years, is merely reading

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> the said provision in isolation and not in the context of the entire section. The words 'assess' or 'reassess'-have been used at more than one place in the Section and a harmonious construction of the entire provision would lead to an irresistible conclusion that the word assess has been used in the context of an abated proceedings and reassess has been used for completed assessment proceedings, which would not abate as they are not pending on the date of initiation of the search or making of requisition and which would also necessarily support the interpretation that for the completed assessments, the same can be tinkered only based on the incriminating material found during the course of search or requisition of documents."

60. In ***Kabul Chawla*** (supra), the Court also took note of the decision of the Bombay High Court in ***Commissioner of Income Tax v. Continental Warehousing Corporation (Nhava Sheva) Ltd. [2015] 58 taxmann.com 78 (Bom)*** which accepted the plea that if no incriminating material was found during the course of search in respect of an issue, then no additions in respect of any issue can be made to the assessment under Section 153A and 153C of the Act. The legal position was thereafter 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

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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

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> 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."

61. It appears that a number of High Courts have concurred with the decision of this Court in ***Kabul Chawla*** (supra) beginning with the Gujarat High Court in ***Principal Commissioner of Income Tax v. Saumya Construction Pvt. Ltd.*** (*supra*). There, a search and seizure operation was carried out on 7th October, 2009 and an assessment came to be framed under Section 143(3) read with Section 153A(1)(b) in determining the total income of the Assessee of Rs. 14.5 crores against declared income of Rs. 3.44 crores. The ITAT deleted the additions on the ground that it was not based on any incriminating material found during the course of the search in respect of AYs under consideration i.e., AY 2006-07. The Gujarat High Court referred to the decision in ***Kabul Chawla*** (supra), of the Rajasthan High Court in ***Jai Steel (India), Jodhpur v. ACIT*** (*supra*) and one earlier decision of the Gujarat High Court itself. It explained in para 15 and 16 as under:

> "15. On a plain reading of section 153A of the Act, it is evident that the trigger point for exercise of powers thereunder is a search under section 132 or a requisition under section 132A of the Act. Once a search or requisition is made, a mandate is cast upon the Assessing Officer to issue notice under section 153A of the Act to the person, requiring him to furnish the return of income in respect of each assessment year falling within six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made and assess or reassess the same. Since the assessment under section 153A of the Act is linked with search and requisition under sections 132 and 132A of the Act, it is

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evident that the object of the section is to bring to tax the undisclosed income which is found during the course of or pursuant to the search or requisition. However, instead of the earlier regime of block assessment whereby, it was only the undisclosed income of the block period that was assessed, section 153A of the Act seeks to assess the total income for the assessment year, which is clear from the first proviso thereto which provides that the Assessing Officer shall assess or reassess the total income in respect of each assessment year falling within such six assessment years. The second proviso makes the intention of the Legislature clear as the same provides that assessment or reassessment, if any, relating to the six assessment years referred to in the sub-section pending on the date of initiation of search under section 132 or requisition under section 132A, as the case may be, shall abate. Sub-section (2) of section 153A of the Act provides that if any proceeding or any order of assessment or reassessment made under sub-section (1) is annulled in appeal or any other legal provision, then the assessment or reassessment relating to any assessment year which had abated under the second proviso would stand revived. The proviso thereto says that such revival shall cease to have effect if such order of annulment is set aside. Thus, any proceeding of assessment or reassessment falling within the six assessment years prior to the search or requisition stands abated and the total income of the assessee is required to be determined under section 153A of the Act. Similarly, sub-section (2) provides for revival of any assessment or reassessment which stood abated, if any proceeding or any order of assessment or reassessment made under section 153A of the Act is annulled in appeal or any other proceeding.

16. Section 153A bears the heading "Assessment in case of search or requisition". It is "well settled as held by the Supreme Court in a catena of decisions that the heading or the Section can be regarded as a key to the interpretation of the operative portion of the section and if there is no ambiguity in the language or if it is plain and clear, then the heading used in the section strengthens that meaning. From the heading of section

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153. the intention of the Legislature is clear, viz., to provide for assessment in case of search and requisition. When the very purpose of the provision is to make assessment In case of search or requisition, it goes without saying that the assessment has to have relation to the search or requisition, in other words, the assessment should connected With something round during the search or requisition viz., incriminating material which reveals undisclosed income. Thus, while in view of the mandate of sub-section (1) of section 153A of the Act, in every case where there is a search or requisition, the Assessing Officer is obliged to issue notice to such person to furnish returns of income for the six years preceding the assessment year relevant to the previous year in which the search is conducted or requisition is made, any addition' or disallowance can be made only on the basis of material collected during the search or requisition, in case no incriminating material is found, as held by the Rajasthan High Court in the case of *Jai Steel (India) v. Asst. CIT (supra)*, the earlier assessment would have to be reiterated, in case where pending assessments have abated, the Assessing Officer can pass assessment orders for each of the six years determining the total income of the assessee which would include income declared in the returns, if any, furnished by the assessee as well as undisclosed income, if any, unearthed during the search or requisition. In case where a pending reassessment under section 147 of the Act has abated, needless to state that the scope and ambit of the assessment would include any order which the Assessing Officer could have passed under section 147 of the Act as well as under section 153A of the Act.

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19. On behalf of the appellant, it has been contended that if any incriminating material is found, notwithstanding that in relation to the year under consideration, no incriminating material is found, it would be permissible to make additions and disallowance in respect of an the six assessment years. In the opinion of this court, the said contention does not merit acceptance, inasmuch as. the assessment in respect of each of the six assessment years is a separate and distinct assessment.

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> Under section 153A of the Act, assessment has to be made in relation to the search or requisition, namely, in relation to material disclosed during the search or requisition. If in relation to any assessment year, no incriminating material is found, no addition or disallowance can be made in relation to that assessment year in exercise of powers under section 153A of the Act and the earlier assessment shall have to be reiterated. In this regard, this court is in complete agreement with the view adopted by the Rajasthan High Court in the case of *Jai Steel (India) v. Asst. CIT (supra)*. Besides, as rightly pointed out by the learned counsel for the respondent, the controversy involved in the present case stands concluded by the decision of this court In the case of *CIT v. Jayaben Ratilal Sorathia (supra)* wherein it has been held that while it cannot be disputed that considering section 153A of the Act, the Assessing Officer can reopen and/or assess the return with respect to six preceding years ; however, there must be some incriminating material available with the Assessing Officer with respect to the sale transactions in the particular assessment year."

62. Subsequently, in ***Principal Commissioner of Income Tax- 1 v. Devangi alias Rupa*** (*supra*), another Bench of the Gujarat High Court reiterated the above legal position following its earlier decision in ***Principal Commissioner of Income Tax v. Saumya Construction P. Ltd.*** (*supra*) and of this Court in ***Kabul Chawla*** (supra). As far as Karnataka High Court is concerned, it has in ***CIT v. IBC Knowledge Park P. Ltd.*** (*supra*) followed the decision of this Court in ***Kabul Chawla*** (supra) and held that there had to be incriminating material *qua* each of the AYs in which additions were sought to be made pursuant to search and seizure operation. The Calcutta High Court in ***CIT-2 v. Salasar Stock Broking Ltd.*** (*supra*), too, followed the decision of this Court in ***Kabul Chawla*** (supra). In ***CIT v. Gurinder Singh Bawa*** (*supra*), the Bombay High Court held that:

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> "6...once an assessment has attained finality for a particular year, i.e., it is not pending then the same cannot be subject to tax in proceedings under section 153A of the Act. This of course would not apply if incriminating materials are gathered in the course of search or during proceedings under section 153A of the Act which are contrary to and/or not disclosed during the regular assessment proceedings."

63. Even this Court has in ***CIT v Mahesh Kumar Gupta*** (*supra*) and ***The Pr. Commissioner of Income Tax-9 v. Ram Avtar Verma*** (*supra*) followed the decision in ***Kabul Chawla*** (supra). The decision of this Court in ***Pr. Commissioner of Income Tax v. Kurele Paper Mills P. Ltd.*** (*supra*) which was referred to in ***Kabul Chawla*** (supra) has been affirmed by the Supreme Court by the dismissal of the Revenue's SLP on 7th December, 2015.

The decision in Dayawanti Gupta

64. That brings us to the decision in ***Dayawanti Gupta*** (*supra*). As rightly pointed out by Mr. Kaushik, learned counsel appearing for the Respondent, that there are several distinguishing features in that case which makes its ratio inapplicable to the facts of the present case. In the first place, the Assessees there were engaged in the business of Pan Masala and Gutkha etc. The answers given to questions posed to the Assessee in the course of search and survey proceedings in that case bring out the points of distinction. In the first place, it was stated that the statement recorded was under Section 132(4) and not under Section 133A. It was a statement by the Assessee himself. In response to question no. 7 whether all the purchases made by the family firms, were entered in the regular books of account, the answer was:

> "We and our family firms namely M/s Assam Supari Traders and M/s Balaji Perfumes generally try to record the transactions

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> made in respect of purchase, manufacturing and sales in our regular books of accounts but it is also fact that some time due to some factors like inability of accountant, our busy schedule and some family problems, various purchases and sales of Supari, Gutka and other items dealt by our firms is not entered and shown in the regular books of accounts maintained by our firms."

65. Therefore, there was a clear admission by the Assessees in ***Dayawanti Gupta*** (supra) there that they were not maintaining regular books of accounts and the transactions were not recorded therein.

66. Further, in answer to Question No. 11, the Assessee in ***Dayawanti Gupta*** (supra) was confronted with certain documents seized during the search. The answer was categorical and reads thus:

> "Ans:- I hereby admit that these papers also contend details of various transactions include purchase/ sales/ manufacturing trading of Gutkha, Supari made in cash outside Books of accounts and these are actually unaccounted transactions made by our two firms namely M/s Asom Trading and M/s. Balaji Perfumes."

67. By contrast, there is no such statement in the present case which can be said to constitute an admission by the Assessee of a failure to record any transaction in the accounts of the Assessee for the AYs in question. On the contrary, the Assessee herein stated that, he is regularly maintaining the books of accounts. The disclosure made in the sum of Rs. 1.10 crores was only for the year of search and not for the earlier years. As already noticed, the books of accounts maintained by the Assessee in the present case have been accepted by the AO. In response to question No. 16 posed to Mr. Pawan Gadia, he stated that there was no possibility of manipulation of the

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accounts. In ***Dayawanti Gupta*** (supra), by contrast, there was a chart prepared confirming that there had been a year-wise non-recording of transactions. In ***Dayawanti Gupta*** (supra), on the basis of material recovered during search, the additions which were made for all the years whereas additions in the present case were made by the AO only for AY 2004-05 and not any of the other years. Even the additions made for AYs 2004-05 were subsequently deleted by the CIT(A), which order was affirmed by the ITAT. Even the Revenue has challenged only two of such deletions in ITA No. 306/2017.

68. In para 23 of the decision in ***Dayawanti Gupta*** (supra), it was observed as under:

> "23. This court is of opinion that the ITAT's findings do not reveal any fundamental error, calling for correction. The inferences drawn in respect of undeclared income were premised on the materials found as well as the statements recorded by the assessees. These additions therefore were not baseless. Given that the assessing authorities in such cases have to draw inferences, because of the nature of the materials - since they could be scanty (as one habitually concealing income or indulging in clandestine operations can hardly be expected to maintain meticulous books or records for long and in all probability be anxious to do away with such evidence at the shortest possibility) the element of guess work is to have some reasonable nexus with the statements recorded and documents seized. In tills case, the differences of opinion between the CIT (A) on the one hand and the AO and ITAT on the other cannot be the sole basis for disagreeing with what is essentially a factual surmise that is logical and plausible. These findings do not call for interference. The second question of law is answered again in favour of the revenue and against the assessee."

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69. What weighed with the Court in the above decision was the "habitual concealing of income and indulging in clandestine operations" and that a person indulging in such activities "can hardly be accepted to maintain meticulous books or records for long." These factors are absent in the present case. There was no justification at all for the AO to proceed on surmises and estimates without there being any incriminating material *qua* the AY for which he sought to make additions of franchisee commission.

70. The above distinguishing factors in ***Dayawanti Gupta*** (supra), therefore, do not detract from the settled legal position in ***Kabul Chawla*** (supra) which has been followed not only by this Court in its subsequent decisions but also by several other High Courts.

71. For all of the aforementioned reasons, the Court is of the view that the ITAT was justified in holding that the invocation of Section 153A by the Revenue for the AYs 2000-01 to 2003-04 was without any legal basis as there was no incriminating material *qua* each of those AYs.

Conclusion

72. To conclude:

(i) Question (i) is answered in the negative i.e., in favour of the Assessee and against the Revenue. It is held that in the facts and circumstances, the Revenue was not justified in invoking Section 153A of the Act against the Assessee in relation to AYs 2000-01 to AYs 2003-04?

(ii) Question (ii) is answered in the affirmative i.e., in favour of the Assessee

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and against the Revenue. It is held that with reference to AY 2004-05, the ITAT was correct in confirming the orders of the CIT(A) to the extent it deleted the additions made by the AO to the taxable income of the Assessee of franchise commission in the sum of Rs. 88 lakhs and rent payment for the sum of Rs. 13.79 lakhs?

73. The appeals are accordingly dismissed but in the circumstances, no orders as to costs.

S. MURALIDHAR, J

CHANDER SHEKHAR, J

MAY 25, 2017
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