IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'G', NEW DELHI

BEFORE SHRI O.P. KANT, ACCOUNTANT MEMBER
AND
SHRI K.N. CHARY, JUDICIAL MEMBER

ITA No.5870/Del/2017
Assessment Year: 2009-10

Mr. Trilok Chand Chaudhary, 39, Gadai Pur, Mehrauli, New Delhi	**Vs.**	ACIT, Central Circle-26, New Delhi
PAN :AAEPC0683P		
(Appellant)		**(Respondent)**

Appellant by	Shri Pranshu Goel, CA
Respondent by	Shri S.S. Rana, CIT(DR)

Date of hearing	18.07.2019
Date of pronouncement	20.08.2019

ORDER

PER O.P. KANT, A.M.:

This appeal by the assessee is directed against order dated 27/06/2017 passed by the Ld. Commissioner of Income-tax (Appeals)-31, New Delhi [in short 'the Ld. CIT(A)'] for assessment year 2009-10, raising following grounds:

1. *That the order of the Ld. CIT (A) passed u/s 250 of the Income Tax Act, 1961 is bad in law and on facts.*
2. *That the Ld. CIT [A] has erred in rejecting the additional grounds taken u/s 250(5) of the Income Tax Act.*

2.1 *That the Ld. CIT (A) rejected the additional grounds on the premise that the additional grounds taken are factual grounds and not legal and hence judgment of Hon'ble Supreme Court in the case of NTPC 229 ITR 383 cannot be applied.*

2.2 *That the ld. CIT(A) was wrong in holding that the assessee made a new case by raising purely factual issues which were not raked up before the ld. AO.*

2.2 That the Ld. CIT(A) made false averments in para 4.3 that the ld. AO had referred various documents and valuables like jewellery found and seized from the premises of the assessee.

2.3 That the Id. CIT(A) even mentioned a wrong fact in para 4.3 that appellant had the agricultural income or not is purely a question of fact. In fact, assessee had no issue of agricultural income which was pending for adjudication before ld. CIT(A).

2.4 That the ld. CIT(A) in para 4.7 rejected the additional grounds for A.Y 2007-08 which was never the year covered u/s 153A assessments.

3. That the Ld. CIT(A) has erred in ignoring the judgement of jurisdictional Hon'ble Delhi High Court in the case of CIT v Kabul Chawla [2016] 380 ITR 573 (Delhi) whereby it was held that completed assessments can be interfered with by the Ld. AO while making addition u/s 153A only on the basis of some incriminating material found during search.

4. That the Ld. CIT(A) has erred in directing the Ld. AO to restrict the addition of Rs. 6,00,000/- made u/s 2(22) (e) of the Income Tax Act to the extent of accumulated profits. By doing so, Ld. CIT(A) has exceeded his jurisdiction/powers given u/o of the Income Tax Act, 1961.

5. That the Ld. CIT(A) as well as Ld. AO have not appreciated the fact that the advance was received by the assessee to purchase the properties on behalf of lender companies and therefore advance was in the nature of trade advance which does not cover u/s 2(22) (e) of the Income Tax Act.

6. That the Ld. CIT(A) has erred in confirming the addition of Rs. 3.30 crore made by the ld. AO in the hands of assessee on Protective Basis.

6.1 That the addition was sustained by the ld. CIT(A) merely on conjectures and surmises.

6.2 That the ld. CIT(A) has not appreciated the fact the seized document was found from the premises of third party and therefore addition on the basis of the said document can only be made u/s 153C of the Act.

7. That the order passed by the learned CIT(A) is against the principles of natural justice.

8. That the appellant craves leave to add, alter, amend, substitute, delete and modify any or all the grounds of appeal, which are without prejudice to one another, before or at the time of hearing of the appeal.

2. Briefly stated facts of the case are that, the assessee is an individual and derived income from house property, capital gains and income from other sources. For the year under consideration, the assessee filed original return of income on 31/03/2011 declaring total income of Rs.19,01,580/-. A search and seizure

operation under section 132 of the Income Tax Act, 1961 (in short 'the Act') was carried out on 11/09/2013 and 17/09/2013 in the case of AKN group of cases, during which the premise of the assessee was also covered. During the course of search, the assessee surrendered income of Rs. 1.2 crore for the amount spent on the marriage of the daughter in respect of the year under consideration. Consequent to the search action, proceedings under section 153A of the Act were initiated and notice was accordingly issued on 30/06/2014 asking the assessee to file return of income. In response, the assessee filed return of income on 22/09/2015, declaring income of Rs.1,39,01,580/-. Subsequently, statutory notices were issued and assessment was completed after making addition of Rs.3.3 crores and Rs.6,00,000/-. The addition of Rs.3.3 croress was made on the basis of the documents seized from the premise of Sh. Ashok Chowdhary on account of items of gift given by the assessee in marriage of his daughter. This adition was made by the Assessing Officer on protective basis in the hands of the assessee, whereas substantive addition was made in the hands of Sh Ashok Chowdhary in assessment year 2009-10. The addition of Rs.6 lakh was made holding the sum received by the assessee from company M/s Rosemary properties Private Limited as deemed dividend in terms of section 2(22)(e) of the Act.

2.1 Aggrieved with the additions made, the assessee filed appeal before the Ld. CIT(A) and challenged legality of the additions made by way of filing additional ground. The assessee also challenged additions on merit. The Ld. CIT(A) did not admit the additional ground of the assessee and upheld addition of deemed dividend following his own order for assessment year 2013-14

and 2014-15. The addition of Rs.3.3 crore made on protective basis by the Assessing Officer was held by the Ld. CIT(A) on substantive basis in the hands of the assessee.

3. Before us, Ld. Counsel of the assessee referred to ground No. 3 of the appeal and submitted that in view of the decision of the Hon'ble Delhi High Court in the case of CIT Vs. Kabul Chawla (2016) 380 ITR 573 (Delhi), completed assessment cannot be interfered by the Ld. Assessing Officer under section 153A of the Act except on the basis of some incriminating material found during the course of search. The Ld. counsel of the assessee submitted that limitation period for issuing notice under section 143(2) of the Act under regular assessment proceeding had expired in financial year 2010-11 and in absence of any notice issued, the proceedings in the year under consideration stands completed before the date of the search. He submitted that addition under section 2(22)(e) of the Act has been made without any basis on incriminating material, which cannot be made in view of the decision of the Hon'ble Delhi High Court.

3.1 The Ld. DR though relied on the order of the lower authorities, however, could not controvert that the addition under section 2(22)(e) of the Act has been made without any basis of incriminating material in completed assessments.

3.2 We have heard the rival submission and perused the relevant material on record. The Ld. counsel has challenged the addition of Rs.6 lakh under section 2(22)(e) of the Act on the ground that this addition could not have been made in view of the ratio laid down in the case of CIT Vs. Kabul Chawla (supra). The Hon'ble Delhi High Court in the case of Kabul Chawla (supra) has held that if two conditions of completed assessment and no

incriminating material for making addition are fulfilled then no addition could have been made in that assessment year. On perusal of the order of the lower authorities, we find that the instant addition has been made on the basis of the submissions made by the assessee during the course of assessment proceedings under section 153A of the Act. The Ld. DR could not point out any incriminating material on the basis of which this addition could have been claimed to be made. It is also not disputed that the assessments stood completed prior to the date of the search in view of no notice issued under section 143(2) the Act for scrutiny of the case within the limitation period available in the Act. Thus, the assessee fulfils both the conditions for invoking the ratio in the case of Kabul Chawla that no addition could have been made in case of completed assessment in absence of any incriminating material found during the course of the search. In similar set of facts, the Hon'ble High Court of Bombay in the case of Principal CIT Vs. Jignesh P. Shah (2018) 9999 taxmann.com 111 (Bombay) held that no addition of deemed dividend could be made in assessment order passed under section 153A of the Act in absence any incriminating material. Accordingly, we set aside the finding of the Ld. CIT(A) on the issue in dispute and direct the lower authorities to delete the addition under section 2(22)(e) amounting to Rs. 6 lakh. The ground No. 3 of the appeal is accordingly allowed.

4. Since we have already granted relief on the issue of addition under section 2(22)(e) of the Act while deciding the ground No. 3 of the appeal the other ground challenging the addition under section 2(22)(e), i.e., ground no. 1 to ground no. 2.4 and ground

No. 4 & 5 are rendered merely academic, and are not required to adjudicate upon.

5. In ground No. 6.2 of the appeal, the assessee has challenged addition of Rs.3.30 crores on the ground that the document relied upon for making the addition was found from the premises of the third party and thus, the addition could have only been made under section 153C of the Act.

5.1 Brief facts qua the issue in dispute are that during the search proceeding at the premise of Sh. Ashok Chowdhary certain document was seized which contained a list of valuables including, jewellery items, cloths for bride and bridegroom, household articles (freeze, TV, microwave, AC , washing machine etc), vehicles, total silver (3 quintile), total gold (8 KG) , Diamond (3 carats) etc. According to the Assessing Officer, daughter of the assessee has been married to the son of Sh. Ashok Chowdhary and these items were given by the assessee as dowry on marriage of his daughter. But, since this document was found from the premises of Sh. Ashok Chaudhri and due to no explanation by him, addition was made by the Assessing Officer in his hand on substantive basis and on protective basis in the case of the assessee. But the Ld. CIT(A) upheld addition in the case of the assessee on substantive basis. The Ld. CIT(A) observed that during the appellate proceeding in the case of Ashok Chowdhary, the assessee filed an affidavit and owned that this document was prepared by him. The Ld. CIT(A) further brought on record that during the search operation, Ashok Chaudhri stated that whole items mentioned in the list were received by his family from Sh Trilok Chaudhri i.e. the assessee at the time of marriage of his son. The assessee contested that there is no reference in the said

document that those items have been given during the marriage. The Ld. CIT(A) made a detailed discussion as why these items must have been given in the marriage in view of circumstantial evidences.

5.2 Before us, the Ld. counsel of the assessee submitted that for making addition on the basis of any material including document found during the course of search at the premises of the third party, the procedure laid down under section 153C of the Act is to be followed. According to learned counsel in the instant case, said procedure of law has not been followed by the Assessing Officer and, therefore, the addition cannot be legally sustained. The Ld. counsel was asked to file a copy of the Panchnama under which the relevant document containing list of the item was seized, which he filed. The Ld. counsel in support of his contention that no addition could have been made under section 153A of the Act in the case of the assessee in respect of incriminating material found from the course of search at the premise of the third parties, relied on following decisions:

- *DCIT Vs. Smt. Shivani Mahajan [ITA No.5585/Del/2015](pronounced on 19.03.2019)*
- *DCIT Vs. Vikas Jain [ITA No.4075/Del/2014] (pronounced on 19.03.2019)*
- *Pavitra Realcon (P) Ltd. Vs. ACIT [2017] 87 taxmann.com 142 (Del. – Trib.)*
- *Krishna Kumar Singhania Vs. DCIT [2017] 88 taxmann.com 259 (Kol-Trib)*
- *CIT Vs. Pinaki Misra [2017] 88 taxmann.com 521 (Delhi-HC)*

5.3 Before us, the Ld. DR relied on the decision of the Hon'ble Delhi High Court in the case of Sh. Vinod Kumar Gupta in ITA No. 1003/2017, wherein addition on the basis of statement of the third party during the course of such was held as validly made.

5.4 We have heard the rival submissions of the parties and also perused copy of Panchnama through which the document in dispute was seized. On perusal of the Punchnama, we find that the said search warrant was issued in the case of Shri Ashok Chaudhri and the Panchnama is not containing name of the assessee. Therefore, it is evident that the material relied upon for making addition was not found from the premises of the assessee.

5.5 We also find that during relevant period, i.e., FY: 2014-15, for using any material found from the premises of the third party during the course of the search in assessment proceeding of the assessee, the Assessing Officer of the third party was required to record satisfaction as the material belong to the assessee in terms of section 153C of the Act and then was required to proceed as per the provisions of section 153C of the Act. In the instant case, it is evident that addition in dispute has been made in the assessment completed under section 153A of the Act. The assessee raised this issue before the Ld. CIT(A), however, the Ld. CIT(A) rejected the arguments of the assessee observing as under:

> *"6.3 Another argument of the appellant, if understood correctly, is that in reference to the document under consideration, the AO ought to have initiated proceedings u/s 153C and that in no case this can be considered u/s 153A. This argument has no legs to stand for the simple reason that it is patently absurd. Undisputedly, a search u/s 132 was conducted in the appellant's case and therefore, the assessment was to be completed u/s 153A and the Ld. AO was under a statutory obligation to consider entire material irrespective of the place from where it was found (i.e. appellant's own place or some other place). There cannot be two assessment one u/s 153A and other u/s 153C. In short, the argument of the appellant that document seized from the premises of Sh. Ashok Chaudhary cannot be considered u/s 153A is absurd and is accordingly rejected."*

5.6 In our opinion, the finding of the Ld. CIT(A) is not based on correct appreciation of law. The reasoning of the Ld. CIT(A) is that there cannot be two simultaneous assessment under section 153A and other under section 153C of the Act. This reasoning is faulty. The assessment under section 153C could have been made after completion of the assessment under section 153A of the Act. The Act has provided separate provisions for making assessment in case of material found in the course of the search from the premises of the assessee as well as the material found in the course of search at the premises of the third party. The Assessing Officer is required to follow the procedure laid down in the Act for making the assessment and he cannot devise his own procedure for shortcut methods. In our considered opinion, when the case of the assessee is covered under the provision of section 153 of the Act and if reliance is placed on the incriminating material found during the course of search of third-party, then provision of section 153C of the Act would be applicable and have to be adhered to. Thus, in the instant case, the Assessing Officer was required to first complete the proceedings under section 153A in hand, which were initiated by way of notice dated 30/06/2014 and thereafter, he was at liberty to take action under section 153C of the Act for bringing the material found from the premise of Sh. Ashok Chaudhri to tax in the hands of the assessee.

5.7 In the case of Shivani Mahajan(supra), identical question was raised before the Tribunal as under:

> *"9. We have carefully considered the arguments of both the sides and perused the material placed before us. After considering the facts of the case and the rival submissions, we find that in these appeals, following two questions arise for our consideration:*

(i) Whether any material found in the search of any other person than the assessee in appeal can be considered in the assessment under 153A of the assessee.

5.8 The Tribunal after considering arguments of the parties held as under:

"14. From a reading of the above decisions of Hon'ble Jurisdictional High Court, it is evident that completed assessment can be interfered with by the Assessing Officer on the basis of any incriminating material unearthed during the course of search. If in relation to any assessment year no incriminating material is found, no addition or disallowance can be made in relation to that year in exercise of power under Section 153 of the Act. Obviously, the reference to the incriminating material in the above decisions of Hon'ble Jurisdictional High Court is in regard to incriminating material found as a result of search of the assessee's premises and not of any other assessee. The legislature has provided Section 153C by invoking the same the Revenue can utilize the incriminating material found in the case of search of any other person to the different assessee. Section 153C is reproduced below for ready reference:

"Assessment of income of any other person.

153C. [C][Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, where the Assessing Officer is satisfied that, -

(a) any money, bullion, jewellery or other valuable article or thing, seized or requisitioned, belongs to; or

(b) any books of account or documents, seized or requisitioned, pertains or pertain to, or any information contained therein, relates to, a person other than the person referred to in section 153A, then, the books of account or documents or assets, seized or requisitioned shall be handed over to the Assessing Officer having jurisdiction over such other person] [and that Assessing Officer shall proceed against each such other person and issue notice and assess or reassess the income of the other person in accordance with the provisions of section 153A, if, that Assessing Officer is satisfied that the books of account or documents or assets seized or requisitioned have a bearing on the determination of the total income of such other person [for six assessment years immediately preceding the assessment year relevant to the previous year in which search is conducted or requisition is made and] for the relevant assessment year or years referred to in subsection (1) of section 153A]:]. "

> *15. Thus, when during the course of search of an assessee any books, document or money, bullion, jewellery etc. is found which relates to a person other than the person searched, then the Assessing Officer of the person searched shall hand over such books of account, documents, or valuables to the Assessing Officer of such other person and thereafter, the Assessing Officer of such other person can proceed against such other person. However, in the case under appeal before us, admittedly, Section 153C is not invoked in the case of the assessee and the assessment is framed under Section 153A. We, respectfully following the above decisions of Hon'ble Jurisdictional High Court, hold that during the course of assessment under Section 153A, the incriminating material, if any, found during the course of search of the assessee only can be utilized and not the material found in the search of any other person."*

5.9 The facts of the case of Vinod Kumar Gupta (supra) are distinguishable with the facts of the instant case. In the case of Vinod Kumar Gupta (supra) material found from Sh. S.K. Gupta was used in assessment proceeding under section 153A of the Act in the case of Sh. Vinod Kumar Gupta. But in that case warrant in fact was issued in the name of Sh. SK Gupta, Gaurav Gupta, Sh. Vinod Kumar Gupta, Ms. Veena Gupta, Sh. Vikas Gupta, and Ms. Madhu Gupta. The Panchnama drawn was also signed by both the assessee (Sh. Vinod Kumar Gupta) and SK Gupta. The statements of both Sh. S.K. Gupta and Sh. Vinod Gupta were recorded on the same date. The Hon'ble High Court held that as search and seizure was conducted through one authorization, there was no requirement of issuing separate notice under section 153C of the Act and following separate procedure under section 153C of the Act. But in the instant case, separate search warrant has been issued in the case of the assessee as well in the case of Sh. Ashok Chowdhary and the Assessing Officer has used the material found in the course of search at the premise of Sh. Ashok Chowdhary, which is not permitted in view of the express provision of the law.

5.10 The addition made by the Assessing Officer in violation of the procedure provided in the Act is bad in law and *void-ab-initio* and cannot be sustained. Accordingly, the addition of Rs.3.3 crore, made protectively on the basis of the documents found from the premises of the third party, by the Assessing Officer and upheld by the Ld. CIT(A) on substantive basis, is deleted. The ground No. 6.2 of the appeal is accordingly allowed.

6. Other grounds No. 6 to 6.1 & 7 are accordingly rendered academic only and thus, dismissed as infructuous.

7. The ground No. 8 being general nature, we are not required to adjudicate upon and accordingly dismissed as infructuous.

8. In the result, the appeal of the assessees allowed.

Order is pronounced in the open court on 20th August, 2019.

Sd/-	Sd/-
[K.N. CHARY]	**[O.P. KANT]**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 20th August, 2019.
RK/-[d.t.d.s]
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi