IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'A' NEW DELHI

BEFORE
SHRI GS PANNU, HON'BLE PRESIDENT
&
SHRI K.NARASIMHA CHARY, JUDICIAL MEMBER

ITA No.- 5481/del/2018
(Assessment Year: 2007-08)

Late Sh. Brij Kishore Kochar through legal heir Sh.AmitKochar, sector-A 1316, pocket B & C, Vasant Kunj New Delhi.	**Vs.**	ACIT, Central circle-18 New Delhi.
PAN No. AAIPK1338H		
Appellant		**Respondent**

Assessee by Sh. Praanshu Goes, CA
Revenue by Sh. Padampani Bora, Sr. DR

Date of hearing: 11/11/2021
Pronouncement on 04/01/2022

ORDER

PER K. NARASIMHA CHARY, JM.

Aggrieved by the order dated 1/6/2018 in appeal No. 158/17-18 passed by the learned Commissioner of Income Tax (Appeals)-27, New Delhi ("Ld. CIT(A)") in the case of late Sh. Briz Kishore Kochar ("the assessee"), for the assessment year 2007-08, assessee preferred this appeal through the legal aid Sh. Amit Kochar.

2. Brief facts of the case are that there was a search conducted on Aerens group on 17/8/2011. Subsequently there was a search in the case of the assessee under section 132 of the Income Tax Act, 1961 (for short "the Act") on 10/2/2012. Notice under section 152A of the act was issued and the assessee filed written off income on 21/11/2013 declaring a total income of Rs. 42, 52, 180/- by showing Long Term Capital Gain (LTCG) of Rs. 7, 55, 401/-, sale consideration of Rs. 22, 50, 000/-and indexed cost of acquisition at Rs. 14, 94, 599/-.

3. By way of order dated 20/3/2014 passed under section 143(3)/153A of the Act learned Assessing Officer observed that the assessee failed to furnish requested to documents and therefore, the sale consideration at Rs. 23 Lacs and cost of acquisition at Rs. 40 Lacs was to be taken for computing the Long-Term Capital Gain (LTCG) at Rs. 9 Lacs instead of Rs. 7, 55, 401/-and the difference of Rs. 1, 44, 599/-was added to the declared income of the assessee, apart from disallowing the claim of deduction under section 80 C of the Act.

4. Assessee preferred appeal before the Ld. CIT(A) and the Ld. CIT(A) confirmed the addition. Thereupon, the assessee carried the matter in appeal to the Tribunal and the Tribunal by order dated 12/5/2016 set aside the assessment order to the file of the learned Assessing Officer to passed the assessment order de novo, after providing reasonable opportunity of being heard.

5. Subsequent thereto, in the second round, learned Assessing Officer issued notice under section 142 (1) of the Act and section 143(2) of the Act requiring the assessee to furnish the details/information, to

which by letter dated 6/12/2017 assessee replied that the details/information was already furnished earlier and the same may be considered. Learned Assessing Officer, therefore, by way of order dated 6/12/2017 passed under section 254/153A of the Act, concluded that the assessee has nothing more to say in this matter and in the absence of any proof, the sale consideration was taken dated 23 Lacs instead of Rs. 22.5 Lacs as declared by the assessee, and also the indexed cost of acquisition was taken at Rs. 40 Lacs as against the declared value of Rs. 14, 94, 599/- and to prevent leakage of Revenue the learned Assessing Officer repeated the addition of Rs. 1, 44, 599/-.

6. In the appeal against the assessment order dated 6/12/2017, the assessee pleaded, interalia, that for assessment year 2007-08 the assessee was assessed under scrutiny under section 143(3) of the Act and the learned Assessing Officer accepted the assessee's computation of income whereby the capital gains made on the sale of property was disclosed and assessed, and since the assessment in this case was complete under scrutiny assessment, this will not abate. On this ground assessee submitted before the Ld. CIT(A) that the learned Assessing Officer can only make an addition on the basis of any incriminating material found in the course of search and since there is no incriminating material in this case, no addition could be made under section 153A of the Act.

7. Ld. CIT(A), by way of impugned order observed that having gone through the observations/directions of the ITAT, he found that the direction was given to the learned Assessing Officer to provide reasonable opportunity of being heard to the assessee to decide the case

but inasmuch as nothing new was submitted by the assessee, learned Assessing Officer had no option but to make the addition which was made during the earlier assessment proceedings and confirmed by the Ld. CIT(A) in the first round of litigation. Ld. CIT(A) therefore, held that in the absence of any new material, there were no grounds to interfere, and accordingly upheld the additions and disallowances.

8. Assessee, therefore, preferred this appeal and it is submitted by the Ld. AR that the Ld. CIT(A) ignored the plea of the assessee that in this case scrutiny and assessment was complete long before the search, such assessment would not abate and the learned Assessing Officer can only make an addition on the basis of any incriminating material found in the course of search, which is conspicuously absent in this case. By placing reliance on the addition of the Hon'ble jurisdictional High Court in the case of Pr. CIT vs. Sunny Infra Projects Ltd., (ITA.Nos.502, 503, 505 & 506/2016 dated 24.04.2017), CIT vs. Kabul Chawla, 380 ITR 573 and Pr. CIT vs. MeetaGutgutiaPr. CIT vs. MeetaGutgutia Prop. M/s. Ferns 'N' Petals (ITA.No.306/2017 dated 25th May, 2017),he submitted that any addition not supported by the incriminating material found during the search, cannot be sustained.

9. Per contra, Ld. DR placed reliance on the orders of the authorities and justified the same on the ground that the authorities followed the directions of the Tribunal; and that the Tribunal directed the learned Assessing Officer to proceed with the reassessment after hearing the assessee and, therefore, the learned Assessing Officer and for that matter the Ld. CIT(A) are justified in making and sustaining the addition on the failure of the assessee to produce any new material.

10. We have gone through the record in the light of the submissions made on either side. There is no dispute that in the original assessment made under section 143(3) of the Act, and as a matter of fact the plea taken by the assessee on this aspect was noted by the Ld. CIT(A) at paragraph No. 5 of his order at page No. 5. Ld. CIT(A) however did not advert to this vital aspect which impacts the assumption of jurisdiction of the learned Assessing Officer to make any addition, in a concluded assessment, in the absence of any incriminating material found during the subsequent search.

11. The Hon'ble Delhi High Court in the case of Pr. CIT vs. Sunny Infra Projects Ltd., (ITA.Nos.502, 503, 505 & 506/2016 dated 24.04.2017) held as under :

> *"13. Consequently, the Court is of the view that the above document could not constitute incriminating material which could justify the making of the additions in exercise of the powers under Section 153C of the Act. It has been repeatedly stressed by this Court in several judgments including CIT v. Anil Kumar Bhatia 352 ITR4 493 (Del.); CIT v. Kabul Chawla 380 ITR 573 (Del.); Dayawanti through Legal Heir Sunita Gupta v. CIT (2016) 390 ITR 496 (Del.) and CIT-VII v. RRJ Securities Limited (2016) 380 ITR 612 that the seized material must have some nexus or relevance to the additions sought to be made and must be relevant for the belief formed regarding income having escaped assessment."*

12. In the case of CIT vs. Kabul Chawla (2015) 61 taxmann.com 412 (Del) Hon'ble Delhi High Court, having considered its earlier decision in the case of CIT vs. Anil Kumar Bhatia (supra), considered the following question of law :

> *"2. The issue that the Court proposes to address in these appeals is the same that was considered by the ITAT viz., "Whether the additions made to the income of the Respondent-Assessee for*

the said A.Ys under section 2(22)(e) of the Income Tax Act, 1961 ('Act') were not sustainable because no incriminating material concerning such additions were found during the course of search and further no assessments for such years were pending on the date of search ?"

Hon'ble Court further that :

"vii. Completed assessments can be interfered with by the A.O. while making the assessment under section 153A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment"

13. In the case of Pr. CIT vs. MeetaGutgutia (supra) Hon'ble Delhi High Court held at paras 69 to 72 as under :

"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 quaeach 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 153 A of the Act against the Assessee in relation to AYs 2000-01 to AYs 2003-04."

14. Considering the facts of the case in the light of above decisions, it is clear that the original assessment stood completed on the date of the search and no assessment proceedings were pending as regards the assessment order under appeal i.e., 2007-08. It is an undisputed fact that no incriminating material was recovered during the course of search concerning the addition made on account of long-term capital gain. It is well settled law that seized material must have some nexus or relevance to the additions sought to be made and must be relevant for the belief formed regarding income having escaped assessment.

15. In view of the above, we are of the view that completed assessment can be interfered with by the Assessing Officer while making assessment under section 153A of the Act only on the basis of some incriminating material unearthed during the course of search which was not produced or not already disclosed or made known in the course of original assessment. We, therefore, are of the view that invocation of section 153A of the Act by the Revenue for assessment year 2007-08 was without any legal basis as there was no incriminating material qua the assessment order under appeal. Assessing Officer was not justified in making the addition on account of long-term capital gains. The issue is therefore covered by the above judgments of the Hon'ble Delhi High Court referred to above. We, accordingly, set aside the order of the authorities below and delete the addition.

16. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on this the 4th day of January, 2022.

Sd/-	Sd/-
(GS PANNU)	**(K. NARASIMHA CHARY)**
PRESIDENT	**JUDICIAL MEMBER**

Dated: 04/01/2022