IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'B' BENCH, KOLKATA

(Before Sri J. Sudhakar Reddy, Accountant Member & Sri Aby T. Varkey, Judicial Member)

I.T(SS).A No. 67/Kol/2017
Assessment Year: 2010-11

Deputy Commissioner of Income Tax, Central Circle-2(2), Kolkata.....Appellant

M/s. Rashmi Iron Industries Pvt. Ltd.....Respondent
1, Garstin Place
Orbit House
3rd Floor
Room No.-3B
Kolkata -700 001
[PAN : AADCR 0339 R]

Appearances by:
Shri A.K. Tulsiyan, FCA, appeared on behalf of the assessee.
Shri Vijay Shankar, CIT D/R, appearing on behalf of the Revenue.

Date of concluding the hearing : November 14th 2018
Date of pronouncing the order : December 12 h , 2018

ORDER

Per J. Sudhakar Reddy, AM :-

This appeal filed by the revenue is directed against the order of the Learned Commissioner of Income Tax (Appeals)-20, Kolkata, (hereinafter the "ld.CIT(A)"), passed u/s. 250 of the Income Tax Act, 1961 (the 'Act'), dt. 22/03/2017, for the Assessment Year 2010-11.

2. There is a delay of 26 days in filing of these appeals. After perusing the petition for condonation, we are convinced that the department was prevented by sufficient cause from filing this appeal on time. Hence the delay is condoned and appeal admitted.

4. The assessee is a company and it filed its original return of income on 14/09/2010 for the Assessment Year 2010-11 declaring total income of Rs.52,969/-. A search and seizure operation u/s 132 of the Act, was conducted at the business and residential premises of Rashmi Group at Kolkata and other places, on 18/02/2013. Thereafter the Assessing Officer issued notice u/s 153A dt. 08/05/2014 and was served upon the assessee on 15/05/2014. In response to the notice, the assessee filed revised return declaring the same income as in the original return of income. The Assessing

Officer completed the assessment u/s 153A r.w.s. 143(3) of the Act on 31/03/2015 determining total income of the assessee at Rs.6,92,33,014/-.

4.1. Aggrieved the assessee carried the matter in appeal. The ld. First Appellate Authority granted part relief. He relied on the decisions of the Hon'ble Calcutta High Court in the case of *PCIT vs. Salasar Stock Broking Limited (ITA No.264 of 2016) dt. 24.08.2016* and the judgment in the case of *CIT vs. Veerprabhu Marketing Ltd. [2016] 73 taxmann.com 149 (Calcutta)* and held that, incriminating material is a prerequisite for making additions in assessment u/s 153A/143(3) of the Act, wherever assessments have not abated. He pointed out that the Hon'ble Jurisdictional High Court has concurred with the judgment of the Hon'ble Delhi High Court in the case of *CIT vs. Kabul Chawla (2016) 380 ITR 0573 (Del)*. He further relied upon a number of decisions of the ITAT Kolkata Bench and deleted all the additions made in the assessment u/s 153A/143(3), which were not based on any incriminating material found during the course of search and seizure proceedings and as the assessment has not abated.

5. Aggrieved the revenue is in appeal before us on the following grounds:-

> *"i. That the Ld.CIT(A) has erred in adjudicating the matter without making any independent enquiry to determine the existence of incriminating evidence in the seized material.*
>
> *ii. That the Ld. CIT(A) has failed to appreciate that a Special Leave Petition has been admitted by the Hon'ble Supreme Court[in [2017] 79 Taxman 115(SC) CIT-7 vs RR] Securities Ltd] on the issue/judicial pronouncements which has been overlooked by the CIT(A), while adjudicating the matter.*
>
> *iii. Ld. CIT(A) has also erred in making comparison with the case of Veer Prabhu Marketing as in the instant case the notice was issued u/s 153C and not u/s 153A as done in the case of the assessee. Hence, the facts and circumstances of the instant case with the case relied upon by the Ld. CIT(Appeals) differ. The case of CIT vs. Kabul Chawla(2016)ITR 0573 (Del) which was also relied upon by the Ld CIT(A) is also different as the contended addition was u/s 2(22)(e) of the IT Act.*
>
> *iv. Further the Ld CIT(A) erred in overlooking the recent High Court Judgement in the case of E.N. Gopakumar vs. CIT(Central) (2016) 75 Taxman.com 215(Kerala) wherein it was held that:*
>
> *Section 153A read with section 2(22), of the IT Act, 1961- search and seizure-assessment in case of (condition precedent)- Assessment Years 2002-03, 2005-06 and 2006-07- whether completed assessment can be interfered with Assessing Officer while making assessment U/S 153A only on the basis of some*

incriminating materials unearthed during course of search which was not produced or not already disclosed or made known in course of original assessment- Held, yes- Pursuant to search carried out in the case of assessee, a notice U/S 153A(J) was issued- in course of assessment. The Statute nowhere makes it conditional that the Department has to unearth some incriminating material to conclude some method against the assessee in events where the assessment is triggered by a notice u/s 153(1)(a) of the Act.

v. That on the fact and in the circumstances of the case, the Ld. CIT(A) had erred in allowing the assessee's appeal by observing that additions made by the AO in the assessment order passed u/s 153A/143(3) are not based on any incriminating documents/papers seized during the search operation."

vi. That on the fact and in the circumstances of the case, the Ld. CIT(A) had erred in not adjudicating the appeal on merit.

vii. That on the fact and in the circumstances of the case, the department craves to add more grounds or alter any ground at the time of appeal."

6. The ld. D/R, submitted that the incriminating material need not necessarily be found during the course of search and that the material which is gathered during the course of any proceedings under the Act undertaken in connection with any other persons and the material gathered during post search operations can also be the basis on which additions can be made in an assessment made u/s 153A r.w.s. 143(3) of the Act. He submitted that in the case on hand the addition in question was made based on statements recorded from var ous entry operators during the course of search and seizure operations at their premises and also was based on a cash trail prepared by the Assessing Officer during the post search enquiry. The sum and substance of his submission is that the statements recorded during the course of survey and search operations undertaken by the department separately on several persons, who are allegedly entry operators and the details of the cash trail of the various transactions constitute incriminating material, which can be used for making addition in an assessment u/s 153A r.w.s. 143(3) of the Act. Further reliance was placed on the judgment of the Hon'ble Kerala High Court in the case of *E.N. Gopakumar v. Commissioner of Income-tax (Central) [2016] 75 taxmann.com 215 (Kerala)*.

7. The ld. Counsel for the assessee, on the other hand, opposed the contentions of the ld. D/R and argued that the issue in question is covered in favour of the assessee by a catena of judgments of the Hon'ble High Courts as well as that of the Hon'ble Supreme

Court. He vehemently contended that none of the additions in question in this case was made based on any material found during the course of search, and hence the additions made by the Assessing Officer in the assessment framed u/s 153A r.w.s. 143(3) of the Act, for assessments which have not abated, are bad in law. He submitted that the entire addition in question was of share application money received and alleged commission paid on the same, in addition to disallowance u/s 14A of the Act. He submitted that the cash trial is not part of the seized documents and was prepared by the revenue in post survey proceedings and that they do not relate to the relevant year.

7.1. He relied on certain case-law to submit that deposits made in the earlier year cannot be taxed in the current Assessment Year where no cash has been deposited. He further argued that the addition cannot be made based on the cash trial because the assessee was not provided with the copy of the bank statement of those third parties in whose accounts, the alleged cash deposits were traced to and the copies of the bank statements of the intermediate companies. He further submitted that copy of the statement recorded from those third parties who are the bank account holders of the alleged chain of companies were not provided to the assessee nor any opportunity was given to the assessee to cross-examine the chain of companies whose bank accounts and statements recorded from directors formed basis of the addition. He submitted that the assessee was kept in dark and no material whatsoever collected by the Assessing Officer was confronted to the assessee.

7.1.1. He further argued that no evidence was brought on record by the Assessing Officer to prove that the alleged cash deposits in the bank account of third parties was in fact the assessee's money. Thus, he submits that the addition cannot be based on such material which is never confronted to the assessee.

7.2. On the issue of alleged statements from several entry operators being the basis of the addition in question, he submitted that the addition was not based on any of these statements by the Assessing Officer. He argued that the fact that all these alleged entry operators had retracted from the statements allegedly made by them, is not denied by the Assessing Officer. He further argued that the copies of the alleged statements were not confronted with the assessee nor any opportunity given for cross-examining these

statements. He further relied on the judgment of the Hon'ble Madras High Court in the case of *CIT vs S. Kader Khan Son [2008] 300 ITR 157* for the proposition that the statements recorded during the course of survey cannot be used as evidence. He relied on the order of the ld. CIT(A) and submitted that the same should be upheld in view of the binding decisions of the Hon'ble Jurisdictional High Court on this matter. He distinguished the judgment of the Hon'ble Kerala High Court and submitted that even otherwise, the judgment cannot be followed in view of the binding nature of the judgment of the Hon'ble Jurisdictional High Court.

8. We have heard rival contentions. On careful consideration of the facts and circumstances of the case, perusal of the papers on record, orders of the authorities below as well as case law cited, we hold as follows:-

8.1. We first consider the legal position as to whether an addition can be made in an assessment u/s 153A r.w.s. 143(3) of the Act, which is not based on any incriminating material found during the course of search and seizure, when the assessment for the Assessment Year in question has not abated In the case on hand, the assessee filed its original return of income on 31/08/2008. The time limit for issual of notice u/s 143(2) of the Act, was 30/09/2009. The search and seizure operation was conducted in this case on 18/02/2013. The statutory period for issual of notice u/s 143(2) of the Act, in the case of the Assessment Years had expired prior to the date of search operation. Hence the assessment for the impugned Assessment Year has not abated. The Assessing Officer made the addition in question by observing as under at page 15 & 16 of the assessment order:-

> *I) Names of the companies appealing m statements of the entry providers given to investigation wing figure as applicants to shares in the assessee company.*
>
> *II) Perusal of the operating bank a/c shows that the a/c of most of the investing companies is in the same bank as that of the assessee company.*
> *III) There is no justification on record whatsoever as to whether the company's credentials commanded a huge share premium, particularly when the same is being paid by strangers.*
>
> *IV) Summons U/S 131 to such persons I company have not been adequately responded and the assessee has failed to produce them in response to the show- cause notice.*

V) The findings that the investing companies which subscribed to the shares were borne on the file of the ROC and that the monies have come through a/c payee cheques is at best, neutral. Mere payment by cheques is not sacrosanct as would not, make a non-genuine transaction as genuine.

VI) Bonafide and genuineness of the transactions is the main issue and in this regard, the assessee company has failed miserably.

VII) Scrutiny has revealed the camouflage adopted by the assessee and exposed the true nature of the transactions.

VIII) Onus is on the assessee to prove the identity of share applicants, their creditworthiness and genuineness of the transactions appearing in its books of sale which is not proved in this case. In fact, genuineness of the transactions has not been established in spite of repeated opportunities.

IX) There is enough material on record to doubt the veracity of the transactions."

A perusal of the above demonstrates that the additions in question are not based on any incriminating material found during the course of search.

8.2. On the legal position, we find that the various Courts of law under similar circumstances have held as follows:-

CIT,Kolkata-III Vs. Veerprabhu Marketing Limited [2016] 73 taxmann.com 149 (Calcutta) :

In this case The Honourable Calcutta High Court expressed the following views:
"We are in agreement with the views of the Karnataka High Court that incriminating material is a pre-requisite before power could have been exercised under section 153C read with section 153A.
In the case before us, the assessing officer has made disallowances of the expenditure, which were already disclosed, for one reason or the other. But such disallowances were not contemplated by the provisions contained under section 153C read with section 153A. The disallowances made by the assessing officer were upheld by the CIT(A) but the learned Tribunal deleted those disallowances."

PCIT-2, Kolkata Vs. Salasar Stock Broking Limited (ITAT No. 264 of 2016) dated 24.08.2016 : (Calcutta)

In this case, the Honorable High Court observed that the Ld. ITAT, Kolkata was of the opinion that the assessing officer had no jurisdiction u/s 153A of

the I.T. Act to reopen the concluded cases when the search & seizure did not disclose any incriminating material. In taking the aforesaid view, the Ld. ITAT relied upon the judgments of Delhi High Court in the case of ***CIT(A) Vs. Kabul Chawla in ITA No. 707/2014 dated 28.08.2014****. The Court also observed that more or less an identical view has been taken by this Bench in* ***ITA No. 661/2008 in the case of CIT Vs. Veerprabhu Marketing Limited.*** *Considering the above facts, the Honorable High Court did not admit the appeal filed by the Department.*

The 'A' Bench of the Delhi ITAT, recently in the case of Anurag Dalmia vs. DCIT in ITA Nos. 5395 & 5396/DEL/2017; Assessment Years: 2006-07 & 2007-08, dt. 15/02/2018, under identical circumstances held as follows:-

"12. We have heard the rival submissions, perused the relevant material placed on record and the finding given in the impugned order with respec to legal issue raised vide ground no.5 by the assessee that the additions made in this year are beyond the scope of assessment u/s.153A, as no incriminating material was found during the course of search for the impugned Assessment Year; and the assessment had attained finality and was not abated in terms of 2nd Proviso to Section 153A. As stated above, the original return of income was filed in July, 2006 and said return was duly accepted and processed u/s. 143(1) vide intimat on dated 25.05.2007. Since no notice u/s. 143(2) was issued thereafter or any other proceedings have been commenced to disturb said return of income, accordingly, it had attained finality much prior to the date of search which was on 20.01.2012. Hence in terms of 2nd Proviso to Section 153A the assessment for the Assessment Year 2006-07 was not pending and accordingly, has to be reckoned as unabated assessment. Under the jurisdiction of Hon'ble Delhi High Court, the law is well settled that in case of unabated assessment, the additions which can be roped-in in the assessments framed u/s.153A, would only be with regard to any in rim nating material or evidence unearthed or found during the course of search. If no incriminating material has been found during the course of search, then no addition can be made in the assessment years where assessments had attained finality The elevant observations and the ratio laid down would be discussed in the later part of this order.

15. Now coming to the ratios laid down by the Hon'ble Jurisdictional High Court, first of all, in the case of Kabul Chawala (supra), the Hon'ble Court after discussing the issue threadbare and analysing the various judgments of different High Courts laid down the following legal proposition in terms of scope of addition which can be made u/s. 153A(1) which are as under:-

"37. On a conspectus of Section 153A (1) of the Act, read with the provisos thereto, and in the light of the law explained in the aforementioned decisions, the legal position that emerges is as under:

i. Once a search takes place under Section 132 of the Act, notice under Section 153 A (1) will have to be mandatorily issued to the person searched requiring him to file returns for six AYs immediately preceding the previous year relevant to the AY in which the search takes place.
ii. Assessments and reassessments pending on the date of the search shall abate. The total income for such AYs will have to be computed by the AOs as a fresh exercise.

iii. The AO will exercise normal assessment powers in respect of the six years previous to the relevant AY in which the search takes place. The AO has the power to assess and reassess the 'total income' of the aforementioned six years in separate assessment orders for each of the six years. In other words there will be only one assessment order in respect of each of the six AYs "in which both the disclosed and the undisclosed income would be brought to tax".

iv. Although Section 153 A does not say that additions should be strictly made on the basis of evidence found in the course of the search, or other post-search material or information available with the AO which can be related to the evidence found, it does not mean that the assessment "can be arbitrary or made without any relevance or nexus with the seized material. Obviously an assessment has to be made under this Section only on the basis of seized material."

v. In absence of any incriminating material, the 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 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."

This judgment of the Hon'ble Delhi High Court has been followed in several judgments not only by the Hon'ble Delhi High Court but also by other Hon'ble High Court like, ***Pr. CIT vs. Soma a Construction Pvt. Ltd. 387 ITR 529 (Guj), CIT vs. IBC Knowledge Park Pvt. Ltd. 385 ITR 346 (Kar)*** *and* ***CIT vs. Gurinder Singh Bawa reported in 386 ITR 483.*** *In the latest judgment the Hon'ble Delhi High Court in* ***Pr. CIT vs. Meeta Gutgutia,*** *their Lordships reiterated the same principle after discussing and analyzing catena of decisions including that of Anil Kumar Bhatia (supra) and Dayawanti Gupta. The Hon'ble HighCourt observed and held as under:-*
"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:

"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 department had filed special leave petition before the Hon'ble Apex Court against the above judgment of the Delhi High court. (Pr CIT V KURULE PAPER MILLS P. LTD: S.L.P (C) No-34554 of 2015[2016] 380ITR (st) 64-Ed)..

The Hon'ble Apex court dismissed the special leave petition filed by the department.
The relevant Para as mentioned in the ITR is reproduced as under.
"Their Lordships Madan B.Lokur and S.A.Bobde JJ dismissed the Department's special leave petition against the judgment dated July 06,2015 of the Delhi High Court in I.T.A No 369 of 2015, whereby the High Court held that no substantial question of law arose ***since there was a factual finding that no incriminating evidence related to share capital issued was found during the course of search and that the assessing officer was not justified in invoking section 68 of the Act for the purpose of making additions on account of share capital"***

9. Applying the propositions of law laid down in the above case-law to the facts of the case on hand, we find that he only addition made is of share application received u/s 68 of the Act and addition of commission paid allegedly for the share application money and finally a disallowance u/s 14A of the Act. No incriminating material has been found during the course of search. The alleged statements recorded from entry operators have admittedly been retracted and the Assessing Officer has not based the additions on these statements. Even otherwise, when copies of the alleged statements recorded by the revenue officials have not been given to the assessee, no addition can be made based on such evidence which is not confronted to the assessee. The contents of the statements are also not brought out in detail in the assessment order. Only a general reference is made that there were certain statements recorded from various entry operators by the investigation wing. No addition can be made on such general observations. We also find that the assessee has not been given an opportunity to cross-examine any of these persons, based on whose statements, the revenue claims to have made these additions. The Hon'ble Supreme Court in the case of *Kishinchand Chellaram vs. CIT, 125 ITR 713 (SC)* had held that opportunity of cross-examination must be provided

to the assessee. The Jurisdictional High Court in the case of *CIT Vs Eastern Commercial Enterprises (1994) 210 ITR 103 (Kol HC)* held as follows:-

As a matter of fact, the right to cross-examination a witness adverse to the assessee is an indispensable right and the opportunity of such cross-examination is one of the cornerstones of natural justice.

9.1. Even otherwise, it is not clear as to which of these statements were recorded during the course of search operation or whether the statements were recorded during the course of survey operations. It is well settled that a statement recorded during the course of survey operation cannot be used as an evidence under the Act.

10. Coming to the alleged cash trail, none of the materia gathered by the Assessing Officer by way of bank account copies of various companies supposed to be a chain was given/confronted to the assessee. The alleged statements were supposedly recorded from directors of these companies which formed this alleged chain are also not brought on record. Only a general statement has been made that the investigation wing had recorded some statements. There is no evidence whatsoever that cash has been routed from the assessee company or that any cash was deposited by the assessee company. There is no material whatsoever brought on record to demonstrate that the alleged cash deposit made in the bank account of a third party was from the assessee company. No opportunity to cross-examine any these parties was provided to the assessee.

Thus, none of these material gathered by the Assessing Officer can be categorized as incriminating material found during the course of search or found during the course of any other operation under the Act. Thus, we hold that the additions in question are not based on any incriminating material. The ld. CIT(A) on page 32 & 33 of his order held as follows:-

> *"I have considered the findings of the AO in the assessment order, different case laws was brought on record and appeal orders passed by my predecessors on this legal issue. I find from the assessment order that during the search & seizure operations conducted u/s 132 of the IT Act, 1961, incriminating documents/papers were not seized. At least addition made by AO in the assessment order passed u/s 153A/143(3) are not based on any incriminating documents/ papers seized during the search operation. It would also not to be out of context to mention here that in this*

case, on the date of search, no assessment for this year was pending. Therefore, keeping in view the ratio decided by the jurisdictional bench of Kolkata tribunal in case referred above and the ratio decided by the Hon'ble Calcutta High Court in the case of Veer Prabhu Marketing Ltd (supra) in the light of CBDT's decision of not filing SLP in this case in the Supreme Court and keeping in view the Apex court's decision to dismiss SLP on the similar issue in the case of Pr CIT vs Kurele Paper Mills Pvt Ltd: SLP (C) No. 34554 of 2015 dt.07.12.2015, I am of this view that in order to maintain judicial continuity on this issue and respectfully following the ratio decided by the Hon'ble Calcutta High Court in the case of Veer Prabhu Marketing Ltd (supra), assessee's appeal on ground no 1 is allowed and as such I am not inclined to adjudicate appeal on ground no. 2 on merit."

11. We find not infirmity in the order of the ld. CIT(A) and hence uphold the same.

12. In the result appeal of the revenue is dismissed.

Kolkata, the 12th day of December, 2018.

Sd/-	Sd/-
[**Aby T. Varkey]**	[**J. Sudhakar Reddy**]
Judicial Member	Accountant Member

Dated : 12.12.2018
{SC SPS}

Copy of the order forwarded to:

1. ***M/s. Rashmi Iron Industries Pvt. Ltd***

1, Garstin Place
Orbit House
3rd Floor
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Kolkata -700 001

2. ***Deputy Commissioner of Income Tax, Central Circle-2(2), Kolkata***

3. CIT(A)-
4. CIT- ,
5. CIT(DR), Kolkata Benches, Kolkata.

True copy
By order

Assistant Registrar
ITAT, Kolkata Benches