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

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER

ITA No.2995/Del/2015
Assessment Year: 2008-09

Roseberry Mercantile Pvt. Ltd., 14D, 14th Floor, Hansalaya, 15, Barakhamba Road, New Delhi.	Vs.	ACIT, Central Circle, Bhainsali Road, Meerut.

PAN: AABCR3485J

(Appellant)		(Respondent)
Assessee by	:	Shri G.C. Srivastava & Shri Suvinay K. Dash, Advocates
Revenue by	:	Shri S.S. Rana, CIT, DR
Date of Hearing	:	13.09.2018
Date of Pronouncement	:	30.11.2018

ORDER

PER R.K. PANDA, AM:

This appeal by the assessee is directed against the order dated 10th March, 2015 of the CIT(A), Meerut, relating to Assessment Year 2008-09.

2. The facts of the case, in brief, are that the assessee is a company and derives income from interest on loans and advances granted by it as an NBFC and profit on sale of mutual funds. The return of income was filed on 6th November, 2008 declaring total income of Rs. Nil. The return was processed u/s 143(1) on 8th July, 2009.

Subsequently, the case was reopened u/s 147 after duly recording the reasons in writing. In response to notice u/s 148 of the IT Act dated 23rd October, 2009, the assessee submitted to treat the original return as return filed in compliance to notice u/s 148 of the IT Act, 1961. Subsequently, the Assessing Officer completed the assessment u/s 147/143(3) on 31st December, 2009 determining the total income at Rs.73,510/- wherein he made certain additions by disallowing STT debited to P&L Account, income-tax debited, disallowance u/s 14A and preliminary expenses.

3. Subsequently, a search operation u/s 132 of the IT Act, 1961 was carried out in the Subharti group of cases on 12.11.2010. Being a part of the search, a search was carried out at the bank accounts of the assessee situated at Oriental Bank of Commerce, Subharti Dental College Branch Subhartipuram, Meerut during which cash of Rs.5,48,50,000/- was found and seized. In response to notice u/s 153A, the assessee filed the return declaring loss of Rs.21,619/-. During the course of assessment proceedings, the Assessing Officer observed that the assessee company has issued equity shares of Rs.87,12,500/- on a premium of Rs.16,55,37,500/- during the year under consideration. He asked the assessee company, vide questionnaire dated 18th October, 2012 to furnish details as to how the premium was worked out by the issue managers, auditors, etc., and the copies of the working and material relied on. In absence of any compliance to the statutory notices issued by the Assessing Officer from time to time to prove the identity, credit worthiness and capacity of the share applicants and genuineness of the transactions, the Assessing Officer invoked the

provisions of section 68 of the Act and relying on the decision of the Hon'ble Delhi High Court in the case of *CIT vs. Nova Promotors & Finlease (P) Ltd. (2012) 18 taxmann.com 217 (Del)*, made an addition of Rs.17,42,50,000/- to the total income of the assessee.

4. Before the CIT(A), the assessee made elaborate submissions. It was submitted that the issues for increase in share capital were examined in the original assessment for assessment year 2008-09 and no adverse finding was given by the Assessing Officer in the order passed u/s 143(3). It was submitted that on the date of search, assessment for assessment year 2008-09 was not pending and no incriminating document relating to the issue of increase of share premium was found or seized during the search. The assessee submitted that the details which were called for by the Assessing Officer were also submitted by the assessee during the course of original assessment proceedings. Referring to the decision of the Mumbai Bench of the Tribunal in the case of *All Cargo Global Logistics Ltd. vs. DCIT*, it was submitted that no addition can be made. The decision of the Hon'ble Allahabad High Court in the case of *CIT Meerut vs. Nav Bharat Duplex Ltd. (2013) 35 taxmann. 289* was also brought to the notice of the CIT(A).

5. However, the ld.CIT(A) was also not satisfied with the arguments advanced by the assessee and upheld the addition made by the Assessing Officer by observing as under:-

> "4.4 I have gone through the rival submission as above. The entire argument of the AR is primarily based on the fact that firstly, original assessment was already

abated and secondly, that in the search, no incriminating material was found. However, the AO has mentioned in the very first paragraph of the assessment order that cash amounting to Rs.5,48,50,000/- was found and seized during the search. It is further seen from record that the company had shown the following returned income for the assessment years falling within the block period:

Assessment year	Returned income
2005-06	Rs.10,750/-
2006-07	Rs.1,78,975/-
2007-08	Rs.242/-
2008-09	Rs.(-) 21,619/-
2009-10	Rs. (-) 65,054/-
2010-11	Rs. (-) 146/-

From the above data, .it is obvious that the assessee has hardly any business. In this situation, seizure of Rs 5,48,50,000/- from the bank account of the assessee constitutes sufficient incriminating material upon which the entire affairs of the assessee can be examined. This is precisely what the AO has attempted to do in the assessment order made subsequent to the search

4.5 The AR has relied heavily on the judgment given by the ITAT Mumbai, in the case of All Cargo Global Logistics Ltd. Vs DCIT Central Circle 44 (2012) 137 ITD 0026. However, the facts of the narrated case are different from the case of the appellant because in that case, no incriminating material was found during the course of search. On the other hand, in this case, cash amounting to Rs. 5,48,50,000/- was seized from the bank account of the assessee. Needless to say, this fact was not available at the time of the original assessment. Thus, the fact that the original assessment has abated will not make any difference because incriminating material was indeed found in the form of FDRs in this case. In the judgment given by the TAT Mumbai, the Hon'ble ITAT had remarked that assessment u/s 153A can be made on the basis of undisclosed income or property discovered in the course of search.

4.6 From a careful study of the written submission made by the AR, it is seen that the appellant had not been able to answer the queries raised by the AO in the assessment order. The basic question which is to be answered here is - why would any prudent business establishment invest in the appellant company by paying heavy premium? It is seen from record that the assessee company has issued equity shares of Rs. 87,12,500/- on a premium of Rs. 16,55,37,500/- during the year under consideration. As mentioned above, the appellant company did not have any net worth. In this situation it seems highly unlikely that the shares of company would command a premium of Rs. 490/- per equity share. Moreover, the companies who have invested in the shares of the appellant company have not earned any income on their investment. The entire setup smacks of accommodation entries which have been exposed by the search operation conducted by the Income tax Department. I, therefore agree with the

conclusion reached by the AO that there is no satisfactory explanation of money received by the appellant company on account of share application and the same has been rightly added by the AO.

4.7 The AR has also quoted the judgment of Hon'ble Allahabad High Court in the case of CIT Meerut Vs Nav Bharat Duplex Ltd. As per the AR, it has been held in this judgment that only identity of the shareholder is required to be established. The AR has further stated that the identity was established during the course of original assessment. However, as mentioned above, new and incriminating evidence was found during the course of search and during the assessment made subsequent to search even the identity of the share applicants were not established.

4.8 Considering the totality of facts and on the basis of discussions made above, I have come to a conclusion that addition of Rs. 17,42,50,000/- was righty made by the AO. Ground of appeal No.l is dismissed and addition of Rs. 17,42,50,000/- is confirmed."

6. Aggrieved with such order of the CIT(A), the assessee is in appeal before the Tribunal by raising the following grounds:-

1. On the facts and circumstances of the case, the learned Commissioner of Income Tax (Appeals), Meerut, erred in law as well as on fact in confirming the addition of Rs. 17,42,00,000/-, made by the A.O., which was received by the appellant company as Share Capital and Share Premium, being Capital receipt, in the hand of the appellant

2. On the facts and circumstances of the case, the learned Commissioner of Income Tax (Appeals), Meerut, erred in law as well as on fact in confirming the action of the A.O without jurisdiction, of visiting the issue of share capital, which was examined and finalized in the assessment under section 148 of the IT Act 1961.

3. On the facts and circumstances of the case, the learned Commissioner of Income Tax (Appeals), Meerut, erred in law as well as on fact in confirming the addition of Rs.17,42,00,000/-, made by the A.O., in an assessment made under section 153A of the I.T. Act, in the absence of any incriminating material, which was found and seized during the course of search under section 132 of the I.T. Act, 1961.

4. The appellant craves leave to add, alter, amend, raise or delete any or all grounds of appeal."

7. The ld. counsel for the assessee, referring to the copy of the 'Panchnaama' dated 4th December, 2010, copy of which is placed at pages 3-5 of the paper book, submitted that only the bank account of the assessee was searched and no search at the business premises of the assessee has taken place. Referring to the assessment order passed u/s 153A/143(3) of the IT Act, he submitted that the Assessing Officer made an addition on account of share application money u/s 68 of the IT Act amounting to Rs.17,42,50,000/- and no addition was made on account of such bank deposit. He submitted that the original assessment was completed u/s 147/143(3) and no incriminating material was found during the course of search. Referring to the decision of the Hon'ble Delhi High Court in the case of *CIT vs. Kabul Chawla, reported in 380 ITR 573 (Del)*, he submitted that the Hon'ble High Court in the said decision has held that jurisdiction u/s 153A cannot be assumed in case of a completed assessment on the date of search when no incriminating materials were found during the course of search. Relying on various other decisions including the decision of the Hon'ble Delhi High Cou t in the case of *DCIT vs. Meeta Gutgutia reported in 395 ITR 526,* he submitted that Hon'ble High Court in the said decision has held that invocation of section 153A to reopen concluded assessments of assessment years earlier to year of search was not justified in absence of incriminating material found during search *qua* each assessment year. He submitted that the above decision of Hon'ble Delhi High Court was challenged by the Revenue and the SLP has been dismissed by the Hon'ble Supreme Court as reported in 96 taxmann.com 468. He also relied on the following decisions:-

i) CIT vs Sinhgad Technical Education Society, 397 ITR 344;

ii) INTAS Pharmaceuticals Ltd. vs. DCIT – IT (SS) A no.807to 809/Ahd/2010 and batch of other appeals, order dated 14.08.2015.

iii) ACIT vs. Goldmohur Design & Apparel Park Ltd., 96 taxmann.com 375;

iv) CIT vs. Smt. Shaila Agarwal, 346 ITR 130 (Allahabad).

8. He accordingly submitted that in absence of any incriminating material found during the course of search no addition can be made u/s 153A/143(3) in case of a completed assessment.

9. So far as the merit of the case is concerned he submitted that the original assessment in this case was completed u/s 147/143(3) on 31st December, 2009 and the details which the Assessing Officer called for during the course of assessment proceedings u/s 153A/143(3) of the IT Act were already on the record as they were filed by the assessee during the course of original assessment proceedings. The same were considered by the then Assessing Officer and were accepted by him. Now, there is no new material fact available with the Assessing Officer even after the search and seizure action u/s 132 of the IT Act which could be a cause of making a fresh assessment and making an addition on account of share application money. The Assessing Officer has not made any further inquiry after the search so as to find out that whatever details furnished during the course of original assessment proceedings/reassessment proceedings were incorrect or false. Since the assessee has established the identity and credit worthiness of the share applicants and the

genuineness of the transaction and the Assessing Officer, after considering the submissions made by the assessee has accepted such share application and share premium as explained, therefore, in absence of any contrary material in the possession of the Assessing Officer, he cannot take a different view and put the assessee to a further test of producing the share applicants after a gap of so many years. He submitted that although these details were available in the assessment records of the assessee, the Assessing Officer in the order passed by him has not at all considered the same. Even though this was brought to the notice of the CIT(A), he has also not considered the argument of the assessee that all details were available in the assessment records since these details were filed during the course of original assessment proceedings. He accordingly submitted that when the fixed deposits seized during the course of search formed part of the regular books of account and, therefore, could not be construed as incriminating material and since no other incriminating material was found during the course of search, therefore, no addition can be made in the hands of the assessee in the absence of any adverse material especially when the original assessment was completed u/s 143(3)/147 accepting the share capital and share premium. Therefore, both legally and factually no addition can be made in the hands of the assessee.

10. The ld. DR, on the other hand, heavily relied on the order of the Assessing Officer and CIT(A). He submitted that the assessee during the year under consideration has issued equity shares of Rs.87,12,500/- on premium of

Rs.16,55,37,500. Despite being given adequate opportunity, the assessee failed to furnish justification for such huge premium. Further, the assessee has failed to furnish documentary evidence in support of identity and credit worthiness of the share applicants and the genuineness of the transaction. Therefore, the ld. CIT(A) was fully justified in sustaining the addition made by the Assessing Officer. So far as the arguments of the ld. counsel for the assessee that in absence of any incriminating material found during the course of search, no addition can be made u/s 153A/143(3) in case of a completed assessment is concerned, the ld. DR referring to the decision of the Hon'ble Allahabad High Court in the case of *CIT vs. Raj KumarArora reported in 367 ITR 517,* submitted that the Hon'ble Allahabad High Court in the said decision has held that the Assessing Officer has power to reassessee returns of assessee not only for undisclosed income found during the course of search operation, but also with regard to material available at the time of original assessment. Similar view has been taken by the Hon'ble Allahabad High Court in the case of *CIT vs. Kesarwani Zarda Bhandar Sahson Allahabad In ITA No.270 of 2014*.

11. So far as the decision of the Hon'ble Delhi High Court in the case of *CIT vs. Kabul Chawla (supra)* relied by the ld. counsel is concerned, he submitted that the Hon'ble Kerala High Court has held that assessment proceedings generated by issuance of a notice u/s 153A(1)(a) can be concluded against interest of the assessee including making additions even without any incriminating material being available against the assessee in search u/s 132 on the basis of which notice was issued u/s

153A. The ld. DR submitted that the Hon'ble Kerala High Court, while deciding the issue against the assessee has considered the following decisions:-

i) CIT vs. Kabul chawla (2016) 380 ITR 573;

ii) CIT vs. Continental Warehousing Corpn. (Nhava Sheva) Ltd. (2015) 374 ITR 645

iii) Principal CIT vs. Kurele Paper Mills (P) Ltd. (2016) 380 ITR 571 (Del)

iv) CIT vs. Lancy Constructions (2016) 383 ITR 168;

v) CIT vs. ST. Francies Clay Décor Tiles (2016) 240 Taxman 168; &

vi) CIT v. Promy Kuriakose (2016) 386 ITR 597 (Ker.)

11.1 He also relied on the following decisions:-

i) CIT vs MAF Academy (P) Ltd., 361 ITR 258;

ii) CIT vs. Navodaya Castle Pvt. Ltd. (2014) 367 ITR 306 (Del);

iii) Konark Structural Engineering (P) Ltd. vs. DCIT (2018) 90 taxmann.com 56 (Bom);

iv) DRB Exports (P) Ltd vs. CIT (2018) 93 taxmann.com 490 (Cal);

v) Prem Castings (P) Ltd. vs. CIT (2017) 88 taxmann.com 189 (All);

vi) CIT vs. Nipun Builders & Developers (P) Ltd. 30 taxmann.com 292;

vii) CIT vs. Nova Promoters & Finlease (P) Ltd. 18 taxmann.com 217;

viii) CIT vs. Ultra Modern Exports (P) Ltd. 40 taxmann.com 458;

ix) CIT vs. Frostair (P) Ltd. 26 taxmann.com 11;

x) CIT vs. N.R. Portfolio Pvt. Ltd. (2014) 42 taxmann.com 339;

xi) CIT vs. Empire Builtech (P) Ltd. 366 ITR 110; &

xii) CIT vs. Focus Exports (P) ltd. 51 taxmann.com 46.

12. The ld. counsel for the assessee in his rejoinder submitted that the decision of the Hon'ble Allahabad High Court in the case of Raj Kumar Arora (supra) is of no help to the Revenue for the reason that the High Court has only held that the assessment can be framed u/s 153A even if no incriminating material was found based on the material existing at the time of original assessment. The assessment can be of the undisclosed income found during the search and of income based on the material available at the time of original assessment. He submitted that it would be a complete misreading of the judgment of the Allahabad High Court to suggest that if an issue has been examined at the time of original assessment, it can be revisited or reviewed merely because search was taken place particularly when no material of any kind is found to indicate that the income determined at the time of original assessment needs to be interfered with. This is neither the import of the decision of the Hon'ble High Court nor by any stretch of imagination can such an interpretation be drawn from the ratio of the said decision. He submitted that the argument of the ld. DR that whether there be any material o not, the search by itself gives the power to the Assessing Officer to review his own order is misleading. He submitted that in the case of Raj Kumar Arora (supra), there was no scrutiny assessment and the material available at the time of original assessment was not examined nor any view for or against the assessee was taken by the Assessing Officer while making the original assessment. Further, the Revenue cannot rely on the same set of material for arriving at two contrary findings at two different points of time while the level of authority taking the decisions is same. Referring to the decision of the Ahmedabad Bench of the Tribunal

in the case of *INTAS Pharmaceuticals Ltd. vs. DCIT in IT (SS)A No.807/Ahd/ 2010*, he submitted that the Tribunal has considered the decision of the Hon'ble Allahabad High Court in the case of Raj Kumar Arora (supra) and held that the said decision deals with the scope of section 153A and not that of assumption of jurisdiction which stands on a different footing. He reiterated that the Hon'ble Delhi High Court in the case of Meeta Gutgutia (supra) has held that reopening of completed assessment was not justified in the absence of incriminating material and the SLP filed by the Revenue has been dismissed by the Hon'ble Supreme Court on the question of law raised by the Revenue. He submitted that although the dismissal of SLP may not amount to laying down of a law, but, the fact remains that the Hon'ble Supreme Court did not find any infirmity in the view taken by the Delhi High Court that in the absence of incriminating material the concluded asses ment cannot be reopened u/s 153A.

13. We have considered the rival arguments made by both the sides and perused the material available on record We find the original assessment in the instant case was completed u/s 147/143(3) of the IT Act on 31st December, 2009 determining the total income at Rs.73,510/-. A search u/s 132 of the IT Act was conducted in the case of bank account of the assessee on 12.11.2010. We find during the said search, an amount of Rs.5,48,50,000/- was found in the bank account of the assessee which was seized. Since the assessee did not file the requisite details as called for by the Assessing Officer to substantiate the identity and credit worthiness of the share applicants and genuineness of the transactions, the Assessing Officer made addition of

Rs.17,42,50,000/- being the share capital of Rs.87,12,500/- and share premium of Rs.16,55,37,500/- received by the assessee during the impugned assessment year. Although it was submitted before the CIT(A) that no incriminating material was found during the course of search and the Assessing Officer in the assessment completed u/s 147/143(3) has accepted such share capital and share premium and no contrary material was found during the course of search or after post search inquiry, the ld.CIT(A) sustained the addition made by the Assessing Officer, the reasons for which have already been reproduced in the preceding paragraphs I is the submission of the ld. counsel for the assessee that in absence of any incriminating material found during the course of search, no addition u/s 153A/143(3) can be made in the case of a completed assessment. Although he relied on various decisions of the Hon'ble Delhi High Court and that of the coordinate Benches of the Tribunal, however, we find the issue stands decided against the assessee by the decision of the jurisdictional High Court in the case of CIT vs. Raj Kumar Arora (supra) wherein it has been held that the Assessing Officer has power to reassess returns of the assessee not only for undisclosed income found during the search operation, but also with regard to material available at the time of original assessment. Similar view has been taken by the Hon'ble Allahabad High Court in the case of CIT vs. Kesarwani Zarda Bhandar Sahson, Allahabad (supra) wherein it has been held that the Assessing Officer has power to reassess returns of the assessee not only for undisclosed income found during search operation, but also with regard to material available at the time of original assessment. In view of the binding decisions of the jurisdictional High Court, we are

unable to accept the contention of the ld. counsel for the assessee that in the absence of any incriminating material found during the course of search, the initiation of proceeding u/s 153A are not valid. Therefore, the legal ground raised by the assessee stands dismissed.

14. Now, coming to the merit of the case, it is an admitted fact that in the order passed u/s 147/143(3) on 31st December, 2009, the Assessing Officer had examined the issue of share premium and share application money. On the basis of various details filed by the assessee as required by the Assessing Officer, no addition was made and the issue of share premium was accepted without making any addition. We find, the Assessing Officer at para 3 of the assessment order passed u/s 147/143(3) has mentioned as under:-

> "During the relevant previous year the assessee earned income from interest on loans and advances granted by it as an NBFC and profit on sale of mutual funds. Apart from that during the previous year the assessee's authorized share capital increased by Rs.88 lakhs and issued share capital liability increased by Rs.17.42 Crores (including premium)."

15. During the course of search, no incriminating documents were found so as to prove that the documents filed during the course of original assessment proceedings are false or untrue. A perusal of the 'Panchnama' appearing on pages 3-5 of the paper book shows that no search was conducted at the business premises of the assessee and the warrant was issued only in the name of Bank account of the assessee maintained with Oriental Bank of Commerce from where the fixed deposits were seized. These fixed deposits forming part of the regular books of account, in our opinion, cannot be

held as incriminating material. The original assessment records were very much available with the Assessing Officer. Although the assessee did not appear before the Assessing Officer, however, it was the duty of the Assessing Officer to go through the past records of the assessee before making any addition in the *ex parte* order that too passed u/s 153A/143(3). Although the assessee submitted before the CIT(A) that the issue of share premium was examined by the Assessing Officer during the assessment proceedings u/s 147/143(3) however, we find the ld.CIT(A) for reasons best known to him, closed his eyes and sustained the addition made by the Assessing Officer on the ground that the assessee did not appear before the Assessing Officer. Under these circumstances, we find merit in the argument of the ld. counsel for the assessee that the Revenue cannot rely on the same set of material for arriving at two contrary findings at two different points of time while the level of authority taking the decision remains the same. In our opinion, when the assessee during the course of reassessment proceedings had filed the requisite details such as the copies of share applications, bank statements including details of allotment, premium charge, etc., and nothing adverse was found during the course of search proceedings and considering the fact that nothing adverse during post search inquiries was found to negate the documents already filed at the time of the reassessment proceedings, the present Assessing Officer, on the same set of material cannot take a different view than the view already taken by his predecessor at the time of original assessment merely because a search has taken place. In view of the above discussion, we are of the considered opinion that the addition made by the Assessing Officer and sustained by

the CIT(A) is not justified. Accordingly, the Assessing Officer is directed to delete the addition made by him u/s 68 of the IT Act. The grounds of appeal raised by the assessee on merit are accordingly, allowed.

16. In the result, the appeal filed by the assessee is partly allowed.

The decision was pronounced in the open court on 30.11.2018.

Sd/-	Sd/-
(SUCHITRA KAMBLE) JUDICIAL MEMBER	(R.K. PANDA) ACCOUNTANT MEMFBER

Dated: 30th November, 2018

dk

Copy forwarded to

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asstt. Registrar, ITAT, New Delhi