IN THE INCOME TAX APPELLATE TRIBUNAL

(DELHI BENCH 'G' : NEW DELHI)

BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER
AND
SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER

ITA No. 3259/Del/2014
Assessment Year: 2006-07

SATYA NARAIN PRAKASH PUNJ, 10, PRITHVI RAJ ROAD, NEW DELHI – 110 001 (PAN: ACMPP1444R)	VS.	CIT, DELHI-XI, NEW DELHI 11TH FLOOR, E-2 BLOCK PRATYAKSH KAR BHAWAN CIVIC CENTRE, NEW DELHI
(APPELLANT)		**(RESPONDENT)**

Assessee by : Sh. Ved Jain, Adv. &
Sh. Ashish Goyal, Adv.
Revenue by : Sh. S.S. Rana, CIT(DR)

ORDER

PER H.S. SIDHU, JM

This is an appeal filed by the assessee against the impugned order of the Ld. Commissioner of Income Tax, Delhi-XI, New Delhi dated 27.03.2014 passed u/s. 263 of the Income tax Act, 1961 (hereinafter referred as the Act). The assessee has raised the following revised grounds:-

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1. *On the facts and circumstances of the case, the order passed by the learned Commissioner of Income Tax (CIT) under Section 263 of the Act is bad, both in the eye of law and on facts.*

2. *On the facts and circumstances of the case, the order passed by the learned CIT under Section 263 is bad in law as the same is barred by limitation as provided under section 263(2) of the Act*

3. *On the facts and circumstances of the case, the order passed by the learned CIT cancelling the assessment order passed by the A.O. is untenable in the absence of order of the A.O. being erroneous as well as prejudicial to the interest of the Revenue.*

4.(i) *On the facts and circumstances of the case, the initiation of proceedings u/s 263 is bad in law, in view of the assessment order, made u/s 153A which the CIT intended to revise u/s 263, itself being bad is law and a nullity.*

(ii) *That the order u/s 153A is null and void, as in the absence of any search having been carried out on the assessee, no proceedings u/s 153A can be initiated.*

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(iii) Without prejudice to the above and in the alternative, in the absence of any incriminating material found during the course of search original assessment having not been abated, no addition u/s 153A can be made.

(iv) Without prejudice to the above and in the alternative, on the facts and circumstances of the case in the absence of any satisfaction being recorded by the AO of the searched person and the AO of the assessee, proceedings initiated against the assessee and the consequent order passed by the AO was without jurisdiction and bad in law and hence can't be subject matter of revision under section 263 of the Act.

5. On the facts and circumstances of the case, the learned CIT has erred both on facts and in law in ignoring the fact that both the issues raised by him in notice under Section 263 were before the A.O. and as such the jurisdiction on this issue under Section 263 cannot be assumed by him.

6. On the facts and circumstances of the case, the learned CIT has erred both on facts and in law in ignoring the contention of the appellant that the

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proceeding under Section 263 cannot be used for substituting opinion of the A.O. by that of the CIT.

7. *On the facts and circumstances of the case, the learned CIT has erred both on facts and in law in setting aside the matter to the file of the A.O. to assess afresh without giving a finding as to the error and prejudice caused to the revenue by the assessment order.*

8. *(i) On the facts of the circumstance of the case, the contention of the CIT that the income received from M/s Punj Lloyd Ltd , Nehru Place is to be taxed under the head House Property' as against 'business income shown' by the assessee is bad both in the eyes of law and on facts.*

(ii) That the above stand of the assessee having been accepted in other years also, the view of the CIT is against the settled principle of consistency.

9. *That the appellant craves leave to add, amend or alter any of the grounds of appeal.*

2. The brief facts of the case are that assessee filed the return of income on 31.10.2006 declaring an income of Rs. 8,22,85,380/-. The assessment of the same was completed after scrutiny under Section 143(3) of the Act vide order dated 14.11.2008 at an income of Rs. 8,28,57,070/-. Thereafter a search took place on

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the Punj Lloyd Group. Consequent to that, 153A notice was issued to the assessee to file the return in response thereto. The assessee filed the return u/s 153A on 15.10.2010. The AO completed the assessment u/s 153A vide order dated 28.12.2011. No additions were made in this reassessment in the absence of any incriminating material being found during the course of the search. The Ld. CIT however, issued a notice dated 19.03.2014, proposing to revise the reassessment order passed by the AO under Section 153A on the ground that said order is erroneous and prejudicial to the interest of the Revenue. It was alleged in the said notice that long term capital gain of Rs. 7,15,31,199/- should have been taxed at the rate of 20% as against the rate of tax of 10%. It was further alleged that a sum of Rs. 3,45,03,001/- received by the assessee during the year should have been assessed as income from house property. The assessee submitted a detailed reply where it was pointed out that assessee has not been subjected to any search and as such the proceeding under Section 153A per se are bad in law. Further, in the absence of any incriminating material being found during the search, the assessment originally completed cannot be tinkered with as the same has not abated. It was contended that the assessment for the year was not pending on the date of the search. The Ld. CIT however rejected the contention of the assessee on the ground that assessee has not challenged the validity of the order passed by the AO under Section 153A read with Section 143(3) of the Act and as such the

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order passed by the AO can be subject matter of revision. Based on this reasoning the Ld. CIT cancelled the order passed by the AO with a direction to frame the same afresh. It was contended by the Ld. AR that the order of the Ld. CIT is not sustainable in the eyes of law as he does not have the power in the revision proceeding to do what AO could not have done in the reassessment proceeding under Section 153A. It was contended that no incriminating material was found during the course of the search. It is not the case of the AO as well as that of the Ld. CIT as is evident from the assessment order passed under Section 153A and revision order passed by Ld. CIT u/s. 263 that any incriminating material relating to the assessee was found in the search. In the absence of any incriminating material being found, the original assessment has to be reiterated and cannot be tinkered with as has been held by the Jurisdictional High Courts in the various judgments As regards the contention of the Ld. CIT that order passed under Section 153A has not been challenged, it was submitted that since the assessee was not aggrieved by that order, it has not challenged the said order. But that does not give power or authority to the Ld. CIT to revise the order u/s. 263. It was further contended that what cannot be done directly cannot be done indirectly. In the reassessment proceeding u/s. 153A, in respect of assessment which has not abated, the AO cannot tinker with the assessment without there being any incriminating material. When the AO cannot tinker with the original assessment in the absence of any

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incriminating material, the Ld. CIT cannot do in the revision proceeding u/s. 263 of the Act. The Ld. Counsel of the assessee placed reliance on the decision of the Coordinate Delhi Bench of the ITAT in the case of Mahesh Kumar Gupta vs. CIT, ITA no. 1347/Del/2014 dated 8.6.2016 which has been confirmed by the Hon'ble Jurisdictional Delhi High Court in ITA No. 810/2016 vide order dated 22.11.2016. The Ld. Counsel for the assessee further placed reliance on the following judgments:

- M/s Classic Flour and Food Processing Pvt Ltd vs CIT ITA No. 764 to 766/Kol/2014 dated 5th April 2017
- M/s Tanuj Holdings Pvt. Ltd. vs DCIT[2016] 46 ITR (Trib) 420 dated 20th January, 2016
- Paul John Delicious Cashew Company vs ITO (2005) 94 ITD 131 (Coch.)

3. On the contrary, the Ld. CIT(DR) submitted that Ld. CIT has all the powers u/s 263 of the Act to revise the order passed by the AO. The Ld. DR placed reliance on the following judgments in support of his contention:

- Malabar Industrial Co. Ltd. Vs CIT (243 ITR 83)
- Rajmandir Estates (P.) Ltd. Vs PCIT 386 ITR 162 (Cal.)
- Rajmandir Estates (P.) Ltd. Vs PCIT [2017] 77 taxmann.com 285(SC)
- Deniel Merchants Pvt. Ltd. Vs. ITO (Appeal No. 2396/2017) dated 29.11.2017

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4. We have heard both the parties and perused the records, especially the orders passed by the authorities below as well as the case laws relied upon by both the parties. We find that the issue here is whether Ld. CIT was within her rights to cancel the reassessment order passed under Section 153A of the Act on the ground that the said order is erroneous and prejudicial to the interest of the Revenue. We note that the reasoning given by the Ld. CIT for such revision is taxability of capital gain at the rate of 20% as against the rate of 10% and taxability of income from house property. From the facts, it is evident that the assessee has filed the return on 31.10.2006. The said return was taken up for scrutiny. During the course of the scrutiny the assessee has filed all the details regarding computation of long term capital gain as well as the details of the memberships and subscriptions and service charges. It has also filed service agreement between Punj Business Center and M/s. Punj Lloyd Ltd. The AO after examination of the above details has completed the assessment u/s. 143(3) of the Act vide order dated 14.11.2008. Thereafter, there was a search on M/s Punj Lloyd Group on 17.3.2010. It is an admitted position that no incriminating material was found during the course of the search relating to the assessee. This fact also gets corroborated from the assessment order passed by the AO under Section 153A of the Act and the revision order passed by the Ld. CIT u/s. 263 of the Act as there is no reference to any seized material. The Ld. CIT now u/s. 263 of the Act

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want to revise the order passed by the AO under Section 153A of the Act. The issue is whether Ld. CIT can do this in the absence of any incriminating material. As rightly contended by the Ld. AR of the Assessee, the Ld. CIT cannot do indirectly what AO could not have done directly. The two issues raised by the Ld. CIT in the show cause notice, could not have been dealt with by the AO in the proceedings u/s. 153A of the Act. If the AO could not have done this exercise, we are of the view that Ld. CIT cannot do in her revision power under 263. The power to revise u/s. 263 is where the order passed is erroneous and prejudicial to the interest of the Revenue. In the present case, the reassessment order passed under Section 153A, the same is neither erroneous nor prejudicial to the interest of the Revenue. The AO has done what was permissible for him to do. It is not the case of the Ld. CIT that she intends to revise the original assessment order dated 14.11.2008. In any case, the order dated 14.11.2008, 2008 otherwise cannot be revised because of the limitations of two years under Section 263 of the Act. Accordingly, the order passed by the Ld. CIT cancelling assessment and directing the AO to frame the assessment afresh is bad in law. Our aforesaid view is fortified by the decision of the Coordinate Bench of the ITAT in the case of Mahesh Kumar Gupta vs. CIT ITA No. 1347/Del/2014 dated 8.6.2016. In this case, the CIT had invoked revisionary powers u/s 263 holding an assessment u/s 153A to be erroneous and prejudicial to the interest of Revenue. However, during the course of

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search in pursuance of which the assessment u/s 153A was made, no incriminating material was found. In such circumstances as the AO in proceedings u/s 153A did not have jurisdiction to make addition in the absence of any incriminating material, the Tribunal held even the order u/s 263 revising such illegal order to be bad in law. The relevant findings of the ITAT read as under:

> "*Thus, in present case the issue of deemed dividend does not arise from the provisions of Section 153A of the Act and there is no seized material unearthed at the relevant time. Thus it is beyond Assessing Officer's power to address the said issue in proceedings initiated under Section 143(3) read with Section 152A of the Act. The CIT was wrong in directing the examination of taxability of deemed dividend under Section 2(22)(e) of the Act, in the proceedings u/s 153A of the Act while passing order under Section 263 of the Act when the proceedings under Section 153A itself has not unearthed the said issue. Thus, the CIT do not have power under Section 263 of the Act to give its own opinion when there is no new material unearthed. The issue taken up by*

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the CIT was not within the purview of the Assessing Officer at the inception of assessment proceedings."

4.1 We further find that the aforesaid order passed in ITA 1347/Del/2014 dated 8.6.2016 in the case of Mahesh Kumar Gupta vs. CIT of the Tribunal has been confirmed by Hon'ble Delhi High Court in ITA No. 810/2016 vide order dated 22.11.2016 title as Pr. CIT, Central-1, Delhi vs. Sh. Mahesh Kumar Gupta. The relevant findings of the Hon'ble High Court are reproduced as under:-

"1. The Revenue is aggrieved by the order of the Income Tax Appellate Tribunal (ITAT) and urges that the impugned order, inasmuch as it upset and set aside the addition made by the Commissioner of Income Tax (CIT) in exercise of the powers under Section 263 of the Income Tax Act, 1963 (in short the Act) bringing to tax certain amounts as "deemed dividend" under Section 2(22)(e) of the Act, was erroneous.

2. The brief facts of the case are that further to search and seizure proceedings the assessee filed its returns under Section 153A of the Act. The assessment was completed by the Assessing Officer (AO). The jurisdictional CIT was of the opinion that the assessment order was both prejudicial and erroneous to the interest

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of the Revenue and directed its revision inasmuch as an addition under Section 2(22)(e) of the Act was mandated. The assessee successfully appealed to the ITAT.

3. The ITAT concluded based upon the materials available that the search and seizure operations did not yield any fresh material warranting addition under Section 153A of the Act, and therefore, could not clothe the CIT with the authority to add an amount on the basis of a fresh appraisal of the existing materials that formed part of the original assessment. It is urged by the Revenue that CIT acted within his jurisdiction in concluding that the AO erroneously did not bring to tax the amount that had to be included under Section 2(22)(e) facially itself, therefore, the CIT's order was justified, consequently, the ITAT should not have interfered with that determination.

4. There is no dispute that the search and seizure proceedings in this case did not result in anything, therefore, material either in the form of books of account or other documents related to the issue of deemed dividend under Section 2(22) of the Act. The amounts paid were in fact originally declared in the assessment returns of the assessee. The CIT, therefore, had opportunity to exercise his powers as it were on the basis

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of returns as filed originally and validly under Section 263 of the Act.

5. In the circumstances in the absence of any material disclosing that the issue of deemed dividend had been wilfully derived or had been deemed or otherwise withheld from the assessment an addition under Section 153A was warranted – based on the proposition taught by this Court in judgment dated 28.08.2015 in ITA 707/2014 titled: CIT vs Kabul Chawla Therefore, we concur with the ITAT's opinion in this regard. The search and seizure proceedings in such cases are undoubtedly meant to bring to tax amount that are to be determined on the basis of materials seized in the course of such searches; permitting anything over and above that would virtually amount to letting the Revenue have a third or fourth opinion as it were. Searches – to quote the view of Attorney-General (NSW) vsQuin (1990) HCA 21 in another context are "not the key which unlocks the treasury" of the Revenue's jurisdiction in regard to matters that had attracted attention in the regular course of assessment.

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6. For the above reasons, we are of the opinion that no questions of law arise. The appeal is, therefore, dismissed."

4.2 We further find that similar view has been taken by the Cochin Bench of the ITAT in the case of Paul John Delicious Cashew Company vs. ITO (2005) 94 ITD 131 (Coch.) wherein, the Tribunal has held as under:

"16. In the present case also the re-assessment proceedings have been initiated only for the purpose of verification and examination which is not the scope of reassessment proceedings. It would be the case of rather reasons to suspect rather than reasons to belief that there was escapement of income. It is a case of the AO seeking to make fishing and roving inquiry without any basis. We have no hesitation in concluding that in tiation of reassessment proceedings in the present case was not valid as the mandatory requirement of such 147 has not been satisfied. We therefore hold that reassessments orders for A.Y.2007-08 and 2008-09 dated 30.12.2011 were invalid. Consequently order passed u/s 263 of the Act dated 21.03.2014 for A.Y.2007- 08 and 2008-09 are also held to be invalid and quashed. Thus the appeals being ITA No.765 and 766/Kol/2014 are allowed."

4.3 We note that the case laws cited by the Ld. CIT(DR), are on distinguished facts. In all the four case laws the issue before the

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court was appreciation of facts on merit. In the present case, the issue is whether Ld. CIT can do what AO could not have done in the absence of incriminating material. As discussed above, the issue in dispute is squarely covered in favour of the assessee by the aforesaid order of the Jurisdictional Delhi High Court dated 22.11.2016 passed in the case of Pr. CIT vs. Sh. Mahesh Kumar Gupta (Supra) and therefore, respectfully following the same ratio, we quash the order passed by the Ld. CIT under Section 263 of the Act and allow the appeal of the assessee. Since we have quashed the order u/s. 263 of the Act and allow the appeal of the asses ee, hence, there is no need to adjudicate upon the other grounds raised in the appeal of the assessee.

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

Order pronounced on 04-06-2018.

Sd/- **Sd/-**

[N.K. BILLAIYA] **(H.S. SIDHU)**
ACCOUNTANT MEMBER **JUDICIAL MEMBER**

Dated : 04-06-2018

SR BHATANGAR

Copy forwarded to:

1.Appellant
2.Respondent
3.CIT
4.CIT(A), New Delhi.
5.CIT(ITAT), New Delhi.

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