

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

**BEFORE SHRI G. D. AGRAWAL, VICE PRESIDENT
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER**

I.T.A. No. 3943/DEL/2015 (A.Y 2008-09)

I.T.A. No. 3944/DEL/2015 (A.Y 2009-10)

ACIT Circle-49(1), Room No. 1405, 14 th Floor, E-2, Block, Dr. S. P. Mukherjee Civic Centre New Delhi (APPELLANT)	Vs	Charanjt Singh Sarna B-1/594, Janakpuri, New Delhi ABFPS9427D (RESPONDENT)
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Applicant by	Sh. S. S. Rana, CIT (DR)
Respondent by	Sh. Ved Jain, CA

Date of Hearing	11.03.2019
Date of Pronouncement	03.06.2019

ORDER

PER SUCHITRA KAMBLE, JM

These two appeals are filed by the Revenue against the order dated 27/03/2015 passed by CIT(A)-XVII, New Delhi for Assessment Year 2008-09 & 2009-10 respectively.

2. The grounds of appeal are as under:-

I.T.A. No. 3943/DEL/2015

“(i) Whether the CIT(A) has erred in deleting the addition of Rs.1,03,73,611/- made by the A.O u/s 41(1)/68 of the I.T Act despites the facts that the assessee could not produce any documentary evidence in support of his claim that the liabilities of M/s Dashmesh Impex and M/s Abchal Impex were actually paid by M/s Silver Rock Trading LLC Company.

(ii) Whether the CIT(A) has erred in restoring back the issue of the addition of Rs. 7,72,665/- u/s 68 of the I.T Act to the file of the A.O which is not permissible under the provisions of the I.T. Act.”

I.T.A. No. 3944/DEL/2015

“Whether the CIT(A) has erred in deleting the addition of Rs.1,12,27,860/- made by the A.O u/s 41(1)/68 of the I.T Act despite the facts that the assessee could not produce any documentary evidence in support of his claim that the liabilities of M/s Dashmesh Impex and M/s Abchal Impex were actually paid by M/s Silver Rock Trading LLC Company ”

3. These are appeals filed by the Revenue against the order dated 27.03.2015 passed by the CIT(A) for the A.Y. 2008-09 and A.Y. 2009-10, whereby the CIT(A) has allowed the appeals of the assessee deleting the following additions made by the Assessing Officer:

- (i) A.Y. 2008-09 : Rs. 1,03,73,611/- & Rs. 7,72,665/-
- (ii) A.Y. 2009-10 : Rs. 1,12,27,860/-

4. The assessee is an individual, being a partner in the firm M/s Dashmesh Impex and having a proprietary concern, namely Abchal Impex. The assessee filed his return of income for the A.Y. 2008-09 on 29.09.2008 declaring an income of Rs. 3,30,350/- and for the A.Y. 2009-10 on 22.02.2010 declaring an income of Rs. 3,72,430/-. In the present assessee's case asset/cash found by DRI on 01.10.2010 being requisition under section 132A. Subsequent to the search, notice u/s 153A of the Act was issued to the assessee on 19.12.2012, in response to which the assessee filed a return similar to the return filed earlier. As per the contentions of the assessee, there was no incriminating material found for the year under consideration as is evident from the fact that it is not a case of search but requisition deemed search u/s 132A during the course of search and the Assessing Officer made additions of Rs. 1,03,73,611/- in A.Y. 2008-09 and Rs. 1,12,27,860/- in A.Y. 2009-10 by making observations

on the basis of the documents filed by the assessee during the course of assessment proceedings.

5. Being aggrieved by the Assessment Order the assessee filed appeal before the CIT(A). The CIT(A) allowed the appeal of the assessee on the merits of the case, however, the legal ground and arguments raised by the assessee, that in absence of any incriminating material found during search, no addition can be made have been dismissed by the CIT(A).

6. The Ld. AR filed application under Rule 27 thereby stating additional grounds which are as under:-

"1. That on the facts and circumstances of the case, the Ld. CIT(A) has erred both on facts and in law in rejecting the contention of the assessee that the proceedings initiated under Section 153A and order passed by the learned Assessing Officer (AO) under Section 153A/143(3) is bad in law and hence needs to be cancelled.

2. That on the facts and circumstances of the case, the Ld. CIT(A) has erred both on facts and in law in rejecting the contention of the assessee that the additions made under Section 153A are bad in law in the absence of any incriminating material belonging to the assessee being found during the course of the search."

The Ld. AR submitted that in terms of the provisions of Rule 27 of the ITAT Rules, 1963, the assessee is entitled to defend the order of the CIT(A) on the issued decided against the assessee and assessee is assailing the legal issues which were decided against him. In this regard, the Ld. AR submitted that the assessments of the year under consideration being A.Y. 2008-09 and 2009-10 have already completed. The Ld. AR further submitted that it is a settled law that a completed assessment could not be interfered with by the Assessing Officer while making an assessment u/s 153A of the Act if no incriminating material has been found during the course of search and in the present case,

addition is not based on any incriminating material found during the course of search as is evident from Pg. 2 Para 3 of the assessment order that the addition is made on the basis of observations made during the course of assessment proceedings and not on the basis of any incriminating material. This issue is now squarely covered by the judgment of coordinate Bench of ITAT in the case of Mahagun India Pvt. Ltd. v. ACIT ITA No. 2817/Del/2012 dated 09.10.2018. The Ld. AR relied upon the decision of the Hon'ble Jurisdictional High Court in the case of CIT v. Kabul Chawla [2016] 380 ITR 573, wherein the relevant findings are in Para 37 quoted 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 A Y 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 A Ys “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. ”

The Ld. AR also relied upon the following judgments:

- Pr. CIT v. Best Infrastructure (India) Pvt. Ltd. [2017] 397 ITR 82.
- Pr. CIT v. Meeta Gutgutia [2017] 395 ITR 526
- Pr. CIT v. RSA Digi Prints in ITA Nos. 469, 471, 504 and 505 of 2017 dated 06.09.2017 Gujarat High Court.
- Pr. CIT v. Salasar Stock Broking Ltd. in ITA No. 254 of 2016 dated 24.08.2016 Calcutta High Court
- CIT v. IBC Knowledge Park Pvt. Ltd. [2016] 385 ITR 346
- CIT v. Continental Warehousing Corporation Ltd. [2015] 374 ITR 645

7. The Ld. AR further submitted that before the CIT(A) the assessee has duly raised legal grounds and grounds on merits of the case. Though, the CIT(A) has allowed the appeal of the assessee on the merits of the case, however, the legal ground and arguments raised by the assessee have been dismissed by the CIT(A). Therefore, considering the provisions of Rule 27 of the ITAT Rules, 1963, the assessee is entitled to defend the order of the CIT(A) on the issued decided against the assessee. The Ld. AR relied upon the decision of the Jurisdictional High Court in the case of CIT v. Edward Keventer (Successors) 123 ITR 200 (Delhi), where the Hon'ble Court has decided the issue of the rights of the respondent in the appeal. The Ld. AR also relied upon the decision of this Tribunal in the case of ITO v. IME International P. Ltd. in ITA No. 1873/Del/2012 dated 08.01.2016. The Ld. AR also relied upon the

following judgments:

- CIT v. Jamnadas Virji Shares and Stock Brokers Pvt. Ltd. in ITA No. 97 of 2012 dated 26.03.2012 Bombay High Court
- DCIT v. Brijwasi Impex P. Ltd. in ITA No. 361/Del/2011 dated 30.10.2014 ITAT Delhi
- ITO v. Smt. Gurinder Kaur [2006] 102 ITD 189
- ACIT v. Barnala Steel Industries Ltd. in ITA No. 5544/Del/2010 dated 05.12.2013 ITAT Delhi

8. The Ld. AR also submitted that even on merits, regarding addition of Rs. 1,03,73,611/- in A.Y. 2008-09 and Rs. 1,12,27,860/- in A.Y. 2009-10, the CIT(A) has given a detailed and reasoned findings. Therefore, the Ld. AR submitted that the CIT(A) is correct in deleting these additions on merit made by the Assessing Officer.

9. On the next issue, regarding addition of Rs. 7,72,665/- u/s 68 of the Act, the Ld. AR submitted that the CIT(A) has restored the matter back to the Assessing Officer. However, no order has been passed by the Assessing Officer on this issue till now as per the submissions of the Ld. AR. Therefore, considering the above facts and judicial precedents, the Ld. AR submitted that the orders passed by the Assessing Officer in the case of assessee for A.Y. 2008-09 and 2009-10 deserves to be quashed, as the additions made in these orders are not based on any incriminating material found during the course of search in the case of assessee and the CIT(A) is correct in deleting the said additions on merits.

10. The Ld. DR objected the Application under Rule 27. The Ld. DR submitted that cash of Rs. 1,12,50,000/- was seized by DRI from residence of the assessee on 01.10.2010. The assessee has shown increased in its personal

capital account of Rs. 1,03,73,611/-. The assessee is having 25% share in partnership firm M/s Abchal Impex. There is no way he could have taken liabilities of the firm in his personal account through a journal entry. No documentary evidence has been furnished with regard to payment of trading liabilities by M/s Silver Rock Trading LLC based in Dubai. In the above case, the Ld. DR relied upon the following decisions with regard to cessation of liability u/s 41(1) of I.T. Act:

1. Rollatainers Ltd. Vs CIT 2011 339 ITR 54 (Delhi)
2. Logitronics (P.) Ltd. Vs CIT [2011] in 333 ITR 386 (Delhi)

The Ld. DR relied upon the decision of E.N. Gopakumar Vs CIT (2016) 75 taxmann.com 215 (Kerala) with regard to validity of proceedings u/s 153A wherein following decisions were considered:

- CIT V. Kabul Chawla [2016] 380 ITR 573/[2015] 234 Taxman 300/61 taxmann.com 412 (Delhi) (para 4).
- CIT v. Continental Warehousing Corpn. (Nhava Sheva) Ltd. [2015] 374 ITR 645 (Bom.) (para 4)
- Principal CIT v. Kurele Paper Mills (P.) Ltd. [2016] 380 ITR 571 (Delhi) (para 4)
- CIT V. Lancy Constructions [2016] 383 ITR 168 (Kar.) (para 4)
- CIT V. ST. Francies Clay Decor Tiles [2016] 240 Taxman 168 (Ker.) (para 5)
- CIT v. Promy Kuriakose [2016] 386 ITR 597 (Ker.) (para 5).

The Ld. DR also relied upon the following decisions:

1. Dr. A. V. Sreekumar Vs CIT T20181 90 taxmann.com 355 (Kerala)
2. CIT Vs Raj Kumar Arora [2014] 367 ITR 517 (Allahabad)
3. CIT Vs Kesarwani Zarda Bhandar Sahson Alld. TITA No. 270 of 20141 (Allahabad)

11. We have heard both the parties and perused all the material available on record. As regards Rule 27 application filed by the assessee, Rule 27 clearly set out that the respondent 'may support the order appealed against on any of the grounds decided against him'. The order appealed against can be challenged by the assessee only qua the aspects of the issue decided against him in deciding such overall issue against the assessee, which was contested in the appeal. Thus, Application filed under Rule 27 is admitted. Now we come to the grounds agitated by the assessee in the said application. It is pertinent to note that asset/cash was found by DRI on 01.10.2010 being requisitioned under Section 132A of the Act. Subsequent to this, notice u/s 153A of the Act was issued to the assessee on 19.12.2012. But there is no incriminating material found for the year under consideration as is evident from the fact that it is not a case of search but requisition u/s 132A of the Act. Thus, the decision of the Hon'ble Delhi High Court in case of Kabul Chawla (supra) is squarely applicable in the present case. The Hon'ble High Court held that

"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. "

Thus, the Assessing Officer has passed the order without giving any nexus or relevance with the so called incriminating material. On the contrary there is no incriminating material available at all. The case laws submitted by the Ld. DR will also not hold ground in department's case as the very basis of the Assessment Order that of incriminating material and the nexus/ relevance is absent in the Assessment Order. Therefore, additional grounds of the assessee's application under Rule 27 are allowed.

12. As regards to Revenue's appeal is concerned, on merit the CIT(A) has taken all the cognizance of the evidence produced by the assessee before the

Assessing Officer. The CIT(A) has given detailed findings of the case, which are as follows:

“7.1 I have carefully considered the facts of the case and perused material available on the record. Here, the liabilities/sundry creditors of two business concerns; namely, M/s Dashmesh Impex (the partnership firm in which the appellant is one of the partners) and M/s Abchal Impex (the appellant’s proprietary concern) have taken over by the appellant as individual through the journal entries passed in the books of accounts of M/s Dashmesh Impex and M/s Abchal Impex by crediting his capital account and debiting the corresponding creditors/M/s Silver Rock Trading LLC Company accounts. The contra entries were passed by the appellant in his personal capital account (crediting the personal capital account and debiting corresponding capital accounts appearing in the books of M/s Dashmesh Impex and M/s Abchal Impex). It is worth mentioning here that the purchases made by M/s Dashmesh Impex and M/s Abchal Impex from various parties in past were not paid in time by these business concerns. However, these liabilities were paid by M/s Silver Rock Trading LLC Company, wherein the appellant is having 25% share. M/s Silver Rock Trading LLC is a Dubai based Company. The trading liabilities of M/s Dashmesh Impex and M/s Abchal Impex were actually paid in time indirectly through M/s Silver Rock Trading LLC. The payment made by M/s Silver Rock Trading LLC on behalf of M/s Dashmesh Impex and M/s Abchal Impex, was taken over by the appellant as his individual liability. Till yet, no payment to M/s Silver Rock Trading LLC has been made by the appellant. Thus, according to me, here the question is of not the payment of trading liabilities by the repayment of loan/advance to M/s Silver Rock Trading LLC. Since M/s Silver Rock Trading LLC is a Dubai based Company; therefore, I am of the considered view that provisions of section 2(22)(e) do not apply here as there is no income tax in Dubai,

7.2. Since the liabilities under reference are neither the appellant’s

trading liability as individual nor the business of these concerns were taken over by the appellant as per the explanation to section 41(1)(b); therefore, I do not see any justification in taxing the liability taken over by the appellant u/s 41 as the conditions laid down in section 41 are not fulfilled here at all. Further, I am of the considered opinion that by taking over the above referred liabilities, the appellant has not derived any benefit there from nor such liabilities were ceased to exist. By passing journal entries in the books of accounts M/s Dashmesh Impex and M/s Abchal Impex as mentioned above, the liabilities in the names of various creditors get replaced by the appellant's personal capital accounts appearing in the books of the business concerns. Such outstanding amount does not constitute income arising out of the remission/cessation of the trade liability in terms of section 41. Reliance is placed on the decision of the Hon'ble Delhi High Court in case of CIT v. Hotline Electronics Ltd. 205 Taxman 245 and Shree Vardhman Overseas Ltd (2012) 204 Taxman 524. Such amount can be brought to tax in terms of section 41(1) only in the year of cessation of the liability and not otherwise. Here, in the relevant year the liability was taken over by the appellant at the Insistent of M/s Silver Rock Trading LLC who made payment as mentioned above. For M/s Silver Rock Tradng LLC, the appellant is a shareholder and therefore, taking over of the liability by a shareholder having 25% share in M/s Silver Rock Trading LLC increased the prospects of recovery of by the company.

7.3. *Alternatively, the AO has also held the sum of Rs.1,03,73,611/- taxable u/s 68. The above discussion demonstrates the details of transactions which fulfill all the three limbs of section 68 and therefore, I am of the considered view that the same cannot be taxed u/s 68. ”*

There is no need to interfere with the finding on merit given by the CIT(A). Both the Assessment Years are identical, therefore, both the appeals of the Revenue are dismissed.

13. In result, both the appeals of the revenue are dismissed.

Order pronounced in the Open Court on 3rd June, 2019.

Sd/-
(G. D. AGRAWAL)
VICE PRESIDENT

Sd/-
(SUCHITRA KAMBLE)
JUDICIAL MEMBER

Dated: 03/06/2019
*R. Naheed **

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR

ITAT NEW DELHI

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Date of dictation	11.03.2019
Date on which the typed draft is placed before the dictating Member	12.03.2019
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	03.06.19
Date on which the fair order is placed before the Dictating Member for pronouncement	03.06.19
Date on which the fair order comes back to the Sr PS/PS	03.06.19
Date on which the final order is uploaded on the website of ITAT	03.06.19
Date on which the file goes to the Bench Clerk	03.06.19
Date on which the file goes to the Head Clerk	