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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ ITA 212/2022

PCIT (CENTRAL)-3, NEW DELHI Appellant

Through: Mr.Ajit Sharma, Sr.Standing Counsel
for the Revenue.

versus

SUNWAY REALTECH PVT. LTD. Respondent

Through: None

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Date of Decision: 21st July, 2022

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

J U D G M E N T

MANMOHAN, J (Oral):

C.M.No.31787/2022

Keeping in view the averments in the application, the delay in filing the present appeal is condoned.

Accordingly, the application stands disposed of.

ITA No.212/2022

1. Present Income Tax Appeal has been filed challenging the Order dated 14th October, 2019 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA No. 6818/Del./2013 for the Assessment Year 2008-09.
2. Learned counsel for the Appellant states that the ITAT has erred in confirming the order passed by CIT(A) deleting the additions of Rs.7,17,24,500/- made by assessing Officer on account of unexplained



investment. He states that the ITAT has erred in confirming the order passed by CIT(A) without adhering to the principle of preponderance of probability as no ordinary prudent person would sell his shares at a loss of 90% within five days of purchase without receiving balance consideration outside books of accounts.

3. He also states that the ITAT has erred in holding that balance/trial sheet found during search being a public document is not an incriminating material without appreciating/considering the fact that: (i) the balance sheet found and seized from the office of assessee was linked to the transaction involving sale of shares for Rs.63,69,500/- and Rs.65,06,000/-; (ii) trial balance of the assessee being private company is not a public document and it is kept there in connection with the transaction undertaken.

4. A predecessor Division Bench of this Court in ***Commissioner of Income Tax vs. Kabul Chawla, (2016) 380 ITR 573*** has held that if no incriminating material is found during the course of the search in respect of an issue, then no addition in respect of such an issue can be made in the assessment under Sections 153A and 153C of the Income Tax Act, 1961 (in short 'Act'). The legal position summarized in the subsequent decision of ***PCIT vs. Meeta Gutgutia, (2017) 82 taxmann.com 287 Del*** is reproduced hereinbelow:-

"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."



5. Though the judgment in *Kabul Chawla* (supra) has been challenged in connected matters and is pending before the Supreme Court, yet there is no stay of the said judgment till date. Accordingly, this Court finds no ground not to follow the said judgment.

6. Further, in the present case, the Assessing Officer in the satisfaction note has recorded that the documents found during the search pertained to assessee and therefore it is a fit case for initiation of proceedings under Section 153C of the Act. However, the Assessing Officer failed to record as to how the documents found during search reflected any undisclosed income of the assessee. The Assessing Officer, without even demonstrating/or drawing any nexus of the seized documents with the undisclosed income of the assessee, merely on the ground that the seized documents belong to the assessee initiated proceedings under Section 153C of the Act, which is against the settled position of law in several decisions of this Court. Some of the relevant cases referred to by the ITAT are as under:-

(i) **CIT vs. RRJ Securities Ltd. 2015 SCC OnLine Del 13085**

“36. The decision in SSP Aviation (supra) cannot be understood to mean that the AO has the jurisdiction to make a re-assessment in every case, where seized assets or documents are handed over to the AO. The question whether the documents/assets seized could possibly reflect any undisclosed income has to be considered by the AO after examining the seized assets/documents handed over to him. It is only in cases where the seized documents/assets could possibly reflect any undisclosed income of the Assessee for the relevant assessment years, that further enquiry would be warranted in respect of those years. Whilst, it is not necessary for the AO to be satisfied that the assets/documents seized during search of another person reflect undisclosed income of an Assessee before commencing an enquiry under Section 153C of the Act, it would be impermissible for him to



commence such enquiry if it is apparent that the documents/assets in question have no bearing on the income of the Assessee for the relevant assessment years.

37. As expressly indicated under Section 153C of the Act the assessment or reassessment of income of a person other than a searched person would proceed in accordance with the provisions of Section 153A of the Act. The concluded assessments cannot be interfered with under Section 153A of the Act unless the incriminating material belonging to the Assessee has been seized.

38. As indicated above, in the present case, the documents seized had no relevance or bearing on the income of the Assessee for the relevant assessment years and could not possibly reflect any undisclosed income. This being the undisputed position, no investigation was necessary. Thus, the provisions of section 153C, which are to enable an investigation in respect of the seized asset, could not be resorted to; the AO had no jurisdiction to make the reassessment under Section 153C of the Act.”

(ii) PCIT vs Dreamcity Buildwell Pvt. Ltd. 2019 SCC OnLine Del 9624

“7. In the present case the search took place on 5th January 2009. Notice to the Assessee was issued under Section 153 C on 19th November 2010. This was long prior to 1st June, 2015 and, therefore, Section 153C of the Act as it stood at the relevant time applied. In other words, the change brought about prospectively with effect from 1st June, 2015 by the amended Section 153C(1) of the Act did not apply to the search in the instant case. Therefore, the onus was on the Revenue to show that the incriminating material/documents recovered at the time of search ‘belongs’ to the Assessee. In other words, it is not enough for the Revenue to show that the documents either ‘pertain’ to the Assessee or contains information that ‘relates to’ the Assessee.

*18. In the present case, the Revenue is seeking to rely on three documents to justify the assumption of jurisdiction under Section 153 C of the Act against the Assessee. **Two of them, viz., the licence issued to the Assessee by the DTCP and the letter issued by the DTCP permitting it to transfer such licence, have no relevance for the purposes of determining escapement of income***



of the Assessee for the AYs in question. Consequently, even if those two documents can be said to 'belong' to the Assessee they are not documents on the basis of which jurisdiction can be assumed by the AO under Section 153C of the Act."

(iii) CIT vs. Radhey Shyam Bansal, 2011 SCC Online Del. 2495

*"21. The word 'satisfaction' has not been defined in the Act. The 'satisfaction' by its very nature must precede before the papers/documents are sent by the Assessing Officer of the person searched to the Assessing Officer of the third person. Mere use or mention of the word 'satisfaction' in the order/note will not meet the requirement of concept of satisfaction as used in Section 158BD. The satisfaction has to be in writing and can be gathered from the assessment order, if it is so mentioned/recorded, or from any other order, note or record maintained by the Assessing Officer of the person searched. The word 'satisfaction' refers to the state of mind of the Assessing Officer of the person searched, which gets reflected in a tangible shape/form when it is reduced into writing. It is the conclusion drawn or the finding recorded on the foundation of the material available. The word 'satisfied' occurs in many a statute and has its connotation. The term 'is satisfied' means simply makes up its mind [per Lord Pearson in Blyth v. Bivth (1966) 1 ALL E.R. 524 (541)]. Dixon J. has defined it as 'actual persuasion'. It fundamentally means a mind not troubled by doubt or to adopt the language of Smith J. 'a mind which has reached a clear conclusion' (see Angland v. Payne (1944) N.Z.L.R. 610 (626)). **The Assessing Officer is satisfied when he makes his mind or reaches a clear conclusion when he takes a prima facie view that the material available establishes 'undisclosed income' of a third party. Assessing Officer must reach a clear conclusion that good ground exists for the Assessing Officer of the third person to initiate proceedings as material before him shows or would establish 'undisclosed income' of a third person. At this stage, as the proceedings are at the very initial state, the 'satisfaction' neither is required to be firm or conclusive. The 'satisfaction' required is to decide whether or not block assessment proceedings are required to be initiated. But 'satisfaction' has to be founded on reasonableness. It cannot be***



*capricious satisfaction. Though, it is a subjective satisfaction, it must be capable of being tested on objective parameters. **The opinion though tentative, however, cannot be a product of imagination or speculation.** It cannot be spacious or mercurial. It should not be a mere pretence and should be made in good faith rather than suspicion. Reliability, credibility or for that matter what weight has to be attached to the material, depends upon the subjective satisfaction of the Assessing Officer but definitely it is subject to scrutiny whether the satisfaction has a rational nexus or a relevant bearing to the formation of satisfaction and is not extraneous or irrelevant. **The satisfaction must reflect rational connection with or relevant bearing between the material available and undisclosed income of the third person. The rational connection postulates and requires satisfaction of the Assessing Officer that a third person has 'undisclosed income' on the basis of evidence or material before him.** The material itself should not be vague, indefinite, distinct or remote. If there is no rational or intangible nexus between the material and the satisfaction that a third person has undisclosed income', the conclusion would not deserve acceptance. Then the satisfaction is vitiated. It is to this limited extent that the satisfaction can be gone into and examined. The satisfaction though subjective, must meet the aforesaid criteria.”*

(emphasis supplied)

7. In fact, in the present case, both the CIT (A) as well as ITAT have given concurrent findings of fact that no incriminating materials had been seized during search. Consequently, the contention of learned counsel for the Appellant that incriminating documents or materials had been found and seized at the time of search is contrary to fact.
8. Moreover, the CIT(A) had directed that the transactions need to be scrutinised in the case of the seller of the shares, namely, Triveni Infrastructure Development Company Co. Limited (TIDCO).



9. Also, the same shares had been sold by assessee in the subsequent Assessment Year 2011-2012 at a lesser price as against the addition made by the Assessing Officer which is accepted by the Assessing Officer.
10. Keeping in view the aforesaid, this Court is of the opinion that the question of law raised in present appeal has been settled by earlier Division Bench in *Kabul Chawla* (supra) and no incriminating documents or materials had been found and seized at the time of search.
11. It is also pertinent to mention that the ITAT had dismissed the appeal of the Revenue relying on its decision in ITA No. 6817/Del./2013 [*DCIT vs Prominent Realtech Pvt. Ltd*] on the basis that facts involved in both the matters were found to be same. The revenue preferred an appeal against the said decision of the Tribunal, which was dismissed by this Court in ITA 193/2022 vide Order dated 12th July, 2022. Consequently, this Court is of the view that no substantial question of law arises for consideration in the present appeal and the same is dismissed.



MANMOHAN, J



MANMEET PRITAM SINGH ARORA, J

JULY 21, 2022
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