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

43

+ ITA 358/2022 & CM APPL. 42277/2022

PR. COMMISSIONER OF INCOME TAX
(CENTRAL)-2

..... Appellant

Through: Mr. Sanjay Kumar, Sr. Standing
Counsel for Revenue with Ms. Easha
Kadian, Advocate.

versus

M/S JPM TOOLS LTD.

..... Respondent

Through: Mr. Salil Aggarwal, Sr. Advocate
with Mr. Madhur Aggarwal & Mr.
Mahir Aggarwal, Advocates.

45

+ ITA 360/2022 & CM APPL. 42279/2022

PR. COMMISSIONER OF INCOME TAX
(CENTRAL)-2

..... Appellant

Through: Mr. Sanjay Kumar, Sr. Standing
Counsel for Revenue with Ms. Easha
Kadian, Advocate.

versus

M/S JAY FE CYLINDER LTD.

..... Respondent

Through: Mr. Salil Aggarwal, Sr. Advocate
with Mr. Madhur Aggarwal & Mr.
Mahir Aggarwal, Advocates.



46

+ ITA 361/2022 & CM APPL. 42280/2022

PR. COMMISSIONER OF INCOME TAX
(CENTRAL)-2

..... Appellant

Through: Mr. Sanjay Kumar, Sr. Standing
Counsel for Revenue with Ms. Easha
Kadian, Advocate.

versus

M/S JAY IRON AND STEEL LTD. Respondent

Through: Mr. Salil Aggarwal, Sr. Advocate
with Mr. Madhur Aggarwal & Mr.
Mahir Aggarwal, Advocates.

47

+ ITA 362/2022 & CM APPL. 42281/2022

PR. COMMISSIONER OF INCOME TAX
(CENTRAL)-2

..... Appellant

Through: Mr. Sanjay Kumar, Sr. Standing
Counsel for Revenue with Ms. Easha
Kadian, Advocate.

versus

M/S JPM TOOLS LTD. Respondent

Through: Mr. Salil Aggarwal, Sr. Advocate
with Mr. Madhur Aggarwal & Mr.
Mahir Aggarwal, Advocates.

48

+ ITA 363/2022 & CM APPL. 42285/2022

PR. COMMISSIONER OF INCOME TAX
(CENTRAL)-2

..... Appellant

Through: Mr. Sanjay Kumar, Sr. Standing
Counsel for Revenue with Ms. Easha
Kadian, Advocate.



versus

M/S JAY AUTO COMPONENTS LTD. Respondent

Through: Mr. Salil Aggarwal, Sr. Advocate
with Mr. Madhur Aggarwal & Mr.
Mahir Aggarwal, Advocates.

49

+ ITA 364/2022 & CM APPL. 42286/2022

PR. COMMISSIONER OF INCOME TAX
(CENTRAL)-2 Appellant

Through: Mr. Sanjay Kumar, Sr. Standing
Counsel for Revenue with Ms. Easha
Kadian, Advocate.

versus

M/S JAY IRON AND STEEL LTD. Respondent

Through: Mr. Salil Aggarwal, Sr. Advocate
with Mr. Madhur Aggarwal & Mr.
Mahir Aggarwal, Advocates.

50

+ ITA 365/2022 & CM APPL. 42287/2022

PR. COMMISSIONER OF INCOME TAX
(CENTRAL)-2 Appellant

Through: Mr. Sanjay Kumar, Sr. Standing
Counsel for Revenue with Ms. Easha
Kadian, Advocate.

versus

M/S JAY IRON AND STEEL LTD. Respondent

Through: Mr. Salil Aggarwal, Sr. Advocate
with Mr. Madhur Aggarwal & Mr.
Mahir Aggarwal, Advocates.



51

+ ITA 366/2022 & CM APPL. 42288/2022

PR. COMMISSIONER OF INCOME TAX
(CENTRAL)-2

..... Appellant

Through: Mr. Sanjay Kumar, Sr. Standing
Counsel for Revenue with Ms. Easha
Kadian, Advocate.

versus

M/S JAY AUTO COMPONENTS LTD. Respondent

Through: Mr. Salil Aggarwal, Sr. Advocate
with Mr. Madhur Aggarwal & Mr.
Mahir Aggarwal, Advocates.

52

+ ITA 367/2022 & CM APPL. 42289/2022

PR. COMMISSIONER OF INCOME TAX
(CENTRAL)-2

..... Appellant

Through: Mr. Sanjay Kumar, Sr. Standing
Counsel for Revenue with Ms. Easha
Kadian, Advocate.

versus

M/S JAY ACE TECHNOLOGIES LTD. Respondent

Through: Mr. Salil Aggarwal, Sr. Advocate
with Mr. Madhur Aggarwal & Mr.
Mahir Aggarwal, Advocates.

53

+ ITA 368/2022 & CM APPL. 42290/2022

PR. COMMISSIONER OF INCOME TAX
(CENTRAL)-2

..... Appellant

Through: Mr. Sanjay Kumar, Sr. Standing
Counsel for Revenue with Ms. Easha
Kadian, Advocate.



versus

M/S JAY AUTO COMPONENTS LTD. Respondent

Through: Mr. Salil Aggarwal, Sr. Advocate
with Mr. Madhur Aggarwal & Mr.
Mahir Aggarwal, Advocates.

%

Date of Decision: 26th September, 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):

1. Present income tax appeals have been filed challenging the common order dated 23rd December, 2021 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA No. 7280/Del./2017 for Assessment Year ('AY') 2010-11, ITA No. 6640/Del./2017 for AY 2009-10, ITA No. 6639/Del./2017 for AY 2009-10, ITA No. 7281/Del.2017 for AY 2011-12, ITA No. 6622/Del./2017 for AY 2009-10, ITA No. 6626/Del./2017 for AY 2008-09, ITA No. 6628/Del./2017 for AY 2010-11, ITA No. 6624/Del/2017 for AY 2011-12, ITA No. 6638/Del./2017 for AY 2011-12 and ITA No. 6623/Del./2017 for AY 2010-11.

2. Learned counsel for the Appellant states that the ITAT has erred in relying upon the judgement of this Court in the case of *CIT vs Kabul Chawla 380 ITR 573 (Del)* ignoring the fact that Revenue's SLP on similar issue is pending adjudication before the Supreme Court in the case of M/s Apar Industries Ltd.



3. He states that the ITAT has erred in holding that no incriminating material was found in the search, whereas the original copies of share certificates pertaining to share capital and premium allotted to investor companies were found at the premises of the Assessee company itself instead of investor companies premises evidencing that the investor companies were bogus/accommodation entry providing entities. He further states that the Tribunal failed to appreciate that the additions were based on a statement made by one Sh.Rajesh Agarwal which has live link with the documents seized during the course of search.

4. He also contends that as the notices issued under Section 133(6) of the Income Tax Act, 1961 ('the Act') to the investor companies were returned back unserved, they were not genuine business entities and they did not have sufficient network to make investment.

5. *Per contra*, learned senior counsel for the Respondents/Assessees, who appears on advance notice, states that only photocopies of the share certificates were found during search and not the original share certificates, as alleged by learned counsel for the Appellant. In support of his contention, he relies upon the following portion of the impugned order passed by the ITAT:-

“iii) Share Certificates found during the course of search, with regards to allotment of shares by Minda group of companies to various companies, noted by AO at page 18 of his order. We have gone through the orders so passed by AO, CIT (A) and also the remand report so furnished by AO during the course of appellant proceedings and notice that these share certificates pertained to 8 companies, namely, M/s JA Builders Ltd, M/s JPM Automobiles Ltd, M/s IBER Medior Ltd, M/s JPM Tsukada Pvt Ltd, M/s Brilliant Jewels Pvt. Ltd, M/s JPM Tools Ltd, M/s JPM Farms Pvt. Ltd, M/s Jay Nikki Industries Ltd. as recorded by CIT (A) at pages



59 and 60 of his order. In our opinion share certificates merely record the number of shares issued along with the price of shares, which are duly disclosed in the books of accounts so compiled by the assessee, as such, even if the share certificates have been found and seized the same cannot be taken to be “incriminating” in nature, as they merely record the details of transactions, which are duly disclosed and recorded in the books of accounts. The learned CIT DR though argued that original share certificates were seized during the course of search, however, the assessee’s case all throughout has been that photocopies of share certificates were seized. In any case, even in the remand report which has been extracted by CIT (A) at page 42 of his order, the AO has not been able to place material on record to rebut the contention of assessee that the share certificates were photocopies and not original. Even the Ld. CIT DR during the course of hearing has not been able to place on record any material to establish the factual position as to whether the share certificates seized were original or photocopies. However, on going through the orders of assessment, we have noticed that no addition has been made with regards to the share certificates seized of six companies seized by the Revenue and additions have only been made with regards to two companies i.e. M/s JPM Tools Ltd. and M/s Jay Nikki Industries Ltd., wherein, also the learned AO in the order of assessment has not made the share certificates as a basis to make addition under section 68, rather, he has placed reliance on the post investigation report and statement of a third party Sh. Rajesh Agarwal. Thus, whether the share certificates were original or photocopies, the same will make no difference, as the same has not been made as basis by the AO in the impugned order of assessment. Similar view has also been taken by a coordinate bench of ITAT Delhi in the case of ACIT vs Moon Beverages Ltd. (ITAT Delhi) in ITA No. 115 to 118/Del/2018, wherein, following findings have been recorded, on which we draw our support:

“46.1 Before deciding the issue on merit, we would first like to decide the legal ground raised by the assessee challenging the validity of the assumption of jurisdiction u/s 153A in absence of any incriminating material found during the course of search when the assessment was not pending. As mentioned



earlier, the original return was filed on 30th September, 2009 declaring income at Rs.10,27,91,857/-. The assessment was completed u/s 143(3) determining the total income at Rs.10,27,91,857/-. This assessment was rectified u/s 154 of the IT Act determining the income at Rs.7,50,21,860/-. Thus, the assessment was completed and was not pending on the date of search. A perusal of the assessment order shows that the addition is not based on any incriminating material, but, based on post-search enquiries or statements recorded u/s 132(4) of the Act. The share certificates and counterfoils thereof found during the search, in our opinion, cannot be construed as incriminating in nature.”

6. He further states that the statement of Mr.Rajesh Agarwal cannot be relied upon by the Appellant inasmuch as the Assesseees were not given an opportunity to cross-examine Mr.Rajesh Agarwal despite a request being made by the Respondents-Assesseees.

7. He also states that all investor companies had filed detailed replies before the Assessing Officer and had furnished all requisite details as asked for by the Assessing Officer in the notices issued under Section 133(6) of the Act. He emphasises that the investor companies had sufficient networth to make the investment. In support of his contention, he relies upon the following Table reproduced by the ITAT in the impugned order:-

Subscribing Company	Net Worth as per Balance Sheet (in Rs)	Investment made in share capital (in Rs)
M/s Festino Agencies Pvt. Ltd.	2,83,00,000/-	15,00,000/-
M/s Eversite Commodities Pvt. Ltd.	2,65,84,000/-	15,00,000/-



M/s Gajanand Agrotech Ltd.	7,81,98,000/-	15, 00, 000/-
M/s Gajeshwar Sales Pvt. Ltd.	3,88,61,942/-	5,00,000/-
M/s Matribhumi Commodities Pvt. Ltd.	4,15,90,000/-	5, 00, 000/-
M/s Monalisa Commercial Pvt. Ltd.	3,74,35,000/-	16,00,000/-
Lambodar Commercial Pvt. Ltd.	2,96,25,000/-	8,00,000/-
Bhavatarani Sales Pvt. Ltd.	3,76,50,000/-	18,00,000/-
M/s Mukul Mills Pvt. Ltd.	2,22,33,000/-	18,00,000/-
M/s Mayur Vanijya Pvt. Ltd.	3,32,99,907/-	5,00,000/-
M/s Octal Commodities Pvt. Ltd.	3,03,42,000/-	15,00,000/-
M/s Vandana Designs Pvt. Ltd.	1,65,05,000/-	8,00,000/-
M/s Exotica Commodities Pvt. Ltd.	1,81,73,303/-	7,00,000/-
M/s Kushal Infotech Pvt. Ltd.	4,47,41,466/-	17,00,000/-
M/s Mupnar Trexim Pvt. Ltd.	2,62,78,000/-	33,50,000/-
M/s Ranisati Apartments Pvt. Ltd.	1,58,89,000/-	14,00,000/-
M/s Festino Agro Pvt. Ltd.	3,89,58,000/-	24,00,000/-



<i>M/s Frost Traders Pvt. Ltd.</i>	2,30,68,113/-	18,00,000/-
<i>M/s Trimline Vyapaar Pvt. Ltd.</i>	2,91,44,889/-	4,00,000/-

8. It is settled law that where the assessment of the Respondents/Assessees has attained finality prior to the date of search and no incriminating documents/materials have been found and seized at the time of search, no additions can be made under Section 153A of the Act, as in that eventuality, the cases of the Respondents-Assessees would be of non-abated assessment. (See: *CIT vs Kabul Chawla 380 ITR 573 (Del)*, *Principal Commissioner of Income Tax vs. Bhadani Financiers Pvt. Ltd., 2021 SCC OnLine Del 4430* and *PCIT vs. Meeta Gutgutia, (2017) 82 taxmann.com 287 Del*)

9. This Court finds that though the appeal in APAR Industries Ltd. is pending adjudication before the Apex Court, yet there is no stay order in favour of the revenue. Consequently, in view of the judgments of the Supreme Court in *Kunhayammed and Others Vs. State of Kerala and Another, (2000) 6 SCC 359* and *Shree Chamundi Mopeds Ltd. Vs. Church of South India Trust Association CSI Cinod Secretariat, Madras (1992) 3 SCC 1*, the issue of law is covered by the judgments passed by this Court.

10. In the present batch of matters, both CIT (A) and ITAT have given concurrent findings of fact that no incriminating material had been brought on record by the Assessing Officer to sustain the additions. In fact, the ITAT in the impugned order, has held that the allegation of the Assessing Officer that no notices under Section 133(6) of the Act were received by the investors, is irrelevant as the said parties had filed detailed replies in



response to the Section 133(6) notices along with the requisite details as required by the Assessing Officer.

11. Further, upon perusal of the Table reproduced hereinabove, which shows the networth of the investor companies and the investment made in the share capital, this Court is in agreement with the contention of learned senior counsel for the Respondents-Assessees that the investor companies had sufficient networth to make investment in the Assessee's group of companies.

12. Learned predecessor Division Bench of this Court in ***PCIT vs. Best Infrastructure (India) (P.) Ltd.*** [2017] 84 taxmann.com 287 (Delhi) has held that statements recorded under Section 132 (4) of the Act of the Act do not by themselves constitute incriminating material. The relevant portion of the said judgment is reproduced hereinbelow:-

"36. Turning to the facts of the present case, it requires to be noted that the statements of Mr. Anu Aggarwal, portions of which have been extracted hereinbefore, make it plain that the surrender of the sum of Rs. 8 crores was only for the AY in question and not for each of the six AYs preceding the year of search. Secondly, when Mr. Anu Aggarwal was confronted with A- 1, A-4 and A-11 he explained that these documents did not pertain to any undisclosed income and had, in fact been accounted for. Even these, therefore, could not be said to be incriminating material qua each of the preceding AYs.

37. Fourthly, a copy of the statement of Mr. Tarun Goyal, recorded under Section 132 (4) of the Act, was not provided to the Assessees. Mr. Tarun Goyal was also not offered for the cross-examination. The remand report of the AO before the CIT(A) unmistakably showed that the attempts by the AO, in ensuring the presence of Mr. Tarun Goyal for cross-examination by the Assessees, did not succeed. The onus of ensuring the presence of Mr. Tarun Goyal, whom the



Assessee clearly stated that they did not know, could not have been shifted to the Assessee. **The onus was on the Revenue to ensure his presence.** Apart from the fact that Mr. Tarun Goyal has retracted his statement, the fact that he was not produced for cross-examination is sufficient to discard his statement.

38. Fifthly, statements recorded under Section 132 (4) of the Act do not by themselves constitute incriminating material as has been explained by this Court in Harjeev Aggarwal (supra). Lastly, as already pointed out hereinbefore, the facts in the present case are different from the facts in Smt. Dayawanti Gupta (supra) where the admission by the Assessee themselves on critical aspects, of failure to maintain accounts and admission that the seized documents reflected transactions of unaccounted sales and purchases, is non-existent in the present case. In the said case, there was a factual finding to the effect that the Assessee were habitual offenders, indulging in clandestine operations whereas there is nothing in the present case, whatsoever, to suggest that any statement made by Mr. Anu Aggarwal or Mr. Harjeet Singh contained any such admission.

39. For all the aforementioned reasons, the Court is of the view that the ITAT was fully justified in concluding that the assumption of jurisdiction under Section 153A of the Act qua the Assessee herein was not justified in law.”

(emphasis supplied)

13. In any event, in the present cases, as the Respondents-Assessee were denied the opportunity to cross-examine Mr. Rajesh Agarwal, despite a specific request, this Court is in agreement with the ITAT that his statement needs to be excluded and cannot be relied upon as a piece of evidence to make any addition. In fact the Supreme Court in the case of **M/s Andaman Timber Industries vs. CCE (SC), 127 DTR 241** has held “...not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the



impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected.”

14. Consequently, this Court is of the view that no substantial question of law arises for consideration in the present batch of appeals and accordingly, the same are dismissed along with pending applications.

MANMOHAN, J

MANMEET PRITAM SINGH ARORA, J

**SEPTEMBER 26, 2022
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