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

\+ ITA 528/2019

PR.COMMISSIONER OF INCOME TAX (CENTRAL)- 3
..... Appellant

Through: Mr. Zoheb Hossain, Sr. Standing Counsel with Mr. Vipul Agrawal and Mr. Parth Semwal, Jr. Standing Counsel.

versus

M/S PGF LTD. ..... Respondent

Through: None.
Mr. Sachit Jolly, Amicus Curiae

\+ ITA 529/2019

PR.COMMISSIONER OFLNCOME TAX (CENTRAL)- 3
..... Appellant

Through: Mr. Zoheb Hossain, Sr. Standing Counsel with Mr. Vipul Agrawal and Mr. Parth Semwal, Jr. Standing Counsel.

versus

M/S PGF LTD. ..... Respondent

Through: None.
Mr. Sachit Jolly, Ld. Amicus Curiae

\+ ITA 530/2019

PR.COMMISSIONER OF INCOME TAX (CENTRAL)- 3
..... Appellant

Through: Mr. Zoheb Hossain, Sr. Standing Counsel with Mr. Vipul Agrawal and Mr. Parth Semwal, Jr. Standing Counsel.

versus

M/S PGF LTD. ..... Respondent

Through: None.
Mr. Sachit Jolly, Amicus Curiae

\+ ITA 535/2019

PR.COMMISSIONER OF INCOME TAX (CENTRAL)- 3
..... Appellant

Through: Mr. Zoheb Hossain, Sr. Standing Counsel with Mr. Vipul Agrawal and Mr. Parth Semwal, Jr. Standing Counsel.

versus

M/S PGF LTD. ..... Respondent

Through : None.
Mr. Sachit Jolly,. Amicus Curiae

Reserved On : 18th October, 2022
% Date of Decision: 14th November, 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:**

*FACTS*

1. The aforesaid appeals have been filed by the Appellant-Revenue, challenging the consolidated order dated 29th June, 2018 passed by the Income Tax Appellate Tribunal (for short 'ITAT') in ITA Nos.2131-2134/Del/2010 for the Assessment Years 2000-01 to 2003-04, whereby the ITAT has upheld separate Orders dated 10th February, 2010 passed by the Commissioner of Income Tax (Appeals)-III, New Delhi (for short CIT(A) quashing the assessment order(s) dated 28th December, 2007 passed under

Section 153A of the Income Tax Act, 1961 (for short 'the Act, 1961') for the respective Assessment Years pursuant to the search carried out on 22nd September, 2005 at the premises of the Respondent-Assessee under Section 132 of the Act, 1961.

2. Both the appellate authorities, viz., CIT(Appeal) and the ITAT have returned concurrent findings of fact that no incriminating material was found during the search conducted on 22nd September, 2005 warranting assessment under Section 153A of the Act, 1961.

*SUBMISSIONS ON BEHALF OF THE REVENUE*

3. The appeals and questions of law, as formulated by the Appellant–Revenue are premised on the submission that it is not necessary that incriminating material is found during search under Section 132 of the Act, 1961 for an order under Section 153A of the Act, 1961 to be passed even where original assessments have attained finality and have not abated. The questions of law as suggested in one of the appeal being ITA 527/2019 are reproduced hereinbelow:-

> *"A.Whether Ld. ITAT has erred in dismissing the appeal of the revenue by relying on the decision of the Hon'ble High Court in CIT v. Kabul Chawla 380 ITR 573 CIT, without properly appreciating the provisions contained in section 153A of the IT Act which does not require to have any incriminating material found during the search and seizure action as an essential requirement for making an addition in the assessment?*
>
> *B. Whether the Ld. ITAT has erred in dismissing the appeal of the revenue by relying on the decision of the Hon'ble High Court in CIT v. Kabul Chawla 380 ITR 573, without properly appreciating the provisions contained in Section 153A which starts with the non-obstante clause which seeks to operate in the supersession of provisions contained in Section 139, 147, 148, 149, 151 and 153?*

*C. Whether Ld. ITAT has erred in dismissing the appeal of the revenue by relying on the decision of the Hon'ble High Court in CIT v. Kabul Chawla 380 ITR 473, without properly appreciating the provisions contained in Section 153A which have been inserted w.e.f. 01.06.2003 after the provisions contained in Section 158 BC and other allied provisions contained in chapter XIV – B which were made inapplicable after 31.05.2003 as per section 158BI of the IT Act?*

*D. Whether the Hon'ble ITAT has erred in not appreciating the Hon'ble Allahabad High Court's decision in the case of CIT(Central) Kanpur vs. Rajkumar Arora (2014) 211 Taxmann 453 that the assessing officer has power to reassess returns of assessee not only for undisclosed income which was found during search operation but also with regard to material that was available at the time of original assessment?*

*E. Whether the Ld. ITAT has erred in allowing the appeal of the assessee without examining the merits of the additions made pursuant to the recasted Profit and Loss Account submitted by the assessee in response to notice issued under Section 153A?*

4. By way of separate applications bearing CM Nos.49886-49889 of 2019, the Appellant Revenue has filed judgments of the Supreme Court of India in ***PGF Ltd. v. UOI [2015] 13 SCC 50*** and Punjab & Haryana High Court in ***PGF v. UOI [2004] SCC Online P&H 676*** and proposed two further questions of law on the basis of findings of the High Court and Supreme Court wherein the sale and purchase of agricultural land by the Respondent-Assessee have been held by Courts to bogus/sham/paper transactions.

5. During the course of hearing before this Court, the learned Senior Standing Counsel for the Revenue had argued that the statement recorded during the course of search under Section 132(4) of the Act, 1961 can be

treated as incriminating material/document on the basis of which addition/disallowance can be made under Section 153A of the Act, 1961. For the said proposition, reliance was placed on the decision of this Court in the case of ***Smt. Dayawanti Gupta v. CIT : [2017] 390 ITR 496.***

6. Since none had appeared for the Respondent-assessee despite being served, this Court had requested Mr. Sachit Jolly, Advocate, to appear as Amicus Curiae.

*SUBMISSIONS ON BEHALF OF THE LEARNED AMICUS CURIAE*

7. Mr. Sachit Jolly, learned Amicus Curiae submitted that in terms of Section 153A(1) of the Act, 1961 where search is initiated under Section 132 of the Act, 1961 assessments for six assessment years preceding the date of search may be reopened and completed under that Section. He stated that this Court as well as other High Courts have consistently held that no addition under Section 153A can be made in the absence of incriminating material found during the search, particularly where original assessments have already concluded.

8. Learned Amicus Curiae submitted that the second proviso to Section 153A(1) of the Act, 1961 provides that if any assessment or reassessment proceedings relating to any assessment year falling within the period of the six assessment years is pending on the date of search, then the same shall 'abate' and assessment shall be completed under Section 153A of the Act, 1961. He stated that in such a case, an argument can be made that the scope and remit of assessment will not only include additions on the basis of documents found during search but also additions which could have been made in the regular assessment. Therefore, according to him, the first issue which requires consideration is whether any proceedings had abated by

virtue of the search or whether the scope of present Assessment Years are to be restricted to incriminating documents found during the search. In this context, the learned counsel Amicus Curiae highlighted the following facts for each of the Assessment Year(s):-

| **A.Y.** | **Date of filling of original Return of Income ('ROI')** | **Date of processing under Section 143(1)** | **Original Assessment /Reassessment Proceedings** | **Abated/Unabated** |
|---|---|---|---|---|
| 2000-01 | 30.11.2000 | 13.12.2000 | Reassessment order dated 23.12.2003 passed under Section 147 of the Act. | Since the reassessment was already done before the date of search, therefore, the proceedings were **'unabated'**. |
| 2001-02 | 31.10.2001 | 26.03.2002 | Reassessment order dated 19.09.2003 passed under Section 147 of the Act. | -do- |
| 2002-03 | 31.10.2002 | 31.12.2002 | Reassessment order dated 08.07.2004 passed under Section 147 of the Act. | -do- |
| 2003-04 | 01.12.2003 | 03.02.2004 | As per the report dated 17.02.2021 of the Revenue as provided by the Senior Standing | Since neither any notice of assessment /reassessment was issued to the Assessee nor any such assessment was framed, therefore, |

| | | | | |
|---|---|---|---|---|
| | | | Counsel, it has been confirmed that neither any notice under Section 143(2) of the Act was issued nor any assessment / reassessment was framed for the AY 2003-04 based on the ROI filed on 01.12.2003. | there were no proceedings pending as on the date of search. Pertinently, even the limitation for issuance of notice under Section 143(2) of the Act had expired much before the date of search and therefore, no proceedings could in any case have been pending on the date of search. Thus, this case will also be classified under the category of '**unabated**'. |

9. According to the learned Amicus Curiae, it, therefore, followed that all the Assessment Years in question fall in category 1, i.e., where assessment proceedings had attained finality and no proceedings were pending on the date of search. He emphasised that the CIT(A) and the ITAT have quashed the assessment orders passed under Section 153A of the Act, 1961 solely on the legal ground that the additions/disallowances made in these assessments were not based on any 'incriminating' documents found during search proceedings.

10. He pointed out that neither before the ITAT nor in the appeal memorandum filed before this Court, it has been contended by the Revenue that there was any 'incriminating' material found during the course of search

on the basis of which additions had been made in the assessment order(s) under Section 153 A of the Act, 1961.

11. He lastly submitted that perusal of order(s) passed under Section 153A of the Act, 1961 demonstrated that the additions/disallowances were based on inferences drawn from Order passed by the ITAT order for Assessment Year 1998-99 and the recasted accounts filed by the Respondent-Assessee pursuant to the ITAT Order of AY 1998-99. He stated that the assessment order(s) did not refer to any new material much less any incriminating material found during search. Thus, according to him, there was no fresh information/material which was unearthed during the search proceedings or any statement under Section 132(4) of the Act, 1961which was recorded during search that could be classified as 'incriminating material', on the basis of which additions/disallowances were made by the Revenue.

*COURT'S REASONING*

*WHETHER ADDITION / DISALLOWANCE CAN BE MADE UNDER SECTION 153A IN THE ABSENCE OF ANY INCRIMINATING MATERIAL FOUND DURING SEARCH?*

12. This Court is of the view that the issue whether addition/disallowance can be made in the assessments under Section 153A of the Act, 1961 in the absence of any incriminating material found during the course of search is no longer *res intergra*.

13. A learned predecessor Division Bench of this Court in the case of ***CIT v. Kabul Chawla, 380 ITR 573*** has summarized the position regarding the scope of assessments framed under Section 153A of the Act as under:-

*"Summary of the legal position*

*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."*

The Revenue's SLP against the above decision of ***Kabul Chawla*** (supra) has already been dismissed by Supreme Court due to low tax effect.

14. This Court has consistently applied and followed the decision of ***Kabul Chawla*** (supra) in the following cases:

- CIT v. Bhadani Financiers Pvt. Ltd: ITA 81/2020
- CIT v. Jaypee Financial Services Ltd: ITA 42/ 2021
- CIT v. Ankush Saluja: ITA 186/2019
- CIT v. Baba Global Ltd.:ITA 821 & 822/2016
- CIT v. SMC Power Generation Ltd.: ITA 406/2019

15. In addition, the ratio of ***Kabul Chawla*** (supra) has been applied by various other High Courts in the following cases:

- CIT v. Continental Warehousing Corpn. (Nhava Sheva) Ltd: 374 ITR 645
- CIT v. Gurinder Singh Bawa: [2016] 386 ITR 483 [Bom.]
- CIT v. R.M. Investment and Trading Co. Pvt. Ltd.: 2019 SCC OnLine Bom 2250
- CIT v. Soumya Construction (P.) Ltd.: [2016] 387 ITR 529 [Guj.]
- CIT v. Devangi alias Rupa: Tax Appeal No. 134 of 2017 [Guj.]

- CIT v. IBC Knowledge Park (P.) Ltd.: [2016] 385 ITR 346 [Kar.]
- CIT v. Salasar Stock Broking Ltd: G.A. No.192 of 2016 [Cal.]
- R.Chitra v. ITSC: 418 ITR 530 [Mad.]
- CIT v. Gahoi Dal & Oil Mills: [2020] 117 taxmann.com 117 (MP)

*NO STATEMENT UNDER SECTION 132(4) PRODUCED BEFORE THIS COURT*.

16. It is to be noted that the Appellant-Revenue has not placed reliance or even referred to any statement recorded under Section 132(4) of the Act, 1961. No such statement has been produced before this Court. Therefore, in the facts of the present case, the issue does not arise for consideration unless it can be demonstrated by the Appellant-Revenue that the statements recorded under Section 132(4) disclose some incriminating material on the basis of which orders under Section 153A have been passed.

17. It may also be relevant to point out this Court in the case of ***CIT v. Harjeev Aggarwal: [2016] 229 DLT 33***, in the context of erstwhile provisions of Block Assessment, has held that the statement recorded during the course of search, on a standalone basis, without any reference to material found/discovered during the search would not empower the AO to make block assessment merely because of any admission made by Assessee during the search operation. Similarly, this Court in ***CIT v. Sunil Aggarwal: 379 ITR 367*** has held that when a statement recorded under Section 132(4) of the Act, 1961 is retracted, then, the AO would require some corroborative material before making any additions/disallowances on the basis of the statement.

18. That apart, this Court in the following decisions has considered and distinguished the decision of ***Dayawanti*** (supra) holding that the decision of ***Dayawanti*** (supra) was rendered in the peculiar facts and circumstances of that case and the ratio of ***Kabul Chawla*** (supra) has not been diluted:

- CIT v. Meeta Gutgutia: [2017] 395 ITR 526
- CIT v. Best Infrastructure (India) (P.) Ltd.: [2017] 397 ITR 82
- CIT v. Dharampal Premchand Ltd: [2018] 408 ITR 170 – request for reference to larger bench rejected by this Court.
- CIT v. Anand Kumar Jain (Huf): ITA 23/2021

*EFFECT OF JUDGMENT OF THE PUNJAB & HARYANA HIGH COURT AND THE SUPREME COURT?*

19. Insofar as the judgment dated 26th July, 2004 of the Punjab & Haryana High Court is concerned, the said judgment is prior to the search. However, the Assessing officer has neither referred to this Judgment in the assessment order under Section 153A nor has he relied upon the conclusions of the High Court in the said Order. Further, the Judgment arises from a challenge mounted by the Respondent to an Order passed by the SEBI, which Order has not been produced by the Appellant citing unavailability. A special audit under Section 142(2A) of the Act, 1961 was also made in the case of Respondent in the original assessment proceedings for AY 1998-99, which has also not been produced by the Appellant citing unavailability. Given the fact that the Assessing Officer has not even referred to the judgment of the Punjab & Haryana High Court nor has he relied upon the conclusions of the High Court and that the SEBI Order, High Court judgment and the Special Audit report were made before the date of search, it can be concluded that assessment has not been framed on the basis of

incriminating material culled from the decision of the High Court or found during search.

20. Further, the judgment of the Supreme Court which was rendered on 12th March, 2013 cannot be said to incriminating material found during search conducted on in 2005 and, therefore, cannot form the basis of the assessment order passed in 2007. The Supreme Court in the said decision has only directed the Income tax Department to examine any wrong doings by the respondent. At best, such directions could constitute material for initiating proceedings under Section 148 the Act, 1961 provided some material was found as a result of the enquiry conducted by the Income Tax Department pursuant to the decision of the Supreme Court. However, such findings of the Supreme Court in 2013 cannot constitute incriminating material found during search in 2005 which would validate assessment order under Section 153A passed in 2007.

21. Consequently, given the facts and circumstances of the present cases, no substantial question of law arises for consideration of this Court. Accordingly, the present appeals are dismissed.

22. Before parting with the order, this Court would like to place on record its appreciation for the assistance rendered by Mr. Sachit Jolly, learned Amicus Curiae.

**MANMOHAN, J**

**MANMEET PRITAM SINGH ARORA, J**

**NOVEMBER 14, 2022**
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