
(2021) 02 DEL CK 0328

Delhi High Court

Case No: Income Tax Appeal No. 23, 26, 27, 28, 29, 30, 31 Of 2021, Civil Miscellaneous
Application No. 5385, 5516, 5522, 5524, 5525, 5526, 5540 Of 2021

PCIT (Central) - 3

APPELLANT

Vs

Anand Kumar Jain
(HUF)

RESPONDENT

Date of Decision: Feb. 12, 2021

Acts Referred:

Income Tax Act, 1961 " Section 132, 132(4), 153A, 153C, 158B(b), 158BB(1), 158BC, 260A

Citation: (2021) 02 DEL CK 0328

Hon'ble Judges: Rajiv Sahai Endlaw, J; Sanjeev Narula , J

Bench: Division Bench

Advocate: Ajit Sharma

Final Decision: Dismissed

Judgement

Sanjeev Narula, J

1. The present appeals under Section 260A of the Income Tax Act [hereinafter referred to as the "Act"] are directed against the common order

dated 30th July, 2019 [hereinafter referred to as the "impugned order"] passed by the Income Tax Appellate Tribunal [hereinafter referred to as

the "ITAT"] in ITA 5947/Del./2018, ITA No. 4723/Del./2018, ITA No. 5954/Del./2018, ITA No. 5950/Del./2018, ITA No. 5948/Del./2018,

ITA No. 5947/Del./2018 and ITA No. 5955/Del./2018.

2. Briefly, the facts of the case are that the Assessee purchased shares of an unlisted private company in 2010. This unlisted company then merged

with another unlisted company, M/s Focus Industrial Resources Ltd. and shares of this merged entity were allotted to the Assessee. Subsequently, the

merged entity allotted further bonus shares to the Assessee and thereafter it was listed on the Bombay Stock Exchange. Assessee sold these shares

on the stock exchange in 2014 and earned a huge profit which was claimed as exempt income on account of being long term capital gain.

3. A search was conducted u/s. 132 on 18th November, 2015 at the premises of the Assessee {being Anand Kumar Jain (HUF), its coparceners and

relatives} as well as at the premises of one Pradeep Kumar Jindal. During the search, statement of Pradeep Kumar Jindal was recorded on oath u/s.

132(4) on the same date, wherein he admitted to providing accommodation entries to Anand Kumar Jain (HUF) and his family members through their

Chartered Accountant. The assessing officer framed the assessment order detailing the modus operandi as to how the cash is provided to

accommodation entry operator in lieu of allotment of shares of a private company.

Thereafter when the matter was carried up in appeal before the

CIT(A), the findings of AO were affirmed. However, in further appeal before the ITAT, the said findings were set aside vide the impugned order.

4. The Revenue is aggrieved with the aforesaid impugned order and has filed the present appeal under Section 260A of the Act, proposing the

following questions of law:

a. Whether the ITAT is justified in deleting the additions made on account of bogus long term capital gain on the ground that the evidences

found during search at the premises of entry provider cannot be the basis for making additions in assessment completed u/S. 153A in the

case of beneficiary ignoring the vital fact that there was a common search u/s 132 conducted on the same day in both the cases of the entry

provider and the beneficiary?

b. Whether ITAT was justified in holding that mere failure of cross examination of entry operator is fatal when copy of statement was

provided to the Assessee and Assessee failed to discharge the onus of providing the genuineness of LTCG especially in view of the apex

court decision in the case of State of UP vs. Sudhir Kumar Singh [AIR 2020 SC 5215]?

5. Mr. Ajit Sharma, Sr. Standing Counsel submits that the ITAT has erred by holding that the Assessee's premises were not searched, and

therefore notice under Section 153A could not have been issued. He submits that ITAT ignored that the assessment order itself reveals that a

common search was conducted at various places on 18th November, 2015, including at the premises of the entry provider and the Assessee and thus

assessment u/s 153A has been rightly carried out. He further argues that ITAT erred in setting aside the assessment order on the ground that no right

of cross-examining Pradeep Jindal was afforded to the Assessee. He argues that there is no statutory right to cross-examine a person whose

statement is relied upon by AO, so long as the Assessee is provided with the statement and given an opportunity to rebut the statement of the witness.

The Assessee has been provided with a copy of the statement of Pradeep Kumar Jindal and the ITAT has wrongly noted to the contrary.

Furthermore, the Assessee has failed to bring in any evidence to dispute the factual position emerging therefrom and has therefore failed to establish

any prejudice on account of not getting the opportunity to cross-examine the witness. In view of the statement of Mr. Jindal, it was incumbent upon

the Assessee to discharge the onus of proof which had been shifted on him. The revenue has sufficient material in hand in the nature of the

statements recorded during the search and therefore, the Assessee ought to have produced evidence to negate or to contradict the evidence collected

by the AO during the course of the search and assessment proceeding which followed thereafter. Mr. Sharma also emphasised that the statement

recorded under Section 132(4) of the Act can be relied upon for any purpose in terms of the language of the Act and thus action under section 153A

was justified.

6. We have considered the contentions of Mr. Sharma, however, we feel that the instant appeals do not raise any question of law, much less

substantial question of law for our consideration. The relevant portion of the impugned order reads as under:-

“5. We find that the Ld. Counsel for the assessee has drawn our attention towards the relevant portion of the judgment / decision of

the Hon'ble Supreme Court of India, Hon'ble High Courts and various Benches of the Tribunal on the legal issue on which he argued, Ld.

Counsel for the assessee further submitted that admittedly from assessee's own premises during search u/s. 132 of the Act no incriminating

material was found and no adverse statement is there on record of the assessee u/s. 132(4) of the IT Act and it is an admitted fact before us

that mere basis of un-confronted statement of Sh. Pradeep Kumar Jindal recorded u/s. 132(4) of the Act in his own separate search action

and on the basis of un-confronted material for the said search u/s. 132(4), which in our considered opinion, cannot be made as a sole basis

for making the additions u/s. 153A of the IT Act without recourse of mandatory and exclusive provisions under the Act like u/s 153C of the

Act which specifically covered the extant situation. In our opinion, the decision of the Hon'ble Supreme Court of India, Hon'ble High Courts

and the various Benches of the Tribunal are directly applicable in the present case wherein they have adjudicated and decided the similar

issue in favour of the assessee by accepting the similar arguments of the Ld. Counsel for the assessee.

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5.1. As regards the arguments advanced by Ld. CIT(DR) are concerned, the same are not applicable in the present case because keeping in

view the assessment order passed by the AO we have not seen from the proceedings of the AO regarding providing any statement of Sh.

Pradeep Kumar Jindal to the assessee meaning thereby the Revenue Authorities have not provided the statement of Sh. Pradeep Kumar

Jindal to the assessee and also did not provide the opportunity of cross examination of Sh. Pradeep Kumar Jindal, on which basis the

addition has been made and the provisions of Section 153A of the Act have been wrongly applied in the case of the assessee. Therefore, we

do not find any cogency in the arguments advanced by the Ld. CIT(DR) and the case laws cited by him in support of his contention are not

applicable here.Ã¢â¬â¸

7. The preliminary question under consideration before us is whether a statement under Section 132(4) constitutes incriminating material for carrying

out assessment under S. 153(A) of the Act. A reading of the impugned order reveals that the statement of Mr. Jindal recorded under Section 132(4)

forms the foundation of the assessment carried out under Section 153A of the Act. That statement alone cannot justify the additions made by the AO.

Even if we accept the argument of the Revenue that the failure to cross-examine the witness did not prejudice the assessee, yet, we discern from the

record that apart from the statement of Mr. Jindal, Revenue has failed to produce any corroborative material to justify the additions. On the contrary

we also note that during the course of the search, in the statement made by the assessee, he denied having known Mr. Jindal. Since there was

insufficient material to support the additions, the ITAT deleted the same. This finding of fact, based on evidence calls for no interference, as we

cannot re-appreciate evidence while exercising jurisdiction under section 260A of the Act.

8. Next, we find that, the assessment has been framed under section 153A, consequent to the search action. The scope and ambit of section 153A is

well defined. This court, in CIT v. Kabul Chawla (2016) 380 ITR 573:2015 SCC OnLine Del 1155, 4concerning the scope of assessment under

Section 153A, has laid out and summarized the legal position after taking into account the earlier decisions of this court as well as the decisions of

other High Courts and Tribunals. In the said case, it was held that the existence of incriminating material found during the course of the search is a

sine qua non for making additions pursuant to a search and seizure operation. In the event no incriminating material is found during search, no addition

could be made in respect of the assessments that had become final. Revenue's case is hinged on the statement of Mr. Jindal, which according to

them is the incriminating material discovered during the search action. This statement certainly has the evidentiary value and relevance as

contemplated under the explanation to section 132(4) of the Act. However, this statement cannot, on a standalone basis, without reference to any

other material discovered during search and seizure operations, empower the AO to frame the block assessment. This court in Principal Commissioner

of Income Tax, Delhi v. Best Infrastructure (India) P. Ltd., [[2017] 397 ITR 82: 2017 SCC OnLine Del 9591. This case was challenged in the

Supreme Court and SLP No. 13345/2018 was admitted. But subsequently, it was dismissed as withdrawn. Thus, the decision in Best Infrastructure

(supra) has not been disturbed.] has inter-alia held that:

“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. [Commissioner of Income Tax v. Harjeev Aggarwal, (2016) 290 CTR 263: 2016 SCC OnLine

Del 1512. This case was subsequently referred to a larger bench in the case of CIT v. M.S. Aggarwal (ITA 169/2005), where subsequently

the question was not answered as the referral court dismissed the same on account of law tax effect on 9th August 2019. Thus, the decision

in Harjeev Aggarwal (supra) continues to be the prevailing legal position.]“

9. In Commissioner of Income Tax v. Harjeev Aggarwal, [Commissioner of Income Tax v. Harjeev Aggarwal, (2016) 290 CTR 263: 2016 SCC

OnLine Del 1512. This case was subsequently referred to a larger bench in the case of CIT v. M.S. Aggarwal (ITA 169/2005), where subsequently

the question was not answered as the referral court dismissed the same on account of law tax effect on 9th August 2019. Thus, the decision in

Harjeev Aggarwal (supra) continues to be the prevailing legal position.] this Court had held as follows:

“23. In view of the settled legal position, the first and foremost issue to be addressed is whether a statement recorded under Section

132(4) of the Act would by itself be sufficient to assess the income, as disclosed by the Assessee in its statement, under the Provisions of

Chapter XIV-B of the Act.

24. In our view, a plain reading of Section 158BB(1) of the Act does not contemplate computing of undisclosed income solely on the basis of

a statement recorded during the search. The words “evidence found as a result of search” would not take within its sweep statements

recorded during search and seizure operations. However, the statements recorded would certainly constitute information and if such

information is relatable to the evidence or material found during search, the same could certainly be used in evidence in any proceedings

under the Act as expressly mandated by virtue of the explanation to Section 132(4) of the Act. However, such statements on a standalone

basis without reference to any other material discovered during search and seizure operations would not empower the AO to make a block

assessment merely because any admission was made by the Assessee during search operation.

25. (i) However, as stated earlier, a statement on oath can only be recorded of a person who is found in possession of books of accounts,

documents, assets, etc. Plainly, the intention of the Parliament is to permit such examination only where the books of accounts, documents

and assets possessed by a person are relevant for the purposes of the investigation being undertaken. Now, if the provisions of Section

132(4) of the Act are read in the context of Section 158BB(1) read with Section 158B(b) of the Act, it is at once clear that a statement

recorded under Section 132(4) of the Act can be used in evidence for making a block assessment only if the said statement is made in the

context of other evidence or material discovered during the search. A statement of a person, which is not relatable to any incriminating

document or material found during search and seizure operation cannot, by itself, trigger a block assessment. The undisclosed income of an

Assessee has to be computed on the basis of evidence and material found during search. The statement recorded under Section 132(4) of

the Act may also be used for making the assessment, but only to the extent it is relatable to the incriminating evidence/material unearthed or

found during search. In other words, there must be a nexus between the statement recorded and the evidence/material found during search

in order to for an assessment to be based on the statement recorded.

26. In CIT v. Sri Ramdas Motor Transport Ltd., (1999) 238 ITR 177 (AP,)a Division Bench of Andhra Pradesh High Court, reading the

provision of Section 132(4) of the Act in the context of discovering undisclosed income, explained that in cases where no unaccounted

documents or incriminating material is found, the powers under Section 132(4) of the Act cannot be invoked. (Ã¢â¬Å!)

27. It is also necessary to mention that the aforesaid interpretation of Section 132(4) of the Act must be read with the explanation to Section

132(4) of the Act which expressly provides that the scope of examination under Section 132(4) of the Act is not limited only to the books of

accounts or other assets or material found during the search. However, in the context of Section 158BB(1) of the Act which expressly

restricts the computation of undisclosed income to the evidence found during search, the statement recorded under Section 132(4) of the Act

can form a basis for a block assessment only if such statement relates to any incriminating evidence of undisclosed income unearthed

during search and cannot be the sole basis for making a block assessment.

28. If the Revenue's contention that the block assessment can be framed only on the basis of a statement recorded under Section 132(4) is

accepted, it would result in ignoring an important check on the power of the AO and would expose assesseees to arbitrary assessments based

only on the statements, which we are conscious are sometimes extracted by exerting undue influence or by coercion. Sometimes statements

are recorded by officers in circumstances which can most charitably be described as oppressive and in most such cases, are subsequently

retracted. Therefore, it is necessary to ensure that such statements, which are retracted subsequently, do not form the sole basis for

computing undisclosed income of an assessee.

29. In Commissioner of Income Tax v. Naresh Kumar Aggarwal: (2014) 3699 ITR 171 (T & AP), a Division Bench of Telangana and Andhra

Pradesh High Court held that a statement recorded under Section 132(4) of the Act which is retracted cannot constitute a basis for an order

under Section 158BC of the Act. (Ã¢â‚¬Å¡)Ã¢â‚¬Å¡

10. Now, coming to the aspect viz the invocation of section 153A on the basis of the statement recorded in search action against a third person. We

may note that the AO has used this statement on oath recorded in the course of search conducted in the case of a third party (i.e., search of Pradeep

Kumar Jindal) for making the additions in the hands of the assessee. As per the mandate of Section 153C, if this statement was to be construed as an

incriminating material belonging to or pertaining to a person other than person searched (as referred to in Section 153A), then the only legal recourse

available to the department was to proceed in terms of Section 153C of the Act by handing over the same to the AO who has jurisdiction over such

person. Here, the assessment has been framed under section 153A on the basis of alleged incriminating material (being the statement recorded under

132(4) of the Act). As noted above, the Assessee had no opportunity to cross-examine the said witness, but that apart, the mandatory procedure

under section 153C has not been followed. On this count alone, we find no perversity in the view taken by the ITAT. Therefore, we do not find any

substantial question of law that requires our consideration.

11. Accordingly, the present appeals, along with all pending applications, are dismissed.