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

+ ITA 850/2019

COMMISSIONER OF INCOME TAX (EXEMPTION), NEW
DELHI

..... Appellant

Through: Mr. Ajit Sharma, Senior Standing
Counsel with Ms. Adeeba Mujahid,
Junior Standing Counsel.
Mr. Ashutosh Senger and Mr. Rishab
Sharma, Advocates.

versus

U. P. DISTILLERS ASSOCIATION

..... Respondent

Through: Mr. S. Krishnan, Advocate.

+ ITA 851/2019

COMMISSIONER OF INCOME TAX (EXEMPTION), NEW
DELHI

..... Appellant

Through: Mr. Ajit Sharma, Senior Standing
Counsel with Ms. Adeeba Mujahid,
Junior Standing Counsel.
Mr. Ashutosh Senger and Mr. Rishab
Sharma, Advocates.

versus

U. P. DISTILLERS ASSOCIATION

..... Respondent

Through: Mr. S. Krishnan, Advocate.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE SANJEEV NARULA

ORDER

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23.09.2019

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C.M. No. 42491/2019 in ITA 850/2019 & C.M. No. 42492/2019 in ITA 851/2019 (delay)

1. By these applications, the applicant seeks condonation of delay of 76 days in filing both the applications. For the reasons stated in the applications, the delay is condoned.
2. The applications stand disposed of in the aforesaid terms.

ITA 850/2019 & ITA 851/2019

3. The present appeals have been filed by the Revenue assailing the order dated 14.12.2018 passed by the Income Tax Appellate Tribunal, Delhi 'E' Bench, New Delhi passed by the ITAT in respect of ITA 3208/Del/2013 for the assessment year 2005-06 and in ITA No. 2576/Del/2010 for the assessment year 2003-04, whereby the Tribunal has allowed the appeals preferred by the Respondent/assessee and set aside the additions made by the Assessing Officer in the income of the Respondent/assessee trust.

4. A search and seizure operation under section 132 of the Act was carried out at the premises of the assessee and at the residence of Sh. RK Miglani, Secretary General of the assessee society on 14.02.2006, from where various incriminating documents relating to the assessee society were seized. Subsequently, assessment was completed u/s 153A vide order dated 28.12.2007 at Rs. 45,21,43,413/- (against loss of Rs. (-) 73,354/- in the status of AOP) in view of AO's findings that the activities of UPDA were not charitable in nature and were, in fact in infringement of law and in complete violation of public policy. The AO made additions of Rs.45,22,04,401 /- on account of unexplained receipts recorded in the

documents/books of account found and seized from the premises of the assessee and residence of Shri R. K. Miglani. He relied on the statement of Shri Miglani recorded u/s 132(4) of the Act wherein he had himself admitted that he was working as Secretary General of UPDA and the entries appearing in the seized documents were in respect of amounts paid by members of UPDA for the purpose of making illegal payments to politicians/public servants as mentioned in the said documents. Ld. CIT (A)-33, vide order dated 18.02.2013 (in Appeal No. 354/07-08/101) dismissed the appeal of the assessee confirming the addition of Rs. 45.22 crores as unaccounted revenue receipts in the hands of the assessee which is not applied to the objects of society. Ld. CIT(A) further held that the unaccounted receipt of Rs. 45.22 crore is not exempt u/s 11 as activities of UPDA were not charitable in nature and were, in fact, in infringement of law and in complete violation of public policy.

5. Ld. Tribunal vide its common order for AYs 2001-02 to 2007-08 dated 14.12.2018 in ITA 3208/Del/2013 allowed the appeals of the assessee holding that the assessment framed u/s 153A of the Act was bad in law, as no search u/s 132 of the Act was carried out at the premises of the assessee and deleted the addition of Rs. 45.22crores made by the AO on account of unexplained credit entries recorded in the seized documents and denial of exemption u/s 11 of the Act. Hence, the present appeal.

6. The admitted position on facts, as emerging from the record, is that no search under Section 132 of the Act was conducted in the premises of the Respondent/assessee. Merely a survey under Section 133A was conducted.

Consequently, invocation of Section 153A was not warranted, which led to the assessment order being framed making additions in the income of Respondent/assessee on the basis of documents recovered which, purportedly, showed cash receipts by the Respondent/assessee from its members. The assessment was made by the Assessing Officer on the basis of the said purported cash receipts found in the documents upon conduct of survey under Section 133A of the Act against the assessee, and upon conduct of search under Section 132 on the premises of the Secretary of the Respondent Trust, Shri R. K. Miglani, and on the basis of the statement attributed to him. The relevant findings returned by the Tribunal in the impugned order read as follows:

“199. If the search warrant was never executed at the premises of the assessee, it leads to only one conclusion that the assessee was never searched. If the assessee was never searched u/s 132 of the Act, assessments framed u/s 153A of the Act are bad in law because provisions of section 153A provides for assessment in case of search or requisition.”

7. In respect of the additions sought to be made under Section 68 of the Act, the Tribunal observed as follows:

“209. Adverting to the facts relating to the additions made u/s 68 of the Act, we must first understand the precondition for invoking the provisions of section 68 of the Act and the precondition is that where any sum is found credited in the books of the assessee maintained for any previous year. No such entries are found -in the books of the assessee. What was found was merely notings in loose papers/spiral bound diaries. Whether entries in loose sheets can be construed as entries in the books of account, the Hon'ble Supreme Court in the cases of Common Cause, A Registered Society Vs. UOI 394 ITR 220 wherein the Hon'ble

Supreme Court considered the following facts:

"Raids were conducted on the Birla and Sahara Group of Companies and incriminating materials in form of random sheets and loose papers, computer prints, hard disk, pen drives etc. were found. Evidence of certain highly incriminating money transactions were also found.

- *Question arises as to whether a case was made out on the basis of above materials, to constitute Special Investigation Team (SIT) and direct investigation against the various functionaries/officers and further monitor the same?*
- *Loose sheets of papers are wholly irrelevant as evidence being not admissible under section 34 so as to constitute evidence with respect to the transactions mentioned therein being of no evidentiary value. The entire prosecution based upon such entries which led to the investigation was quashed by this Court. [Para 20]*
- *The Court has to be on guard while ordering investigation against any important constitutional functionary, officers or any person in the absence of some cogent legally cognizable material. When the material on the basis of which investigation is sought is itself irrelevant to constitute evidence and not admissible evidence, whether it would be safe to even initiate investigation? In case it is done, the investigation can be as against any person whosoever high in integrity on the basis of irrelevant or inadmissible entry falsely made, by any unscrupulous person or business house that too not kept in regular books of account but on random papers at any given point of time. There has to be some relevant and admissible evidence and some cogent reason, which is prima facie reliable and that too, supported by some other circumstances pointing out that the particular third person against whom the allegations have been levelled was in fact involved in the matter or he has done some act during that period, which may have co-relations with the random entries. In case all these are not insisted, the*

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process of law can be abused against all and sundry very easily to achieve ulterior goals and then no democracy can survive in case investigations are lightly set in motion against important constitutional functionaries on the basis of fictitious entries, in absence of cogent and admissible material on record, lest liberty of an individual be compromised unnecessarily. The materials which have been placed on record either in the case of Birla or in the case of Sahara are not maintained in regular course of business and thus lack in required reliability to be made the foundation- of a police investigation. [Para-21]

- *In case of Sahara, in addition there is adjudication by the Income Tax Settlement Commission. The order has been placed on record. The Settlement Commission has observed that the scrutiny of entries on loose papers, computer prints, hard disk, pen drives etc. have revealed that the transactions noted on documents were not genuine and have no evidentiary value and that details in these loose papers, computer print outs, hard disk and pen drive etc. do not comply with the requirement of the Indian Evidence Act and are not admissible evidence. It further observed that the department has no evidence to prove that entries in these loose papers and electronic data were kept regularly during the course of business of the concerned business house and the fact that these entries were fabricated, non-genuine was proved. It held as well that the PCIT/DR have not been able to show and substantiate the nature and source of receipts as well as nature and reason of payments and have failed to prove evidentiary value of loose papers and electronic documents within the legal parameters. The Commission has also observed that department has not been able to make out a clear case of taxing such income in the hands of the applicant firm on the basis of these documents. [Para 22]*
- *It is apparent that the Commission has recorded a finding that transactions noted in the documents were not genuine and thus has not attached any evidentiary value to the pen drive, hard disk, computer loose papers, computer printouts. [Para 23]*

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- *Since it is not disputed that for entries relied on in these loose papers and electronic data were not regularly kept during course of business, such entries were discussed in the order passed in Sahara's case by the Settlement Commission and the documents have not been relied upon the Commission against assessee and thus such documents have no evidentiary value against third parties. On the basis of the materials which have been placed on record, it is opined that no case is made out to direct investigation against any of the persons named in the Birla's documents or in the documents of Sahara. [Para 24]*
- *In the case of State of Haryana v. Bhajan Lal 1992 Supp (I) SCC 335, this Court has laid down principles in regard to quashing the F.I.R. The Court can quash FIR also if situation warrant even before investigation takes place in certain circumstances. This Court has laid down thus:*

(8) Where the allegations made in the first information report of the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(9) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under section 156(1) of the Code except under an order of a Magistrate within the purview of section 155(2) of the Code.

(10) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(11) Where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated u/s 155(2) of the Code.

(12) *Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.*

(13) *Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.*

(14) *Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.*
[Para 26]

- *Considering the aforesaid principles which have been laid down, it is opined that the materials in question are not good enough to constitute offences to direct the registration of FIR and investigation therein. The materials should qualify the test as per the aforesaid decision. The complaint should not be improbable and must show sufficient ground and commission of offence on the basis of which registration of a case can be ordered. The materials in question are not only irrelevant but are also legally inadmissibly under section 34 of the Evidence Act, more so with respect to third parties and considering the explanation which have been made by the Birla Group and Sahara Group, it is opined that it would not be legally justified, safe, just and proper to direct investigation. [Para 27]”*

8. Therefore, the Tribunal has rejected reliance placed by the Revenue on some loose papers/spiral bound diaries, by placing reliance on Common Cause (supra). In these circumstances, we are of the view that no question of law arises for consideration in the present appeals, and the same are,

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accordingly, dismissed.

VIPIN SANGHI, J

SANJEEV NARULA, J

SEPTEMBER 23, 2019

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