

\$~S-42 & 43

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

+ ITA 458/2022

PR. COMMISSIONER OF INCOME TAX-7 Appellant

Through: Mr.Puneet Rai, Sr.Standing Counsel
with Ms.Adeeba Mujahid, Jr.Standing
Counsel and Mr.Nikhil Jain,
Advocate.

versus

SURYA FRESH FOODS PVT. LTD. Respondent

Through: Mr.Satyen Sethi, Advocate.

+ ITA 459/2022

PR. COMMISSIONER OF INCOME TAX-7 Appellant

Through: Mr.Puneet Rai, Sr.Standing Counsel
with Ms.Adeeba Mujahid, Jr.Standing
Counsel and Mr.Nikhil Jain,
Advocate.

versus

SURYA FRESH FOODS PVT. LTD. Respondent

Through: Mr.Satyen Sethi, Advocate.

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Date of Decision: 17th November, 2022

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

Signature Not Verified

Digitally Signed By: ASWANT
SINGH RAWAT
Signing Date: 18.11.2022
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J U D G M E N T

MANMOHAN, J (Oral):

CM APPL.49062/2022 (exemption) in ITA 458/2022

CM APPL.49240/2022 (exemption) in ITA 459/2022

Allowed, subject to all just exceptions.

Accordingly, the applications stand disposed of.

CM APPL.49063/2022 in ITA 458/2022

CM APPL.49241/2022 in ITA 459/2022

Keeping in view the averments in the applications, the delay in filing the appeals is condoned.

Accordingly, the applications stand disposed of.

ITA 458/2022

ITA 458/2022

Present Income Tax Appeals have been filed challenging the Order dated 11th January, 2022 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA No.4971/Del/2017 for the Assessment Year 2009-10 and ITA No.4972/Del/2017 for the Assessment Year 2010-11.

Learned counsel for appellant states that the ITAT has erred in law in holding that additions under Section 153A of the Income Tax Act, 1961 ('the Act') cannot be made without incriminating material gathered during the course of search even though there is no legal requirement in law that incriminating material must be found during search. He submits 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 SLPs on similar issue are pending before the Supreme Court.

He further states that the ITAT has erred in deleting the additions made by the Assessing Officer on account of deductions under Section 80IB

of the Act.

Upon perusal of the paper book, this Court finds that the ITAT upheld the findings of the CIT-(A) that the additions made in the present appeals were not based on any material incriminating or otherwise recovered in the course of search action. The relevant extract of the impugned order is reproduced hereinbelow:

“ 8. We have carefully considered the rival submissions and the legal ground raised. It is a matter of record that the assessment concerning Assessment Years 2009-10 and 2010-11 stood concluded and were not pending at the time of search. Hence, the CIT(A) has rightly applied the position of law governing the field that while making the assessment under Section 153A of the Act, the Revenue is not entitled to interfere with already concluded (and not abated) assessment passed either under Section 143(1) or under Section 143(3) of the Act and not pending at the time of search, in the absence of any incriminating documents unearth, as a result of search. This legal position is affirmed and answered in favour of the assessee by large number of judicial precedents of different jurisdiction..”

This Court finds that the conclusion reached in ***Kabul Chawla*** (supra) has been summarized in ***PCIT vs. Meeta Gutgutia***, (2017) 82 ***taxmann.com*** 287 ***Del.*** The relevant portion of the judgment passed in ***PCIT vs. Meeta Gutgutia*** (supra) 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."

Even, this Court in ***Principal Commissioner of Income Tax vs. Bhadani Financiers Pvt. Ltd., 2021 SCC OnLine Del 4430*** has held that where the assessment of the respondents have attained finality prior to the date of search and no incriminating documents or materials had been found and seized at the time of search, no addition could be made under Section

153A of the Act as the cases of the respondents were of non-abated assessment.

Though the issue involved in *Kabul Chawla* (supra) has been challenged and is pending adjudication before the Supreme Court, yet there is no stay of the said judgment till date.

Consequently, in view of the judgments passed by 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 present appeals are covered by the judgments passed by this Court in *Bhadani Financiers Pvt. Ltd.* (supra) and *Kabul Chawla* (supra).

Accordingly, no substantial question of law arises in the present appeals and the same along with applications are dismissed.

MANMOHAN, J

MANMEET PRITAM SINGH ARORA, J

NOVEMBER 17, 2022/TS