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

% *Judgment reserved on: 04.12.2023*
Judgment pronounced on: 08.12.2023

\+ **ITA 680/2023**

PRINCIPAL COMMISSIONER OF INCOME TAX -CENTRAL -1
..... Appellant

Through: Mr Ruchir Bhatia, Sr. Standing Counsel with Ms Deeksha Gupta, Advocate.

versus

OXYGEN BUSINESS PARK PVT. LTD (FORMERLY KNOWN AS ACHVIS SOFTECH PVT. LTD.) ..... Respondent

Through: Mr Ajay Vohra, Sr. Advocate with Mr Rohit Jain, Mr Aniket D. Agrawal and Mr Samarth Chaudhari, Advocates.

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER
HON'BLE MR. JUSTICE GIRISH KATHPALIA
[Physical Hearing/Hybrid Hearing (as per request)]

GIRISH KATHPALIA, J.:

1. By way of this appeal brought under Section 260A of the Income Tax Act, the appellant/revenue has assailed order dated 28.06.2021 of the Income Tax Appellate Tribunal, whereby appeal bearing No. ITA 7826/Del/2018 filed by the revenue against the assessee (*respondent herein*) pertaining to the Assessment Year 2011-12 was dismissed. On advance notice, the respondent/assessee entered appearance through counsel. We heard learned counsel for both sides.

2. The appellant/revenue has proposed in this appeal the following questions as substantial questions of law:

> *2.1 Whether the scope of assessment under section 153A extends to income unearthed on the basis of statements recorded during post search proceedings?*
>
> *2.2 Whether the decision in the case of CIT Vs Kabul Chawla (2015) 61 Taxman.com 412 (Del) applies to a case where a fresh material/information received after the date of search is sufficient to reopen the assessment under section 153A [see Dr. A.V. Sreekumar Vs CIT (2018) 90 taxman.com 355]?*

However, after preliminary hearing held on 04.12.2023, learned counsel for appellant/revenue stated that the proposed question No. 2.1 is not pressed for the time being. That being so, we have examined only the proposed question No. 2.2.

3. Briefly stated, circumstances relevant for present purposes are as follows. The respondent/assessee was engaged in development of Special Economic Zone (SEZ) for information technology enabled services in Noida, U.P. On 30.09.2011, the respondent/assessee filed its return of income for the Assessment Year 2011-12 and the same was processed under Section 143(1) of the Act. Thereafter, on 29.10.2013, search and seizure action under Section 132 of the Act was carried out at the premises of the respondent/assessee and accordingly, notice dated 11.11.2014 under Section 153A of the Act was issued, calling upon the respondent/assessee to file return of income consequent to the search action. On 22.03.2016, the respondent/assessee requested the appellant/revenue to treat the original

return of income as the return filed in response to notice under Section 153A of the Act. In the said return of income, the respondent/assessee had declared net profit of Rs.1,55,13,39,200/- and the same was claimed as deduction under Section 80IAB of the Act. The Assessing Officer disallowed the deduction claimed under Section 80IAB of the Act to the extent of Rs.13,30,50,000/- and added back the same to the income declared in the return of income. Further, the Assessing Officer also initiated penalty proceedings under Section 271(1)(c) of the Act against the respondent/ assessee. Feeling aggrieved, the respondent/assessee challenged the said order of the Assessing Officer by way of appeal before the Commissioner of Income Tax (Appeals). In the course of appellate proceedings before CIT(A), the respondent/assessee raised additional ground contending that since no incriminating material belonging to the assessee was found during the course of the said search proceedings, initiation of proceedings under Section 153A of the Act was bad in law, especially because the assessment proceedings stood closed under Section 143(1) of the Act. Vide order dated 27.09.2018, CIT(A) partly allowed the said appeal, including the said additional ground, holding that according to the settled legal position, invocation of Section 153A by revenue would not be sustainable in law where no incriminating material pertaining to the assessee was recovered during the search action. The appellant/revenue assailed the said order of CIT(A) by way of appeal before the Tribunal, which appeal was dismissed by way of the impugned order. Hence, the present appeal.

4. As mentioned above, in the course of preliminary hearing learned counsel for the appellant/revenue did not press the proposed question No.

2.1 and opted to confine this appeal only to the extent as to whether the decision of this court in the case titled ***CIT vs Kabul Chawla,*** (2015) 61 taxmann.com 412 (Del) would apply also to a case where fresh material or information is received after the date of search and consequently sufficient to reopen the assessment under Section 153A of the Act as laid down in the case titled ***Dr. A.V. Sreekumar vs CIT,*** (2018) 90 taxmann.com 355. On this aspect, learned counsel for appellant/revenue submitted that although during the search action, no incriminating material against the respondent/assessee was recovered, but subsequently statement of the valuer Shri B.P. Singh was recorded in post-search proceedings, which formed the basis of disallowance of deduction claimed under Section 80IAB of the Act. With the help of judgment in the case of ***Dr. A.V. Sreekumar*** (supra), learned counsel for appellant/revenue contended that statement of Shri B.P. Singh, though recorded in post-search proceedings, can be the basis of initiation of proceedings under Section 153A of the Act.

5. So far as legal position is concerned, the decision of this court in the case of ***Kabul Chawla*** (supra) was upheld by the Supreme Court in the case of ***PCIT vs Abhisar Buildwell Pvt. Ltd.***, (2023) SCC OnLine SC 481. The issue as to whether the Assessing Officer can consider all material that is available on record, including that found during the search and make an assessment of total income was considered by different High Courts, taking divergent views. Some of the High Courts, including this court took a view that where no assessment proceedings are pending on the date of initiation of search, the Assessing Officer may consider only the incriminating material found during the search and is precluded from considering any

other material derived from any other source.

6. In the case of ***Kabul Chawla*** (supra), after detailed discussion, this court held thus:

> *"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 153A(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 153A 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".

7. After examining the views of different High Courts, the Supreme Court in the case of ***Abhisar Buildwell*** (supra) approved of the view taken by this court in the case of ***Kabul Chawla*** (supra) and held thus:

"22. For the reasons stated hereinabove, we are in complete agreement with the view taken by the Delhi High Court in the case of Kabul Chawla (supra) and the Gujarat High Court in the case of Saumya Construction (supra) and the decisions of the other High Courts taking the view that no addition can be made in respect of the completed assessments in absence of any incriminating material.

23. In view of the above and for the reasons stated above, it is concluded as under:

i) that in case of search under Section 132 or requisition under Section 132A, the AO assumes the jurisdiction for block assessment under section 153A;

ii) all pending assessments/reassessments shall stand abated;

iii) in case any incriminating material is found/unearthed, even, in case of unabated/completed assessments, the AO would assume the jurisdiction to assess or reassess the 'total income' taking into consideration the incriminating material unearthed during the search and the other material available with the AO including the income declared in the returns; and

iv) in case no incriminating material is unearthed during the search, the AO cannot assess or reassess taking into consideration the other material in respect of completed assessments/unabated assessments. Meaning thereby, in respect of completed/unabated assessments, no addition can be made by the AO in absence of any incriminating material found during the course of search under Section 132 or requisition under Section 132A of the Act, 1961. However, the completed/ unabated assessments can be re-opened by the AO in exercise of powers under Sections 147/148 of the Act, subject to fulfilment of the conditions as envisaged/

mentioned under sections 147/148 of the Act and those powers are saved".

8. The case of ***Dr. A.V. Sreekumar*** (supra), relied upon heavily by the appellant/revenue is completely distinguishable in the sense that in the said case, the material considered in addition to the material unearthed during search action was the documents received by the revenue through Tax Evasion Petition (TEP), filed prior to the search; and that one of the contentions was that the said documents received by the revenue through Tax Evasion Petition could not be relied upon to make additions since the same were not seized in the search conducted. The Kerala High Court in the said case, expressing agreement with the aforesaid legal proposition laid down by this court, observed that the case before it stood on different footing insofar as the said documents received by the revenue prior to search action were incriminating material by themselves, which led to initiation of search action. That is not the case in the present matter. In the present matter, admittedly, the assessment for the Assessment Year 2011-12 was finalized on 20.01.2012 and no notice under Section 143(2) of the Act was issued, as such no assessment was pending on the date of search action i.e. 29.10.2013. Also admittedly, in the present case, during the search action against the respondent/assessee no incriminating material was found and the material in the form of statement of Shri B.P. Singh now sought to be relied upon by the appellant/revenue was recorded subsequent to the search action. Therefore, the proposed question of law numbered 2.2 in the memo of appeal cannot be admitted as substantial question of law.

9. In view of the aforesaid, we are unable to find any substantial question of law in this appeal for our consideration under Section 260A of the Act.

10. Therefore, the appeal is dismissed.

GIRISH KATHPALIA
(JUDGE)

RAJIV SHAKDHER
(JUDGE)

DECEMBER 08, 2023/as