

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'E' NEW DELHI
BEFORE SHRI G. D. AGRAWAL, VICE PRESIDENT
AND
SMT SUCHITRA KAMBLE, JUDICIAL MEMBER
I.T.A .No.-1347/DEL/2014
(ASSESSMENT YEAR-2004-05)**

Mahesh Kumar Gupta 47, Shardhanand Marg Delhi AAGPG8365G (APPELLANT)	Vs	CIT(A) Central-1 New Delhi (RESPONDENT)
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Appellant by	Sh. Niren Gupta, CA
Respondent by	Ms. Sulekha Verma, CIT DR

Date of Hearing	21.04.2016
Date of Pronouncement	08 .06.2016

ORDER

PER SUCHITRA KAMBLE, JM

This appeal is filed by the assessee against the order dated 17/02/2014 passed by CIT(A)- New Delhi.

2. The grounds of appeal are as under:-

- “1. (i) That the CIT has wrongly assumed jurisdiction u/s 263 as the order passed u/s 153A with the approval of Joint Commissioner u/s 153D ceases to be an order of the Assessing Officer as mentioned in Sec 263(1). The order of the CIT be cancelled as being without jurisdiction.

- (ii) *That the CIT has wrongly relied upon Section 263(1) Explanation (a) (i) to assume jurisdiction which is inapplicable.*
2. *That the CIT was wrong to direct the examination of taxability of the deemed dividend in the proceedings u/s 153A wrongly widening the scope of Sec 153A as it was not a material found on the basis of search. The direction be quashed.*
3. (i) *That the CIT was wrong to treat the comments of the Hon'ble High Court which Assessment Year in the nature of obiter as binding precedent. The CIT was wrong to make it as a basis for passing the order u/s 263.*
- (ii) *That the CIT has wrongly relied on 20,000/- Sec 263 proceedings of Jakson Generators (P) Ltd. which is not a part of the records of the assessee. The same be excluded from consideration.*
4. *That the CIT was wrong to give a wide meaning to the word 'record' as contained in Sec 263 Explanation (b) and has wrongly taken into consideration statement of accounts which are not a part of the record of the assessee. The inference drawn in unwarranted & may be excluded from consideration.*
5. *That the order u/s 263 being contrary to law be quashed.*

3. In this case search u/s 132(1) of the Income Tax Act, 1961 was conducted on 10/2/2010 as part of Jaksons Generator Group of cases. During the search, undisclosed income of Rs. 19.94 crore was found which was surrendered by Shri S. K. Gupta. Assessment Proceedings in the case were initiated by issuing notice u/s. 153A dated 12.11.2010 which was duly served on the assessee. In response to notice u/s. 153A return declaring income of Rs.

6,09,677 was filed on 9.2.2011. During the year under consideration the assessee was a director in the Company Jackson Generators (P) Ltd. The company is engaged in the manufacture and sale of Gen Sets. He is also partner in the firm M/s. Jackson & Co. having 33% shares in the Profit & Loss a/c. The firm is engaged in the manufacturing and sale of Gen Sets and trading in Motors, Engines etc. During the year under consideration assessee has received salary from Jackson Generators (P) Ltd. Assessee also shown income from property, business and income from long term capital gains etc. The assessment u/s 143(3) r.w.s. 153A was completed on 9/12/2011 by assessing income at Rs. 6,09,677/-.

4. The Commissioner of Income Tax, Central – I, New Delhi observed that the assessee, Shri Mahesh Kumar Gupta is shareholder/director of M/s Jakson Generator (P) Ltd., holding substantial shareholding of more than 43.19% in the company and he is also partner in M/s. Jakson & Co. having sharing profit of 30% in the firm. Further, the CIT observed that M/s Jakson & Co. has taken loan of Rs.1,72,15,824/- from M/s Jakson Generator Pvt..Ltd.- which ought to be fixed as deemed dividend u/s 2(22) (e) of the Income Tax Act, 1961 in the hand of Shri Mahesh Kumar Gupta-as this transfer of loan attracts the provision of 2(22) (e) of the Act as any payment by a company (not being a company in which public are substantial interested) to a shareholder holding not less than 10% voting power as to any concern in which such shareholder is partner (holding substantial shareholding 20%). As the above amount was not considered for taxation at the time of

assessment proceedings u/s 143(3) r.w.s 153A of the Act on 9/12/2011, the assessment order for the Assessment Year 2004-05 is found to be erroneous in so far as prejudicial to the interest of revenue being the Assessing Officer has made omission of ignoring the provisions of deemed dividend amounting to Rs.1,72,15824/-.

5. Accordingly, notice u/s 263 of the I.T. Act, 1961 was issued to the assessee on 5/8/2013 apprising him of the issue relating to the transaction of loan/advance received by M/s Jakson & Co. of Rs.1,72,15,824/- from M/s Jakson Generator Pvt. Ltd which is to be taxed as deemed dividend u/s 2(22) (e) of the I.T Act as the loan granted by M/s Jakson Generator Pvt. Ltd to M/s Jakson & Co. was treated as advancement of loan by a company in which the substantial shareholding i.e. Shri Mahesh Kumar Gupta holds 43.19% shares in M/s Jakson Generator Pvt. Ltd and also controls M/s Jakson & Co. by holding 30% profit sharing and to showcase as to why the provision of section 263 of the I.T Act shall not be invoked in the case.

6. In response to the show cause notice u/s 263 of the I.T Act the assessee filed replies raising objections that copy of account of M/s Jakson Generators Pvt. Ltd in the books of Jakson & Co. was not filed in the case of the assessee Sh. M. K. Gupta and it cannot form part of assessment record of the assessee. The assessee also stated that when he has not taken loan/advances, loan taken by M/s Jakson & Co. from M/s Jakson Generators Pvt. Ltd has been squared off. The invocation of provision of Section 263 of the Act

is not properly justified when Assessment order was passed u/s 1143(3) r.w.s. 153A of the Act with the approval of Joint Commissioner of Income Tax. Thus the CIT's finding that it will attract Section 2(22)(e) of the Act is not correct.

7. The CIT held that he is satisfied that the order passed by the Assessing Officer is erroneous in so far as it is prejudicial to the interest of the revenue and hence the same is set aside. The CIT directed the Assessing Officer to examine the taxability of the amount of Rs. 1,72,15,824/- in the hands of the assessee u/s 2(22)(e) of the I. T. Act, 1961.

8. The assessee is before us in the present appeal.

9. The Ld. AR has not pressed Ground No. 1, 3, 4 & 5 and only contested Ground No. 2 of the appeal. Hence Ground No. 1, 3, 4 and 5 are dismissed.

10. The Ld. AR submitted that the CIT was wrong to direct the examination of taxability of the deemed dividend in the proceedings u/s 153A of the Act. Thus, wrongly widen the scope of Section 153A of the Act as it was not a material found on the basis of search. The Ld. AR relied upon the order of ITAT New Delhi in case of Shri Kabul Chawla Vs. ACIT (ITA No. 779/DEL/2013 dated 23.05.2014, New Delhi).

11. The Ld. DR submitted that CIT under Section 263 of the Act has properly invoked his powers. The Ld. DR relied upon the order of ITAT New Delhi in case of Shri Kabul Chawla Vs. ACIT (ITA No.

779/DEL/2013 dated 23.05.2014, New Delhi) as well as the Hon'ble Delhi High Court decision in case of CIT Vs. Ankitech Pvt. Ltd. 340 ITR 14. The said case laws dealt with the issue that where loans and advances are given in normal course of business and transaction in question benefits both payer and payee companies, provisions of Section 2(22)(e) cannot be invoked.

12. We have perused all the records and heard both the parties. The search under Section 132(1) took place in Jaksons Group of cases and the Assessment Order was passed under Section 143 r.w.s. 153A of the Act. In case of Kabul Chawla (supra), Hon'ble Delhi High Court held in para 37 and para 38 as under:

“37. On a conspectus of Section 153A(1) of the Act, read with the proviso 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 the absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made. The word ‘assesss’ in Section 153A 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 153A 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.

Conclusion

38. The present appeals concern AYs 2002-03, 2005-06 and 2006-07. On the date of the search the said assessments already stood completed. Since no incriminating material was unearthed during the search, no additions could have been made to the income already assessed.”

The Clause (iv) above, the Hon'ble High Court held that "obviously an assessment has to be made under this Section only on the basis of seized material". In clause (v), the same is reiterated by holding "In absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made". In clause (vii), it is stated "Completed assessments can be interfered with by the AO while making the assessment under Section 153A only on the basis of some incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be reiterated and the abated assessment or reassessment can be made". In clause (vii), it is stated "Completed assessments can be interfered with by the AO while making the assessment under Section 153A only on the basis of some incriminating material unearthed during the course of search".

Thus, in present case the issue of deemed dividend does not arise from the provisions of Section 153A of the Act and there is no seized material unearthed at the relevant time. Thus it is beyond Assessing Officer's power to address the said issue in proceedings initiated under Section 143(3) read with Section 153A of the Act. The CIT was wrong in directing the examination of taxability of deemed dividend under Section 2(22)(e) of the Act, in the proceedings u/s 153A of the Act while passing order under Section 263 of the Act when the proceedings under Section 153A itself has not unearthed the said issue. Thus, the CIT do not have power under Section 263 of the Act to give its own opinion when there is

no new material unearthed. The issue taken up by the CIT was not within the purview of the Assessing Officer at the inception of assessment proceedings.

13. In the result, appeal of the Assessee is allowed.

The order is pronounced in the open court on 08th of June, 2016.

Sd/-

**(G. D. AGRAWAL)
VICE PRESIDENT**

Dated: 08/06/2016

*R. Naheed **

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Sd/-

**(SUCHITRA KAMBLE)
JUDICIAL MEMBER**

ASSISTANT REGISTRAR

ITAT NEW DELHI

		Date	
1.	Draft dictated on	21/04/2016	PS
2.	Draft placed before author	22/04/2016	PS
3.	Draft proposed & placed before the second member	.2016	JM/AM
4.	Draft discussed/approved by Second Member.		JM/AM

5.	Approved Draft comes to the Sr.PS/PS	08.06.2016	PS/PS
6.	Kept for pronouncement on		PS
7.	File sent to the Bench Clerk	08.06.2016	PS
8.	Date on which file goes to the AR		
9.	Date on which file goes to the Head Clerk.		
10.	Date of dispatch of Order.		