Ashwani Talwar, New Delhi vs Dcit, Noida on 29 June, 2021

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI "A" BENCH: NEW DELHI

(THROUGH VIDEO CONFERENCING)

BEFORE SHRI G.S. PANNU, VICE PRESIDENT AND
SHRI KUL BHARAT, JUDICIAL MEMBER

ITA Nos.3153 to 3155/Del/2017
Assessment Years : 2004-05 to 2006-07

Ashwani Talwar,	DCIT,
Advocate Deepak Kapoor,	Vs Central Circle, 2nd Floor,
59, Nehru Apartments,	Arto Complex, Sector-33,
Outer Ring Road,	Noida.
Kalkaji, New Delhi-110019.	
PAN-AAAPT0920E	
APPELLANT	RESPONDENT
Appellant by	Sh.Deepak Kapoor, Adv.
Respondent by	Sh.Satpal Gulati, CIT DR
Date of Hearing	30.03.2021
Date of Pronouncement	29.06.2021

ITA No.3156/Del/2017
Assessment Years : 2007-08

Ashwani Talwar,	DCIT,
Advocate Deepak Kapoor,	Vs Central Circle, 2nd Floor,
59, Nehru Apartments,	Arto Complex, Sector-33,
Outer Ring Road,	Noida.
Kalkaji, New Delhi-110019.	
PAN-AAAPT0920E	
APPELLANT	RESPONDENT
Appellant by	Sh.Deepak Kapoor, Adv.
Respondent by	Sh.Satpal Gulati, CIT DR
Date of Hearing	28.05.2021
Date of Pronouncement	29.06.2021

ORDER

PER KUL BHARAT, JM :

These appeals by the assessee for the assessment years 2004-05 to 2007-08 are directed against the order of learned CIT(A)-IV, Kanpur, all dated 31.03.2017.

2. All these appeals are having identical grounds of appeals. Therefore, all appeals were taken up together being disposed of by way of a consolidated order.

3. First we take up ITA No.3153/Del/2017 [Assessment Year 2004-05] wherein the assessee has raised following grounds of appeal:-

1. "The impugned assessment order is invalid as there was no incriminating material qua the assessee found/unearthed during the search and the assessment for Assessment Year 04-05 already stood completed. Therefore, no addition could have been made to the income already assessed. Reliance is placed on judgement of Hon'ble Delhi High Court in CIT vs Kabul Chawala (2016) 380 ITR 573; CIT vs Muralidhar Dr. S and Vibhu Bakhru JJ. (2016) 384 ITR

543.

2) That the Impugned order is not maintainable in law as the Ld. CIT(A)- Kanpur vide Impugned Order has reversed the judgment and order of his predecessor CIT(A)~ Meerut, who vide order dated 22-07-2011 deleted the addition made by the Ld. AO even though there is no fresh material brought on record by the Ld. CIT(A)- Kanpur and/or the Ld. AO in remand proceedings.

3) That the Impugned Order is not tenable in law in so far as the Ld. CIT(A) has taken a different view and went on to confirm the addition relating to S.No. 1 even though the provisions of Rule 46A of IT Rules, 1962 were not applicable in respect of the additions made. In other words, on the same facts and evidence, the Ld. AO has reversed the judgment of his predecessor without even conducting any further enquiry whatsoever and bringing any fresh evidence on record.

4) That on facts and in law, the addition of Rs. 65,000/- under section 69 of the Income Tax Act, 1961 being unexplained investment in the PPF A/c of the assessee is unjustified, illegal and unwarranted. The assessee made investment in PPF Account out of known sources and out of income chargeable to tax. Therefore, on grounds taken, basis adopted and on facts as well as in law the addition of Rs. 65,000/- is unjustified, illegal and unwarranted and the same deserves to be deleted."

4. At the outset, it was noticed that there was a typographical error in the Ground No.1. The error was pointed to the Ld. Counsel for the assessee who subsequently modified the ground. The Ground No.1 of the appeal now reads as under:-

i. "The impugned assessment order is invalid as there was no incriminating material for the assessee found/unearth during the search and assessment order for assessment year 2004-05 already stood completed. Therefore, no addition could have been made to the income already assessed. Reliance is placed on the judgement of Hon'ble Delhi High Court in CIT vs Kabul Chawla (2016) 380 ITR

573."

5. The facts giving rise to the present appeal are that a search operation was carried out on the residential and other premises of the assessee including residential premises No.F-2, Maharani Bagh, New Delhi on 15.02.2008. During the course of search operation, the cash and jewellery was found and seized. A notice u/s 153A of the Income Tax Act, 1961 ("the Act") was issued on 29.07.2009 calling upon the assessee for filing return of income. Thus, the return of income was

filed on 22.09.2009 declaring income at Rs.23,93,936/- and also agricultural income of Rs.4,02,170/-. The Assessing Officer proceeded to frame assessment on the basis of material available on record and information supplied by the assessee. The Assessing Officer made addition of Rs.65,000/- u/s 69 of the Act, on account of cash deposited in PPF account of the assessee; bogus gift and loan of Rs.60,000/- and Rs.15,50,000/- respectively. Hence, the Assessing Officer assessed the income of the assessee at Rs.44,71,105/-.

6. Aggrieved against this, the assessee preferred appeal before Ld.CIT(A) who after considering the submissions deleted the additions of Rs.60,000/- & Rs.15,50,000/- and sustained the addition of Rs.65,000/- made on account of cash deposits in PPF account of the assessee.

7. Aggrieved against the order of Ld.CIT(A), the assessee is in appeal before the Tribunal.

8. It is pertinent to note that that this is second round of litigation and in the earlier round, the Tribunal was pleased to restore the appeal to the file of Ld.CIT(A) for admitting the additional evidences and decide the appeal afresh. Hence, in the second round of litigation, Ld.CIT(A) after considering the submissions and evidences placed on record, deleted the addition related to gift and loan amounting to Rs.60,000/- & Rs.15,50,000/- respectively. The only addition sustained was related to cash deposit in PPF account of Rs.65,000/-.

9. Against this, the assessee has preferred the appeal before the Tribunal.

10. Ground Nos. 1 & 2 raised by the assessee are legal grounds and have been raised against the validity and legality of the assessment framed by the Assessing Officer.

11. At the outset, Ld. Counsel for the assessee submitted that there was no fresh material before the Assessing Officer. Moreover, no incriminating material was found in the search operation as such no addition could have been made. He further submitted that the assessment has been framed contrary to the ratio laid down by the judgements of Hon'ble Delhi High Court in the case of Kabul Chawla [2016] 380 ITR 573 [Del.] and Pr. CIT vs Lata Jain [2016] 384 ITR 543 [Del.]. He submitted that in the light of aforesaid judgements of Hon'ble Delhi High Court, the assessment so framed deserves to be quashed.

12. On the contrary, Ld. CIT DR opposed these submissions and supported the orders of the authorities below.

13. In rejoinder, Ld. Counsel for the assessee pointed out that the assessment in question is unabated, therefore, in the light of the judgement of Hon'ble Delhi High Court in the case of CIT vs Kabul Chawla (supra), the assessment deserves to be quashed.

14. We have heard the rival submissions and perused the material available on record. The Revenue could not controvert the fact that the additions as made by the Assessing Officer are not on the basis of material gathered during the course of search. Admittedly, the additions are not linked with incriminating material found during the course of search. Moreover, it is not disputed that the

assessment was not abated in the year under consideration, the assessment had been completed. The Hon'ble Delhi High Court in the case of Kabul Chawla (supra) held as under:-

> "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 assessment years immediately preceding the previous year relevant to the assessment year in which the search takes place.
>
> ii. Assessments and reassessments pending on the date of the search shall abate. The total income for such assessment years will have to be computed by the Assessing Officers as a fresh exercise.
>
> iii. The Assessing Officer will exercise normal assessment powers in respect of the six years previous to the relevant Assessment Year in which the search takes place. The Assessing Officer 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 Assessment Years "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 Assessing Officer 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 'assess' 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. In so far 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 Assessment Year on the basis of the findings of the search and any other material existing or brought on the record of the Assessing Officer.

vii. Completed assessments can be interfered with by the Assessing Officer 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."

15. Respectfully following the same, we hereby quash the impugned assessment order being not in the conformity with law laid down by the Hon'ble Jurisdictional High Court. Ground of appeal Nos. 1 & 2 raised by the assessee in this appeal are allowed.

16. Rests of the grounds are on merit of addition, have become of academic nature only as we have quashed the assessment order, hence are not being adjudicated herein.

17. In the result, the appeal of the assessee in ITA No.3153/Del/2017 [Assessment Year 2004-05] is allowed.

18. Now, we take up ITA No.3154/Del/2017 [Assessment Year 2005-06] filed by the assessee. The assessee has raised following grounds of appeal:-

> 1). "The impugned assessment order is invalid as there was no incriminating material qua the assessee found/unearthed during the search and the assessment for AY 05-06 already stood completed.

Therefore, no addition could have been made to the income already assessed. Reliance is placed on judgement of Hon'ble Delhi High Court in CIT vs Kabul Chawala (2016) 380 ITR 573; CIT vs Muralidhar Dr. S and Vibhu Bakhru JJ. (2016) 384 ITR 543.

2) That the Impugned order is not maintainable in law as the Ld. CIT(A)- Kanpur vide Impugned Order has reversed the judgment and order of his predecessor CIT(A)- Meerut, who vide order dated 23-03-2011 deleted the addition made by the Ld. AO even though there is no fresh material brought on record by the Ld. CIT(A)- Kanpur and/or the Ld. AO in remand proceedings.

3) That the Impugned Order is not tenable in law in so far as the Ld. CIT(A) has taken a different view and went on to confirm the addition relating to S.No. 1 even though the provisions of Rule 46A of IT Rules, 1962 were not applicable in respect of the additions made. In other words, on the same facts and evidence, the Ld. AO has reversed the judgment of his predecessor without even conducting any further enquiry whatsoever and bringing any fresh evidence on record.

4) That on facts and in law, the addition of Rs. 70,000/- under section 69 of the Income Tax Act, 1961 being unexplained investment in the PPF A/c of the assessee is unjustified, illegal and unwarranted. The assessee made investment in PPF Account out of known sources and out of income chargeable to tax. Therefore, on grounds taken, basis adopted and on facts as well as in law the addition of Rs. 70,000/- is unjustified, illegal and unwarranted and the same deserves to be deleted.

5) That on facts and in law, the addition of Rs. 60,000/- under section 69 of the Income Tax Act, 1961 being unexplained cash deposits in banks is unjustified, illegal and unwarranted. The assessee deposited the amount in the bank account out of known sources. Therefore, on grounds taken, basis

adopted and on facts as well as in law, the addition of Rs. 60,000/- is unjustified, illegal and unwarranted and the same deserves to be deleted.

6) That on facts and in law, the addition of Rs. 50 lakhs under section 2 (22) (e) of the Income Tax Act, 1961 is illegal and unjustified. The provisions of section 2(22) (e) are not applicable and the Ld. Assessing Officer did not apply its mind to the facts brought to his notice. Therefore, on grounds taken and basis adopted and on facts and in law, the addition of Rs. 50,00,000/- is unjustified and unwarranted and the same deserves to be deleted.

7) That on facts and in law treating long term capital amounting to Rs. 35,25,645/- as income from other sources is totally wrong, unjustified and illegal. Long term capital arises on sale of shares of Indian company within the meaning of section 2(29B) of the Act. During assessment proceedings appellant filed all supporting documents, evidences. The Ld. Assessing Officer ignored the facts and treated long term capital gains income as income from other sources. The Ld. Commissioner of Income tax (Appeals) has also upheld the treatment given by the Ld. A.O. by ignoring the issues raised by the Appellant in first appeal.

Therefore, on facts and in law and on grounds taken and basis adopted, the treatment of long term capital gains amounting to Rs. 35,25,645/- as income from other sources is illegal and unjustified and treatment/taxability under the head Long term Capital gains is to be allowed as originally claimed in the return by the appellant."

19. At the outset, it was also noticed in this appeal that there was a typographical error in the Ground No.1. The error was pointed to the Ld. Counsel for the assessee who subsequently modified the ground. The Ground No.1 of the appeal now reads as under:-

> i. "The impugned assessment order is invalid as there was no incriminating material for the assessee found/unearth during the search and assessment order for assessment year 2004-05 already stood completed. Therefore, no addition could have been made to the income already assessed. Reliance is placed on the judgement of Hon'ble Delhi High Court in CIT vs Kabul Chawla (2016) 380 ITR
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> 573."

20. The facts are identical as were in Assessment Year 2004-05 except two additional additions in the form of deemed dividend and bogus long term capital gain. In the present case, Ld.CIT(A) sustained additions related to cash deposits in PPF account of Rs.70,000/-, bank accounts of Rs.60,000/- and addition of Rs.50,00,000/- made by invoking the provisions of section 2(22)(e) of the Act and long term capital gain declared on account on sale of shares of Rs.35,25,645/-.

21. Aggrieved against this, the assessee is in appeal before this Tribunal.

22. Ground Nos. 1 & 2 raised by the assessee in this appeal are against the legality and validity of the assessment framed by the Assessing Officer.

23. Ld. Authorized representatives of the parties adopted the same arguments as were in Assessment Year 2004-05. In this year as well the assessment had been completed hence the assessment was not abated and additions have no nexus with the incriminating material found during the course of search. In the Assessment Year 2004-05, we have quashed the assessment on the ground that same has not been framed on the basis of incriminating material found during the course of search. By following the judgement of Hon'ble Delhi High Court rendered in the case of CIT vs Kabul Chawla (supra). The Revenue has not pointed out any change into the facts and circumstances, therefore, taking a consistent view, the assessment for the year under appeal is hereby quashed being contrary to the law laid down by the Hon'ble Jurisdictional High Court of Delhi in the case of Kabul Chawla (supra). Ground Nos. 1 & 2 raised by the assessee in this appeal are allowed.

24. Rests of the grounds are on the merit of additions since we have already quashed the assessment order. The other grounds have become academic in nature only hence, are not adjudicated. Therefore, the appeal of the assessee in ITA No.3154/Del/2017 pertaining to Assessment Year 2005-06 is allowed in terms indicated above.

25. Now, we take up ITA No.3155/Del/2017 [Assessment Year 2006-07] filed by the assessee. The assessee has raised following grounds of appeal:-

> 1) The impugned assessment order is invalid as there was no incriminating material qua the assessee found/unearthed during the search and the assessment for AY 06-07 already stood completed.

Therefore, no addition could have been made to the income already assessed. Reliance is placed on judgement of Hon'ble Delhi High Court in CIT vs Kabul Chawala (2016) 380 ITR 573; CIT vs Muralidhar Dr. S and Vibhu Bakhru JJ. (2016) 384 ITR 543.

2) That the Impugned order is not maintainable in law as the Ld. CIT(A)- Kanpur vide Impugned Order has reversed the judgment and order of his predecessor CIT(A)- Meerut, who vide order dated 23-03-2011 deleted the addition made by the Ld. AO even though there is no fresh material brought on record by the Ld. CIT(A)- Kanpur and/or the Ld. AO in remand proceedings.

3) That the Impugned Order is not tenable in law in so far as the Ld. CIT(A) has taken a different view and went on to confirm the addition relating to S.No. 1 even though the provisions of Rule 46A of IT Rules, 1962 were not applicable in respect of the additions made. In other words-, on the same facts and evidence, the Ld. AO has reversed the judgment of his predecessor without even conducting any further enquiry whatsoever and bringing any fresh evidence on record.

4) That on facts and in law, the addition of Rs. 70,000/- under section 69 of the Income Tax Act, 1961 being unexplained investment in the PPF A/c of the assessee is unjustified, illegal and unwarranted. The assessee made investment in PPF Account out of known sources and out of income chargeable to tax. Therefore, on grounds taken, basis adopted and on facts as well as in law the addition of Rs. 70,000/- is unjustified, illegal and unwarranted and the same deserves to be

deleted.

5) That on facts and in law, the addition of Rs. 2,50,000/- under section 69 of the Income Tax Act, 1961 being unexplained cash deposits in banks is unjustified, illegal and unwarranted. The assessee deposited the amount in the bank account out of known sources. Therefore, on grounds taken, basis adopted and on facts as well as in law, the addition of Rs. 2,50,000/- is unjustified, illegal and unwarranted and the same deserves to be deleted.

6) That on facts and in law, the addition of Rs. 2,00,000/- under section of the Income Tax Act, 1961 is unjustified and illegal. The assessee duly discharged the onus under section 68 and no adverse inference was called for. Therefore, on grounds taken and basis adopted and on facts and in law, the addition of Rs. 2,00,000/- is illegal and unwarranted and same deserves to be deleted in toto.

26. At the outset, it was also noticed in this appeal that there was a typographical error in the Ground No.1. The error was pointed to the Ld. Counsel for the assessee who subsequently modified the ground. The Ground No.1 of the appeal now reads as under:-

> i. "The impugned assessment order is invalid as there was no incriminating material for the assessee found/unearth during the search and assessment order for assessment year 2004-05 already stood completed. Therefore, no addition could have been made to the income already assessed. Reliance is placed on the judgement of Hon'ble Delhi High Court in CIT vs Kabul Chawla (2016) 380 ITR
>
> 573."

27. The facts are identical as were in ITA No.3154/del/2017 pertaining to Assessment Year 2005-06. In this year, Ld.CIT(A had sustained the additions of Rs. 70,000/- and Rs.2,50,000/- made on account of cash deposits in the PPF account and cash deposits in the bank accounts of the assessee respectively.

28. Ld.CIT(A) also sustained the addition of Rs.2,00,000/- made on account of bogus gifts and however, the addition of Rs.2,00,000/- was deleted.

29. Aggrieved against this, the assessee is in appeal before the Tribunal.

30. We have heard Ld. Authorized representatives of both the parties. We find that Ground Nos. 1 & 2 raised by the assessee in this appeal are against the legality and validity of the assessment framed by the Assessing Officer. Ld. Authorized representatives of the parties adopted the same arguments as were in Assessment Year 2004-05. In the Assessment Year 2004-05, we have quashed the assessment on the ground that same has not been framed on the basis of incriminating material found during the course of search. By following the judgement of Hon'ble Delhi High Court rendered in the case of CIT vs Kabul Chawla (supra). The Revenue has not pointed out any change into the facts and circumstances of the present case, therefore, the assessment for the year under appeal is hereby quashed being contrary to the law laid down by the Hon'ble Jurisdictional High

Court of Delhi in the case of Kabul Chawla (supra). Ground Nos. 1 & 2 raised by the assessee in this appeal are allowed.

31. Rests of the grounds are on the merit of additions since we have already quashed the assessment order. The other grounds have become academic in nature only and are not adjudicating. Therefore, the appeal of the assessee in ITA No.3155/Del/2017 pertaining to Assessment Year 2006-07 is allowed in terms indicated above.

32. Now, we take up ITA No.3156/Del/2017 [Assessment Year 2007-08] filed by the assessee. The assessee has raised following grounds of appeal:-

> i) "The impugned assessment order is invalid as there was no incriminating material qua the assessee found/unearthed during the search. Reliance is placed on judgement of Hon'ble Delhi High Court in CIT vs Kabul Chawala (2016) 380 ITR 573; CIT vs Muralidhar Dr. Sand Vihhu Bakhru JJ. (2016) 384 ITR 543.
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> ii) That the Impugned order is not maintainable in law as the Ld. CIT(A)- Kanpur vide Impugned Order has reversed the judgment and order of his predecessor CIT(A)- Meerut, who vide order dated 10.03.2011 deleted the addition made by the Ld. Assessing Officer even though there is no fresh material brought on record by the Ld. CIT(A)- Kanpur and/or the Ld. AO in remand proceedings.

iii) That the Impugned Order is not tenable in law in so far as the Ld. CIT(A) has taken a different view and went on to confirm the addition relating to S.No. 2 & 3 even though the provisions of Rule 46A of IT Rules, 1962 were not applicable in respect of the additions made. In other words, on the same facts and evidence, the Ld. AO has reversed the judgment of his predecessor without even conducting any further enquiry whatsoever and bringing any fresh evidence on record. This is nothing but a change of opinion by the Ld. CIT(A) which is not permissible in law.

iv) That on facts and in law, the addition of Rs. 20 lakhs under section 2 (22) (e) of the Income Tax Act, 1961 is illegal and unjustified. The provisions of section 2(22)(e) are not applicable and the Ld. CIT(A) did not apply its mind to the facts brought to his notice. Therefore, on grounds taken and basis adopted and on facts and in law, the addition of Rs. 20,00,000/- is unjustified and unwarranted and the same deserves to be deleted.

v) That on facts and in law, the addition of Rs. 2,00,00,000/- on account of benefit derived on purchase of flat for lower consideration is illegal and unjustified. The addition is made by the on the basis of conjecture & surmises without affording the assessee reasonable opportunity of being heard. The IT Department also did not provide the material relied upon by it to make the addition. Therefore, on grounds taken and basis adopted and on facts and in law the addition of Rs. 2,00,00,000/- is illegal & unwarranted and the same deserves to be deleted in toto."

33. At the outset, it was also noticed in this appeal that there was a typographical error in the Ground No.1. The error was pointed to the Ld. Counsel for the assessee who subsequently modified

the ground. The Ground No.1 of the appeal now reads as under:-

> i. "The impugned assessment order is invalid as there was no incriminating material for the assessee found/unearth during the search and assessment order for assessment year 2004-05 already stood completed. Therefore, no addition could have been made to the income already assessed. Reliance is placed on the judgement of Hon'ble Delhi High Court in CIT vs Kabul Chawla (2016) 380 ITR
>
> 573."

34. Ground No.(i) raised by the assessee in this appeal is against the legality of the assessment on the ground that no fresh material was brought on record. Ld. Counsel for the assessee reiterated the submissions as made in the Assessment Years 2004-05 to 2006-07.

35. Ld.CIT DR opposed the submissions and submitted that in this year, the assessment was abated. Therefore, the assessment framed cannot be quashed.

36. We have heard Ld. representatives of both parties and perused the material available on record. Ld. Counsel for the assessee could not controvert to facts that in the year under appeal, the assessment was not abated. Admittedly in the year under appeal, regular assessment was not completed, therefore, we do not see any merit in the contention of the assessee. Thus, Ground No.(i) raised by the assessee is rejected.

37. Ground Nos.(ii), (iii) & (iv) raised by the assessee are inter- connected and raised against the sustaining of addition of Rs.20 Lakhs invoking under the provision of section 2(22)(e) of the Act.

38. Facts of the case are that while framing the assessment, the Assessing Officer observed that as per the bank statement of the assessee, there were credit entries of M/s. ATS infrastructure Ltd. totaling to Rs.20 Lakhs on 17.05.2006. It was observed that in the said company, the assessee was having share holding/voting power of 33.33%. Therefore, treating the credit in the account of the assessee as the loan from M/s. ATS infrastructure Ltd. The Assessing Officer made addition by invoking the provision of section 2(22)(e) of the Act. The assessee carried the matter before the Ld.CIT(A) who in the second round of the litigation sustained this addition. Hence, the assessee is in further appeal before this Tribunal.

39. It is pertinent to note that the impugned addition was infact deleted by Ld.CIT(A) in the original proceedings. However, when the matter was remanded by this Tribunal for fresh adjudication, Ld.CIT(A sustained this addition. Ld. Counsel for the assessee reiterated the submissions as made before the Ld.CIT(A). Ld. Counsel for the assessee submitted that in the original proceedings, Ld.CIT(A), Meerut had infact deleted this addition. He drew our attention to the findings of Ld.CIT(A), Meerut who vide order dated 10.03.2011 in para 9.5 held that the sum of Rs.20 Lakhs received by the assessee on 17.05.2006 from M/s. ATS infrastructure Ltd. represents repayment of pre-existing liability by M/s. ATS infrastructure Ltd., therefore, the same is not covered u/s 2(22)(e) of the Act. Ld. Counsel for the assessee submitted that however, in the proceedings remanded by the

Tribunal, Ld.CIT(A) ignored the factum of finding of Ld.CIT(A) who had categorically came to the conclusion that the impugned addition represents the repayment of pre-existing liability by M/s. ATS infrastructure Ltd. However, Ld.CIT(A) merely on the conjectures and surmises sustained the addition.

40. On the contrary, Ld. CIT DR opposed these submissions and supported the orders of the authorities below.

41. We have heard the rival contentions and perused the material available on record. The contention of the assessee throughout had been that the impugned addition represented the pre-existing liability. We find that in the original proceedings, Ld.CIT(A) vide order dated 10.03.2011 has decided the issue by observing as under:-

> 9.5. Decision and reasons therefor:
>
> "I have carefully considered the rival contentions including those made in the Remand Report and Rejoinder thereof. The AO issued notice dated 29/09/09 u/s 142(1) of the Income-tax Act in which 27 queries were raised. None of these queries pertains to taxability of sum received by the assessee from M/s ATS Infrastructure Ltd and application of provisions of section 2(22)(e) in respect thereof. The assessee filed the reply on 14/12/09 along with documents and papers. Since there was-ne query in respect of taxability of sum of Rs.20 Lacs by the AO, no submissions were made by the assessee in this respect during assessment proceedings.
>
> In appeal before me, the assessee has contended that no reasonable opportunity was given to the Assessee. The assessee has stated that the assessee had booked 11 flats/plots in his personal capacity, in his own name, in the name of his wife Mrs Afsha Talwar and daughter Ms Sanam Talwar with M/s ATS Infrastructure Ltd and accordingly the assessee had given booking amount of Rs.20 Lacs to M/s ATS Infrastructure Ltd through various cheques on 03/03/06.
>
> The assessee stated that the booking amount of Rs.20 Lacs paid by the assessee on 03/03/06 was actually repaid by M/s ATS Infrastructure Ltd on 16/05/06.
>
> The assessee has filed various documentary evidence such as confirmation certificate from M/s ATS Infrastructure Ltd, copy of account of assessee for booking of flats/plots in projects as appearing in the books of M/s ATS Infrastructure Ltd along with the bank account statement of HDFC Bank Ltd from which the payment of Rs.20 Lac was made by the assessee to M/s ATS Infrastructure Ltd. Considering the evidence placed on record I am of the view that the sum of Rs, 20 Lacs received by the assessee on 17/05/06 from M/s ATS Infrastructure Ltd represents a repayment of pre-existing liability by M/s ATS infrastructure Ltd and therefore, the same is not covered u/s 2(22)(e) of the Income Tax Act, 1961. The addition of Rs.20 lac is therefore deleted."

42. However, vide order dated 31.03.2017, addition was sustained by observing as under:-

> "It may be seen from the assessment order that it is undisputed fact that appellant has more than 10% shares in the company. Moreover, it is also undisputed fact that the amount has flown from the account of the company to the account of appellant. In support of his claim appellant could not furnish any agreement between M/s. ATS infrastructure Ltd. and himself with respect of sale of property for which appellant has claimed to have paid booking amount to the company. In this situation, it emerges that the story put by appellant to explain the amount taken as repayment of booking amount is nothing but an afterthought of appellant. Because at the assessment stage as well as during the course of hearing, he could not produce any documentary evidence to prove the genuineness of booking of flat as well as repayment thereof. What he could produce is the confirmation from builder. Since, the appellant is a director in the company, therefore, such confirmation can obviously be obtained and furnished from interested person. Therefore, I do not find force in the contention of the appellant and I consider the transaction as loan transaction and addition is confirmed. The cases relied upon by the appellant are on their own footing and distinguishable on facts. Therefore, this is not applicable to the present case. Thus, addition of Rs. 20,00,000/- is confirmed."

43. In the aforesaid findings of Ld.CIT(A), it is clear that no effort was made to ascertain the veracity of the confirmation made by the assessee. there is no evidence suggesting that the amount of Rs.20 Lakhs from M/s. ATS infrastructure Ltd. was loan on advance to the assessee. In the absence of evidences, we are not inclined to affirm the view of Ld.CIT(A) when undisputedly during the original appellate proceedings. Ld.CIT(A had categorically stated that the impugned amount represents repayment of pre-existing liability. Ld.CIT(A) has not brought any material to take a contrary view. Even during the appellate proceedings, Ld.CIT(A) has recorded the factum of confirmation furnished by the assessee. Hence, we hereby delete the addition. Thus, Ground Nos. (ii),

(iii) & (iv) raised by the assessee in this appeal are allowed.

44. Now coming to Ground No.(v) raised by the assessee in this appeal is against the sustaining of addition of Rs.2 crore on account of benefit derived on purchases of flat for lower consideration.

45. Ld.CIT(A) submitted that in case of Mr. Geetambar Anand, Co- director of the company, adopted totally different view point thereby, he deleted the addition. Ld. Counsel for the assessee reiterated the submissions as made in the appellate proceedings.

46. Ld. CIT DR opposed the additions and supported the assessment order.

47. We have heard the rival contentions and perused the material available on record. The assessee has assailed the impugned addition on the ground that the authorities below were not justified in making the addition. It is contended that the Assessing Officer erred in adopting market price at Rs.3.5 crore in utter disregard to the fact that the value adopted by Stamp Valuation Authority is

much lower than the value as disclosed by the assessee. Ld. Counsel for the assessee has also filed written note which is reproduced here under for ready-reference:-

> 1. "The addition of Rs 2 crore on account of benefits derived on allotment of flat was made by the income tax department in the case of the assessee as well as the other co-directors of ATS Infrastructure Limited viz. Mr. Geetambar Anand and Anil Kumar Saha, by using the exact language.
>
> 2. In the case of co-director Mr. Geetambar Anand, the income tax department has accepted the deletion of addition of Rs. 2 crore on account of benefits derived on allotment of flat. The copy of the original assessment order dt. 29-12-2009, CIT (Appeals) orders dt.

09-03-2011 and 13-01-2014 and ITAT orders dt. 28-06-12 and 16- 06-2017 in case of co-director Mr.Geetamber Anand have been placed on records. The CIT (Appeals) vide order dated 13-01-2014 in Appeal No.: 297/13-14 (in pursuance of order of the ITAT dated 28- 06-2012 in ITA No. 2707/DELl2011) deleted the addition of Rs. 2 crore on account of benefits derived on allotment of flat. The income tax department did not file the appeal against the deletion of addition and the proceedings for assessment year 2007-08 in case of Mr.Geetambar Anand achieved finality vide order dated 16.06.2017 in ITA No.2217/Del/2014. The copy of the order dated 16.06.2017 in ITA No.2217/Del/2014 is placed on record."

48. On the contrary, Ld.CIT DR opposed these submissions and supported the orders of authorities below.

49. We have heard the rival contentions and perused the material available on record. The Revenue is not disputed the fact that the facts of the case of Mr. Geetambar Anand, Co-director of the company are identical and in the case of Mr. Geetambar Anand, Co-director of the company, the addition has been deleted. The matter travelled upto the stage of the Tribunal in ITA No.2217/Del/2014. The Tribunal vide order dated 16.06.2017 dismissed the appeal of Revenue being low tax effect. Admittedly in the case of the Co-director, the Revenue had not challenged the deletion of addition of Rs.2 crore. Considering the totality of the facts, we are of the considered view that the Ld.CIT(A) was not justified in making the addition in the case of the assessee when in the similarly situated Co-director, addition was deleted. Moreover, in the original proceedings, Ld.CIT(A), Meerut considered the facts in depth and relying on the judgement of Hon'ble Supreme Court rendered in the case of M/s. Dhakeshwari Cotton Mills vs CIT, WB [1954] 26 ITR 775m 782 (SC), observed that the addition of Rs.2 crore was liable to be deleted. He had categorically given a finding that the assessee had filed an Agreement for allotment dated 02.09.2006 between M/s ATS Infrastructure Ltd. and Mr. Prabodh Nath Aggarwal for consideration of Rs.1.5 crore. It was further observed that the Assessing Officer neither conducted any inquiry from Mr. Prabodh Nath Aggarwal nor the Assessing Officer tried to find out the market price of K-Villa at the time of allotment in Financial Year 2006-07. It was further observed that the statement of Mr. Geetambar Anand is vague and it was not clear as to what the value of K-Villa was at the time of allotment to the assessee. He further observed that considering these facts for the purpose of stamp duty, the value of K-Villa

was only Rs.81,04,355/- and the HDFC Bank also granted a loan of Rs.1.35 crore against the market price of Rs.1.5 crore. Therefore, he held that market price of Rs.1.5 crore at the time of allotment was fair and reasonable. It is further observed that Ld.CIT(A) has not brought any new material to rebut the finding of Ld.CIT(A) in the original proceedings, therefore, the addition cannot be sustained. Accordingly the Assessing Officer is hereby directed to delete the addition. Thus, Ground No.(v) raised by the assessee in this appeal is allowed.

50. In the result, the appeal of the assessee is allowed.

51. In the final result, all appeals filed by the assessee are allowed.

Above decision was pronounced on conclusion of Virtual Hearing in the presence of both the parties on 29th June, 2021.

Sd/-	Sd/-
(G.S. PANNU)	(KUL BHARAT)
VICE PRESIDENT	JUDICIAL MEMBER

* Amit Kumar *

Copy forwarded to:

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

ASSISTANT REGISTRAR
ITAT, NEW DELHI