

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'B', NEW DELHI
BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER
AND
SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER**

ITAs No.977 & 891/Del/2022
Assessment Year 2009-10 & 2013-14

Feather Infotech Pvt. Ltd. C/o Ajay Kanjhlia & Associates Chartered Accountants 3605, 1 st Floor, 8 th Street, Vishwas Nagar, Shahdara, Delhi.	Vs.	DCIT Central Circle-I Gurgaon
TAN/PAN: AABCF3620M		
(Appellant)		(Respondent)

Assessee by:	Shri C.S. Anand, Advocate
Revenue by:	Shri T. James Singson, CIT-D.R.
Date of hearing:	10.01.2024
Date of Pronouncement:	13.02.2024

ORDER

PER PRADIP KUMAR KEDIA, AM :

Both the captioned appeals arise from the order of the Commissioner of Income Tax (Appeals)-3, Gurgaon in respective assessment orders passed by the Assessing Officer tabulated hereunder:

Sr. Nos.	ITA/CO Nos.	CIT(A) Order dated	Assessment Order dated	Remarks
1.	ITA No.977/Del/2022	CIT(A)-3, Gurgaon order dated 23.03.2022	Assessment order dated 22.03.2016	Assessment Order under section 153A(1)(b) of the Income Tax Act, 1961.
2	ITA No.891/Del/2022	CIT(A)-3, Gurgaon order dated 04.03.2022	-do-	-do-

2. In the captioned appeal, the assessee has *inter alia* challenged the jurisdiction usurped by the Assessing Officer (AO) under section 153A(1)(b) of the Act towards additions / disallowances made.

3. In view of the preliminary objections of the assessee which seeks to put question mark over the legitimacy of additions/disallowances made under section 153A of the Act, we deem it expedient to dispose of the aforesaid preliminary ground at the outset as it strikes the root of the matter.

4. Briefly stated, a search and seizure operation under section 132 of the Income Tax Act, 1961 (The Act) was carried out at the premises of Urbtech group of cases including the captioned assessee herein on 10.10.2013. Consequently, a notice under section 153A of the Act was issued seeking to assess the income of the assessee under the provisions of section 153A of the Act. The assessment was carried out under section 153A read with Section 143(3) of the Act and certain additions / disallowances were made. The action of the AO was confirmed by the CIT(A) in the first appeal. The assessee has knocked the door of the Tribunal against the impugned first appellate order in the present appeal.

5. When the matter was called for hearing, the learned Counsel for the assessee, at the outset, submitted that the captioned appeal stood concluded / completed at the time of search and consequently, the assessment in the captioned appeal remains unabated and stood concluded prior to search. In this backdrop, the learned Counsel submitted that the additions / disallowances made in the appeal has no rational connection or live link with material found in the course of search action carried out under section 132 of the Act. The learned Counsel submitted that impugned additions under challenge have been made solely on the basis of post search inquiry / investigation by the Deputy Director of Income Tax (Inv.)-I, Faridabad whereby the copy of appraisal report in the case of one Mr. Tarun Goyal was received from Deputy Director of Income Tax (Inv.), Unit-IV(1), Jhandewalan, New Delhi. As per the Appraisal Report in the case of Mr. Tarun Goyal, it was found that Mr. Tarun Goyal admitted that he and his group concerns were in the business of providing the entries to convert the unaccounted money into garb of share capital and share premium. As per seized document in the case of assessee, (i) M/s. Kanha Fats

& Oils Pvt. Ltd. had applied for allotment of 9 lakh shares of the company namely M/s. Lionine Packaging Pvt. Ltd. for which it had paid Rs.9 crore during the period 25.11.2008 to 24.12.2008 and (ii) M/s. Elecon Securities Pvt. Ltd. had applied for allotment of Rs.4,75,000/- shares of the company namely Lionine Packaging Pvt. Ltd. for which it had paid Rs.4.75 crores on 24.12.2008. Thus, name of the assessee-company was nowhere appearing in the seized documents. The assessee had obtained subscription during the year from M/s. Ordinary Financial Services Pvt. Ltd. and M/s. Elecon Securities Pvt. Ltd. The learned Counsel thus submitted that the AO has imputed allegations against the assessee without any tangible material found in the course of search in relation to assessee. The ld. counsel assertively reiterated that there is no reference to any seized material adverse to the assessee which has any connection or bearing with the impugned additions in the captioned appeal.

5.1 The learned Counsel quipped that the adjustments made to the returned income by the AO in the instant appeal is either subject matter of regular assessment or probably can be assessed under section 153C of the Act but however certainly do not resonate with the scheme of search assessment under section 153A of the Act *de-horse* reference to any incriminating material found in the course of search from the premises of the assessee with reference to impugned additions. The learned Counsel thus emphasized that appraisal report of a third party obtained in a post search inquiry cannot be construed as incriminating material found in the course of search in respect of the instant assessee to enable the AO to make additions / disallowances in the search assessment under section 153A of the Act. The appraisal report of third party prepared in an altogether separate proceedings cannot be construed any incriminating material *per se*. The learned Counsel thus asserted that in the absence of any incriminating material emanating from search in the case of assessee, no adjustment to the returned income is permissible under the umbrella of section 153A of the Act in such unabated assessment.

5.2 The learned Counsel reiterated that the assessment for A.Y. 2009-10 in question stood concluded by operation of law and was not pending for assessment at the time of search. Therefore, such assessment concluded prior to search survives and do not get abated. The learned Counsel submitted that in these facts, it is not permissible for the AO to invoke authority vested under section 153A of the Act to indulge in making routine examination of various items of

income and expenditure filed or various credit entries recorded in the books and declared in the return which has no correlation to incriminating material found in the course of search. The learned Counsel thus submitted that the ratio of landmark judgment rendered in the case of *Pr. CIT vs. Abhisar Builwell (P.) Ltd [2023] 149 taxman.com 399* would squarely apply to the facts of the case and the scope of assessment under section 153A is restricted to the incriminating material found in the course of search of the assessee owing to the fact that such assessment for A.Y. 2009-10 stood concluded / completed at the time of search and thus do not get abated by operation of law.

6. Per contra, learned DR for the Revenue relied upon the observations made in the first appellate order and submitted that when proceeding under section 153A has been validly initiated, the jurisdiction under other provisions of the Act stood ousted and the AO is entitled to make reference to and rely upon the incriminating documents collected which squarely implicates the assessee.

7. We have carefully considered the rival submissions and perused the orders of the authorities below and examined the merits of legal contentions raised on behalf of the assessee and counter raised on behalf of the Revenue.

7.1 It is the case of the assessee that additions/disallowances could not be made in the assessment framed under section 153A of the Act unless some incriminating material has been found in the course of search in the hands of the assessee which seeks to implicate the assessee for carrying out clandestine transaction. It is further case of the assessee that in the instant case where the assessment in relation to A.Y. 2009-10 stood concluded / completed prior to search, any adverse material such as appraisal report in the case of a third party (Mr. Tarun Goyal in the instant case) prepared in an altogether different proceedings cannot be read as incriminating material found in the course of search in the case of present assessee. Thus, the material collected *post facto* after search from third parties cannot be imported in the case of the captioned assessee for the purposes of compliance of salutary conditions of existence of incriminating material at the time of search in the hands of assessee. The appraisal report in the case of a third person prepared by the Investigation Team of that searched person do not have any nexus or live link

whatsoever with any material of incriminating nature found in the course of search at the premises of the assessee which is the genesis of proceedings under section 153A of the Act as held in *Abhisar Builwell* (supra).

7.2 The appeal of the assessee thus hinges around one pertinent legal point as to whether, while making assessment under section 153A, the Revenue is entitled to interfere with unabated assessment which stood concluded either under section 143(1) or under section 143(3) and not pending at the time of search in the absence of any incriminating material unearthed as a result of search in the case of assessee.

8. On facts, it is noticed that the assessee had issued shares at premium to subscriber namely, M/s. Ordinary Financial Services Pvt. Ltd. and received total consideration of Rs.3,30,00,000/-. Likewise shares issued to other subscriber namely, M/s. Elecon Securities Pvt. Ltd. fetched Rs.1,70,00,000/- to the assessee. The AO alleged that these two entities are controlled by entry provider namely, Shri Tarun Goyal who has admitted such facts on oath in the course of search carried out at his premises. The AO while framing the assessment has solely relied upon the observations in the Appraisal Report provided in the case of Shri Tarun Goyal collected in the course of post search inquiry / investigations. No reference to any incriminating material is found in relation to subscribers in the course of search in the case of assessee herein. In this backdrop as pointed out on behalf of the assessee, there is a total absence of reference to any incriminating material found in the course of search in the case of the assessee which may have any bearing to the impugned additions/disallowances except observations in the appraisal report in the case of Mr. Tarun Goyal adverse to subscriber companies in an all together different search proceedings. As a corollary, it is manifest that additions/disallowances have been made without reference to any specific incriminating material/document found as a result of search and seizure action under section 132 of the Act and such additions are solely based on appraisal report against the subscribers of the assessee in the course of search in that case. Some additions have been made in the course of routine inquiry at the time of assessment under Section 153A without showing any correction to the incriminating material unearthed in the course of search.

9. Guided by the principles laid down in *Abhisar Buildwell (P.) Ltd. (SC)* (supra) as followed by the Co-ordinate Benches in numerous cases, we find force in the legal plea raised on behalf of the assessee. Hence, in the absence of any incriminating material in an unabated assessment additions / disallowances made by AO in the captioned appeal require to be quashed. In this view of the matter, we do not consider it necessary to adjudicate other legal and factual aspects concerning additions/disallowances.

10. In the result, the captioned appeal of the assessee in ITA No.977/Del/2022 concerning A.Y. 2009-10 is allowed.

11. Now we advert to the appeal of the assessee concerning A.Y. 2013-14 arising in ITA No.891/Del/2022 .

12. The grounds of appeal raised by the assessee read as under:

1. *That on the facts of the case and in law, the assumption of jurisdiction and issue of notice u/s 153A of the I.T. Act, 1961 are bad in law.*
2. *That on the facts of the case and in law, the assessment order framed u/s 153(1)(b) of the I.T. Act, 1961 is bad.*
3. *That on the facts of the case and in law, no addition on the basis of the bills of M/s Shubam Enterprises bearing dates 01.05.2011, 02.06.2011, 02.07.2011, 03.08.2011, 02.09.2011, 02.10.2011, 02.11.2011, 04.11.2011 (covering total amount of Rs.23839725/-) was justified for AY 2013-14.*
4. *That in the light of the observations recorded in the assessment order, at the most the expenses claimed on the basis of the bills of M/s Shubam Enterprises (Rs.23839725/-) and M/s Rooyal Sales Corporation (Rs.2428754/-) could had been disallowed. In any case, making addition u/s 69C of the I.T. Act, 1961 is illegal.*
5. *That on the facts of the case and in law, the learned CIT(Appeals)-3 Gurgaon has erred in confirming the addition of Rs 26268479/- with the remark "Accordingly the addition made by the AO is confirmed u/s. 69C of the Act as well as u/s. 68 of the Act."*
6. *That on the facts of the case and in law, the learned CIT(Appeals) -3 Gurgaon has erred in confirming the addition while taking shelter of the provisions of section 68 of the I.T. Act, 1961, without issuing the mandatory Show Cause Notice to the appellant assessee asking it to explain as to why the provisions of section 68 of the I.T. Act, 1961 be not applied.*
7. *That on the facts of the case and in law, the addition of Rs 26268479/-was neither justified u/s 69C of the I.T. Act, 1961, nor u/s 68 of the I.T. Act, 1961.*
8. *That on the facts of the case and in law, the assessment order is liable to be annulled because the learned JCIT Central Range Gurgaon had granted approval, without application of his mind and in mechanical manner.*

A bare reading of the letter dt. 21.03.2016 which was issued by the learned JCIT Central Range Gurgaon to the learned AO, suggests that the learned JCIT had looked only into the draft assessment order.

9. *That the remark of the learned CIT(Appeals)-3 Gurgaon ".....the approval is an administrative action which is required to be based on existence of set of circumstances and on subjective satisfaction as per the provisions of the Act. Further, approval u/s 153D being an official act provided under the statute, it is to be presumed that before according approval, the Range Head has looked into the records, applied his mind and he did not find any reason to disapproved the order passed by the Assessing Authority and therefore he has accorded approval", is untenable. "*

13. Briefly stated, a search and seizure operation was carried out at the premises of the assessee on 10.10.2013. A bill book in the name of M/s. Shubham Enterprises and M/s. Raoyal Sales Corporation was found at the premises of the assessee. The provisions of Section 153A was invoked and notice under Section 143(2) along with notice under Section 142(1) were issued to the assessee for the purposes of making assessment. The AO observed that the assessee has failed to prove the *bona fides* of supplies allegedly made by the suppliers namely, M/s. Shubham Enterprises and Raoyal Sales Corporation. The AO observed that the transactions entered with these entities are sham transactions devoid of any *bona fide*. The AO thus invoked the provisions of Section 69C of the Act and held that expenditure recorded in the names of aforesaid suppliers namely, M/s. Shubham Enterprises and M/s. Raoyal Sales Corporation amounting to Rs.2,38,39,725/- and Rs.24,28,754/- respectively are unexplained expenditure within the meaning of Section 69C of the Act.

14. Aggrieved, the assessee preferred appeal before the CIT(A). The CIT(A) recorded the submissions of the assessee but however declined any relief. As per paragraph 6.8 of the first appellate order, the CIT(A) invoked co-terminus power vested with him and observed that the additions made by the Assessing Officer are also covered by the provisions of Section 68 of the Act in tandem with Section 69C of the Act.

15. Further aggrieved, the assessee preferred appeal before the Tribunal. The assessee has raised multiple grounds as noted above raising factual and legal contentions.

16. The Id. counsel for the assessee submitted at the outset that AO as well as CIT(A) have proceeded on misconception of facts and law. Apropos the addition towards bogus purchases

aggregating to Rs.2,62,68,479/-, the Id. counsel pointed out that the payments have been made through banking channel towards such purchases to the suppliers. The supplies from M/s. Shubham Enterprises of Rodi & amp; river sand went into the construction of the building and capitalized. Likewise supplies of furniture & amp; fixtures and DG-sets from M/s. Raoyal Sales Corporation are again capital in nature and can also be physically verified at the site. The Id. counsel pointed out that both the expenditures are capital expenditure in nature and a balance-sheet item and therefore, the assessed income cannot be increased by disallowing capital expenditure. The Id. counsel further pointed out that Section 69C invoked by the AO has no application in the facts of the present case where the expenditure incurred and duly recorded in the books of account. The source of such expenditure or part thereof is not in dispute at the first instance. What is in dispute is the genuineness of incurring the expenditure. In the absence of any allegation towards unexplained source of expenditure, Section 69C does not apply at all. The AO has thus misdirected himself in law in making additions under Section 69C of the Act. The Id. counsel thereafter adverted to the first appellate order and submitted that the CIT(A) however has drastically modified the assessment order and invoked provisions of Section 69C for disallowance of alleged bogus expenses. No show cause notice has been given to the assessee for modifying the substantive charge against the assessee. The Id. counsel pointed out that Section 68 is also not applicable as such provision operates in respect of amount credited in the books. In the present case, the allegation against the assessee is towards bogus claim of outgo, i.e. expenditure where Section 68 has no application. Section 68 applies only qua credits and not to the opposite position of debits. The Id. counsel thereafter adverted to the decision rendered by the SMC bench in the case of *Toffee Agricultural Farms (P.) Ltd. v. ITO - [2022] 141 taxmann.com 429 (SMC)* to assert that the SMC Bench has observed that the course adopted by the CIT(A) to modify the basis of disallowance from Section 69C to Section 68 is not permissible in similar facts. The Id. counsel next submitted that the invoices from the suppliers relate to F.Y. 2011-12 rather than F.Y. 2012-13 which is the subject matter of assessment in the present case. The corresponding expenses thus have been booked in the previous year relevant to A.Y. 2012-13 and therefore, out of ambit of assessment in A.Y. 2013-14 in question. The Id. counsel thus submitted that the additions made are fully unjustified on all counts and urged for reversal of the action of the Revenue Authorities.

17. The Id. DR for the Revenue, on the other hand, referred to and relied upon the assessment order and the first appellate order.

18. We have carefully considered the rival submissions, perused the assessment order and also the first appellate order. The material referred to and relied upon in the course of hearing has been taken into account in terms of Rule 18(6) of the Income Tax (Appellate Tribunal) Rules 1963.

19. The disallowance towards alleged bogus purchases aggregating to Rs.2,62,68,479/- is subject matter of controversy. We take notice of the fact that the expenditure incurred in the instant case are capital expenditure and therefore, no addition as proposed could be made to the taxable income towards such capital expenditure. Secondly, as pointed out on behalf of the assessee and corroborated by the copy of invoices and the ledger account, it is evident that the impugned purchases relate to financial year other than F.Y. 2011-12 relevant to A.Y. 2012-13 in question. Therefore, disallowance if any is not permissible in the A.Y. 2013-14 under adjudication.

20. We now advert to the legal ground raised on behalf of the assessee towards inapplicability of Section 69C as well as Section 68 of the Act in the facts of the case. The power of the CIT(A) to modify the assessment on the touchstone of Section 68 along with Section 69C has also been called into question. A bare reading of Section 68 suggests that there has to be credit of amounts in the books maintained by the assessee and such credit has to be of sum during the year for which the assessee either offers no explanation about the nature of source of such credit or the explanation offered towards source of such credit is not found to be satisfactory in the opinion of the Assessing Officer. When objectively seen with reference to material available on record, it is evident that the present case relates to outgo or payment on account of expenditure which is squarely opposite to the credit in the books of account. Apparently, Section 68 would not apply in the absence of any credit in the books of account in relation to impugned additions.

21. On the similar footings, Section 69C also do not apply since Section 69C is confined to a situation where source of expenditure incurred could not be objectively explained to the satisfaction of the AO. In the instant case, what being disallowed is the expenditure incurred and not the source of payment towards such expenditure. Neither Section 68 nor Section 69C is applicable in the present case. Alongside, we also observe that the CIT(A) has modified and broadened the charge to encompass application of Section 68 of the Act. While doing so, no opportunity was given to the assessee to counter such proposal. The exercise of purported co-terminus power in such manner is not permissible in law. On this ground also, the action of CIT(A) needs to be set aside.

22. In summation, the impugned additions cannot be countenanced where neither the expenditure has been claimed as revenue expenditure nor such expenditure relates to assessment year in question and such action is impermissible on the contours of Section 68 as well as Section 69C invoked by the Revenue Authorities.

23. We thus set aside the first appellate order and direct the AO to delete the impugned additions. Having come to such conclusion, we do not consider it necessary to examine other legal and factual aspects raised in the grounds of appeal.

22. In the result, the captioned appeal of the assessee in ITA No891/Del/2022 concerning A.Y. 2013-14 is allowed.

23. In the combined result, both the captioned appeals of the assessee are allowed.

Order pronounced in the open court on 13.02.2024

Sd/-

**(KUL BHARAT)
JUDICIAL MEMBER**

Sd/-

**(PRADIP KUMAR KEDIA)
ACCOUNTANT MEMBER**

Date:- .02.2024

Prabhat