

(2024) 05 ITAT CK 0074

Income Tax Appellate Tribunal (Delhi B Bench)

Case No: Income Tax Appeal No. 710, 711, 713, 714, 715, 718, 719, 720, 723, 724, 725/DEL/2019, Cross Objection Nos. 58, 59, 61, 62, 63, 66, 67, 68, 71, 72, 73/DEL/2019

DCIT

APPELLANT

Vs

Dheer Chand Sharma

RESPONDENT

Date of Decision: May 31, 2024

Acts Referred:

- Income Tax Act, 1961 - Section 132, 132A, 142(2A), 144, 147, 148, 153A

Hon'ble Judges: Saktijit Dey, (VP); Naveen Chandra, (AM)

Bench: Division Bench

Advocate: Anand Chaudhuri, Deepanshu Mehta, Kumailabbas, T. James Singson

Final Decision: Dismissed

Judgement

1. This bunch of 22 appeals and cross-objections, respectively, by the Revenue and the assessees, arise out of separate orders of learned Commissioner of Income Tax (Appeals)-29, New Delhi, pertaining to assessment years 2008-09, 2009-10 & 2010-11. Since, the issues in all these appeals are common and culminate out of common search and seizure operation, carried out u/s 132 of the Income-tax Act, 1961, the appeals have been clubbed together and disposed of in a consolidated order, for the sake of convenience.

2. The grounds raised in the appeals and cross objections are more or less identical, except variation in figures. Facts relating to the issues in dispute are also more or less identical. Therefore, we take up ITA no. 713/Del/2019 and C.O. no. 61/Del/2019 as the lead cases.

3. In so far as the cross objection is concerned, the assessee in addition to the grounds raised in the memo of appeal has subsequently filed revised grounds which are as

under:

"1. The Ld.CIT(A) has erred in law by not quashing the impugned assessment order passed under section 153A/144 of the Income-tax Act, 1961 in the absence of any incriminating material seized during search on Assessee/Respondent and the same also not being based on any seized incriminating material.

2. The Ld.CIT(A) has erred in law by making the impugned addition of alleged commission income of the Assessee/Respondent as a new source of income despite said income being outside the subject-matter of impugned assessment order.

3. Without prejudice to Ground no.2 above, the Ld.CIT(A) has erred in law and facts by making the addition of alleged commission income in the absence of any evidence or material to establish that the said income was earned by the Assessee/Respondent.

4. Without prejudice to Ground no.3 and 4 above, the Ld.CIT(A) has erred in law in arbitrarily determining the rate of alleged commission income at 2.5 percent and the same being contrary to settled range between 0.15 and 0.5 percent as per case law precedent.

5. The Ld.CIT(A) has rightly deleted the other additions made against the Assessee/Respondent vide impugned assessment order."

4. In ground no. 1 of revised grounds, the assessee has raised a legal issue, challenging the validity of the additions made in the assessment order passed u/s 153A/144 of the Act.

5. At the outset learned Departmental Representative submitted that this ground was not raised by the assessee originally, hence at this stage such ground should not be admitted.

6. Having considered the submissions of the parties, we are of the view that the issue raised in ground no. 1 is a purely legal and jurisdictional issue going to the root of the matter. Moreover, facts relevant for deciding this issue, are available on record, hence do not require investigation into fresh facts. It is further noted, the assessee had raised this issue even before learned First Appellate Authority. Therefore, the issue arises out of the order of the First Appellate Authority. In view of the aforesaid, we are inclined to admit the ground raised by the assessee. Since the issue raised in this ground is a legal and jurisdictional issue, we deem it appropriate to address this issue at the very outset.

7. Relevant facts, necessary for deciding this issue are stated hereinafter briefly.

8. The assessee hitherto are individuals. A search and seizure operation u/s 132 of the Act was carried out on 23.08.2012 on M/s NKG group of cases. The assessee in appeal were also covered under the said search and seizure operation. Consequent to search and seizure operation, the Assessing Officer initiated proceedings u/s 153A of the Act calling upon the assessee to file their returns of income. In compliance with the notices issued u/s 153A of the Act, the assessee filed their respective returns of income. In course of assessment proceedings, in response to the queries raised by the Assessing Officer, the assessee furnished their books of account, computation of income, balance-sheet, profit & loss account, audit report, bank statement and various other documents. After examining the documents filed, the Assessing Officer, as alleged, found various discrepancies in them. Hence, he made reference for special audit u/s 142(2A) of the Act. Based on the Special Audit report the Assessing Officer ultimately concluded that the books of account are not reliable, accordingly, rejected them. Further, alleging non-compliance on the part of the assessee, he proceeded to complete the assessment u/s 153A read with section 144 of the Act. While doing so he made a number of additions on account of bogus purchases, unexplained cash credit, disallowance of expenses etc. Ultimately he concluded the assessments in like manner for all the assessee under appeal.

9. Against the assessment orders so passed, assessee preferred appeals before learned First Appellate Authority. While deciding the appeals, learned First Appellate Authority held that the Assessing Officer has found the assessee to be only entry operators, providing accommodation entries to NKG group without carrying out any real trading activity. Therefore, he held that no addition on account of bogus purchases, unexplained cash credit could have been made. Thereafter, he proceeded to estimate commission income @ 2.5% on the total accommodation entries provided to M/s NKG Infrastructure Ltd., in the form of sales.

10. Before us, it is the specific case of the assessee that the additions made by the Assessing Officer were not based on any incriminating material found in course of search and seizure operation. Learned counsel for the assessee submitted that on the date of search, assessments in respect of impugned assessment years stood completed. Hence, there was no abetment of assessment on the date of search. He submitted that in a case of unabated assessment, the Assessing Officer has no power to make additions, not based on incriminating material found as a result of search. Drawing our attention to the assessment order, he submitted that nowhere in the assessment order, the Assessing Officer has referred to a single piece of incriminating material. He submitted, even the panchnama does not reveal seizure of any document or valuables. Thus, he submitted, the additions having been made in absence of any incriminating material, are not sustainable. In support of such contention, learned counsel relied upon the judgment of Hon'ble Supreme Court in the case of PCIT vs.

11. The learned Departmental Representative, though agreed that neither the assessment order nor the panchnama refer to any seized/incriminating material, however, he submitted, there could be some incriminating material found as a result of search on NKG group leading to the additions made by the Assessing Officer.

12. We have considered rival submissions and perused the material available on record. We have also applied our mind to the judicial precedents, cited before us. As far as primary facts are concerned, there is no dispute that as on the date of search, no assessment proceedings for the impugned assessment years were pending. Thus, it is a case of unabated assessment. On a careful scrutiny of the impugned assessment order, it is observed that the Assessing Officer has not referred to any incriminating material qua the additions made. On the contrary, the additions have been made either on the basis of documents furnished by the assessee in course of assessment proceedings including bank statements or based on the special audit report. There is not even a single reference to any incriminating material found as a result of search in the assessment order.

13. Pertinently, on perusal of panchnama prepared at the time of search and seizure operation, a copy of which is placed at page 60 of the paper book, it is observed that it does not refer to any incriminating material found in course of search and seizure operation. Thus, it is established on record that the additions made by the Assessing Officer were not based on any incriminating material found as a result of search and seizure operations. In fact, learned First Appellate Authority has given a completely new dimension to the case by deleting the additions made by the Assessing Officer and making a completely new addition of commission income, that too, on purely estimate basis by applying the rate of 2.5% on the alleged accommodation entries provided to M/s NKG Infrastructure Ltd., by way of sales.

14. Thus, it is a proven fact on record that no addition in the assessment order was based on any incriminating material found as a result of search. In the above said factual background, the issue that arises for our consideration is, whether in case of unabated assessment any addition can be made in assessment order passed u/s 153A of the Act without any incriminating material found as a result of search. In our view, the issue is no more res-integra by virtue of law laid down by the Hon'ble Apex Court in the case of PCIT vs. Abhisar Buildwell (P) Ltd. (supra). While affirming the decision of the Hon'ble Delhi High Court in the case of CIT vs. Kabul Chawla [2015] 61 taxmann.com 412, the Hon'ble Supreme Court has laid down following ratio:

“(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 fulfillment of the conditions as envisaged/mentioned under sections 147/148 of the Act and those powers are saved."

15. As could be seen from the observations of the Hon'ble Supreme Court in para (iv) above, the Assessing Officer cannot assess or reassess the income relating to completed/unabated assessment, in case no incriminating material is unearthed during the search. Thus, the above said ratio laid down by the Hon'ble Supreme Court clinches the issue in favour of the assessee. Once it is established on record that the additions made by the Assessing Officer are not with reference to any incriminating material found as a result of search, such additions cannot survive. That being the factual and legal position we have no hesitation in deleting the additions made by the Assessing Officer.

16. For the very same reasons, the addition of commission income directed to be made by learned First Appellate Authority must also stand deleted as it is not based on any incriminating material found as a result of search and seizure operation. Ground no. 1 is allowed.

17. In view of our decision in ground no. 1 in assessee's cross-objection, appeal filed by the Revenue becomes redundant.

18. In the result, cross objection stands partly allowed, whereas appeal by the Revenue is dismissed.

19. Our decision above will apply mutatis mutandis to all other appeals and cross-objections.

20. Resultantly, cross objections by the assessee are partly allowed and Revenue's appeals are dismissed.