

IN THE INCOME TAX APPELLATE TRIBUNAL  
AMRITSAR BENCH, AMRITSAR  
BEFORE SH. SANJAY ARORA, ACCOUNTANT MEMBER AND  
SH. N.K.CHOUDHRY, JUDICIAL MEMBER

**I.T.A Nos.399&400(Asr)/2015**  
Assessment Years: 2007-08&2009-10  
PAN: AAEFH 5966J

M/s. Horizon Builders  
& Developers 54-Palm Groove,  
Ajnala Road, Amritsar.

Vs. Asstt. Commissioner of Income  
Tax, Circle-V, Amritsar.

**(Appellant)**

**(Respondent)**

Appellant by: Sh. Ashwani Kalia (C.A)

Respondent by: Smt. Balwinder Kaur (D.R)

Date of hearing : 30.01.2018

Date of pronouncement: 08.02.2018

**ORDER**

Per Sanjay Arora, A.M.

This is a set of two appeals by the Assessee for two succeeding years, being Assessment Years (AYs.) 2007-08 & 2009-10, arising out of the orders by the Commissioner of Income Tax (Appeals)-2, Amritsar ('CIT(A)' for short) of even date, i.e., 28.05.2015, dismissing the assessee's appeals contesting its assessments for the said years u/s. 153C of the Income Tax Act, 1961 ('the Act' hereinafter), both dated 30.12.2011.

2. The sole issue arising in these appeals is the sustainability in law, in the facts and circumstances of the case, of the addition in the sum of Rs. 9.92 lacs and Rs. 6.10 lacs for the two successive years respectively, effected u/s. 69/69A of the Act.

*ITA No. 399/Asr/2015 (A.Y. 2007-08)*

3. The brief facts of the case are that the assessee, a partnership firm in the business of civil construction, as builders as well as on contract basis, was issued notice u/s. 153C of the Act on 18.03.2011 on the basis of incriminating material found in search on 05.02.2009 at the business premises of a firm, M/s. Khanna Pahwa Associates, as well as at the residences of its' partners. The said firm, in property dealing, is a related concern in-as-much as its' two partners are fathers of two of the three partners of the assessee-firm. The returned income being nil, assessment was framed at Rs. 11 lacs, being Rs. 10 lacs added u/s. 69/69A on account of unexplained expenditure, and Rs. 1 lac estimated as income on contract work. In appeal, the ld. CIT(A) found that the aggregate expenditure for the relevant year, as per the documents found during search, found unrecorded in the books of account of the assessee-firm (recorded by Assessing Officer (AO) at pages 3 and 4 of the assessment order), is Rs. 9,92,211. The addition of the balance Rs. 7,789 was accordingly deleted. The addition of Rs. 1 lac as estimated income was, again, both *ad hoc* and without basis. The assessee securing part relief thus, is in second appeal against the assessment to the extent confirmed.

4. We have heard the parties, and perused the material on record.

The argument that there was no search at the business premises of the assessee or its partners - a matter of fact, is without any consequence either in law or on facts. The basis of the impugned assessment is the material found during search of another — in fact, a related party, for which the law provides u/s. 153C. In fact, the initiation of proceedings, and assumption of jurisdiction to assess, is not under challenge; the ld. counsel for the assessee, Sh. Ashwani Kalia, not pressing Grounds 1 and 7 of the Appeal, making an endorsement to that effect thereon.

The next argument advanced before us, placing reliance on the decision in *CIT vs. Ravi Kumar* [2007] 294 ITR 78 (P&H), is that the assessment is bad in law

as neither section 69 nor sec. 69A is applicable in the facts and circumstances of the case. The Hon'ble High Court had in that case held that section 69A cannot be invoked unless the assessee is found to be in possession or ownership of any valuable article, jewellery, etc., finding nothing perverse in the findings by the Tribunal to the effect that the assessee, on the basis of the material on record, had not been found to be so. We find little merit in the assessee's argument. To begin with, a precedent is an authority only for what it actually decides and not what may remotely or even logically follow from it, as clarified in *Goodyear India Ltd. vs. State of Haryana and Another* [1991] 188 ITR 402 (SC) (also refer: *CIT v. Sun Engineering Works (P.) Ltd.* (1992) 198 ITR 297 (SC); *Lachman Dass Bhatia Hingwala (P.) Ltd. vs. Asstt. CIT* (2011) 330 ITR 243 (Del.) (FB); *Blue Star Ltd. v. CIT* (1996) 217 ITR 514 (Bom)). It is the ratio of a judgment that is binding, and all that Hon'ble Court has laid down is that the conditions precedent for a section are to be satisfied before the same could be invoked. The matter therefore boils down to being one of fact. In the facts of the present case, expenditure on building material as well as on services in relation to construction was found. The same was met both vide cheque as well as in cash. While the former component was recorded in the assessee's regular books of account, the latter was not. It is the source of this cash, utilized for meeting the expenditure, listed separately, date-wise basis, which has been deemed as income in view of it being unexplained as to its source. That is, the assessee has, in terms of the document found in search – which is to be regarded as true in terms of s. 292C of the Act, incurred the expenditure, paying for the same in cash, so that the availability of cash with it on the relevant date/s (of payment) is proved. The same clearly falls u/s. 69A, which reads as under:

**‘Unexplained money, etc.**

**69A.** Where in any financial year the assessee is found to be the owner of any money, bullion, jewellery or other valuable article and such money, bullion, jewellery or valuable article is not recorded in the books of account, if any, maintained by him for any source of income, and the assessee offers no explanation about the nature and source of acquisition of the money, bullion, jewellery or other valuable article, or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the money and the value of the bullion, jewellery or other valuable article may be deemed to be the income of the assessee for such financial year.’

Alternatively, it could equally be said that the assessee has not been able to explain the source of expenditure found to have been incurred during the relevant year, in which case section 69C, which deems unexplained — as to its source, expenditure, as income, gets attracted. How, one wonders, then, does it matter or the assessee prejudiced if one section is specified in preference to another; the assessee, in either case, being required to explain the source for meeting the expenditure, deeming the same as income where not satisfactorily explained. As explained in *Hazurimal Kuthiala v. ITO* [1961] 41 ITR 12 (SC), the exercise of power would be referable to a jurisdiction which confers validity upon it and not to a jurisdiction under which it would be nugatory. In the facts of that case, it was therefore held by the Hon'ble Court that the order of the Commissioner was not invalid merely because it was not made under the Patiala Act. Rather, in the facts of the instant case it is, as afore-stated, section 69A which is more aptly applicable. This is as not only is the assessee found to have incurred expenditure during the relevant year, the same stands met by payments in cash during the relevant year. *It is only these cash payments, and not the total expenditure actually incurred, on account of it being unexplained as to source thereof, which is brought to tax as its income.*

The assessee's next argument is that it had during the relevant year, apart from the work for self, also undertaken work for one, Mr. Anil Seth, constructing a

house for him, incurring major expenditure during the relevant year, even as the construction was completed only during f.y. 2008-09, i.e., in June, 2008, as evidenced from the material found during search itself. The expenses incurred in cash pertain to his work, which was being paid for by him. The assessee had in fact incurred a loss on this work as, again, manifest from the said material, being in the form of an account. The explanation has two aspects. As regards 'loss', so that the amount paid by the assessee (Rs. 14.15 lacs) is higher than that received from Shri Anil Seth, the same is of little consequences as the assessee had not claimed the said loss as a business loss per it's return of income, required to be u/s. 139(3) filed by the due date of filing the return u/s. 139(1). Where, in fact, is the question of claim of loss when the assessee has not accounted for the said work? The claim is also untenable as the contract work implies that the assessee is entitled to an agreed amount, either in absolute terms or specified in percentage, over and above the cost incurred. A fixed price, irrespective of the cost incurred by the assessee, on the other hand, implies it to be a sale of construction. Rather, and this constitutes the second aspect of the matter, incurring a higher expenditure implies that the expenditure was incurred in the first instance by the assessee, which was subsequently reimbursed by Mr. Anil Seth. The assessee could not have suffered a loss, as signified by the expenditure incurred being higher than the receipt, if the expenditure was being incurred from the cash made available to the assessee by him. On the contrary, how does the assessee explain the source of the excess expenditure? The argument, instead of advancing, defeats the assessee's case. That apart, there are other infirmities in the argument. There is, firstly, nothing on record to show that the construction commenced during the relevant previous year, i.e., f.y. 2006-07. Rather, going by the fact that it gets completed or substantially so, in end June, 2008, it would, given the time it normally takes for the civil construction of a residential house, have commenced some time in f.y. 2007-08,

i.e., the previous year relevant to AY 2008-09. Then, again, the basis of the assessee's claim is that while the expenditure discharged per cheques is for self, that made in cash is for the contract work, being undertaken for Shri Anil Seth, and one, Ms. Vani, account of both which appears on the same sheet/seized material (PB page 39), with the assessee earning a profit on the latter project. No correlation between expenditure incurred and the payments in cash, so that they pertain to specific item/s of expenditure, has been made at any stage, including before us, with in fact, the cash being paid in round figures while the expenditure is in odd figures. In the absence of any correlation and, in fact, apparent contradiction, the assessee's case is without any factual basis.

The assessee's next argument is, again, only to be stated to be rejected. It is pleaded that as the partners had surrendered a total of Rs. 54 lacs, the same be telescoped against the addition that may stand to arise in the case of the assessee-firm. This is as it is they who made the cash available to the firm, which commenced operations during the current year, i.e., in June, 2006. The income referred to and offered by the partners is for AY 2009-10, which is the second year in appeal before us. How could the income generated, even if translating into cash, during the previous year relevant to AY 2009-10, be conceivably available during the relevant year, i.e., f.y. 2006-07. The ld. AR had no answer.

Finally, the assessee's states that there has been some duplication in arriving at the figure of Rs. 9.92 lacs. This is as the same figure of cash expenditure gets included both from the account of the expenditure as well as of the vendor, i.e., from whom the relevant goods/services stand sourced. We were taken through the relevant sheet (PB pages 24 to 38) by the ld. AR, to exhibit the same. We find this as correct. Also, it was shown by him that in a couple of cases, the payment made in April, 2007 has been also included while casting the total payment for which addition has been made. The ld. DR could not rebut the same, being even

otherwise apparent. Even as the ld. AR was provided opportunity by the Bench to quantify the said duplication, so that we may delete the addition to that extent, no working was provided. We, therefore, subject to the verification by the A.O. in the matter, direct for the deletion of the addition to the extent of the said duplication, clearly specifying the same in his order, as well as of the addition *qua* cash payments made after March 31, 2007. The assessee shall provide the necessary details/calculation.

We decide accordingly, and the assessee gets partly relief.

*ITA No. 400/Asr/2010 (A.Y. 2009-10)*

5. A reading of the assessment order reveals that the addition has in fact not been made on account of unexplained expenditure, as inferred, or even *qua* unexplained cash, but for the excess unaccounted receipt (Rs. 12.15 lacs) over the unexplained expenditure (Rs. 6.06 lacs), as found on the basis of the seized material (PB pages 10-25). However, as the ld. AR would point out during hearing, the very same sheet that reflects the receipt of Rs. 12.15 lacs from Shri Anil Seth, drawn as on 25.06.2008, also states the expenditure incurred on that project, at Rs. 14.74 lacs, incurring thus a loss of Rs. 2.59 lacs. The A.O. could not read a document *de hors* its context, drawing an inference as favourable to him, contrary to what the document explicitly states.

6. We have heard the parties, and perused the material on record.

The Revenue's case is without any substance. PB page 25, listing the receipt and expenditure on two housing projects, as appears to be the case, is at the end of or towards the completion of the same, is summarized as under: (Amt. in Rs. lacs)

A/c	Upto	Receipt	Expenditure	Profit/(Loss)
1. Anil Seth	25/6/2008	12.05	14.64	(2.59)
2. Vani	26/6/2008	5.50	4.62	0.88
Total		17.55	19.26	(1.71)

The AO has, while taking the receipt on the basis of this document, i.e., from Shri Anil Seth, included another Rs. 10,000 (the said page not forming part of the assessee's PB), i.e., at Rs. 12.15 lacs, taken the expenditure on the basis of another set of documents, totaling to Rs. 6.10 lacs. The difference or the excess receipt of Rs. 6.05 lacs (i.e., Rs. 12.15 lacs - Rs. 6.10 lacs), wrongly taken by him at Rs. 6.10 lacs, was added to the returned income (refer para 2/pg. 4 of the assessment order). *How could that be?* The document clearly states of the assessee having incurred a loss on the Anil Seth project, at Rs. 2.59 lacs. Rather, the other part of the document, stating the profit earned on another project, also could not be ignored, so that the assessee has in fact incurred a loss of Rs. 1.71 lacs. How could the said document be interpreted to construe income? In fact, even considering from the stand-point of the source of expenditure, the document explains the source of cash, being from the project owners in the main, and from the partners (specified by name, with their respective amounts). In fact, none of the documents listing the expenditure, save three, list the dates on which the same is incurred. How could then it be said that the same is incurred during the relevant previous year, i.e., f.y. 2008-09, even as that before 26.06.2008 would get explained on the basis of the receipt and expenditure statement, discussed above (PB page 25). The three documents, at PB pages 13, 14, 15, refer to a date post 26.06.2008, so that the expenditure does not pertain to these projects, and is thus liable to be added as unexplained expenditure u/s. 69C. The amounts per the three documents aforesaid totals to Rs. 11,660/-. An addition to this extent is thus confirmed, and the balance directed for deletion.

We decide accordingly.

7. In the result, the assessee's appeals are partly allowed.

*Order pronounced in the open Court on February 08, 2018*

Sd/-  
(N.K.Choudhry)  
Judicial Member

Sd/-  
(Sanjay Arora)  
Accountant Member

Date: 08.02.2018

/GP/Sr.PS

Copy of the order forwarded to:

- (1) The Assessee M/s. Horizon Builders & Developers
- (2) The ACIT, Circle-V, Amritsar
- (3) The CIT(A)-2, Amritsar
- (4) The CIT Amritsar.
- (5) The SR DR, I.T.A.T.

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By Order