

**IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'B' BENCH,  
NEW DELHI**

**BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND  
MS. SUCHITRA KAMBLE, JUDICIAL MEMBER**

**ITA Nos. 1126, 1127 & 1128/DEL/2013  
[A.Ys 2003-04, 2004-05 & 2005-06]**

M/s Flex Engineering Ltd  
Now merged with Uflex Ltd  
305, 3<sup>rd</sup> Floor, Bhanot Corner  
Pamposh Enclave, Greater Kailash  
New Delhi

Vs. The Dy. CIT  
Central Circle - 18  
New Delhi

PAN : AAACF 0109 J

**ITA No. 2502/DEL/2013  
[A.Y 2004-05]**

The Dy. CIT  
Central Circle - 18  
New Delhi

Vs. M/s Flex Engineering Ltd  
Now merged with Uflex Ltd  
305, 3<sup>rd</sup> Floor, Bhanot Corner  
Pamposh Enclave, Greater Kailash  
New Delhi

PAN : AAACF 0109 J

[Appellant]

[Respondent]

**Date of Hearing : 09.01.2019**

**Date of Pronouncement : 14.01.2019**

Assessee by : Shri M.P. Rastogi  
Shri Rajiv Kumar, CA

Revenue by : Ms. Nidhi Srivastava, CIT-DR

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER,

The above captioned three appeals by the assessee are preferred against three separate orders of the CIT(A) - III, New Delhi pertaining to A.Ys 2003-04, 2004-05 and 2005-06. The Revenue has preferred cross appeal for assessment year 2004-05. Since the underlying facts in the issues raised by the assessee and revenue in all these appeals pertain to same assessee and were heard together, these are being disposed of by this common order for the sake of convenience and brevity.

ITA Nos. 1126 & 1127/DEL/2013

2. The assessee has raised the following additional ground of appeal:

*"That in the absence of any incriminating material found during the course of search, the assumption of jurisdiction u/s 153A of the Income-tax Act, 1961 [hereinafter referred to as 'the Act' for short] is arbitrary, unjust and consequently the addition/disallowance made by the Assessing*

*Officer under a completed assessment, not abated, is arbitrary, unjust and bad in law."*

3. Since the additional ground challenges the assumption of jurisdiction by the Assessing Officer to frame u/s 153A of the Act and being a legal ground, the same is admitted. Since the additional ground mentioned hereinabove goes to the root of the matter, the same is adjudicated first.

4. Facts on record reveal that search and seizure operation was conducted on M/s Flex Group of cases on 23.02.2006. For assessment year 2003-04, assessment was completed u/s 143(3) of the Act vide order dated 31.03.2005. Return for assessment year 2004-05 was filed on 31.10.2004 and time to issue notice u/s 143(2) of the Act expired on 30.09.2005. These facts show that on the date of search, the assessment years 2003-04 and 2004-05 were completed assessment and, therefore, any addition made in the assessment framed u/s 153A of the Act has to be based upon incriminating material found at the time of search.

5. The panchnama is as under:

“Annexure AA

Inventory of books of account found and seized during the course of search and seizure operation u/s 132 of the I.T. Act in the case of M/s Flex Engineering Ltd conducted on 27.02.2006 at A-2, Sector 60, Noida:

<u>Sl No.</u>	<u>Description</u>
1.	Hard Disk of server of FEL Accounts - One”

6. A perusal of the aforementioned seized document shows that what was seized in the search proceedings were only books of account of the assessee.

7. The Assessing Officer has made addition on the basis of Volker Committee Report which was constituted by the United Nations to examine the Oil for Food Programme.

8. As mentioned elsewhere, no incriminating material was found at the time of search and the additions have been made on account of kickbacks solely on the presumption that the assessee must have paid some money to Iraq for participating in the Oil for Food Programme.

Additions have been made only on the basis of presumption without there being any direct concrete evidence found at the time of search proceedings.

9. The Hon'ble High Court of Delhi in the case of Kabul Chawla 380 ITR 573 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 153 A (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 153 A 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 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 153 A 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 153 A 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."*

12. A similar view was taken by the Hon'ble jurisdictional High Court in the case of Meeta Gutgutia reported in 395 ITR 526.

13. The Hon'ble Supreme Court has also taken a similar view in the case of Singhad Educational Society 297 CTR 441.

14. Respectfully following the direct judgments of the Hon'ble Jurisdictional High Court of Delhi [supra] and the Hon'ble Supreme Court, we have no hesitation to hold that assessments framed u/s 153A of the Act are without jurisdiction and the order deserves to be quashed.

15. In the result, ITA Nos. 1126 & 1127/DEL/2013 are allowed.

ITA No. 1128/DEL/2013

16. While framing assessment order, the Assessing Officer observed that when Iraq was authorised to sell its crude oil under the Oil for Food Programme, it realised that it could generate illicit income outside of the United Nations oversight. The Assessing Officer observed that Iraq earned \$ 228.8 million of income from these surcharges by requiring its oil buyers to pay surcharges of generally between 10 to 30% per barrel of oil. The Assessing Officer observed that Iraq's other major source of illicit income from the programme came from kickbacks paid by companies that it selected to receive contracts for humanitarian goods under the programme.

17. The Volkar Committee was constituted by the United Nations to look into the illicit transactions done by Iraq in oil for food programme. The Volkar Committee found sufficient evidence that all the suppliers were required to pay kickbacks in order to obtain or execute humanitarian contracts under the programme. In Volkar Committee report, the name of the assessee was also mentioned.

18. Taking a leaf out of this information, the Assessing Officer formed a belief that the assessee must have paid kickbacks in the said programme. The Assessing Officer finally observed that as the exact period of payment of kickback by the assessee is not ascertainable, addition is made on prorata basis and computed Rs. 55,675/- as kickback assumed to have been paid by the assessee during the year under consideration. Addition of Rs. 55,675/- was made, which was confirmed by the CIT(A).

19. Before us, the ld. AR vehemently stated that the Assessing Officer has made addition without bringing any cogent material evidence on record to substantiate his claim that the assessee must have paid some kickbacks for participating in the said programme. It is the say of the ld. AR that Volkar Committee by the United Nations looked into the illicit transactions done by Iraq in oil for food programme but nowhere the said committee has stated that the assessee has actually paid any kickbacks. The ld. AR further stated that the report of Volkar Committee was for a specific purpose and the same cannot be used for framing assessment under the Indian Income Tax Act. The ld. AR relied upon the judgment of the Hon'ble Jammu

and Kashmir High Court in the case of International Forest Company 101 ITR 719.

20. The ld. AR further stated that the onus is upon the Revenue to prove that the assessee has incurred certain expenditure which are unexplained before making any addition u/s 69C of the Act. Reliance was placed on the decision of the Hon'ble Bombay High Court in the case of Chandulal Sadharam Khemani 53 TAXmann.com 293 and the decision of the Hon'ble Delhi High Court in the case of Lubtec India Ltd 311 ITR 175.

21. Per contra, the ld. DR strongly supported the findings of the lower authorities.

22. We have carefully considered the orders of the authorities below. The undisputed fact is that the additions made by the Assessing Officer are solely based upon the Volkar Committee. In our understanding of the provisions of section 69C of the Act, first of all, the assessee must have incurred some expenditure but there is nothing to show that the expenditure was, in fact, incurred by the assessee. The assessee had denied having incurred the expenditure and it was on the Revenue to

prove that the assessee had paid kickbacks by participating in the oil for food programme. No such evidence has been brought on record except Volkar Committee Report.

23. The Volkar Committee was constituted by the United Nations for a special purpose.

24. The Hon'ble Jammu and Kashmir High Court in the case of International Forest Company [supra] has held that even if it is to be taken that the Income tax authorities are not bound by strict rules of evidence, report of Iyengar Commission could not be referred to and relied upon by the Appellate Tribunal unless it had not only invited the attention of the assessee to the passages which it intended to rely but had also given opportunity to the assessee to explain those passages and to adduce evidence against the truth of recitals contained therein.

25. Considering the facts of the case in totality, we hold that the Revenue grossly failed in discharging the onus u/s 69C of the Act without bringing any cogent direct material evidence on record. The additions so made cannot be sustained and accordingly directed to be deleted.

26. In the result, the appeal of the assessee in ITA No. 1128/DEL/2013 is allowed.

ITA No. 2502/DEL/2013

27. Solitary grievance of the Revenue is that the CIT(A) erred in directing the Assessing Officer to compute the claim of deduction u/s 80HHC of the Act as originally filed and claimed in its return of income.

28. The bone of contention is the return of income filed on 31.10.2004 which was revised on 31.07.2008. In the revised return, the assessee inadvertently did not claim deduction u/s 80HHC of the Act in the normal computation of taxable income unlike in the return filed initially u/s 153A of the Act wherein deduction u/s 80HHC was claimed against the total income in the normal computation of taxable income. The revised return of income was dismissed by the Assessing Officer and accordingly, new claims made in the revised return were also rejected.

29. The claim of deduction u/s 80HHC against book profit u/s 115JB was considered by the Assessing Officer and was denied by observing as under:

"As discussed above, the return furnished on 31.7.2008 referred to as 'revised return u/s 153A' by the assessee is considered as invalid and not taken into cognizance. Thus the return filed initially on 3.10.2006 (u/s 153A) is treated as a valid return furnished in response to notice u/s 153A. From the perusal of the computation of taxable income for the year under consideration furnished along with return u/s 153A, it is seen that while computing taxable income as per normal computation, the assessee has claimed deduction u/s 80HHC after including long term capital gain in the gross total income. However, as per the provision of section 112(2) of the Income Tax Act, 1961, the deduction under Chapter - VI-A shall be allowed from the gross total income as reduced by long term capital gain. Hence, capital gain amounting to Rs. 6,73,45,435/- is not allowed to be included in the gross total income for computing the deduction u/s 80HHC. During the assessment year under consideration the assessee has brought forward unabsorbed losses/depreciation of Rs. 20,60,40,682/- which the assessee has himself adjusted against the income from business resulting in Nil business income in return furnished u/s 153A. Noticeably, the assessee too has not claimed deduction u/s 80HHC in computation of taxable income as per normal provisions of Act in the 'revised return' furnished subsequently. As the total business profit of the assessee during the instant assessment year

as per normal computation after setting off unabsorbed losses/depreciation brought forward from earlier assessment years is Nil. therefore, the assessee is not eligible for any deduction u/s 80HHC. Thus, since deduction u/s 80HHC while computing book profit u/s 115JB is also to be computed on the basis of business profit computed according to normal provisions of the Act as discussed above in the preceding paragraphs, no deduction u/s 80HF1C is allowable while computing book profit u/s 115JB too. Therefore, the total taxable income of the assessee during the year under consideration is taken at Rs. 6,73,45,435/-. The assessee is liable to proceedings u/s 271 (1 )(c) on account of concealment and furnishing of inaccurate particulars of his income as discussed above."

30. The assessee carried the matter before the CIT(A) and reiterated its claim of deduction u/s 80HHC of the Act and placed strong reliance on the judgment of the Hon'ble Supreme Court in the case of Sun Engineering Works 198 ITR 297 and Chettinad Corporation Pvt Ltd 200 ITR 320.

31. The CIT(A) was convinced with the claim of the assessee by holding as under:

"I have gone through the above submissions of the appellant and have perused the AO's order and considered the facts and evidences on record and other judicial pronouncements on the issue.

In view of the spirit of Apex Court's judgement in the case of CIT vs. Sun Engineering Works (198 ITR 297) and Chettinad Corp. P. Ltd. vs. CIT (200 ITR 320), I am of the considered view that the provisions of section 153A cannot be read in isolation because it has the same effect as that of the section 147/148. Because section 153A clearly provides that this section is to **"assess"** or **"ire-assess"** the income of 6 assessment year proceedings the search year. Therefore, in section 153A proceedings also the assessment cannot be made at a income less than the income originally assessed.

Hence, in view of the judgment of Sun Engineering (Supra) and Chettinad Corp. P. Ltd (supra) the revised claim has rightly been disallowed by the AO. The AO is however directed to compute the appellant's claim of deduction under section 80HHC as originally filed and claimed in its return of income."

32. We have carefully considered the orders of the authorities below and have given thoughtful consideration to the findings of the CIT(A). The findings of the CIT(A) are based upon the judgment of the Hon'ble Supreme Court in the case of Sun Engineering Works and Chettinad

Corporation Pvt. Ltd [supra] and the direction for computing the claim of deduction u/s 80HHC as per original return filed calls for no interference.

33. In the result, the appeal of the Revenue is dismissed.

34. To sum up, in the result, all the three appeals of the assessee are allowed whereas the appeal of the Revenue is dismissed.

**The order is pronounced in the open court on 14.01.2019.**

**Sd/-**

**[SUCHITRA KAMBLE]  
JUDICIAL MEMBER**

**Sd/-**

**[N.K. BILLAIYA]  
ACCOUNTANT MEMBER**

Dated: 14<sup>th</sup> January, 2019

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,  
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
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