

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : E : NEW DELHI

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
AND
SHRI KULDIP SINGH, JUDICIAL MEMBER

ITA Nos.3833 & 3834/Del/2015
Assessment Years: 2006-07 & 2007-08

ACIT,
Central Circle-07,
ARA Centre,
Jhandewalan Extn.,
New Delhi.

Vs Varun Beverages Ltd.,
R/o F-2/7, Okhla Industrial Area,
Phase-I,
New Delhi.
PAN: AAACV2678L

CO Nos.39 & 40/Del/2016
(ITA Nos.3833 & 3834/Del/2015)
Assessment Years: 2006-07 & 2007-08

Varun Beverages Ltd.,
R/o F-2/7, Okhla Industrial Area,
Phase-I,
New Delhi.
PAN: AAACV2678L

Vs. ACIT,
Central Circle-07,
ARA Centre,
Jhandewalan Extn.,
New Delhi.

(Appellant)

(Respondent)

Assessee by : Shri Rajat Jain &
Shri Akshat Jain, CAs
Revenue by : Ms Pratima M. Biswas, CIT, DR
Date of Hearing : 08.04.2019
Date of Pronouncement : 18.04.2019

ORDER

PER BENCH:

The above two appeals filed by the Revenue are directed against the separate orders dated 26th March, 2015 of the CIT(A)-24, New Delhi relating to assessment

years 2006-07 & 2007-08, respectively. The assessee has filed the Cross Objections against the appeals filed by the Revenue. For the sake of convenience, these were heard together and are being disposed of by this common order.

ITA No.3833/Del/2015 (A.Y. 2006-07)

2. Facts of the case, in brief, are that a search and seizure operation u/s 132 of the Act was carried out on M/s Jaipuria group of cases on 27th March, 2012. The case of the assessee was also covered in the said search. In response to notice u/s 153A of the IT Act, 1961 dated 8th April, 2013, the assessee filed its return of income on 1st July, 2013 declaring nil income. During the course of assessment proceedings, the Assessing Officer observed that during the search operations, it was observed that the assessee group has booked substantial expenses under the head 'Advertisement expenses.' He noted that some of the expenses did not appear to be genuine or justified. The A.O. noted that in the proceedings of the post search investigation, vide questionnaire dated 16th April, 2012, the assessee was asked to provide the details of the advertisement expenses. From the various details furnished by the assessee, it was observed that there are number of parties to whom advertisement expenses have been booked, but, no address or PAN have been provided. He, therefore, asked the assessee to explain as to why the advertisement expenses booked from such parties may not be treated as bogus due to the absence of evidence to prove the identity of the parties. Rejecting various explanations given by the assessee, the Assessing Officer made addition of Rs.44,20,848/- treating the above advertisement expenses as not genuine

and, therefore, he treated the sum as unexplained expenditure by invoking the provisions of section 69C of the IT Act. Similar addition has been made by the Assessing Officer of an amount of Rs.50,18,858/- for assessment year 2007-08 as unexplained expenditure u/s 69C of the IT Act.

3. The Assessing Officer further noted that the assessee vide its reply dated 26th February, 2013, furnished the following transactions (purchase of sugar) with M/s Bajaj Hindustan Ltd.:-

S.No.	A.Y.	Amount
1.	2006-07	1,68,80,000/-
2.	2007-08	16,28,80,000/-

4. In response to notice u/s 133(6) of the Act dated 3rd January, 2014, M/s Bajaj Hindustan Ltd. replied that they had transactions with the assessee only during the F.Y. 2011-12. The Assessing Officer, therefore, inferred that the purchases shown by the assessee at Rs.1,68,80,000/- for assessment year 2006-07 are bogus purchases. He, therefore, added the amount of Rs.1,68,80,000/- to the total income of the assessee. Similarly, he made an addition of Rs.16,28,80,000/- during the assessment year 2007-08 on account of bogus purchases.

5. The Assessing Officer further noted that the assessee has made investment of Rs.27,14,97,669/-. He, therefore, asked the assessee to explain the applicability of provisions of section 14A r.w. Rule 8D of the IT Rules, 1962. Rejecting the various explanations furnished by the assessee and invoking the provisions of section 14A r.w. Rule 8D of the IT Rules, the Assessing Officer made disallowance of

Rs.12,58,73,774/- u/s 14A r.w. Rule 8D. He accordingly determined the total income of the assessee at Rs.14,71,74,620/-. Similarly, the total income was determined at Rs.21,71,25,060/- for assessment year 2007-08

6. So far as the addition of bogus purchase of raw material is concerned, the Id.CIT(A), on the basis of the remand report of the Assessing Officer, deleted the addition for which the Revenue is not in appeal, therefore, we are not concerned with the same.

7. So far as the addition on account of bogus advertisement expenses is concerned, the Id.CIT(A), following his order for 2008-09, deleted the same.

8. So far as the disallowance of expenditure u/s 14A r.w. Rule 8D is concerned, the Id.CIT(A) directed the Assessing Officer to disallow an amount of Rs.13,57,488/- being 0.5% of the average investment and deleted the balance amount. Similarly, for assessment year 2007-08, he directed the Assessing Officer to sustain an amount of Rs.9,86,091/- being 0.5% of the average investment and the balance amount was directed to be deleted.

9. Aggrieved with such order of the CIT(A), the Revenue is in appeal before the Tribunal by raising the following grounds:-

1. The order of Ld. CIT(A) is not correct in law and facts.
2. On the facts and circumstances of the case, the Ld. CIT(A) has erred in law in deleting the addition of Rs. 44,20,848/- made by the Assessing Officer on account of advertisement expenses.
3. On facts and circumstances of the case the Ld. CIT(A) has erred in law in

restricting the addition made u/s 14A r. w. Rule 8D of I. T. Rules to Rs. 13,57,488/- out of total addition of Rs. 65,49,093/- thereby allowing relief to assessee of Rs. 51,91,605/- .(The AO had made an addition of Rs. 12,58,73,554/- u/s 14A r. w. Rule 8D of I. T. Rules which was subsequently reduced u/s 154 of IT Act to Rs. 65,49,093/-).

4. The appellant craves leave to add, amend any/all grounds of appeal before or during the course of hearing of the appeal.

10. The ld. counsel for the assessee, at the time of hearing, filed the following legal ground under Rule 27 of the ITAT Rules:-

“1. That on the facts and circumstances of case, additions made under section 153A of the Income tax Act, 1961 is bad in law as the same were not made on the basis of incriminating material found during the course of search and seizure operation and the case of relevant assessment year has already been assessed under section 143(1) /143(3) which could not abate on the date of search.

11. The ld. counsel for the assessee, referring to the order of the Tribunal in assessee’s own case for assessment years 2008-09 to 2010-11, submitted that under identical circumstances, the Tribunal, following the decision of the Hon'ble Delhi High Court in the case of *CIT vs. Kabul Chawla, reported in 380 ITR 573 (Del)* has deleted the addition and the appeal filed by the Revenue was dismissed. The facts being similar in the present appeals filed by the Revenue, therefore, the appeals filed by the Revenue have to be dismissed on this ground itself. He further submitted that since the assessee has not received any dividend income during the year which has been claimed as exempt, therefore, in view of the decision of the Hon'ble Supreme Court in the case of *Cheminvest Ltd. vs. CIT reported in 61 taxmann.com 118*, the

provisions of section 14A of the Act r.w. Rule 8D of the IT Rules will not apply and therefore no disallowance is called for.

12. The Id. DR, on the other hand, opposed the admissibility of the additional ground filed by the assessee by submitting the following written submission:-

1. “The assessee has raised Additional Grounds claiming that the additions made u/s 153A of the Income Tax Act, 1961 is bad in law as the same were not made on the basis of incriminating material found during the course of search and seizure operation and the case of relevant assessment year has already been assessed u/s 143(1)/ 143(3) which could not abate on the date of search.

2. The Revenue strongly opposes filing of additional grounds at this juncture considering that these issues were not raised either before the Assessing Officer or before the CIT(A). Para 1 of Page 1 of Assessment order records:

“Search & Seizure operation under section 132 of the Income tax act was carried out M/s Jaipuria Group (R.K: Jaipuria Group) of cases on 27.03.2012. Warrant of authorization u/s 132 of the I.T. Act, 1961 was also issued in the name of M/s Varun Beverages Ltd., Plot No. 31, Sector- 49, Institutional Area, Gurgaon.”

3. Also before the CIT(A) the ground taken was

“That on the facts and in the circumstances of the appellant’s case, the assessing officer erred both in fact and in law in making addition of Rs. 14,71,74,622/- under section 153A of the Income Tax Act, 1961 while the case of the relevant assessment year was also assessed under section 143(3) of the Income Tax Act, 1961 without bringing in any incriminating material on record which belongs to the appellant pertaining to the relevant assessment year seized during the course of search and seizure operation. Hence, the addition of Rs. 14,71,74,622/- on account of various grounds is bad in law and liable to be deleted.”

4. Ld. CIT(A) has rejected this ground by recording at para 4.1.1 of his order as under:

“ In this ground the appellant is agitating that the assessment has been framed u/s 153A r.w.s 143(3) without bringing any incriminating material on record that belonged to the assessee which has been seized during search & seizure operation. This is a repetitive ground. Similar ground has been raised for A. Y. 2008-09 and other years also. Vide my separate order dated 14.11.14 in the appellant’s own case for A.Y 2008-09 (A.No. 357/14-15), I have rejected the present ground. Following my said order and for the same reasons, I hereby reject ground No. 1.”

5. Assessee has pressed into service order of NTPC 2002-TIOL279-SC-ITLB However, it is pertinent to note that here the Apex Court has held:

“We fail to see why Tribunal should be prevented from considering a question of law arising from assessment proceedings although not raised earlier. ”

6. Here it is pertinent to note that the pre-condition that issue should arise from assessment proceedings has not been satisfied.

7. Also, it is submitted that the NTPC case has not specifically overruled the Judgment in the case of Gurjargravures [Addl. CIT Vs Gurjargravures (P.) Ltd [19781 111 ITR 1 (SC)] which bars raking up of an issue not raised earlier.

8. It is also pointed out that in the NTPC case, the Hon’ble court has relied on the case of Jute Corporation of India which in turn has relied on the case of Kanpur Coal. However, in Kanpur Coal the issue has been raised before both the A.O. and the first Appellate authority.

9. Moreover, the Apex Court in Jute Corporation of India Ltd. 2002-TIOL1027SCITLB (for short 'Jute Corporation case) held as under:

“U/s 254 power of the Tribunal in dealing with appeals is thus expressed in thewidest possible terms. The purpose of the assessment proceedings before the taxing authorities is to assess correctly the tax liability:

we do not see any reason why the assessee should be prevented from raised that question before the IT AT for the first time, so long as the relevant facts are on record in respect of that item. The Tribunal has jurisdiction to examine a question of law which arises from the facts as found by the authorities below and having a bearing on the tax liability of the assessee. The factual matrix of the case is thus to be considered and the adjudication in the case of NTPC has to be considered in the correct context. ”

10. With this preface, it is felt that before embarking upon to rely on NTPC case its factual matrices should not be lost sight of. For applying this judgment following needs to be cumulatively satisfied:

- (a) All facts relevant to the issue should have been found by the lower authorities.
- (b) Additional ground proposed
 - (i) Should be a question of law and
 - (ii) It should be emerging out of the facts found out by the AO/CIT(A).
- (c) Additional ground should be the one which couldnot be raised earlier for bona fide reasons.
- (d) Additional ground should have a bearing on the quantification of the taxable income.

In the light of the above it is respectfully submitted that additional grounds raised by the assessee *may not be admitted.*”

12.1 She accordingly submitted that the additional ground raised by the assessee be dismissed and the order of the A.O. be restored.

13. We have considered the rival arguments made by both the sides and perused the orders of the authorities below. We have also considered the various decisions cited before us. We find that under identical circumstances, the Tribunal in assessee's own case for assessment year 2008-09 to 2010-11, vide ITA Nos.832,863 & 864/Del/2015 filed by the Revenue, has decided the issue and the appeals filed by the Revenue have been dismissed. The relevant observation of the Tribunal at para 8 of the order is being reproduced as under:-

“8. We have considered the rival submissions made by both the sides and perused the material available on record. A bare perusal of the assessment order shows that there is no mention of any incriminating material found during the course of search with respect to the unexplained advertisement expenses. There is also no incriminating material on which the Assessing Officer has made the other addition i.e., on account of disallowance u/s 14A of the IT Act. Therefore, it is quite clear that the addition in the instant case has been made on the basis of post search inquiry and the addition is not based on any incriminating material found during the course of search. Therefore, the decision of the Hon'ble Delhi High Court in the case of CIT vs. Kabul Chawla (supra) will be clearly applicable to the facts of the present case wherein it has been held that completed assessments can be interfered with by the Assessing Officer while making assessments u/s 153A only on the basis of some incriminating material unearthed during the course of search which was not produced or not disclosed or not made known in the course of original assessments. Since the impugned assessment year is a completed assessment, therefore, the same, in our opinion, cannot be disturbed without any incriminating material found during the course of search. Similar are the cases for assessment years 2009-10 and 2010-11. Since the Revenue failed to bring on record any incriminating material found during the course of search, therefore, the completed assessments in the instant case could not have been disturbed. We, therefore, allow the legal ground raised by the assessee under Rule 27 of the IT(AT) Rules, 1963 and decide the same in favour of the assessee. Since the assessee succeeds on the legal ground, therefore, the appeal filed by the Revenue is dismissed.”

14. Since, in the instant case also, a bare perusal of the assessment order shows that there is no mention of any incriminating material found during the course of search with respect to unexplained advertisement expenses or expenditure for earning tax free dividend income, therefore, in absence of any incriminating material found during the course of search, no addition on account of bogus advertisement expenses or disallowance u/s 14A r.w. Rule 8D can be made. In view of the decision of the coordinate Bench of the Tribunal in assessee's own case for assessment years 2008-09 to 2010-11, we allow the legal ground raised by the assessee under Rule 27 of the ITAT Rules, 1963 and decide the same in favour of the assessee. Since the assessee succeeds on the legal ground, therefore, the appeal filed by the Revenue is dismissed.

15. So far as the CO filed by the assessee is concerned, since it is an admitted fact that no exempt income has been received by the assessee during the year, therefore, in view of the latest decision of the Hon'ble Supreme Court in the case of *PCIT vs. Oil Industry Development Board of India vide order dated 08.02.2019* where it has been held that in absence of any exempt income, no disallowance u/s 14A r.w. Rule 8D is permissible, no disallowance u/s 14A r.w. Rule 8D is called for.

16. In the result, the appeals filed by the Revenue are dismissed and the CO filed by the assessee is allowed.

ITA No.3834/Del/2015 & CO No.40/Del/2016

17. After hearing both the sides, we find the grounds raised by the Revenue and the additional ground as well as the grounds raised in the CO filed by the assessee are

identical to the grounds raised by the Revenue and the additional ground as well as the grounds raised in the CO by the assessee in ITA No.3833/Del/2015 and CO No.40/Del/2016 for assessment year 2006-07. We have already decided the issue and the appeal filed by the Revenue has been dismissed and the CO of the assessee has been allowed. Following similar reasoning the appeal filed by the Revenue is dismissed and CO of the assessee is allowed.

18. In the result, both the appeals filed by the Revenue are dismissed and the COs filed by the assessee are allowed.

The decision was pronounced in the open court on 18.04.2019.

Sd/-
(KULDIP SINGH)
JUDICIAL MEMBER

Sd/-
(R.K. PANDA)
ACCOUNTANT MEMFBER

Dated: 18th April, 2019

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Copy forwarded to

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

Asstt. Registrar, ITAT, New Delhi