

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'A' : NEW DELHI)**

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

(THROUGH VIDEO CONFERENCE)

**ITA No.355/Del./2017
(ASSESSMENT YEAR : 2009-10)**

M/s. Brijwasi Builders (P) Ltd., vs. ACIT,
E – 9, Panchsheel Park, Central Circle 30,
New Delhi – 110 017. New Delhi.

(PAN : AADCB6676P)

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : Shri M.P. Rastogi, Advocate
Shri Sanjay Kalra, Advocate
REVENUE BY : Shri Satpal Gulati, CIT DR

Date of Hearing : 25.10.2021

Date of Order : 25.10.2021

ORDER

PER KULDIP SINGH, JUDICIAL MEMBER :

Appellant, M/s. Brijwasi Builders (P) Ltd. (hereinafter referred to as 'the assessee') by filing the present appeal sought to set aside the impugned order dated 25.11.2016 passed by the Commissioner of Income-tax (Appeals)-31, New Delhi qua the assessment year 2009-10 on the grounds inter alia that :-

“1. That the order passed by Ld. err (A)-31, (hereinafter referred to as CIT (A)), New Delhi is bad in 'law and contrary to facts.

2. That on the facts and circumstances of the case and in law,, the Ld. CIT (A) was not justified in refusing to admit the additional ground of appeal raised during the appellate proceedings by incorrectly holding that the plea not taken before the Assessing Officer cannot be taken in appellate proceedings.

2.1 That the additional ground raised by the appellant - "That on the facts and circumstances of the case and in law, the Ld. A.O. has erred in making additions in non-abated assessment completed u/s iS3A in the absence of any incriminating material'; challenged the power of the Assessing Officer to make additions u/s 153A, in a non abated assessment, in the absence of any incriminating material.

2.2 That the remanding of additional ground to the Assessing Officer for comments amounted to implicit admission of additional ground and therefore the Ld. CIT (A) was not justified in not adjudicating the additional ground of appeal.

3. That on facts and circumstances of the case and in law the Ld. CIT(A) was not justified in upholding the addition of Rs.1,45,00,000/- as unexplained cash credits in respect of loan taken from following parties during the assessment year under appeal :-

- | | | |
|-----------|---|-------------------------|
| a. | M/s. SAR Logistics | Rs. 10,00,000 |
| b. | Kushal Infra Projects Industries Indian Ltd. | Rs.1,15,00,000/- |
| c. | Sri Balaji Gardencity Developers (P) Ltd. | Rs.20,00,000” |

2. Briefly stated the facts necessary for adjudication of the controversy at hand are : On the basis of search and seizure action carried out u/s 132 of the Income-tax Act, 1961 (for short ‘the Act’) on 18.10.2011 and 11.09.2013 at the business premises of the assessee at E-9, Panchsheel Park, New Delhi and on the basis of subsequent search on the assessee along with Saluja Group of cases, notice was issued u/s 153A of the Act on 13.08.2015 and in

response thereto, return declaring loss of Rs.6,821/- was filed by the assessee. Necessary notices were issued vide questionnaire dated 13.10.2015, 20.01.2016 & 10.02.2016 and assessee was called upon to prove the genuineness of advances/share application money/unsecured loans entered in the books of account as having been received during the year under consideration. Since the assessee has failed to furnish any confirmation, source of loan, identity and creditworthiness of M/s SAR Logistics, M/s. Kushal Infra Project Industries India Ltd., M/s. Kushal Infra Project Industries India Ltd. & M/s. Sri Balaji Gardencity Developers Pvt. Ltd. qua the loan/advance to the tune of Rs.10 lakhs, Rs.1 crore, Rs.15 lakhs & Rs.20 lakhs respectively, AO made addition of Rs.1,45,00,000/- u/s 68 of the Act and thereby framed the assessment at Rs.1,44,93,180/- u/s 153A of the Act.

3. Assessee carried the matter before the Id. CIT (A) by way of filing the appeal who has confirmed the addition by dismissing the appeal. Feeling aggrieved by the order passed by the Id. CIT(A), the assessee has come up before the Tribunal by way of filing the present appeal.

4. We have heard the Id. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and

orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

5. Undisputedly, on the basis of search conducted on 18.10.2011 at the business premises of the assessee, initially no action was taken. It is also not in dispute that another search operation was carried out on the assessee along with Saluja Group on 11.09.2013 in which no incriminating material was found/seized. Then AO on the basis of first search conducted on 18.10.2011 initiated the enquiry and made addition of Rs.1,45,00,000/- on the ground that assessee has failed to prove any confirmation, source of loan, identity and creditworthiness of his creditors.

6. At the very outset, Id. AR for the assessee contended that before Id. CIT (A), he has raised additional ground challenging the jurisdiction of the AO initiating enquiring on the basis of search conducted on 18.10.2011, which was arbitrarily rejected and drew our attention towards paras 4.5, 4.6 & 4.7 of the impugned order passed by the Id. CIT (A).

7. For ready perusal, operative part of the impugned order passed by the Id. CIT (A) rejecting additional ground raised by the assessee is extracted as under :-

“4.5 I have considered the findings recorded by the Id. AO as per the assessment order, the additional ground raised and the submissions of the appellant thereon the remand report and the rejoinder thereto, the position of the law and the facts of the case on record. While raising the additional ground, the appellant has relied upon the decisions of Hon'ble Apex Court in the cases of NTPC Ltd. (supra) and Goetze (India) Ltd (supra) I have carefully gone through these decisions and find that both have held that a question of law can be raised at any point of time However, the issue raised by the appellant as per the additional ground is that the addition was wrongly made in the absence of any incriminating material. This not a question of law but a finding of fact i.e. as to whether any incriminating material was found or not. Hence, the aforesaid case laws are not applicable to the case of the appellant. The Id. AO has referred to various documents found and seized from the premises of the appellant while making the addition. The nature of these documents; as to whether they are incriminating or not, cannot be allowed to be raised at this stage, if this was not done earlier before the Id AO. Reliance in this regard is placed on the decision of Hon'ble Apex Court in the case of I.J. Iyyapan and anr. vs. The Oharmodayan Company {1966 AIR 1017, 1963 SCR (1)85}. whereby their lordships held that a party cannot change its stand and make a new case at appellate stage or raise an issue which was never raised earlier. Their lordships in this case have observed as under:

"13 Now it is not open to a party to change his case at the appellate stage because at the most the case of the appellant in the trial court was what was contained in paragraph /I of the Written Statement where the question of estoppel was raised and the plea taken was that the respondent company was estopped from claiming any right to the building after accepting the offer of the appellant pursuant to which the appellant had expended a large amount of money that was not a plea of license at that stage It is not for us to say what the ease of the parties would have been if the case of license had been specifically raised but the fact remains that the plea of license was not raised in the trial court nor was it adjudicated upon there. "

4.6 Further reliance is placed on the decision of Punjab and Haryana High Court in the case of Punjab Feed Mills (228 ITR 386, 94 Taxman 405) wherein it was held that If a matter was never contested on a particular issue before the lower authority, no grounds could legitimately be raised before the appellate authority. It was held that the appropriate forum to claim higher deduction was the Assessing Officer only. The

appellate authority could grant relief only to the extent it was declined unjustifiably by the lower authority. Further, in the case of C.K. Gopinath vs CIT (260 ITR 213) Hon'ble Kerala High Court has held that. when the assessee had not chosen to take the alternative contention Before the Assessing Officer, the Commissioner of Income-tax(Appeal) and the Tribunal were right in holding that the question could not be considered at that stage. The addition was therefore, held justified

4.7 The plea now taken by the appellant is altogether new not even advocated before the AO and even in the statement of facts filed with the appeal. Having failed to put up its case earlier, in my considered view, the appellant cannot be allowed to make out a new case in appeal entirely different from what was made out before the AO because inherently in appear; It IS the finding of the AO which needs to be shown as not being correct in the light of the facts and circumstances and the legal position as brought before him (AO). The Id. AR argued that the CIT(A) can allow the appellant to go into any ground of appeal not specified in the grounds of appeal, if the appellate authority is satisfied that the omission of that ground from the form of appeal was neither willful nor unreasonable. In this regard, having considered the facts and circumstances of the case, I am of the opinion that no reasonableness behind not raising this Issue earlier, has been shown by the appellant and therefore, it lacks the bonafide. I, therefore, hold that in view of the decisions cited supra, the appellant cannot be allowed to change the nature of the case at this stage. Accordingly, the additional ground raised is not admitted.”

8. Bare perusal of the aforesaid findings returned by the Id. CIT(A) rejecting the additional ground sought to be raised by the assessee goes to prove that Id. CIT (A) has misdirected himself by recording that, *“the issue raised by the assessee as per additional ground that addition was wrongly made in the absence of any incriminating material is not question of law but finding of a fact.”* We are of the considered view that initiating the proceedings u/s 153A on the basis of search and seizure carried out u/s 132 of the Act is a “legal ground” which can be raised at any stage of the

proceedings. So, in these circumstances, to impart the complete justice, the case is required to be remitted back to Id. CIT (A) to allow and decide the additional ground as to the jurisdiction to initiate the proceedings u/s 153A. Ld. DR for the Revenue also agreed to the proposition mooted out by the Bench. Consequently, present appeal is remitted back to Id.CIT (A) to decide afresh after allowing/deciding the additional ground challenging the jurisdiction of the AO by the assessee. Consequently, the appeal filed by the assessee is allowed for statistical purposes.

Order pronounced in open court on this 25th day of October, 2021 after the conclusion of the virtual hearing.

**Sd/-
(R.K. PANDA)
ACCOUNTANT MEMBER**

**sd/-
(KULDIP SINGH)
JUDICIAL MEMBER**

**Dated the 25th day of October, 2021
TS**

Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT(A)-31, New Delhi
- 5.CIT(ITAT), New Delhi.

**AR, ITAT
NEW DELHI.**