

IN THE INCOME TAX APPELLATE TRIBUNAL “A” BENCH, MUMBAI

**BEFORE SHRI M. BALAGANESH, AM AND
SHRI PAVAN KUMAR GADALE, JM**

ITA No. 1896/Mum/2020
(Assessment Year: 2012-13)

M/s. Abil Infraprojects Pvt. Ltd. St. Regis, 33 rd Floor, Senapati Bapat Marg, Phoenix Mill Compound, Lower Parel, Mumbai-400 013	Vs.	Dy. CIT, Central Circle 2(3), Mumbai-400 020
PAN/GIR No. AAACR 7823 H		
(Appellant)	:	(Respondent)

Appellant by	:	Shri Anuj Kisnadwala
Respondent by	:	Smt Shailaja Rai

Date of Hearing	:	08.11.2021
Date of Pronouncement	:	10.11.2021

ORDER

Per M. Balaganesh, AM:

This appeal by the assessee is directed against the order of the learned Commissioner of Income Tax (Appeals)-48, Mumbai ('Id.CIT(A) for short) dated 10.07.2020 and pertains to the assessment year (A.Y.) 2012-13.

2. The only issue to be decided in this appeal is as to whether the Id. CIT(A) was justified in confirming the disallowance of 50% of helicopter expenses in facts and circumstances of the instant case.

3. We have heard the rival contentions and perused the materials available on record. We find that the assessee company is engaged in the business of real estate and infrastructure development. During the year under consideration, the assessee has shown income from business and income from other sources. The assessee filed its original return of income u/s.139(1) of the Act on 29.09.2012, declaring total income of Rs.4,43,08,340/-. The assessment was completed u/s. 143(3) of the Act on 25.03.2015,

determining the total income at Rs.4,56,50,570/-. In the said assessment, a sum of Rs.2,06,356/- was disallowed towards foreign travel expenses, apart from making disallowance of Rs.11,35,791/- towards helicopter expenses at 100%. The assessee preferred an appeal before the Id. CIT(A), who upheld the disallowance made on account of foreign travel expenses and reduced the disallowance on account of helicopter expenses by 50%, vide his order dated 30.09.2016.

4. Subsequently, a search and seizure action u/s.132 of the Act was initiated on ABIL Group on 21.07.2017, wherein the assessee was also covered u/s.132 of the Act. In response to the notice u/s. 153A of the Act, the assessee filed its return of income on 13.11.2018, declaring total income of Rs.4,50,83,200/-. In the said return, the assessee duly offered 50% disallowance sustained by the Id. CIT(A) on account of helicopter expenses of Rs.5,67,895/- and 100% of foreign travel expenses.

5. During the course of search and seizure assessment proceedings u/s.143(3) r.w.s. 153A of the Act, the Id. A.O. sought to examine the helicopter expenses totally debited in the profit and loss account. The assessee during the course of search assessment proceedings explained that in order to have quick access to existing and prospective construction site as well as to travel across various cities for business meetings in lesser time, the key management personnel of the assessee uses helicopter services. It was also pointed out that some time, the helicopter is not available due to technical or other unavoidable reasons, in such case, the assessee has hired the Chartered aircraft/helicopter from private aircraft service provider. The assessee pointed out that it has 1/6th share in AOP named 'Ariki Aviation' w.e.f 01.04.2008. The said AOP has a helicopter which is co-owned by the members of the AOP. The assessee pointed out that during the Financial year 2011-12, relevant to A.Y. 2012-13, it had incurred expenses of Rs.1,13,57,791/-, towards share of the assessee in establishment, flying and maintenance cost of the helicopter possessed by 'Ariki Aviation' (AOP). Apart from this, the assessee has also paid hiring charges of Rs.18,63,705/- to aviation service provider – M/s. First Future Air Services. These aircraft hiring charges are grouped under 'travelling and

conveyance expenses'. It was pointed out that in order to eliminate the personal element of the cost of helicopter expenses, the assessee had voluntarily disallowed Rs.5,67,896/- and added the same to the income, declaring in the return filed u/s.153A of the Act for the A.Y. 2012-13. The assessee during the course of assessment proceedings, furnished a detailed note on helicopter expenses, copy of Memorandum of Understanding (MOU) of Arika Aviation, log sheet of total flying hours and empty flights and ledger extract of helicopter expenses. The Id. A.O. however, disregarded the contentions of the assessee and proceeded to make the disallowance of helicopter expenses in the following manner:-

Sr. No.	Particulars	Amt. Rs.
1	Share of establishment, flying and maintenance expenses of helicopter Arki Aviation	11,35,791
2	Helicopter hiring charges	18,63,705
3	Total helicopter expenses	29,99,496
4	50% disallowance of the above	14,99,748
5	Less: Helicopter expenses voluntarily disallowed by the appellant in return filed u/s.153A	5,67,896
6	Disallowance made by Id. A.O. in order passed u/s.143(3) r.w.s. 153A[4-5]	9,31,852

6. This action of the A.O. was upheld by the Id. CIT(A).

7. Before us, the Id. Authorized Representative (AR for short) filed an additional ground, which was duly taken on record as under:

1. The learned CIT(A) ought to have held that the disallowances made by the Assessing Officer of Rs.11,47,853/- (Helicopter expenses of Rs.9,31,853/- + Depreciation of Rs.2,16,000) are bad in law since no incriminating material pertaining to the said disallowances was found during the course of search from the premises of assessee and the relevant assessment year is an unabated year.

8. We find that the aforesaid additional ground is purely a legal issue and does not involve any verification of facts as the facts relevant for adjudication of the same are already on record. Hence, in view of the decision of the Hon'ble Supreme Court decision in the case of NTPC Limited reported in 299 ITR 383, we are inclined to admit the additional ground of appeal and take up the same for adjudication.

9. We find that the search and seizure action u/s.132 of the Act was carried out on the assessee group on 21.07.2017. Admittedly, the original assessment for A.Y. 2012-13 was already completed u/s.143(3) of the Act on 25.03.2015. Hence, on the date of search, the assessment for A.Y. 2012-13 becomes unabated assessment. We find that the Id. A.O. while framing the search assessment u/s.143(3) r.w.s. 153A of the Act had proceeded to disallow the sums pertaining to helicopter expenses on account of personal element together with depreciation component thereon for the same reason, among other disallowances/additions. From the perusal of the assessment order, we find that with regard to the disallowance made on account of helicopter expenses and depreciation on helicopter, the Id. A.O. had not made any reference to any seized document found during the course of search. Hence, it could be safely concluded that the entire disallowance made on account of helicopter expenses and depreciation thereon were made without any incriminating material found during the course of search. The law is very well settled that in respect of an unabated assessment, the assessment originally framed either u/s.143(1) or 143(3) of the Act could be disturbed only if there is any incriminating material found during the course of search relating to such addition/disallowance. In the instant case, admittedly, there is no incriminating material found during the course of search for making the disallowance on account of helicopter expenses and depreciation thereon, as is evident from the orders of the lower authorities.

10. Hence, in view of the decision of Hon'ble Jurisdictional High Court in the case of Continental Warehousing Corporation Ltd. reported in 374 ITR 645 (Bom), no disallowance on account of helicopter expenses and depreciation thereon could be made for A.Y. 2012-13 in the absence of any incriminating material found during the course of search. Accordingly, the additional ground raised by the assessee is allowed.

11. Since, the additional ground raised by the assessee is allowed; the adjudication of regular grounds raised by the assessee on merits becomes infructuous.

12. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 10/11/2021

Sd/-
(Pavan Kumar Gadale)
Judicial Member

Sd/-
(M. Balaganesh)
Accountant Member

Mumbai; Dated : 10/11/2021
Roshani, Sr. PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT - concerned
5. DR, ITAT, Mumbai
6. Guard File

BY ORDER,

(Dy./Asstt. Registrar/Sr. Private Secretary)
ITAT, Mumbai