

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

Before Sh. A. D. Jain, Vice-President

Dr. B. R. R. Kumar, Accountant Member

ITA No. 7101/Del/2017 : Asstt. Year : 2011-12

ITA No. 7102/Del/2017 : Asstt. Year : 2012-13

ITA No. 7103/Del/2017 : Asstt. Year : 2013-14

DCIT, Central Circle-18, New Delhi (APPELLANT)	Vs	NKG Infrastructure Ltd., 6, Todermal Lane, Ground Floor, Near Bengali Market, New Delhi (RESPONDENT)
PAN No. AACCN1659D		

Assessee by : Sh. Akshit Jain, CA &

Sh. Rajat Jain, CA

Revenue by : Ms. Sarita Kumari, CIT DR

Date of Hearing: 08.02.2022

Date of Pronouncement: 11.03.2022

ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeals have been filed by the Revenue against the orders of Id. CIT(A)-29, New Delhi dated 12.09.2017.

ITA No. 7101/Del/2017 : Asstt. Year : 2011-12:

ITA No. 7102/Del/2017 : Asstt. Year : 2012-13:

2. As the issue involved in both the appeals being similar except the quantum, hence are adjudicated together.

3. The assessee company is the flagship company of NKG Group which is engaged in the business of work of civil construction and execution of infrastructure sector projects. A search & seizure operation was conducted on 23.08.2012 u/s 132 of the Income Tax Act, 1961 in M/s NKG Group of cases.

4. There is only one issue involved in all the grounds of appeal for both the assessment years which relates to ad-hoc addition made by the AO of Rs.5,20,00,000/- and Rs.4,80,00,000/- for the AYs 2011-12 and 2012-13 respectively. The fact of the case is that a search and seizure action was carried out at the business premises of the appellant on 23.08.2012. A similar action was also carried out on 05.11.2009. At the time of earlier action, the appellant admitted an additional profit @0.25% of the total turnover declared by them to cover all possible discrepancies/leakage. On the similar line the appellant made a surrender before the settlement commission by filing application under section 245C of the IT Act but the application was rejected by the settlement commission and whatever surrender made by the appellant before the settlement commission has been added by the AO on ad-hoc basis while completing the Assessment Order.

5. The Id. CIT(A) deleted the addition holding that the AO had made additions by taking advantage of ad-hoc surrender made by the appellant in application filed u/s 245C of the Act, as per provision of section 245HA(3) of the Act.

6. Aggrieved the revenue filed appeal before us.

7. Heard the arguments of both the parties and perused the material available on record.

8. The facts reveals that a search and seizure operation under section 132 was earlier carried out at the premises of the appellant on 05/11/2009 and proceedings under section 153A / 143(3) of the Income Tax Act, 1961 was completed for the Assessment Years 2004 - 05 to 2010 - 11 in which the appellant admitted as additional profits @ 0.25% of the total

turnover declared by them to cover all possible discrepancies / leakages. We have gone through the rationale given by the Id. CIT(A) which is as under:

"A search and seizure operation under section 132 was again carried out at the premises of the appellant on 23.08.2012. The assessee during the course of proceeding for assessment pending before Assessing Officer for the Assessment Years 2007 - 08 to 2012 - 13 filed an application under section 245C(1) of the Income tax Act, 1961 for settlement of cases offering additional income on ad-hoc basis, being @0.25% of turnover to cover all possible leakage which comes to Rs 5,15,59,000/- & Rs 4,67,20,000/- for the assessment year 2011 - 12 and 2012 - 13 respectively. However, the settlement commission vide order under section 245D(2C) of the Income tax Act, 1961 dated 09/04/2015 has declared the application invalid as the appellant has not made a full and true disclosure of its income and the manner of deriving such income. Consequent to application became invalid, the Assessing Officer during the course of assessment proceedings asked the appellant to furnish the explanation regarding additional income offered of Rs. 5,15,59,000/- and Rs. 4,67,20,000/- for the assessment year 2011-12 and assessment year 2012-13 respectively before Settlement Commission.

It was argued that since, the additional profits @ 0.25% on the total turnover was offered for earlier assessment years to cover possible leakages, therefore, it has also offered 0.25% of total turnover shown in the audited financial statement for the assessment year 2011 - 12 and 2012 - 13 before the settlement commission and also paid taxes thereon only to cover up various possible discrepancies which may arise due to

the complexities of business and modus operandi involved in the business of the appellant company which inter alia includes certain back to back contracts might not be recorded in the books for which no records have been maintained and the same was also covered in the offer even though there was no transaction of purchase of mitti / grit in the said assessment years. The said ad-hoc surrender of income was made before Settlement Commission to fulfill minimum requirement of additional amount of income tax to be disclosed before Settlement Commission and to avoid further litigations and to buy peace of mind and to get immunity from penalty & prosecution.

We find that the Assessing Officer has made addition of Rs 5.20 Cr. and of Rs.4.80 Cr. for the AYs 2011-12 and 2012-13 respectively on ad-hoc basis, on perusal of Assessment Orders, it is quite evident that the assessing officer has made ad-hoc additions on the basis of declaration of additional income offered before settlement commission for the assessment years under consideration without bringing any material on record to establish that the appellant has actually earned such income”.

9. Having gone through the entire facts on record, we find that the addition has been made purely on ad-hoc basis taking cue from the application filed by the assessee before the Settlement Commission. Hence, we decline to interfere with the order of the Id. CIT(A).

ITA No. 7103/Del/2017 : Asstt. Year : 2013-14:

10. There is only one issue involved in appeal relates to addition of Rs.2,41,63,617/- made by the AO on account of unexplained cash. The fact of the case is that during the course of search action a cash of Rs.1,40,87,900/- and Rs.2,02,22,000/- was found from the residences of the directors, namely, Sh. Pradeep Kumar Garg and Sh. Davender Kumar Garg respectively. They claimed that the entire cash belong to the appellant company and explained the same by producing the cash book. However, the AO held that no reason for keeping huge cash at residences of the directors was explained, therefore, the AO treated the same as unexplained cash out of the undisclosed income of the assessee.

11. Before the Id. CIT(A), the source of cash was explained to be withdrawal from the bank account no.00000030183300444 of the company maintained with SBI, Ghaziabad (UP) on various dates.

12. Before the Id. CIT(A), the directors had furnished copy of trial balance of company reflecting Imprest balance of Pradeep Kumar Garg and Devendra Kumar Garg as on date of search itself, copy of audited balance sheet, income tax return and relevant portion of bank statement of M/s NKG Infrastructure Limited showing cash withdrawals from banks which were also part of reply furnished before the Assessing Officer during the course of assessment proceedings. The appellant company also produced books of accounts including cash book before the Assessing Officer. It was further submitted that it is quite evident that the assessing officer himself accepted that the said alleged cash belongs to the appellant company by relying upon statement of the directors recorded under section 132(4)

and explanation / documents / evidences furnished by the appellant as well as by these directors for rebuttal that the said alleged cash belongs to M/s NKG Infrastructure Limited. The details of cash found & seized from the premises of directors of appellant company, additions made by the Assessing Officer and explanation thereon are as under:

Name of Directors	Premises from where Cash was found	Cash found as per Panchnama	Cash considered in assessment order and made addition by the AO
Devendra Kumar Garg	KG - 112, Kavi Nagar, Ghaziabad	2,00,22,000	2,02,22,000 (wrongly considered while correct fig. is Rs. 2,00,22,000/-)
Pradeep Kumar Garg	6, Todermal Lane, Ground Floor, Near Bengali Market, Connaught Place, New Delhi	1,40,87,900	1,31,70,000 (The A.O. wrongly considered that cash of Rs 1,31,70,000/- out of total cash found of Rs. 1,40,87,900/-, belongs to M/s NKG Infrastructure Pvt. Ltd.)
Total cash Found		3,41,09,900	3,33,92,000
Less: cash belongs to the Shri Pradeep Kumar Garg		2,900	-
		3,41,07,000	3,33,92,000
Less: Cash In hand as on 31/03/2012		92,28,383	92,28,383
Amount of Addition		2,48,78,617	2,41,63,617

13. The appellant company has practice to withdraw cash from bank and grant imprest to the working directors and to certain employees etc. for expenses required to be incurred for the business purpose of the appellant company in the normal course of business. The appellant company was having cash balance as on 31.03.2012 of Rs 92,28,383/-, cash in hand in the books as on 21.08.2012 i.e. just before the date of search 23.08.2012 was of Rs.48,900.59 and cash balance in imprest

account of Rs.3,41,41,000/- (including cash imprest with Shri Pradeep Kumar Garg of Rs.1,40,85,000/- and Shri Devendra Kumar Garg of Rs.2,00,22,000/-) hence, total cash balance was of Rs.3,41,89,900.59.

14. The appellant has furnished trial balance and audited Balance Sheet of the appellant company along with cash book and the detail of cash as per audited balance sheet along with cash in imprest account with directors and employees which is reproduced as under:

Particulars	Balance as On 01.04.2012	Balance as On 23.08.2012	Balance as On 1.03.2013
Cash in hand	8,634,347	48,901	1,779,192
Add: Cash in Imprest accounts	594,036	34,141,000	12,718,409
Cash in hand including imprest account	9,228,383	34,189,901	14,497,601

15. On perusal of the facts, the Id. CIT(A) found that the cash during the course of search operation was duly recorded in the books of accounts of the appellant company and the appellant company had substantiated the source of cash found with sufficient documentary evidences which was also verified by the assessing officer during the course of assessment proceedings. The directors of the appellant company in their statement recorded u/s 132(4) of the Income Tax Act, 1961 duly explained the source of cash found from their premises explaining that the same belongs to M/s NKG Infrastructure Limited under the head imprest account for incurring expenses on account of appellant company and for the purpose of security.

16. The Id. CIT(A) after considering the facts and circumstances of the case, submission of the appellant and

perusal of the copy of the bank account, found that the contention of the appellant to be in order.

17. Heard the arguments of both the parties who reiterated the arguments taken up before the respective authorities and perused the material available on record.

18. We are of the considered view that the source of cash found from the possession of the directors have duly been explained by furnishing sufficient documentary evidences such as trial balance showing imprest balance of directors, Bank statement reflecting withdrawal of cash, audited financial statements and cash book before the Assessing Officer during the course of assessment proceedings in which no defect/shortcoming was noticed. The same has been explained even on the day of search. The AO has also not disputed the fact that the amount indeed belongs to the company but only doubted its presence of the residence of the directors for which plausible explanation has been put forward by the directors which is acceptable keeping in view the business operations of the directors and the need for having an imprest amount/cash in hand with the directors. Under these circumstances, we decline to interfere with the reasoned order of the Id. CIT(A).

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19. Further, the assessee filed legal grounds before us which reads as under:

"That on the facts and circumstances of case, assessment order passed under section 153A read with section 143(3) of the

Income Tax Act, 1961 is null and void being the same was time barred."

20. Admission of the legal ground has been opposed in principle by the Id. DR. Keeping in view, the judgment of the Hon'ble Apex Court in the case of National Thermal Power Co. Ltd. Vs CIT (1998) 229 ITR 383, the legal ground filed by the assessee is accepted. The relevant portion of the judgment is as under:

"5. Under Section 254 of the Income-tax Act, the Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit. The power of the Tribunal in dealing with appeals is thus expressed in the widest possible terms. The purpose of the assessment proceedings before the taxing authorities is to assess correctly the tax liability of an assessee in accordance with law. If, for example, as a result of a judicial decision given while the appeal is pending before the Tribunal, it is found that a non-taxable item is taxed or a permissible deduction is denied, we do not see any reason why the assessee should be prevented from raising that question before the tribunal for the first time, so long as the relevant facts are on record in respect of that item. We do not see any reason to restrict the power of the Tribunal under Section 254 only to decide the grounds which arise from the order of the Commissioner of Income-tax (Appeals). Both the assessee as well as the Department have a right to file an appeal/cross-objections before the Tribunal. We fail to see why the Tribunal should be prevented from considering questions of law arising in assessment proceedings although not raised earlier.

6. In the case of Jute Corporation of India Ltd. v. C.I.T. . this Court, while dealing with the powers of the Appellate Assistant Commissioner observed that an appellate authority has all the powers which the original authority may have in deciding the question before it subject to the restrictions or limitations, if any, prescribed by the statutory provisions. In the

absence of any statutory provision, the appellate authority is vested with all the plenary powers which the subordinate authority may have in the matter. There is no good reason to justify curtailment of the power of the Appellate Assistant Commissioner in entertaining an additional ground raised by the assessee in seeking modification of the order of assessment passed by the Income-tax Officer. This Court further observed that there may be several factors justifying the raising of a new plea in an appeal and each case has to be considered on its own facts. The Appellate Assistant Commissioner must be satisfied that the ground raised was bona fide and that the same could not have been raised earlier for good reasons. The Appellate Assistant Commissioner should exercise his discretion in permitting or not permitting the assessee to raise an additional ground in accordance with law and reason. The same observations would apply to appeals before the Tribunal also.

7. The view that the Tribunal is confined only to issues arising out of the appeal before the Commissioner of Income-tax (Appeals) takes too narrow a view of the powers of the Appellate Tribunal [vide, e.g., C.I.T, v. Anand Prasad (Delhi), C.I.T. v. KaramchandPremchand P. Ltd. and C.I.T. v. Cellulose Products of India Ltd. . Undoubtedly, the Tribunal will have the discretion to allow or not allow a new ground to be raised. But where the Tribunal is only required to consider a question of law arising from the facts which are on record in the assessment proceedings we fail to see why such a question should not be allowed to be raised when it is necessary to consider that question in order to correctly assess the tax liability of an assessee.

8. The reframed question, therefore, is answered in the affirmative, i.e., 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. We remand the proceedings to the Tribunal for consideration of the new grounds raised by the assessee on the merits."

21. Respectfully following the above judgment of the Hon'ble Apex Court, the legal grounds taken up by the assessee are hereby admitted.

22. We find that, the issue raised by the assessee stands adjudicated by the Co-ordinate Bench of Tribunal in assessee's own case for the A.Y. 2008-09 to A.Y. 2010-11 in ITA Nos. 3825 to 3827/Del/2018 vide order dated 05.09.2018. The relevant portion of the said order is as under:

"10. For proper appreciation of this contention, it is necessary to refer to Section 153 and 153A of the Act, as they stood at the relevant point of time.

Section 153 was reading thus,-

Section 153: (1) No order of assessment shall be made under section 143 or section 144 at any time after the expiry of—

(a) two years from the end of the assessment year in which the income was first assessable ; or

(b) one year from the end of the financial year in which a return or a revised return relating to the assessment year commencing on the 1st day of April, 1988, or any earlier assessment year, is filed under subsection (4) or sub-section (5) of section 139,

whichever is later :

Provided that in case the assessment year in which the income was first assessable is the assessment year commencing on or after the 1st day of April, 2004 but before the 1st day of April, 2010, the provisions of clause (a) shall have effect as if for the words "two years", the words "twenty-one months" had been substituted:

Section 153-B of the Act was reading that,-

'153B. Time limit for completion of assessment under section 153A.—

(1) Notwithstanding anything contained in section 153, the Assessing Officer shall make an order of assessment or reassessment,—

(a) in respect of each assessment year falling within six assessment years referred to in clause (b) of sub-section (1) of section 153A, within a period of two years from the end of the financial year in which the last of the authorizations for search under section 132 or for requisition under section 132A was executed;

xxx xxx xxx

xxx xxx xxx

(3) The provisions of this section, as they stood immediately before the commencement of the Finance Act, 2016, shall apply to and in relation to any order of assessment or reassessment made before the 1st day of June, 2016.

Explanation.—In computing the period of limitation under this section—

xxx xxx xxx

xxx xxx xxx

(v) in a case where an application made before the Income-tax Settlement Commission is rejected by it or is not allowed to be proceeded with by it, the period commencing from the date on which an application is made before the Settlement Commission under section 245C and ending with the date on which the order under sub-section (1) of section 245D is received by the Principal Commissioner or Commissioner under subsection (2) of that section; or

xxx xxx xxx

xxx xxx xxx

shall be excluded:

Provided that where immediately after the exclusion of the aforesaid period, the period of limitation referred to in clause (a) or clause (b) of this sub-section available to the Assessing Officer for making an order of assessment or reassessment, as the case may be, is less than sixty days, such remaining period shall be extended to sixty days and the aforesaid period of limitation shall be deemed to be extended accordingly:

11. A reading of section 153 makes it clear that, no order of assessment shall be made under section 143 or section 144 at the time after the expiry of two years from the end of the assessment year in which the income was first assessable, and many provisos are provided to the section; whereas section 153- B starts with the expression that "notwithstanding anything contained in section 153", and states that the Assessing Officer shall make an order of assessment or reassessment in respect of each assessment year falling within six assessment years and for the relevant assessment year or years referred to in class (b) of subsection (1) of section 153-A etc.

12. Admittedly the assessment involved in this matter is under section 153A of the Act. While section 153-B specifically refers to the order of assessment under section 153-A of the Act, there is no such reference to section 153-A in section 153 of the Act. On a careful reading of these two provisions of law under section 153 and section 153-B of the Act, it occurs to our mind that the provisions under section 153-B of the Act are applicable to the facts of the case and section 153 has no relevance at all, lest we are afraid that it would attribute redundancy to the wisdom of legislature in enacting the non-obstante clause in Section 153-B of the Act.

13. It is further clear from the above that the Learned Assessing Officer shall make the order of assessment within a period of two years from the end of the financial year in which the last of the authorizations for search under section 132 was executed and this period of two years shall be reckoned after excluding the period between the date on which application made before the Income Tax Settlement Commission and the date on which the order under sub section (1) of section 245-D was received by the Principal Commissioner or Commissioner under sub section two of that section. This is subject to the further rider that if after exclusion of this particular period, the period of limitation available to the Assessing Officer for making an order of assessment is less than 60 days, such remaining period shall be extended to 60 days and the aforesaid period of limitation shall be deemed to be extended accordingly.

14. Admittedly, in this case the search was conducted on 23/08/2012, assessee filed the return of income on 17/11/2014, application before the Income Tax Settlement Commission was filed on 18/02/2015, and order under section 245-D (2C) of the Act was passed on 09/04/2015. It is, therefore, clear that under the provisions of section 153-B of the Act, learned Assessing Officer had to pass the order of assessment within two years, after excluding the period spent before the Income Tax Settlement Commission. It means the limitation period for conclusion of the impugned assessment proceedings expires by 31/03/2015. Even if we allow the period of 60 days from the date of the order of the learned settlement commission on 09/04/2015, the order should have been passed by 07/06/2015. It is, therefore, clear that the orders passed on 31/03/2006 is not clearly within the period of limitation prescribed under section 153-B of the Act."

23. Thus, in the absence of any material change in the facts of the case and legal proposition, we hold that the Assessment Order passed u/s 153A r.w.s. 143(3) of the Income Tax Act,

1961 is *null and void* as the order has been passed after the due date of limitation.

24. To conclude, the addition made by the revenue is directed to be obliterated both on legal grounds and merits of the case.

25. In the result, the appeals of the Revenue are dismissed.
Order Pronounced in the Open Court on 11/03/2022.

Sd/-

(A. D. Jain)
Vice President

Dated: 11/03/2022

Subodh Kumar, Sr. PS

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Sd/-

(Dr. B. R. R. Kumar)
Accountant Member

ASSISTANT REGISTRAR