

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

**BEFORE DR. B. R. R. KUMAR, ACCOUNTANT MEMBER  
AND  
SH. YOGESH KUMAR U.S., JUDICIAL MEMBER**

**I.T.A. No. 5469/DEL/2015 (A.Y. 2005-06)  
I.T.A. No. 5470/DEL/2015 (A.Y. 2006-07)**

ACIT Central Circle-15, Room No. 353, E-2, ARA Centre, Jhandewalan Extension, New Delhi <b>(APPELLANT)</b>	Vs	Nagar Dairy Pvt. Ltd. D-3/10, Paschim Marg Vasant Vihar, New Delhi  AABCN7304C <b>(RESPONDENT)</b>
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**C.O Nos. 24 & 25/Del/2016  
(In I.T.A. Nos. 5469 & 5470/DEL/2015  
A.Y. 2005-06 and A.Y 2006-07)**

Nagar Dairy Pvt. Ltd. D-3/10, Paschim Marg Vasant Vihar, New Delhi AABCN7304C <b>(APPELLANT)</b>	Vs	ACIT Central Circle-15, Room No. 353, E-2, ARA Centre, Jhandewalan Extension, New Delhi <b>(RESPONDENT)</b>
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<b>Assessee by</b>	<b>Sh. Rajat Jain, CA &amp; Sh. Akashat Jain, CA</b>
<b>Revenue by</b>	<b>Sh. P Praveen Sidharth, CIT DR</b>

<b>Date of Hearing</b>	<b>17.10.2022</b>
<b>Date of Pronouncement</b>	<b>22.11.2022</b>

**ORDER**

**Per Yogesh Kumar U.S., Judicial Member:**

These appeals have been filed by the Revenue and the Cross Objections by the assessee against the order dated 12/06/2015 passed by the Ld. CIT(A) – XVI, New Delhi for Assessment Years 2005-06, 2006-07 respectively. Since,

the issue involved in both the appeals and the Cross Objections are identical, they were heard together and being adjudicated by a common order.

2. In ITA No. 5469/Del/2015, following grounds have been raised by the Revenue:

*“On the facts and in the circumstances of the case, the Ld. CIT (A) has erred in deleting the addition of Rs. 19,71,07,162/- on account of unexplained purchases while holding that the books of accounts of the assessee were defective.*

*On the facts and in the circumstances of the case, the Ld. CIT (A) has erred in deleting the addition on account of unexplained purchases of Rs. 19,71,07,162/- and substituting the same with GP addition of 1.0% amounting to Rs.20,05,883/- only, which was without any basis.*

*On the facts and in the circumstances of the case, the Ld. CIT (A) has erred in not upholding the action of the AO in disallowance of Rs.12,83,95,605/- u/s 40A(3) of the Act and in holding that no addition was made by the AO u/s 40A(3) whereas the AO had categorically mention this addition in the order and also initiated penalty u/s 271(1)(c); though no separate addition was made considering the disallowance of higher amount on account of bogus purchases.*

*On the facts and in the circumstances of the case, the Ld. CIT (A) has erred in adjudicating the addition made under section 40A(3) of the Act when the assessee had not taken any ground in this respect.*

*On the facts and in the circumstances of the case, the Ld. CIT (A) has erred in misinterpreting the provisions of Rule 6DD of the I.T. Rules read with section 40A(3) of the Act and in observing that no disallowance u/s 40A(3) can be made in case of GP addition, when the AO had not made any GP addition.*

*On the facts and in the circumstances of the case, the Ld. CIT (A) has erred in restricting the disallowance of 30% of transportation*

*expense to 10% only without appreciating that the assessee had itself agreed to disallowance of 20% of transportation expense in the regular assessment of A.Y. 2005-06.*

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

3. In CO No. 24/Del/2016, following grounds have been raised by assessee:

*“1. That in the facts and circumstances of the case, the Ld. CIT(A) erred in law in upholding the validity of assumption of jurisdiction by the AO under section 153C of the Income tax Act, 1961 (hereinafter referred as the “Act”) even without complying with the mandatory requirement of recording of satisfaction by the AO of the searched person as envisaged under section 153C of the “Act” and therefore, the assessment is bad in law and deserves to be quashed.*

*2. That in the facts and circumstances of the case, the Ld. CIT(A) failed to appreciate that in terms of proviso to Section 153C of the “Act” the date of the search has to be construed as reference to the date of receiving of documents belonging to the assessee by the AO having jurisdiction over the assessee, which is 26.09.2012 in the case of respondent. Therefore, initiation of proceedings under section 153C of the Act for the Assessment Year 2005 - 06 is barred by limitation and deserves to be quashed.*

*3. That in the facts and circumstances of the case, the Ld. CIT(A) erred in not appreciating the fact that it is apparent from the satisfaction recorded under section 153C by the AO of the assessee and the appellate order that no document belonging to the assessee, which is relevant for Assessment Year 2005 - 06 has been seized and therefore, initiation of proceedings under section 153C of the “Act” itself is bad in law and deserves to be quashed.*

*4. That in the facts and circumstances of the case, the Ld. CIT(A) erred in fact and in law as the seized document / assets do not reflect any undisclosed income of the respondent for the impugned Assessment Year, for which the assessment had already been*

*concluded under section 143(3) of the Act and was not pending on the date of recording satisfaction under section 153C, therefore the assessment order passed under section 153C of the Act is bad in law and deserves to be quashed.*

*5. That in the facts and circumstances of the case, the Ld. CIT(A) erred in law that it is beyond the scope of provisions of Section 153C read with Section 153A of the "Act" to make / confirm GP Addition and also confirming additions to income on ad-hoc disallowances of certain expenditure i.e.*

- (a) ad-hoc estimated disallowance of Rs 95,592/- (Rs 3,18,640/-) being 20% of transportation expenses made by the AO without there being any incriminating material on record.*
- (b) ad-hoc estimated disallowance of Rs 26,097/- being 10% of certain administrative expenses made by the AO without there being any incriminating material on record.*
- (c) ad-hoc estimated disallowance of Rs 8,340/- being 15% of paddy husk expenses made by the AO without there being any incriminating material on record.*

*The aforesaid grounds of the cross objections are without prejudice to each other*

*The respondent craves leave to add, amend or alter any of the grounds of cross objections."*

4. Brief facts of the case in **ITA No. 5469/Del/2015 (Revenue) & C.O. No. 24/Del/2016(Assessee) and ITA No. 5470/Del/2015 (Revenue) & C.O No. 25/Del/2016 (Assessee):**

5. A search and seizure operation u/s 132(1) of the Income Tax Act, 1961 ('Act' for short) was conducted on 17/09/2010. In the case of M/s Nagar Dairy Group covered with Sanya Group cases. The assessee being one of the group case of M/s Nagar Dairy and the case was also covered u/s 133A of the Act. During the course of search and seizure operation at the business premises of M/s AIMS Promoters Pvt. Ltd. certain documents relating to the assessee

company were found and seized which have been impact on income of the assessee. As per the A.O., the case of the assessee has been covered u/s 153C of the Act. Accordingly, notice u/s 153C was issued on 26/09/2011. In compliance of the said notice the assessee has filed copy of the return already filed on 18/10/2005 and no separate return has been filed. The assessment order u/s 153C/144 of the Act has been came to be passed on 28/03/2013 against the assessee by making an addition on different counts by computing the income of the assessee for the Assessment Years 2005-06 at Rs. 19,89,48,024/- as against returned loss at Rs. -26,26,994/- and for Assessment Year 2006-07 at Rs. 45,41,07,908/- as against the returned loss at Rs. -7,47,257/-

6. Aggrieved by the assessment orders for Assessment Years 2005-06 and Assessment Year 2006-07 dated 28/03/2013 the assessee has preferred appeals before the CIT(A), wherein the assessee apart from challenging the assessment order on merit, has also challenging the validity of assumption of jurisdiction by the A.O u/s 153C of the Act and also challenged on the ground of limitation to proceed u/s 153C of the Act.

7. The Ld. CIT(A) vide orders dated 12/06/2015 partly allowed the appeals filed by the assessee for the years under consideration by deleting the addition made on account of unexplained purchases. Further, the Ld. CIT(A) was of the opinion that the additions u/s 40A(3) was totally uncalled for and unjust in estimating the disallowance at 65.14%. Thus, disallowance made u/s 40A(3) of the Act has been deleted. The Ld. CIT(A) has also restricted disallowance of transport expenses at 20% as against the ad-hoc estimated addition being 30% of the transport expenses.

8. As against the above deletion the Department has preferred the Appeals in ITA No. 5469/Del/2015 (A.Y 2005-06) and ITA No. 5470/Del/2015 (A.Y 2006-07) respectively on the grounds mentioned above. The assessee has

preferred the C.O No. 24/Del/2016 (A.Y 2005-06) and C.O No. 25/Del/2016 (A.Y 2006-07) by challenging the validity of assumption of jurisdiction by the A.O. u/s 153C and also on the point of limitation etc. on the grounds mentioned above.

9. Since the assessee has challenged the issue of jurisdiction and the issue of limitation to excise power to pass an order u/s 153C of the Act etc., the C.O's for the Assessment years 2005-06 & 2006-07 of the assessee are taken for consideration before dealing with the Appeals filed by the Revenue.

10. The Ld. Counsel for the assessee submitted that, the Ld. CIT(A) has committed error in upholding the validity of assumption of jurisdiction by the assessee A.O. u/s 153C of the Act without appreciating the fact that the A.O. has not recorded the satisfaction of the searched person as required u/s 153C of the Act. Further contended that, the Ld. CIT(A) has not considered the proviso to Section 153C of the Act, wherein the date of the search has to be construed as reference to date of receiving the documents belonging to assessee by the A.O. having jurisdiction over the assessee. The said date of receiving documents being 26/09/2012, to invoke the provision u/s 153C against the assessee by the A.O. the assessee six years has to be reckoned from 26/09/2012, thus the A.O. can assume jurisdiction only for the Assessment Years 2007-08 to 2012-13. Therefore, initiation of proceedings u/s 153C of the Act for the Assessment Year 2005-06 and Assessment Year 2006-07 is barred by limitation.

11. The Ld. Counsel for the assessee has also submitted that as per the satisfaction recorded u/s 153C of by the A.O of the assessee, there were no documents belonging to assessee which is relevant for the Assessment Year 2005-06 & Assessment Year 2006-07 has been seized. Therefore, the proceedings u/s 153C of the Act is bad in law. The Ld. CIT(A) has also ignored the facts that the seized document/assets do not reflect any disclosed income

of the assessee for the year under consideration for which the assessment had already been concluded u/s 143(3) of the Act and was not pending as on the date of recording satisfaction u/s 153C. The Ld. Counsel for the assessee further submitted that, the ld. CIT(A) has erred in confirming the GP addition and also confirm the addition to income on ad-hoc disallowance of certain expenditure which is beyond the scope of provision of Section 153C read with Section 153A of the Act. The Ld. Counsel for the assessee has also relied on the various judicial pronouncements.

12. Per contra, the Ld. DR has relied on the assessment order and submitted that the assessment order passed u/s 153C/144 of the Income Tax Act is as per the provision of the Income Tax Act.

13. We have heard the parties, perused the material on record and gave our thoughtful consideration.

14. It is emerges from the records that the search was conducted on 17/09/2010 in the case of Nagar Dairy Groups covered with Sanya Group of cases the assessee is one of the group cases of Nagar Dairy and the case of the assessee was also covered u/s 133A of the Act. However, during the course of search and seizure operation at the business premises of M/s AIMS Promoters Pvt. Ltd. certain documents relating to the assessee company were found and seized. The satisfaction u/s 153C of the searched person has not been recorded. The satisfaction of the assessee u/s 153C had recorded by the A.O for the Assessment Year 2005-06 to 2010-11 on 26/09/2012. In brief,

Date of filing of return – 18.10.2005

Date of search – 17.09.2010

Date of issue of notice u/s 153C – 26.09.2011

Date of receiving of seized material – 26.09.2012

Date of passing of order u/s 153C – 28.03.2013

## Assessment Years liable to Section 153C – A.Y. 2007-08 to A.Y.2012-13

15. The First proviso to Section 153C of the Act provides that six assessment years in which assessment or reassessments could be made u/s 153C of the Act would have to be considered with reference to date of handing over of assets or documents to A.O of other person by recording satisfaction by the A.O. of searched person. In the present case, admittedly the satisfaction recorded by the A.O. u/s 153C of the Act on 26/09/2012, the assessee six years u/s 153C of the Act has to be reckoned from 26/09/2012 which will include the Assessment Years 2007-08 to 2012-13. It is well settled law that six Assessment Years u/s 153C of the Act has to be reckoned the date of recording of satisfaction. The Jurisdictional High Court in the case of CIT Vs. RRJ Securities Ltd. (2015) 62 Taxman.com 391 has held as under:-

*“24. As discussed hereinbefore, in terms of proviso to Section 153C of the Act, a reference to the date of the search under the second proviso to Section 153A of the Act has to be construed as the date of handing over of assets/documents belonging to the Assessee (being the person other than the one searched) to the AO having jurisdiction to assess the said Assessee. Further proceedings, by virtue of Section 153CQ) of the Act, would have to be in accordance with Section 153A of the Act and the reference to the date of search would have to be construed as the reference to the date of recording of satisfaction. It would follow that the six assessment years for which assessments/reassessments could be made under Section 153C of the Act would also have to be construed with reference to the date of handing over of assets/documents to the AO of the Assessee. In this case, it would be the date of the recording of satisfaction under Section 153C of the Act. i.e., 8th September, 2010. In this view, the assessments made in respect of assessment years 2003-04 and 2004-05 would be beyond the period of six*

*assessment years as reckoned with reference to the date of recording of satisfaction by the AO of the searched person. It is contended by the Revenue that the relevant six assessment years would be the assessment years prior to the assessment year relevant to the previous year in which the search was conducted. If this interpretation as canvassed by the Revenue is accepted, it would mean that whereas in case of a person searched, assessments in relation to six previous years preceding the year in which the search takes place can be reopened but in case of any other person, who is not searched but his assets are seized from the searched person, the period for which the assessments could be reopened would be much beyond the period of six years. This is so because the date of handing over of assets/documents of a person, other than the searched person, to the AO would be subsequent to the date of the search. This, in our view, would be contrary to the scheme of Section 153C( 1) of the Act, which construes the date of receipt of assets and documents by the AO of the Assessee (other than one searched) as the date of the search on the Assessee. The rationale appears to be that whereas in the case of a searched person the AO of the searched person assumes possession of seized assets/documents on search of the Assessee; the seized assets/documents belonging to a person other than a searched person come into possession of the AO of that person only after the AO of the searched person is satisfied that the assets/documents do not belong to the searched person. Thus, the date on which the AO of the person other than the one searched assumes the possession of the seized assets would be the relevant date for applying the provisions of Section 153A of the Act. We, therefore, accept the contention that in any view of the matter, assessment for AY 2003-04 and AY 2004-05 were outside the scope of Section 153C of the*

*Act and the AO had no jurisdiction to make an assessment of the Assessee's income for that year.*

16. Further, in the case of Pr. Commissioner of Income Tax, Central-1 Vs. Raj Builworth (P). Ltd.(2020) 113 Taxman.com 600 (Delhi), the Hon'ble Supreme Court by confirming the ratio held as under:-

*2.As per the findings of the Commissioner of Income Tax (Appeals) dated 10.11.2015 and Income Tax Act Appellate Tribunal dated 09.04.2018, the satisfaction for initiation of the proceedings under Section 153C was recorded by the Assessing Officer on 02.02.2015. Accordingly, proceedings under Section 153C could have been initiated for a period of six years from the end of the financial year preceding the date on which the satisfaction was recorded.*

*3.In the present case, the Assessing Officer of the search party and the respondent assessee was the same. In such a factual matrix, the Assessing Officer could not have been initiated and passed an Assessment Order under Section 153C of the Act for the Assessment Year 2007-08 as the same was beyond the period of six years from the end of the financial year in which the satisfaction note was recorded by the Assess' Officer.*

*4. In view of the aforesaid position, we are not required to examine other issues and contentions raise the Revenue on merits. Recording the aforesaid, the appeal is dismissed in limine without any order costs.”*

17. In the instant case, the search was conducted on 17/09/2010 on AIMS Promoters Pvt. Ltd. and the satisfaction u/s 153C of the Act has been recorded on 26/09/2012, therefore, six assessment years u/s 153C in the case of the assessee would be Assessment Years 2007-08 to 2012-13. Thus, the

Assessment Years 2005-06 & 2006-07 are beyond the scope of Section 153C of the Act and the A.O. had no jurisdiction to make assessment of the Assessee's income for the said years u/s 153C/144 of the Act. Thus, by considering the facts and circumstances of the cases and relying on the judicial pronouncements (supra) we are of the considered opinion that the Ground No. 2 of the C.O are deserves to be allowed.

18. In view of allowing the grounds of appeal in C.O. filed by the assessee by setting aside the Assessment Orders for the Assessment years 2005-06 & 2006-07 on the ground of the assessment orders are barred by limitation and beyond the jurisdiction of the Assessing Officer, the appeal filed by the Revenue in ITA No. 5469/Del/2015 & 5470/Del/2015 have rendered in-fructuous.

**ITA No. 5469/Del/2015 : AY 2005-06:**

19. For the sake of completeness, we have gone through the additions made by the AO and the merits of the issues. The AO has treated the purchases u/s 40A(3) but no addition has been made under this section. The same purchases have been treated as unexplained purchases owing to purported lack of identity, genuineness and creditworthiness of the parties from whom the milk purchase was made. Aggrieved with the addition on account of purchases of milk made by the AO, the assessee filed appeal before the Id. CIT(A).

**Disallowance of purchases u/s 40A(3) - not added by the AO.**

20. The Id. CIT(A) on page 227 of the appellate order dated 12.06.2015 has observed that the provisions of Section 40A(3) of the Act is not attracted where the parties are identified and there is no material on record to doubt the genuineness of payments. - in this regard reference is made to the judgment of Hon'ble Supreme Court in the case of Attar Singh Gurmukh Singh vs. ITO (1991) 191 ITR 667, 673 (SC). The Id. CIT(A) on page 230 has observed that "*the appellant has submitted the details during the course of assessment*

*proceedings u/s 153C to substantiate its claim that all the payments in excess of Rs. 20,000/- were made on holidays, etc. as per Rule 6DD. The appellant has also furnished the total purchases of milk in cash under the exemption provided by Rule 6DD.”*

21. The ld. CIT(A) on page 234 has observed that suppliers of milk has also confirmed the fact of receiving cash payments on Sundays and after the working hours of bank during their interrogation on oath in the presence of AO in the proceedings held u/s 250 and therefore covered by the provisions of Rule 6DD. It has been further observed that on reference to the calendar enclosed with the submissions in this regard the claim of the appellant was not found to be erroneous. All the cash payments made to the above parties in excess of Rs. 20,000/- were either made on Sundays or early morning or evenings when the bank remained closed. The tax auditor, who audited the appellant's books of account, also mentioned that the payments made in excess of Rs. 20,000/- were covered by the provisions of Rule 6DD of Income tax Rules, 1962.

22. The ld. CIT(A) on page 237 has observed that AO was extremely unjust in estimating 40A(3) disallowances @ 65.14% contrary to the provisions of Law. There is no such provisions under the Income Tax Act, 1961 which confers authority on the AO to make addition u/s 40A(3) on estimated basis. Further, the ld. CIT(A) on page 224 in Para(iv) has observed that assessment made applying a flat gross profit rate, no disallowance possible invoking 40A(3). Thus when books of account of the appellant have been rejected and GP rate is applied, no addition under section 40A(3) of the Act could be survived. - CIT vs. Banwari Lal Banhidhar (1998) 229 ITR 232 (HC - All.).

23. Thus, the ld. CIT(A) has cogently brought on record about the fact of genuineness of the payment and applicability of Rule 6DD along with the relevant case laws. Under the above mentioned facts and circumstances, the CIT(A) at page no. 237 held that action of AO u/s 40A(3) is not upheld. Since,

no addition has been made by the AO under this section holding that the addition has been made on account of unexplained purchases, any adjudication by the Tribunal would be only academic in nature.

**Addition on account of unexplained purchases:**

24. The ld. CIT(A) has recorded the detailed statement of all the purchase parties on oath and came to a conclusion that the identity, genuineness and creditworthiness of the parties has been proved beyond doubt. The relevant part of the order of the ld. CIT(A) dated 12.06.2015 page no. 218 para (xvii) and (xviii) pertaining to this issue are as under:

*“All the parties who did not turn up during 153C proceedings were summoned u/s 131 by him and their statements were recorded in the presence of AO, Shree Rajesh Kumar, ACIT, Central Circle-15, New Delhi who failed to point out any anomalies or contradictions or falsities in their statements even though all such parties deposed on oath that they had supplied milk to the appellant both in cash as well as cheque. Thus the identity, genuineness and creditworthiness of all the parties in respect of whom sales (purchase by appellant) were held to be bogus by the AO u/s 153C became accomplished facts. Since under the overall circumstances, the correctness of the appellant’s claim had been established by furnishing relevant bills, bank statements.....”*

25. Hence, the identity, genuineness and creditworthiness of all the parties from whom purchases were made were proved beyond doubt. Hence, no addition is called for on this account.

**Ad-hoc estimation of GP @ 1% on sales by the CIT(A):**

26. We find that the ld. CIT(A) himself held that there is no reason for doubting the purchases made and payment made in cash being the parties are identified and accepted that they have made sale to the appellant in cash and

there is no doubt as regard to genuineness of corresponding sales effected by the appellant and rightly deleted the addition on account of unexplained purchases. Further, the CIT(A) has verified the purchases by recording statement of suppliers of milk during the appellate proceedings in presence of AO and it is not the case of any inflation in price of the milk purchased by appellant as nothing incriminating was brought on record. Therefore, the action of the ld. CIT(A) to resort to ad-hoc estimation of GP @ 1% of total sales is arbitrarily and mechanical. Hence, the action of the ld. CIT(A) cannot be supported and is liable to be deleted.

**ITA No. 5470/Del/2015 : AY 2006-07 –  
Similar to A.Y. 2005-06**

27. For the sake of completeness, we have gone through the additions made by the AO and the merits of the issues. The AO has treated the purchases u/s 40A(3) but no addition has been made under this section. The same purchases have been treated as unexplained purchases owing to purported lack of identity, genuineness and creditworthiness of the parties from whom the milk purchase was made. Aggrieved with the addition on account of purchases of milk made by the AO, the assessee filed appeal before the ld. CIT(A).

28. We find that the issue is pertaining to purchases u/s 40A(3), addition on account of unexplained purchases are on the similar lines of the A.Y. 2005-06. The ld. CIT(A) has also dealt the issues in the similar manner after examination of the parties u/s 131 in the presence of the Assessing Officer concerned. Hence, we decline to interfere with the order of the ld. CIT(A) on this issue.

29. With regard to ad-hoc estimation of GP of 1% on the sales, we hold that the adjudication and the ratio held for the A.Y. 2005-06 is applicable *mutatis mutandis*.

30. In the result, C.O. Nos. 24 & 25/Del/2016 filed by the assessee are allowed, accordingly the Assessment Orders dated 28.03.2013 for the A.Y. 2005-06 and A.Y. 2006-07 are quashed and the appeals of the Revenue in ITA No. 5469 & 5470/Del/2015 are stands dismissed.

**Order pronounced in the Open Court on this 22nd Day of November, 2022**

**Sd/-**  
**(Dr. B. R. R. KUMAR)**  
**ACCOUNTANT MEMBER**

**Sd/-**  
**(YOGESH KUMAR U.S.)**  
**JUDICIAL MEMBER**

Dated: 22/11/2022  
*R. Naheed \**

Copy forwarded to:

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

ASSISTANT REGISTRAR  
ITAT NEW DELHI