

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

**SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER
and
SHRI NARENDER KUMAR CHOUDHRY, JUDICIAL MEMBER**

**ITA No.7714/Del./2018
(ASSESSMENT YEAR : 2013-14)**

DCIT, Central Circle 1,
Gurugram.

vs.

Platinum Towers P. Ltd.,
K-91, 2nd Floor,
Lajpat Nagar – II,
New Delhi.

(PAN : AAACP5640G)

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : Shri Parikshit Agarwal, CA
REVENUE BY : Shri T Kipgen, CIT DR

Date of Hearing : 29.12.2022
Date of Order : 09.01.2023

ORDER

PER SHAMIM YAHYA, ACCOUNTANT MEMBER :

This appeal by the Revenue is directed against the order of Id. CIT

(A)-3, Gurgaon dated 07.09.2018 for the Assessment Year 2013-14.

2. The grounds of appeal taken by the Revenue read as under :-

“(i) Whether on the facts and the circumstances of the case, the Ld. CIT(A) erred in deleting the addition of Rs. 2 crore made on account of unaccounted expenditure / investments made in the hands of the assessee for the assessment year under consideration.

(ii) Whether on the facts and the circumstances of the case, the Ld. CIT(A) failed to appreciate that the addition of Rs. 2

crore made on account of unexplained expenditure/ investments transactions were neither recorded in the books of account/ITR computation of income of M/s Spaze Towers Pvt. Ltd. nor those of the assessee and the telescoping sought by the assessee is just a figment of imagination of the assessee group as not even an iota of evidence was found during the course of search nor furnished during the assessment proceedings to substantiate the claim that the undisclosed income earned by M/s Spaze Towers Pvt. Ltd. was utilized to incur the expenses or make the investments by the assessee.

(iii) Whether on the facts and the circumstances of the case, the Ld. CIT(A) failed to appreciate that the benefit of telescoping can be given only to the same assessee and that too only when he is able to demonstrate that undisclosed income was actually earned before the date of utilisation and the onus to prove it, is on the person who is claiming the benefit and not on the Revenue.

(iv) Whether on the facts and the circumstances of the case, the Ld. CIT(A) failed to appreciate that there is no evidence that the amounts shown to have incurred as expenses or invested in assets have been received by the assessee as loan / deposit from M/s Spaze Towers Pvt. Ltd. in cash and the ledger account and confirmations submitted by the assessee before him showing receipt of amount in cash and repayment is an afterthought to reduce the tax liability.

(v) Whether on the facts and the circumstances of the case, the Ld. CIT(A) failed to appreciate that the findings of the Hon'ble ITSC are binding in respect of the applicants only and such findings in respect of a non-applicant i. e. the assessee cannot be accepted if not supported by any evidence.

(vi) Whether on the facts and the circumstances of the case, the Ld. CIT(A) failed to appreciate that M/s Spaze Towers Pvt. Ltd. is a separate assessee and legal entity and appropriation of its funds by the directors/promoters or their family members including the assessee for the purpose of their personal expenses amount to income in the hands of directors/promoters or their family members including the assessee in view of the provisions of sec. 2(22)(e) of the Act.”

3. The assessee has also filed an application under Rule 27 of the ITAT Rules which states that on law, facts and circumstances of the case, the addition of Rs.2 crores made by the AO deserves to be declared illegal in assessment framed u/s 153A when no incriminating material qua this year was found in search and original assessment was a completed assessment.

4. Brief facts of the case are that there was a search action carried out under section 132 of the Act on Spaze Group of cases on 17.02.2016. Notice u/s 153A was issued to the assessee. Assessee company was engaged in the business of real estate activities. AO noted that during search operations at Farm House No.16, The Greens Rajokri, New Delhi, it was observed that farm house as well as its interiors and fixtures were very luxurious. Further, AO noted that during post search proceedings, Spaze Group vide letter dated 11.03.2016 voluntarily offered to tax undisclosed/unrecorded investments in construction of the said farm house amounting to Rs.2 crores. Further, AO referred to various disclosures of the Spaze Group and proposed to add Rs.2 crores in the hands of the assessee on the basis of fund flow statement of Spaze Group. Assessee responded as under :-

"Without prejudice, it is respectfully submitted that the assessee has already declared, during the course of search u/s 132(4) of the Act that M/s Spaze Towers Pvt. Ltd. has made an

investment of Rs. 2.00 Cr. on account of construction/renovation/furniture & fixtures etc. of the farm house in question.

And

The same fact has already been stated in SOF also at page No. 11 of SOF in the case of M/s Spaze Towers Pvt. Ltd. (copy attached), before Hon'ble Settlement Commission and accordingly, has also reduced cash in hand from cash flow statement submitted before Hon'ble Settlement Commission (copy attached). Taking into the account this additional unrecorded investment the total investment in farm house is very well covered.

However, it is pertinent to mention here that the assessee stated in letter dated 11.03.2016, that this investment of Rs. 2.00 cr was made during the period from A.Y 2010-11 to A.Y 2012-13. It is respectfully submitted that the letter dated 11.03.2016 was given at very early stage of search proceedings. In fact the assessee wanted to state the period of major construction from F.Y 2010-11 to F.Y 2012-13 but inadvertently written Assessment year instead of Financial year. On perusal of Construction expenses attached herewith (also stated at page No. 53 of SOF), it is perused that the major construction activity was carried out in FY 2010-11 to FY 2012-13 i.e relevant to AY 2011-12 to AY 2013-14. The assessee has used such cash for interior/construction/furniture/fixtures/fittings/equipments etc and thus deducted cash from cash flow in AY 2013-14. The investment so made by the assessee, shall be recorded in the books of the assessee, once the final orders of Hon'ble Income Tax Settlement Commission are passed.

It is also not out of context to mention here that the assessee had stated in letter dated 11.03.2016 that there are few discrepancies and this unrecorded investments of Rs. 2 Cr. is one of them. The assessee has also stated at page no.3 first Para of the letter dt. 11.03.2016 that the undersigned agrees to pay income tax and interest hereon (after telescopic adjustments), on the above said discrepancies. It was further stated that mode and manner of deriving such undisclosed income is specified and substantiated already in clause No.1 herein above. (Clause

No.1 deals with unrecorded income on account of excessive purchase/expenses in the books of M/s Spaze Towers Pvt. Ltd.) for Rs.53.00 Cr. (app) in Asst years from 2009-10 to AY 2016-17. The above discussion shows that as far as income is concerned, it was earned by M/s Spaze Towers Pvt. Ltd. and the cash derived from such excessive bogus purchases amounting to Rs.52,74,24,931/- before Hon'ble Settlement Commission. The cardinal Principal of Income tax is that income tax can't be charged more than once on the same income. Any levy of tax contrary to the provision of the act which may result unjust enrichment to the exchequer would be ultra vires Article 265 of the constitution.

For the sake of reference it is respectfully submitted that the assessee has already submitted before Hon'ble Settlement Commission that the actual source of funds of Rs. 2.00 Cr. so invested has already been reduced from the cash flow Rs. 2.00 Cr. in A.Y 2013-14). The assessee therefore, owes this amount to M/s Spaze Towers Pvt. Ltd."

5. However, the AO was not convinced. He made the impugned addition by concluding as under :-

"The assessee has made the reference of the Judgment of Hon'ble Apex court in the case of "CIT Vs Shelly Products 261 ITR 367." However the case laws cited by the assessee are entirely different on facts and circumstances of the instant case. In this regard the following points are required to be considered:-

(i) M/s Spaze Towers Pvt. Ltd. is a company separately assessed to tax with a different PAN. Whatever cash was generated by it from bogus purchases was its income which has been surrendered by it to the Govt.

(ii) Since the company M/s Spaze Towers Pvt. Ltd. is being separately assessed to tax and being a separate legal entity, appropriation of its funds by the directors/promoters or their family members for the purpose of their personal expenses amounts to income of the directors/promoters.

(iii) It is also pertinent to mentioned here that the fund flow statement submitted by M/s Spaze Tower Pvt. Ltd. containing the admission of expenses to meet out the personal expenses of the directors/promoters and their family members, is a clear violation of the provisions of the Companies Act.

4.7 The assessee has submitted that the source of funds was cash received from M/s Spaze Towers Pvt. Ltd., however, the same has not been shown as income in the ITR of the assessee. Therefore, addition of Rs.2,00,00,000/- is being made to the total returned income of the assessee for the year under consideration.”

6. Against the above order, assessee went in appeal before the Id. CIT(A). Assessee also raised the issue that addition was made *de hors* any incriminating material found during search. However, Id. CIT (A) did not decide this aspect. Ld. CIT (A) adjudicated the issue on merits. Ld. CIT (A) referred to Income Tax Settlement Commission (ITSC), New Delhi order in case of Spaze Towers Pvt. Ltd. and referring to that order, he mentioned that the ITSC has held that telescoping for unexplained expenditure/ investment has to be allowed if the investment /expenses have been done during the same period when the income earned. He noted that in the case of the assessee, for the year under consideration in this appellate order, the unexplained expenditure/investment by the assessee amounting to Rs.2 crores which was added to the income of the assessee cannot be sustained as it relates to the same period when income was earned by M/s. Spaze Towers Pvt. Ltd. as disclosed before the ITSC. He further noted that it has been held that as per claim of the assessee, the

amounts given to the Directors/shareholders for the personal expenses are receivables which also enable telescoping. Hence, ld. CIT (A) deleted the addition made by the AO by holding as under :-

"a) The entire exercise during the assessment proceedings is based on the unwarranted presumption that the appellant is the owner of the cash amount of Rs.2,00,00,000/-, in spite of the specific submission that the said cash belonged to M/s Spaze Towers Pvt Ltd, which, was undisputedly offered to tax before the Hon'ble Settlement Commission, and the Hon'ble ITSC New Delhi, has also accepted as well in its final order under section 245D(4) of the I.T. Act

b) It is also clear that the understanding between the appellant and the said M/s Spaze is clear from the facts that the said amount is on returnable basis and hence cannot be treated as income for the appellant. It is not out of context to mention here that the Appellant has already repaid the said amount of Rs.1,50,000/- to the said Spaze Towers Pvt Ltd (Copy of ledger account in the books of Spaze Towers Pvt Ltd is enclosed herewith in support of contention of the Appellant).

c) At no stage had the Revenue discharged its onus of establishing the appellant to be actual owner of the cash amount out of which the household expenditure was incurred.

d) Once the appellant submitted that the source of the cash of Rs.1,50,000/- belonged to M/s. Spaze Towers Pvt. Ltd., and the same was also not denied by the latter, the appellant was under no obligation to explain any further the source or accumulation of the same in the hands of the group companies and no further addition is deserved in the hands of the appellant."

7. Furthermore, ld. CIT (A) considered the amount as returnable and directed the AO to take further action as under :-

“ Thus, it has been submitted by the appellant that the cash received is on returnable basis and hence cannot be treated as income for the appellant. Copy of appellant ledger account in the books of Spaze Towers Pvt Ltd has also been enclosed, wherein business income of the year under consideration amounting Rs. 2,00,00,000/- has been debited in the books of M/s Spaze Tower Pvt Ltd and the same has been paid back by the appellant company in the next financial year.

The copy of account for AY 2017-18 and AY 2018-19 have has been confirmed both by authorized signatories of the appellant company

and the Spaze Towers Power Ltd, Gurgaon and has been submitted by the appellant during the assessment proceedings.

In view of the above discussion, the AO is advised to take necessary action in the case of appellant in the year under consideration with respect to loan/deposit taken from M/s. Spaze Towers Pvt. Ltd. in cash and thus otherwise than by specified modes as per provisions of the Act.”

8. Against the above order, assessee is in appeal before us. We have heard both the parties and perused the records.

9. At the outset, we note that there was a search in the case of Spaze Group. The addition in the hands of the assessee relates to a farm house interior expenditure. No incriminating material was found thereof except for Spaze Group declaration that Rs.2 crores have been spent on furnishing of the farm house in post search proceedings. Thus, it is abundantly clear there is no incriminating material relating to said addition. In such circumstances, the decision of Hon'ble Delhi High Court in the case of Kabul Chawla 380 ITR 173 (Del.) applies where it has been held that in case of completed assessment, no addition u/s 153A can be done *de hors* seized material during search. Since in the present case there is no whisper of incriminating material, addition is liable to be deleted on account of jurisdiction.

10. We further note that Id. CIT (A) on merits has granted relief to the assessee on the ground that the same has been accepted by the Spaze Group before the ITSC as has been incurred by them and which is reflected in their fund flow statement. On this plank so, Id. CIT (A) has

directed the AO that the addition is to be deleted. We find that we have already held that addition has been made *de hors* any incriminating material found during search and in the assessment year u/s 153A of the Act in case of completed assessment, no addition can be made *de hors* any reference of incriminating material found during search. The deletion on merits by Id. CIT (A) is also by a well reasoned order. Hence, we affirm the same also.

11. In the result, assessee's application under Rule 27 of ITAT Rules is allowed and Revenue's appeal is dismissed.

Order pronounced in the open court on this 9th day of January, 2023.

**Sd/-
(NARENDER KUMAR CHOUDHRY)
JUDICIAL MEMBER**

**sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER**

**Dated the 9th day of January, 2023
TS**

Copy forwarded to:

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

**AR, ITAT
NEW DELHI.**