

IN THE INCOME TAX APPELLATE TRIBUNAL
"G" BENCH, MUMBAI

SHRI OM PRAKASH KANT, ACCOUNTANT MEMBER
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER

ITA No. 6456/MUM/2019
(Assessment Year: 2008-09)

M/s Orion Enterprises,
5-A, Sangam Building, Near HDFC Bank,
Juhu Versova Link Road,
Andheri (W), Mumbai - 400053
[PAN: AABFO0229Q]

..... Appellant

ACIT, Central Circle-20,
Room No. 402, 4th Floor,
Aayakar Bhawan, M.K. Road,
Mumbai - 400020

Vs

..... Respondent

Appearances

For the Appellant/Assessee : Shri Jayesh Dadia
For the Respondent/Department : Shri Vinay Sinha

Date of conclusion of hearing : 18.10.2022
Date of pronouncement of order : 11.01.2023

ORDER

Per Rahul Chaudhary, Judicial Member:

1. By way of the present appeal the Appellant has challenged the order, dated 30.08.2019, passed by the Ld. Commissioner of Income Tax (Appeals)-51, Mumbai [hereinafter referred to as 'the CIT(A)'] for the Assessment Year 2008-09 whereby the Ld. CIT(A) had partly allowed the appeal against the Assessment Order, dated 30.12.2010, passed under Section 143(3) read with Section 153A of the Income Tax Act, 1961 (hereinafter referred to as 'the Act').
2. The Appellant has raised following grounds of appeal:
 - " 1. The Ld. CIT(A) has erred in law and on the facts of the

case in confirming the action of the assessing officer in making addition of Rs. 15,00,000/- u/s 69A of the Act. The action is unjustified and unwarranted.

2. *The Ld. CIT(A) has erred in law and on the facts of the case in confirming the action of the assessing officer in making addition of Rs. 3,00,000/- u/s 68 of the Act. The action is unjustified and unwarranted.*
3. *The Ld. CIT(A) has erred in law and on the facts of the case in confirming the action of the assessing officer in making disallowance of Rs. 19,80,501/- u/s 69A of the Act. The action is unjustified and unwarranted.*
4. *The Ld. CIT(A) has erred in law and on the facts of the case in confirming the action of the assessing officer in making addition of Rs. 76,94,538/- u/s 69A of the Act. The action is unjustified and unwarranted."*

3. The relevant facts, in brief, are that Appellant is a partnership firm carrying on the business of interiors and paintings. A search & seizure under Section 132(1) of the Act was carried out by the DDIT (Inv) Unit-II(2) in the case of Nagi Group on 30.05.2008. Notice, dated 05.09.2008, under Section 153A of the Act was issued to the Appellant. In response to the same, the Appellant filed return of income on 30.12.2008 declaring total income of INR 35,10,030/-. Thereafter, the Appellant filed another return of income on 02.06.2009 declaring total income of INR 35,77,880/- after claiming depreciation on office premises. The Assessing Officer, vide order dated 30.12.2010, framed assessment on the Appellant for the Assessment Year 2008-09 under Section 143(3) read with Section 153A of the Act after making the following additions/disallowances:

- (a) Disallowance of cash expenses of INR 16,410/- under Section 40A(3) of the Act
- (b) Disallowance of INR 15,00,000/-, INR 50,04,220/- and INR 76,94,538/- under Section 69A of the Act
- (c) Addition of INR 9,00,000/- under Section 68 of the Act

- (d) Adhoc disallowance of INR 12,88,703/- being 25% of expenses aggregating to INR 51,54,814/- debited to the Profit & Loss Account
 - (e) Addition of INR 2,00,000/- on account of unexplained loans
4. Being aggrieved, the Appellant preferred appeal before CIT(A) against the Assessment Order dated 30.12.2010. The CIT(A) vide order dated 30.08.2019, partly allowed the aforesaid appeal for the Assessment Year 2008-09. The ground related to disallowance of INR 16,410/- made by the Assessing Officer under Section 40A(3) of the Act was not pressed by the Appellant. The CIT(A) sustained the addition of INR 15,00,000/- and INR 76,94,538/- made under Section 69A of the Act. The CIT(A) granted relief to the Appellant by deleting the disallowance of INR 2,00,000/- made under Section 68 of the Act. Further, the CIT(A) restricted the disallowance of INR 9,00,000/- made under Section 68 of the Act to INR 3,00,000/-. As regards, disallowance of INR 50,04,220/- made by the Assessing Officer under Section 69A of the Act, the CIT(A) granted relief to the Appellant by restricting the disallowance to INR 20,37,250/- (INR 3,08,039/- + INR 56,749/- + INR 16,72,462/-). The CIT(A) also restricted the adhoc disallowance of INR 12,88,703/- to INR 5,15,481/-.
5. Not being satisfied by the relief granted by the CIT(A) the Appellant has preferred the present appeal against the order, dated 30.08.2019, passed by CIT(A) on the grounds reproduced in paragraph 2 above which are taken up hereinafter in seriatim.

Ground No. 1

6. Ground No. 1 is directed against the addition of INR 15,00,000/-

made by the Assessing Officer under Section 69A of the Act. The facts relevant to the adjudication of this ground are that when the case of the Appellant was taken up for scrutiny the Assessing Officer noted that as per page 30 of the seized material, the Appellant had outstanding dues of INR 35,00,000/- out of which INR 15,00,000/- represented cash received from Mr. Ali Bagash not recorded in the books of accounts. Since, Mr. Ali Bagash had confirmed granting of loan of INR 20,00,000/-, the Assessing Officer made an addition of INR 15,00,000/- under Section 69A of the Act which was confirmed by the CIT(A).

7. The Ld. Authorised Representative for the Appellant appearing before us submitted that the documents on the basis of which additions has been made in the hands of the Appellant is neither dated nor signed. Therefore, it is a dumb document which cannot form the basis of addition in absence of any corroborative material or evidence. The Ld. Departmental Representative countered the aforesaid submissions and submitted that the aforesaid documents contained details of cheque transaction of INR 20,00,000/-. Mr. Ali Bagash had also confirmed that a loan of INR 20,00,000/- was granted by him to the Appellant. Therefore, it cannot be said that the document was not corroborated by any material/evidence. The Appellant had failed to explain the cash transaction of INR 5,00,000/- and INR 10,00,000/- recorded in the aforesaid document which clearly stated that in total INR 35,00,000/- was due to Mr. Ali Bagash.
8. We have considered the rival submissions and perused the material on record. We note that during the assessment

proceedings, in reply to show cause notice it was stated by the Appellant that loan of INR 20,00,000/- was already paid back by the Appellant. On perusal of order passed by the Assessing Officer/CIT(A) it can be seen that the date on which loan of INR 20,00,000/- was taken or repaid has not been stated. In our view, the aforesaid dates were relevant as the seized document forming the basis of the addition showed entry of 'Old Outstanding - INR 5,00,000/- (cash)' prior to entry for 'Cheque INR 20,00,000/- (Citi Bank – 223528 HDFC deposited Citi Bank Orion Enterprises – 112)' whereas entry of Cash INR 10,00,000/- followed the aforesaid entry for cheque. The seized document is not dated, and therefore, cannot form the basis of making addition of INR 15,00,000/- for the Assessment Year 2008-09. The search was also carried out on 30.05.2008, i.e., during the Financial Year 2008-09 (relevant to the Assessment Year 2009-10) and therefore, even under Section 69A of the Act the amount of INR 15,00,000/- could not have been deemed to be income for the Assessment Year 2008-09. Therefore, we hold that there was no basis of making the addition of INR 15,00,000/- in the hands of the Appellant for the Assessment Year 2008-09 and therefore, the same is deleted.

Ground No. 2

9. Ground No. 2 pertains to order of the CIT(A) sustaining the addition of INR 3,00,000/- out of the total addition of INR 9,00,000/- made by the Assessing Officer under Section 68 of the Act.

10. The seized documents in the form of balance sheet of the Appellant for previous year 2007-08 showed an entry of loan of INR 9,00,000/-. During the assessment proceedings, the

Appellant explained that the aforesaid financial statements were pre-audit statements prepared before finalization of the accounts. While finalizing account amount of INR 9,00,000/- which was initially shown as advance was included in sale and profit arising there from were offered to tax. Not being convinced the Assessing Officer made the addition of INR 9,00,000/-. In appeal against the aforesaid addition, the CIT(A) called for a remand report from the Assessing Officer. After considering the aforesaid remand report and the response to the same received from the Appellant, the CIT(A) concluded that the Assessing Officer had resorted to cherry picking and has adopted figures which were beneficial to the revenue while ignoring the other figures/entries which were beneficial to the Appellant. After considering the entries pertaining to unsecured loan as per the seized documents and the final audited accounts, the CIT(A) restricted the disallowance to INR 3,00,000/- being the difference between the amount of unsecured loan reflected in the documents seized and the final audited accounts.

11. The Ld. Authorised Representative for the Appellant reiterated the submissions made before the CIT(A) and submitted that both, the Assessing Officer and the CIT(A) failed to appreciate that the seized documents were pre-audit accounts which were not finalized. The CIT(A) has granted relief to the Appellant by accepting the alternative plea that the entire seized documents must be considered while rejecting the primary contention that the amount of INR 9,00,000/- was disclosed as sales and profits therefrom were offered to tax as income. Per contra, the Ld. Departmental Representative relied upon the order passed by Assessing Officer and the CIT(A). He submitted that the

Appellant had failed to provide any evidence to support his submission.

12. We have considered the rival submissions and perused the material on record. During the assessment proceedings the Appellant failed to provide any documents/evidence to support his contention that INR 9,00,000/- was advance which was subsequently included in sales on finalization of the work/assignment. The CIT(A) has granted relief to the Appellant by accepting the alternative plea advanced by the Appellant and restricted the addition to INR 3,00,000/-, being the amount of unsecured loans of INR 29,00,000/- reflected in the seized material and amount of unsecured loan of INR 26,00,000/- reflected in the final audited accounts. Thus, we do not find any infirmity in the order passed by the CIT(A). Ground No. 2 raised by the Appellant is dismissed.

Ground No. 3

13. Ground No. 3 pertains to order of CIT(A) sustaining disallowance of INR 19,80,501/- under Section 69A of the Act out of the total disallowance of INR 50,04,220/- made by the Assessing Officer.
14. During the search proceedings, a loose paper filed consisting of 45 sheets of paper were seized. On sheet number 9 to 13 there were handwritten notings pertaining to the Appellant for the previous year 2007-08 which have been reproduced in paragraph 6.1 of the assessment order which read as under:

"6.1 It consists of handwritten notings of the Orion Enterprises for the year ending 31.03.2008. These notings contain remarks regarding difference in ICICI Bank car loan as per books and as per bank statement, cash shortage of Rs. 3,08,039/-, Drs/Crs

balance written off of Rs. 10,23,719/- excess payment made, TDS etc. further, it is mentioned that Harsha has been given interim advance of Rs. 16,72,462/- and personal drawing is Rs. 20,00,000/- which is not in the books of account. The assessee was requested to show cause as to why this amount should not be added in the total income of the assessee, Orion Enterprises U/s 69A of the Income Tax Act, 1961 in the year AY 2008-09."

15. The Appellant filed reply in response to the show cause notice issued by the Assessing Officer in relation to the above notings. However, the Assessing Officer was not convinced with the reply furnished by the Appellant and therefore made the aggregate addition of INR 50,04,220/- under Section 69A of the Act consisting of the following:
- (a) INR 3,08,039/- on account of cash shortage
 - (b) INR 10,23,719/- in respect of debtors/creditors written off
 - (c) INR 16,72,462/- in respect of interim advance to Ms. Harsha/Harsha Interiors
 - (d) INR 20,00,000/- in respect of personal drawings by Ms. Supreet Nagi, partner of the Appellant firm
16. In appeal, the CIT(A) confirmed the addition of INR 3,08,039/- on account of cash shortage and addition of INR 16,72,462/- in respect of interim advance to Ms. Harsha/Harsha Interiors. However, CIT(A) granted relief by deleting the addition of INR 20,00,000/- in respect of personal drawings and restricting the addition of INR 10,23,719/- on account of debtor/creditor written off to INR 56,749/-.
17. Not being satisfied with the relief granted by the CIT(A), the Appellant is now in appeal before us against the order of the CIT(A) sustaining the addition of INR 3,08,039/- on account of cash shortage and addition of INR 16,72,462/- in respect of

interim advance to Ms. Harsha/Harsha Interiors.

18. The Ld. Authorised Representative for the Appellant appearing before us submitted that the documents seized during search on the basis of which addition have been made by the Assessing Officer are in the nature of working papers prepared during the audit process. The discrepancies pointed out were corrected at the time of preparing the final accounts and therefore, no addition could have been made in relation to the same. He submitted that no enquiry was made by the Assessing Officer despite the fact the Appellant had stated that no interim advance was paid to Harsha Interiors. Per contra, the Ld. Departmental Representative relied upon the order passed by the Assessing Officer and the CIT(A). He submitted that no documentary evidences were submitted by the Appellant during the assessment or appellate proceedings to support the contentions and therefore, the Assessing Officer/CIT(A) were justified in making/sustaining the additions.
19. We have considered the rival submissions and perused the material on record. On perusal of sheet number 9 to 13 (placed at page 39 to 43 of the paper-book) we are of the view that the same are in the nature of working papers of the auditor. As regards, cash shortage of INR 3,08,039/- it was explained by the Appellant during the assessment proceedings that the same was on account of incorrect accounting entries passed by the Accountant. Further, a number of entries were not made by the Accountant. This resulted in cash shortage of INR.3,08,039/- in the books of accounts of the Appellant. However, the Appellant failed to provide any reconciliation statement or details of entries corrected/made. Therefore,

Assessing Officer rejected the aforesaid explanation on the ground that documentary evidence was not produced by the Appellant. For the same reasons, CIT(A) also sustained the addition. Even in the appellate proceedings before us, no details/reconciliation has been furnished by the Appellant. Accordingly, in absence of any documentary evidence in the form of reconciliation or otherwise furnished by the Appellant, addition of INR 3,08,039/- is sustained.

20. As regards, addition of INR 16,72,462/- on account of entry of interim advance to Ms. Harsha/Harsha Interiors, we note that in appeal, the CIT(A) had called for the remand report. In paragraph 8.2 the relevant portion of remand report has been reproduced by the CIT(A). The relevant extract of the same pertaining to interim advance to Ms. Harsha/Harsha Interiors read as under:

“An interim advance is paid to Harsha. The AR stated that nowhere it is mentioned that the advance was paid during the current financial year. These are wrong audit postings which were subsequently corrected. No advance was paid and Harsha had supplied materials to the assessee. During remand proceedings, no documentary evidences were furnished to prove the contention of the assessee. Mere statement that these are wrong audit postings does not suffice. Hence not acceptable.”

21. From the above, it is clear that the Appellant had explained that no advance was paid to Ms. Harsha/Harsha Interiors during the relevant previous year. However, the Assessing Officer and the CIT(A) rejected the explanation furnished by the Appellant on the ground that no documentary evidence was furnished by the Appellant. We note that during the assessment proceedings the Appellant had contended that amount of INR 16,72,462/- reflected the work done/material supplied by Harsha Interiors.

As per the reply of the Appellant reproduced in paragraph 6.2 of the Assessment Order, a copy of the ledger account was also furnished to the Assessing Officer. Thus, the Appellant had furnished the ledger account [placed at page 44 of the paper-book] during the assessment proceedings in support of his contention. However, the Assessing Officer and the CIT(A) failed to carry out any enquiry in relation to the same. In our view, in the aforesaid facts and circumstances addition of INR 16,72,462/- cannot be sustained as the Appellant cannot be asked to prove the negative. Accordingly, addition of INR 16,72,462/- is deleted.

22. In view of the above, Ground No. 3 raised by the Appellant is partly allowed.

Ground No. 4

23. Ground No. 4 pertains to an addition of INR 76,94,538/- made by the Assessing Officer under Section 69A of the Act which has been sustained by the CIT(A) in appeal preferred by the Appellant.
24. The facts relevant to the adjudication of this ground are that during the assessment proceedings that Assessing Officer found that amount of INR 2,80,39,145/- has been credited to bank account of the Appellant. The Appellant was asked to explain the source of the aforesaid credit of the documentary evidence. The explanation furnished by the Appellant was not to the satisfaction of the Assessing Officer and therefore, the Assessing Officer made an addition of INR 76,94,538/- being the total credit to INR 2,80,39,145/- to the bank account of the Appellant reduced by (a) loan & inter-bank transfer of INR

90,60,000/- and (b) sales of INR 1,12,84,607/-.

25. The Ld. Authorised Representative for the Appellant submitted that the above addition made by the Assessing Officer was confirmed by the CIT(A) despite all the relevant documentary evidence having been filed during the appellate proceedings to substantiate that amount of inter-bank transfer and loan stood at INR 1,34,14,683/- as against INR 90,60,000/- taken by the Assessing Officer. The conclusion arrived by the CIT(A) was based upon incorrect remand report submitted by the Assessing Officer. If the correct figures were considered then the addition of INR 76,94,538/- shall stand reduced to INR 10,81,729/- Per contra, the Ld. Departmental Representative submitted that the CIT(A) had considered, both, the remand report as well as the response of the Appellant to the remand report. Therefore, the contention raised by the Appellant is without any merit. In rejoinder, the Ld. Authorised Representative for the Appellant submitted that the CIT(A) has merely stated that the explanation furnished was not reliable since the audited final accounts reflected that a loan of INR 26,00,000/- was received whereas the Appellant has contended that a loan of INR 34,00,000/- was received during the relevant previous year. Referring to the relevant extract of the bank account statement (placed at page 45 to 89 of the paper-book), the Ld. Authorised Representative for the Appellant submitted that the Assessing Officer had erred in computing the amount of inter-bank transfer and loan and the relevant documents clearly shows that the correct figures of INR 1,34,14,683/-.
26. We have considered the rival submissions and perused the material on record including the remand report dated

03.05.2019. We note that in the remand report, the Assessing Officer has rejected the contentions raised by the Appellant by merely stating as under:

“The above contention of the assessee is unsupported by documentary evidences. The action of the AO is therefore justifiable.”

27. We note that the Appellant has placed on record the relevant extract of bank statements. However, the same were not considered by the Assessing Officer in the remand proceedings. Even the CIT(A) has accepted the remand report and based his conclusion on the basis of single entry pertaining to loan received during the relevant previous year. Accordingly, in the facts and circumstances of the present case, we deem it appropriate to remand this issue back to the file of Assessing Officer for de-novo adjudication after giving the Appellant a reasonable opportunity of being heard. In view of the aforesaid, Ground No. 4 raised by the Appellant is allowed for statistical purposes.

In the result, the present appeal is partly allowed.

Order pronounced on 11.01.2023.

Sd/-
(Om Prakash Kant)
Accountant Member

Sd/-
(Rahul Chaudhary)
Judicial Member

मुंबई Mumbai; दिनांक Dated : 11.01.2023
Alindra, PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR,
ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार /(Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai