

IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH : C : DELHI

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER  
AND  
SHRI M. BALAGANESH, ACCOUNTANT MEMBER

ITA Nos.2421 to 2423/Del/2018  
Assessment Years: 2008-09 to 2010-11

Kay Jay Projects Pvt. Ltd.,  
172, Navrattan Market,  
Maliwara, Chandni Chowk,  
New Delhi.

Vs

DCIT,  
Central Circle,  
Noida.

PAN: AACCK5401A

(Appellant)

(Respondent)

Assessee by : Shri S.B. Gupta, CA  
Revenue by : Shri J.S. Minhas, CIT, DR  
Date of Hearing : 03.05.2023  
Date of Pronouncement : 10.05.2023

ORDER

PER M. BALAGANESH, AM:

These appeals in ITAs No.2421 to 2423/Del/2018 for AYs 2008-09 to 2010-11 arise out of the order of the Commissioner of Income Tax (Appeals)-IV, Kanpur [hereinafter referred to as 'Id. CIT(A)', in short] in Appeal No. CIT(A)-IV/11022, 11019 & 11020/DCIT-CC/NOIDA/2016-17/689 to 691 dated 23.02.2018 against the orders of assessment passed u/s 153A r.w.s. 143(3) of the Income-tax Act, 1961 (hereinafter referred to as 'the Act') dated 30.11.2016 by the Id. Assessing Officer, Central Circle, Noida (hereinafter referred to as 'Id. AO').

2. Most of the issues involved are identical in all these appeals. Hence, they are taken up together and disposed of by this common order for the sake of convenience. With the consent of both the parties, the appeal for AY 2008-09 is taken as the lead case and the decision rendered thereon shall apply with equal force for other assessment years also, in respect of identical issues, except with variance in figures.

3. The assessee has raised the following grounds of appeal for the assessment year 2008-09 before us:-

*“1. On the facts and circumstances of the case, the order passed by the learned Commissioner of Income Tax (Appeals) {CIT(A)} is bad both in the eye of law and on facts.*

*2. On the facts and circumstances of the case, the learned CIT(A) has erred, both on facts and in law, in rejecting the contention of the appellant that the proceedings initiated under Section 153A and assessment framed under Section 153A/143(3) are in violation of the statutory conditions and the procedure prescribed under the law and as such the same is bad and liable to be quashed.*

*3. On the facts and circumstances of the case, the proceedings initiated under Section 153A and assessment framed thereafter under Section 153A are bad in the eye of law in the absence of any incriminating material being found during the course of the search.*

*4. On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming the addition of Rs. 50,00,000/- made by the AO on account of unsecured loan received during the year treating the same as unexplained under section 68 of the Income Tax Act.*

*5. On the facts and circumstances of the case, the learned CIT(A) has erred, both on facts and in law, in confirming the abovesaid addition despite the assessee bringing on record all evidences and explanation to prove the identity and creditworthiness of the lenders as well as the genuineness of the transaction.*

*6. On the facts and circumstances of the case, the learned CIT(A) has erred, both on facts and in law, in not confirming the addition despite the fact that the addition has been made without conducting any enquiry under Section 131/133(6) and drawing adverse inference against the assessee.*

*7. On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming the addition of Rs. 97,16,144/- made by the AO on account of difference in the cost of construction of building claimed by the assessee and value determined by the Registered Valuer treating the same as unexplained investment.*

8. *On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in rejecting the contention of the assessee that the valuation report submitted by the DVO is barred by limitation.*

9. (i) *On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming the addition ignoring the fact that valuation is only an art and as such addition cannot be made solely on its basis.*

(ii) *That the addition has been confirmed rejecting the contention of the assessee that in the absence of any evidence of actual expenditure being made addition made is untenable in the eye of law.*

(iii) *On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming the addition ignoring the defects in the valuation report of the DVO.*

10. *The appellant craves leave to add, amend or alter any of the grounds of appeal.”*

4. The assessee, vide application dated 01.05.2023 also raised additional grounds of appeal which are nothing, but, the reproduction of original ground Nos.2 and 3 raised herein (supra).

5. We have heard the rival submissions and perused the material available on record. At the outset, we find that the additional grounds raised by the assessee go to the root of the matter and it being a legal issue, the same are hereby admitted for adjudication. Even otherwise, we find that these aspects raised in additional grounds were indeed submitted before the Ld.CIT(A) in the form of written submissions, but, the same were not addressed by the Id.CIT(A). Hence, the assessee, as a matter of abundant caution, though raised the grounds vide grounds No.2 and 3 in the original grounds, had also raised the same by way of additional ground.

6. The assessee is a domestic company regularly maintaining its books of account which are subjected to statutory audit under the Companies Act, 1956. The assessee had filed the return of income together with computation of income, audited accounts, etc. The assessee was searched u/s 132 of the Act on 23.05.2013. The assessee owned an immovable industrial property situated at Plot No.B-6, Sector-4, Noida and had duly declared the cost of construction of building

on the plot of Rs.82,79,077/- in its books plus air-conditioning expenses in the building of Rs.26,50,000/- totalling to Rs.1,09,29,077/- upto 31.03.2010. During the course of search assessment proceedings, the Id. AO asked the assessee to submit purchase deed of plot and details of investments, source of investments with documentary evidence, date of investment made in the construction of the property, source of investment thereof and copy of valuation report of the approved valuer. All these documents were duly submitted by the assessee except the valuation report. Copy of details of investment along with documentary evidences comprising ledger-wise summary sheet along with bills were submitted during the course of assessment proceedings. During the course of assessment proceedings, the Id. AO referred the valuation of construction cost of building u/s 142A of the Act to the Id. Valuation Officer (DVO) on 14.03.2016. The valuation officer issued letters dated 11.04.2016 and 14.09.2016 to the assessee calling for certain details. The assessee responded to the said letters on 18.07.2016 and 28.09.2016 respectively. The Id. DVO furnished the valuation report on 28.10.2016 estimating the fair market value of the cost of construction at Rs.2,90,86,790/- till 31.03.2010. Accordingly, the Id. AO show-caused the assessee for making addition on account of unexplained investment in the cost of construction of the building u/s 69B of the Act by substituting the value determined by the Ld. DVO as against the cost of construction disclosed by the assessee in its books. For the sake of convenience, the addition contemplated by the Ld. AO for all the three years are tabulated below:-

AY	As per books	As per valuation report	Difference
2008-09	38,65,908	1,35,82,052/-	97,16,144/-
2009-10	25,63,289/-	90,05,575/-	64,42,286/-
2010-11	18,49,880/-	64,99,163/-	46,49,283/-

7. In the said show-cause notice, the Id. AO also enclosed the valuation report of the Id. DVO and submitted to the assessee. Vide letters dated 25.11.2016 and 26.11.2016, the assessee pointed out multiple defects and deficiencies in the said

valuation report and also submitted a valuation report obtained from a registered valuer dated 08.07.2016 who estimated the cost of construction at Rs.72,39,614/-. The Id. AO did not whisper about the filing of the objections by pointing out various defects in the Id. DVO's report and also remained silent about the registered valuer's report submitted by the assessee dated 08.07.2016. In the search assessment concluded u/s 153A of the Act on 30.11.2016 for AY 2008-09, the Id. AO proceeded to treat the difference in value of cost of construction of Rs.97,16,144/- as unexplained investment made by the assessee.

8. Before the Id. CIT(A), the assessee reiterated its submissions and further pointed out that the reference made to Id. DVO by the AO *per se* is grossly incorrect in view of the fact that the audited books of account submitted by the assessee were not sought to be rejected by the Id. AO. No deficiencies were pointed out in the said books of account by the Id. AO. The valuation report of the Id. DVO suffers from multiple defects and deficiencies. The said valuation report u/s 142A of the Act was furnished by the Id. DVO on 28.10.2016 which is beyond the maximum period allowed to the Id. DVO to furnish the same to the Id. AO in terms of section 142A(6) of the Act. The assessee also pointed out that this addition is not supported by any incriminating material found during the course of search and since the assessment for AY 2008-09 is a concluded assessment, this addition could not be made in the search assessment in the absence of incriminating material. The Id. CIT(A), however, proceeded to hold that the assessee was unable to substantiate the investment made in immovable property and accordingly the books of account were rejected by him u/s 145(3) of the Act. The Id.CIT(A) in para 6.3 of his order had duly recorded the objection of the assessee that the report of the Id. DVO cannot be acted upon as it was furnished beyond the period of six months from the end of the month in which reference u/s 142A of the Act was made by the AO. The Id.CIT(A), however, did not give any independent finding on this objection in his appellate order. The Id.CIT(A) simply stated that opportunity of hearing was granted by the

ld. DVO to the assessee and, hence, the valuation report given by him is justified. No finding was also given by the ld.CIT(A) on the aspect of objection raised by the assessee that there was no incriminating material found during the course of search *qua* this addition. Aggrieved, the assessee is in appeal before us.

9. The entire crux of the arguments advanced by the ld. AR *qua* this addition is as under:-

- (a) The addition made on account of cost of construction was based on valuation report issued by the ld. DVO. The said valuation report was obtained only during the course of assessment proceedings. The same cannot be construed as an incriminating material found during the course of search. Reliance in this regard was placed on the recent decision of the Hon'ble Supreme Court in the case of *PCIT vs. Abhishar Buildwell P. Ltd. in Civil Appeal No.6580 of 2021 dated 24.04.2023* in support of his contention.
- (b) Reference was made to ld. DVO u/s 142A of the Act. Hence, it is the duty of the ld. AO to first find some defects and deficiencies in the books of account submitted by the assessee and consequentially reject the same u/s 145(3) of the Act and, thereafter, proceed to make reference to ld. DVO u/s 142A of the Act. In the instant case, the books of account were not rejected by the ld. AO and, instead, the same were done by the ld. CIT(A). If the ld.CIT(A) steps into the shoes of ld. AO in view of co-terminous powers available with him, then, it is duty bound on the part of the ld.CIT(A) to make a fresh reference to ld. DVO u/s 142A of the Act. This was admittedly not done by the Revenue in the instant case. Reference to DVO must be preceded by rejection of books of account by the authority who is making the reference. Reliance in this regard was placed on the decision of the

Hon'ble Supreme Court in the case of *Sargam Cinema vs. CIT*, reported in 328 ITR 513 and in the case of *CIT vs. Nirmal Kumar Aggarwal*, reported in 259 Taxman 320 (SC).

- (c) In the instant case, the reference to DVO was made on 14.03.2016 by the Id. AO u/s 142A of the Act. Hence, in terms of section 142A(6) of the Act, the Id. DVO is duty-bound to furnish his valuation report on or before 30.09.2016. Admittedly, the DVO's report was dated 28.10.2016 which has been relied upon by the Id. AO for framing the addition towards cost of construction in the hands of the assessee. This is in gross violation of provisions of section 142A(6) of the Act. Reliance was placed on the decision of the coordinate Bench of Hyderabad Tribunal in the case of *Shri Zulfi Revdjee vs. ACIT*, ITA No.2415/Hyd/2018 dated 05.09.2019.
- (d) The provisions of section 69B of the Act uses the word 'find.' The Id. AO is bound to find something by way of some material that the assessee had made investment in cost of construction over and above the value disclosed in the books of account. The Id. AO directly cannot apply the provisions of section 69B of the Act and make an addition. The assessee is not even supposed to submit a valuation report when the audited books of account are presented before the Id. AO. In any case, the assessee had also furnished a valuation report from the registered valuer dated 08.07.2016 before the lower authority.
- (e) The valuation report of Id. DVO suffers from various inconsistencies and deficiencies practically numbering to 20 defects, which were pointed out by the assessee before the lower authorities and there is absolutely no whisper in the orders passed by the lower authorities meeting the objections raised thereon by the assessee.

10. *Per contra*, the Id. DR vehemently argued that the legal grounds raised by the assessee before us either in the original grounds or in the additional grounds are not to be entertained at all as they do not emanate from the orders of the lower authorities. On merits of the addition, the Id. DR placed reliance on para 6.3 to 6.5 of the order of the Id.CIT(A).

11. At the outset, the preliminary objection raised by the Id. DR on the legal grounds raised by the assessee before us, in our considered opinion, deserves to be dismissed inasmuch as it is an admitted fact that they are legal grounds going to the root of the issue in dispute before us. It is settled law that legal grounds could be raised even for the first time before this Tribunal when the facts relevant for its adjudication are already on record. We have also addressed, *supra*, that the additional grounds raised by the assessee vide letter dated 01.05.2023, were only as a matter of abundant caution as they were already part of original grounds filed before us and the very same objections were indeed raised by the assessee before the Id.CIT(A) by way of written submissions. As stated (*supra*), the Id.CIT(A) had not even bothered to address his views on the said legal submissions made by the assessee.

12. Though the Id. AR had raised before us several propositions, we would like to confine ourselves to address only two propositions in the instant case, i.e.,

(a) Valuation Report of Id. DVO is barred by limitation; and

(b) No incriminating material has been found during the course of search.

13. It is not in dispute that assessments for AY 2008-09, 2009-10 and 2010-11 were concluded/unabated assessments as on the date of search on 23.05.2013. Hence, it is mandatory for the Revenue to take cognizance of any incriminating material that has been found during the course of search if they wish to disturb the assessments already concluded earlier. This situation would not have been any

different even if the earlier assessment has been completed u/s 143(1) of the Act. Admittedly, no incriminating material has been found during the course of search *qua* this addition towards cost of construction. This fact is evident from the perusal of the orders of the lower authorities. The sole basis of the addition is only the valuation report furnished by the Id. DVO which has been obtained by the Id. AO during the course of search assessment proceedings. Then, the said report cannot constitute incriminating material found during the course of search. Hence, we have no hesitation to hold that no addition could be made by placing reliance on the said valuation report while framing the assessment u/s 153A of the Act in the hands of the assessee. This issue is now well settled by the recent decision of Hon'ble Supreme Court referred to supra in the contentions of the Id. AR.

14. We find that the provisions of section 142A(6) of the Act categorically state that the valuation report has to be furnished by the Id. DVO within six months from the end of the month in which reference is made by the Id. AO. Admittedly, the valuation report is dated 28.10.2016 which is beyond the prescribed time of 30.09.2016. Hence, it is clearly evident that the said valuation report of Id. DVO is barred by limitation and, hence, cannot be relied upon by any party in the eyes of law. Consequentially no addition *per se* can be made by the Revenue by placing reliance on an invalid valuation report.

15. In view of the above, the addition made in the sum of Rs.97,16,144/- towards the cost of construction of the building is hereby directed to be deleted.

16. Since the relief is granted to the assessee on the aforesaid two propositions made by the Id. AR, the other propositions argued by the Id. AR are left open.

17. The next issue to be decided in the appeal of the assessee for AY 2008-09 is with regard to the addition made towards unsecured loan u/s 68 of the Act in the sum of Rs.78 lakhs.

18. We have heard the rival submissions and perused the material available on record. The Id. AO observed that from the perusal of the balance sheet of the assessee, it was seen that the assessee has taken unsecured loan from the following parties as under:-

Name of the party	Opening balances	Debit	Credit	Closing balance
CHD Developers Pvt. Ltd.	-	-	25,00,000/-	25,00,000/-
Creative Capital Services Pvt. Ltd.	-	28,00,000/-	78,00,000/-	50,00,000/-
Rajinder Paul Jindal		-	100,000/-	100,000/-
Rakesh Guptajee			7,50,000/-	7,50,000/-
Sarita Dahiya	100,000/-		11,50,000/-	10,50,000/-

19. The assessee was asked to furnish the details of unsecured loans together with complete present postal address, datewise details of mode of receipts along with bank statements of the lenders, their PANs, their IT returns, identity proof, confirmation letters of the lenders for the purpose of verification of their creditworthiness and genuineness of the transactions.

20. The Id. AO at page 2 of his order has stated that the assessee furnished confirmation letter, bank statement and copies of the ITR of Rajinder Paul Jindal, Rakesh Guptajee and Sarita Dahiya (directors), but no complete details were filed with respect to Creative Capital Services Pvt. Ltd. However, the Id. AO, vide order sheet entry dated 22.11.2016, asked the assessee to furnish the details in respect of Creative Capital Services Pvt. Ltd., from whom loan of Rs.78 lakhs was received during the year and Rs.28 lakhs had been returned during the year. The Id. AO

observed that the assessee, had filed the copy of ITR along with balance sheet and Profit & Loss Account of the said lender, but, did not file their bank statements. Hence, the source and nature of availability of money in the creditors' bank account could not be ascertained. The Id. AO further observed that the assessee company has not carried out any business activities during the year. The assessee company has not paid any interest on the loan received from Creative Capital Services Pvt. Ltd. Therefore, genuineness and credit worthiness of the transaction remains unverified. With these observations, he proceeded to treat the receipt of unsecured loan of Rs.78 lakhs from Creative Capital Services Pvt. Ltd. as unexplained cash credit u/s 68 of the Act and added the same to the total income of the assessee for the AY 2008-09. Before the Id.CIT(A), the assessee *prima facie* submitted that the actual receipt of loan from Creative Capital Services Pvt. Ltd. during the year was only Rs.50 lakhs and not Rs.78 lakhs. This was in view of the fact that a cheque for Rs.28 lakhs given by the lender got dishonoured. No repayment of Rs.28 lakhs has been made by the assessee during the year as erroneously pointed out by the Id. AO. It was submitted that the said lender company is duly assessed to income-tax and from the balance sheet of the creditor, it has a net worth of Rs.3,95,48,572/- as on 31.03.2008, operating revenue of Rs.6,96,03,082/- and profit before tax of Rs.15,45,113/-. The loan transaction was executed through regular banking channel by RTGS made from the lender's bank account with HDFC Bank, Asaf Ali Road, New Delhi – 110 002 on 18.05.2007 and was credited to the assessee's bank account maintained with ICICI Bank, Chandni Chowk, New Delhi – 110 006. Accordingly, it was pleaded that identity of the creditor is established, genuineness of the transaction is established and creditworthiness of the lender is also established. The assessee also submitted that the assessee had repaid the loan of Rs.50 lakh to Creative Capital Services Pvt. Ltd. on 27.09.2010 in respect of which the assessee also furnished a copy of the bank statement for the relevant period. The Id. CIT(A) accepted the plea of the assessee that a sum of Rs.28 lakhs was never received effectively by the assessee as the cheque given by the lender got

dishonoured. To this extent, he granted relief to the assessee. However, he approved the action of the Id. AO in stating that the bank statement of the lender company has not been furnished by the assessee and, hence, the addition made u/s 68 of the Act deserves to be sustained.

21. It is not in dispute that the assessee had furnished all the documents called for by the Id. AO with regard to the lender company except the bank statement of the lender company. The bank statement of the lender company would be the personal property of the lender company and would not be available with the assessee company. The purpose of verification of bank statement is only to ensure the creditworthiness of the lender company. But, we find the credit worthiness of the lender is proved beyond reasonable doubt from the bare perusal of the balance sheet and Profit & Loss Account wherein it has own funds of Rs.3.95 crores, whereas the amount advanced by the lender to the assessee is only Rs 50 lakhs. This clearly proves the credit worthiness of the lender. The said person is duly assessed to income-tax and copy of ITRs were duly filed before the Id. AO together with the PAN. Hence, the identity is also proved. The transactions have been routed through regular banking channels details of which were already submitted hereinabove and, hence, the genuineness of the transaction is also proved. Merely because the bank statement of the lender company (which is the personal property of the lender company) is not furnished by the assessee, that would not automatically disprove the creditworthiness of the lender. Nothing prevented the Id. AO by either issuing notice u/s 133(6) of the Act to the lender company to ascertain the said details. Admittedly, no examination whatsoever was carried out by the Id. AO in the instant case after the receipt of documents from the assessee. Hence, the assessee cannot be fastened with a tax liability for non-furnishing of a particular document which is not even expected to be in possession of the assessee. When this was pointed out to the Id. DR before us, he merely relied on para 5.3 of the order of Id. CIT(A). The contention of the Id. CIT(A) in para 5.3 has already been

addressed by us hereinabove. Hence, we hold that the assessee in the instant case had duly proved all the three ingredients of section 68 of the Act viz., identify of the creditor, creditworthiness of the creditor and genuineness of the transaction. Hence, there cannot be any addition u/s 68 of the Act for the same. Accordingly, we direct the Id. AO to delete the addition made on account of unsecured loan.

22. In any case, this addition was also made by the Id. AO only from perusal of the balance sheet and not by placing reliance on any incriminating material found during the course of search. Hence, the ratio laid down by the Hon'ble Supreme Court in the case of Abhisar Buildwell Pvt. Ltd., referred to, supra, would hold good for this issue also.

23. Accordingly, the grounds raised by the assessee for AY 2008-09 are allowed.

24. In the result, the appeal of the assessee for AY 2008-09 is allowed.

25. As far as AYs 2009-10 and 2010-11 are concerned, the only issue contested for these years is addition made on account of cost of construction. The decision rendered by us hereinabove in AY 2008-09 shall apply mutatis mutandis for these two years also.

26. In the result, all the appeals of the assessee are allowed.

Order pronounced in the open court on 10.05.2023.

Sd/-

(SAKTIJIT DEY)  
JUDICIAL MEMBER

Sd/-

(M. BALAGANESH)  
ACCOUNTANT MEMBER

Dated: 10<sup>th</sup> May, 2023.

dk

Copy forwarded to

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asstt. Registrar, ITAT, New Delhi