

आयकर अपीलीय अधिकरण, 'सी' न्यायपीठ, चेन्नई
**IN THE INCOME TAX APPELLATE TRIBUNAL
'C' BENCH, CHENNAI**

श्री मंजुनाथ. जी, लेखा सदस्य एवं श्री मनोमोहन दास, न्यायिक सदस्य के समक्ष
**BEFORE SHRI MANJUNATHA. G, HON'BLE ACCOUNTANT MEMBER
AND SHRI MANOMOHAN DAS, HON'BLE JUDICIAL MEMBER**

आयकर अपील सं./ITA Nos.: 723 & 724/Chny/2022
निर्धारण वर्ष / Assessment Years: 2010-11 & 2011-12

M/s. Varalakshmi Starch Industries Private Limited, No. 127/1, Old No. 7, Varalakshmi Towers, II Floor, Gandhi Road, Hasthampatty, Salem – 636 007.

v. Assistant Commissioner of Income Tax, Central Circle, Salem.

[PAN:AABCV-0094-P]

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/Appellant by : Shri. V. Balaji, CA
प्रत्यर्थी की ओर से/Respondent by : Shri. N. Senthil Kumar, CIT

सुनवाई की तारीख/Date of Hearing : 18.05.2023
घोषणा की तारीख/Date of Pronouncement : 31.05.2023

आदेश / O R D E R

PER MANJUNATHA. G, ACCOUNTANT MEMBER:

These two appeals filed by the assessee are directed against separate, but identical orders of the Id. Commissioner of Income Tax (Appeals)-18, Chennai, both dated 24.06.2022 and pertains to assessment year 2010-11 & 2011-12. Since, facts are identical and issues are common, for the sake of

convenience these appeals were heard together and are being disposed off, by this consolidated order.

2. The assessee has more or less raised common grounds of appeal for both assessment years. Therefore, for the sake of brevity, grounds of appeal filed for assessment year 2010-11 are reproduced as under:

"Based on the facts and circumstances of the case and in law, M/s Varalakshmi Starch Industries Pvt. Ltd. (hereinafter referred to as "Appellant"), respectfully craves leave to prefer an appeal against the order passed by the Learned Commissioner of Income-Tax (Appeals) 18, Chennai (hereinafter referred to as the "Ld. CIT(A)") under section 250(6) of the Income-tax Act, 1961 ("the Act") relevant to Assessment Year 2010-11 (hereinafter referred to as the "impugned AY") on the following grounds:

That on the facts and circumstances of the case and in law:

GROUND 1: GENERAL

1.1 The Order of the Ld. CIT(A) is contrary to the law, facts and circumstances of the case .

GROUND 2: NO INCRIMINATING DOCUMENTS RELATING TO THE YEAR UNDER CONSIDERATION FOUND DURING THE COURSE OF SEARCH

2.1 The Ld. CIT(A) has erred in upholding the additions made by the Ld. Assessing Officer ("the Ld. AO") to the extent of Rs.56,85,026/- for the impugned A Y when there is no incriminating documents found in the course of search at the premises of the appellant.

2.2 The Ld. CIT(A) erred in holding that the loose sheets found during the course of search formed the incriminating material for assessment when such sheets or materials indicated only the details of the contract entered into between the appellant - company and M/s. J .K Construction, invoices issued by M/s. J .K Construction which did not formed the basis of addition made by

the Ld. Assessing Officer vide assessment order u/s 143(3) r.w.s. 153A of the Act.

GROUND 3: INVALID REFERENCE TO DISTRICT VALUATION OFFICER

3.1 The Ld. CIT(A) erred in not quashing the addition of undisclosed investments u/s 69 of the Act made exclusively on the basis of the valuation report dated 23-12-2016 issued by the Ld. District Valuation officer ("DVO") without a valid reference as per the provisions of the Act.

3.2 The Ld. CIT(A) erred in upholding the reference made by the Assistant Director of IncomeTax (Investigation) ("ADIT(Inv.)") to the Ld. DVO under Section 142A of the Act as valid when the Ld. ADIT(Inv.) is not empowered to make such reference as per the provisions of the Act as existed on 03-07-2014, being the date of reference to DVO.

GROUND4: OTHER DEFECTS IN VALUATION REPORT

4.1 Based on the facts and circumstances of the case, the Ld. CIT (A) has erred in affirming the addition made by the Ld. AO based on the valuation report dated 23-12-2016 without considering the following:

a. The standard rates applied in respect of construction of maize starch plant refers to the rate applicable for external contractors which will be inclusive of statutory duties such as service tax and VATetc.

B. The rates adopted for materials and labouris without taking cognizance of the fact that the maize starch plant is located at a Panchayat and not major city.

c. The rates for the floors of Maize Starch Unit shall be adopted considering the differences in structure of each floor.

d. The *value of Godown II of the maize starch plant, comprising of ground floor plus 3 floors arrived at Rs. 1,03,40,114/- in the valuation report dated 23-12-2016 issued by the Ld. DVO, which was relied upon by the Ld. AO and as affirmed by the Ld. CIT(A), has been included twice in the said valuation report vide S.No.3.11 & 3.12and S.No.1.6,1.7 &1.8 .*

e. In respect of S.No.3.5 of Annexure to valuation report dated 23-12-2016, the value of unloading platform with asbestos roof sheet has been estimated adopting the rates applicable to RCC

roof sheets instead of taking the rates of AC roof sheets as there are no side walls/intermediate pillars, resulting in an over valuation estimated at Rs.5,91, 180/-

f. Though the Ld. DVO has mentioned in his valuation report dated 23-12-2016 that the godown II does not have any outer/side walls in third floor, while estimating the value of the starch plant has taken the same value as adopted for first and second floors .

GROUND 5: REBATE OF 7.5% PROPOSED BY THE DVO FOR SELF-SUPERVISION

5.1 The Ld. CIT(A) erred in affirming the computation of the undisclosed investments for addition under Section 69 of the Act without appreciating the facts of the appellant's case .

5.2 The Ld. CIT(A) erred in denying the rebate of 7.5% from investment value as per the Ld. DVO's report towards self-supervision and direct purchase of materials by the appellant without any concrete basis .

GROUND 6:EXPENSES INCURRED BY YOUR APPELLANT NOT CONSIDERED/REDUCED FROM THE VALUE ESTIMATED BY THE DVO

6.1 The Ld. CIT(A) erred in upholding the addition made by the Ld. AO without taking cognizance of the fact that idle resources including factory, infrastructure facilities, power, water and labour has been utilized for construction of maize starch plant by the appellant.

6.2 The Ld. CIT(A) erred in upholding the addition made by the Ld. AO without giving due credit to **the** expenses incurred/borne by your appellant towards wages, salaries, repairs, maintenance, forklifts, excavators, loaders, trucks and mini trucks and heavy machineries/vehicles such as cranes, hoists, JCB, excavators, lifts, vibrators, etc and workshop with equipment's for gas cutting, welding, grinding, drilling etc.

GROUND7: OTHERS

Your appellant craves the indulgence of the Hon'ble Income Tax Appellate Tribunal to add/alter and supplement the grounds of appeal as well as file additional grounds of appeal along with documentary evidences to support the case of the appellant.

For these and such other grounds that may be adduced at the time of hearing, it is prayed that the order of the assessing officer be modified accordingly.

The Appellant submits that each of the above grounds is independent and without prejudice to one another.

The Appellant craves leave to add, alter, amend, vary, omit or substitute any of the aforesaid grounds of appeal at any time before or at the time of hearing of the appeal, so as to enable the Hon'ble Tribunal to decide on the appeal in accordance with the law. "

3. The brief facts of the case are that the appellant, M/s. Varalakshmi Starch Industries P. Ltd, is a manufacturer of starch from Tapioca, filed its return of income for the assessment year 2010-11 on 29.09.2010, admitting total income of Rs. 2,15,87,370/-. A search action u/s. 132 of the Income-tax Act, 1961 (hereinafter referred to as "the Act") was conducted in the business premises of the appellant on 22.05.2014. During the course of search, it was noticed that the assessee has constructed a new maize starch plant in Pappireddipatti Post, Dharmapuri District. The cost of investment made in this starch unit as well as in the Effluent treatment plant and Godown extension building has been accounted in the books of account of the assessee for assessment years 2010-11 & 2011-12. The Assistant Director of Income-tax (Inv), Salem referred, the building to the

Valuation Cell for determination of cost of construction incurred for the building.

4. Consequent to search, the case was taken up for assessment proceedings and during the course of assessment proceedings, the Assessing Officer noticed that the basis for reference to DVO by the ADIT (Inv) is construction bill recovered from M/s. J K Construction, a partnership firm, who is a contractor for the building constructed by the assessee. A sworn statement was recorded from Shri. J. Baskar, Managing partner of the firm, while answering to the question on the work executed by the firm for assessee company, he has stated that the project was constructed for housing heavy machineries and he also stated that firm has raised bills at various times and payments were made through account payee cheque and cash. He had also furnished copies of five bills aggregating to Rs. 9,38,90,639/-. The balance sheet of the assessee shows total cost of building including Tapioca plant, maize starch plant, ETP and other godowns all put together at Rs. 7,33,42,140/-. The assessee had also shown separately a sum of Rs. 1,46,58,844/- as cost of building under power division and Rs. 54,30,000/- as cost of building under work in progress. The AO, further noted

that the District Valuation Officer submitted his report and estimated the cost of construction at Rs. 13,44,45,000/-. The valuation report dated 04.12.2014, in respect of cost of investment made in the Effluent treatment plant was received from the Valuation Officer, estimating the cost of construction at Rs. 3,63,28,000/-. Separate Valuation report dated 27.11.2014 was received from the Valuation Officer, Coimbatore for the godown extension building and cost of construction has been estimated at Rs. 70,44,000/-. Subsequently, on 28.12.2016, an amended valuation report dated 23.12.2016 was received from valuation cell and revised the cost of construction of the starch maize unit at Rs. 9,55,96,000/-. The AO, after considering valuation report submitted by the DVO and also taken into account explanation furnished by the assessee, opined that the assessee has not fully accounted expenditure incurred for construction of maize starch unit, cost of power division and work in progress of building in power division and thus, arrived at total cost of construction at Rs. 9,34,30,984/- and after reducing the expenditure accounted in the books of accounts of the assessee arrived at unaccounted investment in maize starch unit at Rs. 2,22,33,791/-. Further, the Assessing Officer apportioned

unaccounted investment in construction of building for assessment years 2010-11 & 2011-12 on the basis of percentage of completion of building and made addition of Rs. 1,61,32,839/- for assessment year 2010-11 and Rs. 61,00,952/- for assessment year 2011-12.

5. Being aggrieved by the assessment order, the assessee preferred an appeal before the CIT(A). Before the Id. CIT(A), the assessee has challenged the assessment order passed by the AO in light of certain judicial precedents, on the ground that additions made towards unaccounted investment in building is not with reference to any incriminating material found as a result of search and consequently, in case of abated assessments, no additions can be made. The assessee had also challenged additions made by the AO towards unaccounted investment in cost of building on the ground that there are discrepancies in value arrived at by the DVO. The Id. CIT(A), after considering relevant submissions of the assessee and also taken note of valuation report of DVO opined that the value arrived at by the DVO is at higher side. Therefore, by allowing rebate towards self-supervision and other cost, arrived total cost of maize starch unit at Rs. 7,64,76,800/-,. Further, after

reducing cost disclosed in the books as per Assessing Officer, arrived at unexplained investment in the pant at Rs. 78,34,931/- and apportioned between two assessment years as per the ration worked out by the AO and sustained additions made towards unexplained investment for construction of building for the assessment year 2010-11 for Rs. 56,85,026/- and for assessment year 2011-12 at Rs. 21,49,905/-. Aggrieved by the Id. CIT(A) order, the assessee is in appeal before us.

6. The Id. Counsel for the assessee, referring to the date of search submitted that the assessment for assessment years 2010-11 & 2011-12 are unabated as on the date of search, because the assessment for the assessment year 2010-11 has been completed u/s. 143(3) of the Act, on 18.12.2012 and the due date for issue of 143(2) notice for assessment year 2011-12 expires on 30th September, 2012, which is much before the date of search in the case of the assessee on 22.05.2014. He further submitted that if assessment are not abated as on the date of search, then no addition can be made towards any income, in absence of any incriminating material found as a result of search. In this case, if you go through additions made

by the AO towards unaccounted investment in construction of building, said additions is purely based on report of the District Valuation Officer, but not based on any incriminating material found as a result of search. Although, the AO refers to bills recovered from M/s. J K Construction, but those bills are already received by the assessee and accounted in their books of accounts. Further, the AO failed to make out any difference between bills submitted by the contractor and bills accounted by the assessee in their books of accounts, which is evident from the assessment order passed by the AO, where the AO admitted that there is no difference between bills submitted by the contractor and expenditure incurred in the books of accounts of the assessee. Further, although the AO referred some loose sheets found during the course of search, it refers to construction of building by the appellant, but those loose papers does not show any unaccounted income in respect of amount incurred for construction of building. Therefore, the AO on the basis of DVO report arrived at unaccounted investment in construction of building. Since, the additions made by the AO is not based on any incriminating material found as a result of search, same cannot be sustained, because the assessment for assessment years 2010-11 & 2011-12 are unabated as on

the date of search. In this regard, he relied upon the decision of Hon'ble Supreme Court in the case of PCIT vs Abhisar Buildwell P. Ltd 2023 SCC Online SC 481. The appellant had also relied upon the following judicial precedents:

1. *Continental Warehousing Corporation vs CIT [2013] ITA 523 (Bom)*
2. *CIT vs Meeta Gutgutia [2017] ITA 306 to 310 (Delhi)*
3. *CIT vs. Harjeev Aggarwal [2016] 290 CTR (Delhi) 263*
4. *CIT vs Kabul Chawla [2014] ITA 707, 709, 713 (Delhi)*
5. *Om Shakthy Constructions Agencies (Madras) P Ltd vs DCIT [2016] ITA No. 1998 to 2004/Mds/2015*
6. *DCIT vs Saravana Stores (Tex) [2018] 61 ITR (Trib) 20*

7. The Id. CIT-DR, Shri. N. Senthil Kumar, supporting the order of the Id. CIT(A) submitted that, during the course of search loose sheet containing cost of construction was found and impounded and said materials construed incriminating material for the purpose of framing assessment u/s. 153A of the Act. Further, as per report of DVO, there is a difference in cost incurred for construction of building and the AO, after considering the estimated cost of construction and amount shown by the assessee in their books of accounts, has made additions towards unexplained investment in building.

Therefore, he submitted that there is no merit in arguments of the assessee that additions made towards unexplained investment in cost of construction of building is not supported by any evidence and thus, no addition can be made.

8. We have heard both the parties, perused materials available on record and gone through orders of the authorities below. It is a well established principle of law by the decision of Hon'ble Supreme Court in the case of PCIT vs Abhisar Buildwell P. Ltd (Supra), where the Hon'ble Supreme Court has held that in case of no incriminating material unearthed during the course of search, the AO cannot assess or re-assess taking into consideration other material in respect of completed assessment/unabated assessment. Meaning thereby, in respect of completed/unabated assessment, no addition can be made by the AO in absence of any incriminating material found during the search u/s. 132 of the Act or requisition u/s. 132A of the Act. In this case, the date of search was on 22.05.2014. The assessment years involved in the present case are assessment years 2010-11 & 2011-12. Further, both assessment years are unabated assessment as on the date of search, because the assessment for assessment year 2010-11

has been completed u/s. 143(3) of the Act, on 18.12.2012 and for the assessment year 2011-12 the appellant filed the return of income on 30.09.2011 and due date for issue of notice u/s. 143(2) of the Act was expired on 30.09.2012, which is much before the date of search in the present case i.e., 22.05.2014. Since, both assessments are unabated/completed as on the date of search, in absence of any incriminating material found as a result of search, no addition can be made for the assessment framed u/s. 143(3) r.w.s. 153A of the Act.

9. In so far as, reference of the AO towards incriminating material, we find that although the AO referred to some loose papers which containing cost of construction incurred for construction of building in the assessment year, but on perusal of assessment order, we find that the AO failed to make out any unaccounted income in respect of construction of building from the loose sheets found during the course of search. As regards, bills recovered from M/s. J K Construction, the contractor of the building, those bills submitted by the contractor has been accounted by the assessee in their books of accounts and the AO could not make out difference towards cost of construction when compared to bills submitted by the

contractor. Therefore, those two materials cannot be considered as incriminating material found as a result of search. Further, if you go through additions made by the AO towards unexplained investment in construction of building, said addition is purely based on report of DVO, who has estimated the cost of construction and the AO worked out difference in cost of construction on the basis of estimated cost worked out by the DVO and expenditure incurred by the assessee and accounted in their books of accounts. In our considered view, all these three elements of evidences cannot be considered as incriminating material found as a result of search. Therefore, we are of the considered view that additions made by the AO towards unexplained investment in cost of construction is not supported by any incriminating material found as a result of search and thus, in absence of incriminating material no additions can be made towards unexplained investment in the assessment framed u/s. 143(3) r.w.s. 153A of the Act.

10. The assessee has relied upon the following judicial precedents in support of their arguments. The case laws relied

upon by the Id. Counsel for the assessee are discussed as under:

a) *Principal CIT V. Abhisar Buildwell P. Ltd.*, 2023 SCC Online SC 481. The Hon'ble Supreme Court very recently has held that "in case no incriminating material is unearthed during the search, the AO cannot assess or reassess taking into consideration the other material in respect of completed assessments/unabated assessments. Meaning thereby, in respect of complete d/unabated assessments, no addition can be made by the AO in absence of any incriminating material found during the course of search under Section 132 or requisition under Section 132A of the Act, 1961."

b) *Continental Warehousing Corporation vs. CIT* (2013) ITA 523(Bom). The Hon 'ble Bombay High Court held that "No addition can be made in respect of an unabated assessment which has become final if no incriminating material is found during the search.

c) *CIT vs. Meeta Gutgutia* (2017) ITA 306 to 310 (Delhi) The Hon 'ble Delhi High Court held that there was no justification at all for the AO to proceed on surmises and estimates without there being any incriminating material qua the AY for which he sought to make additions of franchisee commission. The above distinguishing factors in *Dayawanti Gupta* (supra), therefore, do not detract from the settled legal position in *Kabul Chawla* (supra) which has been followed not only by this Court in its subsequent decisions but also by several other High Courts. For all of the aforementioned reasons, the Court is of the view that the ITAT was justified in holding that the invocation of Section 153A by the Revenue for the AYs 2000-01 to 2003-04 was without any legal basis as there was no incriminating material qua each of those AYs."

d) Further the Delhi High Court in the case of *CIT V. Harjeev Aggarwal* 2016) 290 CTR (Delhi) 263 has held that mere statements made during the course of the search, under section 132(4) of the Act, cannot be considered to be incriminating material. This principle was followed in the later decision of the *CIT US. Meeta Gutgutia* (2017) ITA 306 to 310 (Delhi).

e) *CIT vs. Kabul Chawla (2014) ITA 707, 709, 713 (Delhi)*
The Hon'ble Delhi High Court held that:

"iv.) Although Section 153 A does not say that additions should be strictly made on the basis of evidence found in the course of the search, or other post-search material or information available with the AO which can be related to the evidence found, it does not mean that the assessment can be arbitrary or made without any relevance or nexus with the seized material. Obviously an assessment has to be made under this Section only on the basis of seized material.

v.) In absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made. The word 'assess' in Section 153 A is relatable to abated proceedings (i.e. those pending on the date of search) and the word reassess' to completed assessment proceedings) Since no incriminating material was unearthed during the search, no additions could have been made to the income already assessed.

f) *Om Shakthy Constructions Agencies (Madras) P Ltd vs. DCIT (2016) ITA No 1998 to 2004/Mds/2015* The Hon'ble Chennai Bench of the ITAT, held that:

"In other words, harmonious interpretation will produce the following results:

(a) In so far as pending assessments are concerned, the jurisdiction to make original assesSment and assessment under section 153A merge into one and only one assessment for each assessment year shall be made separately on the basis of the findings of the search and any other material existing or brought on the record of the Assessing Officer,

(b) in respect of non-abated assessments, the assessment will be made on the basis of books of account or other documents not produced in the course of original assessment but found in the Course of search, and undisclosed income or undisclosed property discovered in the course of search. Thus in assessment that are abated, the Assessing Officer retains the original jurisdiction as well as jurisdiction conferred on him under section 153A for which

assessments shall be made for each of the six assessment years separately and in other cases, in addition to the income that has already been assessed, the assessment under section 153A will be made on the basis of incriminating material, which in the context of relevant provisions means - books of account, other document, found in the course of search but not produced in the course of original assessment, and undisclosed income or property discovered in the course of search.

g) DCIT VS. Saravana Stores (Tex) (2018) 61 ITR (Trib) 20: The Hon'ble Chennai Bench of the ITAT, held that "Hence, this Tribunal is of the considered opinion that in the absence of any material found during the course of search operation, there cannot be any assessment for the block period under section 153A of the Act. Hence, the Commissioner of Income-tax (Appeals) has rightly deleted the addition made by the Assessing officer. Therefore, this Tribunal do not find any reason to interfere with the order of the lower authority and accordingly the same is confirmed."

11. In this view of the matter and by following the decision of Hon'ble Supreme Court in the case of PCIT vs Abhisar Buildwell P. Ltd (Supra), we are of the considered view that additions made by the AO towards unexplained investment in building cannot be sustained, because such addition is not supported with reference to any incriminating material found as a result of search, because the assessment for assessment year 2010-11 & 2011-12 are unabated/completed as on the date of search. Thus, we direct the AO to delete additions made towards unexplained investment in construction of building for assessment year 2010-11 & 2011-12.

12. In the result, both the appeals filed by the assessee are allowed.

Order pronounced in the court on 31st May, 2023 at Chennai.

Sd/-

(मनोमोहन दास)

(MANOMOHAN DAS)

न्यायिक सदस्य/Judicial Member

Sd/-

(मंजुनाथ. जी)

(MANJUNATHA. G)

लेखासदस्य/Accountant Member

चेन्नई/Chennai,

दिनांक/Dated: 31st May, 2023

JPV

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त/CIT
4. विभागीय प्रतिनिधि/DR
5. गार्ड फाईल/GF