

**IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'E'  
BENCH  
NEW DELHI**

**BEFORE SH. G. S. PANNU, PRESIDENT, AND  
SH. AMIT SHUKLA, JUDICIAL MEMBER**

**ITA No. 374/Del/2015  
Assessment Year: 2004-05**

**ITA No. 375/Del/2015  
Assessment Year: 2005-06**

**And**

**ITA No. 641/Del/2012  
Assessment Year: 2006-07**

<b>DCM Shriram Industries Ltd.</b> 6 <sup>th</sup> Floor, Kanchanjunga Building 18, Barakhamba Road, New Delhi-110001	<b>The DCIT</b> Circle 7(1), New Delhi
---	--

Assessee by: Sh. Pradeep Dinodia, F.C.A.  
Sh. R. K. Kapoor F. C. A.

Department by: Sh. Dilip Singh Kothari CIT-DR

Date of hearing	.06.2023
Date of pronouncement	26.07.2023

1. The aforesaid appeals have been filed by the assessee against orders passed by Ld. CIT (A) vide the common order dated 22.09.2014 for the A. Y. 2004-05 and A. Y. 2005-06 (i.e., Appeal Nos. 409 to 410/13-14/1560 to 1561) appeal relating to A. Y. 2006-07, is against order dated 07.12.2011 (Appeal No. 419/08-09/118) for the quantum of assessment passed u/s 143(3) of the Income Tax Act. In all these appeals identical grounds of appeals have been raised against certain common issues on the additions

made by the Assessing Officer, which have been upheld by the Ld. CIT (A).

2. In so far as Orders for A. Y. 2004-05 and A. Y. 2005-06 are concerned, the Ld. Authorized Representative Mr. Pradeep Dinodia on behalf of the assessee, at the outset, submitted that originally orders for A. Y. 2004-05 and A. Y. 2005-06 were passed u/s 153C of the Income Tax Act. These Orders passed by the Ld. AO were quashed by the Ld. CIT(A) which gave jurisdiction to Ld. AO u/s 153A(2) of Act to redo the assessments, because these assessments were pending and got abated as on the date of recording the satisfaction for the purpose of initiation of proceedings u/s 153C of the Act and as per the said provisions u/s 153A(2), the Ld. AO got jurisdiction to proceed against the assessee u/s 143(3) if the Orders earlier passed u/s 153C are annulled.
3. The Ld. AR of the assessee further submitted that in the earlier round of proceedings u/s 153C of the Act, the issues arising from these appeals were decided in favor of the assessee. However, the department filed appeals before Hon'ble Delhi High Court and the matters were remitted back to the Hon'ble ITAT for re-adjudication as per the directions of Hon'ble Delhi High Court. These appeals were re-heard by Hon'ble ITAT as per the directions of Hon'ble Delhi High Court and again an order dated 14.12.2018 was passed by 'E' Bench of Delhi ITAT in a batch of appeals confirming the earlier findings of Hon'ble ITAT in the first round of appeal. These orders of the ITAT dated 14.12.2018 are

also pending before the Hon'ble Delhi High Court on appeal by the department.

4. The brief facts and background of this matter are that, a search and seizure u/s 132 of the Act took place on the office premises of Radico Khaitan and Survey u/s 133A on UPDA offices. A search was also carried out at the residence of one Shri R.K. Miglani, who was the Honorary Secretary of UPDA. The statement of Shri R.K. Miglani was recorded u/s 132(4) of the Act. These documents which were seized from the residential and office premises of UPDA u/s 133A or from Sh. R. K. Miglani, and according to the department, allegedly conveyed that all the distilleries situated in U.P. were contributing certain cash based on the production, which money was allegedly being used as bribe to pay certain public servants/bureaucrats/politicians. The department initiated proceedings u/s 153C by recording an identical satisfaction based on identical documents in respect of all the distilleries and completed assessments by making additions of large amounts in respect of each of the distilleries including the assessee u/s 69C of the Income Tax Act by holding that each distillery has incurred unexplained expenditure.
5. It has been pointed out that basis/information/material used for making additions under the present Assessment Orders passed u/s 143(3) of the Income Tax Act as well the earlier Assessment Orders which were passed u/s 153C of the Income Tax Act were form the same set of documents which were impounded/seized from the office of UPDA. Similarly, the statement of Mr. R. K. Miglani has been heavily relied upon by

the AO in the Assessment Orders which was also the basis for making assessments u/s 153C of the Act. The only difference is that, earlier assessments were framed u/s 153C of the Income Tax Act and the present Assessment Orders have been passed u/s 143(3) of the Income Tax Act.

6. Further, it has been submitted that the only apparent difference in the assessment orders passed u/s 143(3) of the Income Tax Act which are presently under challenge before the ITAT as compared with the orders earlier passed u/s 153C of the Income Tax Act is that, earlier the Assessing Officer used the expression belonging to and held that the documents seized /impounded from UPDA or its Secretary General Sh. R. K. Miglani belonged to the assessee, whereas in the present assessment proceedings it has been alleged that these documents pertain to assessee. It has been submitted that, this Tribunal has already rendered the findings on the nature of such documents and now it really does not matter whether the documents are held to be belonging to or pertaining to the assessee. Because all such documents have been rejected as unreliable and dumb documents by the Tribunal.

7. Mr. Pradeep Dinodia, submitted that in both round of proceedings undertaken at the level of ITAT were against orders passed u/s 153C of the Income Tax Act in the case of various distilleries who were members of UPDA and against whom identical proceedings had been initiated, because the documents found during search, were common and it has been categorically

held by the ITAT that documents which came in the possession of the department neither belong to any of the assessee nor conveyed that any such alleged payments out of books of accounts have been made by any of the distilleries including the assessee to the UPDA.

8. At this stage, the Ld. AR took us through the various relevant portions of finding from the latest order passed by the Hon'ble ITAT Delhi Bench dated 14.12.2018, which was common order in the case of all distilleries including assessee wherein assessee's appeals were also identified at **Page 12** of the orders being ITA No. **1652/Del/2013** and ITA No. **1653/Del/2013** for A. Y. 2004-05 and A. Y. 2005-06 along with Cross Objections filed by the assessee are also identified.
9. He submitted that in the said Order, categorical and factual findings have been recorded that the common documents impounded during the course of search on the UPDA or its Secretary Mr. R. K. Miglani are dumb documents and no adverse inference can be drawn from these documents much less that any expenditure worth making addition u/s 69C of the Act which can be said to have been incurred by the assessee., He pointed out that similar finding has been given in assessee's own case in the first round of proceedings that, uncontroverted statement of Sh. R. K. Miglani could not be relied upon by the department, as the same is against the principle of natural justice. The relevant portion of various paragraphs which have been referred to and relied upon by the Ld. AR on this issue in ITA No. **1652/Del/2013** & ITA No. **1653/Del/2013** in order dated

14.12.2018, duly cross-referenced with the relevant page of paper book filed (paper book pages **39 to 207**) on which our specific attention was drawn are as under: -

**“43. Considering the nature of each document relied upon by the Assessing Officer in the assessment order and supported by the learned CIT-DR before us, it cannot be said that these documents were ever authored by any of the distilleries and, therefore, cannot be said to be belonging to them or any of them. The documents were seized from Shri R.K. Miglani or UPDA and, therefore, any presumption under the Act is against these persons and not against any of the distilleries.**

**46. The Assessing Officer, during the course of assessment proceedings, has heavily relied upon the entries found in the impounded documents. But, there is not even a single finding by the Assessing Officer which could suggest that the corresponding entries were found in the regular books of account of any of the distillery. This shows that no independent verification/examination was done by the Assessing Officer who simply relied upon the seized material supplied to him by the Investigation Wing.**

**52. As mentioned elsewhere, the Revenue has not brought anything on record to establish that the production figures reflected in the tables were forwarded by the appellants through a fax message or on its letter head. This was clear mandate of the Hon’ble High Court when it remitted the matter to the file of the Tribunal.**

**54. Another theory propounded by the Revenue is that every distillery had to contribute Rs.20/- per case and had thus contributed such a sum is entirely unsupported by any material. It is not known who had collected the alleged sum to have been contributed and what is the destination of such sum. In none of the documents, name of the payee, any public servant or politician appears. This itself establishes that the documents are dumb.**

**60. We are of the considered opinion that the allegation of the Revenue is entirely unjustified, unsupported by any document found from the possession or control of the appellants. It is well settled rule of law that burden of proof is on the allegor and not on the person against whom the allegation is made. In the present appeals, the burden is thus on the Revenue to establish that the documents found from the third persons are reliable and authentic and also such documents belong to the distilleries which is uncorroborated by any evidence and even the author of the documents have not been identified. Therefore, it can safely been concluded that the Revenue has not discharged its burden. The mere fact that some of the distilleries are members of the association [UPDA) does not by itself lead to a conclusion that adverse inference can be drawn against members of the association since documents were found from the premises of the association and not from the distilleries. The contents of the impugned documents have to be established as genuine by leading cogent positive evidence or material and have to be supported by**

**corroborative material. In the present appeals, no such material has been brought on record. Therefore, we have no hesitation to hold that the proceedings u/s 153C of the Act have not been validly initiated and, therefore, deserve to be quashed.”**

10. Ld. AR submitted that, not only the documents which have been relied upon by the Ld. AO while making the assessments u/s 153C or for that matter in the present Assessment Order u/s 143(3), even the statement of Mr. R. K. Miglani which has been heavily relied upon by the Ld. AO in both these orders, whether u/s 153C or for that matter u/s 143(3) have been appropriately dealt with the concluding finding that no reliance can be placed on such statement, because no cross examination has been afforded to any of the assesseees in spite of assessee’s specifically asking for such cross examination. The relevant portion of findings as given in ITAT’s order in ITA no. **1652/Del/2013 &1653/Del/2013** in said order dated 14.12.2018 in the proceedings u/s 153C of the Income Tax Act regarding the validity of the statement of Mr. R. K. Miglani are as under: -

**“64. The contention of the learned DR that since Shri R. K. Miglani was related to the member distilleries of UPDA, therefore it was not necessary to allow cross examination is not acceptable. The Hon’ble High Court of Delhi in the case of Mr. S.N. Aggarwal 293 ITR 43 has held as under:**

***“11. In the present case the Assessing Officer has placed reliance on the statement of Smt. Sarla Aggarwal, daughter of the assessed while arriving at***

*the conclusion that the entries belong to the transactions of the assessed. This statement made by Smt. Sarla Gupta, cannot be said to be relevant or admissible evidence against the assessed, since the assessed was not given any opportunity to cross examine her and even from the statement, no conclusion can be drawn that the entries made on the relevant page belongs to the assessed and represents his undisclosed income. It is also an admitted fact that the statement of the assessed was not recorded at any stage during the assessment proceedings. The only conclusion which can be drawn about the nature and contents of the document is that it is a dumb document and on the basis of the entry of nothings or figure etc. in this document, it cannot be concluded that this represents the undisclosed income of the assessee.”*

65. The Hon’ble Supreme Court in the case of Andaman Timber Vs. CIT in Civil Appeal No. 4228 of 2006 has held as under:

*“According to us, not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity in as much as it amounted to violation of principles of natural justice because of which the assessee was adversely affected.”*

**67. A plain reading of the aforementioned sections would show that the presumption is available in the case of a person who was found in the possession or control i.e. the ‘searched person’. Therefore, the presumption may be good against Shri R.K. Miglani or UPDA. But not in the cases of “the other person” which are the distilleries in the present appeals. Therefore, the judicial decisions relied upon by the learned DR are misplaced and, therefore, needs no specific mention.**

**72. Considering the facts of the dispute in totality, we are of the opinion that the assessment framed u/s 153C of the Act is in gross violation of the principles of natural justice and deserve to be tagged as nullity.”**

11. Ld. AR thereafter vehemently argued that factual findings on the nature of documents which are being relied upon by the department or for that matter the statement of Mr. R. K. Miglani have now been rendered in favor of the assessee by holding that such documents are dumb documents and cannot be relied upon for making addition u/s 69C of the Income Tax Act. The veracity and usefulness of these documents or statement of Sh. R. K. Miglani remains the same whether the assessments are to be framed u/s 153C or 143(3) of the Income Tax Act. It has been reiterated that all the documents which were relied upon in the orders earlier passed u/s 153C of the Income Tax Act have now been made the basis of making assessments u/s 143(3) of the Income Tax Act. Thus, unless the factual finding rendered by the ITAT on the validity of such documents is rendered as invalid, no

adverse inference can be drawn because Tribunal has already examined all such documents after the directions from Hon'ble Delhi High Court in the first round of assessment u/s 153C of the Income Tax Act.

12. It has been further submitted that AO during the course of assessment proceedings had made thorough investigation by issuing notices u/s 133(6) of the Income Tax Act to all the parties/suppliers from whom the purchases/payments etc. have been made over Rs. 5.00 lacs for all these years. Relevant documents about the enquiries made by the Ld. AO during the assessment proceedings have been filed at Paper Book Pages 5 to 37 of the paper book. This attempt by the Ld. AO to have been made mainly to identify the sources of generating alleged cash for making the alleged onward payments through the UPDA. It has been submitted that eventually no discrepancy was found to exist and no unaccounted income or expenditure was found to have been incurred by the assessee. It has been submitted that under these circumstances making an addition u/s 69C of the Income Tax Act for the alleged illegal payments to any party is wholly unjustified.

**Assessment Year 2005-06 ITA No. 375/Del/2013**

13. Apart from additions made u/s 69C of the Income Tax Act, on account of alleged unexplained expenditure incurred, another Ground of Appeal has been raised in A. Y. 2005-06 in which the AO has made the addition u/s 41 of the Income Tax Act towards the waiver of principal amount of loan which the assessee got from Morgan Stanley amounting to Rs. 5,37,12,480/-. The

Counsel for the assessee submitted that assessee, being a listed company in the Stock Exchange had made a public offer for the issue of debentures (NCDs) for 58.01 Crores in F. Y. 1993-94. Such public offer, as per the documents, was meant only for capital expenditure wherein the assessee wanted to expand its existing manufacturing facilities as per the offer documents. M/s. Morgan Stanley had also subscribed the public offer in the NCDs. The proceeds of NCDs were also utilized towards the capital expansion only as has also been pointed out and highlighted by referring the Audited Balance Sheet of the assessee of the F. Y. 1994-95 and also the Director's Report from where it is noted that as against the public offer of 58.01 Crores, the assessee had spent 64.08 Crores in the capital field. Ld. Counsel submitted that, since assessee was unable to repay some of its debts and was not able to honour its liability, one time settlement took place with M/s. Morgan Stanley where against the total dues including interest towards such NCDs of amounting to Rs. 10.62 Crores, the assessee was able to settle the amount for 5.25 Crores. This settlement was mainly on account of full re-payment of interest amount which was due on such NCDs and a part of the payment was settled towards the capital/principal amount. The assessee, by referring to the submissions made to the AO, had clarified that amount which was waived by M/s. Morgan Stanley clearly represented the loan/NCDs dues towards the capital and was in the capital field. A certificate from Morgan Stanley evidencing the settlement has also been filed in Paper Book at page 294, which clearly reveals that amount settled at Rs. 5.25 Crores is towards principal. He

pointed out that out of total dues of Rs. 10,62,12,480/- interest due was only 4,12,50,915/-. Hence, amount waived by Morgan Stanley for Rs. 5,37,12,480/- remains towards principal amount. He submitted that although such waiver was shown as income in its regular books of accounts, yet for the purpose of filing the Income Tax Return, such amount was treated in the capital field because waiver of loan obtained by the assessee which loan is utilized towards capital assets has been held to be non-taxable receipt. The assessee had strongly relied upon the judgment of Hon'ble Supreme Court in the case of **Mahindra & Mahindra** as reported in **404 ITR 1**, a copy of which was filed before us.

**Assessment Year 2006-07 ITA No. 641/Del/2012**

14. In this assessment year, the assessee raised an additional ground vide its application dated 30.03.2021 which was filed on 01.04.2021. Through this ground, the assessee has contended that assessment for A. Y. 2006-07 was required to be framed u/s 153C of the Income Tax Act. However, in absence of requisite satisfaction having been recorded for A. Y. 2006-07 u/s 153C of the Income Tax Act, the AO was not justified in passing the order u/s 143(3) of the Income Tax Act. The assessee has argued that the ground is pure legal ground and goes to the jurisdiction of making an assessment and should be decided as per the judgment of Hon'ble Delhi High Court in the case of **RRJ Securities 380 ITR 612** and many other judgments on this legal proposition.

15. The Ld. DR, who represented the matter on behalf of the department, heavily relied upon the orders of Ld. AO as also the

orders of Ld. CIT(A) wherein the additions made, against which the assessee has come up before us, have been confirmed. The Ld. DR submitted that the reliance on the order of Hon'ble ITAT dated 14.12.2018 in proceedings u/s 153C of the Act is misplaced because assessee never made these submissions before the Ld. CIT (A) and did not inform CIT(A) about such an order and all these submissions, according to Ld. DR, are fresh which don't flow from the order of either AO or Ld. CIT(A).

16. At this stage, against the query from the Bench, it was clarified that the orders of Ld. CIT(A) were passed in 2014 and in fact order for A. Y. 2006-07 was passed in 2011 and therefore there was no occasion for the assessee to make any reference to the order of Hon'ble ITAT which was passed in December 2018.

17. As regards the issue of waiver of loan which the assessee has treated in the capital field, Ld. DR submitted that possibility of some of the proceeds from the issue of NCDs having been used in the working capital cannot be ruled out and therefore the amount written back by the assessee on account of waiver of loan should be treated as taxable u/s 41(1) of the Income Tax Act and order of AO/CIT(A) on this issue should be upheld.

18. We have heard both the parties on the issues involved in these appeals and also perused the relevant finding and material referred to before us. First common issue involved in these appeals for all the three years relates to addition u/s 69C of the Act which has been based on the documents which were seized during a search/survey on UPDA and its Secretary General Shri

R. K. Miglani. Similarly, the other basis of making the addition is the statement of Sh. R. K. Miglani which was recorded u/s 132(4) of the Income Tax Act. This being the undisputed fact for making the addition, we find that the same very aspect has been elaborately discussed by the coordinate bench of this ITAT in batch of appeals wherein common order has been passed in the case of various distilleries whose names appeared in the documents which were so seized. The Tribunal has held that, *firstly*, these documents don't belong to assessee; and *secondly*, even the nature of documents which have been relied upon has been duly examined by the bench in these batches of appeals. Now the fact remains that the assessments which has now been framed u/s 143(3) or which were earlier made u/s 153C are based on these same very documents. The nature of documents have been duly examined in detail and factual findings have been recorded by this Tribunal that these documents are only having hearsay value or these documents are dumb documents which cannot be relied upon. This fact remains uncontroverted even during these proceedings before us. Similarly, reliance by the department on the statement of Sh. R. K. Miglani, Secretary General of UPDA, too has been rejected by the ITAT in aforesaid appeals. In fact it is noted from the said order that some of documents which were seized, based on which the additions have been made, have been made part of the order of ITAT at Pages 195 to 207. The Ld. DR has also not been able to point out any additional fact or evidence which could justify in taking a different view of the matter based on these documents or based on the statement of Sh. R. K. Miglani.

19. Thus, we are in tandem with the submissions of Ld. Counsel that whether the documents seized from the searched party are held as “belonging to” or “pertaining to”, it does not materially effect the findings rendered by the Tribunal, in the batch of appeals decided on this issue and categorical findings have been rendered on the evidentiary value of the documents seized/impounded wherein it has been held by the Tribunal that such documents are dumb documents. Hence no mileage can be availed on this difference between “belonging to” or “pertaining to” as has been observed by AO/CIT(A) in their orders.

20. We therefore, are of the considered view that since the documents relied upon by the department or the statement of Sh. R. K. Miglani remains the same having no evidentiary value as per the factual findings recorded in the said order of ITAT and already relevant paras from the said order have already been extracted above in this order, which, in our considered opinion, are very much relevant to put the issue as rest. Therefore, respectfully following findings given by Tribunal in aforesaid batch of appeals, we hold that no addition of any alleged unexplained expenditure u/s 69C can be made in the hands of the assessee and the additions made u/s 69C of the Act for A. Y. 2004-05, A.Y. 2005-06 and A.Y. 2006-07 amounting to Rs. 4,53,93,300/-, 3,13,45,000/- and 4,14,44,000/- respectively are hereby directed to be deleted.

21. Another issue for which additions have been made by the AO in **A. Y. 2005-06** is regarding the waiver of loan amount

arising out of NCDs which were allotted by the assessee to M/s. Morgan Stanley in the public offer made in F. Y. 1993-94. The facts on this issue remain undisputed that in the public offer so made for Rs. 58.01 Crores, these funds were to be utilized for the modernisation of its existing plants/manufacturing facilities. The assessee actually utilized these funds for the above purpose, which is noted from the Audited Balance Sheet for the F. Y. 1994-95 and as against issue of 58.01 Crores, assessee had actually spent 64.80 Crores. Director's Report also certifies that the right issue of PCDs/NCDs have been utilised for the purpose as mentioned in the offer letter.

22. Such kind of waiver of loan on utilization of capital asset has now been set at rest by Hon'ble Supreme Court in the case of **Mahindra & Mahindra (404 ITR 1)**, wherein Hon'ble Court, after discussing the various provisions as contained in section 41(1) of the Act and also u/s 28, held that there is a difference in trading liability and other liability. The provisions of section 41(1) are attracted only if some trading liability is written back. If the amount of loan is utilized towards acquisition of capital assets, then the provisions of section 41(1) of the Income Tax Act are not attracted. Thus, respectfully following the judgment of Hon'ble Supreme Court, we hold that no addition can be made u/s 41(1) of the Income Tax Act and the amount of Rs. 5,37,12,480/-, being the amount waived by M/s. Morgan Stanley, cannot be brought to tax. This is more so especially when factum of having utilising this amount towards the capital expansion of the assessee's business is not in dispute and remains unchallenged. This ground of appeal is, accordingly allowed.

**Assessment Year 2006-07 ITA No. 641/Del/2012**

23. The assessee has raised an additional ground in A. Y. 2006-07 regarding the assessment framed u/s 143(3) of the Income Tax Act instead of 153C of the Income Tax Act, which according to assessee was the correct provision which should have been invoked for making the assessment. According to the assessee, the assessment order so passed is a nullity in view of the judgment of Hon'ble Delhi High Court in the case of **RRJ Securities (supra)**.

24. Since the relief has already been allowed to the assessee on merits of the additions by holding that addition u/s 69C of the Income Tax Act cannot be made, we find that this issue remains of academic interest which does not require any independent adjudication.

25. In the result, the appeals of the assessee are disposed off as above. The appeals for A. Y. 2004-05 and 2005-06 are treated as **allowed** and appeal for A. Y. 2006-07 is treated as **partly allowed**.

**The order is pronounced in the open court on 26<sup>th</sup> July, 2023.**

**sd/-**

**G. S. Pannu  
PRESIDENT**

**sd/-**

**Amit Shukla  
JUDICIAL MEMBER**

DATED: 26.07.2023

Copy forwarded to:

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

Asst. Registrar

ITAT, New Delhi