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

SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER
and
SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER

ITA No.6973/Del./2018
(ASSESSMENT YEAR : 2013-14)

DCIT, Central Circle 1, Gurgaon.	vs.	Noni Farms P. Ltd., Spazedge, Sector 47, Sohna Expressway, Gurgaon (Haryana).
		(PAN : AAACN2756R)
(APPELLANT)		(RESPONDENT)

ASSESSEE BY : Shri Parikshit Aggarwal, CA
REVENUE BY : Shri Subhra Jyoti Chakraborty, CIT DR

Date of Hearing : 16.08.2023
Date of Order : 22.08.2023

ORDER

PER SHAMIM YAHYA, ACCOUNTANT MEMBER :

This appeal by the Revenue is directed against the order of the ld. CIT (Appeals)-3, Gurgaon dated 20.08.2018 pertaining to the assessment year 2013-14.

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

> "(i) Whether on the facts and the circumstances of the case, the Ld. CIT(A) erred in deleting the additions made on account of unaccounted expenditure I investments I assets made in the hands of the assessee for various assessment years.
>
> (ii) Whether on the facts and the circumstances of the case, the Ld. CIT(A) failed to appreciate that the additions made on account of

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

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

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

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

(vi) Whether on the facts and the circumstances of the case, the Ld. CIT(A) failed to appreciate that M/s Spaze Towers Pvt. Ltd. is a separate assessee and legal entity and appropriation of its funds by the directors/promoters or their family members including the assessee for the purpose of their personal expenses amount to income in the hands of directors/promoters or their family members in view of the provisions of sec. 2(24)(iv) and sec. 2(22)(e) of the Act."

3. Brief facts of the case are that a search action was carried out u//s132 of the Income-tax Act, 1961 (for short 'the Act') on Spaze Group of cases on 17.02.2016 by virtue of authorization of the Pr. Director of Income Tax (Inv.), Chandigarh. The assessee was engaged in the business of real estate activities. During assessment proceedings, assessee was asked vide letter

dated 19.12.2017 to give the justification regarding investment in Farm House. The assessee vide letter dated 21.12.2016 submitted his reply and the relevant portion of his reply was reproduced by the AO in his order. For the sake of brevity, the same is reproduced as under:-

> "Without prejudice, it is respectfully submitted that the assessee has already declared, during the course of search u/s 132(4) of the Act that M/s Spaze Towers Pvt. Ltd. has made an investment of Rs. 2.00 Cr. on account of construction/renovation/furniture & fixtures etc. of the farm house in question.
>
> And
>
> The same fact has already been stated in SOF also at page No. 11 of SOF in the case of M/s Spaze Towers Pvt. Ltd. (copy attached), before Hon'ble Settlement Commission and accordingly, has also reduced cash in hand from cash flow statement submitted before Hon'ble Settlement Commission (copy attached). Taking into the account this additional unrecorded investment; the total investment in farm house is very well covered.
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> However, it is pertinent to mention here that the assessee stated in letter dated 11.03.2016, that this investment of Rs. 2.00 cr was made during the period from A.Y 2010-11 to A.Y 2012-13. It is respectfully submitted that the letter dated 11.03.2016 was given at very early stage of search proceedings. In fact: the assessee wanted to state the period of major construction from F. Y 2010-11 to F.Y 2012~13 but inadvertently written Assessment year instead of Financial year. On perusal of Construction expenses attached herewith (also stated at page No. 53 of SOF), it is perused that the major construction. activity was carried out in FY 2010-11 to FY 2012-13 i.e relevant to AY 2011-12 to AY 2013-14. The assessee has used such cash for interior/construction/furniture/fixtures/fittings/ equipments etc and thus deducted cash from cash flow in AY.2013-14. The investment so made by the assessee, shall be recorded in the books of the assessee, once the final orders of Hon'ble Income Tax Settlement Commission are passed.
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> It is also not out of context to mention here that the assessee had stated in letter dated 11.03.2016 that there are few discrepancies and this unrecorded investments of Rs. 2 Cr. is one of them. The assessee has also stated at page no. 3 first Para of the letter dt. 11.03.2016 that the undersigned agrees to pay income tax and interest hereon (after telescopic adjustments), on the above said discrepancies. It was further stated that mode and manner of deriving such undisclosed income is specified and substantiated already in clause No.1 herein above. (Clause No.1 deals with unrecorded income on account of excessive purchase/expenses in the books of M/s Spaze Towers Pvt. Ltd.) for Rs. 53.00 Cr. (app) in Asst years from 2009-10 to AY 2016-17. The

above discussion shows that as far as income is concerned, it was earned by M/s Spaze Towers Pvt. Ltd. and the cash derived from such excessive bogus purchases amounting to Rs. 52,74,24,493/- before Hon'ble Settlement Commission. The cardinal Principal of Income tax is that income tax can't be charged more than once on the same income. Any levy of tax contrary to the provision of the act which may result unjust enrichment to the exchequer would be ultra vires Article 265 of the constitution.

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

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

"4.6 The assessee has made the reference of the Judgment of Hon'ble Apex court in the case of "CIT Vs Shelly Products 261 ITR 367./1 However the case laws cited by the assessee are entirely different on facts and circumstances of the instant case. In this regard the following points are required to be considered :-

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

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

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

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

4. Against the above order, assessee appealed before the ld. CIT (A). Assessee also raised the issue that addition was made *de hors* any incriminating material found during search, however, ld. CIT (A) did not decide this aspect. Ld. CIT (A) adjudicated the issue on merits. Ld. CIT (A) referred to Income Tax Settlement Commission (ITSC), New Delhi order in the case of Spaze Towers Pvt. Ltd.. Referring to the above order, ld. CIT (A) concluded as under :-

> " Thus, the Hon'ble ITSC has held that telescoping for unexplained expenditure/ investment has to be allowed if the investment/ expenses have been done during the same period when the income earned.
>
> 5.5 In the case of the appellant, for the year under consideration in this appellate order, the unexplained expenditure/ investment by the appellant which is added to the income of the appellant by the AO cannot be sustained as it relates to the same period when income was earned by M/s Spaze Towers Pvt Ltd. as disclosed before the Hon'ble Income Tax Settlement Commission.
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> Further, it has been held by the Hon'ble ITSC that as per the claim of the applicant, the amounts given to the directors/ shareholders for the personal expenses are receivables, which also enable telescoping;
>
> In view of the above discussion, the addition made by the AO in the case of appellant during the year under consideration cannot be sustained and hence deleted."

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

6. Ld. Counsel for the assessee submitted that the issue is squarely covered in favour of the assessee by the decision of ITAT in the case of ACIT vs. Platinum Towers P. Ltd. in ITA No.7714/Del/2018 for AY 2013-14 vide order dated 09.01.2023.

7. Upon careful consideration, we find that the facts in the present case are similar. ITAT in the aforesaid case has concluded as under :-

> "9. At the outset, we note that there was a search in the case of Spaze Group. The addition in the hands of the assessee relates to a farm house interior expenditure. No incriminating material was found thereof except for Spaze Group declaration that Rs.2 crores have been spent on furnishing of the farm house in post search proceedings. Thus, it is abundantly clear there is no incriminating material relating to said addition. In such circumstances, the decision of Hon'ble Delhi High Court in the case of Kabul Chawla 380 ITR 173 (Del.) applies where it has been held that in case of completed assessment, no addition u/s 153A can be done *de hors* seized material during search. Since in the present case there is no whisper of incriminating material, addition is liable to be deleted on account of jurisdiction.
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> 10. We further note that ld. CIT (A) on merits has granted relief to the assessee on the ground that the same has been accepted by the Spaze Group before the ITSC as has been incurred by them and which is reflected in their fund flow statement. On this plank so, ld. CIT (A) has directed the AO that the addition is to be deleted. We find that we have already held that addition has been made *de hors* any incriminating material found during search and in the assessment year u/s 153A of the Act in case of completed assessment, no addition can be made de hors any reference of incriminating material found during search. The deletion on merits by ld. CIT (A) is also by a well reasoned order. Hence, we affirm the same also."

8. We find that the facts in the present case are similar. Hence, following the aforesaid order, we decide the issue against the Revenue.

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

Order pronounced in the open court on this 22nd day of August, 2022.

Sd/-	**sd/-**
(CHANDRA MOHAN GARG)	**(SHAMIM YAHYA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated the 22nd day of August, 2022
TS

Copy forwarded to:

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

AR, ITAT
NEW DELHI.