INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "G": NEW DELHI

BEFORE
SHRI DR. BRR KUMAR, ACCOUNTANT MEMBER
AND
MS. ASTHA CHANDRA, JUDICIAL MEMBER

ITA Nos. 1314 & 1315/Del/2023
Asstt. Years: 2016-17 & 2017-18

Surender Kumar Jain 1241, Kacha Bagh, Chandni Chowk, Delhi – 110 006 PAN AEIPJ7446P	Vs.	ACIT, Central Circle-14, New Delhi.
(Appellant)		(Respondent)

Assessee by:	Shri P. Ray Choudhary, Advocate
Department by:	Shri Piyush Tripathi, Sr. DR
Date of Hearing:	15.02.2024
Date of pronouncement:	07.03.2024

O R D E R

PER ASTHA CHANDRA, JM

The appeals filed by the assessee are directed against the separate orders dated 28.02.2023 of the Ld. Commissioner of Income Tax (Appeals)-28, New Delhi **("CIT(A)")** pertaining to Assessment year **("AY")** 2016-17 and 2017-18. Since common issue is involved in both the appeals, these were heard together and are being disposed of by this common order.

2. The common issue relates to addition of Rs. 11,45,348/- and Rs. 10,88,000/- under section 69A of the Income Tax Act, 1961 **(the "Act")** made by the Ld. Assessing Officer **("AO")** in AY 2016-17 and 2017-18 respectively which has been sustained by the Ld. CIT(A).

3. Briefly stated, the facts are that the assessee is an individual. He is proprietor of M/s. S.K. Impex engaged in the business of gold/bullion trading. For AY 2016-17 he filed his return on 07.12.2016 declaring income of Rs. 1,56,23,790/- which was accepted vide order of assessment dated 21.12.2019 passed under section 153C r.w.section 143(3) of the Act. Likewise, for AY 2017-18 he filed his return on 25.10.2017 declaring income of Rs. 3,84,76,300/- which was accepted vide assessment order dated 21.12.2019 under section 153C r.w. section 143(3) of the Act.

3.1 Search under section 132 of the Act was conducted on 05.01.2017 on M/s. Jindal Bullion Ltd. "JBL" Group of cases. Certain incriminating documents/information contained in the seized material pertained to the assessee, the proprietor of M/s. S.K. Impex. So the said material was handed over to the AO of the assessee for the purpose of further determination of his income in both the years.

3.2 Accordingly, notice under section 153C of the Act was issued on 10.06.2021 to the assessee for both the AYs. In response, the assessee filed return on 13.11.2021. Statutory notice(s) were issued and the assessee filed details on-line in compliance thereto.

3.3 It was found in search that M/s. JBL was maintaining a software called "Hajir Johri" in digital data. M/s. JBL was maintaining two sets of account, one in Tally Software and the other in Hajir Johri software. The Tally software entries contained the Pakka entries whereas the entries in Hajir Johri were a combination of Kaccha and Pakka entries. It was noticed that the Hajir Johri software contained various ledger accounts for number of parties which included the assessee also.

3.4 The Ld. AO noted from the Hajir Johri software ledger that M/s. JBL had received from the assessee cash aggregating to Rs. 11,45,348/- (Rs.

10,00,000/- on 26.08.2015; Rs. 1,32,000/- on 16.11.2015 and Rs. 13,348/- on 06.01.2016) during the financial year **("FY")** 2015-16 relevant to AY 2016-17. Likewise, M/s. JBL had received from the assessee cash of Rs. 10,88,000/- on 22.06.2016 i.e. in FY 2016-17 relevant to AY 2017-18. The Ld. AO required the assessee to prove the genuineness of the above cash transactions vide show cause notice dated 09.12.2021 to which the assessee replied via e-mail on 13.12.2021 stating therein inter alia that the assessee had entered into transactions with M/s. JBL with Rs. 38,31,71,220/- during the FY 2015-16 and with Rs. 18,85,67,331/- during the FY 2016-17 on various dates through bank account and submitted invoices of the same. A common reply for both the years was given regarding the above cash transactions which is as under:-

***"Cash Transactions**: With regard to the cash transactions found in the books of M/s Jindal Bullion Ltd, supposedly in the name of M/s SK Impex, merely entries found in someone else's books does not tantamount to actual transactions taken place in absence of any corroborative evidence such as Bills, Invoices, Challans, etc. This is nothing but reliance being placed on conjectures and surmises only as there is no evidence that the assessee actually entered into cash transactions with the third party. Merely computer entries in someone else book's does not in any manner whatsoever lead to acceptance of the fact that there was any transaction. Even there were no cross examination at the time of search and survey of M/s Jindal Bulion Ltd. with assessee. Moreover at the time of survey at the assessee's firm M/s SK Impex during the FY 2016-17, no evidence regarding these transactions were found by the income tax department. Therefore any addition on the above fact would not only be bad in law but also against the principal of natural justice."*

4. The above explanation was not acceptable to the Ld. AO. According to him the onus lay on the assessee to prove the source of impugned amount(s) paid by him to M/s. JBL in cash which the assessee failed to do. According to him the said amount(s) are expenses towards purchases of gold/bullion and treated the same as unexplained expenditure of the assessee in both the AY(s) and added under section 69C of the Act to the income of the assessee. He completed the assessment on total income of Rs. 1,67,69,140/- and Rs.

3,95,64,300/- for AY 2016-17 and AY 2017-18 on 28.12.2021 and 30.12.2021 respectively under section 153C r.w. section 143(3) of the Act.

5. Aggrieved, the assessee carried the matter in appeal before the Ld. CIT(A) in both the AY(s). The Ld. CIT(A) summarised the submission of the assessee in para 6.1 to 6.4 of his appellate orders. He recorded his observation and findings in para 6.5 of his appellate orders separately based on facts emerging from the details submitted and findings made by the Ld. AO as under:-

"6.5 I have considered the facts and submission of the assessee. The following facts emerges from the details submitted and findings made by the AO:

a) There was a search on M/s JBL Group on 05.01.2017 where in there were two sets of accounting data pertaining to M/s JBL found. One maintained in Tally Software and the second maintained in Johri-Hajir software.

b) The accounts maintained in tally software were shown in its regular books of account however, the accounts maintained in Johri Hajir software where actually completed business transactions details including transaction made in cash for purchase/ sale of Gold/ Silver which were mostly not part of the regular books of accounts.

c) During the course of search the statements of relevant persons who were maintaining Johri Hajir software and updating the accounts have accepted the fact that data maintained in Hajir Johri software contained the cash as well as transaction through banking channels. Certain loose sheets were also found and seized showing purchase and sale of Gold/Silver in lieu of cash.

d) The director of M/s JBL Sh. Parul Ahulwalia identified the Hajir Johri ledger of Sh. Surinder Kumar Jain wherein date wise transactions of sale of Gold and Silver including the weight are ledgerised.

e) All the transactions maintained in the Hajir Johri Ledger exactly matching with the books of accounts of the appellant assessee except the transaction made in cash on 26.08.2015, 22.09.2015, 16.11.2015 and 06.01.2016.

f) The Hajir Johri ledger established the facts that the appellant assessee was having regular business transaction with M/s JBL and hence, the transactions made on above dates as per the Hajir Johri ledger cannot be said to be false.

g) The appellant has been kept denying the above fact without providing plausible reason since it cannot be true that the information provided in a same ledger would be partly correct and partly incorrect.

h) The Hajir Johri ledger mentions even the corresponding transactions with respect to the cash received from the appellant including sale of gold/bullions. Hence, on going through the Hajir Johri ledger it cannot be said that the transactions appearing therein are not genuine.

In view of the above, it has been observed that since the appellant has failed to explain the source of such cash payments/receipts, it is held that the net amount of Rs. 11,45,348/- paid by the appellant assessee to M/s JBL is treated as unexplained expenditure in the hands of the appellant. Accordingly, the addition of Rs. 11,45,348/- made by the AO is upheld and the ground nos. 3 & 4 of the appeal is dismissed."

5.1 Thus, the Ld. CIT(A) confirmed the impugned addition in both the years but in AY 2017-18 under section 69A of the Act and not under section 69C as done by the Ld. AO.

6. Dissatisfied, the assessee is in appeal before the Tribunal in both the AYs and common grounds relate thereto.

7. The Ld. AR submitted that the assessee did not enter into any cash transaction with M/s. JBL, the entity searched under section 132 of the Act. According to him, all transactions made by the assessee with M/s. JBL were through banking channel and has been found to be recorded in the books of the assessee. Apart from the ledger account in Hajir Johri which is not maintained by the assessee, the Ld. AO relied on the statement of Ms. Parul Ahluwalia, Director and former employee of M/s. JBL but in her statement she nowhere identified that the cash transactions related to the assessee and no specific questions were put to her in this regard. Since the Hajir Johri ledger account was neither maintained by the assessee nor was found from him, presumption under section 292C does not apply to the assessee.

7.1 It has emphatically been submitted by the Ld. AR that the assessee was never confronted with the statement of Ms. Parul Ahluwalia. He came to know of such a statement from the assessment order(s) only. Had the

assessee been confronted with the statement of Ms. Parul Ahluwalia, he would have requested for her cross-examination. Due to lack of such an opportunity, the statement of Ms. Parul Ahluwalia cannot be used adversely against the assessee. He relied on the decisions of Hon'ble Supreme Court in Andman Timber Industries vs. CCE, Kolkata-2, Civil Appeal No. 4228/2006 (SC) and Hon'ble Delhi High Court in CIT vs. Harjeev Aggarwal (2016) 70, taxmann.com 95 (Del).

7.2 The Ld. AR further submitted that the impugned addition under section 69C as done by the Ld. AO cannot be sustained. Moreover, the confirmation of impugned addition under section 69A for AY 2017-18 by the Ld. CIT(A) is also not maintainable. As per the Ld. AO the alleged cash transactions refer to "payment received by M/s. JBL". Even assuming that payments refer to expenditure, it is not forth coming from the Hajir Johri ledger or any other material to support this view. Further, there is no evidence on record to show that the alleged transactions refer to 'unexplained money' as held by the Ld. CIT(A) in AY 2017-18.

8. The Ld. Sr. DR relied on the orders of the Ld. AO/CIT(A).

9. We have given our careful thought to the submission of the parties and perused the records. The facts are not in dispute. During assessment proceedings the common plea of the assessee in both the AY(s) was that merely entries found in the Hajir Johri ledger of M/s. JBL supposedly in the name of M/s. S.K. Impex, the proprietary concern of the assessee does not tantamount to actual transactions having taken place in the absence of any corroborative evidence such as bills, invoices, challans etc. There is no inkling in the order of the Ld. AO/CIT(A) that the alleged cash transactions are substantiated by any supporting evidence as claimed by the assessee. On the contrary, the impugned additions are based purely on conjectures and surmises solely relying on the statement of Ms. Parul Ahluwalia, Director and former employee of M/s. JBL, the entity subjected to search

operation during which her statement was recorded. The Ld. AR submitted before us that Ms. Parul Ahluwalia nowhere in her statement identified that alleged cash transactions related to the assessee. No specific questions in this regard were asked from her. Nothing is forthcoming from the side of the Revenue to controvert the above pleadings of the assessee.

9.1 It was asserted by the assessee before the Ld. AO that the assessee was not even cross examined during search operation of M/s. JBL or during post search enquiry/investigation either by the Intelligence Wing or by the Ld. AO. The Revenue is silent on this aspect of the assessee's assertion.

9.2 It is observed that during the course of assessment proceedings the show cause notice dated 09.12.2021 issued to the assessee does not have any whisper about the statement of Ms. Parul Ahluwalia that her statement is being used adversely against the assessee. It is submitted by the Ld. AR that the assessee got the knowledge of such statement only on receipt of assessment order. If that is the scenario, the question of allowing the assessee an opportunity to cross-examine Ms. Parul Ahlulwalia does not arise. In fact this has not taken place. Therefore, we are of the opinion that the statement of Ms. Parul Ahluwalia recorded during search of M/s. JBL cannot legally be adversely used against the assessee. In taking this view, we are supported by the decision of Hon'ble Delhi High Court in CIT vs. SMC Share Brokers Ltd. (2007) 288 ITR 345 (Del) wherein the court held that where statement of a third person is acted upon without giving an opportunity to cross examine him, principles of natural justice has not been followed and order would not be valid. This decision was rendered in the context of order under section 158BD which is equally applicable in the case of the assessee to order passed under section 153C of the Act.

9.3 Perusal of the assessment orders would show that whereas the Ld. AO has used his imagination in applying the provision of section 69C for making the impugned addition in both the years treating the alleged cash

transactions as expenditure incurred by the assessee towards purchase of gold/bullion from M/s. JBL, the Ld. CIT(A) was in a fix. So he confirmed the impugned addition in AY 2016-17 under section 69C as unexplained expenditure and in AY 2017-18 under section 69A as unexplained money. In our view the impugned addition made by the Ld. AO in both the AY(|s) is not sustainable because it is based on mere suspicion, surmise and conjectures and not on legally sound footing and the Ld. CIT(A) admittedly confirmed the addition based alone on facts which emerges from the details and findings made by the Ld. AO (para 6.5 of appellate orders refers).

9.4 For the reasons set out above and on the facts and in the circumstances of the case, we allow the appeals of the assessee and direct the Ld. AO to delete the impugned addition in both the AY(s).

10. In the result, the appeals of the assessee for AY 2016-17 and AY 2017-18 are allowed.

Order pronounced in the open court on 7th March, 2024.

sd/-	sd/-
(DR. BRR KUMAR)	**(ASTHA CHANDRA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 07/03/2024
Veena

Copy forwarded to -
1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi

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Date on which the approved draft comes to the Sr. PS/PS	

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Date on which the fair order comes back to the Sr. PS/PS	
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