IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'C', NEW DELHI

BEFORE SHRI G. S. PANNU, VICE PRESIDENT AND
MS. MADHUMITA ROY, JUDICIAL MEMBER

I.T.A. No. 6974/Del/2018
(Assessment Year : 2013-14)

ACIT Central Circle – I, Gurugram	Vs.	K. S. Chawla & Sons (HUF) 7th Floor, HSIIDC Building, Udyog Vihar, Phase-5, Gurugram

PAN: AADHK 7622 M

(**Appellant**) .. (**Respondent**)

And

C.O. No. 15/Del/2019
(Assessment Year : 2013-14)

K. S. Chawla & Sons (HUF), 7th Floor, HSIIDC Building, Udyog Vihar, Phase-5, Gurugram	Vs.	ACIT Central Circle – I, Gurugram

(**Appellant**) .. (**Respondent**)

Appellant by : Shri Parikshi Aggarwal, C.A.
Respondent by : Ms. Rishpal Bedi, CIT-D.R.

Date of Hearing 02.07.2024
Date of Pronouncement 24.07.2024

O R D E R

PER MS. MADHUMITA ROY – JUDICIAL MEMBER :

The instant appeal filed by the Revenue and the CO by the assessee are directed against the order dated 20.08.2018 passed by the

Ld. Commissioner of Income Tax (Appeals) – 3, Gurgaon under section 250 of the Income Tax Act, 1961 (hereinafter referred as to 'the Act') arising out of the order dated 26.12.2017 passed by the Assessing Officer, DCIT, Central Circle-I, Gurgaon under Section 153A of the Act for Assessment Year 2013-14.

2. The brief fact leading to the case is this that the assessee declaring total income at Rs.3,49,660/- filed its return of income on 30.11.20176 in response to the notice u/s 148 of the Act dated 09.10.2017. In fact a search and seizure operation under Section 132 of the Act was conducted at the residential/business premises of the group companies namely M/s. Spaze Towers Pvt. Ltd. and its associates on 17.02.2016. While conducting search at Farm House No.482-483, Opposite Air Force Station, Rajokri, New Delhi, it is found that Farm House as well as interiors and fixtures were very luxurious. During the course of post search proceedings, the said Spaze Group by and under the letter dated 11.03.2016 voluntarily offered to tax undisclosed/unrecorded investments in construction of the said Farm House amounting to Rs.2 Cr. Relevant to mention that the said Farm House belonging to the assessee & Sons HUF. The statement of Shri Harpal Singh Chawla was recorded under Section 132(4) of the Act on 08.04.2016 wherein, he has stated that Rs.2 Cr. has been invested in cash in the construction/renovation/furniture/furnishing/art wares of the said Farm House belonging to the assessee. The assessee was asked by and under the letter dated 19.12.2017 to give justification regarding the investment in the said Farm House. On the other hand, an amount of Rs.52.74 Cr.

was offered for taxation by the Group of Companies namely M/s. Spaze Towers Pvt. Ltd. before the Hon'ble Settlement Commission, New Delhi by preferring an application dated 30.11.2016 and the statement of Facts containing Fund Flow Statement. The payment/expenditure to the tune of Rs.2 Cr. has been shown in regard to cash expenses incurred on K.S. Chawla & Sons Farm House towards interior/furniture/fixtures and art effects – Chawla family before the said Settlement Commission.

The assessee in reply to the show-cause submitted the following before the Learned AO referring the case of M/s. Spaze Towers Pvt. Ltd. before the Hon'ble Settlement Commission and mentioned that accordingly, has also reduced cash in hand from cash flow statement submitted before the said Commission.

> *"4.3 The assessee vide letter dated 21.12.2016 submitted his reply. The relevant portion of his reply 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 started 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.*

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 ie 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.

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."

3. Therefore, taking into consideration this additional unrecorded investment, the total investment in Farm House was very well covered. The assessee, therefore, owes its amount to M/s. Spaze Towers Pvt. Ltd. It has further relied upon different judgments passed by the Hon'ble Apex Court. However, though the assessee submitted that the source of funds was cash received from M/s. Spaze Towers Pvt. Ltd., as the same was not shown in the income and ITR of the assessee, the addition to the tune of Rs.2 Cr. was made in the hands of the assessee which stood deleted by the Learned CIT(A). Hence, the instant appeal before us.

4. It was categorically mentioned before the First Appellate Authority that no addition is sustainable on account of alleged cash expenses incurred on interior/furniture/fixture as the said expenditure was incurred by M/s. Spaze Towers Pvt. Ltd., towards cash expenses incurred on the appellant on returnable/recoverable basis and thereby, did not constitute income in the hands of the assessee. The house hold expenditure incurred was out of the cash belonged to the appellant as was the basis of the addition made by the Learned AO despite the fact that cash undisputedly belonged to M/s. Spaze Towers Pvt. Ltd. which fact was duly admitted by the said company and also offered to tax before the Hon'ble Settlement Commission. The case of the assessee in this that as the said company since claimed that the amount in dispute is receivable for them which was incurred by the said company is payable by the appellant, the

same cannot be treated as income of the appellant. It was further submitted that as far as impugned income is concerned, it was earned by M/s. Spaze Towers Pvt. Ltd. in the shape of over invoicing of purchases and the cash derived from such inflated purchases, which was also offered to tax before the Settlement Commission, New Delhi and the Fund Flow Statement whereof was duly accepted by the Settlement Commission, the same income cannot be taxed twice in the hands of the assessee. Any levy of tax, contrary to the provisions of the Act, which may result unjust enrichment to the exchequer, would be ultra-vires Article 265 of the Constitution.

5. In this regard, the assessee before us also submitted the order passed by the Settlement Commission, the relevant portion whereof particularly were telescoping has been allowed, and also accepted the fact that both income and expenditure during the same period cannot be taxed as it would lead to double taxation is as follows:

> *"We have heard the applicant as well as the Department. Hence, telescoping has to be allowed and during hearing even the Department accepted the logic that both income and expenditure during same period cannot be taxed as it would lead to double taxation. Moreover, as per claim of the Applicant. the above amounts given to the Directors/Shareholders for personal expenses are receivables, which also enables telescoping.*
>
> *It is clear from the above assertion, that the said M/s Spaze had also claimed that the said amounts is receivable for them le the amounts so incurred by M/s Spaze Towers at Rs. 2,00,00,000/- in question is payable by the appellant to M/s Spaze Towers Pvt Ltd. And therefore also, it is respectfully submitted that the same can not be treated as income of the applicant."*

Apart from that, the addition *de hors* any incrimination material during search has also placed by the assessee before the First Appellate Authority. It was pleaded that search can be conducted only on the satisfaction, when the department is of the firm believe that, the assessee is in possession of certain 'undisclosed' assets or documents suggesting earning of 'undisclosed income' by the assessee, search could be conducted. Further that, the purpose of making assessment under Section 153A of the Act is not to verify the return, as such, but to make assessment primarily on the basis of the material found during the course of search and addition could be made on such undisclosed income. In this particular case, no incriminating material was found except for Spaze group amounting to Rs.2 cr. spent on furnishing the said Farm House in search proceeding. As in the absence of any incrimination material no addition under Section 153A of the Act can be done in a completed assessment, the entire proceedings is therefore, liable to quashed as was one of the main arguments made by the assessee before the authorities below.

6. Finally having regard to the entire aspect of the matter, the Learned CIT(A) deleted the addition with following observation:

> *"5.1 The only effective ground of appeal during the year under consideration relates to addition of Rs. 2 crores made on account of undisclosed investment in construction/renovation/furniture of K.S. Chwla & Sons Farm House.*

5.2 In the statement of facts containing Fund Flow Statement, M/s Spaze Towers Pvt Ltd has shown the following transactions during the year under consideration mentioning cash expenses incurred on K.S. Chawla & Sons Farm House towards interior/furniture/fixture and art effect amounting Rs. 2,00,00,000/-.

AY	*Particulars*	*Payment/Expenditure*	*Addition to the Appellant's income*
2013-14	*Cash expenses on Farm House*	*Rs. 2,00,00,000/-*	*Rs. 2,00,00,000/-*

5.3 The AO has made addition of Rs. 2,00,00,000/- to the income of the appellant during the year under consideration AY 2010-11 stated hereunder:

> *"4.4 In this case, 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 mention here that the fund flow statement submitted by M/s Spaze Towers Pvt Ltd containing the admission of expenses to meet out the personal expenses of the directors/ promoter and their family members, is a clear violation of the provisions of the companies Act"*

4.5 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 in the income in the ITR of the assessee Therefore, addition of Rs. 2,00,000/- is being made to the total returned income of the assessee for the year under consideration.

These arguments were reiterated in the counter comments of Pr. CIT on appellant's reply under Rule 9 Report before the Hon'ble ITSC.

6.4 Hon'ble Income Tax Settlement Commission Additional Bench-1, New Delhi in order u/s 245D (4) of the Act in case of M/s Spaze Towers Pvt Ltd has adjudicated the matter as hereunder:

5.4 Commission's finding:- We have heard the applicant as well as the department. The main contention of the department is that telescoping should not be allowed for unexplained investment/ expenditure done during the period when the cash was generated through inflated purchases. We are unable to accept the contention of the department. It is noted that offering the income to tax and utilization of cash generated during earning of such income is not one and the same thing. The income being offered to tax may have already been spent or invested in any asset. Therefore, the telescoping of income and expenditure/ assets has to be allowed if the investment/ expenses has been done during the same period when income earned. It is further noted that in the letter referred above, except for income related to bogus purchases of Rs. 53 cr(approx) and miscellaneous income, all other offer of income is based on documents related to investment/expenditure during same period, which has been explained by the applicant through its fund flow statement. Hence, telescoping has to be allowed and during hearing even the department accepted the logic that both income and expenditure during same period cannot be taxed as it would lead to double taxation. Moreover, as per the claim of the applicant, the above amounts given to the directors/shareholder for personal expenses are receivables, which also enables telescoping. As regards offer of miscellaneous income is concerned, it is observed that it was not based on any seized document and hence cannot be substantiated. It is also observed that section 2(22)(e) of the Act is not applicable in this case as none of the directors had more than 10% holding in the applicant money. Further, Sec-115-0 is also not applicable as the applicant company has not declared any dividend and cash payment(as noted above) have not been treated as deemed dividend'. As regards the objection of the department that cash, to the extent of indicated in the cash flow, was not discovered during the search, the mere non- availability/ non discovery of an asset or cash cannot have an adverse bearing on the income computed on the basis of incriminating material and/or explanations offered by an applicant. Neither is an assessee obliged to voluntarily make a full and true disclosure of its assets during search action nor can the department certify that it has no other asset apart from what has been discovered. Therefore, no adverse view is being taken on this issue".

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 Tax Settlement Commission.

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.

5.6 During the appellate proceedings, the appellant has been submitted as follows:

In the light of the aforesaid facts, it is the respectful submission of the appellant that the addition of Rs.2,00,00,000/- in the hands of the appellant merely on conjectures and surmises is patently erroneous and legally unsustainable for the following reasons

a) The entire exercise during the assessment proceedings is based on the unwarranted presumption that the appellant is the owner of the cash amount of Rs.2,00,00,000/-, in spite of the specific submission that the said cash belonged to M/s Spaze Towers Pvt Ltd, which was undisputedly offered to tax before the Hon'ble Settlement Commission, and the Hon'ble ITSC New Delhi, has also accepted as well in its final order under section 245D(4) of the I.T. Act.

b) It is also clear that the understanding between the appellant and the sald M/s Spaze is clear from the facts that the said amount is on returnable basis and hence cannot be treated as income for the appellant. It is not out of context to mention here that the Appellant has already repaid the said amount of Rs.

2,00,00,000/- to the said Spaze Towers Pvt Ltd (Copy of ledger account in the books of Spaze Towers Pvt Ltd is enclosed herewith in support of contention of the Appellant).

c) At no stage had the Revenue discharged its onus of establishing the appellant to be actual owner of the cash amount out of which the household expenditure was incurred;

d) Once the appellant submitted that the source of the cash of Rs.2,00,00,000/- belonged to M/s. Spaze Towers Pvt. Ltd, and the same was also not denied by the latter, the appellant was under no obligation to explain any further the source or accumulation of the same in the hands of the group companies and no further addition is deserved in the hands of the appellant.

e) The appropriation of funds by the appellant is not on non-returnable basis and the appellant has admitted its liability to pay towards M/s Spaze Towers Pvt Ltd in its books of accounts in compliance to order of Hon'ble ITSC New Delhi. In fact, the payment has also been made by the appellant to the said M/s Spaze Towers Pvt Ltd.

Thus, it has been admitted by the appellant that the cash received is on returnable basis and hence cannot be treated as income of the appellant. Further, it has been stated that the appellant has already repaid the said amount of Rs. 2,00,00,000/- to the said Spaze Towers Pvt the copy of appellant ledger account in the books of Spaze Towers Pvt Ltd has also been submitted during the appellate proceedings, wherein business income of earlier years shown as amount of personal expenses of appellant.

Further the account of the appellant has been credited by the same amount, (Rs 2,00,00,000/-) in the account of M/s Spaze Towers Pvt Ltd on account of cheque no. 321822 dated 31.03.2018 received from appellant. This copy of account has been confirmed both by the appellant and M/s Spaze Towers Power Ltd, Gurgaon and has been submitted by the appellant during the assessment proceedings.

In view of the above discussion, the AO is advised to take necessary action in the case of appellant in the year under consideration with respect to loan/ deposit taken from M/s Spaze

Towers Pvt Ltd in cash and thus otherwise than by specified modes as per provisions of the Act.

6. As a result, the appeal of the appellant is allowed."

7. Having regard to this particular fact that the impugned amount of Rs.2 Cr. were duly offered to tax before the Settlement Commission by Spaze Towers Pvt. Ltd. wherein it has been stated categorically that the said company had incurred expenditure amounting to Rs.2 Cr. towards cash expenses on interior/furniture of the appellant, the source of which inflated purchases recorded in the books of accounts of M/s. Spaze Towers Pvt. Ltd. meaning thereby when the income brought to tax by the ld. AO indeed constitute a part of the disclosure made before the Settlement Commission and once the same has been charged to tax in the hands of the assessee therein the same amount cannot be said to be the income of the appellant before us, addition of the very same amount in the hands of the appellant, therefore, rightly been deleted by the Ld. First Appellate Authority. Under these circumstances of the case, the order passed by the Learned CIT(A) is therefore found to be just and proper so as not to warrant interference.

8. Before us, the assessee raised additional ground under Rule 11 of ITAT Rules, 1963 to this effect that the assessment proceedings deserves to be declared as illegal as the case was initiated by issuing notice under Section 148 of the Act, but was concluded by passing an order under Section 153A of the Act. The ratio laid down by the Hon'ble Delhi High Court in the case of Kabul Chawla, reported in 380 ITR 573 (Delhi)

found to be applicable to this effect that in an unabated assessment no addition under Section 153A of the Act cannot be made without reference to any incriminating material seized during the search. In the absence of any incriminating material in the facts and circumstances of the case in hand, the addition is therefore, not sustainable.

9. As the entire addition has been deleted by the ld. CIT(A) which is confirmed by us the ld. Counsel fairly agreed that the above issue is rendered academic at this stage and is not being therefore adjudicated and is kept open.

C.O.No.15/Delhi/2019

10. As the departmental appeal challenging the order of deletion of addition made by the ld. A.O to the tune of Rs.2 crores is dismissed by us upholding such order impugned passed by the ld. CIT(A). The C.O filed by the assessee becomes infructuous and thus dismissed as infructuous.

11. In the result, the appeal preferred by the Revenue is found to be devoid of any merit and thus dismissed and the C.O. filed by the assessee is dismissed as infructuous.

Order pronounced in the open court on 24/07/2024

Sd/-	Sd/-
(G. S. PANNU)	(Ms. MADHUMITA ROY)
VICE PRESIDENT	JUDICIAL MEMBER

Dated 24/07/2024

*Priti Yadav, Sr.PS**

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI