IN THE INCOME TAX APPELLATE TRIBUNAL

DELHI BENCH "A", NEW DELHI

BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER,

AND

SHRI SUDHIR KUMAR, JUDICIAL MEMBER

	ITA NO. 722/Del/2021	
	A.YR. : 2012-13	
DY. COMMISSIONER OF INCOME TAX, CENTRAL CIRCLE-8, NEW DELHI	VS.	ARTLINE VINIMAY PRIVATE LIMITED, H.NO. 8, GROUND FLOOR, TODARMAL LANE, BENGALI MARKET, NEW DELHI – 110 001 (PAN: AACCA5237E)
(APPELLANT)		**(RESPONDENT)**

Appellant by	:	Sh. Amit Goel, CA & Sh. Pranav Yadav, Adv.
Respondent by	:	Sh. N.K. Bansal, Sr. DR
Date of hearing	:	08.10.2024
Date of pronouncement	:	10.10.2024

ORDER

PER SHAMIM YAHYA, AM :

The Revenue has filed the instant appeal against the order dated 08.07.2020 of the Ld. CIT(A)-24, New Delhi relating to assessment year 2012-13 on the following grounds:-

1. *The Ld. CIT(A) has erred in law in entertaining and disposing of an appeal against a 'protective' assessment which, by definition, is not an assessment in present and one which would become so only if the*

substantive assessment is finally cancelled in appeal (which is not a fact here, as the substantive addition in the hands of Rajyog Buildtech Pvt. Ltd. for AY 2013-14 and 2014-15 is subject matter of appeal before the ITAT.

2. *The Ld. CIT(A) has erred in law as well as on facts in deleting protective addition the addition of Rs. 2,44,68,000/- by upholding that no substantive addition has been made in the case of any other assessee without considering the fact that substantive addition was made in the case of Rajyog Buildtech Pvt. Ltd. in subsequent years i.e. AY 2013-14 and 2014-15 amounting to Rs. 29.65 Cr. and Rs. 180 Cr. respectively on account of unsecured loan received from M/s Artline Vinimay Pvt. Ltd.*
3. *The Ld. CIT(A) has also erred in law by holding that necessary document evidences have been filed by the assessee to prove identify, creditworthiness or genuineness with respect to refund of share application money invested in earlier years as well as during the year under consideration and at the same time ignoring the fact that the assessee company is a entry provider and no real business has been carried out by it.*

2. Briefly stated facts are that the assessee filed its e-return of income on 28.09.2012 declaring total income of Rs. 16,178/-. AO noted that in this case, information was received from the Investigation Wing, Kolkata and as per the information received, on perusal of the bank statement of the assessee company, it was found during the year under consideration that the account of the assessee company was credited with an amount of Rs. 2,44,68,000/- from cash deposits, transfer and from some companies. Later on, reassessment proceedings u/s. 147

of the Act were initiated and notice u/s. 148 of the Act was issued on 29.03.2019, requiring assessee to furnish its return of income. In response thereto, the assessee e-filed its return of income u/s. 147/148 of the Act on 23.04.2019 declaring total income of Rs. 16,180/-. Notice u/s. 143(2) of the Act was issued on 10.5.2019 through ITBA portal and further notice u/s. 142(1) of the Act alongwith questionnaire was issued to the assessee on 13.05.2019. The assessee vide his reply dated 30.5.2019 submitted that return u/s. 147/148 of the Act has been filed. Another notice u/s. 142(1) of the Act was issued and in response to the same, the assessee filed details and documents on the department's web portal 'ITBA' for e-assessment. On considering the submissions, the AO completed the assessment u/s. 147 of the Act on 31.12.2019 by making addition of Rs. 2,44,68,000/- on protective basis by noting that since the assessee is an accommodation entry provider and fund received from various parties have been transferred immediately to other paper companies. AO further made an addition of Rs. 1,21,323/- on substantive basis in respect of loss on sale of shares.

3. Against the aforesaid assessment order, assessee appealed before the Ld. CIT(A), who vide his order dated 08.07.2020 has partly allowed the appeal of the assessee by confirming the substantive addition of Rs. 1,21,323/- and deleted the protective addition of Rs. 2,44,68,000/-. The relevant observations of the Ld. CIT(A) are reproduced as under:-

4.4.8 *I have considered the facts on record as well as reply submitted by the appellant. Firstly, it is observed that in the entire assessment order there is no mention of the parties from-whom share application money was received back. He has only relied upon figure of Rs. 2,44,68,000/- given by Investigation Wing, Kolkata. Secondly, in para 7 of the assessment order, the heading given by the Assessing Officer is 'Addition on account of bogus refund of share application money'. This shows that the Assessing Officer is adding back refund of share application money. No mention has been made in the assessment order with regard to the section under which the addition is being made.*

4.4.9 *The Assessing Officer has relied upon statement of Sh. Santosh Kumar Shah. However, no cross examination has been allowed to the appellant due to which it has little evidentiary value as held by Hon'ble Supreme Court in the case of Andaman Timber Industries v Commissioner of Central Excise, vide its order dated 2nd September 2015 and Kisnichand Chellaram v. CIT (1980) 125 ITR 713 (SC).*

4.4.10 *The amount of Rs. 2,06,57,000/- which was invested as share application money in earlier years and received back during the year cannot be added under section 68, 69 or 69A of Income Tax Act. It is not the case of the Assessing Officer that identity, genuineness or creditworthiness has not been proved. Necessary documentary evidence has been furnished by the appellant.*

4.4.11 *An amount of Rs. 65,50,000/- was advanced as share application money during the year and received back during the year through banking channels. No addition can be made with regard to this amount under section 68, 69 or 69A of Income Tax Act, particularly when no finding has been given by the Assessing Officer that identity, genuineness or creditworthiness has not been proved. Necessary documentary evidence has been furnished by the appellant.*

4.4.12 *The Assessing Officer himself has made protective addition of Rs. 2,44,68,000/- which shows that he is convinced that substantive addition is required to be made in the hands of other persons. On the basis of details available on record, no substantive addition appears to have been made. Under these circumstances, protective addition cannot be made in view of various judgements relied upon by the appellant above.*

4. Aggrieved with the aforesaid Ld. CIT(A)'s decision, Revenue is in appeal before us.

5. We have heard both the parties and perused the relevant records.

6. At the time of hearing, Ld. DR relied upon the order passed by the AO and reiterated the grounds of appeal raised by the Revenue.

6.1 Per contra, at the outset, Ld. AR for the assessee submitted that in the case of Lalsi Hardas vs. ITO [43 ITR 387) (SC) the Hon'ble Apex Court has held that where the AO was not certain as to who has actually received the income, protective addition could be made by the AO. However, the Apex Court clarified and laid down the principle that firstly there should be an assessment of the person where the AO thinks that substantive addition has to be made. Thus he submitted that in accordance with the aforesaid decision of Hon'ble Apex Court, the addition made by the AO on protective basis is not sustainable and the Ld CIT(A) has rightly deleted the addition. It was further submitted that with regard to contentions raised by the revenue in the grounds of appeal that substantive additions were made in the hand of Rajyog Buildtech Pvt Ltd for AY 2013-14 and AY 2014-15 and year involved in the present appeal of the assessee is AY 2012-13 and therefore it can have no relation with AY 2013- 14 and AY 2014-15. Moreover, even for AY 2013-14 and AY 2014-15, the additions made in the hand of Rajyog Buildtech Pvt Ltd has not survived as the CIT(A) as well as ITAT has deleted the additions made in the case of Rajyog Buildtech Pvt Ltd. Copy of ITAT common order for AY 2013-14 and AY 2014-15 in the case of Rajyog Buildtech Pvt Ltd has been placed on record. He further submitted that it is a settled law that if the substantive addition does not survive, the protective addition also does not survive. Hence, he submitted that in view of the above, Ld. CIT(A) has rightly deleted the addition made by the AO on protective basis, which does not need any

interference, hence, he requested to uphold the same and accordingly, the appeal of the Revenue may be dismissed.

7. Upon careful consideration, we find that Assessing Officer has made protective addition of Rs. 2,44,68,000/- which shows that he is convinced that substantive addition is required to be made in the hands of other persons. On the basis of details available on record, no substantive addition appears to have been made. Under these circumstances, protective addition cannot be made as per settled law. We note that revenue in the grounds of appeal had reiterated that substantive additions were made in the hand of Rajyog Buildtech Pvt Ltd for AY 2013-14 and AY 2014-15 and year involved in the present appeal of the assessee is AY 2012-13 and thus it cannot have relation with AY 2013- 14 and AY 2014-15. However, even in AY 2013-14 and AY 2014-15, the additions made in the hand of Rajyog Buildtech Pvt Ltd has not survived as the CIT(A) as well as ITAT has deleted the additions in the matter of DCIT VS. Rajyog Buildtech Pvt. Ltd. passed in ITA Nos. 1518/DEL/2020 (AY 2013-14) & 1519/DEL/2020 (AY 2014-15) wherein, the Tribunal has dismissed the appeals of the Revenue by holding as under:-

> *"6. Heard the arguments of both the parties and perused the material available on record.*
>
> *7. We have gone through the judgments of Hon'ble Jurisdictional High Court. Reliance is placed on the following case laws:*

i. CIT v. Kabul Chawla (2016] 380 ITR 573/(2015) 234 Taxman 300/61 taxmann.com 412 (Delhi),

ii. All Cargo Global Logistics Limited Vs. DCIT [2012] 18 ITR 106,

iii. ACIT, Central Circle-16, New Delhi vs. Vinita Chaurasia, ITA No. 5957/DEL/2015 dated 05.10.2018,

iv. ACIT, Central Circle-4, New Delhi vs. M/s. Moolchand Steels Pvt. Ltd., ITA No. 2544/DEL/2015 dated 10.10.2018 etc.

8. The Hon'ble Delhi High Court in the case of CIT Vs Kabul Chawla (supra) held as under:

"vii. Completed assessments can be interfered with by the A.O. while making the assessment under section 153A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment"

9. The Hon'ble Delhi High Court in its recent decision in the case of Pr. CIT vs. Meeta Gutgutia (2017) 395 ITR 526 in paras 69 to 72 has held as under:

"69. What weighed with the Court in the above decision was the "habitual concealing of income and indulging in clandestine operations" and that a person indulging in such activities "can hardly be accepted to maintain meticulous books or records for long." These factors are absent in the present case. 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.

70. 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.

71. 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.

Conclusion

72. To conclude:

(i) Question (i) is answered in the negative i.e., in favour of the Assessee and against the Revenue. It is held that in the facts and circumstances, the Revenue was not justified in invoking Section 153A. of the Act against the Assessee in relation to AYs 2000-01 to AYs 2003-04."

10. We have gone through the entire plethora of judgments.

11. The decisions of the Hon'ble Jurisdictional High Court are squarely applicable to the facts and circumstances of the case as no assessment was pending on the date of search and the addition has been made merely on the basis of the book entries already disclosed to the department. Further, reliance is also placed on the decision of the Hon'ble Jurisdictional High Court in the case of PCIT Vs. Subhash Khattar in ITA No. 60/2017 dated 25.07.2017.

12. Hence, keeping in view, the entire factum of the case, we hold that the addition made vide the assessment u/s 153A in the absence of any incriminating material is not sustainable.

13. In the result, the appeals of the Revenue are dismissed."

7.1 Thus it is abundantly clear that substantive addition has not survived. It is a settled law that if the substantive addition does not survive, the protective

addition also does not survive. To support this view, we refer the decision dated 30.10.2023 of the Hon'ble Jurisdictional Delhi High Court in the case of Pr. CIT (Central)-2 vs. Electrical and Electronic India Ltd (2023) 11 TMI 67 - wherein, it has been held that addition made on protective basis does not survive where the substantive addition has been deleted.

7.2 In the background of the aforesaid discussions and respectfully following the precedents, as aforesaid, in our considered view, Ld. CIT(A) has rightly deleted the addition made by the AO on protective basis, which does not need any interference on our part, hence, we affirm the action of the ld. CIT(A) and accordingly the grounds raised by the Revenue are rejected.

8. In the result, appeal by the Revenue is dismissed.

Order pronounced on 10/10/2024.

Sd/-	Sd/-
(SUDHIR KUMAR)	**(SHAMIM YAHYA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

SRB

<u>Copy forwarded to:-</u>

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

Assistant Registrar