

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH “A” DELHI**

**BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER
&
SHRI NARENDER KUMAR CHOUDHRY, JUDICIAL MEMBER**

I.T.As. No.8494 & 8495/DEL/2019
Assessment Years 2003-04 & 2004-05

Deputy Commissioner of Income Tax, Central Circle-27, New Delhi.	Vs.	M/s. Apoorva Extrusion Pvt. Ltd., 110, 1 st Floor Bhanot Corner, Pamposh Enclave, Greater Kailash-I, New Delhi.
TAN/PAN: AAACA2120L		
(Appellant)		(Respondent)

Appellant by:	Shri M.P. Rastogi Adv Shri Rajeev Kumar CA		
Respondent by:	Shri P. Praveen Sidharth, CIT-DR		
Date of hearing:	13	10	2022
Date of pronouncement:	31	10	2022

ORDER

PER SHAMIM YAHYA, A.M.

These appeals by the Revenue are directed against the orders of the Commissioner of Income Tax (Appeals)-XXIX, New Delhi ('CIT(A)' in short) dated 09.08.2019 for the aforesaid assessment years. Since the issues are common and both the appeals were heard together they are being disposed off by way of this consolidated order.

2. The common grounds raised read as under:

1. *Whether on the facts and in the circumstances of the case and in law the Ld.CIT(A) was legally justified in holding that the additions made in the course of proceedings u/s 153C of the*

Income Tax Act, 1961 were not warranted having regard to the judgment of this court in CIT Vs. Kabul Chawla (380) ITR 573.

2. *Whether on the facts and the circumstances of the case and in law the Ld.CIT(A) was legally justified in not appreciating that Revenue has filed various SLPs against the decision of the jurisdictional High Court in CIT Vs. Kabul Chawla in Apex Court and the decisions are pending and hence, the issue has not attained finality.*

3. *Whether on the facts and in the circumstances of the case, the Ld.CIT(A) has erred in law and on facts in directing the AO to confine assessment on the basis of already completed assessment even though the additions were made by the AO while framing assessment u/s 153C of the Act on the issue which was not examined in earlier assessment completed u/s 143(3) of the Income tax Act, 1961.*

4. *The order of the CIT(A) is erroneous and not tenable in law and on facts.”*

3. For the sake of reference, we are referring to the orders of Revenue's Authorities for Assessment Year 2003-04.

4. Pursuant to search and seizure operation in M/s. Flex Group of companies, assessment under Section 153C r.w. Section 143(3) was initiated against the assessee. The assessee is engaged in the business of investment in shares and securities, sale/purchase of shares and securities and other related financial activities. The Assessing Officer noted upon perusal of the profit and loss account of the assessee company that assessee has received Rs.70,55,640 on account of commission from M/s. Akshay Trading Corporation and M/s. R.R. Financial Constants Ltd. and

consultancy charges of Rs.67,00,000/- from M/s. Dharam Pal & Satya Pal. The Assessing Officer proceeded to inquire upon the nature of service rendered by the assessee. He reproduced the assessee's submission as under:

"....it is submitted that the assessee is an investment company and duly registered as NBFC with the Reserve Bank of India and main business of the company is to invest and trade in shares, securities, debentures and allied financial instruments & activities. In view of the same the commission received on the securities towards sub broker ship of marketing of investments in share, securities and bonds etc. are within the preview of the business activities of the assessee company. These activities are incidental in the main business of investments in shares & securities. Since the commission were received on account of services rendered towards procurement of sales order & brokerage were received on account of services rendered towards sub-broker ship for marketing of investment in share, securities & bond etc. therefore the same may be treated as business income & not income from other sources."

4.1 Thereafter the Assessing Officer held as under:

However, the following factors pertinent to the assessee's case are significant:

1) The assessee company has no infrastructure at all, neither owned nor rented to render services for which commission and consultancy income are claimed to have been received.

2) During the year, the assessee has debited negligible/nominal amounts on account of administration and other expenses (Rs. 67,081/- only), the highest expenditure being on account of audit and legal expenses. Salary and wages expenditure too, is a paltry sum @ Rs. 3,750/- p.m.

3) *There is no expenditure by the assessee during the year, which could be directly or indirectly attributed to generation of income from commission and consultancy charges.*

4) *The express nature of business or profession declared by the assessee in Form No. 3CD is investment in shares & securities, sale/purchase of share & securities.*

5) *No evidence has been furnished by the assessee so as to prove that the receipts in the form of commission and consultancy charges comprised income from business.*

6) *The assessee has not furnished any evidence to show that the services have been rendered by him. It appears that this income has been earned by other concern of the group and has been diverted as income of the assessee.*

In the light of the above, it is clear that the income earned by the assessee from commission and consultancy charges amounting to Rs.1,37,55,640/- is not his business income and accordingly, the same is taxed under the head "income from other sources." Penalty proceedings u/s. 271(1)(c) are initiated separately with respect to this addition."

5. Against the above order, the assessee appealed before the CIT(A). The Id. CIT(A) has elaborately noted the submission of the assessee. It was also noted that the original return under Section 139 was filed on 31.10.2003 which was processed under Section 143(1) and assessment was completed under Section 143(3) on 20.12.2005. The Assessing Officer made the assessment under Section 153C r.w. Section 143(3) by only shifting the head of income from business income to income from other sources. The Id. CIT(A) noted that for doing so the Assessing Officer has

not referred to any seized papers/documents. The Id. CIT(A) further referred to the assessee's ground that additions made by the Assessing Officer were not with reference to any seized material and the documents which were seized were not for the year under consideration. In this regard, the assessee referred to the judgment of Hon'ble Delhi High Court in the case of *CIT vs. Kabul Chawla*, 380 ITR 573 (Delhi). Considering the above, the Id. CIT(A) accepted the submission that addition has not been made by reference to any incriminating material found during search. He held as under:

4.2. It was also noticed that the special leave petition before the Hon'ble Apex Court against the above judgment of Delhi High Court had also been rejected. (S.L.P(C)No-34554 of 2015 [2016] 380 ITR (st)64-Ed). In the instant case, it was found that the additions made by the AO are not on the basis of material seized during the course of search. As held by Hon'ble Delhi High Court in the above 2 judgments that the completed assessment can be inferred by the Assessing Officer while making the assessment under Section 153A/153C only on the basis of some incriminating material unearthed during the course of search. In the instant case of the appellant, the assessment was completed and shifting of commission/consultancy income from business income to the head of income from other sources was not based on the basis of any seized material. Therefore, the Assessing Officer is directed to confine its assessment on the basis of already completed assessment.

6. Against above order, the Revenue has filed appeal before us. The Id. Departmental Representative relied upon the orders of the Assessing Officer. We also noted that in the grounds of appeal,

Revenue has not disputed the fact that the assessment is not based upon any incriminating material found during the search but the Revenue's grievance is that the Revenue has filed SLP against the decision of Hon'ble Jurisdictional High Court in the case of *Kabul Chawla* (supra). Per contra, the Id. counsel for the assessee submitted that the issue here is fully covered by the following case laws.

i) CIT vs. Singhad Technical Educational Society, 397 ITR 344 (SC)

ii) CIT vs. Kabul Chawla, 380 ITR 573 (Delhi)

iii) CIT vs. R.R.J. Securities Ltd., 380 ITR 612 (Delhi)

7. The Id. counsel further referred to that none of the items referred by the Assessing Officer in its assessment order in any case warrant the change of head 'business income to income from other sources'. Hence, the Id. counsel for the assessee pleaded that the assessment so framed is not sustainable in law.

8. Upon careful consideration, we note that in this case the Assessing Officer pursuant to search and seizure has only changed the head of income from business income to income from other sources. In doing so, he has not referred to any incriminating material found during the search. In this view of the matter, the Id. CIT(A) is correct that addition is not sustainable on the touchstone of the decision referred hereinabove. The Revenue in its grounds of appeal also mentioned that the decision of Hon'ble Delhi High Court in the case of *Kabul Chawla* (supra) has not been accepted by the Revenue and the SLP has been filed before the Hon'ble Supreme Court. In our considered opinion this does not warrant not following the ratio emanating from the decision of

Hon'ble Jurisdictional High Court as referred above. It is an undisputed fact that in the present case the Assessing Officer has only changed the head of the income from business income to income from other sources and this has not been done by reference to any seized incriminating material. Accordingly in the background of the aforesaid discussion and precedents in our considered opinion there is no infirmity in the order of the Id. CIT(A). Hence, we uphold the same. Before parting we may refer to the pleading of the Id. counsel for the assessee that in the case of the assessee the MAT provisions were applicable and in that view of the matter the tax effect is below the limit of CBDT circular for filing appeal before the Tribunal. We note that since we have already adjudicated upon the issue by confirming the order of the Id. CIT(A) we are not dealing with this aspect as it is only of academic interest.

9. The above order applies mutatis mutandis to both the appeals.

10. In the result, both the appeals of the Revenue stand dismissed.

Order pronounced in the open Court on 31/10/2022.

Sd/-
[NARENDER KUMAR CHOUDHRY]
JUDICIAL MEMBER

DATED: 31/10/2022

prabhat

Sd/-
[SHAMIM YAHYA]
ACCOUNTANT MEMBER