IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : A : NEW DELHI

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
AND
SHRI KULDIP SINGH, JUDICIAL MEMBER

ITA Nos.832, 863 & 864/Del/2015
Assessment Years: 2008-09 to 2010-11

ACIT, Central Circle-7, New Delhi.	Vs.	Varun Beverages Ltd., R/o F.2/7, Okhla Industrial Area, Phase-I, New Delhi. PAN: AAACV2678L
(Appellant)		(Respondent)

Assessee by	:	Shri Akshat jain & Shri Rajat Jain, CAs
Revenue by	:	Shri B.P. Singh, Sr.DR
Date of Hearing	:	17.10.2018
Date of Pronouncement	:	20.11.2018

ORDER

PER R.K. PANDA, AM:

The above three appeals by the Revenue are directed against the separate orders dated 14.11.2014 of the CIT(A)-31, Delhi relating to Assessment Years 2008-09, 2009-10 & 2010-11, respectively. Since identical grounds have been raised by the Revenue in all these appeals, therefore, these were heard together and are being disposed of by this common order.

2. First, we will take up ITA No.832/Del/2015 as the lead case. The facts of the case, in brief, are that a search and seizure operation u/s 132 of the IT Act was carried out on M/s Jaipuria group of cases on 27th March, 2012. The case of the assessee was also covered in the said search. In response to notice u/s 153A of the IT Act, 1961 dated 8th April, 2013, the assessee filed its return of income on 1st July, 2013 declaring an income of Rs.22,00,93,190/-. During the course of assessment proceedings, the Assessing Officer observed that during the search operations, it was observed that the assessee group has booked substantial expenses under the head 'Advertisement expenses.' Some of the expenses do not appear to be genuine/justified. The A.O. noted that in the proceedings of the post search investigation, vide questionnaire dated 16th July, 2012, the assessee was asked to provide the details of the advertisement expenses. From the various details furnished by the assessee, it was observed that there are number of parties to whom advertisement expenses have been booked, but, no address or PAN have been provided. He, therefore, asked the assessee to explain as to why the advertisement expenses booked from such parties may not be treated as bogus due to the absence of evidence to prove the identity of the parties. Rejecting various explanations given by the assessee, the Assessing Officer made addition of Rs.2,03,82,486/- treating the above advertisement expenses as not genuine and, therefore, he treated the sum as unexplained expenditure by invoking the provisions of section 69C of the IT Act. Similar addition has been made by the Assessing Officer of an amount of Rs.1,12,16,675/- for assessment year 2009-10 and Rs.2,41,17,429/- for assessment year 2010-11 as unexplained expenditure u/s 69C of the IT Act.

3. Before the ld. CIT(A) the assessee challenged the validity of the assessment u/s 153A of the Act on the ground that no incriminating material was found. However, the ld.CIT(A) held that when a search u/s 132 has been initiated in the case of an assessee, assessments of six years prior to the search year can be reopened automatically and the Assessing Officer has a duty to assessee as well as reassess the total income of the assessee for those relevant years. Therefore, the requirement of incriminating documents being in possession of the Assessing Officer for reassessing the income is not necessary. So far as the merit of the case is concerned, he deleted the addition by observing as under:-

> 4.2.12 I have considered the submissions of the *AR* and perused the assessment order. The AO has misread the provisions of Section 69C of the Act. The said section is applicable in cases where any expenditure is found to have been incurred and appellant is not able to explain the source of funds used in such expenditure. In the present case it is nobody's case that the appellant did not have sufficient source to explain the advertisement expenditure. The fact that the advertisement expenditure has been duly entered in the books of accounts and payments have been made from the appellant's bank accounts maintained in the regular course of business and also that the expenditure finds its due place in the P & L A/c shows that this is not the case which could be covered u/s 69C of the Act. To this extent the AO's action cannot be sustained.
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> 4.2 It is noted that the AO has approached the issue of genuineness of expenditure in a completely incorrect way. At para 4 of the assessment order, he notes that in the details submitted by the assessee no address or PAN were available in some of the cases and that a show-cause notice was issued on 29.06.2012 to the assessee to explain as to why in the absence of any evidence to prove the identity of the parties, advertisement expenses booked from such parties may not be treated as bogus. In the case of an expenditure incurred by a business entity, the AO is required to first examine whether the assessee possesses sufficient and necessary documentary evidences. Such evidences could be in the form of Bills and vouchers and evidences of actual receipt of goods or services. However, the AO has straightway concluded that the identity of the parties in whose

name advertisement expenses have been booked was not established by the appellant.

4.2.14 I do not consider that in case of an expenditure booked by the assessee, there is any initial onus on him to prove the identity of the parties by providing the PAN details etc. What is required is the availability of Bills and vouchers and these would themselves contain all the name and addresses of the party who had supplied goods or services. In the present case there is no finding that the AO has bothered to look at the documents such as bills and vouchers in respect of advertisement expenses maintained by the assessee. This is a search and seizure case and it is expected that authorities would be having access to the documents and books maintained by the assessee. The AO is required to ascertain if there is any deficiency in the maintenance of important documents like bills and vouchers in respect of the expenses claimed in the P & L A/c.

4.2.15 However, the AO seems to have called for details and advertisement expenses and in the circumstance of certain deficiencies, of not providing address & PAN, he has come to the conclusion that the identity of the parties has not been proved, as if that is requirement in the case of expenses debited to P & L A/c. No doubt, the identity of the party is certainly an important information. But the same prima facie would be available on all the Bills and vouchers relating to the expenditure booked by the assessee. I do not consider that the AO can issue a show- cause notice for disallowing the advertisement expenditure because the assessee has failed to prove the identity of the parties, as if this is a case of loan or cash credits.

4.2.16. During the assessment proceedings also the AO has asked the appellant to prove the identity, genuineness and creditworthiness of parties along with their reconciliation in the books of accounts. This is mentioned at 3rd Para of point No. 4 on page 2 of the assessment order. The relevant para of the assessment order is reproduced below for ready reference:-

> During the assessment proceedings, once again the assessee was asked to furnish the details of the advertisement expenses made party wise alongwith their names, addresses & PAN, details nature of the advertisement expenses, and whether TDS has been made on such expenses as per the questionnaire dated 23.10.2013. The assessee was also requested to prove the identity, genuineness and creditworthiness of parties along with their reconciliation in the books of accounts. In spite of hearing on various dates, the assessee could not furnish the said details.

> The assessee was requested to furnish the said details vide summon u/s 131 dated 10.02.2014. The statement of the assessee was recorded on 05.03.2014, but the assessee requested for further time to furnish the same shortly.

4.2.17. I am of the view that the very approach of asking the appellant to prove the identity, genuineness and creditworthiness of the parties to whom advertisement expenses have been paid is incorrect in the given circumstances. The AO has not at all examined the documents which are available with the assessee about the expenses incurred by him. Instead, as if it is a case of cash credits or loans, the AO has required the appellant to prove the identity, genuineness and creditworthiness of the parties. There is no requirement under the law that the assessee has initial onus to prove the identity, genuineness and creditworthiness of the parties from whom he has received goods and services. Therefore, this approach of the AO cannot be supported.

4.2.18 As regards the non-compliance to notice u/s 133(6) by the third parties, it is noted that the AO has come to conclusion that the transaction involved with the said third party could be bogus, merely because the party has chosen not to answer the AO's question. In the case of expenses incurred by the assessee and duly reflected in the books of accounts, the requirement is that the assessee should maintain proper bills and vouchers and evidences for having purchased the goods or for having incurred expenses. The initial onus cast upon him would stand discharged once he is able to show the entries in the books of accounts and provide supporting evidences as such as bills and vouchers. In the present case, it is not the case of AO that the appellant did not have necessary entries in the books of accounts regularly maintained by it. It is also not the AO's case that the necessary bills and vouchers were not found with the assessee. Therefore, I am of the view that on production of books of accounts and necessary bills and vouchers in support of the expenses debited to P & L A/c the initial onus cast upon the assessee stood discharged. If the AO had any misgivings about the genuineness of these expenses he was within his rights to conduct independent investigation on the matter. However, merely because he has failed in his attempt to contact the third party with whom the assessee had transaction (or obtain replies from him), he cannot come to the conclusion that the transaction itself was bogus.

4.1.19 In the present case, it is not the AO's case that the notices issued u/s 133(6) have been received unserved. This shows that the party was very much there at the addresses given by the assessee. However, the said party has not replied to the AO's query. The response of the AO should have

been to enforce compliance to his notice u/s 133(6). However, it would be completely incorrect to form a presumption against the assessee because of the inaction of the third party.

4.2.20 In the present case, the AO has made addition solely on the basis of non- compliance to notices u/s 133(6) by the third parties. This action of the AO cannot be sustained.

4.2.21. There is merit in the arguments of the AR and also his reliance on the case laws cited by him as detailed at para 4.2.8. Therefore, the addition of Rs. 2,03,82,486/- made u/s 69C of the Act is hereby deleted."

4. Aggrieved with such order of the CIT(A), the Revenue is in appeal before the Tribunal by raising the following grounds:-

"1. The order of Ld. CIT(A) is not correct in law and facts.

2. On the facts and circumstances of the case, the Ld. CIT(A) has erred in law in deleting the addition of Rs. 2,03,82,486/- made by the Assessing Officer on account of unexplained advertisement expenses.

3. The appellant craves leave to add, amend any/all grounds of appeal before or during the course of hearing of the appeal."

5. The ld. counsel for the assessee, at the time of hearing, filed the following legal ground under Rule 27 of the IT(AT) Rules, 1963:-

"1. That on the facts and circumstances of case, additions made under section 153A of the Income tax Act, 1961 is bad in law as the same were not made on the basis of incriminating material found during the course of search and seizure operation and the case of relevant assessment year has already been assessed under section 143(1) /143(3) which could not abate on the date of search"

5.1 Identical grounds have been raised for the other years also.

6. Referring to the decision of the Tribunal in the case of *ACIT vs. Devyani International Ltd. and vice versa*, he submitted that the Tribunal, under identical facts and circumstances, has admitted the ground raised under Rule 27 of the IT(AT) Rules, 1963 and in the absence of any incriminating material found during the course of search has quashed the proceedings u/s 153A of the IT Act. He submitted that since in the instant cases also no incriminating material was found during the course of search and the additions were made on the basis of entries already entered into the books of account, therefore, in view of the decision of Hon'ble Delhi High Court in the case of *CIT vs. Kabul Chawla reported in 61 taxmann.com 412*, the entire proceedings u/s 153A has to be quashed.

7. The ld. DR, on the other hand, supported the order of the Assessing Officer.

8. We have considered the rival submissions made by both the sides and perused the material available on record. A bare perusal of the assessment order shows that there is no mention of any incriminating material found during the course of search with respect to the unexplained advertisement expenses. There is also no incriminating material on which the Assessing Officer has made the other addition i.e., on account of disallowance u/s 14A of the IT Act. Therefore, it is quite clear that the addition in the instant case has been made on the basis of post search inquiry and the addition is not based on any incriminating material found during the course of search. Therefore, the decision of the Hon'ble Delhi High Court in the case of CIT vs. Kabul Chawla (supra) will be clearly applicable to the facts of the present case wherein it has been held that completed assessments can be interfered with by the Assessing Officer while making

assessments u/s 153A only on the basis of some incriminating material unearthed during the course of search which was not produced or not disclosed or not made known in the course of original assessments. Since the impugned assessment year is a completed assessment, therefore, the same, in our opinion, cannot be disturbed without any incriminating material found during the course of search. Similar are the cases for assessment years 2009-10 and 2010-11. Since the Revenue failed to bring on record any incriminating material found during the course of search, therefore, the completed assessments in the instant case could not have been disturbed. We, therefore, allow the legal ground raised by the assessee under Rule 27 of the IT(AT) Rules, 1963 and decide the same in favour of the assessee. Since the assessee succeeds on the legal ground, therefore, the appeal filed by the Revenue is dismissed.

9. In the result, all the above three appeals filed by the Revenue are dismissed.

The decision was pronounced in the open court on 20.11.2018.

Sd/-	Sd/-
(KULDIP SINGH) JUDICIAL MEMBER	(R.K. PANDA) ACCOUNTANT MEMFBER

Dated: 20th November, 2018

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Copy forwarded to:

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

Asstt. Registrar, ITAT, New Delhi