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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Decision: 08.01.2025*

\+ **ITA 426/2024**

DIVINE INFRACON PVT LTD .....Appellant

Through: Mr Salil Aggarwal, Senior Advocate with Mr Mr Madhur Aggarwal, Advocate.

Versus

PR COMMISSIONER OF INCOME TAX 3 .....Respondent

Through: Mr Vipul Agrawal, Senior Standing Counsel with Mr Gibran Naushad and Ms Sakshi Shairwal, Advocates.

CORAM:
HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE MR. JUSTICE TUSHAR RAO GEDELA

VIBHU BAKHRU, ACJ.

1. The appellant (hereafter *the Assessee*) has filed the present appeal under Section 260A of the Income Tax Act, 1961 (*hereafter the Act*) impugning an order dated 07.02.2024 passed by the learned Income Tax Appellate Tribunal (hereafter the *ITAT*) in ITA No.3067/Del/2014 in respect of assessment year (AY) 2009-10.

2. The Revenue had preferred the aforementioned appeal (ITA No. 3067/Del/2014) impugning an order dated 24.02.2014 passed by the learned Commissioner of Income Tax (Appeals) XXXII, New Delhi [hereafter *the CIT(A)*] in respect of AY 2009-10.

3. The Revenue had challenged the learned CIT(A)'s order, essentially, on two grounds. First, that the learned CIT(A) had erred in holding that the provisions of Section 153A of the Act are inapplicable as no incriminating material was found during the course of the search and seizure. And second, that the learned CIT(A) had erred in law in deleting an addition of ₹4,30,00,000/- made by the Assessing Officer (AO) as unexplained credit under Section 68 of the Act.

QUESTION OF LAW

4. The present appeal was admitted by an order dated 13.09.2024 on the following question of law:

> "1. Whether the Tribunal has grossly erred in allowing the appeal of the Revenue, wherein it gave the finding and adjudicated the matter only on legal ground and had given finding on ground no. 1 and have not adjudicated ground no.2, which was specifically raised by the revenue with regards to the addition of INR 4.30 crores so made by learned AO?"

5. However, after some arguments, the learned counsel for the parties agree that the question of law that arises for consideration of this court is not the question as framed but the following question:

> "Whether the Tribunal had erred in determining that the AO had rightly added an amount of ₹4,30,00,000/- to the income of the Assessee as unexplained income under Section 68 of the Act despite the learned CIT(A) not having rendered any finding regarding the said issue in the appeal preferred by the Assessee against the assessment order dated 28.03.2013.

FACTUAL CONTEXT

6. Briefly stated the relevant facts, which are necessary to address the aforesaid question, are as under:

6.1 The Assessee has engaged in the business of real estate development and running of hotels. A search and seizure operations under Section 132/133A of the Act were conducted by the concerned Income Tax Authorities in certain premises in connection with 'Jagat Group of cases, it's directors and other individuals and associates'. The Assessee's business premises located at Plot No.4, Sector-13, Dwarka City Centre, New Delhi was also searched under Section 132(1) of the Act in connection with Jagat Group of cases. Thereafter, the jurisdiction of the case of the Assessee was centralised with the AO, Central Circle-09, New Delhi under Section 127 of the Act, along with other cases.

6.2 The AO had issued a notice under Section 153A of the Act calling upon the petitioner to furnish the returns including in respect of AY 2009-10. The Assessee responded to the said notice by stating that its return filed under Section 139(1) of the Act on 28.10.2009 be considered its return for AY 2009-10.

6.3 The Assessee also objected to the initiation of proceedings under Section 153A of the Act, *inter alia*, on the ground that no incriminating material was found during the operations conducted under Section 132 of the Act and therefore, a notice under Section 153A of the Act could not be issued.

6.4 The AO did not accept the Assessee's contention and after examining the record, assessed the Assessee's total income for AY 2009-10 at ₹4,30,00,000/- as against NIL income declared by the Assessee. The AO had found that the Assessee had taken unsecured loans from three entities as under:

"S. No.	Name of entity	Amount (₹)
1	M/s Index Securities & Research Pvt. Ltd.	1,00,00,000/-
2	M/s Attractive Finlease Ltd.	30,00,000/-
3	M/s Trans National Growth Fluid Ltd.	3,00,00,000/-
Total		4,30,00,000/-"

6.5 The AO had determined that the said entries were accommodation entries from entities managed by Jain Brothers, who were engaged in the business of providing accommodation entries. Accordingly, the AO added of a sum of ₹4,30,00,000/- under Section 68 of the Act on account of unexplained cash credits to the income declared by the Assessee and, accordingly, framed the assessment order.

6.6 The Assessee preferred an appeal against the assessment order dated 28.03.2013 before the learned CIT(A) (Appeal No.321/2013-14). Although the Assessee had challenged the assessment order on several grounds but the learned CIT(A) decided the Assessee's appeal on a singular ground (Ground no.3.2), which was to the effect that the

provisions of Section 153A of the Act were inapplicable as no incriminating material had been found during the search proceedings.

6.7 Aggrieved by the said order dated 24.02.2014, the Revenue preferred an appeal before the learned ITAT – ITA No.3067/Del/2014 – which was allowed by the order dated 07.02.2024, which is impugned in the present appeal.

ANALYSIS

7. As noted above, the learned CIT(A) did not decide the Assessee's appeal on merits of the addition made by the AO. The Asseesee's appeal was decided on the singular ground that Section 153A was inapplicable as no incriminating material was found during the search conducted at the premises of the petitioner.

8. We consider it apposite to set out the following extract of the order dated 24.02.2014 passed by the learned CIT(A):-

> "9. **Ground nos. 3 to 3.1 and 3.3 to 3.9** relate to addition of Rs.4,30,00,000/- made by the Assessing Officer u/s 68 of the IT Act, 1961 on account of unexplained cash credits.
>
> 9.1 Before taking up the above grounds of appeal for adjudication, I consider it appropriate to first adjudicate **ground no. 3.2** which is legal ground and read as under:
>
> > *"3.2 That the learned Assessing Officer has failed to comprehend that, the provision of section 153A of the Act could not be applied in a case where no material has been found as a result of search and, since no evidence or material had been found in search, the instant addition made was outside the scope of section 153A of the Act."*

9.2 I have considered the issue raised in this ground of appeal. It is an admitted fact that a search and seizure operation was conducted at the appellant's premises at Plot no.4, Sector-13, Dwarka City Centre, New Delhi on 14.09.2010 and seized various papers, documents, bills etc. which were inventorized into different annexures. The vide receipt no. 99913801281009. Prior to the date of search, i.e. 14.09.2010 the time for issuing an intimation u/s 143(1), which is a summary assessment was issued and also the time limit for issuing notice u/s 143(2) has expired. However, pursuant to the search conducted u/s 132 at the appellant's premises on 14.09.2010, the initiation of proceedings u/s section 153A are triggered. This section was introduced into the Act by the Finance Bill, 2003 w.e.f. 1.06.2003 alongwith sections 153C and 153B. Section 153A provides for "assessment" in case of search or requisition it runs as under:

> *"Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, in the case of a person where a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A after the 31st day of May, 2003, the Assessing Officer shall-*
>
> *(a) issue notice to such person requiring him to furnishing within such period, as may be specified in the notice, the return of income in respect of each assessment year falling within six assessment years referred to in clause (b), in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139;*
>
> *(b) assess or reassess the total income of six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made.*

Provided *that the Assessing Officer shall assess or reassess the total income in respect of each assessment year falling within such six assessment years:*

Provided further *that assessment or reassessment, if any, relating to any assessment year falling within the period of six assessment years referred to in this [sub-section] pending on the date of initiation of the search under section 132 or making of requisition under section 132A, as the case may be, shall abate."*

10.1.4 The second proviso to section 153A provides that assessment or re-assessment if any, relating to any assessment year falling within the period of six years referred to in section 153A, pending on the date of initiation of search u/s 132 or requisition u/s 132A shall abate.

10.1.5 The three sections introduced w.e.f. 1.06.2003 replaced the "post search Block Assessment Scheme" in respect of any search section 132 or requisition u/s 132A made after 31.05.2003. The new scheme was explained by the CBDT in the circular no.7 of 2003 dated 5.09.2003.

10.1.6 In the present case the ITR was filed on 28.10.2009 and search u/s 132 was conducted on 14.09.2010. It means that no proceedings were pending on the date of search, and the Assessing Officer cannot initiate any action on original return i.e. issuance of notice u/s 143(2) of the Act or any other action as time under any other actions elapsed. This section required to be read down to justify notice only where search or either material that lead to the prima-facie inference of liability. In the present case, the question is whether any incriminating material was found in the course of search in the case of the appellant. There were certain documents, bills, papers etc. found and seized in the course of search pertaining to the year under consideration. However, in the course of the assessment proceedings u/s 153A, the transactions found recorded on these seized papers were duly found recorded in the books of accounts of the appellant by the Assessing Officer, as such he did not make any addition on the basis of these documents. Therefore, the transactions that were found recorded on the

seized material was taken into account in the returns filed before search and cannot be treated as incriminating material in the course of search. The factum that the incriminating material has not come out of the seized material found in the course of search is evident as they were already available in the books of account of the appellant and duly taken into account in the returns filed before the Assessing Officer on 28.10.2009. The seized material was verified by the Assessing Officer and hence he was justified in not accepting the seized material as not incriminating.

10.1.7 Due to the seizure of certain material which is mentioned above, the Assessing Officer is empowered to re-open the proceedings and re-assess the total income. However, no addition was made by the Assessing Officer on the basis of the seized material that was collected during the course of search as the transactions on the seized material duly found to be recorded in the books of account and disclosed in the original return filed on 28.10.2009.

10.1.8 Reliance is placed in the case of Anil Kumar Bhatia & Others, the Hon'ble Delhi Tribunal held that in respect of an assessment u/s 153A, where processing of returns u/s 143(1)(a) stood completed in respect of returns filed in due course before search and no material is found in search thereafter, no addition can be made. In appeal preferred by the department against this order of the Tribunal, the Hon'ble Delhi High Court was pleased to hold that where assessment order had already been passed in respect of all or any of those six assessment years either u/s 143(1)(a) or section 143(3) prior to initiation of search or requisition, still Assessing Officer is empowered to reopen those proceedings u/s 153A without any fetters and re-assess total income taking note of undisclosed income if any unearthed during search. In the present case even though seized material was there, no undisclosed income was unearthed from the same by the Assessing Officer.

10.1.9 In the case of All Cargo Global Logistics Ltd. vs. DCIT reported in (2012) 137 ITD 28, the Hon'ble Special Bench ITAT, Mumbai has considered the scope of section 153A assessment or reassessment in a case of pending assessment and in the concluded assessment and held as under:

> *"After considering the law on the subject in a detailed manner, the Special Bench has held that whether in a case where pursuant to issue of notice under section 153A assessments are abated, Assessing Officer retains original jurisdiction and jurisdiction conferred on him under section 153A for which assessments will be made for each of six assessment years separately. In other cases, where the assessments have already been made, assessment under section 153A will be made on the basis of incriminating materials found in the course of search and not produced in the course of original assessment. The Special Bench held that a reassessment is possible in the case of concluded assessments only if the search has brought out incriminating materials against the assessee. Where no incriminating material was found out and where assessments have already been completed, assessment under section 153A does not allow the Assessing Officer to reassess the income already assessed earlier."*
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> 10.1.10 Therefore, in short, to summarize, no addition was made on the basis of the seized material in the present case by the Assessing Officer which is as good as no incriminating material found in the course of search as the transactions on the said material was found recorded in the books of account of the appellant and disclosed in the return filed before the Assessing Officer, prior to the search. However, this does not restrict the Assessing Officer not to enquire other issues u/s 153A. In view of the above discussion, there appears to be merit in the contentions raised by the appellant in this ground of appeal."

9. It is apparent from the above that the learned CIT(A) did not consider the Assessee's challenge to the addition on merits and did not adjudicate whether the AO had erroneously considered the unsecured loans as accommodation entries. The Assessee's case that no addition could have been made under Section 68 of the Act was, thus, not

addressed by the learned CIT(A). The Assessee's appeal was decided on the singular finding that Section 153A of the Act was inapplicable.

10. The Revenue appealed the order of the learned CIT(A) on two grounds. The same, as noted in the impugned order, are reproduced below:

> "1. Whether Commissioner of Income Tax (Appeals) erred in law and on facts in upholding the ground of the assessee that provision of section 153A of the Act could not be applied in a case where no material has been found as a result of search and since no evidence or material had been found on search the instant addition made was outside the scope of section 153A of the Act.
>
> 2. That the Commissioner of Income Tax (Appeals) erred in law and on facts of the case in deleting the addition of Rs.4,30,00,000/- made by the AO on account of unexplained cash credit u/s 68 of the I.T. Act."

11. The learned ITAT found that the AO was not precluded from framing an assessment under Section 143(3) of the Act read with Section 153A of the Act as the assessment for AY 2009-10 had abated.

12. Insofar as the merits of the additions made by the AO is concerned (Ground No.2 urged by the Revenue before the learned ITAT), the learned ITAT found in favour of the Revenue and affirmed the additions aggregating ₹4,30,00,000/- as unexplained cash credit under Section 68 of the Act.

13. It is apparent from the above that the learned ITAT had proceeded to decide a ground that did not arise from the order passed by the learned CIT(A). As noted above, the learned CIT(A) had decided

the Assessee's appeal confined to the question whether Section 153A of the Act was applicable in the given facts; the learned CIT(A) had not decided the Assessee's challenge to the addition of ₹4,30,00,000/- under Section 68 of the Act. Thus, clearly the question whether the said addition had been rightly made by the AO did not arise for consideration of the learned ITAT notwithstanding that the ground to the aforesaid effect was raised by the Revenue.

14. Mr Aggarwal, the learned Senior Counsel appearing for the Assessee had also contended that no arguments on the said issue had been advanced before the learned ITAT by either side. The impugned order also does not indicate that rival contentions in this regard had been considered.

15. Thus, in effect, the Assessee's challenge to the addition of ₹4,30,00,000/- under Section 68 of the Act had remained unaddressed by the learned CIT(A) but had been affirmed by the learned ITAT, without the same arising from the order passed by the learned CIT(A).

16. The learned ITAT has clearly erred in entering into the said controversy without the learned CIT(A) rendering any finding on merits in regard to the petitioner's appeal. The question of law as framed is decided in favor of the Assessee and against the Revenue.

17. In view of the above, we consider it apposite to set aside the impugned order passed by the learned ITAT to the limited extent that the learned ITAT had determined the merits of the addition of ₹4,30,00,000/- under Section 68 of the Act, and restore the Assessee's

appeal before the learned CIT(A) on the grounds that were not decided by the learned CIT(A). It is so directed.

18. We clarify that the issue whether the AO could have framed an assessment for AY 2009-10 stands concluded in favor of the Revenue and the scope of remand to the learned CIT(A) is limited to examining the remaining grounds as urged by the Assessee.

19. The appeal is disposed of in the aforesaid terms.

VIBHU BAKHRU, ACJ

TUSHAR RAO GEDELA, J

JANUARY 08, 2025
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