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

+ ITA 320/2023

PR. COMMISSIONER OF INCOME TAX(CENTRAL)-2

.....Appellant

Through: Mr. Sanjay Kumar, SSC along  
with Ms. Easha Kadian, JSC.

versus

NAGAR DAIRY PVT. LTD. ....Respondent

Through: Mr. Vidhan Jain, Adv.

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+ ITA 326/2023

PR. COMMISSIONER OF INCOME TAX (CENTRAL)-2

.....Appellant

Through: Mr. Sanjay Kumar, SSC along  
with Ms. Easha Kadian, JSC.

versus

NAGAR DAIRY PVT. LTD. ....Respondent

Through: Mr. Vidhan Jain, Adv.

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+ ITA 341/2023

PR. COMMISSIONER OF INCOME TAX (CENTRAL)-2

.....Appellant

Through: Mr. Sanjay Kumar, SSC along  
with Ms. Easha Kadian, JSC.

versus

NAGAR DAIRY PVT. LTD. ....Respondent

Through: Mr. Vidhan Jain, Adv.

4

+ ITA 369/2023

PR. COMMISSIONER OF INCOME TAX (CENTRAL)-2

.....Appellant



Through: Mr. Sanjay Kumar, SSC along  
with Ms. Easha Kadian, JSC.

versus

NAGAR DAIRY PVT. LTD.

.....Respondent

Through: Mr. Vidhan Jain, Adv.

**CORAM:**  
**HON'BLE MR. JUSTICE YASHWANT VARMA**  
**HON'BLE MR. JUSTICE RAVINDER DUDEJA**

**ORDER**  
**18.09.2024**

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**CM APPL. 33418/2023 (14 Days Delay) in ITA 341/2023**

Bearing in the mind the disclosures made, the delay of 14 days in filing the appeal is condoned.

The application shall stand disposed of.

**ITA 320/2023, ITA 326/2023, ITA 341/2023 & ITA 369/2023**

1. Since the respondents are duly represented, no further steps need be taken.
2. The Principal Commissioner of Income Tax impugns the order of the **Income Tax Appellate Tribunal**<sup>1</sup> dated 24 November 2022 and has posited the following questions of law for our consideration:-

“A. Whether the Ld. ITAT has erred in law on the facts of the case in confirming the order of the Ld. CIT(A) on account of unexplained purchases amounting to Rs.1,77,31,37,509/- while holding that the books of accounts of the assessee were defective?

B. Whether the Ld. ITAT has erred in law on the facts of the case in not upholding the action of the AO in disallowance of Rs.1,08,34,15,088/- under Section 40A(3) of the Act and in holding that no addition was made by the AO under Section 40A(3) whereas the AO had categorically mentioned this addition in order and also initiated penalty under Section 271(1)(c) of the Act, though no separate addition was made considering the

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<sup>1</sup> ITAT



disallowance of higher amount on account of bogus purchases?

C. Whether the Ld. ITAT has erred in law on the facts of the case in adjudicating the addition made under Section 40A(3) of the Act when the assessee had not taken any ground in this respect before the Ld. CIT(A)?

D. Whether, the Ld. ITAT has erred in law on the facts of the case in not sustaining the addition made by the Assessing Officer of Rs.72,18,132/- on the issue of Deemed Dividend even when the provisions of the Section 2(22)(e) of the Act are clearly applicable?"

3. We note that insofar as the deletions made by the **Commissioner of Income Tax (Appeals)<sup>2</sup>** and which form subject matter of the first question, the findings of the CIT(A) had been reproduced in the order of the Tribunal as follows:-

“14. The Id. CIT(A) has summoned all the parties u/s 131 who did not turn up during the proceedings u/s 153C before the AO. The statement of the parties were recorded on oath in the presence of the AO concerned. All the parties have deposed that they had indeed supplied milk to the assessee and payments have been received in cash as well as cheque. Hence, the Id. CIT(A) came to a conclusion that the purchases as alleged by the Assessing Officer, cannot be treated as bogus. For the sake of ready reference, the order of the Id. CIT(A) is reproduced as under:

*"(xvii) All the parties who did not turn up during 153C proceedings were summoned u/s 131 by the undersigned and their statements were recorded in the presence of the AO concerned AO, Shree Rajesh Kumar, ACIT, Central Circle-15, New Delhi who could not find any anomalies or falsities or contradictions in their statements even though all such parties deposed on oath that they had supplied milk to the appellant both in cash as well as cheque. Thus the identity, genuineness and creditworthiness of all the parties in respect of whom sales (purchase by appellant) were held to be bogus by the AO u/s 153C became accomplished facts.*

*(xviii) Since under the overall circumstances, the correctness of the appellant's claim had been established by furnishing relevant bills, bank statements and considering the fact that without purchases of such material and job charges incurred, the manufacture could not have been possible, the impugned addition treating purchases as bogus was not justified.*

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<sup>2</sup> CIT(A)



(xix) *The erstwhile AO forgot to reject the books of account of the appellant. Similarly, the sales were also not doubted. It is an admitted position that substantial amount of sales made were found to be genuine upon verification in the earlier and immediately succeeding AY i.e. 2012-2013.*

(xx) *There were confirmation letters filed by the suppliers alongwith copies of invoices for sale.*

(xxi) *There is substance in the argument of the ld. A/R that after completion of the transactions the appellant was having no control over the suppliers from whom claimed purchases were made nor was it justified to expect control of the appellant over the suppliers.*

(xxii) *The AO did not come up with any positive evidence to establish that the goods were not purchased from those parties but from someone else and that the amount paid by the appellant in consideration against the supply of milk to them were ultimately returned by them to the appellant. Merely because the appellant could not produce the suppliers on an earlier occasion during the course of assessment proceedings u/s 153C or in some cases the parties did not respond to the summons served upon them, it did not automatically lead to the conclusion beyond doubt that the purchases claimed and the suppliers were not genuine.*

(xxiii) *It was in the knowledge of the revenue that the said suppliers were the income tax assesseees. The revenue, apart from issuing notices under section 131 at the instance of the appellant did not pursue the matter further. There was no effort made by the AO erstwhile to pursue the so-called alleged suppliers. In those circumstances, the appellant could not do any further. In the premises the appellant had discharged the burden that lay on him during 153C proceedings.*

(xxiv) *In respect of suppliers upon whom notices could not be served, it was found that they had changed their places of business and new addresses had been furnished along with full particulars as to purchase etc. Thus, the identities of all the parties had been proved. In respect of non-compliance with notices under section 133(6) of the Act, the Assessing Officer could have taken appropriate action against the defaulters. It was not the case of the Assessing Officer that the Appellant did not make any purchases. Nothing was pointed out to show that any purchases were inflated, or bogus."*



4. We take note of the significant findings of fact which stand recorded in clause (xix) and (xx) of the order passed by the CIT(A). Bearing in mind the aforesaid, the Tribunal has ultimately come to hold as follows:-

“15. During the hearing before us, the fact of production of the parties by the Id. CIT(A) in the presence of the Assessing Officer has not been in dispute. The fact that the parties supplied milk to the assessee company could not be disputed. The AO has also held that milk purchases were made not from farmers but through the intermediaries of the milk traders, thus contradicted the fact that the purchases remain unverifiable. Under such circumstances, the action of the Assessing Officer resorting to disallowance of entire purchases is bad in law. Since, the identity, genuineness and supply-worthiness of all the parties has been proved by the way of statement recorded u/s 131 of the Act and all the suppliers were duly paid, we refrain from interfering with the order of the Id. CIT(A) on this issue. Accordingly, Ground No. 1 & 2 of the Revenue's Appeal are dismissed.”

We find no ground to interfere with the view as taken.

5. That takes us to the aspect of the deletions which were made in terms of Section 40A(3) of the **Income Tax Act, 1961**<sup>3</sup>. While dealing with the ambit of the aforesaid provision read along with Rule 6DD of the **Income Tax Rules, 1962**<sup>4</sup>, the Tribunal has upheld the view taken by the CIT(A) by essentially holding that since the genuineness of the purchases had been duly proved, there was no occasion for deletions being made. It has also held that the provisions of Section 40A(3) were consequently not attracted.

6. Prima facie, we find ourselves unable to sustain that finding bearing in mind the provisions contained in Rule 6DD(e) and which exempts payments made to a cultivator, grower or producer of articles, produce or products. Admittedly in the facts of the present case, the milk was procured from intermediaries.

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<sup>3</sup> Act

<sup>4</sup> Rules



7. Apart from the above, we note that Rule 6DD does not incorporate an overarching provision which may enable the restrictions of Section 40A(3) being lifted on the genuineness of a transaction being established.

8. That only leaves us to examine the fourth question and in respect of which the Tribunal has ultimately and on consideration of the provisions made in Section 2(22)(e) held as follows:-

“29. On appeal, the CIT(A) has deleted the addition on account on deemed dividend u/s 2(22)(e) in the hands of the appellant. The CIT(A) has observed on Page No. 344 of the appellate order that,

*“.....the AO was totally unwarranted in adding the unsecured loan, treating It as deemed dividend u/s 2(22)(e) when the appellant company was not a registered shareholder in M/s AIMS Promoters Pvt. Ltd. Even otherwise the above issue was decided by me against the appellant's company director Shree Malook Nagar, upholding the addition in the hands of Shree Malook Nagar, Having regard to the above fact the same amount is not considered fit for addition in two hands.”*

30. The ld. DR vehemently relied on the Assessment Order.

31. It is found from the balance sheet the assessee company has to pay Rs. 1,15,40,789/- to M/s AIMS Promoters Private Limited as advance taken from said concern and Shri Malook Nagar was having 84.11% share holding in M/s AIMS Promoters Private Limited and 66.81% in the assessee company. The assessee company did not hold any shares in the AIMS Promoters Pvt. Ltd. Therefore, the assessee Company neither the registered nor the beneficial share holders of M/s AIMS Promoters Pvt. Ltd. In this regard the assessee has relied upon the judgment rendered in the case of Rainbow Promoters Ltd. vs. ACIT [2022] 139 taxmann.com 332 (Delhi - Trib.) wherein it has been held that,

*“36. .... As the assessee is not share holder of payer group companies who paid loan/advance to the assessee and considering the legal position that dividend is to be received by shareholder only, the amount received by the assessee is not to be treated as deemed divide in the hands assessee.*

*Moreover, this view is fully supported by decision of the Hon'ble Delhi High Court in case of Ankitech (P.) Ltd. (supra).”*



32. In view of the above discussion, we do not find any infirmity or error committed by Ld. CIT(A) in deleting the addition on account of deemed dividend u/s 2(22)(e) of the Act. Accordingly, we dismiss the Ground No. 7 of the Revenue.

**33. In the result, Appeal of the Revenue in ITA No. 5474/Del/2015 and the Cross Objection No. 29/De1/2016 filed by the Assessee are partly allowed.”**

We find that no substantial issue of law arises therefrom.

9. We consequently admit the appeal on the following question of law:

A. Whether the Tribunal has erred in not upholding the action of the **Assessing Officer**<sup>5</sup> in disallowing INR 1,08,34,15,088/- under Section 40A(3) and in holding that no addition was made by the AO under Section 40A(3) whereas the AO had categorically mentioned this addition in the order and had also initiated penalty proceedings under Section 271(1)(c), though no separate addition was made considering the disallowance of higher amount on account of bogus purchases?

10. List again on 07.01.2025.

**YASHWANT VARMA, J**

**RAVINDER DUDEJA, J**

**SEPTEMBER 18, 2024/RW**

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<sup>5</sup> AO