आयकर अपीलीय अधिकरण, कटक न्यायपीठ,कटक

IN THE INCOME TAX APPELLATE TRIBUNAL CUTTACK BENCH CUTTACK

BEFORE SHRI N.S.SAINI, AM & SHRI PAVAN KUMAR GADALE, JM

ITA No.204/CTK/2018

(**निर्धारण वर्ष /** Assessment Year :2011-2012)

Basukinath Roadways Pvt. Ltd., Om Niwas, Barsuan-770041 Dist-Sundergarh(Odisha)	Vs.	Pr. CIT(Central), Direct Tax Building, M.V.P. Colony, Visakhapatnam-830017
स्थायी लेखा सं./जीआइआर सं./PAN/TAN No. : **AAECB 4165 B**		
(अपीलार्थी **/Appellant**)	..	(प्रत्यर्थी / **Respondent**)

निर्धारिती **की ओर से** /Assessee by : Shri P.K.Mishra, AR

राजस्व **की ओर से** /Revenue by : Shri S.M.Keshkamat, CITDR

सुनवाई की तारीख **/ Date of Hearing : 15/11/2018**

घोषणा की तारीख**/Date of Pronouncement 05/12/2018**

आदेश / O R D E R

Per Shri Pavan Kumar Gadale, JM:

This is an appeal filed by the assessee against the revision order u/s.263 of the Act passed by the Pr.CIT(Central), Visakhapatnam, dated 20.03.2018.

2. The assessee has raised the following grounds :-

> *1. That on the facts and in the circumstances of the case, the Ld. Pr. CIT (Central) has erred in law by invoking section 263 with a presumption that the assessment order passed U/s-153A has erroneous and prejudicial to the interest of the revenue particularly when the assessment was unabated and no incrementing seized material was found with respect to the proposed addition of Rs.35,79,213/- (Shortage of material debited in P&L account). Hence, the order passed U/s-263 is bad in law and needs to be annulled.*
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> *2. That on the facts and in the circumstances of the case, the Ld. Pr. CIT (Central) has erred in law by rejecting the argument of the assessee that "assessment has to be completed in course of proceeding U/s-153A based on seized material only" (at para-8 last line) is not correct proposition of law and hence the order passed by the Pr. CIT (Central) U/s-263 needs to be annulled.*

3. That on the facts and in the circumstances of the case, the Ld. Pr. CIT (Central) has erred in presuming that the expenditure of Rs.35,79,213/- debited to the Profit & Loss A/c is not allowable expenses U/s.37(1) while framing the assessment u/s.153A is not proper in the eye of law and hence the order setting aside the assessment is bad in law and needs to be annulled.

4. That the order of the Ld. Pr. CIT (Central) being not based on the facts of the case of the appellant and being contrary to law, should hence be quashed and the appellant Company be given such relief or reliefs as prayed for.

5. That the appellant craves leave to amend, alter, modify, substitute, add to, abridge and/ or rescind any or all of the above grounds.

3. The facts in brief are that the assessee is engaged in the business of transportation of goods & materials. There was a search and seizure operation u/s.132 of the Act on 25.02.2014 in the business and residential premises of the assessee. In the search operations certain materials and documents were seized and impounded. Accordingly, the assessment proceedings u/s.153A were initiated. In response to the notice u/s.153A of the Act, issued on 15.01.2016, the assessee-company disclosed its total income at Rs.1,08,48,050/- for the A.Y.2009-10. Subsequently, the assessment u/s.153A r.w.s.143(3) of the Act was completed on 31.03.2016, determining the total income at Rs.15,84,80,150/-.

4. Subsequently, the Pr. CIT noticed from the assessment records of the assessee for A.Y. 2009-2010 that the assessee had debited an amount of Rs.35,79,213/- in the P & L account towards shortage of materials for which no reasons for shortage of materials was recorded. The Pr. CIT observed that the expenditure claimed towards shortage of goods/material during the transportation is not an allowable expenditure

u/s.37(1) of the Act. Therefore, the Pr. CIT held that the assessment order passed by the AO was erroneous in so far as it is prejudicial to the interest of Revenue. Further the Pr. CIT relied on the decision of Hon'ble Kerala High Court in the case of E.N.Gopakumar vs. CIT [2017] 390 ITR 131 (Ker.), and set aside the assessment order u/s.153A r.w.s.143(3) of the Act and directed the AO to re-do the same afresh after examining the issue in detail.

5. Aggrieved by the order of Pr. CIT, the assessee filed an appeal before Tribunal.

6. Before us, ld. AR reiterated the submissions made in the revision proceedings and submitted that the expenditure as claimed in the profit and loss account in respect of shortage of material is an allowable expenditure u/s.37(1) of the Act as the assessee's primary business is transportation of iron ore and other minerals to various mines to railway siding and loading of the same material into railway rack for onward transportation. In the course of entire process of handling, loss of material is inevitable because of loading/unloading and again loading. Therefore, the difference as claimed as expenditure and in case of shortage of material the customers deducts the cost of materials from the bills raised by the assessee and claimed as deduction. Further the assessee's assessment u/s.143(3) of the Act was completed on 16.12.2011 and the search was initiated in 2014 whereas the assessment order u/s.153A r.w.s.143(3) of the Act was passed on 31.03.2016. In the original assessment u/s.143(3) of the Act these facts were verified by the AO and

completed the assessment. Further the assessment was concluded prior to the search and no incriminating material in respect of shortage of material was found in the course of search and, therefore, the order passed by the Pr. CIT is not in order and prayed for allowing the appeal.

7. Contra, ld. DR relied on the order of Pr. CIT and supported the findings of Pr. CIT.

8. We have heard the rival submissions and perused the material on record. The sole crux of the issue is as to whether the revision order passed u/s.263 of the Act satisfies the twin conditions being erroneous and prejudicial to the interest of Revenue. The contentions of ld. AR that the type of expenditure as referred by the Pr. CIT is inevitable to the assessee for claim and has been claiming from the earlier years and the department has been accepting the same. Further the assessee, in the course of earlier assessment u/s.143(3) dated 16.12.2011 the AO has issued notices u/s.143(2) & 142(1) of the Act and questionnaire to the assessee and in compliance to the submissions the AO having satisfied with the submissions as per the questionnaire has completed the assessment and assessed income of Rs.1,08,48,050/- with disallowances, whereas we found that the AO subsequently upon the search proceedings has called for the various information in respect of share application money and also the cash balances and whereas the same has been added to the income as determined u/s.143(3) of the Act on 16.12.2011 and assessed the total income at Rs.1,08,48,050/-. The Pr. CIT on the issue of orders passed by the AO as erroneous and prejudicial

to the interest of Revenue has made observation that the assessee has debited expenses towards the shortage of material and is of the opinion that assessee's primary business is transportation of iron ore and other minerals to various mines to railway siding and loading of the same material into railway rack for onward transportation. Further in the course of entire process of handling, loss of material is inevitable because of loading/unloading and again loading. Therefore, the difference as claimed as expenditure and in case of shortage of material the customers deducts the cost of materials from the bills raised by the assessee and the same was brought to the knowledge of the AO in the earlier years. Ld. AR further submitted that in the search proceedings in respect of shortage material no incriminating material was found and, therefore, the matter cannot be considered in the revision proceedings and the order of Pr. CIT does not satisfy the twin conditions of erroneous and prejudicial to the interest of revenue, whereas ld. DR relied on the order of Pr. CIT and could not bring any cogent evidence that the expenditure does not satisfy the business conditions of wholly and exclusively for the purpose of business. Ld. AR's contention that this is a normal expenditure incurred wholly and exclusively for the purpose of business and has to be allowed under the provisions of Section 37(1) of the Act, which the department has been considering from the earlier years. We also found that in the earlier assessment u/s.143(3) of the Act the AO having called for the information has made the addition and completed the assessment after satisfaction and observations. The question now revolves on that the

assessee has been incurring such expenditure from the earlier years as envisaged before us considering the type of business activity and claim of expenditure. But after the search proceedings on 25.02.2014 the AO has issued notices u/s.153A of the Act and based on the material available has made the addition in respect of share application money which is not disputed in the present appeal by the department. The Pr. CIT has observed that the assessee has no eligibility for the claim of expenditure. We are of the opinion on the subject matter of shortage of expenses envisaged by the ld. AR as per the questionnaire in the original assessment proceedings, where the assessee has satisfied the availability of evidence and the assessment was completed. We also found the substance in the submissions of ld. AR that the expenditure claimed by the assessee considering the business is normal in nature and the business operations of expenditure is arising out of shortages, which has already been submitted and completed assessments can be interfered with by the Assessing Officer while making the assessment under section 153A of the Act only on the basis of incriminating material unearthed during the course of search which are not produced.

9. We find that the disputed issue in respect of no incriminating material found during the course of search, was discussed by the coordinate bench of the Tribunal in the case of Midas Capital Pvt. Ltd. Vs. ACIT, IT(SS)A No.04&05/CTK/2018, order dated 23.03.2018 for the assessment years 2011-2012 & 2012-2013, where the decision relied on

by the CIT(A) of Hon'ble Kerala High Court was considered by the coordinate bench and observed as under :-

> *"23. We have heard rival submissions and perused the orders of lower authorities and materials available on record. In the instant case, the assessee originally filed its return of income on 29.9.2011 for the assessment year 2011-12 and on 27.9.2012 for the assessment year 2012-13 disclosing total income at Rs. 9,56,200/- and Rs.2,95,840/- and MATY of Rs.21,90,642/-.*
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> *24. In pursuance to search conducted on 6.8.2014, proceedings u/s.153A was initiated in the case of the assessee for the assessment years under consideration. In pursuance to these proceedings, the impugned orders of assessment was passed on 28.12.2016, where, additions of Rs.9,94,50,000/- and Rs.15,00,000/- were made on account of unexplained cash credit by invoking the provisions of section 68 of the Act. It is not in dispute that the time limit of issuance of notice u/s.143(2) of the Act with reference to the original return filed by the assessee on 29.9.2011 for the assessment year 2011-12 and on 27.9.2012 for the assessment year 2012-13, respectively expired on 30.9.2012 for the assessment year 2011-12 and on 30.9.2013 for assessment year 2012-13 and no such notice was issued to the assessee by the said dates. Thus, the original return of income became final on 30.9.2011 and 30.9.2012 for the assessment years 2011-12 and 2012-13, respectively i.e. before the date of relevant search. In other words, the assessment years under consideration were not abated.*
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> *25. Further, the other related facts which have been noticed are that the assessee received Rs.9,94,50,000/- by cheques for the assessment year 2011-12 and Rs.15,00,000/- for the assessment year 2012-13 on account of sale proceeds of investment and credited in the books of account of the assessee in the relevant*

assessment years. The above facts were disclosed in the return of income filed on 29.9.2011 and 27.9.2012.

26. On the other hand, ld CIT DR is of the view that in a proceeding u/s.153A of the Act even in the case of unabated assessment, addition can be made dehors incriminating search material. Ld D.R. in support of his above view relied upon the following decisions.

(a) E.N. Gopakumar v. Commissioner of Income-tax (Central) [2016] 75 taxmann.com 215 (Kerala):

"Section 153A, read with section 132, of the Income-tax Act, 1961 - Search & seizure - Assessment in case of (Scope of) - Whether for issuance of a notice under section 153A(1)(a), it is not necessary that search on which it was founded should have necessarily yielded any incriminating material against assessee or person to whom such notice is issued - Held, yes - Whether, therefore, assessment proceedings generated by issuance of a notice under section 153A(1)(a) can be concluded against interest of assessee including making additions even without any incriminating material being available against assessee in search under section 132 on basis of which notice was issued under section 153A(1)(a) Held, yes [Paras 7 and 8] [In favour of revenue). "

(b) Commissioner of Income-tax Central, Kanpur v. Raj Kumar Arora [2014] 52 taxmann.com 172 (Allahabad) :

"Section 153A, read with section 143 of the Income-tax Act, 1961 - Search and seizure - Assessment in case of (Scope of assessment) - Assessment year 2000-01 - Whether Assessing Officer has power to reassess returns of assessee not only for undisclosed income, which was found during search operation but also with regard to material that was available at time of original assessment - Held, yes [Para 11] [In favour of revenue/Matter remanded]"

27. On the other hand, the AR of the assessee relied upon the following decisions:

(i) (1) CIT Vs. Continental Warehousing Corporation (Nhava Sheva) Ltd.

(2)All Cargo Global Logistics Ltd. (2015) 374 1TR 645 (Bom), where it was held that the notice u/s.153A of the Act was founded on search. If there was no incriminating material found during the search then the Tribunal was right in holding that the power u/s.153A of the Act being not expected, to be exercised routinely, should be exercised if the search revealed any incriminating material. If that was not found then in relation to the. second phase of three years, there was no warrant for making an order within the meaning of this provision, (ii) Jai Steel (India) Ltd. Vs. ACIT, [2013] 36 axmann.com 523 (Raj.HC), wherein the Hon'ble Rajasthan High Court has held that the plea raised on behalf 0 the assessee that as the first proviso provides for assessment or reassessment of the total income in respect of each assessment year falling within the six assessment years, is merely reading the said provision in isolation and not in the context of the entire section. The words 'assess' or 'reassess' have been used at more than one place in the section and a harmonious construction of the entire provision would lead to an irresistible conclusion that the word 'assess' has been used in the context of an abated proceedings and 'reassess' has been used for completed assessment proceedings, which would not abate as they are not pending on the date of initiation of the search or making of requisition and which would-also necessarily support the interpretation that for the completed assessments, the same can be tinkered only based on the incriminating material found during the course of search or requisition of documents.

(iii) Pr.CIT Vs. Meeta Gutgutia Prop. M/s.Fems "N" Petals [2017) 395 ITR 526 (Del), wherein it was held that it is only if during the course of search u/s.132 of the Act incriminating material justifying the re-opening of the assessments for six previous years is found

that the invocation of section 153A qua search of the assessment years would be justified.

iv) In case of Pr. CIT-2, Kolkata Vs. M/s Salasar Stock Broking Ltd., G.A.No.1929 of 2016 (ITAT No.264/Kol/2016), order dated 24.08.2016, the Hon'ble Kolkata High Court has held as under :-

"We are in agreement with the views expressed by the Kamataka High Court that incriminating material is a pre- requisite before power could have been exercised under section 153C read with section 153A.

In the case before us, the assessing officer has made disallowances of the expenditure, which were already disclosed, for one reason or the other. But such disallowances were not contained under section 153C read with section 153A. The disallowances made by the assessing officer were upheld by the CIT(A) but the learned Tribunal deleted those disallowances.
In that view of the matter, we are unable to admit the appeal. The appeal is, therefore, dismissed."

28. We find that none of the decision relied upon by either of the parties are of jurisdictional High Court. It is a well settled position of law that when there are conflicting decisions of High Courts none of which is the jurisdictional High Court, then the decision in favour of the assessee should be followed. For this, we derive support from the decision of Hon'ble supreme Court in the case of CIT vs. Vegetable Products Ltd. 88 ITR 192 (SC). Therefore, we are of the considered view that in an assessment made u/s.153A of the Act for an assessment year for which assessment has not been abated, then the jurisdiction of the Assessing Officer to make addition in such an assessment, is confined to such incriminating search material and no addition dehors the search material can be made.

29. In the instant case, we find that during the course of the relevant search only tally data of the assessee company was found

which shows that the assessee has received cash credit from (i) Runicha Merchants Pvt Ltd., (ii) Sankalp (iii) Scope Vyapar, Event Developers Pvt ltd.,(v) Scope Vyapar, Harman Hire Purchase Pvt Ltd.(vi) Scope Vyapar Sarwati Vincom Ltd., (vi) Scope Alfha Properties Pvt Ltd., (vii) Signet Vinimay Pvt Ltd., (viii) Signet Country Wide Tradecom Pvt Ltd., (ix) Srijan Vypar Pvt Ltd., (x) Srijan Vyapar Caplin Marketing pvt Ltd., (xi) Srijan Tantia Agrochemicals Pvt Ltd.,(xii) West Line, Economy Advisory Services Pvt Ltd., (xiii)Winall Vinimay Pvt Ltd., (xiv) Winall Electro Cock Fuels Pvt Ltd and (xv) Yogiraj aggregating to Rs.9,94,50,000/- for the assessment year 2011-12 and Rs.15,00,000/- for the assessment year 2012-13.

30. In the instant case, we find that the addition was made by the Assessing Officer on the sole ground that amount received on sale of investment of Rs.9,94,50,000/- for the assessment year 2011-12 and Rs.15,00,000/- for the assessment year 2012-13 were unexplained cash credit of the assessee. Thus, there is not reference to any search material by the Assessing Officer based on which such additions were made in the hands of the assessee. Therefore, we set aside the orders of lower authorities and delete the addition of Rs.9,94,50,000/- for the assessment year 2011-12 and Rs.15,00,000/- for the assessment year 2012-13, respectively and allow the grounds of appeal of the assessee."

10. Accordingly, we, have considered the facts of the case and the observations of Pr. CIT and the decision of the coordinate bench of the Tribunal as referred above and we are of the opinion that when no incriminating material was found in respect of shortage of materials in the course of search operations, therefore, the order of revision u/s.263 of the Act by Pr. CIT cannot be sustained. Hence, applying the above *ratio*

decidendi to the present case, we quash the order u/s.263 of the Act passed by the Pr. CIT and allow the grounds of appeal of the assessee.

11. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on 05/12/2018.

Sd/-	**Sd/-**
(N. S. SAINI)	**(PAVAN KUMAR GADALE)**
लेखा सदस्य / ACCOUNTANT MEMBER	**न्यायिक सदस्य / JUDICIAL MEMBER**

कटक Cuttack; दिनांक Dated 05/12/2018

प्र.कु.मि/PKM, Senior Private Secretary

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant-
   Basukinath Roadways Pvt. Ltd.,
   Om Niwas, Barsuan-770041
   Dist-Sundergarh(Odisha)
2. प्रत्यर्थी / The Respondent-
   Pr. CIT(Central),
   Direct Tax Building,
   M.V.P. Colony, Visakhapatnam-830017
3. आयकर आयुक्त(अपील) / The CIT(A),
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, **कटक** / DR, ITAT, Cuttack
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

(**Senior Private Secretary**)
आयकर अपीलीय अधिकरण, कटक / ITAT, Cuttack