IN THE INCOME TAX APPELLATE TRIBUNAL

"B" BENCH : BANGALORE

BEFORE SHRI ARUN KUMAR GARODIA, ACCOUNTANT MEMBER AND

SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA Nos. 1235, 1236, 1307 & 1308/Bang/2017
Assessment Years : 2008-09 to 2011-12

M/s. GMR Kamalanga Energy Ltd., 25/1, Skip House, Museum Road, Bangalore – 560 025. **PAN: AADCG0436E**	vs.	The DCIT, Central Circle – 2(2), Bangalore.
APPELLANT		RESPONDENT

&

ITA Nos. 1325 to 1327/Bang/2017
Assessment Years : 2008-09, 2009-10 & 2011-12

The ACIT, Central Circle – 2(2), Bangalore	vs.	GMR Kamalanga Energy Ltd., 25/1, Skip House, Museum Road, Bangalore – 560 025. **PAN: AADCG0436E**

Appellant by	:	Shri Sunil Jain, C. A.
Respondent by	:	Smt. Neera Malhotra, CIT (DR)
Date of hearing	:	01.04.2019
Date of Pronouncement	:	05.04.2019

O R D E R

Per Bench:

Out of this bunch of seven appeals, six appeals are cross appeals filed by the assessee and revenue for three assessment years i.e. 2008 – 09, 2009 – 10 & 2011 – 12 and the remaining one appeal is filed by the assessee for A. Y. 2010 – 11. These are directed against four separate orders of ld. CIT (A) – 11, Bangalore all dated 29.03.2017. All these appeals were heard together and are being disposed of by way of this common order for the sake of convenience.

2. The grounds raised by the assessee for Assessment Year 2008 – 09 in ITA No. 1235/Bang/2017 are as under.

> "*Ground No.1: Order passed under section 143(3) r.w.s. 153A is liable to be quashed*

1. On the facts and circumstances of the case and in law, the learned CIT(A) has erred in holding that in case a notice under section 153A is issued the Assessing Officer is bound to assess and reassess the total income of the Appellant.

2. The CIT(A) failed to appreciate and ought to have held that a completed assessment cannot be re-examined / reviewed under section 153A where no incriminating material / or undisclosed income is found in course of search assessment proceedings.

3. The CIT(A) has erred in not considering that having regard to the second proviso to section 153A, the completed assessment cannot be disturbed except only in the case where there is any undisclosed income found in the course of search or any incriminating documents pointing towards such undisclosed income is found in the course of search or in the course of assessment proceedings under section 153A of the Income-tax Act.

4. The Appellant therefore prays that the order passed by the Assessing Officer is contrary to the provisions of law and liable to be quashed since no undisclosed income is found in the course of search or in the course of proceedings under section 153A.

Ground No.2:
The Appellant craves leave to add, alter and/or amend all or any of the foregoing grounds of appeal."

3. The grounds raised by the assessee for Assessment Year 2009 – 10 in ITA No. 1307/Bang/2017 are as under.

"*Ground No.1: Order passed under section 143(3) r.w.s. 153A is liable to be quashed*

1. On the facts and circumstances of the case and in law, the learned CIT(A) has erred in holding that in case a notice under section 153A is issued the Assessing Officer is bound to assess and reassess the total income of the Appellant.

2. The CIT(A) failed to appreciate and ought to have held that a completed assessment cannot be re-examined / reviewed under section 153A where no incriminating material / or undisclosed income is found in course of search assessment proceedings.

3. The CIT(A) has erred in not considering that having regard to the second proviso to section 153A, the completed assessment cannot be disturbed except only in the case where there is any undisclosed income found in the course of search or any incriminating documents pointing towards such undisclosed income is found in the course of

search or in the course of assessment proceedings under section 153A of the Income-tax Act.

4. The Appellant therefore prays that the order passed by the Assessing Officer is contrary to the provisions of law and liable to be quashed since no undisclosed income is found in the course of search or in the course of proceedings under section 153A.

Ground No.2:
The Appellant craves leave to add, alter and/or amend all or any of the foregoing grounds of appeal."

4. The grounds raised by the assessee for Assessment Year 2010 – 11 in ITA No. 1236/Bang/2017 are as under.

"*Ground No.1: Order passed under section 143(3) r.w.s. 153A is liable to be quashed*

1. On the facts and circumstances of the case and in law, the learned CIT(A) has erred in holding that in case a notice under section 153A is issued the Assessing Officer is bound to assess and reassess the total income of the Appellant.

2. The CIT(A) failed to appreciate and ought to have held that a completed assessment cannot be re-examined / reviewed under section 153A where no incriminating material / or undisclosed income is found in course of search assessment proceedings.

3. The CIT(A) has erred in not considering that having regard to the second proviso to section 153A, the completed assessment cannot be disturbed except only in the case where there is any undisclosed income found in the course of search or any incriminating documents pointing towards such undisclosed income is found in the course of search or in the course of assessment proceedings under section 153A of the Income-tax Act.

4. The Appellant therefore prays that the order passed by the Assessing Officer is contrary to the provisions of law and liable to be quashed since no undisclosed income is found in the course of search or in the course of proceedings under section 153A.

Ground No.2: Disallowance under section 37

1. On the facts and circumstances of the case and in law, the learned CIT(A) has erred in holding that the Appellant has not set up his business and hence the expenditure of Rs.31,60,275/- debited to Profit and Loss account cannot be allowed.

2. The CIT(A) has erred in treating the year of commencement of

commercial operations i.e., financial year 2013-14 relevant to assessment year 2014-15 as the year of set-up of business.

3. The Appellant was incorporated on December 28, 2007, had set up its business, entered into contracts in the year 2008 for the purpose of its business and the construction of the Power Plant was under progress in the financial year 2009-10. The expenses incurred for the project has been debited to Capital work-in-progress. The expenses which have been debited to the profit and loss account are revenue in nature and are essential to run the business of the company in normal course which cannot be capitalized.

4. The revenue expenses incurred after set-up of business but before commencement of business are allowable as deduction.

5. The proviso to Section 3 of the Income-tax Act, which refers to and defines the term, "previous year" in relation to newly setup business or profession and not with reference to the date of commencement. Section 28 of the Act postulates that profit and gains of business or profession carried out at any time during the previous year, shall be taxed under the head "profits and gains of business and profession."

6. The Appellant therefore prays that the Assessing Officer be directed to allow the expenses of Rs.31,60,275/- debited to Profit and Loss account as the same were incurred after set-up of business.

Without prejudice to Ground No.2
Ground No.3: Expenses to be treated as eligible for capitalisation
1. On the facts and circumstances of the case and in law, the learned CIT(A) has erred in holding that the expenses of Rs.31,60,275/- are not eligible for capitalisation for the purpose of allowing depreciation and not allowable as deduction under section 37 while computing the income under the head income from business.

2. The Appellant has incurred the expenses of Rs.31,60,275/- for the purpose of business. In the event the expenses are not allowed as deduction under section 37 while computing the income under the head income from the business, the same should be treated as eligible for capitalisation and be added to the capital work-in-progress.

3. The Appellant therefore prays that the Assessing Officer be directed to treat the expenses of Rs.31,60,275/- as eligible for capitalisation and be added to the capital work-in-progress

Ground No.4:
The Appellant craves leave to add, alter and/or amend all or any of the foregoing grounds of appeal."

5. The grounds raised by the assessee for Assessment Year 2011 – 12 in ITA No. 1308/Bang/2017 are as under.

"*Ground No.1: Order passed under section 143(3) r.w.s. 153A is liable to be quashed*

1. On the facts and circumstances of the case and in law, the learned CIT(A) has erred in holding that in case a notice under section 153A is issued the Assessing Officer is bound to assess and reassess the total income of the Appellant.

2. The CIT(A) failed to appreciate and ought to have held that a completed assessment cannot be re-examined / reviewed under section 153A where no incriminating material / or undisclosed income is found in course of search assessment proceedings.

3. The CIT(A) has erred in not considering that having regard to the second proviso to section 153A, the completed assessment cannot be disturbed except only in the case where there is any undisclosed income found in the course of search or any incriminating documents pointing towards such undisclosed income is found in the course of search or in the course of assessment proceedings under section 153A of the Income-tax Act.

4. The Appellant therefore prays that the order passed by the Assessing Officer is contrary to the provisions of law and liable to be quashed since no undisclosed income is found in the course of search or in the course of proceedings under section 153A.

Ground No.2: Disallowance under section 37
1. On the facts and circumstances of the case and in law, the learned CIT(A) has erred in holding that the Appellant has not set up his business and hence the expenditure of Rs.8,66,882/- debited to Profit and Loss account cannot be allowed.

2. The CIT(A) has erred in treating the year of commencement of commercial operations i.e., financial year 2013-14 relevant to assessment year 2014-15 as the year of set-up of business.

3. The Appellant was incorporated on December 28, 2007, had set up its business, entered into contracts in the year 2008 for the purpose of its business and the construction of the Power Plant was under progress in the financial year 2010-11. The expenses incurred for the project has been debited to Capital work-in-progress. The expenses which have been debited to the profit and loss account are revenue in nature and are essential to run the business of the company in normal course which cannot be capitalized.

4. The revenue expenses incurred after set-up of business but before commencement of business are allowable as deduction.

5. The proviso to Section 3 of the Income-tax Act, which refers to and defines the term, "previous year" in relation to newly setup business or profession and not with reference to the date of commencement. Section 28 of the Act postulates that profit and gains of business or profession carried out at any time during the previous year, shall be taxed under the head "profits and gains of business and profession."

6. The Appellant therefore prays that the Assessing Officer be directed to allow the expenses of Rs.8,66,882/- debited to Profit and Loss account as the same were incurred after set-up of business.

Without prejudice to Ground No.2
Ground No.3: Expenses to be treated as eligible for capitalisation
1. On the facts and circumstances of the case and in law, the learned CIT(A) has erred in holding that the expenses of Rs.8,66,882/- are not eligible for capitalisation for the purpose of allowing depreciation and not allowable as deduction under section 37 while computing the income under the head income from business.

2. The Appellant has incurred the expenses of Rs.8,66,882/- for the purpose of business. In the event the expenses are not allowed as deduction under section 37 while computing the income under the head income from the business, the same should be treated as eligible for capitalisation and be added to the capital work-in-progress.

3. The Appellant therefore prays that the Assessing Officer be directed to treat the expenses of Rs.8,66,882/- as eligible for capitalisation and be added to the capital work-in-progress

Ground No.4:
The Appellant craves leave to add, alter and/or amend all or any of the foregoing grounds of appeal."

6. The grounds raised by the revenue for Assessment Year 2008 – 09 in ITA No. 1325/Bang/2017 are as under.

"*1. Whether the CIT(A) was right in holding that preliminary expenditure which was spent 06 years before the commencement of the business can be considered as capital expenditure though the assessee never established that the preliminary expenditure is related to any particular business asset?*"

7. The grounds raised by the revenue for Assessment Year 2009 – 10 in ITA No. 1326/Bang/2017 are as under.

"*1. Whether the CIT(A) was right in holding that preliminary expenditure which was spent 05 years before the commencement of*

the business can be considered as capital expenditure though the assessee never established that the preliminary expenditure is related to any particular business asset?"

8. The grounds raised by the revenue for Assessment Year 2011 – 12 in ITA No. 1327/Bang/2017 are as under.

"*1. Whether the CIT(A) was right in holding that preliminary expenditure which was spent 03 years before the commencement of the business can be considered as capital expenditure though the assessee never established that the preliminary expenditure is related to any particular business asset?*"

9. At the very outset, it was submitted by the learned AR of the assessee that in the present case, this is the claim of the assessee that no incriminating material was found in search in connection with any of these four assessment years for which the assessee is in appeal. He placed reliance on several judicial pronouncements in support of this contention including the judgment of Hon'ble Karnataka High Court rendered in the case of Canara Housing Development Co. vs. DCIT as reported in 274 CTR 122. He also placed reliance on a judgment of Hon'ble Delhi High Court rendered in the case of PCIT vs. Meeta Gutgutia as reported in 82 Taxmann .com 287. He also submitted that SLP was filed by the revenue against this judgment of Hon'ble Delhi High before Hon'ble apex court but the same was dismissed as per the Judgment 08.12.2018 and the copy of this Judgment of Hon'ble apex court is available on page no. 5 of the legal paper book filed by the assessee. At this juncture, a query was raised by the bench as to whether there is a finding of any of the authorities below on this factual aspect that any incriminating material for any of these four assessment years was found in course of search or not.. In reply, he submitted that this argument as well as ground was raised by the assessee before CIT (A) as can be seen from Ground No. 3 raised before CIT (A) in A. Y. 2008 – 09 & 2009 – 10 and similar ground raised in remaining two years also and in all four years, it is held by CIT (A) that as per the judgment of Hon'ble Karnataka High Court rendered in the case of Canara Housing Development Co. vs. DCIT (Supra), it was held that undisclosed income and incriminating material is not the precondition for issue of notice u/s 153A. He submitted that the learned CIT (A) has not given a finding about this factual

aspect as to whether any incriminating material was found in search or not. He submitted that as per Para 71 of the judgment of Hon'ble Delhi High Court rendered in the case of PCIT vs. Meeta Gutgutia (Supra), it was held that the invocation of section 153A by the revenue was without any legal basis in respect of those assessment years for which no incriminating material was found in search and the SLP of revenue against this judgment is dismissed by Hon'ble apex court and therefore, even if as per the judgment of Hon'ble Karnataka High Court rendered in the case of Canara Housing Development Co. vs. DCIT (Supra), it was held that undisclosed income and incriminating material is not the precondition for issue of notice u/s 153A, now the judgment of Hon'ble apex court rendered in the case of Meeta Gutgutia (Supra) should be followed. In reply, it was submitted by the learned DR of the revenue that in the case of Meeta Gutgutia (Supra), before Hon'ble Delhi High Court, the judgment of Hon'ble Karnataka High Court rendered in the case of Canara Housing Development Co. vs. DCIT (Supra) was not cited and therefore, not considered and hence, this judgment of Hon'ble Karnataka High Court still holds the field. In rejoinder, it was submitted by the learned AR of the assessee that Hon'ble Delhi High Court in the case Meeta Gutgutia (Supra) has considered its own earlier judgment rendered in the case of CIT vs. Kabul Chawla, 380 ITR 573 and in that case, the judgment of Hon'ble Karnataka High Court rendered in the case of Canara Housing Development Co. vs. DCIT (Supra) was duly noted and considered and therefore, that judgment of Hon'ble Karnataka High Court rendered in the case of Canara Housing Development Co. vs. DCIT (Supra) stands considered in the case of Meeta Gutgutia (Supra) also.

10. We have considered the rival submissions. We find that as per the facts noted in the case of Canara Housing Development Co. vs. DCIT (Supra), incriminating material was found in course of search and invocation of section 153A was not in dispute in that case. The judgment in this case is this that having invoked the provisions of section 153A in proper manner, income to be assessed is not only the income found in search but also the income declared by the assessee in original return and any other income

which comes to light in assessment proceedings u/s 153A. Hence, in our considered opinion, this judgment of Hon'ble Karnataka High Court rendered in the case of Canara Housing Development Co. vs. DCIT (Supra) is not relevant to decide this aspect as to whether section 153A can be invoked for a year prior to the year of search if no incriminating material is found in search for that year and the assessment is not pending on the date of search.

11. This argument was also made by the Learned DR of the revenue that as per the judgment of Hon'ble apex court rendered in the case of Rajesh Jhaveri, 291 ITR 500, an intimation is not an assessment order. She submitted that search in the present case was conducted on 11.10.2012 and out of four years in the present case, no assessment order was passed u/s 143 (3) for any year. She submitted that for A. Y. 2008 – 09, only intimation was issued on 19.11.2009 against the return of income filed on 27.09.2008 and therefore, for this year, the assessment was not completed before search. She submitted that similarly for A. Y. 2009 – 10 also, no assessment order was passed u/s 143 (3) and only intimation was issued for this year on 31.01.2011 against nil return filed on 29.09.2009 and therefore, for this year also, the assessment was not completed before search. She submitted that similarly for A. Y. 2010 – 11 also, no assessment order was passed u/s 143 (3) and only intimation was issued for this year on 08.05.2011 against return filed on 29.09.2009 at returned income of Rs. 100,74,257/- and therefore, for this year also, the assessment was not completed before search. She submitted that similarly for A. Y. 2011 – 12 also, no assessment order was passed u/s 143 (3) and only intimation was issued for this year on 13.02.2012 against return filed on 25.09.2011 at returned income of Rs. 27,24,129/- and therefore, for this year also, the assessment was not completed before search. This was her argument that for these four years, assessment was pending on the date of search because no order was passed u/s 143 (3) and intimation issued u/s 143 (1) is not an assessment order. We find that as per second proviso to section 153A, the assessment pending as on the date of search shall abate. Now the question is this as to

whether for all those assessment years for which no assessment order is passed u/s 143 (3), it can be said that the assessment is pending. In our considered opinion, the assessment can be said to be pending if notice u/s 143 (2) of the I. T. Act was validly issued by the AO and order u/s 143 (3) could not be passed before the date of search and time is available to the AO for passing the order u/s 143 (3). Similarly, in a case where no notice u/s 143 (2) was issued before the date of search and time is available to issue notice u/s 143 (2). In the present case, this is not a case where notice u/s 143 (2) was issued and time is available for passing of order u/s 143 (3). In fact, in the present case, no notice u/s 143 (2) was issued before the date of search for any of these four years. Now we examine as to whether, time was available to the AO to issue notice u/s 143 (2) on the date of search. As per proviso to section 143 (2), no notice shall be issued after expiry of six months from the end of the financial year in which the return was filed. Last return was filed for A. Y. 2011 – 12 on 25.09.2011 and therefore, notice u/s 143 (2) for this year could have been issued up to 30.09.2012 and the search has taken place on 11.10.2012. So time was not available to the AO on the date of search to issue notice u/s 143 (2) for any of these four years. Hence, no assessment was pending on 11.10.2012 and hence, no assessment gets abated. Reliance placed by the learned DR of the revenue on this judgment is misplaced because in our considered opinion, this is not relevant as to whether any assessment order u/s 143 (3) was passed or not before the date of search for deciding this aspect of the matter that the assessment is pending or not on the date of search.

12. As per above discussion, it comes out that the judgment of Hon'ble Karnataka High Court rendered in the case of Canara Housing Development Co. vs. DCIT (Supra) is not relevant to decide this aspect as to whether section 153A can be invoked for a year prior to the year of search if no incriminating material is found in search for that year and the assessment is not pending on the date of search. It also comes out that no assessment was pending in respect of these four years on the date of search. As per the judgment of Hon'ble Delhi High Court rendered in the

case of Meeta Gutgutia (Supra), if no incriminating material is found in search and assessment is not abated, such a completed assessment cannot be reopened u/s 153A in the absence of incriminating material having been found in search. SLP filed by the revenue against this judgment of Hon'ble Delhi High Court is dismissed by Hon'ble apex court. But in order to apply the ratio of this judgment, this factual aspect has to be examined as to whether any incriminating material for any of these four assessment years was found or not in search. Learned CIT (A) has not given any finding on this factual aspect because he proceeded on this basis that this is not material as per the judgment of Hon'ble Karnataka High Court rendered in the case of Canara Housing Development Co. vs. DCIT (Supra) but we have seen that this judgment is not relevant to decide this aspect as to whether section 153A can be invoked for a year prior to the year of search if no incriminating material is found in search for that year and the assessment is not pending on the date of search. Hence, we feel it proper to restore the matter back to CIT (A) for a fresh decision on this aspect about validity of invocation of section 153A in the light of this judgment of Hon'ble Delhi high Court rendered in the case of Meeta Gutgutia (Supra) against which, SLP is dismissed by Hon'ble apex court after finding out the facts as to whether any incriminating material was found in search or not. If the assessee succeeds on this aspect then nothing remains to be decided on merit but if the assessee fails on this technical aspect then the issues on merit should be decided by CIT (A) afresh because in our opinion, the issue on merit should be decided after deciding the technical issue. Hence, in view of this decision, we do not decide any issue on merit arising out of the appeal of the assessee or revenue. The issue on merit arising out of the appeals of revenue has to go back to CIT (A) for a fresh decision for one more reason. The second reason is this that the CIT (A) has in fact remanded this matter to the AO with some directions but after the amendment in section 251, CIT (A) cannot remand a matter to the AO and he has to decide the issue himself. Hence, we set aside the orders of CIT (A) in all four years and restore the entire matter back to his file with the

direction that he should first decide this aspect about validity of invocation of section 153A in the light of this judgment of Hon'ble Delhi high Court rendered in the case of Meeta Gutgutia (Supra) against which, SLP is dismissed by Hon'ble apex court after finding out the facts as to whether any incriminating material was found in search or not. If the assessee succeeds on this aspect then nothing remains to be decided on merit but if the assessee fails on this technical aspect then the issues on merit should be decided by CIT (A) afresh.

13. In the result, all the four appeals filed by the assessee and all three appeals filed by the revenue are allowed for statistical purposes.

Order pronounced in the open court on the date mentioned on the caption page.

Sd/-	Sd/-
(PAVAN KUMAR GADALE)	(ARUN KUMAR GARODIA)
Judicial Member	Accountant Member

Bangalore,
Dated, the 05th April, 2019.
/MS/

Copy to:

1. Appellant	4. CIT (A)
2. Respondent	5. DR, ITAT, Bangalore
3. CIT	6. Guard file

By order

Assistant Registrar,
Income Tax Appellate Tribunal,
Bangalore.