



**IN THE INCOME TAX APPELLATE TRIBUNAL,
CUTTACK BENCH, CUTTACK**

**BEFORE S/SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER
AND MANISH BORAD, ACCOUNTANT MEMBER**

IT(ss)A Nos.45 to 47/CTK/2018
Assessment Years : 2008-09 to 2010-2011

ACIT, Central Circle, Cuttack	Vs.	M/s. Pasupati Feeds, Kota Sahi, Tangi, Cuttack
PAN/GIR No.AAEFP 4117 F		
(Appellant)	..	(Respondent)

C.O.Nos.33 to 35/CTK/2018
(arising out of IT(ss)A Nos.45 to 47/CTK/2018)
Assessment Years: 2008-09 to 2010-2011

ITA Nos.47 to 48/CTK/2019
Assessment Years : 2009-2010 to 2010-2011

M/s. Pasupati Feeds, Kota Sahi, Tangi, Cuttack	Vs.	ACIT, Central Circle, Cuttack
PAN/GIR No.AAEFP 4117 F		
(Appellant)	..	(Respondent)

Assessee by : Shri P.R.Mohanty , AR
Revenue by : Shri M.K.Gautam, CIT (DR)

Date of Hearing : 28 /10/ 2021
Date of Pronouncement : 10/ 12 /2021

ORDER

Per Bench

The revenue has filed appeals against the separate orders of the CIT(A), Cuttack dated 30.1.2018 for the assessment years 2008-09 to 2010-2011. The assessee has filed cross objections in all these three assessment years. The assessee has also filed appeals for the assessment years 2009-

10 and 2011-11 against the orders both dated 20.2.2018 of the Ld. Pr. CIT(Central), Visakhapatnam for the assessment years 2009-10 and 2010-11.

2. As agreed by both the sides, we take up cross objections filed by the assessee for the assessment year 2008-09 to 2010-2011 as same relates to legal issue.

3. Since grounds taken by the assessee in cross objections in all the assessment years are common, except variance of addition, therefore, grounds for the assessment year 2008-09 are reproduced hereunder:

“1. For that under the facts and circumstances of the case, filing of this appeal by the esteemed income tax department is ill-conceived and is based on irrelevant consideration, as such, deserves to be quashed in limine.

2. For that the Learned CIT(A) is not at all justified in holding that the assessment and consequential additions to the total income U/s 153A for the unabated years can be made in absence of any incriminating materials/documents/evidences unearthed during the course of search.

3. For that the Learned CIT(A) is not at all justified in not quashing the assessment orders passed U/s 153A where additions are made purely on the basis of Presumptions & Assumptions in absence of any incriminating material found for the unabated years of assessment on the ground that completed assessments can be interfered with by the AO while making the assessment U/s 153A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in course of original assessment.

4. For that the Ld. CIT(A) is perfectly justified in directing the AO to accept the business income disclosed by the appellant as per the

audited books of account against estimation of business income @ 8% by the AO on the

5. For that the Learned CIT(A) is perfectly justified in deleting the addition of Rs. 27,98,928/- added towards interest earned from fixed deposit deserves to be deleted on the ground that, the appellant has truly & correctly disclosed the interest earned from fixed deposits as per the details available from the form 26AS and there cannot be any estimated addition to this disclosed interest income on the basis of sheer presumptions & assumptions in absence of **any** incriminating material found during search

6. For that the Learned CIT(A) is perfectly justified in deleting the addition of Rs. 27,98,928/- towards interest earned from fixed deposit deserves to be deleted on the ground that the business income disclosed by the appellant includes the interest income and therefore, once again the interest income cannot be added separately.”

4. In Ground Nos.2 & 3, the assessee has raised the legal issues. Since the legal issues go to the root of the matter, we first take up the same for our adjudication.

5. In the written submissions, Id A.R. submitted as under:

“1. The assessee carries on business of manufacturing and selling of poultry feed, cattle feed etc and also engaged in growing and selling of broiler chicken through integrated farming.

Search and seizure operation U/s 132 of I T Act was conducted on 30/10/2013 in the business premises of firm and residential premises of partners in various locations.

In response to issuance of notice U/s 153A of I T Act return of income was filed by assessee on dated 25/06/2015 disclosing same income as originally filed before the search adhering to statutory limitations.

Consequent upon which notices U/s 143(2) & 142(1) are issued calling for various clarifications and submissions, in response to which the authorised representative appeared from time to time submitting clarifications,

explanations & reconciliations with supporting corroborating documentary evidences.

That the assessing authority passed identical assessment orders U/s 153A of the I.T. Act, 1961 for all the concerned years i.e., for A/Y-2008-09 to 2014-15 referring to two seized document namely PFO-08 and PFO-70. It is pertinent to note that as per inventory of books of account found and seized as provided in PANCHANAMA PFO-08 is bunch of loose sheets containing 58 pages and PFO-70 is an external hard disk containing data extracted from SAP *which stands for* system applications and products in data processing.

It is also relevant to note that at the time of conduction of search & seizure the SAP (R3) software was under installation. Software installer OASYS & PACECOM are also cross examined by IT Authorities and they have admitted that there are test data entries in that location which should be reversed. An affidavit dated 22/01/2014 given by Sri Pradipta Mohanty, Chairman of M/s. OASYS Tech Solution Pvt. Ltd. mentioning that for testing purpose in all items test datas of imaginary quantity and value are entered up to 31/05/2013 which has not been reversed by them and are mixed up with real business data of the client M/s. Pasupati Feeds. A copy of said affidavit by Pradipta Mohanty, Chairman of M/s. OASYS Tech Solution Pvt. Ltd was also filed before the authorities.

As stated above although PFO-08 which contains loose sheets and PFO-70 external hard disk which contains trail run date having no evidentiary value because it is well settled that loose sheets of paper are wholly irrelevant as evidence being not admissible U/s 34 so as to constitute evidence with respect to the transactions mentioned therein being of no evidentiary value.

Even otherwise such document shall not alone be sufficient evidence to charge any person with liability even if they are relevant and admissible because the same are only corroborative evidence and to substantiate the liability against a person, independent evidence is necessary as to trust worthy of those entries which is a requirement to fasten the liability. For instance, scribbling or rough notings found on loose papers cannot be straightaway classified as 'incriminating material' unless the AO establishes nexus or connect of such notings with unearthing of undisclosed income of the assessee. This nexus or connect has to be brought out in explicit terms with corroborative material or evidence which any prudent man properly instructed in law must be able to understand or correlate so as to justify the AO's inference of undisclosed income from such seized incriminating material.

The above view further gathers reinforcement from the judgement of the Hon'ble Supreme Court in case of ***Common Cause v. UOI, [2017] 77 taxmann.com 245*** popularly known **Sahara dairies and Aditya Birla**

diaries case. In this case, the Hon'ble Supreme Court, following the judgment rendered in case of **V.C. Shukla (supra)**, laid down the following principles:-

(i) Entries in loose papers/sheets are irrelevant and not admissible under Section 34 of the Evidence Act. It is only where the entries are in the books of account regularly kept, depending on the nature of occupation, that those are admissible;

(ii) As to the value of entries in the books of account, such statement shall not alone be sufficient evidence to charge any person with liability, even if they are relevant and admissible, and that they are only corroborative evidence. Even then independent evidence is necessary as to trustworthiness of those entries which is a requirement to fasten the liability;

(iii) The meaning of account book would be spiral note book/pad but not loose sheets;

(iv) Entries in books of account are not by themselves sufficient to charge any person with liability, the reason being that a man cannot be allowed to make evidence for himself by what he chooses to write in his own books behind the back of the parties. There must be independent evidence of the transaction to which the entries relate and in absence of such evidence no relief can be given to the party who relies upon such entries to support his claim against another;

(v) Even if books of account are regularly kept in the ordinary course of business, the entries therein shall not alone be sufficient evidence to charge any person with liability. It is not enough merely to prove that the books have been regularly kept in the course of business and the entries therein are correct. It is further incumbent upon the person relying upon those entries to prove that they were in accordance with facts;

(vi) The Court has to be on guard while ordering investigation against any important Constitutional functionary, officers or any person in the absence of some cogent legally cognizable material. When the material on the basis of which investigation is sought is itself irrelevant to constitute evidence it is not admissible in evidence.

It is pertinent to mention that the aforementioned judgments of the apex court have been rendered not in direct context and interpretation of the Income Tax Act'1961 but still holds good for fastening the liability under the Income Tax Act also as far as the dumb documents are concerned. Relying on the judgment of the apex court in case of *Common Cause v. UOI(supra)*, the Hon'ble Bench of ITAT , Ahmedabad in case of **Nishant Construction Pvt. Ltd. V ACIT in ITA No. 1502/AHD/2015**, held that in the absence of any corroborative evidence , loose sheet can at the most be termed as "dumb document" which did not contain full details about the dates, and its contents were not corroborated by any material and could

not relied upon and made the basis of addition. Reliance can be also placed on the judgment of the Panaji Bench of ITAT in case of *Abhay Kumar Bharamgouda Patil V ACIT [2018] 96 taxmann.com 377 (Panaji – Trib.)* wherein the judgement of the apex court was relied upon. There are Plethora of Income tax decisions of judicial authorities in this regard.

Never the less the assessing authority referred to Page-No-39, 47 & 48 of PFO-08 and single page extract from the external hard disk demonstrating there in the assessment order that there has been unaccounted purchases for A/Y-2011-12, 2012-13 & 2013-14 amounting to Rs. 1,66,18,977/-, Rs. 10,44,48,496/- & Rs. 9,85,95,485/-. Similarly it was stated that there has been unaccounted sale of Rs. 82,16,851/- found from PFO-70 for the A/Y-2013-14.

BUT no addition was made in this regard in any of the assessment years.

And the assessing authority basing upon the sales figure of AY-2013-14 provided by the assessee during the course of assessment proceeding made some brilliant mathematical deduction, permutations & combinations without any rational reason or rhyme or basis came to a ambiguous & bewildering finding of fact without reference to any incriminating document or substantial evidence that there has been a purchase inflation amounting to Rs.11,28,44,257/- for the A/Y-2013-14.

No addition in this regard was made.

Then the assessing authority went on to narrate the modus operandi of the business of the assessee stating their in the assessment order that M/s Pasupati feeds purchase day old chicks from M/s Pasupati Breeding farm and sends the same to contract farmers spread over many districts of Odisha. The contract farmers also receive feed and medicine from M/s Pasupati feeds. The contract farmers grow the chicken for 35-45 days after which they are lifted from the farms of contract farmers by M/s. Pasupati Feeds and sold to the retail traders. The rate at which this chicken are sold changes daily and the rates are different at different location. The daily rates are advised by M/s. Pasupati Feeds in an Odia daily "The Samaj". Then taking the advertised max. Retail price of a single day using extrapolation and mathematical confusing, unreliable, unimaginable & perplexing deduction permutation & combination came to a conclusion that there has been a supersession of sale even though during the proceeding it was contended that:-

The daily rates of broiler birds selling price published in the newspaper "The Samaj" are maximum retail price and indicative only but the selling price is actually determined on demand supply situation and competitor price. The assessee is a localized firm facing large local, national and multinational competitors like Eastern Hatcheries Pvt. Ltd.,

Suguna Ltd., Venkateswar Hatcheries Ltd., India Broilers Ltd. etc who are factually most influential factor to determine the price. The newspaper published price is indicative only and has no relevance with actual price at which broiler is sold.

The usual business practice of selling grown up broiler birds is that the buyers (broiler traders) bargain the price considering the competitors price and market demand situation and availability of birds in the market. In fact paper published prices are indicative price to the traders and they bargain from that point to arrive at their buying price which is far below the said published price. Moreover the assessee is a small player compared to competitors like Suguna, Venkateswar Hatchery and hence is compelled to sell at a lesser price than competitors to keep up its market share.

It is also humbly put forth before the Authorized Officer that he has not found during search operation any corroborative documents which supports his view that the assessee has sold in the paper published prices. Again paper published prices are not corroborative documents by any explanation in search operation. Authorized Officer has not also cross examined any trader or accumulated any market evidence in support of their view of sales suppression. Further in various courts it is also held that no addition could be made on the basis of presumption assumption or surmises in the hands of the assessee unless it is fully ascertained by corroboratory evidence in absence of incriminating documents in 153A assessment.

The assessee also furnished a list of their traders along with their addresses requesting the authority to counter examine the traders regarding the price of sales at which they purchase from the assessee.

But without any verification, clarification, corroborative evidence or incriminating document on the basis of baseless mathematical jugglery the assessing authority concluded that there has been a suppression of sale for the A/Y-2013-14 amounting to Rs. 25,29,65,966/-. No addition in this regard was made.

This above narrated finding of fact is same for all the assessment years. Finally addition was made on two counts without any basis, reason or rhyme or reference to incriminating document or corroborative evidences as under:.

1. Income from Other Sources:-

Letter was issued seeking details interest income received from fixed deposit, the assessee submitted that during this year, an amount of Rs. 27,98,928/- accrued/received as interest on fixed deposit. The same

was reflected in balance sheet. In this case business income has been estimated. Accordingly, the interest income is added back to the total income of the assessee.

**INTEREST FROM FIXED DEPOSIT
INTEREST FROM FIXED DEPOSIT**

Fin. Year	Asst. Year	Opening Balance of Fixed Deposit	Interest accrued as per audited accounts	Interest estimated @ 7.5% on Opening Balance	Interest assessed by Income Tax Department
2007-08	2008-09	2,18,26,807/-	27,98,928/-	16,37,010/-	27,98,928/-
2008-09	2009-10	2,96,66,262/-	11,74,892/-	22,24,970/-	22,24,970/-
2009-10	2010-11	5,71,27,262/-	19,01,500/-	25,65,884/-	25,65,884/-
2010-11	2011-12	7,66,39,262/-	1,36,55,372/-	57,47,945/-	1,31,88,860/-
2011-12	2012-13	8,65,64,973/-	63,21,416/-	64,92,373/-	64,92,373/-
2012-13	2013-14	7,98,68,487/-	69,96,381/-	59,90,136/-	69,61,374/-
2013-14	2014-15	8,18,89,655/-	56,81,850/-	61,41,724/-	61,41,724/-
TOTAL			3,85,30,339/-	3,08,00,042/-	4,03,74,113/-

1. Estimation of Net Profit:-

As the practice of newspaper advertising was continuing during the year 2013-14, the sale price of the A.Y. 2014-15 is estimated as 5% higher than the sales figure disclosed by the assessee. However prior to the assessment year 2013-14, there was no advertisement; accordingly the disclosed sales turnover is taken as the actual turnover. And as there was no sales suppression fact is involved the prior years, the net profit is considered as 8% of the disclosed turnover.

Asst. Year	Returned Income u/s 139(1)	Returned Income U/s 153A	Addition made in search assessment
2008-09	72,89,856/-	72,89,856/-	Estimation of Net Profit @ 8% on Sales Turn Over Disclosed in Audited Accounts.
2009-10	1,04,29,725/-	1,04,29,725/-	Estimation of Net Profit @ 8% on Sales Turn Over Disclosed in Audited Accounts.
2010-11	1,24,89,939/-	1,24,89,939/-	Estimation of Net Profit @ 8% on Sales Turn Over Disclosed in Audited Accounts.
2011-12	1,62,41,413/-	1,62,41,413/-	Estimation of Net Profit @ 8% on Sales Turn Over Disclosed in Audited Accounts.
2012-13	1,51,55,808/-	1,51,55,808/-	Estimation of Net Profit @ 8% on Sales Turn Over Disclosed in Audited Accounts.
2013-14	1,51,29,520/-	1,51,29,520/-	Estimation of Net Profit @ 11% on Sales Turn Over Disclosed in Audited Accounts.
2014-15	2,17,46,089/-	2,17,46,089/-	Estimation of Net Profit @ 11% on Sales Turn Over Disclosed in Audited Accounts.

That aggrieved by these assessment orders the assessee preferred appeals before the CIT(A) on legal grounds as well as on merit of addition but unfortunately the Ld. CIT(A) rejected the Legal ground i.e., That in absence of any incriminating material unearthed during the course of search the assessing authority had no jurisdiction to initiate proceeding U/s 153A of the Act, and without adhering to the decision in CIT vs. Kabul Chawla 380 ITR 573(Del) and relying on the decisions of Hon'ble Kerala High Court in the case of E.N. Gopakumar vs CIT, 75 taxmann.com 215, CIT vs Raj Kumar Arora, 52 Taxmann, 172 (All).

That on merit of addition the CIT(A) deleted the addition holding their in at Page-9, Para-4.3.2 as under:

"I have carefully examined the assessment order and the submissions of the appellant. I have also perused the assessment records. I am constrained to observe that even though search operation took place no evidence whatsoever was found for F.Y. 2007-08, relating to A.Y. 2008-09. During the course of assessment proceeding, the assessing officer has not examined any person to verify correctness of purchase or sales of the appellant. The assessing officer has not even rejected book results of the appellant. It is important to note here that there was assessment

earlier and appeals before the Commissioner of Income Tax (Appeals) as well as Income Tax Appellate Tribunal, Cuttack Bench, Cuttack and the additions made by the assessing officer were not sustained. In any case the reasons given by the assessing officer for estimating the Net Profit @ 11% for A.Y. 2013-14 and @8% for this assessment year are analysed below:-.....”

There after vide six reasons the Ld. CIT(A) demonstrated, demolished and destroyed the estimation of Net Profit stating their in at Page-12, Para-4.4 as under:-

“As it can be seen from the above noon of the reasons for estimate of the net profit @ 8% of sales are valid. An assessment U/s 153A of the I.T. Act, 1961, after the search, cannot be based on assumptions, presumptions, conjectures, surmises and estimates. On the basis of the above discussion, it is my considered view that the decision of the assessing officer to estimate the net profit of the appellant at the rate of 8% of total turnover at Rs. 3,76,26,779/- cannot be sustained. The assessing officer is directed to take the business income of the appellant at Rs. 72,89,856/-. The addition made by the assessing officer of Rs. 3,03,36,923/- is directed to be deleted. The ground of appeal is allowed.”

Similarly the addition of Interest Income towards Income from other sources was deleted by the Ld. CIT(A) holding their in in the appellate order at Page-14, Last Para as under:-

“The assessing officer has not made any addition in the interest income as such. However he has added interest income separately. The business income shown by the appellant includes the interest income and therefore, once again the interest income cannot be added separately. Accordingly, the addition of Rs. 27,98,928/- is directed to be deleted. The ground of appeal is allowed.”

Now the department is in appeal before the Hon’ble Tribunal against the order of the CIT(A) for deletion of addition on merit and the assessee has filed Cross Objection supporting the CIT(A) for deletion of addition on merit and against rejection of legal ground challenging the jurisdiction which are as under:-

For that the Learned CIT(A) is not at all justified in holding that the assessment and consequential additions to the total income U/s 153A for the unabated years can be made in absence of any incriminating materials/documents/evidences unearthed during the course of search.

That it is a well settled proposition that in absence of any incriminating material unearthed during the course of search the assessing authority had no jurisdiction to initiate proceeding U/s 153A of the Act. There is nothing on record which can justify that the additions made by the A.O. are based on any incriminating material and therefore, assessment years from 2008-09 to 2012-13, there is no scope for the A.O. to issue a notice U/s 143(2) of the Act being time barred before the date of search i.e., 30/10/2013. Therefore, all the assessment years from 2008-09 to 2012-13 are concluded assessments as non abated assessments and in absence of any incriminating material framing of assessment under section 153A is without jurisdiction is void ab initio deserves to be quashed.

Sl. No	Fin.year	Asst.Yr	Date of filing the return	Date of limitation for issuance of notice u/s.143(2)	Remarks
1.	2007-08	2008-09	31.10.08	30.9.09	Unabated/scrutiny assessment order dtdx.20.10.10, CIT Appeal orders dt.21.11.11, ITAT ORDER DT.14.8.12
2.	2008-09	2009-10	31.3.10	30.9.10	Unabated/scrutiny assessment order dtdx.28.11.11, CIT Appeal orders

					dt.28.12.12, ITAT ORDER DT.5.6.13
3.	2009-10	2010-11	1.4.2011	30.9.12	Unabated/scrutiny assessment order dtdx.15.3.13, CIT Appeal orders dt.19.1.15, ITAT ORDER DT.10.11.17
4.	2010-11	2011-12	31.3.12	30.9.12	Unabated
5.	2011-12	2012-13	29.3.13	30.9.13	Unabated
6.	2012-13	2013-14	29.9.13	30.9.14	Abated
7.	2013-14	2014-15	30./11.14	30.9.15	abated

The appellant relies on the following decisions of the Jurisdictional ITAT Cuttack Bench, Cuttack and Jurisdictional High Court of Odisha for the above contention:

1. M/s Pradosh Kumar Rout Vs. ACIT, Central Circle, Cuttack
ITA(SS) No-72 to 74/CTK/2018, DECIDED ON 06/11/2019.

Page-4, Para-6 & 7

"As regards to the decisions relied by Id CIT(A) in the impugned order, wherein, it was held that even if there is no incriminating materials, the Assessing Officer is empowered to make additions in an assessment u/s. 153A of the Act. We find that the above decisions are clearly conflicting to the decision of Hon'ble Delhi High Court in the case of Kabul Chawla (supra). We find that the decisions relied by both the sides are of the judgments of non-jurisdictional High Court. Hence, the decision support the case of the assessee is to be followed in view of the decision of Hon'ble Supreme Court in the case of CIT vs. Vegetable Products, 88 ITR 192 (SC). Hence, respectfully following the decision of the Hon'ble Jurisdictional High Court in the case of Kabul Chawla (supra), we hold that in the absence of any incriminating material unearthed during the course of search, the AO had no jurisdiction to initiate proceedings u/s 153A of the Act.

In the cases at hand, we find that in the course of search, no incriminating materials was unearthed by the department to suggest that the additions are on the basis of searched materials. In view of above, we are of the considered view that no additions are based on

any incriminating materials/income. Accordingly, we delete the additions made by the Assessing Officer and confirmed by the CIT(A) in respect of all three assessees.”

2. DCIT, Central Circle, Sambalpur vs. M/s Basukinath Roadways Private Limited, IT(SS)A Nos.141 & 142/CTK/2018 decided on 20/02/20.

Page-53, Para-13

“Undisputedly, in the instant case, the assessments for the assessment years in question have already been completed on the date of search and the AO has not referred to any incriminating material found during the course of search in the assessment order. Nothing is found contrary to the stated position of the assessee, therefore, the assessment framed u/s.153A of the Act is not sustainable. Respectfully, following the ratio of decision of the Hon’ble Delhi High Court in the case of Kabul Chawla (supra), which clearly applicable on the facts of the present case also, as admittedly no incriminating material relating to these assessment years or as a matter of fact for any of the assessment years were found during the course of search and accordingly, we quash the orders of both the authorities below and held that without referring any incriminating material by the AO in the assessment order for the years under consideration, stated to be unearthed during the course of search, framing the assessment under section 153A of the Act, is *void ab initio*. Thus, the legal ground raised by the assessee in both the cross objections for A.Y.2009-2010 & 2010-2011 is allowed.”

3. Omprakash **Gupta Vs ACIT (Central)- II (ITAT Indore)**
IT(SS)A Nos.277 to 281/IND/2017 decided on 28.02.2019.

Page-9, Para-11

“We have heard the rival submissions, perused the materials available on record and gone through the orders of the authorities below. The assessee is an individual filed returns of income for all the assessment years i.e. assessment years 2008-09 to 2012-13 and assessments are completed u/s 143(1) of the Act. Subsequently, a search action was conducted u/s 132 of the Act in the business group of the assessee and A.O. has asked the assessee to file returns of income for all the assessment years by issue of notice u/s 153A of the Act on 12.9.2014. In response to that, assessee has filed returns of income for A.Yrs. 2008-09 to 2013-14 on 7.11.2014. The case of the assessee is that the return for A.Y. 2012-13 was filed on 7.11.2012. As per section 143(2) of the Act, the last date on which notice for assessment would have been issued was 30.9.2013. All the other returns are filed on earliest date

and the time limit for issue of notice u/s 143(2) of the Act in all those cases has expired. The search was initiated in the business premises of the assessee on 29.1.2014 and therefore the time limit for issue of notice u/s 143(2) of the Act is lapsed. All the assessment years from 2008-09 to 2012-13 are concluded and non abated assessments. The A.O. cannot reopen the assessments u/s 153A of the Act. In so far as the above submission is concerned from the assessment order and even from the Ld. CIT(A)'s order, there is nothing on the record which says that the additions made by the A.O. are based on any incriminating material. Even when the same was pointed out to Ld. D.R., she is not able to establish the fact that additions are based on any incriminating material, therefore we find that the additions made by the A.O. for all the years are not based on any incriminating material found during the course of search. It is only based on subsequent search by issue of notice u/s 153A of the Act calling for the various documents from the assessee additions are made. In so far as the arguments of the Ld. Counsel for the assessee in respect of concluded assessments cannot be reopened, we find that in all the assessment years from 2008-09 to 2012-13, there is no scope for the A.O to issue a notice u/s 143(2) of the Act for the reason that the time limit is already over before the date of search itself i.e. on 29.1.2014. Therefore, in our opinion, all the assessment years from 2008-09 to 2012-13 are concluded assessments and non abated assessments and any addition has to be made in respect of those assessment years, there must be an incriminating material. In the present case, there is no incriminating material and therefore, the additions made by the A.O. cannot survive."

4. Smt. Jami Nirmala vs. PCIT, in the High Court of Odisha at Cuttack
In W.P.(C) No.2857 of 2018 decided on 10.08.2021

Page-11, Para-13 & 14.

"In the present case, the impugned assessment order does not refer to any document unearthed during the course of the search on 26th February, 2016. Therefore, the assumption of jurisdiction under Section 153A of the Act for reopening the assessment for the AY 2015-16 was without legal basis. The impugned assessment order refers only to the cash book found during the survey purportedly conducted on 12th February, 2016 i.e. two weeks prior to the date of search. The Panchanama of the search proceedings unambiguously shows that nothing incriminating was recovered in the course of the search. Even in the counter affidavit of the Opposite Parties does not dispute this position.

In view of the settled legal position the Court has no hesitation in concluding that the impugned assessment order is entirely without jurisdiction."

6. Reiterating the written submissions filed before the Bench, the Id A.R. submitted that since no incriminating material was found during the course of search, assessment made for three assessment years should be quashed.

7. Replying to above, Id CIT DR although supported the order of the Id CIT(A) in not quashing the assessment orders but objected to deletion of additions made by the Assessing Officer.

8. We have considered the submission of both the parties and have gone through the orders of Lower Authorities. We have also deliberated on various case laws relied by Id. AR for the assessee. There is no dispute that search was carried out in case of assessee on 30.12.2013. No assessment for A.Y. 2008-09 to AY 2010-11 was pending and for all these three years there has been scrutiny assessment U/s 143(3) followed by appeal before the CIT(A), Cuttack and consequential appeal before this bench i.e., ITAT, Cuttack Bench, Cuttack, when notice under section 153A on 19.5.2015 was served upon the assessee. Even the time period for issuing notice under section 143(2) for above assessment years had already elapsed. In all these assessment orders, the AO has nowhere mentioned that any incriminating material which was unearthed during the course of search on 30.10.2013 has been utilised for assessment U/s 153A. The assessee during the assessment proceedings initiated in pursuance of notice under section 153A, specifically stated that no addition can be made in the completed

assessment in absence of incriminating material. Even before the Id CIT(A), it was stated that no incriminating materials was found during the course of search, which leads to making of addition.

9. The Hon'ble Delhi High Court in **CIT Vs. Kabul Chawla** (supra) held that completed the assessment can be interfered by the AO while making assessment under section 153A of the Act only on the basis of incriminating material unearthed during the course of search which was not produced or not already disclosed or made known in the course of original assessment..

10. Before us, the Ld. CIT-DR failed to bring any fact that assessment for the years under consideration was pending at the time of search on 30.10.2013. The department has not filed even a single piece of document to support the grounds of appeal raised in these appeals. No contrary law is brought to our notice. We also find that the addition has been made on the basis of estimation. As there was no incriminating material was found during the course of search, it is a well settled proposition that in absence of any incriminating material unearthed during the course of search the assessing authority had no jurisdiction to initiate proceeding U/s 153A of the Act. There is nothing on record which can justify that the additions made by the A.O. are based on any incriminating material and therefore, for assessment years from 2008-09 to 2010-11, there is no scope for the A.O. to issue a notice U/s 143(2) of the Act being time barred before the date of search i.e., 30/10/2013. Therefore, all the assessment years from 2008-09

to 2010-11 are concluded assessments and non abated assessments and in absence of any incriminating material framing of assessment under section 153A is without jurisdiction is void ab initio deserves to be quashed, therefore, we have no hesitation to allow the cross objections filed by the assessee in view of the decision of Hon'ble Delhi High Court in the case of Kabul Chowla (supra) well acknowledged & endorsed by decisions of the Jurisdictional ITAT Cuttack Bench, Cuttack in the case of M/s Pradosh Kumar Rout Vs. ACIT, Central Circle, Cuttack ITA(SS) No-72 to 74/CTK/2018, decided on 06/11/2019, DCIT, Central Circle, Sambalpur vs. M/s Basukinath Roadways Private Limited, IT(SS)A Nos.141 & 142/CTK/2018 decided on 20/02/20, Omprakash **Gupta Vs ACIT (Central)- II (ITAT Indore)** IT(SS)A Nos.277 to 281/IND/2017 decided on 28.02.2019 and the decision of Jurisdictional High Court of Odisha in the case of Smt. Jami Nirmala vs. PCIT, In W.P.(C) No.2857 of 2018 decided on 10.08.2021.

11. In the result, cross objections filed by the assessee for the assessment years 2008-09 to 2010-2011 are allowed.

12. Since we have quashed the assessment orders while allowing cross objections of the assessee, the department appeals for above assessment years against the deletion of additions by the Id CIT(A) have become infructuous. Therefore, same are dismissed.

13. In ITA Nos.47/CTK/2019 for the assessment year 2009-10 and 48/CTK/2019 for A.Y. 2010-2011, it is noticed that the appeals are time barred by 290 days. The assessee has filed condonation petitions, wherein, it is stated that due to negligence of authorised representative of the assessee, appeal could not be filed within the stipulated period, therefore, there was delay of 290 days. It is prayed that the delay be condoned in the interest of justice and appeals be admitted for adjudication.

14. After hearing the rival parties and perusing the condonation petitions, we are convinced that the delay in filing the appeals was due to negligence of Id A.R. of the assessee and no prejudice to be caused to the assessee for this. Accordingly, we condone the delay and admit the appeals for adjudication.

15. In both the appeals, the assessee has challenged the revisional order passed by the Pr. CIT U/s.263 of the Act.

16. Since in both the assessment years under consideration, we have quashed the assessment orders being void ab initio for want of incriminating materials during the course of search, the revisional order passed on the said assessment years is also a nullity. We hold accordingly. Nothing further survives for our adjudication. Accordingly, appeals of the assessee are dismissed being infructuous.

17. In the result, cross objections filed by the assessee for assessment years 2008-09 to 2010-2011 are allowed and that the appeals of revenue are dismissed. The appeals of the assessee for assessment years 2009-10 & 2010-11 against the orders U/s.263 are dismissed being infructuous.

Order pronounced u/s. 34(4) of I.T.A.T.Rules, 1963 on 10 / 12 /2021.

Sd/-
(Manish Borad)
ACCOUNTANT MEMBER

sd/-
(Chandra Mohan Garg)
JUDICIAL MEMBER

Cuttack; Dated 10 /12 /2021
B.K.Parida, SPS (OS)

Copy of the Order forwarded to :

1. The Appellant/Cross objector : Pasupati Feeds,
Tangi, Kotsahi, Cuttack
2. The Revenue: Acit, Central Circle, Cuttack.
3. The CIT(A)-2, Bhubaneswar
4. Pr.CIT-2, Bhubaneswar /Pr.CIT, Visakhapatnam
5. DR, ITAT, Cuttack
6. Guard file.
//True Copy//

By order

Sr.Pvt.secretary
ITAT, Cuttack