

IN THE INCOME TAX APPELLATE TRIBUNAL
“C” Bench, Mumbai
Before Shri Shamim Yahya (AM) & Shri Kuldeep Singh (JM)

I.T.A. Nos. 66 & 69/Mum/2021
(Assessment Years 2012-13 & 2013-14)

Podar Education Sports Trust 202, 2 nd Floor, Podar Chambers, S A Brelvi Road Horniman Circle, Fort Mumbai-400 001 PAN : AAATP9243N (Appellant)	Vs.	DCIT,CC-1(4) Room No.902 Prathishta Bhawan Mumbai-400 020 (Respondent)
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I.T.A. Nos. 67 & 68/Mum/2021
(Assessment Years 2015-16 & 2016-17)

Podar Literacy and Education Trust 103/1, Basavanapura, Off. Basavanapura Road Banglore-560 083 PAN : AAATP9197P (Appellant)	Vs.	DCIT,CC-1(4) Room No.902 Prathishta Bhawan Mumbai-400 020 (Respondent)
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Assessee by	Hema Kataria
Department by	R.K.Sahu
Date of Hearing	09.12.2021
Date of Pronouncement	25. 01.2022

O R D E R

Per Shri Shamim Yahya (AM) :-

These are appeals by the assessee against orders of learned Commissioner of Income Tax (Appeals) for the respective assessment years.

2. Since the grounds are common and the appeals were heard together, these are being consolidated and disposed-off by this common order.

3. For the sake of convenience, we are referring to the grounds of appeal raised from assessment year 2012-13:-

1. On the facts and circumstances of the appellant's case and in law, the Ld. CIT(A) erred in confirming the AO's action of passing assessment order u/s 143(3) r.w.s. 153A of the Income Tax Act, 1961 and making additions there under, which is illegal, bad in law and without jurisdiction.
2. On the facts and circumstances of the appellant's case and in law, the Ld. CIT(A) erred in confirming the AO's action of passing assessment order u/s 143(3) r.w.s. 153 A and making the additions there under, despite the fact that the Ld. AO has failed to comply with the mandate of first proviso to section 143(3) of the Income Tax Act, 1961 before making the assessment.
3. On the facts and circumstances of the appellant's case and in law, the Ld. CIT(A) erred in confirming the AO's action of passing assessment order u/s 143(3) r.w.s. 153A, which is bad in law since the jurisdiction u/s 153A stands vitiated in that the original return filed u/s 139(1) had attained finality, mid thus the Ld. AO has no jurisdiction with no assessment pending and no abatement of any proceedings.
4. On the facts and circumstances of the appellant's case and in law, the Ld. CIT(A) erred in confirming AO's action of making additions in the order passed u/s 143(3) r.w.s. 153A in the absence of any incriminating material found or seized during the course of search.
5. On the facts and the circumstances of the appellant's case and in law the Ld. CIT(A) erred in confirming Ld. AO's action of disallowing the provision for gratuity and leave encashment of Rs. 1,48,65,514/-.

4. Brief facts of the case are that in the assessment order, AO noted that there was a search and seizure in the case are various entities of the assessee group on 09.01.2018. Thereafter, he observed that basic modus operandi followed by the Podar group was to give bogus donation to other trust. That these trusts returned back cash to the group after deducting commission. That this was then introduced into various companies and into the individual accounts by layering it to maze of group companies and bogus transactions with the help of entry providers. Thereafter, AO noted that assessee has filed return of income under section 139 of the I.T.Act on 21.09.2012 declaring total income of Rs. Nil. Subsequently, assessment under section 143(3) was completed by order dated 27.03.2014 assessing the income at nil.

5. Thereafter, the AO noted that notice under section 153A of the Act, dated 16.04.2018 was issued to the assessee. Thereafter, AO examined the assessee's claim of provisions of gratuity. He noted that from the details filed and on comparison in the financials of earlier in the year under consideration, the assessee has claimed provision on account of employees. That in the course of assessment proceedings, assessee was required to justify the claim as it was clearly in the nature of provision. Thereafter, AO observed that it is seen that the provision for gratuity being in the nature of enhanced provision of employees for post-retirement benefit for the year under consideration is Rs. 1,48,65,514/-. The AO reproduced the following reply of the assessee in this regard.

"The amount of provisions under the head current liabilities includes provision for expenses and provision for employees. The provision for employees further includes provision for gratuity and leave encashment and certain other provisions in the nature of reimbursement of allowances, expenses, etc. The year-wise working of such expenses along with copy of relevant extract of Actuarial Certificate for the relevant assessment year under consideration in relation to Gratuity is enclosed herewith.

6. However, the AO was not satisfied, he held that it was not in nature of utilization and merely a provision and hence, not allowable. Hence, he disallowed the amount.

7. Against the above order, assessee appealed before the Ld.CIT(A), challenging the validity of jurisdiction of assessment and addition under section 153A dehorse any incriminating material found and seized during search and also the merits of addition on account of provision for gratuity.

8. Ld.CIT(A) is noted that assessee has submitted following case laws in support of the challenge to jurisdiction.

- i. CIT vs. Murli Agro Products (Bombay High Courts) in ITA No.36 of 2009
- ii. All cargo Global Logistics Ltd. vs. DCIT (2012) 137 ITD 287 (SB) (Mum)
- iii. CIT vs. All Cargo Global Logistics Ltd. reported in 374 ITR 645 (Bom)
- iv. ACIT vs. Pratibha Industries Ltd. (2013) 141 ITD 151 (Mum).

9. However, the Ld.CIT(A) was not convinced . He referred to the observations of the AO and noted that in the case of survey proceedings under section 133A carried out simultaneously to the search action Shri Kiritikumar Darshibhai has mentioned that in his statement that cash was received by the trustees. That the statement of Shri N.K.Sodhani also clearly accepted the donations were bogus in nature and were received back in the group entities the form of cash. That these donations have been given by Podar group trust, including the assessee trust from AY 2011-12 onwards to various trusts and is returned in the form of cash after deducting their commission. The Ld.CIT(A) held that this material is “incriminated enough to proceed against the assessee in accordance with provisions of section 153A of the I.T.Act”. Hence, he held that he was not in agreement with the contention of the assessee that there was no incriminating material found and seized. Hence, the challenge to jurisdiction was dismissed.

10. As regards, the merits of the addition, Ld.CIT(A) observed that during the year under consideration, the assessee has made incriminating provision. This provision is in the nature of un-ascertained liability and therefore not allowable as expenditure. That assessee has failed to furnish any details of utilization of profit during the year. That it is not clear as to how much gratuity has actually been paid and if any amount is paid that is a “creditable” expenditure. Hence, he upheld the addition on merits.

11. Against the above order, assessee is in appeal before us.

12. We have heard both the parties and perused the record. Ld. Counsel of the assessee submitted that addition in the case of assessment framed under proceedings under section 153A cannot be made without reference to any incriminating material found and seized during the search. In support of this proposition following case laws were referred.

- i. CIT vs. Murli Agro Products (Bombay High Courts) in ITA No.36 of 2009
- ii. All cargo Global Logistics Ltd. vs. DCIT (2012) 137 ITD 287 (SB) (Mum)
- iii. CIT vs. All Cargo Global Logistics Ltd. reported in 374 ITR 645 (Bom)
- iv. ACIT vs. Pratibha Industries Ltd. (2013) 141 ITD 151 (Mum).

13. As regards, the issue on merits, it was submitted that the same is duly covered by decision of ITAT in assessee's own group case as under:-

M/s. Anandilal & Ganesh Podar Society in ITA No.5962/Mum/2019.

14. Further, it was pointed out that the provision for gratuity in this case has been made as per actuarial valuation. Hence, it is submitted that on merits, the addition is not at all warranted.

15. On the other hand, Ld. DR, on the issue of jurisdiction referred to the order of Ld.CIT(A) in this regard. He submitted that it was admitted in the statement recorded that bogus donations have been given. That this material is incriminating enough to proceed against the assessee in accordance with provisions of section 153A of the Act. In this regard, Ld. DR referred to following case laws.

- i. Smt. Dayawanti Vs CIT 75 taxman.com 308 (Del.HC)
- ii. Nau Nidh Overseas Pvt.Ltd. 88 taxman.com 665 (Del.HC)

16. On merits, the Ld. DR submitted that the decision of Hon'ble Supreme Court in favor of assessee in the case of Bharat Earthmovers...ITR 428 is not applicable as the said decision is for AY 1978-79. That subsequently provision under section 43B was inserted. That Hon'ble Kerala High Court in the case of Dhanalakshmi Bank 102 taxmann.com 442 has held that provision on leave encashment is not allowable. That the Special Leave Petition by the assessee is dismissed by Hon'ble Supreme court reported in 109 taxman.com 89. He further referred to Hon'ble Madras High court in the case of Nachimuthu Industrial Association vs CIT 4 taxman 181, which had held

that provision made by the assessee of donation in its books cannot be held as application of income. He submitted that as discussed by the AO in his order, the provision of section 11 and 12 do not provide for such deduction.

17. On the issue of jurisdiction in this regard, Ld. Counsel of the assessee has submitted that case laws relied upon by the DR are not applicable in the present case, as the facts are different inasmuch as in those cases, it was statements made in the course of search under section 132(4) were held by Hon'ble Delhi High Court to be incriminating material for the purpose of section 153A of the I.T.Act. However, it was pointed out that in this case the statement referred is obtained only in the course of survey section 133A. In this regard, assessee's counsel placed reliance upon the decision of Madras High Court issue in the case of Khader Khan & sons (300 ITR 157), which was affirmed by the Hon'ble Supreme Court in 352 ITR 430 for the proposition that statement alone cannot be the basis of addition unless corroborated with relevant material. Ld. Counsel further submitted that reference to the case of Dhanlakshmi Bank (supra) on merits is not applicable here as in that case assessee has not made provision on the basis of actuarial valuation. Further, it was submitted that Hon'ble Supreme court in the case of Metal box company of India Ltd. Vs their workmen 73 ITR 53 has held that provision of gratuity on a scientific basis in the form of actuarial valuation carried out every year could be considered to represented as real liability of the employer to the employees. She further refer to several case laws.

18. Upon careful consideration, we note that the first challenge in this regard is that the addition in assessment under section 153A cannot be made without reference to incriminating material found and seized during search. In this regard, we may gainfully refer to the provision of section 153A of the Act.

Assessment in case of search or requisition.

153A. (1) Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, in the case of a person where a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A after the 31st day of May, 2003 [*but on or before the 31st day of March, 2021*], the Assessing Officer shall—

- (a) issue notice to such person requiring him to furnish within such period, as may be specified in the notice, the return of income in respect of each assessment year falling within six assessment years and for the relevant assessment year or years referred to in clause (b), in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139;
- (b) assess or reassess the total income of six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made and for the relevant assessment year or years :

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

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

Provided also that the Central Government may by rules¹⁰ made by it and published in the Official Gazette (except in cases where any assessment or reassessment has abated under the second proviso), specify the class or classes of cases in which the Assessing Officer shall not be required to issue notice for assessing or reassessing the total income for six assessment years immediately preceding the assessment year relevant to the previous year in which search is conducted or requisition is made and for the relevant assessment year or years :

Provided also that no notice for assessment or reassessment shall be issued by the Assessing Officer for the relevant assessment year or years unless—

- (a) the Assessing Officer has in his possession books of account or other documents or evidence which reveal that the income, represented in the form of asset, which has escaped assessment amounts to or is likely to amount to fifty lakh rupees or more in the relevant assessment year or in aggregate in the relevant assessment years;
- (b) the income referred to in clause (a) or part thereof has escaped assessment for such year or years; and
- (c) the search under section 132 is initiated or requisition under section 132A is made on or after the 1st day of April, 2017.

Explanation 1.—For the purposes of this sub-section, the expression "relevant assessment year" shall mean an assessment year preceding the assessment year relevant to the previous year in which search is conducted or requisition is made which falls beyond six assessment

years but not later than ten assessment years from the end of the assessment year relevant to the previous year in which search is conducted or requisition is made.

Explanation 2.—For the purposes of the fourth proviso, "asset" shall include immovable property being land or building or both, shares and securities, loans and advances, deposits in bank account.

(2) If any proceeding initiated or any order of assessment or reassessment made under sub-section (1) has been annulled in appeal or any other legal proceeding, then, notwithstanding anything contained in sub-section (1) or [section 153](#), the assessment or reassessment relating to any assessment year which has abated under the second proviso to sub-section (1), shall stand revived with effect from the date of receipt of the order of such annulment by the Principal Commissioner or Commissioner:

Provided that such revival shall cease to have effect, if such order of annulment is set aside.

Explanation.—For the removal of doubts, it is hereby declared that,—

- (i) save as otherwise provided in this section, [section 153B](#) and [section 153C](#), all other provisions of this Act shall apply to the assessment made under this section;
- (ii) in an assessment or reassessment made in respect of an assessment year under this section, the tax shall be chargeable at the rate or rates as applicable to such assessment year.

19. A reading of the above shows that for non abated assessment year, AO has to be in possession of incriminating material found and seized during search to confer upon jurisdiction for assessment u/s. 153A of the Act. In this regard, we note that Hon'ble jurisdictional High Court in several decisions held that in cases, where the assessments, which are not pending, the addition under section 153A cannot be done without reference to incriminating seized material. The relevant oration of Hon'ble Bombay High Court issue in the case of [CIT vs. Continental Warehousing Corporation](#) [2015] 374 ITR 645 (Bom) reads as under:-

"On a plain reading of [section 153A](#), it becomes clear that on initiation of the proceedings under [section 153A](#), it is only the assessment/reassessment proceedings that are pending on the date of conducting search under [section 132](#) or making requisition under I [section 132/4](#) stand abated and not the assessments/reassessments already finalised for those assessment years covered under [section 153A](#). By a Circular No. 8 of 2003, dated 18-9-2003 (See 263 ITR (St) 61 at 107) the CBDT has clarified that on initiation of proceedings under [section 153A](#), the proceedings pending in appeal, revision or rectification proceedings against finalised assessment/reassessment shall not abate. It is only because, the finalised assessments/reassessments do not abate, the appeal revision or rectification pending against finalised assessment/ reassessments would not abate. Therefore, the argument of the revenue, that on initiation of proceedings under [section 153A](#), the assessments/reassessments finalised for the assessment years covered under [section](#)

153A stand abated cannot be accepted. Similarly on annulment of assessment made under section 153A(1) what stands revived is the pending assessment/reassessment proceedings which stood abated as per section 153A(1)."

"Once it is held that the assessment has attained finality, then the Assessing Officer while passing the independent assessment order under section 153A read with section 143(3) could not have disturbed the assessment/reassessment order which has attained finality, unless the materials gathered in the course of the proceedings under section 153A establish that the reliefs granted under the finalised assessment/reassessment were contrary to the facts unearthed during the course of 153A proceedings. If there is nothing on record to suggest that any material was unearthed during the search or during the 153A proceedings, the Assessing Officer while passing order under section 153A read with section 143(3) cannot disturb the assessment order."

20. The reading of the above makes, it clear that was expounded that in the case of assessment, which have attained finality no addition under section 153A can be done without seized incriminating material. That there has to be material gathered in the course of search proceeding, which establish that relief granted earlier were contrary to the facts unearthed during the course of search proceedings. Further, it is noted that the provisions contained under section 153A are applicable to the procedure of assessment under section 153C also as per Explanation to section 153A. The jurisprudence regarding jurisdictional defect in assessment under section 153C without reference to incriminating seized material found and seized has also been expounded by Hon'ble Supreme Court in the case of CIT vs Singhad Technical Education Society in civil appeal No. 11080 of 2017 and others. In this regards Hon'ble Supreme Court in paragraph 18 of the said order has observed as under:-

“ In this behalf it was noted by the ITAT that as per provisions of section 153C of the Act incriminating material, which was seized had to pertain to assessment years in question and it is an undisputed fact that the document, which were seized did not establish any correlation, document wise with these four assessment years. Since, the requirement under section 153C of the Act is essential for assessment under the provision, it becomes a jurisdictional defect. We find this reasoning to be logical and valid having regard to the provision of section 153C of the Act.”

21. Before examining the present case on the touchstone of above said case laws, we find that the position of assessment years in the present case is as under

(i) In Assessment Year 2012-13 return of income u/s. 139 of the Act was filed on 21/09/2012. The assessment order u/s. 143(3) was completed on 27/03/2014. Since, search was conducted on 09/01/2018, this is a non abated assessment year.

(ii) In AY 2013-14 assessee filed return of income on 21/09/2013 in this case. Since, search was conducted on 09/01/2018 period of issuance of notice u/s. 143(2) was over. Hence, this is also non abated assessment year.

(iii) In AY 2015-16, return of income u/s. 139 of the Act was filed on 29/09/2015. An assessment order u/s. 143(3) was completed on 27/07/2017. Since, search was conducted on 09/01/2018. This is an abated assessment year.

(iv) In AY 2016-17, return of income was filed u/s. 139 of the Act on 30/09/2016. The assessment was selected for scrutiny u/s. 143(3), however the same was abated due to search on Podar Group on 09/01/2018.

22. On the touchstone of above case laws from Hon'ble Jurisdictional High Court & Hon'ble Supreme Court, we find that for assessment years 2012-13 & 2013-14, which are non abated assessment years, no addition is permissible without any incriminating material, which can be correlated with the assessment years, found and seized during search. In the present case, as per the facts emanating no incriminating material was found and seized during search. But, Ld. CIT(A) and Ld. DR have referred to the statement obtained under survey regarding donation and have opined that the same is incriminating enough to warrant jurisdiction. In this regard, we note that firstly as held in the case law above the incriminating material has to be found and seized and correlated with the assessment year, which can be a basis of addition. It is nobody's case here that any material relating to provision for gratuity was unearthed during search proceeding much less incriminating material. Moreover, the

statement on survey under section 133A cannot be said to be a material, which can be said to be incriminating material found and seized during search on the basis of which addition of section 153A can be made. This aspect is further fortified by the decision of Kader Khan (supra) wherein the Hon'ble Supreme Court has upheld the proposition that no addition can be made merely on the statement obtained during survey without corroborative material. In this view of the matter, the decisions referred by Id. DR from Hon'ble Delhi High court, which are in the context of the statement obtained under section 132(4) are not applicable on the facts of the case here. Furthermore, as per the decision of Hon'ble Supreme Court in Singhad Technical Education Society (supra), the incriminating material seized has to establish correlation with the particular assessment year. This is not at all the case here.

23. Hence for AY 202-13 and 2013-14, which are non abated, we hold that the assessee's challenge to jurisdiction succeeds and hence assessment for these years stand quashed. For AY 2015-16 and 2016-17, which are abated assessment years, the assessee's challenge to jurisdiction fails as there is no such jurisdictional requirement for abated assessment year. Hence, challenge to jurisdiction for AY 2015-16 & 2016-17 are dismissed.

24. As regards, the merits of the case, we find that the issue is covered in favour of the assessee by the decision of ITAT in assessee's group case in Anandilal & Ganesh Podar Society (supra) wherein following was held.

12. Considered the rival submissions and material on record. We are of the view that the provision for gratuity and leave encashment has been made by the assessee based on the actuarial valuation report and although these disallowances are purely provision in nature and not actual expenditure but such provisions are required to be made as per mandate of Law and the books of accounts will not reveal the true and fair picture without making provision for these expenses. For e.g., the depreciation is also a book entry and no actual flow of money takes place but provision for depreciation in books of accounts is mandated by law in order to reflect the true and correct profit of the entity. Like depreciation, the provision for gratuity and leave encashment has necessarily be provided in the books of accounts and although there are no direct judicial precedents regarding allowability of provision for gratuity and

leave encashment in case of Trust. However, there are various judicial precedents which allows the claim of depreciation while computing the taxable income of the trust.

13. The contention of the Ld. CIT(DR) appears to be on the assumption that the expenditure should necessarily involve actual delivery of or parting with the money. It seems to us that it need not necessarily be so. The expenditure should be understood as necessary outgoings. The provisions are necessary to be made for certain purposes like, provision for depreciation is to be made in respect of decrease in value of property through wear and tear, deterioration or obsolescence and allowance is made for this purpose in book-keeping, accountancy, etc. It is the provision made for the loss or expenses incurred through using the asset for earning profits, and should, therefore, be charged against those profits as they are earned.

14. If depreciation is not provided for, the books will not contain a true record of revenue or capital. If the asset were hired instead of purchased, the hiring fee would be charged against the profits, having been purchased, the asset is, in effect, then hired by capital to revenue, and the true profit cannot be ascertained until a suitable charge for the use of the asset has been made. Likewise, the provision for gratuity and leave encashment also required to be provided as mandated by Law. Without being such provisions made, the balance sheet will not present a true and fair view of the state of affairs.

15. In CIT v. Indian Jute Mills Association[1982] 134 ITR 68 the Calcutta High Court while constructing the expression 'expenditure incurred' in [section 44\(A\)](#) of the Act observed: "depreciation claim shall include the expenditure incurred."

16. Thus, In our considered view, in case of trust, the meaning 'applied' need not be construed as 'spent'. It includes the necessary provisions required to be made as per statutory requirement. Therefore, we direct the AO to allow the provision for gratuity and leave encashment as applied for the object of the trust. Accordingly the ground raised by the assessee is hereby allowed.

25. Further, since the provision has been made on the basis of actuarial valuation the same is duly supported by the decision of Hon'ble Supreme Court in the case of Metal Box Company Ltd.(supra). The decisions referred above by the DR rendered by Hon'ble Kerala High Court and Madras High Court were on the issue of leave encashment and donation respectively. Hence they are not applicable on the facts here. Hence, assessee's appeal on merits of addition for gratuity provision stands allowed.

26. Our above adjudication applies mutatis mutandis to all the years under appeal.

27. In the result, assessee's appeals for AY 2012-13 & 2013-14 are allowed and appeals for AY 2015-16 & 2016-17 are partly allowed.

Pronounced in the open court on 25 .01.2022

Sd/-
(KULDIP SINGH)
JUDICIAL MEMBER

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai; Dated : 25 /01/2022

Thirumalesh, Sr.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

//True Copy//

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai