

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "A", MUMBAI**

**BEFORE SHRI M. BALAGANESH, ACCOUNTANT MEMBER
AND
SHRI KULDIP SINGH, JUDICIAL MEMBER**

**ITA Nos.547 & 548/M/2021
Assessment Years: 2015-16 & 2016-17**

Jt. Commissioner of Income Tax (OSD), Central Circle-4(2), Room No.1918, 19 th Floor, Air India Building, Nariman Point, Mumbai-400 021	Vs.	M/s. Avacado Properties and Trading (India) Pvt. Ltd., S.No.1406, A/18, Paradigm Building, Link Road, Mindspace, Mumbai – 400064 PAN: AADCA9413F
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Madhur Agrawal, A.R.
Revenue by : Shri Shekhar L. Gajbhiye, D.R.

Date of Hearing : 24.01.2022
Date of Pronouncement : 22.03.2022

O R D E R

Per Kuldip Singh, Judicial Member:

Captioned appeals filed by Jt. Commissioner of Income Tax (OSD), Central Circle-4(2), Mumbai (hereinafter referred to as the Revenue) for A.Y. 2015-16 & 2016-17 bearing common question of law and facts are being disposed of by way of common order.

2. The Revenue by filing the present appeals sought to set aside the impugned order even dated 29.01.2021

passed by the Ld. Commissioner of Income Tax (Appeals) [hereinafter referred as the CIT(A)] on the grounds inter alia that:

ITA No.547/M/2021 A.Y. 2015-16 &
ITA No.548/M/2021 A.Y. 2016-17

“1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in holding that no addition can be made in the assessment u/s 143(3) r.w.s. 153A of the IT Act for unabated year which does not have any link with the search action, even when there is no mention within the provision of section 153A of the IT Act that while reassessing the case (unabated assessment) only incriminating material seized during the search and seizure action will have to be considered.

2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in quashing the notice issued u/s 153A of the Income Tax Act 1961, while such a notice issued is in conformity with the intent and purpose of the provisions of Section 153A of the Income Tax Act, 1961.

3. The appellant craves to leave, to add, to amend and / or to alter any of the ground of appeal, if need be.

The appellant, therefore, prays that on the ground stated above, the order of the Ld. CIT (A)-52, Mumbai, may be set aside and that of the Assessing Officer restored.”

3. Briefly stated facts necessary for adjudication of the controversy at hand in both the aforesaid appeals are : the assessee company is into the business of real estate development and operation of industrial park. Assessee company had initially filed return on 30.11.2015 declaring income at Nil and book profit under section 115JB of the Income Tax Act (for short the

Act) to the tune of Rs.25,42,55,293/- but subsequently the return of income was revised under section 139(5) on 27.03.2017 declaring total income at Nil and book profit under section 115JB of the Act at Rs.25,42,55,292/- by claiming revised depreciation on reduced WDV giving effect to the assessment order of A.Y. 20014-15.

4. Subsequently on the basis of search and seizure operation conducted under section 132 of the Act at the premises of K. Raheja Group of cases on 30.11.2017 assessment proceedings under section 143(3) read with section 153A were initiated for A.Y. 2015-16 & 2016-17. In response to the notice issued under section 153A of the Act the assessee filed the return of income for A.Y. 2015-16 & 2016-17 at Nil and book profit under section 115JB of the Act at 25,42,55,293/- and Rs.33,64,86,089/- for A.Y. 2015-16 & 2016-17 respectively. Then notices under section 143(2) and 142(1) of the Act dated 05.02.2019 and 08.02.2019 respectively were issued for A.Y. 2015-16 & 2016-17. Then assessee filed audit report in form No.10CCB for claim of deduction under section 80IA(4)(iii) of the Act. Declining the contentions raised by the assessee, the AO made a disallowance of Rs.6,87,76,756/- under section 14A and reduced the claim under section 80IA of the Act by Rs.5,28,888/- for A.Y. 2015-16 and by

making disallowance of Rs.7,56,45,011/- under section 14A and reduced the claim under section 80IA by Rs.2,39,660/- for A.Y. 2016-17 and thereby framed the assessment under section 143(3) read with section 153A of the Act.

5. The assessee carried the matter before the Ld. CIT(A) who has deleted the disallowance by allowing the appeal. Feeling aggrieved the Revenue has come up before the Tribunal by way of filing the present appeal.

6. We have heard the Ld. Authorised Representatives of the parties to the appeal, perused the orders passed by the Ld. Lower Revenue Authorities and documents available on record in the light of the facts and circumstances of the case and law applicable thereto.

7. Undisputedly since no scrutiny assessment in this case was there, returns of income filed by the assessee for A.Y. 2015-16 & 2016-17 were subjected to assessment under section 143(3) read with section 153A of the Act on the basis of search and seizure operation dated 30.11.2017. It is also not in dispute that no “incriminating material” was found or seized qua the year under assessment during search and seizure operation.

8. The Ld. D.R. for the Revenue challenging the impugned order passed by the Ld. CIT(A) contended inter-alia that the Ld. CIT(A) has considered fresh claim/ground without verifying reasons and seeking comment of the AO; that such assessment could be framed under section 153A of the Act irrespective of any “incriminating material” and relied upon the decision rendered by Hon’ble Apex Court in case of ACIT vs. Rajesh Jhaveri Stock Brokers (P) Ltd. 291 ITR 500 (SC) (2007), DCIT vs. Zuari Estate Development & Investment Company Ltd. 63 taxmann.com 177 (SC) (2016) and Canara Housing Development Co. vs. DCIT 49 taxmann.com 98 (Kar) (2014)

9. The Ld. D.R. for the Revenue also filed short synopsis to support his argument which has been made part of the judicial record. However, on the other hand, the Ld. A.R. for the assessee, to repel the argument addressed by the Ld. D.R., relied upon the order passed by the Ld. CIT(A) and contended inter alia that since “no incriminating material” found/seized during search operation no addition can be made; that notices issued under section 143(2) of the Act for both the assessment years are time barred.

10. We have perused the order passed by the Ld. CIT(A). The Ld. CIT(A) decided the issue after duly thrashing the facts of this case in the light of the settled principle of law, the crux of which is “since both the additions made by the AO are found to have no link with the search action, such addition could not have been made by the AO during the unabated year, hence these additions do not survive and AO is directed to delete the same.”

11. Aforesaid findings are based upon the settled principle of law by the Special Bench of the Tribunal in case cited as All Cargo Global Logistics Ltd. (2012) (23 taxmann.com 103 (Mum) (SB), in case of Rameshbhai Jivraj Desai (2020) [121 taxmann.com 333] decided by Hon’ble Gujarat High Court and by the Hon’ble Delhi High Court in case of Kabul Chawla (2015) 61 taxmann.com 412 (Delhi); that when “no incriminating material” has come on record on the basis of search and seizure operation where assessment is unabated no additions can be made by the AO under section 153A of the Act.

12. Moreover, in both the cases notice issued under section 143(2) of the Act by the AO is time barred as is evident from the table extracted below:

Sr.No	Particulars	AY 2015-16	AY 2016-17
1	Date of filing original return	30.11.2015	14.10.2016
2	Date of filing revised return	27.03.2017	-
3	Last date for issuance of notice under section 143(2) of the Act (six months from the end of FY in which return is furnished)	30.09.2017	30.09.2017
4	Date of search	30.11.2017	30.11.2017

13. Keeping in view the date of filing the original return and revised return i.e. 30.11.2015 & 27.03.2017 for A.Y. 2015-16 and 14.10.2016 for A.Y. 2016-17 respectively the notice under section 143(2) of the Act was required to be issued on or before 30.09.2017 whereas search in this case was made on 30.11.2017 and as such the entire proceedings under section 153A of the Act are vitiated.

14. To repel this argument of the Ld. A.R. for the assessee, the Ld. D.R submitted that this issue has been raised by the assessee first time before the Ld. CIT(A) who has decided the same without calling for any comment/remand report from the AO. We are of the considered view that this contention of the Ld. D.R. for the Revenue is misconceived because this is a legal issue which can be raised at any stage of the proceedings. So far as the contention

raised by the Ld. D.R. that such assessment could be framed under section 153A of the Act irrespective of any “incriminating material” is concerned, again this argument is not sustainable in view of the settled principle of law discussed in the preceding paras in case of All Cargo Global Logistics Ltd. (supra) Rameshbhai Jivraj Desai (supra).

15. In view of what has been discussed above, finding no illegality or perversity in the impugned order passed by the Ld. CIT(A), both the appeals filed by the Revenue are hereby dismissed.

Order pronounced in the open court on 22.03.2022.

**Sd/-
(M. BALAGANESH)
ACCOUNTANT MEMBER**

**Sd/-
(KULDIP SINGH)
JUDICIAL MEMBER**

Mumbai, Dated: 22.03.2022.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.