IN THE INCOME TAX APPELLATE TRIBUNAL
RAJKOT BENCH, RAJKOT

Before: Shri Waseem Ahmed, Accountant Member
And Shri Siddhartha Nautiyal, Judicial Member

ITA Nos. 287 & 288 /Rjt/2015
Assessment Year 2005-06 & 2006-07

Backbone Projects Ltd., A-9, Kumud Apartment, Nr. Amco Bank, Stadium Circle, Ahmedabad PAN: AABCB1582E (Appellant)	Vs	The Dy. CIT, Central Circle-2, Rajkot (Respondent)

ITA Nos. 340 & 341 /Rjt/2015
Assessment Year 2005-06 & 2006-07

The ACIT, Central Circle-2, Rajkot (Appellant)	Vs	Backbone Projects Ltd., A-9, Kumud Apartment, Nr. Amco Bank, Stadium Circle, Ahmedabad PAN: AABCB1582E (Respondent)

Assessee by: **Shri D.M. Rindani, A.R.**
Revenue by: **Shri Aarsi Prasad, CIT-D.R.**

Date of hearing : 06-07-2022
Date of pronouncement : 26-08-2022

आदेश/ORDER

PER BENCH:-

These are cross appeals filed by the assessee and the Revenue against the orders passed by the Ld. CIT(Appeals) for assessment years 2005-06 and 2006-07 in Appeal Nos. CIT(A)-11/457-R/CC.2/2014-15 and CIT(A)-11/458-R/CC.2/2014-15 respectively. Since common issues are involved in both the assessment years, the same are being disposed of by way of a common order.

Assessment year 2005-06

2. The assessee has raised the following grounds of appeal:

"1. The learned Commissioner of Income Tax (Appeals) - 11, Ahmedabad erred in upholding the validity of order passed u/s 153A r.w.s. 143(3) of the Act particularly in respect of deductions claimed originally and allowed in original order u/s 143(3) of the Act and not related to any incriminating material found during action u/s 132 of the Act.

2. The learned Commissioner of Income Tax (Appeals) - 11, Ahmedabad erred in confirming the action of the assessing officer in disallowing the claim of deduction u/s 80IA(4) in respect of following infrastructure projects undertaken by the appellant:

Sr. No. of project referred by	

CIT (Appeals)	*Name of the project*
1	*Bhavnagar Trapaj Road*
2	*Jambusar Amod*
3	*Palanpur Pipeline Project*
4	*SH - 02 Ukalana - Project Budheal Road*
5	*SH - 14 (BJL) (M - 26) Road*
5	*SH - 17 STM Road*
6	*SH - 23 Sirsa Ukalana – Budheal Road Project*

3. The learned Commissioner of Income Tax (Appeals) - 11, Ahmedabad erred in holding that appellant was not a developer of infrastructure facility in respect of projects specified by him and listed in ground No. 2 above.

The appellant craves leave to add, amend, alter and withdraw any ground of appeal anytime up to the hearing of this appeal."

2.1 The Department has raised the following grounds of appeal:

"1) On facts and circumstances of the case and in law, the Ld. CIT(A) has erred in allowing deduction u/s. 80IA(4) in respect of project No.2,3,5,6,7,8,10 by treating the assessee as a "Developer" of infrastructure projects instead of "Work Contractor" as treated by the Assessing officer.

2) On the facts and in the, circumstances of the case and in law, the CIT(A) ought to have upheld the-order of the A.O.

3) It is, therefore, prayed that the order of the CIT (A) be set aside and that of the A.O. be restored to the above extent."

Assessment year 2006-07

3. The assessee has raised the following grounds of appeal:

"1. The learned Commissioner of Income Tax (Appeals) - 11, Ahmedabad erred in upholding the validity of order passed u/s 153A r.w.s. 143(3) of the Act particularly in respect of deductions claimed originally and allowed in original order u/s 143(3) of the Act and not related to any incriminating material found during action u/s 132 of the Act.

2. The learned Commissioner of Income Tax (Appeals) - 11, Ahmedabad erred in confirming the action of the assessing officer in disallowing the claim of deduction u/s 80IA(4) in respect of following infrastructure projects undertaken by the appellant:

Sr. No. of project referred by CIT (Appeals)	*Name of the project*
1	*GUDC Water Transmission (Limdi - Dhangadhra)*
2	*GUDC WS & SS Mandvi Site*
3	*Bhavnagar-Trapaj Road*

4	*Limdi 46 to 58 Canal Project*
5	*SH - 17 STM Road*
6	*SH - 21 Budheal - Faridabad Road Project*

3. The learned Commissioner of Income Tax (Appeals) - 11, Ahmedabad erred in holding that appellant was not a developer of infrastructure facility in respect of projects specified by him and listed in ground No. 2 above. The appellant craves leave to add, amend, alter and withdraw any ground of appeal anytime up to the hearing of this appeal."

3.1 The Department has raised the following grounds of appeal

"1) The Ld. CIT(A) has erred in law and/or on facts in treating the assessee as a "Developer" of Infrastructure Project instead of "Work Contractor" and thereby allowing deduction u/s. 80IA(4) in respect of those projects.

2) On facts and circumstances of the case and in law, the Ld. CIT(A) ought to have upheld the disallowance of deduction u/s. 80IA(4) in respect of project No.1,2,3,5,6,7,8,11,12,14,16 & 19 by treating the assessee as a "Developer" of infrastructure projects instead of "Work Contractor" as treated by the Assessing officer.

3) The Ld. CIT(A) has erred in law and/or on facts in allowing the employers contribution to P.P. which is paid beyond the due date specified as per P.P. Act.

4) On facts and circumstances of the case and in law, the CIT(A) ought to have upheld the disallowance of employees contribution to P.P. by the assessee.

5) On the facts and in the circumstances of the case and in law, the CIT(A) ought to have upheld the order of the A.O.

6) It is, therefore, prayed that the order of the CIT (A) be set aside and that of the A.O. be restored to the above extent."

4. We shall first proceed with assessment year 2005-06. The brief facts of the case are that the original assessment order was passed on 28-12-2007, wherein certain additions were made to the returned income of the assessee. Thereafter, search under section 132 of the Act was carried out at the premises of the assessee company on 24-06-2010 and proceedings u/s 153A of the Act were initiated. During the course of assessment, the AO sought to make certain disallowances under section 80- IA of the Act, which were challenged by the assessee on the ground that since the original assessment was already concluded and no incriminating material was found during the course of search, such additions are not sustainable under section 153A of the Act. However, the contention of the assessee was dismissed by the AO, by observing as under:

"5.2 Further, the decision of Hon. Special bench has to be seen in the context of the facts of a case. The essence of this decision is that the issues which have reached finality in original assessment should not generally be disturbed in the assessments under section 153A unless and until evidences were found during the course of search demanding necessity for the same. In the case under consideration, original assessment under section 143(3) was completed prior to insertion of the above explanation which has been substituted by the Finance (No.2) Act, 2009, with retrospective effect from 01.04.2000. The said Explanation starts with the phrase 'for removal of doubt..', meaning there by that it only clarifies which is always intended to be the meaning of the provisions of section 80IA(4) of the Act. ***Since, the original assessment was completed***

prior to insertion of this explanation the then Assessing Officer did not had the benefit or occasion to examine the claim of the assessee in the light of intention and meaning of the provision as clarified by the said Explanation. *Subsequently a Search was conducted in the case of the assessee on 24.06.2010 and after examining the documents found at the premises of the assessee during the course of search, it was observed that the assessee was not eligible for deduction under section 80IA(4) as clarified by the said Explanation, It would therefore, be incorrect to say that this was not a finding of the Search. Further, the claim of the assessee was examined during the course of present assessment proceedings and it was found that the findings of the Search that the assessee is not eligible for such deduction, is correct in view of the said -provisions-..of section 80IA(4) of-the Act, It would also be most -relevant to mention that the issue of eligibility of the assessee for deduction under section 80IA(4) in the case of the assessee could not be said to have reached finality in the original assessment as it was found during the course of search that the assessee was not eligible for the deduction under section 80IA(4) as clarified by the said Explanation. The deductions and exemptions are special benefits and, as discussed earlier, it could be allowed only if the assessee is found to be eligible for the same on merit.* ***If any deduction was wrongly allowed in the previous assessments the assessee cannot claim that it could not be disallowed in subsequent assessments under section 153A specially when the issue itself has not reached finality."***

5. Accordingly, the AO made an addition of ₹ 8,09,00,367/- by disallowing the claim of deduction under section 80 IA(4) of the Act.

6. In appeal, the assessee challenged the validity of assessment framed under section 153A of the Act on the ground that at the time of search no incriminating documents were found so as to hold that the assessee is not eligible for deduction under section 80 IA(4) of the Act. However, Ld.

CIT(Appeals) dismissed the assessee's appeal with the following observations:

> *"6. The decisions relied by the appellant were carefully gone through and it was observed that the contents of the decisions were reproduced by the appellant in a distorted manner just to make believe his submission, by grossly ignoring the true spirit of the decisions as well as the provisions of the Act. As a matter of fact, the correct spirit of the findings in these decisions could be understood only after perusal of each of the decisions as a whole and not in piece meals. The extracts reproduced by the appellant were just to make them suitable for his own purpose. The Hon'ble Tribunals and the courts in the cases of Anil kumar Bhatia 211 Taxman 453 (Delhi), Filatex Ltd. (2014) 49 Taxmann.com 465 (Delhi), Sunny Jacob Jewellers & Wedding Centre 362 ITR 664(Kerala) and Hotel Mariya (2011)332 ITR 537 (Kerala) are in agreement that according to the provisions of Section 153A, the A.O. is obliged to issue notice u/s 153A in respect of 6 Assessment Years preceding the year in which search has been initiated. Thereafter, he has to assess or reassess the total income of these six years as provided u/s 153A (1)(b).. It was further clarified that only the assessments or re-assessments pending on the date of initiation of the search or requisition shall abate. The second proviso does not contain any word or words to the effect that no reassessment shall be made in respect of completed assessments. The courts have unanimous view that the language is clear in this behalf and therefore, literal interpretation should be followed. The Bombay Tribunal (special bench) held that such interpretation does not produce any manifestly absurd or unjust results as Section 153A (I) (b) and the first proviso clearly provide for assessment or reassessment of all six years.*
>
> *6.1 The ratio of the decisions of the courts makes it abundantly clear that once action u/s 132 was carried or requisition u/s 132A initiated, it becomes mandatory to the AO. to initiate assessment proceedings in 6 A. Ys., preceding to year in which search was carried out or requisition was made.* ***It is not relevant whether any incriminating material was found, in any particular year or in all of the relevant financial years. Therefore, the ground of appeal that the assessments already made cannot be re-opened u/s 153A is not in***

> ***accordance with the provisions of the Act.*** *After having regard to the rulings of the courts, the provisions of the Act and the facts of the case, this ground of appeal is rejected."*

6.1 From the observations of the Ld. Assessing Officer reproduce above, apparently, no incriminating material was found during the course of search on the basis of which assessment was framed disallowing the claim of the assessee under section 80IA of the Act. The basis of additions apparently may be inferred from the below observations made by Ld. Assessing Officer in the assessment order "*Since, the original assessment was completed prior to insertion of this explanation the then Assessing Officer did not had the benefit or occasion to examine the claim of the assessee in the light of intention and meaning of the provision as clarified by the said Explanation".* Thus, the order passed u/s 153A r.w.s. 143(3) of the Act was not on the basis of any incriminating material found during the course, but on the basis of revision of order sought to be made on the basis of insertion of new Explanation to section 80-IA, which was not existing at the time of completion of original assessment. Now, which shall also refer to the relevant extracts of the order of the Ld. CIT(Appeals) on this point:

> *"6.1* ***The ratio of the decisions of the courts makes it abundantly clear that once action u/s 132 was carried or requisition u/s 132A initiated, it becomes mandatory to the AO. to initiate assessment proceedings in 6 A.Y's, preceding to year in which search was carried out or requisition was made, it is not relevant whether any incriminating material was found in any particular year or in all of the relevant financial years.*** *Therefore, the ground of appeal that the assessments already made cannot be re-opened u/s 153A is not in accordance with the provisions of the Act. After having regard to the*

rulings of the courts, the provisions of the Act and the facts of the case, this ground of appeal is rejected."

6.2 A perusal of the contents of the Ld. CIT(Appeals) order seems to suggest that no incriminating material was found during the course of search so as to disallow the claim of the assessee under section 80-IA of the Act. The Ld. CIT(Appeals) in his order has categorically observed that "*it is not relevant whether any incriminating was found in any particular order and all of the relevant years. Therefore, ground of appeal that the assessments already made cannot be reopened under section 153A is not in accordance with the provisions of the Act*".

7. Before us, the Ld. Counsel for the assessee challenged the validity of the assessment framed under section 153A of the Act in the absence of any incriminating material found during search action undertaken on the assessee, particularly when the assessment years 2005-06 and 2006-07 had attained finality and thus not abated. Before us, the Department has not been able to produce any material/evidence to prove that the assessment under section 153A r.w.s. 143(3) of the Act was framed on the basis of any incriminating material found during the course of search.

8. We have heard the rival contentions and perused the material on record. In the case of **PCIT v. Meeta Gutgutia [2018] 96 taxmann.com 468 (SC)**, Supreme Court held that invocation of section 153A to re-open concluded assessments of assessment years earlier to year of search was not justified in absence of incriminating material found during search qua each

such earlier assessment year. In the case of **Pr. CIT v. Saumya Constructions 81 Taxman.com 292 (Gujarat)**, the Gujarat High Court held that under section 153A, an assessment has to be made in relation to search or acquisition, namely, in relation to material disclosed during search requisitioned. If no incriminating material was found during search, no addition can be made on basis of material collected after the search. The Delhi High Court in the case of **Kabul Chabla (2015) 380 ITR 573 (Delhi High Court)** has held that completed assessment can be interfered by the Assessing Officer while making 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 ware not produced or not already disclosed or made in the course of original assessment. The SLP filed by the Revenue against the above decision of Delhi High Court was dismissed by the Hon'ble Supreme Court vide SLP(C)No.018651/2016.The Gujarat High Court in the case of **Pr. CIT v. Sunrise Finlease 89 Taxman.com 1 (Gujarat)** has held that where no incriminating evidence against assessee was found or seized during the course of search so as to attract provisions of section 153A proceedings, no additions could be made on the basis of statement of director of assessee company which were recorded under section 131 much later after search. The Gujarat High Court in the case of **PCIT v. Dipak Jashvantlal Panchal [2017] 88 taxmann.com 611 (Gujarat)** held that only undisclosed income and undisclosed assets detected during search can be brought to tax in assessment under section 153A of the Act. In the case of **PCIT v. Desai Construction (P.) Ltd. [2017] 81 taxmann.com 271 (Gujarat)**, the Gujarat High Court held that in absence

of any incriminating material found during search, Assessing Officer, in assessment under section 153A, would not be entitled to interfere with assessee's claim for deduction under section 80-IA, which was part of original assessment proceedings and such assessment had abated. The ITAT Rajkot Bench in the case of a **Rajat Minerals v. DCIT 114 Taxman.com 536 (Ranchi-Trib)** held that where no incriminating evidence against the assessee was found or seized during course of search, invocation of provisions of section 153A and making additions/disallowances on basis of tax evasion petition found much after search was unjustified. The Delhi High Court in the case of **Pr. CIT v. Jaypee Financial Services Ltd 127 Taxman.com 419 (Delhi)**, held that where AO during the course of post search proceedings under section 153A against assessee-share trader found certain evidences showing client code modification done by assessee which were not for genuine reasons and, accordingly, made addition on account of such client code modification, since impugned addition was not made by AO based on any incriminating material found during search against assessee and assessment was not pending on date of search, impugned addition was unjustified and same was to be deleted. The Department has not been able to produce any material to suggest / substantiate that the assessment order was passed on the basis of any incriminating material found during the course of search.

8.1 In the instant case, we observe that for assessment year 2005-06, return of income was filed on 31-03-2006 declaring total income of Rs. “Nil” wherein deduction u/s 80-IA of Rs. 8,09,00,367/- has been claimed. The regular assessment for the captioned year was also completed on 28-12-

2007. Subsequently, a search action under section 132 of the Act was carried out at the premises of the assessee company and on 24-06-2010, an assessment order was passed under section 153A r.w.s. 143(3) of the Act, disallowing the deduction claimed under section 80IA(4) of ₹ 8,09,00,367/-. From the facts placed on record, we observe that there was no incriminating material found during the course of search on the basis of which deduction claimed under section 80IA(4) was disallowed by the Ld. Assessing Officer and also confirmed by Ld. CIT(Appeals).

8.2 Similarly, for assessment year 2006-07, return of income was filed on 29-10-2006 declaring total income of Rs. 2,34,73,071/- wherein deduction u/s 80-IA of Rs. 6,40,86,418/- has been claimed. The regular assessment for the captioned year was also completed on 26-12-2008. Subsequently, a search action under section 132 of the Act was carried out at the premises of the assessee company and on 24-06-2010, disallowing the deduction claimed under section 80IA(4) of Rs. 6,40,86,418/-. From the facts placed on record, we observe that there was no incriminating material found during the course of search on the basis of which deduction claimed under section 80IA(4) was disallowed by the Ld. Assessing Officer and also confirmed by Ld. CIT(Appeals). The Department has not been able to produce any material to suggest / substantiate that the assessment order was passed on the basis of any incriminating material found during the course of search.

8.3 Therefore, in view of well settled proposition of law that completed assessment can be interfered by the Assessing Officer while making assessment u/s. 153A only on the basis of some incriminating material

unearthed during the course of search documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made in the course of original assessment, we are of the considered view that in the instant facts, the Ld. CIT(A) has erred in facts and in law in upholding the additions for assessment years 2005-06 and 2006-07. Since we have set aside the assessment order on the issue of jurisdiction itself, we are not separately discussing the merits of the case.

9. In the combined result, the appeals of the Assessee are allowed for assessment years 2005-06 and 2006-07 and the appeals of the Revenue are dismissed for assessment years 2005-06 and 2006-07.

Order pronounced in the open court on 26-08-2022

Sd/-	**Sd/-**
(WASEEM AHMED)	**(SIDHHARTHA NAUTIYAL)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Ahmedabad : Dated 26/08/2022

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order,

Assistant Registrar,
Income Tax Appellate Tribunal,
Rajkot