

IN THE INCOME TAX APPELLATE TRIBUNAL
RAJKOT BENCH, RAJKOT

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

**ITA No. 221/Rjt/2016
Assessment Year 2007-08**

The ITO, Ward-1(1)(2), Rajkot PAN: AABCB1582E (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, Sr. D.R.**

Date of hearing : 06-07-2022
Date of pronouncement : 31-08-2022

आदेश/ORDER

PER BENCH:-

This is an appeal filed by the Revenue against the order passed by the Ld. CIT(Appeals)-11 for assessment years 2007-08 in proceedings under section 153A r.w.s. 143(3) of the Income Tax Act, 1961; in short “the Act”.

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

“1 The learned CIT(A)- Rajkot has erred in law and on facts in deleting the addition made on account of Contract income not offered for taxation of Rs. 2,57,69,929/-.

2 The learned CIT(A)- Rajkot has erred in law and on facts in restricting the addition u/s. 41(1) upto Rs. 8,97,893/- as against the original addition of Rs. 10,21,420/- and thereby granting relief of Rs. 1,23,512/-.

3. The learned CIT(A) ought to have upheld the order of the Assessing Officer.

4 It is, therefore, prayed that the findings given in the order of the Ld. CIT(A) may be dismissed/deleted and that of the Assessing Officer be restored.”

Ground No. 1: Ld. CIT(Appeals) has erred in facts and in law in law in deleting the additions made on account of contract income not offered for taxation of ₹ 2,57,69,929/-

3. The brief facts of the case are that the assessee filed original return of income on 29-10-2007 declaring total income of ₹ 4,09,05,510/-. The original assessment under section 143(3) of the Act, for the impugned assessment year was completed on 24-12-2009. Search was conducted at the premises of the assessee company on 24-06-2010. Thereafter, the AO issued notice u/s 153A of the Act on the assessee on 04-01-2011. In response, the assessee submitted that the original return filed on 29-10-2007 may be treated as return filed in pursuance to notice under section 153A of the Act. In the assessment framed u/s 153A r.w.s. 143(3) of the Act, the AO made addition on the ground that the assessee did not disclose total contract

receipt of ₹ 8,22,19,022/- from the project in Karnool, which was gathered from the TDS certificate wherein the above the above amount was mentioned. Thus, the assessee suppressed the contract receipts of ₹ 2,57,69,929/- and the same are added to the total income of the assessee.

4. In appeal, Ld. CIT(Appeals) allowed the appeal of the assessee both on merits of the case as well as a jurisdiction.

5. On merits, Ld. CIT(Appeals) allowed the assessee's appeal with the following observations:

“4.3 The contents of the assessment order and submission of the appellant have been examined. The copy of TDS certificate revealed that the contract amount was of Rs.82219019/- and the amount of tax of Rs.1628329/- thereon was deducted at the rate of 2.24%. The total amount of the bills of the contract, as per statement in the TDS certificate including difference amount at the rate of 1.2% of VAT was of Rs.82219019/-. All the the deductions made by the contractee were evident in the copy of the ledger account as reproduced hereinabove. It is appalling that the A.O. grossly failed to apply his mind. He ignored the amount of VAT difference which was clearly mentioned in the TDS certificate itself. It was a case of complete non application of mind to the facts of the case. The contents of the TDS certificates established that the AO was not serious in dealing with the issue under consideration as a part of his duty and made addition with least sense of responsibility. There was no sense of fair play towards the taxpayer. A remand report was called for from the AO asking him to examine the issue and submit his report. The copies of details furnished, by the appellant were also forwarded to him. Perusal of the remand report revealed that the AO was having similar attitude as u was at the time of the assessment, it is surprising that all the facts were available with the AO in the assessment proceedings itself and

also forwarded copy of the same for his comments in the appeal proceedings.

4.4 Therefore, after having regard to the facts of the case it is difficult to avoid a conclusion that the addition was based on misapplication of mind of the AO particularly when all the relevant information was available with him. In view of the given facts, it was clear that the action of the AO was totally wrong, unjustified and arbitrary. Accordingly, the ground of appeal is allowed.”

5.1 Further, even on jurisdiction, the Ld. CIT(Appeals) allowed the assessee’s appeal with the following observations:

“4.5 Without prejudice to above, it is necessary to mention that in the assessment order there was no reference of any incriminating material found and seized for making the said addition, it was an undisputed fact that the assessee furnished return u/s. 139(1) on 29.10.2007. Therefore, no assessment proceedings were pending on the date of initiation of search. The rulings of several Tribunals and the High Courts have made the issue very clear that in a case wherein the assessment proceedings were not pending on the date of initiation of the search, no addition can be made which is not related to incriminating seized material and other material gathered by the AO during assessment proceedings which is related to the incriminating material found in the course of search. As mentioned above, the addition was not based on any seized material, therefore, it was not for the AO to make such addition, which can be made in the regular assessment. Thus, on this ground also the appeal of the assessee is allowed.”

6. Before us, the Department has not been able to produce any convincing argument to controvert the factual as well as the legal findings of the Ld. CIT(Appeals) in the appeal order. 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. The additions were made in the assessment on the basis of enquiries made during the course of assessment proceedings under section 153A of the Act. Evidently, from the perusal of the assessment order, the additions were not made on the basis of any incriminating material found during the course of search conducted on the assessee. The Ld. CIT(Appeals) in the appeal order also made a categorical noting that the assessment was not framed on the basis of any incriminating material found during the course of search.

7. 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 were 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. 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 not erred in facts and in law in deleting the additions of Rs. 2,57,69,929/- for assessment year 2007-08. Without prejudice to the above the above, even on merits of the case, we find no infirmity in the observations made by the Ld. CIT(Appeals) in the appeal order. The Department has not been able to bring anything on record to point out any error in the factual findings of the Ld. CIT(Appeals) in the appeal order, while deciding the issue on merits. Accordingly, in our considered view, Ld. CIT(Appeals) has not erred in facts and in law in deleting the additions made on account of contract income not offered for taxation of ₹ 2,57,69,929/-.

9. In the result, ground number 1 of the Department's appeal is dismissed.

Ground number 2: CIT(A) has erred in law and on facts in restricting the addition u/s 41(1) of the Act to ₹ 8,97,893/- as against original addition of ₹ 10,21,420/- and thereby granting relief of ₹ 1,23,512/-

10. On this ground, we would like to state that we have already decided this issue in the assessee's appeal against the order of Ld. CIT(Appeals) in the case of M/s. Backbone Projects Ltd. in ITA No. 142/Rjt/2014 vide order dated 29-08-2022 The relevant extracts of the ruling are reproduced below for reference:

"5. Before us, the counsel for the assessee submitted chart dated 20-08-2021 and argued that out of the out total outstanding liability of ₹ 10, 21, 420/-, there was debit balance of ₹ 1,23,512/- against some of the creditors. Thus, after considering the same, the actual liability of the creditors as on 31-03-2007 was of ₹ 8,97,893/-. However, out of the above outstanding balance of ₹ 8,97,893/-, the assessee repaid an amount of ₹ 6,21,182/- back to the creditors in the subsequent years and an amount of ₹ 2,76,726/- was written off in the subsequent period when it was crystallised as the sum was not payable. Accordingly, this amount of ₹ 2,76,726/- was reflected in the profit and loss account, as income of the assessee, of the concerned financial year when the same was written off by the assessee in its books of accounts. Accordingly, the ld. CIT(A) erred in facts and in law in confirming addition of Rs. 10,21,420/- by invoking provisions of section 41(1) of the Act. In response, Ld. D.R. relied upon the observations made by the ld. CIT(A) in his appellate order.

6. After going through the details, we observe that the actual liability of the creditors was ₹ 8,97,893/- and not ₹ 10,21,420/-. Further we note that the fact that assessee had paid back a sum of ₹ 6,21,182/- back to the creditors in the subsequent years and an

amount of ₹ 2,76,726/- was written off in the subsequent period and offered to income in the subsequent year demonstrates that there was an existing liability of ₹ 8,97,893/- against the assessee as that the end of the financial year under consideration. Therefore, in our considered view, in the instant facts, the Ld. CIT(Appeals) erred in facts and law in confirming the addition of ₹ 10,21,420/- on the ground that the assessee has not been able to prove that the liability was actually subsisting at the end of the financial year.

7. *In the result, the appeal of the assessee is allowed.”*

11. Since the issue has already been adjudicated and in favour of the assessee on merits in the above mentioned order, Ground number 2 of the Department's appeal is dismissed accordingly.

12. In the result ground number 2 of the assessee's appeal is dismissed.

13. Ground numbers 3 and 4 of the Department's appeal are general in nature and hence do not require any specific adjudication.

14. In the combined result, the appeal of the Department is dismissed.

Order pronounced in the open court on 31-08-2022

Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER
Ahmedabad : Dated 31/08/2022

Sd/-
(SIDHHARTHA NAUTIYAL)
JUDICIAL MEMBER

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