

IN THE INCOME TAX APPELLATE TRIBUNAL
RAJKOT BENCH, RAJKOT

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

**ITA No. 218 /Rjt/2015
Assessment Year: 2008-09**

Classic Network Pvt. Ltd. 7/A, Nandi Park, Snehpriya, Nr. IOC Quarter, Kalavad Road, Rajkot PAN: AABCC8197Q	Vs	The Dy. CIT, Central Circle-2, Rajkot
(Appellant)		(Respondent)

**ITA Nos. 204 /Rjt/2015
Assessment Year: 2008-09**

Assistant Commissioner of Income Tax, Central Cir.-2, Rajkot	Vs	M/s. Classic Network Pvt. Ltd., 7/A, Nandi Park, Snehpriya, Nr. IOC Quarters, Kalavad Road, Rajkot PAN: AABCC8197Q
(Appellant)		(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 : 28-09-2022

आदेश/ORDER

PER BENCH:-

These appeals have been filed by both the Assessee and the Revenue against the order passed by the Ld. CIT(Appeals)-11, Ahmedabad in Appeal No. CIT(A)-11/468-R/CC.2/2014-15 vide order dated 12.02.2015 passed for Assessment Year 2008-09.

2. The assessee has taken the following grounds of appeals:-

“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.

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:

<i>Sr. No. of project referred by CIT (Appeals)</i>	<i>Name of the project</i>
<i>5</i>	<i>Nabard Package Gondal</i>
<i>6</i>	<i>Dwarka Okha Km. 234 to 239</i>
<i>7</i>	<i>Pravasipath Dwarka Okha 242 to 247</i>
<i>8</i>	<i>Sardargadh Zinzarda Road</i>

12	<i>SR to Vavera Bagthana Babariyadhar</i>
13	<i>12th Finance commission Botad</i>
14	<i>Kishanpath Yojna Botad Gadhda</i>
15	<i>Kishanpath Yojna Rajkot</i>
16	<i>Kishanpath Yojna Jetur</i>
17	<i>12th finance Morbi Maliya</i>
18	<i>12th Finance RJT /2</i>
19	<i>12th Finance Dwarka Kalyanpur</i>
20	<i>Kishanpath Yojna Jamnagar</i>
21	<i>SRP Dhrol Latipur Km. 9/6 to 15</i>
22	<i>SRP Khambhaliya Dwarka Km. 176 to 187</i>
23	<i>Magharvada Devran</i>
30	<i>Ankleshwar Filter Plant</i>
31	<i>Modheshwar Filter Plant</i>
37	<i>Sodavadar Canal Work</i>
38	<i>Gondal Nagarpalika K – 7</i>
39	<i>Gondal Nagarpalika K - 9</i>

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 grounds No. 2 above.*

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

3. The Revenue has taken the following grounds of appeal:-

- “1. The Ld. CIT(A) has erred in law and on facts in allowing the deduction U/s 80IA(4) in respect of various projects by treating the assessee as developer instead of ‘work contracts’ as treated by the A.O.*
- 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.”*
4. At the outset, the Counsel for the assessee has raised the issue of jurisdiction of passing the assessment order for the above year under Section 153A r.w.s. 143(3) of the Act on the ground that assessment for the above year were already concluded/unabated and during the course of search initiated on the assessee for the impugned assessment years, no incriminating material was found so as to justify the aforesaid additions. The Counsel for the assessee relied on several judicial precedents including on the case of **Pr. CIT v. Saumya Constructions 81 Taxman.com 292 (Gujarat)** rendered by the jurisdiction Gujarat High Court which is to the effect that additions under Section 153A r.w.s. 143(3) of the Act in case of completed / unabated assessments can be made only on the basis of incriminating material found during the course of search, and not otherwise.
5. In order to understand/appreciate the issue raised by the Counsel for the assessee, it would be pertinent to reproduce the relevant extracts of the assessment order for Assessment Year 2008-09, to understand whether any fresh incriminating material was found in the course of search conducted on

“5. The arguments put forth by the assessee company have been carefully considered and a claim of the assessee has been thoroughly examined in the light of provisions of section 80IA(4) read with explanation inserted after sub section (13) of section 80IA of the Act. On perusal of the reply submitted by the assessee it is seen that the same is not acceptable for the reasons discussed in the following paragraphs.....

6. From the observations of the Ld. Assessing Officer reproduced 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.

7. The assessee challenged the assessment order before Ld. CIT(A) on the ground that return of income for Assessment Year 2008-09 was filed on 31-10-2008 declaring total income of Rs. 2,10,24,160/- wherein deduction under Section 80-IA(4) of the Act to the tune of Rs. 3,95,76, 721/- was claimed by the assessee. The regular assessment for the above assessment year was completed. Thereafter, search action under Section 132 of the Act was carried out at the premises of the assessee on 24-06-2010 and proceeding under Section 153A of the Act were initiated vide notice dated 04-01-2011, pursuant to which the Ld. Assessing Officer disallowed deduction under Section 80-IA(4) of the Act claimed by the assessee amounting to Rs. 3,95,76, 721/-. Before Ld. CIT(A), the assessee submitted that the search action is without jurisdiction since it is not in dispute that at the time of search, no incriminating material was found in relation to this year so as to hold that the assessee is not eligible for deduction under Section 80-IA (4) of the Act. Accordingly, the assessee submitted that denial of deduction only because the assessee is subject to search is totally without

jurisdiction. However, Ld. CIT(Appeals) dismissed the challenge to jurisdiction with the following observations:

“6. The decisions relied by the appellant were carefully gone through and it was observed 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 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.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.”

8. 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*”.

9. 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 for Assessment Year 2008-09 had attained finality and thus not abated.

10. Further, vide order sheet entry dated 01st March, 2022, this Bench had directed the Department to submit in writing any incriminating material on the basis of which the assessment has been framed duly substantiated in order to counter the contention of the counsel for the assessee. However, despite several opportunities, 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.

11. 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 under Section 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.

12. In the instant case, we observe that from the facts placed on record, 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).

13. Therefore, in view of well settled proposition of law that completed assessment can be interfered by the Assessing Officer while making assessment under Section 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 2008-09. Since we have set aside the assessment order on the issue of jurisdiction itself, we are not separately discussing the merits of the case.

14. In the result, the appeal of the Assessee is allowed for Assessment Year 2008-09 and the appeal of the Revenue is dismissed for Assessment Year 2008-09.

Order pronounced in the open court on 28-09-2022

Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER
Ahmedabad: Dated 28/09/2022
Tanmay, Sr. PS

Sd/-
(SIDHHARTHA NAUTIYAL)
JUDICIAL MEMBER

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आदेशकीप्रतिलिपिअग्रेषित / 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