

IN THE INCOME TAX APPELLATE TRIBUNAL
“DB” BENCH, JODHPUR
BEFORE SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER &
SHRI DR. DIPAK P. RIPOTE, ACCOUNTANT MEMBER.
ITA No. 228 & 229/JODH/2019
(A.Y: 2011-12 & 2012-13)

DCIT, Central Circle -2 Udaipur. Rajasthan.	Vs.	M/s. Ashapura Infraprojects Pvt Ltd., 101, Vardhman Complex, Bhupalpura, Udaipur-313001, Rajasthan.
PAN/GIR No. : AAGCA1528C		
Appellant	..	Respondent

Assessee by :	None
Revenue by :	Ms. Nidhi Nair, JCIT - DR

Date of Hearing	10.08.2023
Date of Pronouncement	11.08.2023

आदेश / O R D E R

PER PAVAN KUMAR GADALE JM:

These two appeals are filed by the revenue against the common order of the Commissioner of income tax (Appeals) CIT (A)- Udaipur passed U/sec 143(3) r.w.s153A of the Act and U/sec250 of the Act.

2. Since the issues involved in these two appeals are common and identical, hence are clubbed, heard and consolidated order is passed. For the sake of convenience,

we shall take up the ITA No. 228/Jodh/2019 for the A.Y. 2011-12 as a lead case and the facts narrated. The revenue has raised the following grounds of appeal:

1. *"Whether on the facts and in the circumstances of the case and in law the CIT(A) is justified in holding that in the assessments made u/s 153A any addition in the total income can be made only on the basis of incriminating material found during the course of search.*
2. *"Whether on the facts and circumstances of the case and in law the CIT(A) is justified in holding that the disallowance of interest expenses of Rs.2,78,44,291/-and reduction of value of stock by Rs. 1,50,38,829/- was not justified as it was not based on any incriminating material seized.*
3. *"Whether on the facts and circumstances of the case and in law the CIT(A) is justified in not considering the decision of the Hon'ble High Court of Karnataka in Canara Housing development Company Vs DCIT (2014) 49 taxmann.com 98 (kar) wherein the Hon'ble high Court held that the Assessing officer under Section 153A has been entrusted with the duty of bringing to tax the total income of an assessee whose case is covered by Section 153A, by even making reassessments without any fetters, if need be."*
4. *"The Appellant craves, leave or reserving the right to amend modify, alter add or forego any ground(s) of appeal at any time before or during the hearing of this appeal."*

2 .The brief facts of the case are that, the assessee company is engaged in the real estate business. The assessee has

filed the return of income for the A.Y 2011-12 on 30.02.2011 disclosing a total income of Rs. Nil and claim of carry forward loss of Rs. (-) 6,71,98,494/-. There was search and seizure operations U/sec132 of the Act was conducted at the premises of Mahendra Tak Group cases at Udaipur on 21.03.2017. Certain documents and papers found in the course of search operations and the Assessing Officer (AO) has issued notice u/s 153A of the Act. The assessee has filed the return of income in compliance to notice u/s 153A of the Act on 05.10.2018 disclosing a total income of Rs. Nil and carry forward loss of Rs. (-) 6,71,98,494/-. Subsequently notice u/s 143(2) and 142(1) of the Act along with the questionnaire was issued. In compliance to notice, the Ld. AR of the assessee appeared from time to time and submitted the details and the case was discussed. The AO on perusal of the information and the facts in respect of interest payments dealt at Para 4 of the order and has made disallowance of excess interest claimed of Rs. 2,78,44,291/- and also the AO has reduced the value of closing stock and working progress in respect of high claim of interest expenditure disallowance and finally assessed the total loss of Rs. (-) 3,93,54,203/- and passed the order u/s 143(3) r.w.s 153A of the Act dated 18.12.2018.

3. Aggrieved by the order of AO, the assessee has filed the appeal before Ld.CIT(A). The assessee has challenged the validity of the additions made by the AO and the assessment fall under the category of unabated assessment and no incriminating material relating to the year was found in the course of search. The assessee has relied on the propositions of judicial decisions of the Hon'ble High Court and the Honble Tribunal. Whereas the CIT(A) has considered the grounds of appeal, submissions of the assessee, the provisions of law and the judicial decisions and observed that no incriminating material found during the course of search relating to the year and dealt at Page 16 Para 6.1 to 7 of the order read as under:-

6.1 I have considered the submissions of the assessee and the relevant findings of the A.O as given in the order under appeal.

6.2 The scope of proceedings u/s 153A was considered by the Jurisdictional Hon Rajasthan High Court in the case of Jai Steel (India) vs ACIT, Jodhpur, 259 CTR 287(2013), and the Hon. Court concluded as under

"In the firm opinion of this Court from a plain reading of the provision alongwith the purpose and purport of the said provision which is intricately linked with search and requisition under Sections 132 and 132A of the Act, it is apparent that:

- (a) *the assessments or reassessments, which stand abated in terms of the proviso II to section 153A of the Act, the AO acts under his original jurisdiction for which assessments have to be made,*

- (b) *regarding other cases, the addition to the income that has already been assessed, the assessment will be made on the basis of incriminating material and*

- (c) *in absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made*

6.3 In CIT v. Continental Warehousing Corporation (Nhava Sheva) Ltd., 374 ITR 645, the Hon. Bombay High Court addressed the question whether the scope of assessment under Section 153A encompasses additions, not based on any incriminating material found during the course of search. It was held that no addition could be made in respect of the assessments that had become final in the event no incriminating material was found during search

6.4 In the case of Kabul Chawla⁶¹ taxmann.com 412, the Hon. Delhi High Court, was considering appeals against orders u/s 153A passed for AYs 2002-03, 2005-06 and 2006-07, in which assessments had already been made under Section 143(1) of the Act The Hon. Court, summarized the legal position with respect to scope of proceedings u/s 153A as under-

#37. On a conspectus of Section 153A(1) of the Act, read with the provisos thereto and in the light of the law explained in the aforementioned decisions, the legal position that emerges is as under:

i. Once a search takes place under Section 132 of the Act, notice under Section 153 A(1) will have to be mandatorily issued to the person searched requiring him to file returns for six AYS immediately preceding the previous year relevant to the AY in which the search takes place

ii. Assessments and reassessments pending on the date of the search shall abate. The total income for such AYS will have to be computed by the AOS as a fresh exercise.

iii. The AO will exercise normal assessment powers in respect of the six years previous to the relevant AY in which the search takes place. The AO has the power to assess and reassess the 'total income of the aforementioned six years in separate assessment orders for each of the six years. In other words there will be only one assessment order in respect of each of the six AYS "in which both the disclosed and the undisclosed income would be brought to tax"

iv. Although Section 153 A does not say that additions should be strictly made on the basis of evidence found in the course of the search, or other post-search material or information available with the AO which can be related to the evidence found, it does not mean that the assessment "can be arbitrary or made without any relevance or nexus with the seized material. Obviously an assessment has to be made under this Section only on the basis of seized material."

V. In absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made. The word 'assess' in Section 153 A is relatable to abated proceedings (i.e. those pending on the date of search) and the word 'reassess' to completed assessment proceedings

vi. Insofar as pending assessments are concerned the jurisdiction to make the original assessment and the assessment under Section 153A merges into one. Only one assessment shall be made separately for each AY on the basis of the findings of the search and any other material existing or brought on the record of the AO.

Vii Completed assessments can be interfered with by the AO while making the assessment under Section 153 A 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 known in the course of original assessment."

And finally, it was held that on the date of search, the assessments for A.YS 2002-03, 2005-06 and 2006-07, already stood completed and since no incriminating material was unearthed during the search, no additions could have been made to the income already assessed.

6.5 The observations of the A.O leading to the disallowance of interest expenses have been reproduced in Para 4.5 above, it is evident on a reading of the A.O's findings that the disallowance of interest is not based on any incriminating material found during search.

6.6 Further, in A.Y 2011-12, as on the date of search, 21.03.2017, the return of income had been filed and processed u/s 143(1) of the Act the period for issue of notice u/s 143(2) of the Act had lapsed and no assessment proceedings in respect of the said year was pending as on the date of search.

6.7 In A.Y 2012-13, as on the date of search, 21.03.2017 the return of income had been filed and assessment u/s 143(3) stood completed on 25.02.2015 and no assessment proceedings in respect of the said year were pending as on the date of search

6.8 In the above facts, and in view of the position of law as discussed above, it is held that the disallowance of interest, not based on materials found in the course of action u/s 132(1) of the Act, could not have been made in orders passed u/s 153A Accordingly, the disallowance of interest and reduction of closing stock, in both the years under appeal is hereby deleted.

7. Since in all the years under appeal, the disallowance of interest and reduction of closing stock, by the A.O has been deleted in entirety while deciding Ground No. 1 of appeal, Ground 2. Of appeal is rendered academic and it is not found necessary to adjudicate the same,

4. Whereas the CIT(A) has considered the submissions, details and relied on judicial decisions and finally, concluded that the assessment u/s 143(3) r.w.s 153A of the Act and additions made are without any incriminating material, therefore the provisions u/s

153A of the Act, does not attract and the order passed by the AO is devoid of merits and quashed the assessment and allowed the grounds of appeal in favoure of the assessee. Aggrieved by the order of the CIT(A), the revenue has filed an appeal before the Honble Tribunal.

5. At the time of hearing, Ld.DR submitted that Ld.CIT(A) has erred in quashing the assessment and deleting the additions on the ground that no incriminating material was found during the course of search and relied on the judicial decisions and the CIT(A) has over-looked the statement recorded and the Ld.DR prayed for allowing the Revenue's appeal. None appeared on behalf of the assessee.

6. We heard the Ld. DR submissions and perused the material on record. The Ld.DR submitted that the CIT(A) has erred in quashing the assessment order and deleting the additions overlooking the findings of the assessing officer and the judicial decisions. Whereas, the assessee contentions are that the order passed u/s 143(3) r.w.s 153A of the Act is bad in law as no incriminating material was found in the course of search and relied on the Honble Bombay High Court decision of M/s. Allcargo Global Logistic Ltd and CIT Vs Continental ware housing corporation (Nhavaseva) Ltd and

the Hon'ble Tribunal decisions before the CIT(A) and the assessment year falls under category of unabated assessment. We find that the search took place on 21.03.2017 and the assessee has submitted the return of income on 30-02-2011 and time limit for issue of notice U/sec143(2) of the Act is 30-09-2012.

7. We find that there is no dispute with regard to the facts that the Assessment relating to AY 2011-12, fall under the category of "unabated assessment". There is also no dispute that the department did not unearth any incriminating material relating to the additions. And the AO, in the absence of any incriminating material relating to the above said additions, could not have made any addition in unabated assessment year. In support of the above said proposition, we rely upon the decision rendered by Hon'ble Bombay High Court in the case of Continental Corporation (Nhava Sheva) Ltd (2015)(58 taxmann.com 78)(Bom) and Gurinder Singh Bawa (2017)(79 taxmann.com 398)(Bom), wherein the Hon'ble Bombay High Court held that the unabated assessments (finalized assessments) cannot be touched by resorting to the provisions of sec.153A of the Act unless some incriminating materials relating to the said assessments, which are

contrary to and/or not disclosed during regular assessment proceedings are found.

8. Whereas the provisions of sec.153A of the Act provide for issuing of notice u/s 153A of the Act for six assessment years immediately preceding the year of search and thereafter, the AO shall assess or reassess the total income for the above said six years. This section further provides that all pending assessment or re-assessment pending as on the date of search shall abate. Hence the assessments of the assessment years falling within the period of above said six years which are not pending, i.e., which have attained finality shall not abate. Assessments of such assessment years are called “unabated / completed / finalized” assessments. The question as to whether the AO is entitled to interfere with such kinds of unabated/completed/ finalized assessments or not without there being any incriminating material found during the course of search, was examined by the Special bench of Tribunal in the case of All Cargo Logistics Ltd vs. DCIT (2012)(137 ITD 287)(Mum), wherein it was held that the AO could interfere with the unabated/completed/finalized assessments only if the incriminating materials found during the course of search warrant such interference, meaning thereby, if the search action did not bring out any

incriminating material, then the AO cannot disturb the completed assessments and he has to simply reiterate the earlier total income in the present assessment order.

9. Considering the facts, circumstances, submissions, judicial decisions and the ratio of the recent decision of Honble Supreme court in the Pr.CIT Vs Abhisar Buildwell Pvt Ltd. 2023 Live Law (SC) 346 find that the CIT(A) has dealt on the provisions of law, judicial decisions and deleted the additions as no incriminating material was found in the course of search and are of the view that the CIT(A) has passed a reasoned order. Accordingly, we do not find any infirmity in the order of the CIT(A) on these grounds of appeal and uphold the same and dismiss the grounds of appeal of the revenue.

10. In the result, the appeal filed by Revenue is dismissed.

ITA Nos 229/Jodh/2019 A.Y.2012-13.

11. As the facts and circumstances in this appeal are identical to ITA No. 228/Jodh/2019, for the A.Y 2011-12 (except variance in figures) as the search took place on 21.03.2017 and the assessee has submitted the return of income for A.Y 2012-13 on 30-09-2012 and time limit for issue of notice U/sec143(2)of the Act is 30-09-2013.Hence

the decision rendered in above paragraphs would apply mutatis mutandis for this appeal also. Accordingly, grounds of appeal of the revenue are dismissed.

12. In the result, both the appeals filed by the revenue are dismissed.

Order pronounced in the open court on 11.08.2023.

Sd/-
(DR DIPAK P RIPOTE)
ACCOUNTANT MEMBER

Sd/-
(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

Jodhpur Dated 11.08.2023

KRK, PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)
4. Concerned CIT
5. DR, ITAT, Jodhpur
6. Guard file.

//True Copy//

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आदेशानुसार / BY ORDER,

(Asst. Registrar)
ITAT, Jodhpur