

**IN THE INCOME TAX APPELLATE TRIBUNAL “B” BENCH, MUMBAI**

**BEFORE SHRI PRASHANT MAHARISHI, AM AND  
MS. KAVITHA RAJAGOPAL, JM**

ITA Nos.2126 & 2127/Mum/2023  
(Assessment Years: 2015-16 & 2016-17)

NSK Advisors Pvt. Ltd. Poonam Chambers, B-Wing, 5 <sup>th</sup> Floor, Dr. Annie Besant Road, Worli, Mumbai-400 018	Vs.	CIT(A)-53 6 <sup>th</sup> Floor, Aayakar Bhavan, M. K. Road, Mumbai-400 020
PAN/GIR No. AAECN 6483 H		
<b>(Appellant)</b>	:	<b>(Respondent)</b>
<b>Assessee by</b>	:	Shri Waseem Khan
<b>Revenue by</b>	:	Shri S Srinivasu
<b>Date of Hearing</b>	:	18.09.2023
<b>Date of Pronouncement</b>	:	27.09.2023

**ORDER**

**Per Kavitha Rajagopal, J M:**

These are appeals filed by the assessee, challenging the order of the learned Commissioner of Income Tax (Appeals) ('Id.CIT(A) for short)-53, Mumbai, passed u/s.250 of the Income Tax Act, 1961 ('the Act'), pertaining to the Assessment Year ('A.Y.' for short) 2015-16 and 2016-17 respectively.

2. As the facts of the case are identical in both the appeals, we hereby pass a consolidated order by taking ITA No. 2126/Mum/2020 as the lead case for the sake of convenience. It is observed that both these appeals are time barred by 11 days and the assessee is said to have filed an Affidavit for condoning the said delay for the reason that since the assessee was travelling out of country for personal and professional work and due to non availability of staff, the appeal could not be filed within the due date. After

duly considering the reasons for the delay in filing the appeal, we deem it fit to condone the delay as there was sufficient cause for the said delay. Hence, the delay is condoned.

3. The assessee has challenged the assessment order passed u/s. 143(3) r.w.s. 153A of the Act on the ground that there was no incriminating material found and seized during the search proceeding and has also challenged the disallowance of expenses debited to profit and loss account amounting to Rs.2,89,667/- and Rs.11,82,400/- for A.Y. 2015-16 and 2016-17 respectively.

4. The brief facts of the case are that the assessee was engaged in the business of Consultancy and Advisory Services and a search and survey action was conducted u/s. 132/133A of the Act dated 10.05.2018 in the case of Matix (Nishant Kanodia) Group and the assessee was also covered in the said search.

5. The Id. Assessing Officer ('A.O.' for short) vide notice dated 30.12.2019 issued u/s. 153A of the Act was served upon the assessee and in response to which the assessee filed its return of income dated 13.01.2020, declaring total income at Rs.Nil and current year's loss of Rs.(-)2,89,667/-. Subsequently, notice u/s. 143(2) and 142(1) of the Act dated 16.09.2020 and 14.10.2020 respectively was issued. The Id. A.O. passed the assessment order dated 08.04.2021 u/s. 143(3) r.w.s. 153A of the Act where the A.O. determined the total income at Rs.Nil after making a disallowance of expenses u/s. 37(1) of the Act amounting to Rs.2,89,667/- on the ground that the assessee has failed to furnish documentary evidences in support of its claim and has also failed to establish the

fact that the said expenses was for business purpose. The Id. A.O. also held that the assessee has not declared any income but have claimed expenses related to its business.

6. The assessee was in appeal before the Id. CIT(A) challenging the impugned disallowance made by the A.O. The Id. CIT(A) upheld the disallowance made by the Id. A.O. on the ground that impugned year was the first year of incorporation of the assessee company, that the assessee has failed to establish the nexus between the business and the claimed expenses and thereby failed to discharge the onus casted upon the assessee.

7. The assessee is in appeal before us, challenging the order of the Id. CIT(A) in upholding the disallowance made by the Id. A.O.

8. We have heard the rival submissions and perused the materials available on record. Ground no. 1 raised by the assessee challenges the assessment order passed u/s. 153A of the Act on the ground that no addition can be made u/s. 153A of the Act in case where no incriminating material has been found and seized during the course of search. It is observed that the Id. CIT(A) on the grounds of validity of the assessment order passed u/s. 153A of the Act where no incriminating material was found, relied on the decision of the Hon'ble Allahabad High Court in the case of *PCIT vs. Siddharth Gupta* (in ITA No.17 of 2022) where it has been held that even when no incriminating material has been found u/s. 132 of the Act, addition can be made. The Id. CIT(A) had dismissed this ground by relying on the above said decision. The assessee has challenged the finding of the Id. CIT(A) by placing reliance on the following decisions :

- *All Cargo Global Logistics Ltd.* (ITAT, Mumbai Special Bench)
- *Continental Warehousing Corpn.* (ITA No. 523 of 2013 and 1969 of 2013 dated 21.04.2015)
- *Kabul Chawla* High Court of Delhi [2015] 93 CCH 0210 Del HC

9. From the above observation, it is evident that the Id. A.O. has not specified in the assessment order as what was the incriminating material that was found and seized during the search and survey action conducted in the case of Matix (Nishant Kanodia) Group which had also covered the assessee company. The lower authorities have made a disallowance of the claim of expenses as per the profit and loss account of the assessee for the reason that the assessee has not declared any income out of the business for which the expenses were claimed and that the impugned year was the first year of the incorporation of the assessee company and that there was no business activity during the year under consideration. The Id. A.O. disallowed the expenses claimed by the assessee. The first appellate authority upheld the said disallowance by relying on the decision of the Hon'ble Supreme Court in the case of *Swadeshi Cotton Mills Co. Ltd. vs. CIT* [1967] 63 ITR 57 (SC) and the decision of Hon'ble High Court of Kerala in the case of *CIT vs. Premier Breweries Ltd.* [2005] 279 ITR 51 (Ker.) which has held that whether the business has commenced and that the assessee has incurred expenses relating to the said business activity has to be proved by the assessee and if the assessee fails to discharge its onus, the same is liable to be disallowed. We are inclined to decide the issue of validity of the assessment order passed u/s. 153A of the Act in the absence of any incriminating material seized during the search proceeding. It is the settled proposition of law that in case of an unabated assessment, no addition/disallowance can be made without any incriminating material found during the search. We would like to place our reliance on the recent decision of the Hon'ble Apex Court in the case of *Pr. CIT vs. Abhisar Buildwell P. Ltd.* (in Civil Appeal No. 6580 of 2021 vide order dated 24.04.2023), wherein it was held that the Id. A.O. cannot make addition in an unabated or concluded

assessment in the absence of any incriminating material. The relevant extract of the said decision is cited hereunder for ease of reference:

11. As per the provisions of Section 153A, in case of a search under Section 132 or requisition under Section 132A, the AO gets the jurisdiction to assess or reassess the 'total income' in respect of each assessment year falling within six assessment years. However, it is required to be noted that as per the second proviso to Section 153A, the assessment or re-assessment, if any, relating to any assessment year falling within the period of six assessment years pending on the date of initiation of the search under Section 132 or making of requisition under Section 132A, as the case may be, shall abate. As per sub-section (2) of Section 153A, if any proceeding initiated or any order of assessment or reassessment made under sub-section (1) has been annulled in appeal or any other legal proceeding, then, notwithstanding anything contained in sub-section (1) or section 153, the assessment or reassessment relating to any assessment year which has abated under the second proviso to sub-section (1), shall stand revived with effect from the date of receipt of the order of such annulment by the Commissioner. Therefore, the intention of the legislation seems to be that in case of search only the pending assessment/reassessment proceedings shall abate and the AO would assume the jurisdiction to assess or reassess the 'total income' for the entire six years period/block assessment period. The intention does not seem to be to re-open the completed/unabated assessments, unless any incriminating material is found with respect to concerned assessment year falling within last six years preceding the search. Therefore, on true interpretation of Section 153A of the Act, 1961, in case of a search under Section 132 or requisition under Section 132A and during the search any incriminating material is found, even in case of unabated/completed assessment, the AO would have the jurisdiction to assess or reassess the 'total income' taking into consideration the incriminating material collected during the search and other material which would include income declared in the returns, if any, furnished by the assessee as well as the undisclosed income. However, in case during the search no incriminating material is found, in case of completed/unabated assessment, the only remedy available to the Revenue would be to initiate the reassessment proceedings under sections 147/48 of the Act, subject to fulfilment of the conditions mentioned in sections 147/148, as in such a situation, the Revenue cannot be left with no remedy. Therefore, even in case of block assessment under section 153A and in case of unabated/completed assessment and in case no incriminating material is found during the search, the power of the Revenue to have the reassessment under sections 147/148 of the Act has to be saved, otherwise the Revenue would be left without remedy.

12. If the submission on behalf of the Revenue that in case of search even where no incriminating material is found during the course of search, even in case of unabated/completed assessment, the AO can assess or reassess the income/total income taking into consideration the other material is accepted, in that case, there will be two assessment orders, which shall not be permissible under the law. At the cost of repetition, it is observed that the assessment under Section 153A of the Act is linked with the search and requisition under Sections 132 and 132A of the Act. The object of Section 153A is to bring under tax the undisclosed income which is found during the course of search or pursuant to search or requisition. Therefore, only in a case where the undisclosed income is found on the basis of incriminating material, the AO would assume the jurisdiction to assess or reassess the total income for the entire six years block assessment period even in case of completed/unabated assessment. As per the second proviso to Section 153A, only pending assessment/reassessment shall stand abated and the AO would assume the jurisdiction with respect to such abated assessments. It does not provide that all completed/unabated assessments shall abate. If the submission on behalf of the Revenue is accepted, in that case, second proviso to section 153A and sub-section (2) of Section

153A would be redundant and/or re- writing the said provisions, which is not permissible under the law.

13. For the reasons stated hereinabove, we are in complete agreement with the view taken by the Delhi High Court in the case of Kabul Chawla (supra) and the Gujarat High Court in the case of Saumya Construction (supra) and the decisions of the other High Courts taking the view that no addition can be made in respect of the completed assessments in absence of any incriminating material.

11. From the above observation, we are of the considered view that the assessment order passed u/s. 153A of the Act pursuant to a search is null and void in the absence of any incriminating material found during search. The Revenue has also failed to bring on record what was the incriminating material seized during the search on the basis of which addition/disallowance has been made. We, therefore, allow ground no. 1 raised by the assessee.

12. As we have held the assessment order to be null and void, the ground no. 2 raised by the assessee becomes academic in nature.

**ITA No. 2127/Mum/2020**

13. As the facts in ITA No. 2126/Mum/2020 are identical with that of the facts in ITA No. 2127/Mum/2020, the observations given above applies *mutatis mutandis* to this appeal also.

14. In the result, both the appeals filed by the assessee are allowed.

*Order pronounced in the open court on 27.09.2023.*

Sd/-

Sd/-

(Prashant Maharishi)  
Accountant Member

(Kavitha Rajagopal)  
Judicial Member

Mumbai; Dated : 27.09.2023  
Roshani, Sr. PS

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent
3. CIT - concerned
4. DR, ITAT, Mumbai
5. Guard File

BY ORDER,

(Dy./Asstt. Registrar)  
ITAT, Mumbai