

आयकर अपीलीय अधिकरण, हैदराबाद पीठ
IN THE INCOME TAX APPELLATE TRIBUNAL
Hyderabad ' A ' Bench, Hyderabad

Before Shri R.K. Panda, Vice-President
AND
Shri Laliet Kumar, Judicial Member

ITA No.507/Hyd/2022		
Assessment Year: 2012-13		
Sri Jitender Kumar Gupta Hyderabad	Vs.	A.C.I.T Central Circle 3(1) Hyderabad
(Appellant) PAN:AAPPG6606B		(Respondent)
ITA No.508/Hyd/2022		
Assessment Year: 2013-14		
Sri Virender Kumar Gupta Hyderabad	Vs.	A.C.I.T Central Circle 3(1) Hyderabad
(Appellant) PAN:AASPG1887D		(Respondent)
Assessee by:	Shri K.C. Devdas, Ca	
Revenue by:	Smt. T.H. Vijaya Lakshmi, CIT(DR)	
Date of hearing:	25/09/2023	
Date of pronouncement:	17/10/2023	

ORDER

Per Laliet Kumar, J.M

These are the two connected appeals filed by the respective assessees are directed against the common order dated 27.07.2022 of the learned CIT (A)-11, Hyderabad relating to A.Ys. 2012-13 & 2013-14 respectively. Since identical grounds have been taken by the assessees in both these appeals, therefore, for

the sake of convenience, both appeals were heard together and are being disposed of by this common order.

ITA No.507/Hyd/2022 – A.Y 2012-13

2. Facts of the case, in brief, are that the assessee is an individual having income from house property, capital gains, share income as partner in firms and other sources. He filed his return of income for the A.Y 2012-13 on 22.12.2012 declaring total income of Rs.26,07,520/-. Subsequently, a search operation u/s 132 was conducted on 2.5.2018 in the business premises of M/s. Jatinder Roller Flour Mills wherein the assessee is a partner. Notices u/s 153A was issued to the assessee for the subject A.Y and was duly served upon the assessee by e-mail and speed post. In response to the notices, the assessee filed his return of income admitting income of Rs.26,07,520/- on 23.04.2019. Later, the assessee filed his objections for issuing notice u/s 153A for the relevant A.Y being the 7th year from the search year which was disposed of by the Assessing Officer vide letter dated 31.07.2019. Thereafter, statutory notices u/s 143(2) and 142(1) were issued to the assessee to which the AR of the assessee appeared before the Assessing Officer and filed the requisite details.

3. The assessee is a partner in M/s. Jatinder Roller Flour Mills and has purchased 1200 shares of M/s. Dignity Suppliers Ltd for Rs.400/- each on 13.10.2009. Subsequently, as per amalgamation schedule, 1200 shares of M/s. Dignity Suppliers Ltd were converted into 45600 shares of M/s. Twenty First Century Pvt Ltd. Out of 45600 shares of M/s. Twenty First Century Pvt Ltd, the assessee has sold 33500 shares on different dates relevant to A.Y 2012-13 for Rs.1,08,34,445/- and claimed

the resultant Long-Term Capital Gain of Rs.1,04,81,814/- as exempt u/s 10(38) of the I.T. Act.

4. The Assessing Officer disallowed the claim of Long Term Capital Gain u/s 10(38) and assessed the same as unexplained cash receipt u/s 68 of the I.T. Act Accordingly, the amount of Rs.1,04,81,814/- introduced/credited by the assessee against the sale of scripts of above mentioned Twenty First Century India Ltd during the financial year 2011-12 (A.Y 2012-13) in his capital account as his income being unexplained cash credit u/s 68 of the Act. The Assessing Officer also initiated separate penalty proceedings u/s 271(1)(c) for furnishing inaccurate particulars of income.

5. In appeal, the learned CIT (A) upheld the action of the Assessing Officer by observing as under:

The ground no.3 pertains to contention of the appellant that there is no incriminating material on record to make the addition in the case of the appellant. In this regard, it is important to note that the execution of warrant makes it obligatory on the part of the Assessing Officer to initiate proceedings u/s. 153A. It is also important to note that initiation of Search proceedings results in an automatic initiation of notice u/s 153A and there is no mention of the seized material by the legislature in the Section 153A. Further, there is no mention of the concept of undisclosed income in Section 153A as it was in the case of Section 158B. The procedure for Search assessments has been introduced in the form of Section 153A and the Section 158B and others as mentioned in Chapter XIV-B which was a special procedure is no longer applicable. The Section 158B to 158BI had the concept of undisclosed income and which was further based on documents or incriminating material. The legislature has introduced the new provision u/s 153A w.e.f. 01.06.2003 which mandates assessment for the stipulated years without drawing any satisfaction and only on the basis of initiation of Search action u/s 132. The concept of

undisclosed income has been made consciously absent as can be seen on the comparison of both the provisions and procedure, the same thus implies that the Assessing Officer is mandated to complete assessment per law and is not bound or limited to undisclosed income or seized material.

Anything which is clearly absent in the provision and importing the same without any reference or justification is completely arbitrary and beyond the scope of the provision, especially when the concept of abatement of pending proceedings have been provided in the Act. There is no mention that whatever has been seized has to be only used in the proceedings u/s 153A, once there is nothing of this sort mentioned, then it is only an imaginary belief that the reliance has to be only placed on seized material. The Assessing Officer is duty bound to issue notice u/s 153A, irrespective of seizure.

It is also mentioned that all pending proceedings of the above years shall abate and the proceedings are to be initiated afresh u/s. 153A. The above implies that once a Search warrant is executed, the assessment as provided u/s. 153A is mandatory and all other assessment years pending for those years shall abate.

Thus, if there was a notice u/s. 148 issued in any of the above years prior to the date of issue of notice u/s. 153A (obviously the reasons as are, prior to Search, are not based on seized material) then the reasons so recorded leading to any addition in the reopened years naturally has to be made u/s. 153A, as

the proceedings u/s 148 has abated and therefore seized material cannot be a limiting factor of Assessing Officer's jurisdiction to assess u/s 153A.

The section 153A(2) makes it further explicit that in case of 153A getting annulled then the pending proceedings u/s. 148 or any other section will revive. Thus, it is clear that the pending proceedings which were not based on seized material are to be merged for the assessment years mentioned u/s. 153A and the assessment has to be made considering the same to be an open proceedings based on seized material and any other material.

The section 153A does not limit the jurisdiction of the Assessing Officer to the seized material rather it very clearly provides from the abatement of pending proceedings as a kind of assessment which could be made based on records and seized material or either.

It is very clear that the parliament did not desire that two proceedings for the two assessment years to be continued in the case of any appellant causing hardship and also confusion. Therefore it has been very clearly provided that the pending assessment proceedings to abate and only one proceeding to continue as provided u/s. 153A.

The above also implies that if there is any subsequent information received pending the completion of assessment proceedings u/s. 153A or information other than seized material available before the initiation of notice u/s. 153A for which the Assessing Officer was contemplating issue of notice u/s. 148 would also merge with the proceedings u/s. 153A. Otherwise, it would be an exercise

of initiating u/s. 148 and then issuing u/s. 153A and dropping the initiated proceedings u/s. 148 which would be a just unnecessary paper work. However, the above discussion has been made just for explanation, the section 153A is very clear and it is an obligation on the part of the Assessing Officer to initiate proceedings without any discretion or judgment. It is mandatory on the part of the Assessing Officer to initiate the proceedings as provided u/s. 153A as it is mentioned **the Assessing Officer shall** in the said section, which leaves no room for interpretation. Thus, the Assessing Officer is empowered and rather obliged to make additions as a regular assessment also while completing the assessment proceedings.

Further, without prejudice to the above contention, in the present case, there is incriminating material in the form of the various statements and documents gathered by the Investigation Wing along with the SEBI report and also the fact that during the course of Search the appellant, in the statement recorded, could not even give basic details of the transaction which resulted in the claim of exempt income u/s 10(38) as already discussed while disposing the grounds above and also the discussion in the subsequent grounds. In view of the same, the ground no.3 is dismissed accordingly.

The Assessing Officer has followed the due procedure of initiation on account of the definition of specified asset as already adjudicated in ground no.2 accordingly.

Further, as already discussed in any case, there is a presence of incriminating material in the case of the appellant. The appellant in ground no.4 has contended that the report of the Investigation Wing regarding the fraudulent activity of tax evasion by the appellant and the broking apparatus would not constitute an incriminating material and in ground no.5 contended that the same cannot be equated with all the details of share transactions contained in the assessment records. The Assessing Officer, during the course of assessment proceedings, has used the report of the Investigation Wing regarding the fraudulent activity of tax evasion by the appellant and also it is worthwhile to note that the same was also one of the reasons which lead to the Search action u/s 132 on the appellant and during the course of Search proceedings, the appellant's statement was recorded regarding the same and the appellant could not reply to the transaction entered into by its own individual name. The incriminating act done by the appellant was brought out because of the report of the Investigation wing and thus would constitute, through the statement recorded as incriminating material in the case of the appellant by default. The Assessing Officer has used the same in the assessment order to reach the conclusion which has already been discussed in detail. The appellant further has stated that all the details about share transactions were recorded in the books would not constitute as incriminating material. The above contention is bizarre and silly as the transactions recorded in the books are not bonafide and are sham transactions and the Assessing

Officer has proved the same beyond doubt on the basis of evidences gathered. The Act on the part of the appellant to project a sham transaction as a bonafide transaction not liable for tax is an incriminating act and also an incriminating presentation of the transaction and therefore would surely constitute incriminating material in the case of the appellant. Therefore, the ground no.4 and 5 are dismissed. Needless to state that the ground no.3 has been dismissed which discusses that there is no requirement for incriminating material to initiate proceedings u/s 153A.

6. Aggrieved with such order of the learned CIT (A) the assessee is in appeal before the Tribunal by raising the following grounds:

1. The order of the learned Commissioner of Income Tax (Appeals) - 11, Hyderabad [(**Ld.AO**)] in sustaining the assumption of jurisdiction under fourth proviso to the section 153A of the Income Tax Act 1961 (**'the Act'**) to tax the long-term capital gains of ₹1,04,81,814 arising on sale of sales of the Twenty First Century India Limited claimed as exempt u/s 10(38) of the Act is arbitrary, bad in law and invalid. Therefore, the assessment framed under section 143(3) r.w.s 153A of the Act is void and to be quashed.
2. The Ld. CIT(A) failed to appreciate that no evidence/ incriminating material was found during the search of the Appellant's residential premises which reveals that the income from long term capital gains has escaped assessment and that such income is represented in the form of a specified asset as explained in Explanation 2 to the fourth proviso to section 153A of the Act. Therefore, the satisfaction note does not comply to the requirements of the Proviso for assumption of jurisdiction under section 153A. Thus, the threshold requirement for invoking the provisions for relevant assessment year having failed, therefore the initiation of proceeding is bad in law and all other consequential actions which follow the same is bad in law.
3. The Ld. CIT(A) failed in assuming jurisdiction under section 153A of the Act to tax the long- term capital gains of Rs 1,04,81,814 under section 68 of the Act without there being any incriminating material found during search of his residential premises leading to an inference that the claim for exemption of long- term capital gains as claimed in the original return was an accommodation entry.

The Ld CIT(A) failed to appreciate the report of the Directorate of Investigation, Kolkata holding that the transaction adopted by the Twenty First Century India Limited is to accommodate bogus Long Term Capital Gains to the shareholders cannot constitute an incriminating material found during the search to assume jurisdiction under section 153A of the Act. Therefore, the assessment framed under section 143(3) r.w.s 153A of the Act is invalid, bad in law and to be quashed.

5. The Ld CIT(A) failed to appreciate that the assessment records of the Appellant which contained all details about share transaction cannot be equated with evidence found and seized during search to initiate proceeding for relevant assessment years under section 153A. Therefore, the assessment framed under section 143(3) r.w.s 153A of the Act is invalid, bad in law and to be quashed.
6. The Ld. CIT(A) ought to have appreciated that section 153A of the Act has been enacted as a special provision and no concept in general law can be imported into the same and stipulations contained in the special provisions have to strictly complied with. The deviation from this principle has made the order bad in law.

Without prejudice to the above legal grounds challenging the assumption of jurisdiction under section 153A of the Act

7. The order of the Ld. CIT(A) in the sustaining the addition of the amount of ₹ 1,04,81,814 under section 68 of the Act is unsustainable both on facts and in law.
8. The learned Commissioner of Income Tax (Appeals) – 11 [CIT(A)] failed to note that the entire Long Term Capital Gains of ₹ 1,04,81,814 was claimed as exempt u/s 10(38) of the Income Tax Act, 1961 and fully disclosed in the return of income filed u/s 139(4) of the Income Tax Act, 1961 as reflected in the Computation of total income and therefore CIT(A) ought to have clearly held that there being no incriminating material found, the question of making an addition of ₹ 1,04,81,814 u/s 153(A) did not arise.

- The Ld. CIT(A) failed to note that the entire cost of purchases and the receipt of sales have been accepted, the question of making any addition doesn't arise.
10. The Ld. CIT(A) erred in confirming the addition of the long- term capital gains of ₹ 1,04,81,814 solely basing on the report of the Director of Income Tax (Investigation), Kolkata without independent application of mind or without conducting any further investigation or rebutting all the evidences filed by the Appellant. Therefore, the addition of ₹ 1,04,81,814 has no legs to stand.
 11. The Ld. CIT(A) failed to note that the order of the Ld.AO is against the principles of natural justice and fair play in so far as a copy of the statements of Anil Kumar Khemka, Pradeep Kumar Garg and the share broker Sri Sajendra Mookim which were heavily relied by the AO were not provided to the Appellant despite specific request being made. Therefore, the order passed under section 143(3) r.w.s 153A of the Act is invalid and bad in law.
 12. Without prejudice to ground no 9, the Ld. CIT(A) erred in holding that there was no need for providing an opportunity to the Appellant to cross examine the parties from whom statements were recorded under section 131 and which were relied by the Ld.AO for denying the exemption on the ground that no prejudice is caused to the Appellant by not providing an opportunity when prejudice is glaring on the face of the proceedings which had the effect of enhancing the income and denying the statutory benefits. Thus, the order passed under section 143(3) r.w.s 153A of the Act violates the principles of natural justice and vitiates the assessment.
 3. The Ld. CIT(A) erred in holding it is the Appellant's own money that has been routed through different entities and has been converted into sale proceeds from sale of shares without bringing any cogent evidence on record and basing such inference on suspicion make the order unsustainable and must be quashed.

7. The learned Counsel for the assessee while drawing our attention to Grounds 2 to 6 contended that in the appellate proceedings the assessee had raised a specific ground with respect to absence of incriminating documents and submitted that no addition can be made in absence of any incriminating documents u/s 153A of the Act. For the above proposition, the assessee has taken ground No.2 to 6 before the learned CIT (A). He further submitted that the learned CIT (A) in para 3 of his order has duly recorded this fact. However, the learned CIT (A) dismissed the grounds raised by the assessee on legal ground as well as on merit.

8. The learned Counsel for the assessee drew our attention to the return of income filed for the A.Y 2012-13 to page 3 wherein it was pointed out that the assessee has claimed exemption u/s 10(38) for the Twenty First Century India Ltd shares (3350 shares).

STATEMENT OF EXEMPT LONG TERM CAPITAL GAIN ON LISTED SECURITIES U/S 10(38)

Name of Company	Sales Price/Year	Purchase Cost/Year	Transfer Expenses	Exempt u/s 10(38)
TWENTY FIRST CENTURY(INDIA) LTD(SHARES 33500)	10834445.00 (2011-12)	352631.00 (2009-10)	0.00	10481814.00
Total	10834445.00	352631.00	0.00	10481814.00

STATEMENT OF LONG TERM CAPITAL GAIN

Particular	Sales Price/Year	Indexed Cost/Year	Transfer Expenses	Indexed Cost of Improvement	Exempt	Capital Gain
SALE OF FLAT AT SURYALOK, GUNFOUNDRY	2318000.00 (14/11/2011)	1191558.00 (25/05/1982)	0.00	173762.00	0.00	952680.00
Total	2318000.00	1191558.00	0.00	173762.00	0.00	952680.00

SALE OF FLAT AT SURYALOK, GUNFOUNDRY - Cost: 165452 * (785/109) = 1191558; Cost of Improvement: 62200 * (785/281) = 173762

9. It was submitted that the assessee had mentioned the above said fact in the return of income at Page 5 (schedule-1) which is to the following effect:

Schedule EI		Details of Exempt Income (Income not to be included in Total Income)	
EXEMPT INCOME	1	Interest income	1
	2	Dividend income	2
	3	Long-term capital gains from transactions on which Securities Transaction Tax is paid	3
	4	Net Agriculture income (other than income to be excluded under rule 7, 7A, 7B or 8)	4
	5	Share in the profit of firm/AOP etc.	5
	6	Others, (including exempt income of minor child)	6
	7	Total (1+2+3+4+5+6)	7
			34386
			10481812
			2465167
			12981367

10. The learned AR further relied upon the decisions of the Hon'ble Delhi High Court in the case of Chintels India Limited (397 ITR 416) and Punjab & Haryana High Court in the case of Vipin Khanna wherein it was observed that no addition can be made after a period of 4 years since no notice u/s 143(2) was issued within a period of 4 years. He further submitted that the search took place in the business premises of M/s. Jatinder Roller Flour Mills on 2.5.2018 and during the course of search, the team has drawn a panchanama at page 38 of the paper book which was found and seized are duly mentioned.

5. In the course of the search

(a) **The following were found and Seized :**

(i) As per Annexure - B (Rs.28,00,000/- Rs. Twenty Eight Lakhs Only Seized).

(b) **The following were found but not seized :**

- (i) Cash of Rs.30,66,000/- as per annexure 'B' Part I, (Out of this Cash Rs.28,00,000/- is seized as indicated in (a) above)
- (ii) Jewellery weighing Gold Jewellery 2524.000 gms (gross)(1830.000 gms net) valued at Rs.82,44,680/- and silver weighing 18 Kgs valued at Rs.6,30,000/- as per annexure 'C' dated 03.05.2018.
- (iii) Books of accounts and documents as per annexure ----
- (iv) The other valuable articles (including money) as per annexure-----,

11. The learned AR submitted that after the search, the statement of the assessee was duly recorded by the Investigation Wing wherein the assessee had clarified that no bogus Long Term Capital Gain claim was claimed by the assessee and the transaction was genuine and through proper banking channels. He also drew our attention to page 30 (Question No.47 & Answers) to that effect.

Q.47. As per the documents found and seized vide annexure A/JRFM/5 in the premises of M/s Jitender Roller Flour Mills during the search and seizure proceedings conducted on 02.05.2018 and from the replies to the questions mentioned above it appears that the sale consideration of Rs.50Crores towards sale of M/s Andhra Roller Flour Mills, unaccounted Sale consideration of Rs.18.1Crore received towards sale of 207 shops in commercial complex by M/s United Developers was not offered to tax. Further, you have indulged in dubious share transactions to accommodate undisclosed income in the grab of long term capital gain by investing in M/s Twenty First Century Ltd and an amount of Rs.1.04 Crores and Rs.0.37Crores was claimed as bogus Long Term Capital Gain for the A.Y.2012-13 and 2013-14 respectively. In view of the above, please explain why the above mentioned amounts cannot be treated as undisclosed income and brought to tax?

Ans. To the best of my belief, no unaccounted cash has been received in the case of M/s Andhra Roller Flour Mills. Moreover as already stated M/s Andhra Roller Flour mills is not connected to me individually. However, to cooperate with the department I will verify with M/s Andhra Roller Flour mills and furnish the particulars of entire sale proceedings which is in line with the sale agreement by 14.05.2018.

Regarding M/s United Developers, I have already stated that I will verify and substantiate the genuineness of the transactions by 14.05.2018.

Regarding M/s Twenty First Century Ltd, I have already stated that I do not remember all the particulars correctly as it is a very old transaction. To the best of my belief and remembrance it is a fully genuine transaction and not an attempt to claim bogus Long Term Capital Gains. However, the details will be submitted by 14.05.2018.

In view of the above explanations the above amounts cannot be treated as undisclosed income and request you to give us an opportunity to justify and substantiate our claim.

12. The learned AR fairly submitted that thereafter under the duress and pressure, the assessee was forced to forego the claim u/s 10(38) in the statement recorded on 14.6.2018 and our attention was drawn to question No.9 which is to the following effect.

Q.9. Do you want to say anything else?

A. I am withdrawing the exemption claimed for LTCG arose from the company M/s Twenty First Century Ltd in the A.Y. 2012-13 and 2013-14 and the details has been filed in the reply given to your office dated 29.05.2018 and the same has been offered to tax. We are voluntarily offering the same only with a view to avoid litigation as explained in our reply filed on 29.05.2018. I request you to please exempt me from any penal consequences/proceedings in relation to Search and Seizure proceedings.

13. Before us, the learned AR relying upon the Panchnama and the order of the Assessing Officer submitted that as there was no incriminating material found during the course of search pertaining to the Long-Term Capital Gain, therefore, no addition can be made in the hands of the assessee. The learned AR for the assessee for the above said proposition had relied upon decision of the Hon'ble Supreme Court in the case of Abhisar Buildwell (P) Ltd dated 24th April, 2023 and also the decision of the Coordinate Bench in the case of Prerana Agarwal vs. DCIT in ITA No.458/Hyd/2021, dated 8.6.2023 and Mahesh Reddy and others vs. ACIT in ITA Nos.40 to 43/Hyd/2023 dated 1.8.2023.

14. It was also submitted that the statement recorded on 14.6.2018 has not been acted upon by the assessee and the same was later retracted by filing the return of income without withdrawing the claim u/s 10(38) in response to notice u/s 153A. Further, the learned AR relied upon the decision of the Hon'ble Delhi High Court in the case of Best Infrastructures and other decisions on the basis of which it was held that merely on the basis of the statement recorded, no addition can be made u/s 153A of the Act unless corroborative incriminating documents were found from the premises of the assessee. It was submitted that since no incriminating documents were found during the search, therefore, no additions can be made.

15. Per contra, the learned DR submitted that the statement recorded by the Investigation Team is binding and is an incriminating material as held by the learned CIT (A) and she relied upon the decision of Smt. Dayawanti vs. CIT and the

dismissal order of the Hon'ble Supreme Court in the SLP in the case of B. Krishna Kumar vs. DCIT.

16. In rebuttal, the learned AR submitted that the decision of Smt. Dayawanti vs. CIT was considered and distinguished by the Hon'ble Delhi High Court in the case of Kabul Chawla. Further it was submitted that the decision of the Kabul Chawla was upheld by the Hon'ble Supreme Court in the case of Abhisar Builders. It was also held that the decision of B Krishna Kumar is now applicable after the pronouncement of the decision of the Hon'ble Supreme Court in the case of Abhisar Buildwell (P) Ltd (Supra).

17. We have heard the rival submissions and perused the material available on record. The Assessing Officer in paragraph 18 had noted that survey action u/s 133A of the Act was conducted at the premises of the share-broker and the share-broker has accepted the role in providing the accommodation entries. In table reproduced at para 8, the name of the assessee namely Shri Jitender Kumar Gupta and Shri Virender Kumar Gupta have not been mentioned, in the statement so recorded by the Assessing Officer and reproduced in the assessment order. In fact during the course of search, no incriminating material pertaining to the Long Term Capital Gain was found in the premises of the assessee and the entire addition made by the Assessing Officer were based on the report of the Investigation Wing, Kolkata pursuant to the survey action carried out in the premises of the broker.

18. Recently, we had an occasion to examine an identical issue in the case of Mahesh Reddy and others vs. ACIT in ITA Nos.40 to 43/Hyd/2023 dated 1.8.2023 wherein we have held as under:

10. We have heard the rival submissions and perused the material available on record. It is an admitted fact that there is no reference to any incriminating material either by the Assessing Officer or by the Id.CIT(A) in their orders. The whole addition was made in the hands of the assessee on the basis of the search conducted by the Director of Investigation, Kolkata, in the premises of the Kolkata based share brokers wherein they have admitted that they were allegedly providing accommodation entries to various persons. However, the fact remains that no incriminating material was found during the course of search in the premises of the assessee.

10.1. In Paragraph 1.4 of the assessment order, assessee has categorically mentioned that no incriminating material constituting the tangible assets were found in the premises of the assessee. In our view, in the absence of any incriminating material, no addition can be made in the hands of the assessee. For the above said purposes, we may fruitfully reply upon the decision of Hon'ble Supreme Court in the case of Abhisar Buildwell Pvt. Ltd. (supra). The co-ordinate Bench of the Tribunal has an occasion to examine the applicability of the decision in the case of Abhisar Buildwell Pvt. Ltd. (supra) in the case of Preranaa Agarwal ITA 458/Hyd/2021 wherein the co-ordinate Bench of the Tribunal in Para 8.2 to 9.1 had held as under :

“8. We have gone through the record in the light of the submissions made on either side. Insofar as the facts and figures are concerned, there is not much dispute. The return of income filed by the assessee for the assessment year 2013-14 on 27/07/2013 was processed under section 143(1) of the Act and notice under section 143(2) of the Act was never issued. By the date of search on 15/11/2018, four years elapsed after the last date for issuance of notice under section 143(2) of the Act in this case. It is also not the case of the Revenue that any incriminating material was found during the search that was considered by the learned Assessing Officer, but made the assessment. In these circumstances, the question that arises for consideration is

whether any interference could be made with the concluded assessments while assessing the income under section 153A of the Act, when no incriminating material was found.

9. As stated earlier, the return of income filed by the assessee for the assessment year 2013-14 on 27/07/2013 was processed under section 143(1) of the Act by 30/09/2014. Neither notice under section 143(2) of the Act was issued nor any proceedings were pending as on the date of search. Though the divergent views taken on this aspect are brought to our notice by both the counsel, the Hon'ble Supreme Court put a quietus to the issue by the decision in the case of *PCIT vs. Abhisar Buildwell P. Ltd.* (supra). While in complete agreement with the view taken by the Hon'ble Delhi High Court in the case of *CIT vs. Kabul Chawla*, (2015) 61 taxmann.com 412 (Delhi) and the Hon'ble Gujarat High Court in the case of *PCIT Vs. Saumya Construction* (2016) 387 ITR 529 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, Hon'ble Apex Court concluded that-

i) that in case of search under Section 132 or requisition under Section 132A, the AO assumes the jurisdiction for block assessment under section 153A;

ii) all pending assessments/reassessments shall stand abated;

iii) in case any incriminating material is found/unearthed, even, in case of unabated/completed assessments, the AO would assume the jurisdiction to assess or reassess the 'total income' taking into consideration the incriminating material unearthed during the search and the other material available with the AO including the income declared in the returns; and

iv) in case no incriminating material is unearthed during the search, the AO cannot assess or reassess taking into consideration the other material in respect of completed assessments/unabated assessments. Meaning thereby, in respect of completed/unabated

assessments, no addition can be made by the AO in absence of any incriminating material found during the course of search under Section 132 or requisition under Section 132A of the Act, 1961. However, the completed/unabated assessments can be re-opened by the AO in exercise of powers under Sections 147/148 of the Act, subject to fulfilment of the conditions as envisaged/mentioned under sections 147/148 of the Act and those powers are saved.

9.1. This decision applies to the facts of the case on all fours and respectfully following the same, we hold that since no incriminating material found in the case of assessee for the assessment year 2013-14, the concluded assessment cannot be disturbed and the addition made by the learned Assessing Officer and sustained by the learned CIT(A) cannot be upheld. We accordingly allow the appeal of assessee.”

11. In the present case, admittedly, no incriminating material was referred to by the Assessing Officer in the assessment order and the same is also in the case of ld.CIT(A). Therefore, in our view, no addition can be made in the hands of the assessee in view of the law laid down by the Hon'ble Supreme Court in the case of Abhisar Buildwell Pvt. Ltd. (supra).

12. Further, the question that arises is as to whether the information collected by the Director, Investigation from the Brokers in the form of statement etc. form the basis for making the addition in the hands of the assessee or not? In our view, the answer to that is also No, as no material has been brought to our notice either in the assessment order or in the order of ld.CIT(A) showing that the said brokers in their respective statements have indicated that they had provided the accommodation entries to the assessee. Ironically, the Assessing Officer in Para 7 of his order referred to the statement of Shri Kailash Prasad Dhyawala and also of Anil Kumar. However, in none of the said statements, the name of the assessee or the firm of AMR is reflected. Further, even if we assume that some information was found during the course of search at the broker's premises at Kolkata showing that the assessee was beneficial with those accommodation entries, then the said material only can form basis for making the addition in the hands of the assessee under section 153C of the Act and not under section 153A. For the purposes of

making addition u/s 153A of the Act, it is essential and sine qua non that during the course of search, some incriminating material must have been found from the premises of the assessee which shows the escapement of income. In the present case, no incriminating material was found during the course of search. Therefore, no addition can be made in the hands of the assessee. Furthermore, the 4th provision to section 153A reads as under :

'(4) Provided also that no notice for assessment or reassessment shall be issued by the Assessing Officer for the relevant assessment year or years unless—

(a) the Assessing Officer has in his possession books of account or other documents or evidence which reveal that the income, represented in the form of asset, which has escaped assessment amounts to or is likely to amount to fifty lakh rupees or more in the relevant assessment year or in aggregate in the relevant assessment years;

(b) the income referred to in clause (a) or part thereof has escaped assessment for such year or years; and

(c) the search under section 132 is initiated or requisition under section 132A is made on or after the 1st day of April, 2017.

Explanation 1.—For the purposes of this sub-section, the expression "relevant assessment year" shall mean an assessment year preceding the assessment year relevant to the previous year in which search is conducted or requisition is made which falls beyond six assessment years but not later than ten assessment years from the end of the assessment year relevant to the previous year in which search is conducted or requisition is made.

Explanation 2.—For the purposes of the fourth proviso, "asset" shall include immovable property being land or building or both, shares and securities, loans and advances, deposits in bank account.'

13. *The reading of 4th proviso to Section 153A of the Act, make it abundantly clear that the revenue officials shall not issue notice beyond a period of six years unless (1) Assessing*

Officer is in possession of books of accounts and (2) there are other documents or evidence which reveal that income reflected in the form of assets was escaped from assessment.

14. *In the present case, the Assessing Officer was neither in possession of books of accounts nor other documents or evidence, at the time of reassessment which shows any escapement of amount reflected in the assets head. Admittedly, the term 'Asset' was defined under Explanation 2, which include immovable property being land or building or both, shares and securities, loans and advances, deposits in bank account. In the present case, the assessee has purchased 5000 shares on 27.10.2009 and 14.12.2009 of M/s. Astha Tradelink Private Limited for Rs.400/- each. Thereafter, those 5000 shares were converted into 1,90,000/- shares of M/s. Twenty First Century Private Limited and the assessee sold part of the shares in A.Y. 2011-12 relevant to A.Y. 2012-13 and earned capital gains of Rs.5,96,11,906/-. Thus, during the assessment year, the column 'Asset' does not show either the investment in the immovable property being land or building or both, shares and securities, loans and advances. In the absence of any asset being in possession of the assessee, the Assessing Officer shall not have issued the notice to the assessee for making the addition u/s 153A of the Act. In view of the above, the addition made in the hands of the assessee is liable to be deleted.*

15. *There is one more reason to come to the conclusion that the Assessing Officer should have made more efforts to bring on record some tangible material besides the statement of the assessee namely, A. Mahesh Reddy to show that the assessee has agreed to pay the profit during the assessment year under consideration and would be ready to forego the claim made by the assessee at assessment stage during the course of original assessment proceedings.*

16. *In our view, the statement given by the assessee or the director of M/s. Twenty First Century Securities Limited, does not bind the assessee unless it is duly supported by the cogent incriminating material and we find merit in the arguments of the ld.AR who had relied on the decision of Hon'ble High Court of Andhra Pradesh in the case of CIT vs. Shri Ramdas Motor Transport Limited reported in (2015) 55 taxmann.com and also the decisions of hon'ble Delhi High Court in the case of PCIT Vs. Best Infrastructure (India) Pvt. Ltd., (supra), and CIT Vs. Harjeev Aggarwal reported in (2016) 70 taxmann.com 95 (Delhi), wherein at Paragraph 21, it was held as under :*

“21. A plain reading of Section 132 (4) of the Act indicates that the authorized officer is empowered to examine on oath any person who is found in possession or control of any books of accounts, documents, money, bullion, jewellery or any other valuable article or thing. The explanation to Section 132 (4), which was inserted by the Direct Tax Laws (Amendment) Act, 1987 w.e.f. 1st April, 1989, further clarifies that a person may be examined not only in respect of the books of accounts or other documents found as a result of search but also in respect of all matters relevant for the purposes of any investigation connected with any proceeding under the Act. However, as stated earlier, a statement on oath can only be recorded of a person who is found in possession of books of accounts, documents, assets, etc. Plainly, the intention of the Parliament is to permit such examination only where the books of accounts, documents and assets possessed by a person are relevant for the purposes of the investigation being undertaken. Now, if the provisions of Section 132(4) of the Act are read in the context of Section 158BB(1) read with Section 158B(b) of the Act, it is at once clear that a statement recorded under Section 132(4) of the Act can be used in evidence for making a block assessment only if the said statement is made in the context of other evidence or material discovered during the search. A statement of a person, which is not relatable to any incriminating document or material found during search and seizure operation cannot, by itself, trigger a block assessment. The undisclosed income of an Assessee has to be computed on the basis of evidence and material found during search. The statement recorded under Section 132(4) of the Act may also be used for making the assessment, but only to the extent it is relatable to the incriminating evidence/material unearthed or found during search. In other words, there must be a nexus between the statement recorded and the evidence/material found during search in order to for an assessment to be based on the statement recorded.”

16.1. *In view of the above, all the legal grounds raised by the assessee are decided in favour of the assessee. We further note that we have not adjudicated the other grounds on merit as the assessee gets the relief on legal grounds. Thus, the appeal of the assessee is allowed.”*

19. We find no reasons to divert from our findings as the facts of the present case are identical to that of Shri Mahesh Reddy vs. ACIT (Supra). Though the learned DR had relied upon the decision in the case of Smt. Dayawanti, however, the said decision has duly been considered by the Hon'ble Delhi High Court in the subsequent case in the case of Kabul Chawla which was upheld by the hon Supreme Court in the case of Abhisar Buildwell (P) Ltd (Supra). In view of the above, the said decision is of no use to the assessee.

20. In the result, the appeal of the assessee in ITA No.507/Hyd/2022 is allowed.

21. As the facts and issues are identical in all the appeals, therefore, following our decision given in lead appeal ITA 507/Hyd/2022, the other captioned appeal i.e. ITA Nos.508/Hyd/2022 is also allowed.

22. To sum up, both the appeals of assessee are allowed. A copy of this order may be placed in all the respective files.

Order pronounced in the Open Court on 17th October, 2023.

Sd/- (R.K. PANDA) VICE-PRESIDENT	Sd/- (LALIET KUMAR) JUDICIAL MEMBER
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Hyderabad, dated 17th October, 2023.

Vinodan/SPS

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4	DR, ITAT Hyderabad Benches
5	Guard File

By Order