आयकर अपीलीय अधिकरण, हैदराबाद पीठ

IN THE INCOME TAX APPELLATE TRIBUNAL
Hyderabad 'B' Bench, Hyderabad

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

ITA No.369/Hyd/2019		
Assessment Year: 2014-15		
Shri Sujit Agarwal Hyderabad PAN:ACLPA3197P	Vs.	Dy. C. I. T. Central Circle 2(2) Hyderabad
(Appellant)		(Respondent)
Assessee by:	Shri S. Rama Rao, Advocate	
Revenue by:	Shri CH V Gopinath, CIT(DR)	
Date of hearing:	09/11/2023	
Date of pronouncement:	22/11/2023	

ORDER

Per R.K. Panda, Vice-President

This appeal filed by the assessee is directed against the order dated 16.01.2019 of the learned CIT (A)-12, Hyderabad relating to A.Y.2014-15.

2. Facts of the case, in brief, are that the assessee is an individual and the Managing Director of the company, M/s. Sawaria Pipes Pvt Ltd. He filed his original return of income for the impugned A.Y on 30.12.2014 declaring total income of Rs.20,13,600/- and agricultural income of Rs.70,200/-. A search and seizure operation u/s 132 of the I.T. Act was conducted in the case of the assessee on 12.01.2016. In response to notice u/s 153A of the Act issued on 6.9.2016, the assessee filed his return

of income on 14.09.2016 admitting total income of Rs.20,13,600/- and agricultural income of Rs.70,200/-. Statutory notices u/s 143(2) and 142(1) were issued and served on the assessee to which the AR of the assessee appeared before the Assessing Officer and filed the requisite details/information as called for.

3. During the course of assessement proceedings, the Assessing Officer noted that the assessee has benefited from the exempted sale of penny stocks after having acquired the shares of penny stock of M/s. NCL Research and Financial Services Ltd, the details of which are as under:

Name of the company	Amount invested in shares of M/s. NCL Research on 30.04.2012 & 09.05.2012	Amount received on sales	
		As per ROI for the A.Y 2014-15	As per Investigation report received from Directorate of Investigation, Kolkata
	(Rs.)	(Rs.)	(Rs.)
M/s. NCL Research & Financial Services Ltd	1,04,08,802	7,93,85,401	7,97,38,105

4. He observed that the assessee has sold 40,000 shares of M/s. NCL Research & Financial Services Ltd for Rs.7,93,85,401/- during the impugned A.Y. After reducing the cost of acquisition of shares at Rs.1,04,08,802/-, the assessee has arrived at the LTCG of Rs.6,89,76,599/- and claimed the same as exempt u/s 10(38) of the I.T. act.

5. The Assessing Officer observed that despite the fact that the assessee had invested in the company M/s. NCL Research & Financial Services Ltd, however, during the course of post search investigation, in the statement recorded on 19.01.2016, the assessee was unable to give the details of the company, the activities undertaken by the said company or the

name of its Directors or the location of the office or about the financial status of the company. Further, he was also unable to give the details of the persons who purchased the said scrips from him at such high prices when the business activity of the aforesaid company was not convincing. The Assessing Officer, in the light of the above, rejected the explanation of the assessee that the share transaction in M/s. NCL Research & Financial Services Ltd were done through the broker Nirmal Bang Securities and that the payment was made through RTGS drawn on Punjab National Bank on 30.04.2012. The Assessing Officer thereafter analysed the modus operandi adopted by various persons providing accommodation entries for claiming bogus LTCG. Rejecting the various explanations given by the assessee, the Assessing Officer rejected the claim of LTCG of Rs.6,89,76,599/- u/s 10(38) and made addition of Rs.7,97,38,105/- u/s 68 of the I.T. Act by observing as under:

6.2 The submission filed by assessee has been considered. But same is found to be not acceptable for the following reasons:

i. As per the information forwarded by the Directorate of Income tax (Inv.), Kolkata, on the beneficiaries of bogus LTCG scam who are assessed at Hyderabad, Shri Sujit Agarwal has been identified as one of the assesses to have benefitted from the exempted sale of penny stocks to the tune of Rs. 7,97,38,105/- after having acquired the shares of penny stocks viz M/s. NCL Research AND Financial Services Limited for a meager amount.

ii. It is seen that price of shares of M/s NCL Research & Financial Services Ltd. has risen from Rs. 302 on 7.6.2012 to Rs. 2107 on 9.7.2013. This is rise of 600% within a span of one year. During this period company has incurred losses in trading of the securities and commodities. It is therefore clear that shares of M/s NCL Research & Financial Services Ltd. have been rigged and have been used to provide entry of bogus long term capital gain.

iii. The trading in shares of M/s NCL Research & Financial Services Ltd. have been banned by BSE with effect from1.1.2015.The Market Regulatory Authority in India, SEBI had suspended the trading in the scrip of M/s NCL Research & Financial Services Ltd. As already discussed earlier, investigation done by DIRECTORATE OF Kolkata and survey done by Mumbai wing of income tax department on M/s NCL Research & Financial

Services Ltd. has already proved that it is a penny stock company and is engaged in providing accommodation entries.

iv. Assessee vide its sworn statement recorded on 19.1.2016 has by investigation wing Hyderabad has failed to explain the basic details of the company M/s NCL Research & Financial Services Ltd. in which it has invested more than one crore. Assessee was unable to furnish the details of directors, address of the company, profit earned by the company. A prudent businessman will invest only after inquiring financial health and management of the company but surprisingly in the instant case the assessee doesn't know about the basic details of the company which itself shows the ultimate motive was to turn unaccounted money into white through layers in guise of LTCG without having the knowledge of the scrip in which shares are being traded.

v. Even in case of exit providers **Katyani commodities**, **Avlokan Dealcom Pvt Ltd**., SEBI vide its interim order dated 9.11.2015 has inferred that acts of these companies are fraudulent. Further in case of exit providers **blue horizon commosales private limited, helot properties private limited and overload financial advisory pvt ltd** SEBI vide its order in matter of Pine Animation Limited stated that these exit providers have acted in connivance with directors, promoters, allottees for implementation of dubious plan and device that has led to the misuse of stock exchange to artificially increase price and volume of scrip to provide illegitimate gains to the prefential allottees and promoters related entities in order to claim LTCG benefits and has banned them for doing trading . Same observations have been made by SEBI in case of exit providers **Core commodities Pvt. Ltd. and Shivsathi Mercantile Ltd.** in matter of Kailash auto finance. Good point impex private limited another exit provider has also been banned by SEBI due to indulgence in mal practices.

vi. Information was also called from SEBI u/s 133(6) of the act. In response vide its letter dated 25.10.2017 SEBI has stated that during the period 2.4.2012 to 5.7.2013 the price of scrip of M/s NCL Research & Financial Services Ltd opened at Rs. 180.05 and reached a high of Rs. 2200 and closed at Rs. 2098.90 i.e. a rise of 1065.73% from the opening price. The top 10 contibuters as buyers include **Katyani commodities, , helot properties private limited and Sankatsathi Agencies Privae Limited.** It is pertinent to mention here that same exit providers are there in assesse's case also who purchased the scrip

from Shri Sujit Agarwal. Thus it clearly proves that prices were rigged to give th beneficiary benefit of bogus LTCG. In the instant case such beneficiary is Sujit Agarwal.

vii. It is pertinent to mention here that initial investment by sujit Agarwal of Rs. 1,00,00,000/- in scrip of M/s NCL Research & Financial Services Ltd is through money received on 30.4.2012 from Sawaria Pipes Limited in which assesse is a managing director. On perusal of bank statement of Sawaria Pipes Limited, it is seen that before transferring the amount to Sujit Agarwal, there is immediate credit of Rs.47,00,000/- from a entity Arrowsapce **on 28.4.2012** and Rs. 53,00,000/ from Sonata Exim Pvt Ltd. On 28.4.2012 and 30.4.2012. Assesse was further asked vide this office letter dated 3.10.2017 to furnish ROI, P&L account , balance sheet of the parties Sonata Exim Pvt. Ltd. & Arrowspace Pvt Ltd and to furnish ledger of transaction with Sawaria Pipes Pvt. Ltd along with bills/ vouchers. In response assesse furnished only ledger account of these parties in assesse's books. On perusal of the same it is noticed that there is standalone investment by these entities as mentioned above in Sawaria Pipes Pvt. Ltd and there are no other transactions with these entities. Assesse has not given any other details of these entities as asked. This whole chain of events itself is an evidence that layers have been created to bring unaccounted money of assessse into books.

viii. Reliance is placed on Bombay High Court Judgement in case of Sanjay Bimalchand jain L/H Shantidevi Bimalchand Jain Vs PCIT(ITA NO.18/2017 wherein addition made by AO was confirmed by Hon'ble Court since assessee could not furnish the cogent evidence to explain as to how the shares in an unknown company jumped in no time. Facts of the instant case are also similar.

ix. Reliance is also placed on Supreme Court judgement in case of Sumati Dayal wherein it was held that case has to be decided after considering surrounding circumstances and applying the human probabilities. In the instant case assessee invested in the shares of M/s NCL Research & Financial Services Ltd., without having knowledge about company, its directors and financial strength of the company. The profit of the company is negligible and its share prices jumped from Rs. 80 to Rs. 2200 in span of one year. Thus the Performance of the company is not at all commensurate with the escalation in price of shares. The exit providers are non filers mostly. The Scrip of M/s NCL Research & Financial Services Ltd. has been suspended by SEBI and major exit providers as discussed

above have also been banned for trading due to malpractices. Assessee has not invested in the company in the past. The said investment is standalone investment by the assessee in the company. Thus in all human probability assessee has invested in the scrip of /s NCL Research & Financial Services Ltd. to bring its unaccounted income into books through layers and claiming it as exempt LTCG.

x. Reliance is also placed on the decision of the Apex court in the case of Sri Durga Prasad More Vs CIT wherein the principle of human probabilities was relied upon by the court in deciding the case in favour of revenue. At the cost of repeating it is reiterated that the humongous gains made by the assessee in a penny scrip devoid of any fundamentals defies any logic or human probabilities and therefore cannot be genuine.

xi. It is evident that the assessee earned huge Long Term Capital Gains from these transactions which he claimed as exempt from taxation u/s 10(38). This entire edifice was basically a colourable device to give the colour of genuineness to these transactions through which he was successful in bringing back his own unaccounted cash into his account without the need to pay any taxes. Supreme Court in the case of McDowell Vs CTO has given strong verdict against any such arrangements by stating that "Colourable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honourable to avoid the payment of tax by resorting to dubious methods. It is the obligation of every citizen to pay the taxes honestly without resorting to subterfuges". In view of the Apex Court verdict, this entire arrangement is held as a mere colourable device devised with the aforementioned objectives.

6.3. Hence, in view of the above discussions, an amount of **Rs.7,97,38,105/-** credited to bank account of assessee is treated as unexplained income of assessee u/s 68 of the IT Act and the same is added back to the returned income. Penalty proceedings u/s 271(1)(c) of the Act are initiated separately for furnishing inaccurate particulars of income.

[Addition:Rs.7,97,38,105]

6. The Assessing Officer also made addition of Rs.8,38,514/- u/s 68 of the I.T. Act, 1961 being the amount received in cash from Smt. A. Indira. However, this issue is not in appeal since the learned CIT (A) has deleted the same and the Revenue is not in appeal. Therefore, we are not concerned with the same.

7. In appeal, the learned CIT (A) upheld the addition of Rs.7,97,38,105/-made by the Assessing Officer u/s 68 of the I.T. Act, 1961.

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

> *1. The Appellate Order passed by CIT (Appeals) - 12, Hyderabad confirming the addition of Rs. 7,97,38,105/- made u/s 68 of I.T. Act is against the facts of the case and provisions of Income Tax Act, 1961.*
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> *2. The CIT (Appeals) erred on facts and in law in sustaining the addition of Rs.7,97,38,105/- u/s 68 being the gross amount of sale of shares though the actual net amount credited and received in the Bank is Rs.7,93,85,401/- after deduction of Rs.3,52,704/- towards cost of transfer expenses of shares like- STT, Brokerage, Stamp Duty, etc deducted by Broker.*
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> *3. The Learned CIT(Appeals) as well as AO have failed to appreciate that the Appellant has invested a sum of Rs. 1,04,08,802/- in the A.Y. 2013-14 for purchase of shares of NCL Research & Financial Services Limited which amount ought to have been deducted from the net sale proceeds of shares of Rs. 7,93,88,540/-. The amount received and credited in the Bank Account of Rs. 7,93,88,540/- is inclusive of receipt back of investment in the form of cost of acquisition of shares of Rs. 1,04,08,802/-. Thus, at best only the net amount of LTCG of Rs. 6,89,76,599/- only could have been added.*
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> *4. The CIT (Appeals) as well as AO was not justified in disallowing the capital gain of Rs.6,89,76,599.11 claimed to be exempt u/s 10(38) inspite of producing and furnishing all the necessary evidence for purchase and sale of shares by way of documents, explanations, submissions and information during assessment proceedings which conclusively proved to be genuine transaction.*
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> *5. The CIT (Appeals) as well as AO erred in holding that the transaction related to purchase and sale of shares of shell company based on unreliable material collected on the back of assessee and without giving an opportunity of cross examination of adversarial parties.*
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> *6. The CIT (Appeals) as well as AO have erred in law in making addition in an assessment u/s 153A as there was*

no incriminating material found during the course of search operations.

7. The CIT (A) has failed to consider vital information, material and contentions urged in written submissions.

8. The appellant therefore, prays in view of above and detailed grounds to be urged at the time of hearing, Hon'ble ITAT may be pleased to delete the addition of Rs.7,97,38,105/-."

9. The learned Counsel for the assessee at the outset submitted that the addition made by the Assessing Officer amounting to Rs. 7,97,38,105/- u/s 68 of the I.T. Act which has been sustained by the learned CIT (A) is not based on any incriminating material found during the course of search. He submitted that the original return was filed on 30.12.2014 and the time limit for issuing notice u/s 143(2) had expired when the search took place u/s 132 on 12.01.2016. Thus, no assessment was pending on the date of search. Referring to various decisions including the decision of the Hon'ble Supreme Court in the case of PCIT vs. Abhisar Buildwell Ltd reported in 2023 (149 Taxman 399) and the decisions of the Coordinate Benches of the Tribunal in the case of Smt. Prerana Agarwal vs. DCIT (ITA No.458/Hyd/2021) and batch of other appeals vide order dated 08.06.2023 and Mr. Mahesh Reddy Alturi vs. ACIT vide ITA No.40/Hyd/2023 and batch of other appeals vide order dated 30.08.2023, he submitted that the addition made by the Assessing Officer and sustained by the learned CIT (A) is not in accordance with law and therefore liable to be deleted.

10. The learned DR, on the other hand, strongly opposed the above arguments advanced by the learned Counsel for the assessee. He submitted that the provisions of section 153A of the Act do not limit the jurisdiction of the Assessing Officer to make

the addition on the basis of the seized material alone. He submitted that it is the duty of the Assessing Officer to initiate the proceedings u/s 153A of the Act the moment the search warrant is executed. Relying on various decisions including the decision of the jurisdictional High Court in the case of Gopal Lal Bhadruka v. DCIT Reported in (2012) 27, Taxmann.com 167 (AP), the decision of the Kerala High Court in the case of E.N. Gopakumar vs. CIT reported in (2016) (75 Taxmann 215) and various other decisions, he submitted that the addition cannot be deleted merely on the ground that no incriminating material was found during the course of search.

11. We have heard the rival arguments made by both the sides, perused the orders of the AO and the learned CIT (A) and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us by both sides. A perusal of Para 3 of the assessment order shows that during the course of search and seizure operation, the following documents/books of account/loose papers were found and seized:

A) Annexure-A/SA/RES/01 to the Panchanama dated 13.01.2016 drawn at the premises 9-4-86/204, Salarjung Colony, Hyderabad.

B) Annexure-A/SA/RES/02 to the Panchnama dated 13.01.2016 drawn at the premises 9-4-86/204, Salarjung Colony, Hyderabad

12. Similarly, as per Para 4 of the assessment order, the following valuables were found and seized.

S. No.	Name of the assessee covered by search	Assets found			Assets seized		
		Cash Rs.	Gold/Diamond Jewelleries Rs.	Others Rs.	Cash Rs.	Gold/Diamond Jewelleries Rs.	Others Rs.
1.	Sri Sujit Agarwal	76,43,500	1,57,87,300/	--	70,00,000/-	95,48,070/	--
2.	Smt. Uma Agarwal						
3.	Sri Shatrughan Agarwal						

13. A perusal of the entire assessment order shows that the addition was made on the basis of post search inquiries and on the basis of the reports of the Investigation Wings of Mumbai and Kolkata. We find from the assessment order that the original return was filed on 30.12.2014 and the search was conducted on 12.01.2016. Since the period for issue of notice u/s 143(2) had expired by the time the search took place, therefore, no assessment was pending on the date of search. Under these circumstances, we have to see as to whether any addition can be made in the hands of the assessee in a concluded assessment when no incriminating material was found during the course of search and the addition was made purely on the basis of post search inquiry and on the basis of the reports of the Investigation Wing of Mumbai and Kolkata.

14. We find the Coordinate Bench of the Tribunal in the case of Smt. Prerana Agarwal vs. DCIT vide ITA No.458/Hyd/2021 and batch of other appeals for the A.Y 2013-14 order dated 8.6.2023 has observed 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.*
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> *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 A0 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.

10. As far as the remaining appeals in ITA Nos. 459/Hyd/2021,460/Hyd/2021,461/Hyd/2021, 462/Hyd/ 2021, 463/Hyd/2021, 464/Hyd/2021, 352/Hyd/2022, 353/Hyd/2022 & 354/Hyd/2022 are concerned, facts are

identical to the facts in the case of Prerana Agarwal (supra) except in the case of Smt. Anita Agarwal in ITA No. 462/Hyd/2021, wherein the initial assessment was complete under section 143(3) read with section 153A of the Act. In none of the cases any addition was made in the original assessment, and no incriminating material was found during the search. Our findings in the said appeal, mutatis mutandis, would apply to these appeals as well. Hence, all these appeals are also allowed".

15. Similarly, we find the Tribunal in the case of Mahesh Reddy Alturi vide ITA No.40/Hyd/2023 order dated 30.08.2023 for A.Y 2012-13 and batch of other appeals has observed 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 ld.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 13 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.*
>
> *17. In the result, the appeal of the assessee in ITA No.40/Hyd/2023 is allowed"*

16. Since admittedly in the instant case also, no assessment was pending on the date of search on 12.01.2016 and the addition has not been made on the basis of any incriminating material found during the course of search, therefore, following the decisions of the Coordinate Bench of the Tribunal in the case of Prerana Agarwal vs. DCIT (Supra) and Mahesh Reddy Alturi (Supra), we hold that the addition made by the Assessing Officer and sustained by the learned CIT (A) is not justified. Accordingly, the same is directed to be deleted.

17. Since the assessee succeeds on this legal ground, therefore, the grounds challenging the addition on merit are not being adjudicated.

18. In the result, appeal filed by the assessee is allowed.

Order pronounced in the Open Court on 22nd November, 2023.

Sd/-	**Sd/-**
(LALIET KUMAR) **JUDICIAL MEMBER**	**(R.K. PANDA)** **VICE-PRESIDENT**

Hyderabad, dated 22nd November, 2023.
Vinodan/sps

Copy to:

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3	Pr. CIT -Central, Hyderabad
4	DR, ITAT Hyderabad Benches
5	Guard File

By Order