IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "B", PUNE

BEFORE SHRI R. K. PANDA, VICE PRESIDENT
AND
SHRI VINAY BHAMORE, JUDICIAL MEMBER

आयकर अपील सं. / ITA Nos.467 to 469/PUN/2022
निर्धारण वर्ष / Assessment Years: 2011-12 to 2013-14

Rajdeep Buildcon Private Limited, Rajdeep House, Near Bhide Hospital, Savedi, Ahmednagar- 414003. PAN : AAACR8605D	Vs.	DCIT, Central Circle-1(2), Pune.
Appellant		Respondent

Assessee by	:	Smt. Deepa Khare
Revenue by	:	Shri Ajay Kumar Keshari
Date of hearing	:	25.06.2024
Date of pronouncement	:	18.09.2024

आदेश / ORDER

PER VINAY BHAMORE, JM:

The above captioned three appeals filed by the assessee are directed against the separate orders dated 27.04.2022 passed by ld. CIT(A)-11, Pune ['ld. CIT(A)'] for the assessment years 2011-12 to 2013-14 respectively.

2. Since the identical facts and common issues are involved in all the above captioned three appeals of the assessee, we proceed to dispose of the same by this common order.

3. First, we shall take up the appeal of the assessee in ITA No.467/PUN/2022 for A.Y. 2011-12.

ITA No.467/PUN/2022, A.Y. 2011-12 :

4. The appellant has raised the following grounds of appeal :-

> *"1] The Ld. CIT(A) has erred in confirming the disallowance u/s 14A of Rs.68,86,771/- made by the Ld. AO.*
>
> *2] The Ld. CIT(A) has erred in upholding the action of the Ld. AO that the Appellant was not entitled to raise a fresh claim in the return of income filed u/s 153A in respect of a non-abated or completed assessment year.*
>
> *3] The Ld. CIT(A) has erred in confirming the disallowance u/s 14A of Rs.68,86,771/- on merits as well by not appreciating the fact that the case of the Appellant is squarely covered by the decision of the jurisdictional Hon'ble ITAT, Pune in the case of Hari Infrastructure Ltd. vs. Jt. CIT (ITA No.848/PN/2012) dated 18.01.2016 wherein it is held that the investments in Special Purpose Vehicle (SPV) entities will not attract disallowance u/s 14A and that the said decision was available to the Appellant only at the time of filing return of income u/s 153A and not at time of filing return of income u/s 139.*
>
> *4] The Ld. CIT(A) has not appreciated that there cannot be unjust enrichment of the Revenue merely on technical ground that fresh claim cannot be made for unabated assessment year.*
>
> *5] The Appellant craves leave to add, alter, amend or delete any of the above grounds of appeal."*

5. The assessee has also raised the following additional grounds of appeal :-

> *"1. Whether on facts and in law, disallowance u/s 14A of the Income Tax Act can be made on expenditure incurred for earning exempt income where the interest free funds were sufficient and available to make investment earning exempt income?*
> *2. Whether on facts and in law, disallowance u/s 14A of the Income Tax Act can be made on expenditure incurred for earning*

> *exempt income even when there is no exempt income earned or is a loss?"*

6. The facts, in brief, are that the assessee is a company registered under the provisions of the Companies Act, 1956. It is engaged in the business of civil contractors and development of infrastructure projects on BOT basis through various Special Purpose Vehicle (SPV) entities formed for the execution of such projects as per the conditions of the respective authorities. In this case, a search and seizure action u/s 132 of the IT Act was conducted on 27.10.2010, the assessee filed its return of income u/s 139 of the IT Act on 29.09.2011, declaring total income at Rs.21,64,09,080/-. Being specified previous year, the assessment u/s 143(3) was completed on 25.03.2013 by assessing income at Rs.21,94,80,768/-. In the meanwhile, reassessment proceedings were also initiated and assessment u/s 143(3) r.w.s. 147 of the IT Act was completed on 10.03.2014 accepting the income assessed u/s 143(3) vide order dated 25.03.2013 without making any addition. The assessee went into first appeal against the assessment order dated 25.03.2013 but the ld. CIT(A) dismissed the assessee's appeal. The assessee preferred second appeal before the ITAT and the ITAT vide its order dated 11.09.2017 directed

the Assessing Officer to restrict the addition. Considering the directions of the ITAT, the Assessing Officer passed the order giving effect to the order of the ITAT on 11.05.2018 and revised the income to Rs.21,81,77,538/-. Another search and seizure action u/s 132 of the IT Act was carried out on 05.05.2016 in the case of the assessee company. In response to notice u/s 153A of the IT Act, the return of income was filed on 13.02.2018 declaring total income at Rs.21,24,38,573/-. During the course of assessment proceedings, it was found by the Assessing Officer that the assessee made disallowance u/s 14A amounting to Rs.68,86,771/- while filing the original return of income u/s 139 on 29.09.2011. But, while filing the return of income in response to notice u/s 153A, the assessee has not disallowed any amount u/s 14A of the IT Act. Hence, the return of income filed in response to notice u/s 153A on 13.02.2018 is less than the original return of income filed u/s 139 on 29.09.2011. The Assessing Officer asked the assessee to explain the reason for offering lesser income in the return of income furnished in response to notice u/s 153A of the IT Act. The assessee submitted that in the light of decision passed by the Tribunal in the case of Hari Infrastructure Ltd. vs. JCIT in ITA No.848/PN/2012 dated 18.01.2016, the assessee is not required to

disallow any amount u/s 14A of the IT Act. The Assessing Officer did not accept the reply of the assessee and held that fresh claim made by the assessee in 153A proceedings cannot be allowed and, therefore, vide order dated 28.12.2018 completed the assessment by determining the income at Rs.21,81,77,538/- against the income returned by the assessee at Rs.21,24,38,573/-.

7. Being aggrieved with the above assessment order, the assessee preferred first appeal before the ld. CIT(A). After considering the reply of the assessee, ld. CIT(A) dismissed the appeal of the assessee and confirmed the order passed by the Assessing Officer vide order dated 27.04.2022 by observing as under :-

> *"8. During the appellate proceedings, the appellant submitted that Hon'ble ITAT Pune in the case of Hari Infrastructure Ltd Vs. JCIT (ITA No. 848/PN/2012 dated 18/1/2016) has held that investments made in SPV entities will not attract disallowance u/s 14A of the Act. The said decision was not available at the time of filling of original return of income or at the time of original assessment proceedings completed on 25/03/2013. The appellant has further submitted that the ratio laid down by the Han'ble ITAT is squarely applicable to its case and accordingly, while filing the return of income on 13/02/2018, in response to the notice u/s 153A, it did not make any disallowance u/s 14A of the Act.*
>
> *9. As regards to the issue of raising fresh claim of deduction in the return filed us 153A of the Act, the appellant has relied on the decision of Hon'ble ITAT Mumbal in the case of DCIT Vs. Eversmile Construction Co. Pvt Ltd (ITA No.4238/MUM/2010) dated 30/8/2011, wherein it was held that there is no restriction on the assessee to claim any deduction which was not there in the original assessment and such claim of the assessee in proceedings u/s 153A cannot be rejected simply on the ground that it was not claimed in the original*

assessment. The appellant has also relied on the decision of Hon'ble ITAT Mumbai in the case of Universal Medicare Pvt Ltd Vs. DCIT (ITA No.2967 to 2971/MUM/2016) dated 05/12/2018 wherein, it has been held that the assessee is entitled to make fresh claim in assessment proceedings u/s 153A of the Act.

10. The appellant has also submitted that all its investments are in SPV entities formed for the purpose of executing the infrastructure projects. The Ld Assessing Officer made the addition only on the ground that this is a closed year and that if the Assessing Officer cannot make any additions in the absence of incriminating material, then the same principle is also applicable to the assessee and the assessee cannot make any fresh claim of deduction. On relying on the decisions as discussed above, the appellant has requested to delete the addition of Rs. 68,86,771/-.

11. I have considered the facts of the case and submissions made by the appellant. The main issue involved in the present appeal is whether an assessee can make a fresh claim while filing the return u/s 153A of the Act for an unabated assessment, which was not made in the original return or during the original assessment proceedings. I have examined the facts of the case and also gone through the decisions of the various courts cited both by the AO and the appellant. From the facts of the case, it is seen that on the date of the search (05/05/2016), no proceedings under the Act were pending in the case of the appellant for A.Y. 2011-12. As such the regular proceedings for A.Y.2011-12 had attained finality. Under these facts and circumstances of the case, the scope of assessment u/s 153A of the Act is limited to the determination of undisclosed income on the basis of the incriminating documents found or seized during the course of search. I tend to agree with the arguments of the AO that the search proceedings are an exercise to unearth untaxed income and cannot be for the benefit of the assessee. This is particularly so, when the assessment year for which the proceedings u/s 153A of the Act, are for unabated assessment year and where the assessments have already attained finality. As the proceedings for A.Y. 2011-12 had attained finality, the proceedings u/s 153A of the Act can only be to bring to tax undisclosed income unearthed during the course of a search. No benefit can be given to the assessee in terms of a claim which the assessee fails to make in his regular returns filed u/s 139 particularly, so when the assessment proceedings have attained finality. It has also been held by courts that the assessment made u/s 153A of the Act are not de-novo assessments. In the case of Jai Steel (India)[2013] 36 taxmann.com 523 (Rajasthan), the Hon'ble Rajasthan High Court have held as under:

> *"The plea raised on behalf of the assessee that as the first proviso provides for assessment or reassessment of the total income in respect of each assessment year faling within the six*

> *assessment years, is merely reading the said provision in isolation and not in the context of the entire section. The words 'assess or reassess have been used at more than one place in the section and a harmonious construction of the entire provision would lead to an irresistible conclusion that the word 'assess has been used in the context of abated proceedings and reassess has been used for completed assessment proceedings, which would not abate as they are not pending on the date of initiation of the search or making of requisition and which would also necessarily support the interpretation that for the completed assessments, the same can be linkered only based on the incriminating material found during the course of search or requisition of documents. The argument of the counsel for the assessee if taken to the logical end would mean that even in cases where the appeal arising out of the completed assessment has been decided by the CIT(A) or Tribunal and the High Court, on a notice issued under s. 153A, the AO would have power to undo what has been concluded by the High Court. Any interpretation which leads to such conclusion has to be repelled and/or avoided. Consequently, it is held that it is not open for the assessee to seek deduction or claim expenditure which has not been claimed in the original assessment, which assessment already stands completed, only because an assessment under s. 153A in pursuance of search or requisition is required to be made-Suncity Aloys (P) Ltd. vs. Astilt. CIT (2009) 124 TTJ (Jd) 674 (2009) 27 DTR (Jd) 139 affirmed, CIT vs. Smt. Shaila Agarwal (2012) 246 CTR (All) 266 : (2012) 65 DTR (All) 41: (2012) 346 ITR 130 (All) relied on; KP Varghese vs. ITO (1981) 24 CTR (SC) 358 : (1981) 131 1TR 597 (SC) applied".*
>
> *(Paras 25, 29 & 30)*

12. In a decision in the case of M/s D J Malpani (ITA No 1148-1154/PN/2013 decision dated 30/10/2015) the Hon'ble Jurisdictional Pune Tribunal on the issue of fresh claim made in the returns filed u/s 153A held as under:

> *"The Ld. Counsel for the assessee at the outset submitted that the issue stands decided against the assessee by the decision of the Pune Bench of the Tribunal in the case of B.G. Shirke Construction Technology Pvt. Vs. ACTT vide ITA Nos 727 to 730/PN/2010 dated 31-10-2013 for A. Yrs 2003-04 and 2006-07 to 2008-09 respectively. It has been held in the said decision that in respect of the assessments which are completed prior to the date of search, no fresh claim of deduction can be made by the assessee. In view of the above submission by Ld. Counsel for the assessee and hence, of any objection from the Ld. Departmental Representative, the order of the CIT(A) holding that assessee is not entitled to make a fresh claim in the return*

> *fled us. 1534 when no such claim was made in the original return of income has to be upheld. The grounds raised by the assessee are accordingly dismissed.*

13. Such a claim was also considered by the Delhi ITAT in the case of Charchit Aggarwal (129 TTJ 438) and the hon'ble tribunal held as under:

> *The original returns of income for the assessment years 2000-01 to 2005-06 were filed within the time allowed under section 139(1). The search under section 132 in the case of the assessee was carried out on 9-12-2005 and the assessee filed return of income in response to notice under section 1534 on 2-11-2007 for the assessment years 2000-01 to 2005-06. The assessee could have revised returns within a period of one year from the end of relevant assessment year or before completion of assessment whichever was earlier. Admittedly, the assessee did not revise any of the returns for assessment years under consideration prior to the date of search carried out in the case of the assessee. Now question arose as to whether the assessee could revise the returns of income for all the six assessment years covered under the search period which incidentally included the return of income for the very first year of business of the assessee on the ground that valuation of the closing stock was made on estimated basis? In the case of a person where a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A after 31-5-2003, assessment has to be made under section 153A. [Para 8]*
>
> *Section 1534(1) contains non obstante clause and, hence, provisions of this section will override the provisions of sections 139, 147, 148, 149, 151 and 153. Under section 1534(1), the Assessing Officer is empowered to issue notices to the assexsee searched for a period of six years in order to assess the income on the basis of material found during the course of search. The second proviso to section 153A(1) provides that the assessment or reassessment, if any, relating to any assessment year falling within the period of six assessment years referred to in section 1534(1), pending on the date of initiation of search under section 132 of making of requisition under section 132A, as the case may be, shall abate. Therefore, after initiation of search, no assessment in respect of pending assessment shall be made and the Assessing Officer is empowered to issue notice under section 153A to assess or reassess the total income of six assessment years immediately preceding assessment year relevant to the previous year in which such search was conducted or requisition was made. The assessee had valued the closing stock for the assessment years*

2000-01 to 2005-06 on average cost method which had resulted in reduction of taxable income in all the years. The contention of the assessee was that in the case of jewellers, it was impossible to value the closing stock on the basis of market cost as the items of closing stock could not be identified with reference to various purchases made during the year. However, it was undisputed that the assessee had been valuing the closing stock at 'cost' as certified by tax auditors. It is a fact that all the assessees are required to maintain the stock registers during the course of normal business activities. It is not difficult to identify the items purchased, the date of purchase and their coats. Hence, there was no substance in the argument of the assessee that it was impossible to value the closing stock at 'actual cost', particularly in view of the fact that he had been valuing the closing stock at cost price from very beginning of the business. [Para 9]

Moreover, the change of method of valuation of the closing stock is allowed if such change is bona fide and the assessee has proper reasons for such change. The concluded proceedings cannot be reopened on the ground that the assessee had incorrectly valued the closing stock in those years. The assessee had filed returns of income for all the six assessment years under section 139(1). The assessments or reassessments could not be made in these years by invoking the provisions of section 147 after initiation of search proceedings in view of second proviso to section 1534(1). From the facts given above, it was clear that the assessee had changed the method of valuation of the closing stocks for all the assessment years to reduce the profits and, hence, the change in the method of valuation was not bono fide. As regards the contention of the assessee that it was impossible to value the closing stock at cost price in the case of jewellers, this was a sweeping generalization without having any material on records to prove. The assessee had not filed any evidence to support its contention and, hence, it deserved to be rejected. [Para 10]

The provisions of section 153A are directed to assess or reassess the income for six assessment years based on search proceedings and, hence, the assessment proceedings under section 153A are beneficial to the revenue. In other words, the proceedings under section 153A are initiated to assess of reassess the undisclosed income., In the instant case, returns, of income for the assessment years 2000-01 to 2005-06 had been accepted under section 143(1). Therefore, in view of the decision of the Supreme Court in the case of CIT v: Sun Engg. Works (P.) Ltd. (1992) 198 ITR 297/64 Taxman 442, the assessee could not be permitted to claim the benefit of closing

stock by changing the method of valuation as it would become favourable to the assessee. (Para 11]

Therefore, in assessment proceedings under section 1534, which are for the benefit of the revenue, the assessee was not permitted to value the closing stock for concluded years at average cost price Accordingly, the Assessing Officer as well as the Commissioner (Appeals) were justified in rejecting the change in method of valuation adopted by the assessee. Hence, there was no infirmity in the order passed by the Commissioner (Appeals) confirming the additions made by the Assessing Officer due to change in method of valuation. (Para 13)

In the result, the appeal filed by the assessee was to be dismissed. (Para 14]

14. Similar view had been taken by the Jodhpur ITAT in the case Suncity Alloys (P.) Ltd. v. Asstt. CIT [2009] 124 TTJ (Jodh.) 674

"The expression 'assessment or reassessment' used in section 153A connotes determination of total income pursuant to return required to be filed in the case of a person where a search is initiated under section 132 or requisition is made under section 132A. The expression 'assessment' or 'reassessment' used in this section has to be understood in the context of section 153A alone. The word 'assessment' is used in a number of provisions in a comprehensive sense and if can comprehend the whole procedure for ascertaining and imposing liability upon the taxpayer and the machinery for enforcement thereof. The concept of expression 'assessment' is used in the Income-tax Act at different places with different connotations.

In section 153A the expression signifies merely computation of undisclosed income that shall form part of 'total income' within the meaning of section 2(45) in respect of each of the assessment falling within such six assessment years that is required to be aggregated with the income already assessed in cases of completed assessments, moreso when section 132 comprehends action to search of a person in possession of undisclosed income or property. In those cases where assessments are pending at the lime of initiation of action under section 132, the computation of total income has to be done in a normal manner. The computation of total income so made shall meet the requirement of section 4.

Having regard to the provisions of section 139(5) and since the assessments under section 153A are in relation to undisclosed income, it is precisely for this reason that new claim of deduction or allowance cannot be made in the completed assessments.

> *The assessment or reassessment made pursuant to notice under section 153A is not de novo assessment; therefore, there is no merit in the ground to make a new claim of deduction or allowance during assessment/reassessment under section 153A as such where admittedly the regular assessments are shown as completed assessment on the date of initiation of action under section 132."*

15. The above decisions were favorably referred and approved by the Mumbai ITAT (SB) in the case of ALL Cargo Global Logistics (147 TTJ 513) as under:

> *"15. The third line of the argument of the Ld Counsel is based on the premise that in proceedings u/s 1534, the assessee cannot raise a new or fresh claim. In this connection, reliance is placed on the decision in the case of Suncity Alloys (P) Ltd. (supra) and Charchit Agarwal (supra). We have seen that the finding in the case of Suncity Alloys (P) Ltd (supra) is that proceedings u/s 1534 do not constitute de novo assessment. The assessee is precluded from raising any fresh claim after expiration of the time allowed to file revised return u/s 139 (5). Therefore, no such fresh or revised claim can be raised in assessments made u/s 153A. Similar finding has been rendered in the case of Charchit Agarwal (supra) where the assessee was not allowed to change the method of valuation of closing stock in the course of proceedings u/s 153A. On the basis of these decisions, the case of Ld. Counsel obviously is that if the assessee is precluded from raising new and fresh claims in assessment u/s 1534, by implications the revenue will also not be permitted to raise new and fresh grounds for making additions in assessment u/s 1534"*

16. The Assessing Officer has also referred to the decision of Hon'ble Rajasthan High Court dated 20/09/2017, rendered in the case of Tikam Khandelwal & Other Vs. CIT (D.B. Income Tax Appeal No 35, 37, 40, 41, 44, 47, 50/2012 and D.B Income tax Appeal No 7/2016) wherein the Hon'ble Court upheld the proposition that returns of income filed in response to notice u/s 153A are a consequence of search action taken under section 132 on the assessee These proceedings are analogous to proceedings under section 147 i.e. reassessment, to the extent that these proceedings are for the benefit of revenue and not that of the assessee. Therefore, assessee could not be permitted to convert such reassessment proceedings as his appeal or revision in disguise and seek relief in respect of depreciation earlier not claimed in original return of income.

17. Thus, the law is clear that for an unabated assessment year, completed assessment attains finality which cannot be disturbed except on the basis of any incriminating material unearthed during

the course of search action. In other words, an assessee cannot make fresh claims in the returns filed u/s 1534, particularly so in unabated proceedings which has attained finality before search. Therefore, in view of the various decisions rendered by the Supreme Court in the case of CIT v. Sun Engg Works (P) Ltd [1992] 198 (TR 297/64 Taxman 442, Rajasthan High Court in the case of Jai Steels (2013) 259 CTR (Raj) 281, Rajashthan High Court in the case of Tikam Khandelwal & Other Vs CIT (DB Income Tax Appeal No. 35,37,40,41,44,47,50/2012 and D.B. Income tax Appeal No 7/2016) and the judgments of the jurisdictional ITAT and the other judgments as indicated above; the assessee cannot be permitted to raise a fresh claim in the return of income filed u/s 153A in respect of a unabated or completed assessment year Thus, the action of the assessing officer in not accepting the fresh claim in the return of income filed u/s 153A, is upheld.

18. On merits of claim that no disallowance u/s 14A of the Act should be made, the appellant has stated that the disallowance u/s 14A of the Act was incorrectly made in the original return of income and the said mistake was corrected in the return filed u/s 153A of the Act. The submission of the appellant suggests that the sole ground of such claim of the appellant is that all its investments are in SPV entities formed for executing infrastructure projects and such investments were made for commercial reasons and therefore the provisions of section 14A are not attracted in this case in support of his claim, the appellant has relied on the decision of Hon'ble ITAT Pune in the case of Hari Infrastructure Pvt Ltd. (ITA No. 844/PN/2013) dated 18.01.2010 wherein the Hon'ble tribunal following the decision of Hon'ble Delhi High Court in the case of M/s Oriental Structure Engineers Pvt Ltd (ITA No. 605/2012) has held that investments made for commercial expediency shall not attract disallowance u/s 14A of the Act.

19. I have considered the submission made by the appellant. The issue of applicability of disallowance u/s 14A of the Act on investments in subsidiaries have been examined by the Hon'ble Supreme court in the case of Maxopp Investment Limited Vs CIT [2018] 91 taxmann.com 154 (SC), wherein the Hon'ble Supreme Court has held that the 'dominant purpose test' for the investments from which exempt income is earned, is not relevant for the purposes of section 14A of the Act. The Hon'ble SC has observed as under:

> *34. Having clarified the aforesaid position, the first and foremost issue that falls for consideration is as to whether the dominant purpose test, which is pressed into service by the assessees would apply while interpreting Section 14A of the Act or we have to go by the theory of apportionment. We are of the opinion that the dominant purpose for which the investment into shares is made by an assessee may not be relevant. No doubt,*

> *the assessee like Maxopp Investment Limited may have made the investment in order to gain control of the investor company. However, that does not appear to be a relevant factor is determining the issue at hand. Fact remains that such dividend income is non-taxable, in this scenario, if expenditure is incurred on earning the dividend income, that much of the expenditure which is attributable to the dividend income has to be disallowed and cannot be treated as business expenditure ....".*

20. Thus, the Hon'ble Supreme Court has held that that the dominant purpose test for the investments from which exempt income is earned, is not relevant for the purposes of section 144 of the Act. It may be mentioned that the said decision of Hon'ble SC is after the decisions relied upon by the appellant. Therefore, on merits the claim of the appellant that all its investments were made for commercial reasons and therefore the provisions of section 144 are not attracted, cannot be accepted. Hence, the claim of the appellant is rejected on merits as well.

21. To sum up, the action of the Assessing Officer of completing the present assessment at an income computed at the time of giving effect to the order of Hon'ble ITAT dated 11/09/2017 is upheld. The ground Nos. 1, 2 & 3 raised by the appellant are DISMISSED."

8. Being aggrieved with the above first appeal order dated 27.04.2022, assessee is in appeal before this Tribunal.

9. The ld. AR submitted before us that the order passed by the ld. CIT(A) is not correct. In support of its contentions, ld. AR furnished paper books containing various case laws and other details. The sum and substance of ld. AR's contention is that the assessee can make a fresh claim in the return filed in response to notice u/s 153A of the IT Act.

10. On the other hand, ld. DR relied on the orders passed by the subordinate authorities and requested to confirm the same. LD DR

furnished paper book containing various case laws and a written submission was also filed before the Bench.

11. We have heard ld. Counsels from both the sides and perused the material available on record. The main question raised before us in this appeal is that whether the assessee can make a fresh claim in return filed in response to notice u/s 153A of the IT Act or not and that to whether it can go below the originally assessed income which was accepted by the assessee. In this regard, we find that first search and seizure action u/s 132 was conducted on the assessee on 27.10.2010 and the assessee company in original return of income voluntarily disallowed an amount of Rs.68,86,771/- u/s 14A of the IT Act. The assessment was completed u/s 143(3) of the IT Act & income was determined at Rs.21,94,80,768/-. The assessee went in first appeal before the ld. CIT(A), who dismissed the appeal of the assessee. Thereafter, the assessee preferred second appeal before the Tribunal and the Tribunal directed the AO to restrict the income to Rs.21,81,77,538/-. Thereafter, the case was reopened and the assessment order was passed u/s 143(3) r.w.s. 147 of the IT Act, although, no addition was made in this proceeding. Thereafter, another search took place on 05.05.2016 and a notice u/s 153A of

the IT Act was issued to the assessee. In response to above notice, the assessee furnished income tax return disclosing income of Rs.21,24,38,573/-. It is important to mention here that no incriminating material was found during the second search and this being the unabated assessment year, no addition was made by the Assessing Officer, except that, the income was determined at same quantum at which it was determined earlier as per the direction of the Tribunal in the original proceedings, consequently, the returned income was increased by an amount of Rs 68,86,771/- which was voluntarily disallowed by the assessee as per section 14A of the IT Act in the original return in earlier proceedings. We further find that the notice u/s 153A of the IT Act was issued to the assessee & the return of income was furnished by the assessee, but the disallowance voluntarily made by the assessee in the original return of income was not shown in this return, which was filed in response to notice u/s 153A of the IT Act after second search u/s 132 of the IT Act. Therefore, the Assessing Officer in the absence of any incriminating material made no addition to the income but determined the same income at Rs.21,81,77,538/-, which was earlier determined by the Assessing Officer on the basis of directions of the Tribunal after first search u/s 132 of the IT Act. It

is to be noted that in earlier proceedings, the assessee himself voluntarily disallowed an amount of Rs.68,86,771/- u/s 14A but this disallowance was not made by the assessee in the above return and this was not accepted by the Assessing Officer in the light of the fact that when the Assessing Officer is not free to make any addition in the absence of any incriminating material with regard to the unabated & completed assessment then the assessee is also not permitted to make any fresh claim which results in lower income in comparison to original return of income. In this regard, the judgment of the Hon'ble Supreme Court in the case of CIT vs. Shelly Products & Another, 261 ITR 367 (SC) is also relevant. In the instant first appellate proceedings, the ld. CIT(A) after relying on various decisions passed a detailed & reasoned order & dismissed the appeal of the assessee and now the assessee is relying on following judgments before us in support of its contention that the assessee is entitled to make a fresh claim in the return filed in response to section 153A notice. The case laws relied on by the assessee are as under :-

(i) DCIT vs. Eversmile Construction Co. (P.) Ltd., 65 DTR 0039, Bombay.

(ii) DCIT vs. Universal Medicare Pvt. Ltd., ITA No.2967 to 2971/Mum/2016.

(iii) PCIT vs. JSW Steel Ltd., 422 ITR 71 (Bom.).
(iv) DCIT vs. M/s Indu Projects Ltd., ITA No.186 to 189/Hyd/18.
(v) DCIT vs. Hari Infrastructure Pvt. Ltd., ITA No.844/PN/2013.

12. We find that the ld. CIT(A) has considered decisions/judgements relied on by the ld. AR in his detailed order specifically judgment passed in the case of PCIT vs. JSW Steel Ltd., 422 ITR 71 (Bom.), wherein, the issue was related to an abated assessment year. In the instant case in hand the proceedings were already completed and, therefore, assessment year falls in the category of non-abated assessment year, secondly no incriminating material was found during the search. Therefore, we are of the considered opinion that the assessee is not entitled to make a fresh claim in the return filed in response to notice u/s 153A of the IT Act. We further find support from the decision passed by a Co-ordinate Bench of this Tribunal in the case of DCIT vs. M/s. HES Infra Pvt. Ltd. in ITA Nos.603 to 606/Hyd/2016 order dated 31.07.2023, wherein, one of the member i.e. Hon'ble Vice President was also a party to the decision, & the fresh claim made by the assessee in return filed in response to section 153A notice was denied by observing as under:-

> *"39. In the light of the above discussions, we are of the considered opinion that the findings of the ld.CIT(A) is not in accordance with law and the assessee cannot be permitted to make a fresh claim of deduction for the first time in the return filed in response to notice u/s 153A of the Act. Thus, the legal ground is decided in favour of the Revenue and against the assessee."*

13. From the perusal of above decisions it is very much clear that the assessee is not entitled to make a fresh claim in the return filed in response to notice issued u/s 153A of the IT Act if the proceedings are not pending on the date of initiation of search & the assessment year falls in the category of unabated assessment year, & also, if no incriminating material is found, the question of reassessment does not arise in the light of Judgement of the Hon'ble Supreme Court in the case of PCIT vs. Abhisar Buildwell (P.) Ltd. [149 taxmann.com 399 (SC)]. Therefore, in the light of our above discussion, the grounds of appeal raised by the assessee are dismissed. In view of the above, the additional grounds raised by the assessee are also dismissed.

14. In the result, the appeal filed by the assessee in ITA No.467/PUN/2022 for A.Y. 2011-12 stands dismissed.

**<u>ITA Nos.468 & 469/PUN2022,
A.Ys. 2012-13 & 2013-14 :</u>**

15. Since the facts and issues involved in remaining two appeals of the assessee are identical, therefore, our decision in ITA

No.467/PUN/2022 for A.Y. 2011-12 shall apply *mutatis mutandis* to the remaining two appeals of the assessee in ITA Nos.468 & 469/PUN/2022 for A.Ys. 2012-13 & 2013-14 respectively. Accordingly, the remaining two appeals of the assessee in ITA Nos.468 & 469/PUN/2022 for A.Ys. 2012-13 & 2013-14 stands dismissed.

16. To sum up, all the above captioned three appeals of the assessee stands dismissed.

Order pronounced on this 18th day of September, 2024.

Sd/-	Sd/-
(R. K. PANDA)	**(VINAY BHAMORE)**
VICE PRESIDENT	**JUDICIAL MEMBER**

पुणे / Pune; दिनांक / Dated : 18th September, 2024.
Sujeet

<u>आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :</u>

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A)-11, Pune.
4. The Pr. CIT/CIT concerned.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "**B**" बेंच, पुणे / DR, ITAT, "**B**" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.