

**IN INCOME TAX APPELLATE TRIBUNAL  
“A” BENCH : BANGALORE**

**BEFORE SHRI. LAXMI PRASAD SAHU, ACCOUNTANT MEMBER AND  
SHRI. KESHAV DUBEY, JUDICIAL MEMBER**

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| ITA No.1071/Bang/2024     |
| Assessment Year : 2017-18 |

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| Shri. Chinnaswamy Sunder Raju,<br>Sy No.67, Sathanur Village,<br>BagalurJalaHobli,<br>Bengaluru – 560 064.<br><b>PAN : ABGPR 1419 K</b> | Vs. | ACIT,<br>Central Circle – 2(4),<br>Bengaluru. |
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| Assessee by | : | Shri. V Chandra Sekhar, Advocate                    |
| Revenue by  | : | Shri. Shivanand Kalakeri, CIT(DR)(ITAT), Bangalore. |

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| Date of hearing       | : | 13.05.2025 |
| Date of Pronouncement | : | 09.06.2025 |

**ORDER**

*Per Laxmi Prasad Sahu, Accountant Member :*

This appeal is filed against the order of Id. CIT(A) vide order dated 30.03.2024, DIN No.ITBA/APL/M/250/2023-24/1062677882(1) on the following grounds of appeal.

Grounds of Appeal

1. The appellate order of the learned Commissioner of Income-tax [Appeals] - 15, passed under Section 250 of the Act dated 30/03/2024 for the impugned assessment year 2017 - 18, in so far as it is against the Appellant is opposed to law, weight of evidence, probabilities, facts and circumstances of the Appellant's case, requires to be quashed.

2. The appellant denies itself liable to be assessed on total income of Rs. 1,20,97,47,122/- as determined by the learned assessing officer and upheld by the learned Commissioner of Income-tax [Appeals], as against the income reported by the appellant of Rs. 31,47,410/-, on the facts and circumstances of the case.
3. The appellant denies himself liable to be assessed in excess of returned income on the facts and circumstance, the case. The additions made all are unsustainable in law and contrary to the material record and consequently liable to be deleted as not in accordance with the scheme of the income tax act.
4. **Grounds not adjudicated by the learned CIT(A):**

**3.1 Issue of notice u/s.153A of the act:**

The learned CIT(A) has failed to adjudicate that the notice issued u/s.153A of the act does not contain whether the learned assessing officer proposes to assess/reassess the income of the appellant and erred in not holding that the notice issued u/s.153A of the act is bad in law on the facts and circumstances of the case.

**3.2 Issue of notice u/s.143(2) of the act:**

- a. The learned CIT(A) has failed to adjudicate the ground raised with respect to issue of notice of notice u/s.143(2) of the act as per the format prescribed by the Central Board of Direct Taxes and consequently the assumption of jurisdiction to pass the assessment order under sec.143(3) rws 153A of the act is bad in law and the order of assessment order passed is required to be cancelled on the facts and circumstances of the case.

**3.3 Reliance on Digital Evidences:**

- a. The learned CIT(A) has failed to adjudicate the ground raised with respect to relying upon the digital evidences as the same is not admissible in law without complying to the procedure contemplated as per the provisions of sec.65B of the Indian Evidence Act, 1872 on the facts and circumstances of the case.

b. The learned CIT(A) has failed to adjudicate the mandatory requirement of provisions of sec.65B of the Indian Evidence Act, 1872 in respect of the electronic records of printouts taken and relied by the learned assessing officer for making additions being not admissible in evidence and the assessment order being passed on the same cannot be sustainable in law on the facts and circumstances of the case.

c. The learned CIT(A) has failed to adjudicate the addition based on the electronic records being e-mail when the conditions of admissibility of digital evidence u/s.65B of the Indian Evidence Act, 1872 have not been complied with and consequently the addition made in required to be deleted on the facts and circumstances of the case.

5. **Validity of Search Proceedings:**

a. The learned CIT(A) is not justified in concluding that the learned CIT(A) is not empowered to check the reasons recorded to issue of notice u/s.153A of the act owing to insertion of explanation 1 to sec.132(1) of the act in Finance Act, 2017 with retrospective effect from 01.04.1962.

b. Without prejudice the learned CIT(A) ought to have verified with other mandatory conditions required to assume jurisdiction u/s.153A of the act.

6. The learned CIT(A) has erred in not holding that that learned assessing officer has not issued valid notice issued under section 153A of the Act, which is bad in law and on the facts and circumstances of the case.

7. **Approval u/s.153D of the act.**

a. The learned CIT(A) has erred in not holding that the learned assessing has not followed the due procedure u/s.153D of the act while passing the impugned assessment order since the learned assessing officer had obtained approval from additional commissioner of income tax but the learned assessing officer ought to have taken approval from Joint Commissioner of Income Tax under the facts and circumstances of the case.

b. The learned CIT(A) has erred in concluding that the nomenclature Joint commissioner and Additional commissioner are used interchangeably and there is no functional differentiation between the two posts under the facts and circumstances of the case.

**8. Depreciation:**

- a. The learned CIT(A) is not justified in confirming the conclusion drawn by the learned assessing officer in disallowing the depreciation of Rs.1,18,24,27,640/- on the facts and circumstances of the case.
- b. The learned CIT(A) is not justified in confirming the conclusion drawn by the learned assessing officer in disallowing the claim of set off of depreciation loss of Rs.1,18,24,27,640/- on the facts and circumstances of the case.
- c. The learned CIT(A) is not justified in confirming the findings made the learned assessing officer in the assessment order for not allowing the claim of depreciation of Rs.1,18,24,27,640/- on the facts and circumstances of the case.
- d. The learned CIT(A) has failed to appreciate that as per sec.32 of the act the assets are owned by the appellant and used for the purposes of the business and consequently the appellant is entitled for depreciation on the facts and circumstances of the case.
- e. The learned CIT(A) has erred in not considering the amount of depreciation disallowed in the assessment proceedings u/s.143(3) of the act and to such extent of amount of depreciation has been disallowed on two occasion leading to duplication of addition.

**9. Business owned by the appellant:**

- a. The learned CIT(A) is not justified in confirming the conclusion drawn by the learned assessing officer that the business was not owned by the appellant on the facts and circumstances of the case.
- b. The learned CIT(A) is not justified in confirming the conclusion drawn by the learned assessing officer that appellant had no license to operate the solar power business on the facts and circumstances of the case.
- c. The learned CIT(A) has erred in not providing due weightage to the commissioning certificate issued by the Karnataka Power Transmission Corporation to conclude that the business is owned by the appellant on the facts and circumstances of the case.

- d. The learned CIT(A) is not justified in confirming the conclusion drawn by the learned assessing officer, that the date of commissioning mentioned in the commission certificate issued by Karnataka Power Transmission Corporation is the date of put to use of the assets installed in the solar power plant on the facts and circumstances of the case.
- e. The learned CIT(A) is erred in concluding that the appellant did not own the business on the one hand and other hand concluding that the assets are installed only on 24.01.2017 being the date of commissioning mentioned in the commissioning certificate issued by Karnataka Power Corporation Limited dated 08.02.2017.
- f. Without prejudice the learned CIT(A) has erred in not allowing the proportionate amount of depreciation on the entire block of assets even after concluding that the assets are put to use only after 30.09.2016.
- g. The learned CIT(A) has failed to appreciate the fact that the consideration towards procurement of assets are paid out of the personal bank account of the appellant and substantial portion of amount is paid out of the loans borrowed in the name of the appellant.

**10. Land not owned by the appellant:**

- a. The learned CIT(A) is not justified in confirming the conclusion drawn by the learned assessing officer that the land is not owned by the appellant but lands are owned by the M/s. C S Sunder Raju, partner M/s. Perpetual Investments under the facts and circumstances of the case.
- b. The learned CIT(A) has confused with the concept of description mentioned in the document and just because the appellant name is mentioned as M/s. C Sunder Raju, Partner M/s. Perpetual Investments, it can be assumed that the properties are not held by the appellant.

11. The learned CIT(A) is not justified in confirming the conclusion drawn by the learned assessing officer that the plant was not ready to generate solar power by 30.09.2016 under the facts and circumstances of the case.

12. The learned CIT(A) is not justified in confirming the conclusion drawn by the learned assessing officer that the power has not been actually generated and uploaded to the grid before 30.09.2016 under the facts and circumstances of the case.

13. The learned CIT(A) is not justified in concluding that some of the equipments were procured after 30.09.2016 and concluded that the entire plant was not ready to use by 30.09.2016 under the facts and circumstances of the case.
14. The learned CIT(A) is not justified in confirming the conclusion drawn by the learned assessing officer that the assets were not installed and put to use prior to 30.09.2016 under the facts and circumstances of the case.
15. The learned CIT(A) is not justified in confirming the conclusion drawn by the learned assessing officer that the appellant has offered zero revenue from solar power business under the head income from business or profession during the impugned assessment year under the facts and circumstances of the case.
16. The Hon'ble CIT(A) is not justified in not providing due weightage to invoices raised by the appellant from January 2017 to March 2017 and produced during the course of appeal hearing under the facts and circumstances of the case.
17. The Hon'ble CIT(A) is not justified in not providing due weightage the sales declared in VAT-240 return from January 2017 to March 2017 and erred in concluding that the appellant has not generated any income during the impugned assessment year under the facts and circumstances of the case.
18. The learned CIT(A) is not justified in relying upon certain judicial precedents which are not applied in right perspective to the facts of the case of the appellant and further the learned authorities failed to properly appreciate and apply the ratio of the decisions and judicial precedents relied upon by the appellant to the facts of the present case and consequently passed a perverse order, on the facts and circumstances of the case.

**19. Deemed Dividend:**

- a. The learned CIT(A) is not justified in confirming the conclusion drawn by the learned assessing officer that, provisions of sec.2(22)(e) of the act is applicable to the appellant for the impugned assessment year under the facts and circumstances of the case.
- b. The learned CIT(A) has failed to appreciate that the transaction is between the appellant and M/s. Chalukya Capital Investments, partnership firm wherein the appellant is not even a partner and consequently the provisions of sec.2(22)(e) of the act is not applicable on the facts and circumstances of the case.
- c. The learned CIT(A) has erred in confirming the conclusion drawn by the learned assessing officer that the partnership firm M/s. Chalukya Capital Investments is sham/paper entity which was created only to divert funds from the flagship entities on the facts and circumstances of the case.

20. Without prejudice, the appellate order passed by the learned Commissioner of Income-tax [Appeals], is against the principles of natural justice, since the appellant was not afforded a reasonable opportunity of hearing to make its submission, consequently the impugned appellate order passed requires to be cancelled, on the facts and circumstances of the case.

21. Without prejudice, to the right to seek waiver as per the parity of reasoning of the decision of the Hon'ble Apex Court in the case of Karanvir Singh 349 ITR 692, the Appellant denies itself liable to be charged to interest under section 234 B of the Income Tax Act on the facts and circumstances of the case. The appellant contends that the levy of interest under section 234 A & 234 B of the Act is also bad in law as the period, rate, quantum and method of calculation adopted by the learned assessing officer on which interest is levied are not discernible and are wrong on the facts of the case.

22. The appellant craves leave of this Hon'ble Tribunal to add, alter, amend, substitute or delete any or all of the grounds of appeal urged above at the time of hearing of the appeal by this Hon'ble Tribunal.

23. For the above and other grounds to be urged during the course of hearing of the appeal the Appellant prays that the appeal be allowed in the interest of equity and justice.

## Additional grounds

### **1. Notice issued u/s.153A of the act do not mention the basis for issue of the notice:**

- a. The learned CIT(A) has failed to appreciate that the notice issued u/s.153A of the act should mention the basis for issue of notice under sec.153A of the act under the facts and circumstances of the case.
- b. The learned CIT(A) has failed to appreciate that the notice issued u/s.153A of the act should mention whether the notice has been issued based on the seized materials seized u/s.132 of the act or whether based on the books of accounts, other documents or any assets as requisitioned u/s.132A of the act under the facts and circumstances of the case.

### **2. Issue of notice u/s.153C of the act.**

- a. The appellant wishes to submit that a notice u/s.153C of the act ought to have issued for initiation of proceedings under the facts and circumstances of the case.
- b. The appellant wishes to submit that the proceedings has been initiated based on the seized material being an opinion provided by M/s. King & Partidge which was seized in the premises of the one Mr Balasubramanian Chinni, Chief Financial officer of the atria group of companies.
- c. The appellant wishes to submit that in order to invoke the provisions of sec.153A of the act, the seized material should have been seized in the premises of the appellant and not in any other premises belonging to other person.

**3. Additions are being made in the absence of Incriminating material:**

- a. The learned CIT(A) has erred in confirming the addition made in the absence of the incriminating material.
- b. The learned CIT(A) has failed to appreciate that in the case of unabated assessment proceedings, the additions can be made only on the basis of incriminating material.
- c. The learned CIT(A) has failed to appreciate that the case of the appellant was assessed u/s.143(3) of the act and there were no additions made disallowing the claim of depreciation on the ground that the appellant did not own the business nor the appellant was not in possession of appropriate license to run the business.
- d. The learned CIT(A) has failed to appreciate the fact the during the course of abated proceedings, the learned assessing officer had asked the details of depreciation and additional deprecation claimed during the impugned assessment year and there were no additions to the returned income by disallowing the claim of depreciation and additional depreciation on the ground that the appellant did not own the business nor the license.

4. The appellant craves leave of this Hon'ble Tribunal to add, alter, amend, substitute or delete any or all of the grounds of appeal urged above at the time of hearing of the appeal by this Hon'ble Tribunal.

5. For the above and other grounds to be urged during the course of hearing of the appeal the Appellant prays that the appeal be allowed in the interest of equity and justice.

2. Regarding additional grounds taken by the assessee dated 24.05.2024 the Act does not contain any express provision debarring an assessee from raising an additional ground in appeal and there is no provision in the Act placing restriction on the power of the appellate authority in entertaining an additional ground in appeal. In the absence of any statutory provision, general principle relating to the amplitude of appellate authority's power being co-terminus with that of the initial authority should normally be applicable. But this question for the purposes of the Act has been an intricate and vexed one. There is no uniformity in the judicial opinion on this question. Relying on the judgement

of Hon'ble Apex Court in the case of NTPC vs CIT. In view of this the additional grounds are accepted.

3. Briefly stated the facts of the case are that the assessee filed his return of income u/s 139(4) for the A.Y. 2017-18, on 02/03/2018 declaring income under the head(s) Income from Salary, House Property, Capital gains and other sources. The same was taken up for complete scrutiny based upon computer aided scrutiny selection (CASS) and the assessment was duly completed u/s 143(3) by order dated 21/11/2019, by determining the taxable income at Rs 7,83,68,530/-.

4. A search proceedings u/s 132 of IT Act, 1961 was conducted in the case of Mr. Chinna Swamy Sunder Raju at Survey No. 67, Santhanur Village, Hobli, Bangalore North on 17.02.2020, wherein various incriminating material related to the assessee were found and seized. Pursuant to the said search, the file of the assessee was centralized vide order u/s 127, bearing DIN No. ITBA/COM/F/2020-21/1031116412(1), DATED 01.03.2021. It is to be noted that admittedly the assessee did not object to the centralisation of his files.

5. Subsequently the assessee was issued a notice, dated 25/06/2021, u/s 153A for the A.Y. 2017-18 and thirty days time was granted. The assessee filed a return of income u/s 153A on 16.02.2022 admitting the income of Rs. 31,47,412/- after providing multiple opportunities, subsequently notice u/s 143(2) dated 07.03.2022 was issued and other statutory notices were issued to the assessee. In response to the notices the assessee had premeditatedly made all the submissions only at the end of the assessment proceedings that have limitation to complete.

6. During the course of search proceedings, it was found that during the year under consideration net taxable capital gain of RS. 126,53,72,971 in hands of Shri S. Sunder Raju was set off against business loss on account of depreciation claimed with respect to Plant and Machinery of a Solar Plant set up at Ryapte, Tumkur district Karnataka. It was asked to justify the eligibility of claim of

depreciation loss claimed during the year and various opportunities were granted but the assessee replied at the fag end of the assessment proceedings on 24.03.2022 and 29.03.2022. Further it was noticed that the assessee is the managing director of the ACT and director of more than 100 companies. He is also a trustee of A S Kuppa Raju and Brothers Charitable Foundation runs Atria Institute of Technology. The AO made analysis of income declared in the past years and found that prior and post transfer of shares of ACT the assessee was not engaged in the generation of power. Generation of power has been declared as business of the proprietary concern only for FYs relevant to AY 2017-18 and part of 2018-19. The data was taken from ITBA 360-degree profiling from investigation module of ITBA. During the search proceedings u/s 132 of the Act in the case of Brindavan Power Private Limited at the residence of Shri Bala Venkata Subramanyam Chinni Chief Financial Officer (CFO) at Plot No. 350, Shiva Sadan, 14<sup>th</sup> Cross 9<sup>th</sup> Main, 2<sup>nd</sup> stage Indiranagar, Bangalore on 1712.2020 documents were found and seized in the folder marked as Annexure-A/ABPPL/BVSC/01. The same document has been scanned in the assessment order. The AO called information from Karnataka Power Transmission Corporation Limited and found that in all the correspondence addressed to C S Sunder Raju, as partner of M/s Prepetual Investments and not in the individual capacity in the name of assessee. It was also noted that the licence was not granted in the name of the assessee and assessee had claimed depreciation. AS per discussion at para No. 9 and 10 in the assessment order it was concluded that the assessee neither owned the business and nor has used the Plant and Machinery for the purpose of business, thus the assessee was clearly not eligible for depreciation as per section 32 of the Act., accordingly he disallowed the setoff of Loss claimed of Rs. 118,24,27,640/-. Further the AO disallowed the Long Term capital Gain of Rs. 13,90,558/- and deemed dividend of

Rs. 2,41,72072/- and the assessment was duly completed u/s 153A by order dated 31/03/2022, where the taxable income was determined at Rs. 121, 16, 35,238/-,

7. Aggrieved from the above order the assessee filed appeal before the Id. CIT (A) The Id. CIT(A) partly allowed for statistical purpose. Aggrieved from the order of the Id. Cit (A) the assessee filed appeal before the ITAT.

8. The Id. AR of the assessee reiterated the submissions made before the lower authorities and submitted that the AO by making various additions in scrutiny proceedings u/s 143(3), .the issues on which the additions are made by the AO were on record, available during the assessment proceedings completed by order dated 21/11/2019The assessee, aggrieved by the same, filed an appeal before the Commissioner of Income Tax Appeals, which came to be dismissed. The assessee, who is in appeal before us, in addition to the grounds of appeal filed along with Form 36, has also filed three additional grounds, which were not filed before the Id.CIT( A), but which requires our consideration as they are purely legal grounds.

9. The additional grounds are admitted, and we now proceed to adjudicate the same. The three additional grounds, which go the root of the matter, challenge the very assumption of jurisdiction u/s 153A for the impugned assessment year.

#### **10. Additional Ground No.3**

It is also important for us to adjudicate the third additional ground of appeal, before we address the first and second additional grounds of appeal.

11. The assessee has urged that none of the additions made u/s 153A are made based on any incriminating material found in the search of the assessee, which pertains to the A.Y. 2017-18.The Learned AR drew our attention to the assessment order where the AO relies upon seized material marked as A/ABPPL/BVSC/01, found and seized in the residence of one Mr. Bala Venkata Subramaniam Chinni,

the CFO of M/s Atria Brindavan Power Pvt Ltd, in a search operation conducted u/s 132 of the Act, in the case of M/s Atria Brindavan Power Pvt Ltd, in order to initiate proceedings u/s 153A of the Act for the A.Y. 2017-18. The AO has reproduced the contents of the said seized material in the body of the assessment order. The Learned AR also pointed out that there is no reference to any incriminating material which was found and seized in the search proceedings conducted in the case of the assessee and that additions made, refer to material found and seized in the case of Atria Brindavan Power Pvt Ltd / information obtained under 133(6) from certain third parties / information gathered during survey proceedings conducted u/s 133A of the Act in the case of certain third parties.

12. The Learned DR relied strongly upon the orders of the AO and the CIT A and reiterated that the arguments advanced by the assessee are incorrect and that the additions made by the AO in the assessment order are correct, as per seized material referred above and that these additions need to be sustained.

13. We have perused the assessment order and find that all three additions made by the AO are not based on any incriminating material which was found and seized in the search proceedings conducted on the assessee and that all additions made are based on either material found and seized in the case of Atria Brindavan Power Pvt Ltd and / or information obtained under 133(6) from certain third parties and / or information gathered during survey proceedings conducted u/s 133A of the Act in the case of certain third parties. The issues on which additions are made are all recorded and disclosed in the books of accounts maintained by the assessee. It is also an undisputed fact that the transactions / business activity/ claim of depreciation etc., in respect of which the AO has made these additions are all recorded in the books of accounts, and which were available before the AO during the complete scrutiny proceeding which was concluded by

an assessment order u/s 143(3) dated 21/11/2019. In fact, the AO has made several additions to the returned income in the scrutiny proceedings and these additions are also pertaining to the very same transaction/ business activity/claim of depreciation for which additions are made in the assessment order passed u/s 153A of the Act. Since this is an unabated assessment,

14. Further in the report of the AO, obtained and filed by the Learned DR we find that the only material that was found and seized in the search conducted in the case of the assessee is marked as A/SCR/XR2/01. We also find from the assessment order that no addition is made based on this seized material. In fact, there is no mention at all of this seized material in the assessment order. One another important fact, as urged by the learned AR in his arguments, that needs to be considered here is that the material seized during the search proceedings conducted in the case of M/s Atria Brindavan Power Pvt Ltd, is a legal opinion given by M/s King and Partridge on a question, whether a proposed succession of a sole proprietorship, by a company, after due compliance of the conditions laid down in the Income Tax Act, would enable the same to be exempt from Capital Gains Tax. The query raised is not about the set off, of the Income from Capital Gains against Depreciation Loss, as wrongly stated by the AO in the assessment order. The AO is clearly wrong in concluding that the material indicates income escaping assessment in the hands of the assessee and that it denotes intention to evade taxes. The conclusion drawn by the AO is completely erroneous and the said material seized in the search of M/s Atria Brindavan Power Pvt Ltd, does not give any indication of an attempt by the assessee to evade taxes. This seized material is not incriminating in nature and also cannot be said to be representing or even indicative of any income escaping assessment. The entire series of transaction which are listed in the said opinion are actually carried out by the assessee and recorded in the books of accounts and income therefrom is declared in his returns. There is no transaction which is not recorded. The query

raised by the assessee, seeking the opinion, is whether the activities proposed by the assessee are in order and whether the understanding of the assessee of the provisions of Income Tax relevant to these transactions is correct. The opinion does not in any way indicate or reveal that the assessee is seeking advice with a view to evade taxes. In fact, the said opinion cannot be called as an incriminating material.

15. In the Report of the AO, filed by the Learned DR, it is submitted that the issue of notice u/s 153A for the impugned assessment Year is legally correct. The AO has relied upon an order of the Supreme Court in SLP No.14277 of 2023, where the Hon'ble Supreme Court, admitting of the SLP ordered issue of notice and that the SLP be tagged with another SLP No. 14464/2022, filed by the assessee therein namely one M/s SRS Mining, in which the Apex Court has admitted the SLP of the assessee and granted interim stay of the order of the Madras High Court in SRS Mining vs Union of India reported in 141 taxmann. Com 272 (Madras), order dated 10<sup>th</sup> August 2022, to the extent it was against the assessee therein.

16. By virtue of the same it can be inferred that the stay granted by the Apex Court helps the assessee more than the Revenue as the stay is on those issues which were held in favour of the Revenue by the High Court. The learned AR has also filed a copy of the question of law raised by the Revenue in the said SLP, which is on whether disallowance of claim in terms of section 40A can be made based on seized materials which do not form part of books of accounts of the assessee. This question of law raised by the revenue has no relevance to this Additional Ground No.3 in the case of this assessee. We also find that this question of law has been raised in the other SLP's filed by the Revenue pertaining to the assessee therein and has no bearing on the question of law which is now before us.

17. Following the decision of the Supreme Court in the case of PCIT vs Abhisar Buildwell (P) Ltd reported in 149 taxmann.com 399 (SC), the Coordinate 'B' Bench of this ITAT, in the case of one Sri. Kempareddy Govindaraj vs ACIT in ITA 1021/Bang/2024, by order dated 31/01/2025, has held that a concluded assessment cannot be disturbed in the absence of seized material, found and seized in the search u/s 132 conducted in the case of an assessee. The coordinate bench has also held that a re-assessment, based on information which is obtained otherwise, ie. other than seized material found in the search of the assessee, can be done by initiating proceedings u/s 147, provided the conditions for reopening u/s 147 stand satisfied. We also notice that the decision of the Madras High Court in the case of SRS Mining is prior to the decision of the Hon'ble Apex Court in Abhisar Buildwell Pvt Ltd and the Madras High Court did not have the benefit of the same, which is clearly in favour of the assessee.

18. The assessee has also relied upon a decision of a coordinate 'B, bench of this ITAT in the case of a group concern, M/s Atria Wind (Kadambur) Pvt Ltd vs DCIT in ITA no. 692/Bang/2024, order dated 15/10/2024, where the bench held that a concluded assessment cannot be disturbed in the absence of incriminating material being found in the search of the assessee. In fact, the coordinate bench after due examination, has held that the very same seized material, ie. the legal opinion obtained from M/s King and Partridge, Advocates, and which forms the basis for disturbing the originally concluded assessment, cannot be termed to be a material which is incriminating in nature.

19. In the present case, it is clear from the assessment order that all additions made are based on either material found and seized in the search conducted in the case of Atria Brindavan Power Pvt Ltd and / or information obtained under 133(6) from third parties and / or information gathered during survey proceedings conducted u/s 133A of the Act in the case of certain third parties and hence the

assumption of jurisdiction and issue of notice u/s 153A, for the A.Y. 2017-18, is clearly bad in law and consequently the assessment order passed u/s 153A, dated 31/03/2022, is also held to be bad in law and is therefore set aside.

**20. Additional Ground No.2**

The assessee has urged that if at all any assessment was warranted, based on the document which was seized in the search of Atria Brindavan Power Pvt Ltd, the AO ought to have initiated proceedings u/s 153C of the Act and not u/s 153A. We have already held, while adjudicating Addnl Ground No.3, that initiation of proceedings u/s 153A was without jurisdiction and the notice as well as the assessment order is bad in law. The Hon'ble Apex Court in the case of ITO vs Vikram Sujitkumar Bhatia 149 taxmann.com 149 (SC), has categorically held that when material which is found in the search of a person is incriminating in nature and indicates escapement of income in the hands of another person, then the AO of that another person can bring the same to tax in the hands of that another person only u/s 153C and not otherwise. In view of this decision, it is to be necessarily concluded that the AO of this assessee, had to initiate proceedings u/s 153C, if he wanted to use the seized material found in the search of M/s Atria Brindavan Power Pvt Ltd and not u/s 153A.

21. The reliance placed by the Learned DR on the order of the Apex Court admitting its SLP in the case of SRS mining, has already been discussed while dealing with Additional Ground No.3 and the same does not help the Revenue in the appeal before us.

**22. Additional Ground No.1:**

The notice issued u/s 153A is bad in law as the same does not spell out the basis for issuing the notice. The assessee has contended that a notice issued u/s 153A, for an assessment year which does not abate, must spell out the basis for the issue of notice for the reason that a concluded assessment cannot be disturbed in the absence of incriminating material found and seized in the search proceedings, pertaining to such unabated assessment year.

23. The Learned AR during the course of hearing drew our attention to the copy of the notice issued u/s 153A, dated 25/06/2021, which did not contain the basis for issue of notice u/s 153A, other than stating that the same was being issued, pursuant to the provisions of Section 153A.

24. The Learned AR also relied upon the decision of the Bombay High Court in the case of M/s Underwater Services Co. Ltd vs ACIT (448 ITR 691) wherein a Division Bench of the Hon'ble Bombay High Court has held that it was necessary that the notice issued u/s 153A contain the basis of issue of notice, such as the seized materials u/s 132 of the Act, based upon which the said notice is issued, or the books of accounts or other documents requisitioned u/s 132A, based on which the notice is issued. The Hon'ble High Court held that a notice issued u/s 153A which does not give the details of the basis on which the notice is issued is bad in law. The Bombay High Court proceeded to quash the notice issued and restored the matter to the file of the AO, giving him liberty to issue a fresh notice, in accordance with law.

25. The learned DR raised an objection that the assessee could not challenge the notice u/s 153A as he did not object to the same when the file of the assessee was centralized and he was provided an opportunity to file objections to the centralization, if any. The learned DR opined that the assessee ought to have placed his objections when he was given an opportunity to do so before the file

was centralized and having not done so, he is prevented from raising this objection before the ITAT.

26. The Learned AR countered this argument by stating that no notice had been issued u/s 153A of the Act before the file was centralized. The objection or no objection to centralization, does not in any way affect this ground. Non objection to centralization does not empower the AO to issue a notice which is bad in law. Further a pure legal ground, which goes to the root of the matter, as in the present case, could be advanced at the appellate stage, for the first time and the fact that the same was not advanced during the assessment or prior to the assessment is no bar to take such legal grounds for the first time before the appellate authorities.

27. We are in agreement with the learned AR on this issue in view of the decision of the Apex Court in the case of CIT Vs. Singhad Education Society 84 taxmann.com 290, where the Apex Court held that pure legal grounds which go the root of the matter can be taken up at the appellate stage and need to be adjudicated by the appellate authorities.

28. On request, the Learned DR was also given time to seek a report from the AO on the additional and other legal grounds, raised by the assessee, including whether the notice issued contained any annexures which explained the basis for issue of notice.

29. The Learned DR has obtained and filed a report from the AO and we find nothing in the said report which contradicts the averments of the assessee on this issue as there is no evidence of the AO having given the basis for issue of the said notice.

30. We have examined the impugned notice issued u/s 153A of the Act for the A.Y. 2017-18 and find that the same is similar to the one issued in the case before the Bombay High Court. The Notice does not contain the basis for the issue of

the notice. It does not mention the material seized u/s 132 nor any books of accounts or other documents requisitioned u/s 132A of the Act, which formed the basis for the issue of the said notice. The Decision of the Bombay High Court is all the more relevant for the impugned assessment year 2017-18 as the same was subjected to complete scrutiny, prior to the search, and assessment completed u/s 143(3), making it an assessment year which does not abate u/s 153A. The presence of incriminating material seized during the search of the assessee, pertaining to the impugned unabated assessment year, is a sine qua non to disturb the completed assessment in view of the decision of the Hon'ble Supreme Court in the case of *Abhisar Buildwell Pvt Ltd* 149 taxmann.com 349, which has categorically held that a completed assessment cannot be disturbed in the absence of incriminating material, pertaining to such unabated assessment year, being found in the search of the assessee.

31. In view of the fact that the impugned notice issued u/s 153A of the Act, for the A.Y. 2017-18, does not spell out the basis on which the said notice is issued, we are of the opinion that the ratio of the decision of the Bombay High Court in the case of *M/s. Underwater Services Co. Ltd Vs. ACIT* (448 ITR 691), applies to the facts of the case. However, in view of the fact that we have already held Additional Grounds No.2 and 3 in favour of the assessee, this ground becomes academic in nature.

32. We also deem it important advert to those facts which are on record and which have not been proved to be false by any material which was found and seized in the search conducted on the assessee, to support the case of the AO that the assessee did not own the Solar Power Plant and was not entitled to depreciation thereon and also that the Solar Power Plant had not produced power on or before 30.09.2016, to be entitled to depreciation for a full year.

33. As brought out by the AR of the assessee:

- (a) The assessee has purchased the land for the project which is duly evidenced by a Sale Deed.
- (b) The assessee has borrowed Rs 93/- crores from M/s IDBI Bank Ltd for the purpose of this project which is duly evidenced by a Loan Agreement. The loan is given to the assessee in his individual capacity as the bank recognises the fact that the project is his sole proprietary venture.
- (c) The solar power plant generated 10 units of power and supplied the same to the state owned electricity grid on 25.09.2016 itself, vide document dated 25.09.2016, which is placed at Pages 755 of Paper Book Vol.2, filed by the assessee, thus demonstrating that the plant was capable of producing solar power. This is duly evidenced by a document which stands confirmed by an official of the state owned electricity grid, as a witness to the document. This document proves that the Plant was ready for use, thus entitling it for depreciation.
- (d) On the other two additions by way of Income from Capital Gains and Income by way of Deemed Dividend, the AO does not have any evidence found and seized in the search of the assessee, which warrants these additions.

We reiterate the proposition laid down by the Apex Court in the case of M/s Abhisar Buildwell Pvt Ltd, that any information /material which is obtained otherwise, ie. other than seized material found in the search of the assessee, can be used to disturb a concluded

assessment only by initiating proceedings u/s 147, provided the conditions for reopening u/s 147 stand satisfied, as on the date of such initiation. However, the Id DR could not produce any document regarding initiation of proceedings u/s 147/148.

In the present case before us, the material/information relied upon by the AO to make additions to income are not found and seized in the search conducted on the assessee and hence the same cannot be used to disturb a concluded assessment, in a proceeding initiated u/s 153A of the Act and thus all the additions made in the impugned assessment order passed u/s 153A, dated 31/03/2022, are deleted and the assessment order is also set aside, for want of requisite jurisdiction.

34. In view of the above conclusions drawn, all the three additional grounds are held in favour of the assessee and against the Income Tax Department. Further in view of the above conclusions drawn by us, all other grounds of appeal become academic in nature and hence are not adjudicated and left open.

35. In the result the appeal of the assessee is partly allowed.

*Pronounced in the court on the date mentioned on the caption page.*

Sd/-

**(KESHAV DUBEY)**  
**Judicial Member**

Sd/-

**(LAXMI PRASAD SAHU)**  
**Accountant Member**

Bangalore,  
Dated : 09.05.2025.

/NS/\*

Copy to:

1. Appellant
2. Respondent
3. Pr.CIT4.CIT(A)
5. DR, ITAT, Bangalore.

By order

Assistant Registrar  
ITAT, Bangalore.