

**IN THE INCOME TAX APPELLATE TRIBUNAL "DB" BENCH, CUTTACK
(Through Virtual hearing at Kolkata)**

**BEFORE SHRI DUVVURU RL REDDY, VP
AND
SHRIRAJESH KUMAR, AM**

ITA Nos.388 & 392/CTK/2024

(Assessment Years:2009-10 & 2010-11)

**ACIT, Central Circle,
Second Floor
Aaykar Bhavan, Ainthapali,
Sambalpur, Odisha,
PIN-768004, Odisha**

Vs.

**Shiva Cement Limited,
Rourkela, Sundargarh,
YY-25, Civil Township,
Odisha-769004**

(Appellant)

(Respondent)

PAN No. AACCS4497A

CO Nos. 2 & 3/CTK/2025

(Arising in ITA No. 388 & 932/CTK/2024 for A.Y. 09-10 & 10-11)

**Shiva Cement Limited,
Rourkela, Sundargarh,
YY-25, Civil Township,
Odisha-769004**

Vs.

**ACIT, Central Circle,
Second Floor
Aaykar Bhavan, Ainthapali,
Sambalpur, Odisha,
PIN-768004, Odisha**

(Applicant)

(Respondent)

Assessee by : Shri Nitesh S. Joshi,
Nikhil Jangid, S.S. Jangid &
Sudarshan padhi, ARs
Revenue by : Shri Ashim Kr. Chakraborty, DR

Date of hearing: 01.07.2025

Date of pronouncement: 26.08.2025

ORDER

Per Rajesh Kumar, AM:

These cross appeals are against the orders of the Commissioner of Income-tax (Appeals), Bhubaneswar-2(hereinafter referred to as the "Ld. CIT(A)") even dated 26.07.2024 for the AYs2009-10 & 2010-11.

ITA No. 388/CTK/2024 for A.Y. 2009-10

02. The only issue raised by the Revenue is against the order of the Id. CIT (A) deleting the addition of ₹4,35,25,000/- as unexplained cash credit u/s 68 of the Act and of ₹11,76,896/- by way of disallowance u/s 40a(i)(a) of the Income-tax Act, 1961 (the Act) read with section 194J of the Act by applying the decision of Hon'ble Apex Court in the case of PCIT v. Abhisar Buildwell P. Ltd. (2023)454 ITR 212(SC).

03. The facts in brief are that the assessee filed the return of income u/s 139(1) of the Act on 30.09.2009 declaring total loss of ₹1,88,93,962/-. A search u/s 132 of the Income-tax Act, 1961 (the Act) was conducted by the Investigation wing in the case of assessee and his group concerns on 24th and 25th September, 2014. Accordingly, the case of the assessee was centralized vide order passed u/s 127 of the Act by PCIT, Sambalpur on 07.04.2015 and 05.01.2016. Accordingly, notices u/s 153A of the Act was issued on 19.02.2016, which was complied with by the assessee by filing the return of income showing the same income as the original return of income. Thereafter, the statutory notices along with questionnaire were issued and duly served upon the assessee. Pertinent to state that the assessee filed a writ petition before the Hon'ble High Court at Cuttack challenging the validity on 153A of the Act, which was quashed by the Hon'ble Court vide its final order dated 29.09.2021. During the assessment proceedings the Id. AO asked the assessee to furnish the information/ details about the share capital issued, subscribed and paid up during the financial year relevant to the assessment under consideration but according to the AO, the assessee did not make any compliance thereto. Thereafter, the assessee was granted another opportunity vide letter dated 15.11.2016, to furnish

the said details, again there was no compliance. Finally, the Id. AO observed from the balance sheet as on 31.03.2008 and 31.03.2009 that the paid-up capital of the assessee company had increased by 2,88,50,000/- and there was an increased in the share premium amount of ₹1,46,75,000/-. Accordingly, the assessee was called upon to furnish the details/ evidences as regards to identity and creditworthiness and genuineness of the transactions. Again, there was no compliance on the part of the assessee. Finally, the Id. AO treated the said share capital/share premium as unexplained cash credit u/s 68 of the Act and made an addition of ₹4,35,25,000/- to the income of the assessee. Besides, the Id. AO made another addition of ₹11,96,896/- u/s 40a(i)(a) read with section 195J of the Act on the basis of audited statement of accounts furnished by the assessee. The Id. AO observed that the assessee has incurred consultancy charges on various dates when no TDS was deducted at source and no bills and vouchers were produced before the Id. AO despite several opportunities to the assessee. The Id. AO also found from the perusal of the ledger that the payments were made exceeding ₹30,000/- to certain persons as detailed on page no.9 and 10 of the assessment order. Finally, the addition was made u/s 40a(i)(a) of the Act in the assessment framed by the Id. Assessing Officer.

04. The assessee challenged the said assessment before the Id. CIT (A) and the Id. CIT (A) allowed the appeal of the assessee by holding that in case of unabated assessment on the date of search the Id. AO has jurisdiction to make addition on the basis of seized incriminating material only and not otherwise. However, in the instant case the Id. CIT (A) noted that there was no incriminating material and the additions were made on the basis of audited balance sheets/ documents filed by the assessee before the Id. Assessing Officer. The Id. CIT (A) while deleting the addition held as under: -

"6.4 As already noted, the Hon'ble Supreme Court has laid down in the *Abhisar* judgment (*supra*) that in the case of a completed/unabated assessment, two criteria need to be satisfied for an Assessing Officer to be able to assess it:

(i) the impugned material must be collected during the search,

(ii) the impugned material must be incriminating.

However, if no such incriminating material is found, the only remedy available is as per section 147/148 of the Act. In the present case, it is seen that the addition is made not on the basis of any incriminating material collected during search but on the basis of financial statements and bank statements collected during post-search proceedings. It is further seen that such material cannot be considered incriminating. On the basis of the above, it is held that jurisdiction u/s 153A to assessee this case was not available to the Assessing Officer. The assessment order is therefore, quashed."

05. After hearing the rival contentions and perusing the materials available on record, we find that undisputedly the assessment involved in the instant case is unabated assessment year on the date of the search. The search in this case was conducted on 24th and 25th September, 2015. We note that on the date of search there was no pending assessment proceeding against the assessee nor the time limit for issuing notice u/s 143(2) of the Act was available with the Id. AO as same has already expired. Thus, the Id. CIT (A) has correctly recorded the finding that this is an unabated assessment year. We also note that the addition has been made on the basis of audited balance sheets and ledger copies which were available before the Id. AO without any specific reference to the seized incriminating material. We have noted that during the assessment proceedings, the assessee has repeatedly requested the Id. AO to provide the copies of seized material/ documents so that the replies could be furnished accordingly. However, despite several request from the assessee, the Id. AO has failed to provide such material. We note that the assessee filed before the Id. AO during the assessment proceedings copies of balance sheet, tax audited report, computation of income and acknowledgement of ITR and the case was attended from time to time. We also note that the AO was specifically requested on

21.10.2019, 04.01.2021, 29.10.2021, 09.11.2021, 10.11,2021 but despite that the assessee was not furnished the copies nor any inspection was allowed to the assessee. Thus we note that despite that the Id. AO failed to provide any seized incriminating material found during the course of search. Therefore, we do not find any infirmity in the order of the Id. CIT (A) who allowed the appeal of the assessee by following the decision of PCIT v. Abhisar Buildwell P. Ltd. (2023)454 ITR 212(SC). In view of the above facts and circumstances, we are inclined to dismiss the appeal of the revenue by upholding the appellate order.

ITA No. 392/CTK/2024 for A.Y. 2010-11

06. The issue raised in this appeal is similar to one as decided by us in ITA No. 388/CTK/2024 for A.Y. 2009-10. Accordingly, our decision would, mutatis mutandis, apply to this appeal of assessee in ITA No. 392/CTK/2024 for A.Y. 2010-11. Hence, the appeal of Revenue in ITA No. 392/CTK/2024 is dismissed

CO Nos. 2 & 3/CTK/2025

07. The assessee has not pressed the cross objections and therefore, dismissed.

08. In the result, the appeals of the Revenue as well as the COs of the assessee are dismissed.

Order pronounced in the open court on 26.08.2025.

Sd/-
(DUVVURU RL REDDY)
(VICE PRESIDENT)

Sd/-
(RAJESH KUMAR)
(ACCOUNTANT MEMBER)

Kolkata, Dated: 26.08.2025

Sudip Sarkar, Sr.PS



Copy of the Order forwarded to:

1. The Appellant
2. The Respondent
3. CIT
4. DR, ITAT,
5. Guard file.

True Copy//

BY ORDER,

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Cuttack