

**BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER
and
SHRI KULDIP SINGH, JUDICIAL MEMBER**

ITA No.5813/Del./2014
(ASSESSMENT YEAR : 2004-05)

M/s. ATS Infrastructure Ltd., vs. ACIT, Central Circle,
K – 19, Sector 18, Meerut.
Noida.

(PAN : AADCA0609B)

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : Shri Ajay Vohra, Senior advocate
Shri Rohit Jain, Advocate
Ms. Deepashi Rao, CA
REVENUE BY : Smt. Aparna Karan, CIT DR

Date of Hearing : 29.08.2018
Date of Order : 31.08.2018

ORDER

PER KULDIP SINGH, JUDICIAL MEMBER :

Since common questions of facts, law and identical grounds have been raised in the aforesaid appeals, the same are being

disposed off by way of consolidated order to avoid repetition of discussion.

2. The appellant, M/s. ATS Infrastructure Ltd. (hereinafter referred to as 'the assessee') by filing the present appeals, sought to set aside the impugned orders dated 26.08.2014 passed by Ld. CIT (Appeals), Meerut qua the assessment years 2002-03, 2003-04 and 2004-05 on the grounds inter alia that :-

"AY 2002-03

1. BECAUSE the Hon'ble CIT (Appeals) failed to appreciate that no incriminating document was found in search in respect of AY 2002-03 and therefore, no additions can be made by the Ld. AO following the ratio of judgment in All Cargo Logistics Limited vs. DCIT and other leading cases under section 153A read with section 143(3) of the Act. The Ld. AO had no jurisdiction to pass the order under section 153A read with section 143(3) of the Act.

2. BECAUSE the addition of Rs.2,54,789/- on account of pre-paid portion of insurance is illegal and unjustified. The assessee has adopted the same method of accounting in all the earlier as well as subsequent assessment years and accordingly has charged the insurance paid in the year of payment. The Ld. CIT (Appeals) confirmed the addition without appreciating the full facts. The addition of Rs.2,54,789/- is therefore, arbitrary and unwarranted. The same deserves to be deleted.

3. BECAUSE on facts and in law and ground taken and basis adopted the addition of Rs.8,000/- on account of generator shifting charges is unjustified and illegal. The Hon'ble CIT (Appeals) has confirmed the addition without appreciating the facts and the same deserves to be deleted in full.

4. BECAUSE on facts and in law the addition of Rs. 4,067/- on account of negative cash balance is unjustified and illegal. The Hon'ble CIT (Appeals) has failed to understand the facts. The addition of Rs.4,067/- therefore, deserves to be deleted in full.

5. BECAUSE on facts and in law and ground taken and basis adopted the addition of Rs. 50,965/- on account of addition

in fixed assets is unjustified and illegal. The assessee has duly accounted for all the additions in fixed assets in the books of accounts and the source of investment has been fully shown in books as the assessee maintains the books of accounts on double entry system. The Ld. CIT (Appeals) failed to understand the facts and law relating to unexplained investment under section 69. The addition is not maintainable under section 69 of the Act and the same deserves to be deleted in full.”

“AY 2003-04

1. BECAUSE the Hon’ble CIT (Appeals) failed to appreciate that no incriminating document was found in search in respect of AY 2003-04 and therefore, no additions can be made by the Ld. AO following the ratio of judgment in All Cargo Logistics Limited vs. DCIT and other leading cases under section 153A read with section 143(3) of the Act. The Ld. AO had no jurisdiction to pass the order under section 153A read with section 143(3) of the Act.

2. BECAUSE on grounds taken and basis adopted and on facts and in law the disallowance of travelling expenses amounting to Rs.11,50,128/- is uncalled for and unjustified. The Ld. CIT (Appeals) has not fully understood the facts and confirmed the addition of Rs.11,50,128/- mechanically. The addition of Rs.11,50,128/- is therefore, illegal and unjustified and the same deserves to be deleted in full.

3. BECAUSE on facts and in law and on ground taken and basis adopted the disallowance of Rs. 50,000/- under the head business promotion expenses is uncalled for and unjustified. The Hon'ble CIT (Appeals) has not fully appreciated the facts of the case and has confirmed the disallowance of Rs.50,000/- made on conjectures and surmises.

4. BECAUSE on facts and in law and on grounds taken and basis adopted the addition of Rs.59,850/- on account of amount charged to P&L A/c in uncalled for and unjustified. The Ld. CIT (A) has failed to appreciate the facts and has confirmed the disallowance made on conjectures and surmises. The addition of 59,850/- deserves to be deleted in full.

5. BECAUSE notwithstanding ground 4 above, the Ld. CIT (A) should have allowed depreciation on the fixed assets.

6. BECAUSE the addition of Rs. 2,55,717/- on account of pre-paid portion of insurance is illegal and unjustified. The assessee has adopted the same method of accounting in all the earlier as well as subsequent assessment years and accordingly has charged the insurance paid in the year of payment. The

Hon'ble CIT (Appeals) confirmed the addition without appreciating the full facts and without affording the reasonable opportunity of being heard. The addition of Rs.2,55,717/- is therefore, arbitrary and unwarranted. The same deserves to be deleted.

7. BECAUSE notwithstanding ground 6 the Ld. CIT (Appeals) has confirmed the disallowance for Rs.2,54,789/- in the assessment order for assessment year 2002-03. The Ld. CIT (Appeals) ought to have allowed the deduction of Rs.2,54,789/- during the current year.

8. BECAUSE the disallowance of lease rent payable amounting to Rs.4,17,950/- is unjustified and illegal on grounds taken and basis adopted and on facts and in law. The Ld. CIT (Appeals) has failed to understand the facts relating to lease rent payable and has confirmed the additions made by Ld. AO on conjectures and surmises. Therefore, lease rent of Rs.4,17,950/- deserves to be deleted in full.”

“AY 2004-05

1. BECAUSE the Ld. CIT (Appeals) failed to appreciate that no incriminating document was found in search in respect of AY 2004-05 and therefore, no additions can be made by the Ld. AO following the ratio of judgment in All Cargo Logistics Limited vs. DCIT and other leading cases under section 153A read with section 143(3) of the Act. The Ld. AO had no jurisdiction to pass the order under section 153A read with section 143(3) of the Act.

2. BECAUSE on facts and in law the addition of Rs. 3,810/- on account of negative cash balance is unjustified and illegal. The Ld. CIT (Appeals) has failed to appreciate the facts. The addition of Rs. 3,810/- therefore, deserves to be deleted in full.

3. BECAUSE on facts and in law and on grounds taken and basis adopted, the addition of Rs. 3,81,494/- on account of director travelling expenses is unjustified & illegal. The Ld. CIT (Appeals) failed to appreciate the facts and confirmed the addition mechanically. The travelling expenses were incurred by director for business purpose only. The addition is not maintainable under the Act and the same deserves to be deleted in full.

4. BECAUSE on facts and in law and ground taken and basis adopted the addition of Rs. 96,135/- on account of addition in fixed assets is unjustified and illegal. The assessee has duly accounted for all the additions in fixed assets in the books of accounts and the source of investment has been fully shown in

books as the assessee maintains the books of accounts on double entry system. The Ld. CIT (A) failed to understand the facts and law relating to unexplained investment under section 69. The addition is not maintainable under section 69 of the Act and the same deserves to be deleted in full.

5. *BECAUSE the Ld. CIT (A) has wrongly held that the assessee is not entitled to revise the return and therefore, the assessee is not entitled to be assessed at the correct income in accordance with the provisions of the Act. The facts of the cases relied upon by the IT Department are distinguishable and therefore, the ratio of judgment in the cases of CIT v. Suraj Pal Singh (1991) 188 ITR 297; Kumar Jagdish Chandra Sinha vs. CIT (1996) 220 ITR 67 (SC); Indian Farms Fert. Co-operative Ltd. V. Commissioner of Income tax (2008) 170 TAXMAN 139 (Del) and Nelco (India) (P.) Ltd. vs. CIT (2005) 142 TAXMAN 380 (All.) is not applicable to the present case.*

6. *BECAUSE on facts and in law and on grounds taken and basis adopted, the assessee is entitled to claim deduction of entire interest on borrowed capital under section 36(1)(iii) of the Act amounting to Rs.4,62,70,118/-. The assessee inadvertently claimed deduction of part interest of Rs. 2,51,80,198/- in response to the return u/s -153A. Therefore, the assessee is entitled to further deduction of Rs.2,10,89,920/- being difference of 4,62,70,118/- less 2,51,80,198/-. The Ld. AO as well as Ld. CIT (Appeals) have failed to appreciate that as a quasi judicial authority under the Act, the Ld. AO and/or Ld. CIT (Appeals) is required to assess total income of the assessee in accordance with the provisions of Income tax Act, 1961, therefore, the claim for any expenses, if otherwise allowable under the Act, has to be considered and allowed to the assessee.*

7. *BECAUSE the assessee made the claim for deduction on account of interest on borrowed capital u/s 36(1)(iii) and well before the date of assessment and also furnished all information in respect thereof to the Ld. AO and requested the Ld. AO to pass speaking order in respect thereof. The claim for deduction of interest on borrowed capital ought to have been allowed.”*

3. Briefly stated the facts necessary for adjudication of the controversy at hand in all the aforesaid appeals are : On the basis of search operation carried out at the premises of assessee on 15.02.2008, notice under section 153A of the Income-tax Act, 1961

(for short 'the Act') dated 13.03.2009 was issued and in response thereto, the assessee has not filed any fresh return. In view of the reply filed by the assessee, it was directed to get its accounts audited u/s 142 (2A) of the Act for Financial Years 2001-02 to 2007-08 relevant to Assessment Years 2002-03 to 2008-09 by M/s. Gupta & Shah, Chartered Accountants. Thereafter, the assessee has revised its return declaring income at Rs.NIL on 21.01.2010. Declining the contentions raised by the assessee, AO proceeded to hold that the assessee has taken loan/advance of Rs.92,20,000/- from its sister concern, ATS Promoters and Builders P. Ltd. who have accumulated profit of Rs.45,33,261/- only and as such, the same is deemed dividend in the hands of the assessee as the Directors of the assessee company have more than 10% of the share holdings in the ATS Promoters and Builders P. Ltd. and made addition thereof. AO also made addition of Rs.43,836/- debited in the P&L account without deducting any TDS being covered u/s 40A (ia); made addition of Rs.4,067/- being negative cash balance; made addition of Rs.2,54,789/- on account of insurance paid during the year amounting to Rs.5,09,162/- at various dates but prepaid portion of Rs.2,54,789/- has not been accounted for; made addition of Rs.50,965/- on account of addition in fixed assets during the year; and made addition of Rs.8,000/-

claimed on account of crane service for labour charges for keeping Genset on the roof for AY 2002-03 and assessed total income at Rs.48,94,918/-.

3.1 In AY 2003-04, AO made addition of Rs.9,50,000/- received by the assessee from the sister concerns by treating the same as deemed dividend u/s 2(22)(e) of the Act. AO also made addition of Rs.11,50,128/- on account of travelling expenses being personal in nature;; made addition of Rs.50,000/- on account of business promotion expenses; made addition of Rs.59,850/- on account of expenses being capital in nature; made addition of Rs.2,55,717/- on account of insurance paid during the year amounting to Rs.5,53,593/- but prepaid portion of Rs.2,55,717/- has not been accounted for; made addition of Rs.4,17,950/- on account of least rent payable and assessed total income at Rs.30,79,506/-.

3.2 In AY 2004-05, AO made addition of Rs.3,810/- on account of negative cash balance; made addition of Rs.3,81,494/- on account of travelling expenses being personal in nature;; made addition of Rs.96,135/- on account of disallowance u/s 69 of the Act and assessed total income at Rs.3,35,78,919/-.

4. Assessee carried the matter by way of appeals before the Id. CIT (A) who has partly allowed the appeals for AYs 2002-03 & 2003-4 and dismissed the appeal for AY 2004-05. Feeling

aggrieved, the assessee has come up before the Tribunal by way of filing the present appeals.

5. We have heard the ld. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

ASSESSMENT YEARS 2002-03 & 2003-04

6. The ld. AR for the assessee challenging the impugned order passed by the ld. CIT (A) contended that no incriminating material has come on record during the search operation rather entire addition is made on the basis of special audit report relied upon by the AO which is not sustainable in the eyes of law so far as additions in AYs 2002-03 & 2003-04 are concerned.

7. On the other hand, ld. DR for the Revenue relied upon the orders passed by the AO.

8. Bare perusal of para 5 of the impugned order passed by the ld. CIT (A) goes to prove that undisputedly, no incriminating material has come on record during the search and seizure operation conducted at the premises of the assessee on 15.02.2008 rather the additions made by the AO and confirmed by ld. CIT (A) are based upon the fresh appreciation of facts that too on the basis of special audit report.

9. Ld. AR for the assessee challenging the impugned order further contended inter alia that the Assessing Officer has no seized material to reassess the total income on the basis of search operation conducted on 27.03.2012; that since on the date of search, assessment already stood completed and no fresh material was unearthed to make reassessment, the assessment order is not sustainable and relied upon the judgment cited as *CIT vs. Kabul Chawla - 380 ITR 173 (Del.)*.

10. Assessee brought on record copy of computation of income along with acknowledgement of return for income, copy of special audit report furnished u/s 142 (2A) and reply filed by the assessee to the special audit report, available in the paper book containing pages 1 to 75, for the AYs 2002-03 and 2003-04. Assessee also brought on record copy of the tax audit report u/s 44AB of the Act, available at pages 23 to 32 and pages 19 to 28A of the paper book for AYs 2002-03 and 2003-04 respectively. Special audit report and reply filed by the assessee go to prove that the entire assessment made u/s 153A/143 (3) for AYs 2002-03 & 2003-04 hinges upon special tax audit report and not on any incriminating material.

11. Identical issue has come up before the Hon'ble jurisdictional High Court in the case cited as *Kabul Chawla* (supra) wherein all

the earlier decisions delivered by the Hon'ble High Courts have been considered and legal position decided by the Hon'ble jurisdictional High Court is summarized for ready reference as under :-

“37. On a conspectus of Section 153A(1) of the Act, read with the provisos thereto, and in the light of the law explained in the aforementioned decisions, the legal position that emerges is as under:

- i. Once a search takes place under Section 132 of the Act, notice under Section 153 A (1) will have to be mandatorily issued to the person searched requiring him to file returns for six AYs immediately preceding the previous year relevant to the AY in which the search takes place.*
- ii. Assessments and reassessments pending on the date of the search shall abate. The total income for such AYs will have to be computed by the AOs as a fresh exercise.*
- iii. The AO will exercise normal assessment powers in respect of the six years previous to the relevant AY in which the search takes place. The AO has the power to assess and reassess the 'total income' of the aforementioned six years in separate assessment orders for each of the six years. In other words there will be only one assessment order in respect of each of the six AYs “in which both the disclosed and the undisclosed income would be brought to tax”.*
- iv. Although Section 153 A does not say that additions should be strictly made on the basis of evidence found in the course of the search, or other post-search material or information available with the AO which can be related to the evidence found, it does not mean that the assessment “can be arbitrary or made without any relevance or nexus*

with the seized material. Obviously an assessment has to be made under this Section only on the basis of seized material.”

- v. *In absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made. The word 'assess' in Section 153 A is relatable to abated proceedings (i.e. those pending on the date of search) and the word 'reassess' to completed assessment proceedings.*
- vi. *Insofar as pending assessments are concerned, the jurisdiction to make the original assessment and the assessment under Section 153A merges into one. Only one assessment shall be made separately for each AY on the basis of the findings of the search and any other material existing or brought on the record of the AO.*
- vii. *Completed assessments can be interfered with by the AO while making the assessment under Section 153 A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment.*

38. *The present appeals concern AYs 2002-03, 2005-06 and 2006-07. On the date of the search the said assessments already stood completed. Since no incriminating material was unearthed during the search, no additions could have been made to the income already assessed.”*

12. In view of the law laid down by Hon’ble jurisdictional High Court in **Kabul Chawla** (supra) case, we are of the considered view

that when no incriminating material has come on record during the search and seizure operation conducted at the premises of the assessee rather assessment has been based upon special audit report whereas such facts were already brought on record by the assessee by filing original return of income along with computation, the assessment framed u/s 153A read with section 143 (3) is not sustainable in the eyes of law, hence the assessments for AYs 2002-03 & 2003-04 are ordered to be quashed.

ASSESSMENT YEARS 2004-05

13. So far as question of assessment order framed u/s 153A/143(3) by the AO in AY 2004-05 is concerned, admittedly, the assessee has not filed the return before the due date or before the date mentioned in the notice. Admittedly, the assessee has not filed the return u/s 153A before the due date given in the notice issued u/s 153A itself and in these circumstances, return filed by the assessee is to be treated as a return filed u/s 139 (4) of the Act which is not permitted to be filed u/s 139 (5). The Id. CIT (A) has thrashed this issue in detail in para 6.2 of the impugned order which is extracted as under for ready perusal :-

“6.2 I have carefully considered the assessment order passed by DCIT, central Circle Meerut as well as the remand report submitted by her, I have also carefully gone through written submission made by the AR of the

appellant as well as the 'rejoinder to the remand, report. It seems that the arguments 'of the AR on this issue are self-defeating. The AR has given an argument that section 153A starts with a non-obstante clause 'notwithstanding anything contained relating to normal assessment procedure'. The AR has further argued that sections 153A, 153B and 153C are intended to be a complete code for post search assessments in themselves. If this is so, the return filed in response to section 153A cannot be revised as there is nothing in sections 153A to 153C which speaks of revision of return. If the argument of the AR is accepted than one has to understand that for search assessments sections 153A, 153B and 153C constitute a set of sub code within income tax act and since in this sub code there is no provision for revising return the same cannot be done. On alternate arguments also the submission of the AR fails because if it is understood that the return filed under section 153A has been effectively filed either under section 139(1) or in response to section 142(1) then the same should have been filed either on or before due date or on or before the date mentioned in the notice. For a return filed in response to notice under section 153A the due date will be what is mentioned in the notice itself. It is seen that the appellant has not filed return on or before the due date mentioned in the notice under section 153A. In that case the return filed by the appellant will be analogous to a return filed under section 139(4) which cannot be revised under section 139(5). Either way the arguments put forward by the AR of the appellant fails. Incidentally the AR of the appellant has written in his submission "but even where appellant has already filed a return, a fresh return in response to notice under section 153A has to be filed, which incidentally gives him an opportunity to make good omission, if any." By this understanding the appellant should have claimed deduction under section 36(1)(iii) in its return filed in response to notice under section 153A. Since this was not done the charge leveled by the assessing officer that revision of return is an afterthought seems correct. On the basis of above facts I have come to a conclusion that the assessing officer has rightly rejected the revised

return filed by the appellant. Since the revised return itself is considered as nonest any claim made there in has no merit. Therefore detailed submission made by the AR of the appellant on the admissibility of claim of interest is immaterial and irrelevant. The ground of appeal No.4 is accordingly dismissed.”

14. In view of the admitted facts, discussion made in the preceding para 13 and the fact that Id. AR for the assessee fairly conceded that impugned order passed by the Id. CIT (A) needs no interference, the appeal filed by the assessee is hereby dismissed.

15. Resultantly, appeals for the AYs 2002-03 & 2003-04 filed by the assessee are allowed and appeal for AY 2004-05 filed by the assessee is dismissed.

Order pronounced in open court on this 31st day of August, 2018.

**Sd/-
(N.K. BILLAIYA)
ACCOUNTANT MEMBER**

**sd/-
(KULDIP SINGH)
JUDICIAL MEMBER**

**Dated the 31st day of August, 2018
TS**

Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT(A), Meerut.
- 5.CIT(ITAT), New Delhi.

**AR, ITAT
NEW DELHI.**