आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'जी', मुंबई ।

IN THE INCOME TAX APPELLATE TRIBUNAL "G", BENCH MUMBAI

BEFORE SHRI R.C.SHARMA, AM
&
SHRI SANJAY GARG, JM

आयकर अपील सं./**ITA No.4531,4566,876,877,878/Mum/2011**

(**निर्धारण वर्ष** / Assessment Years :2006-07, 2007-08, 2002-03, 2003-04 & 2005-06)

ACIT, CC-32, Mumbai	Vs.	Manidevi Agarwal, 720, A-1, Lok Bharti CHS Ltd., Marol Maroshi Road, Marol, Andheri(E), Mumbai-400059
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : **AAKPA 4962 H**		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

AND

आयकर अपील सं./**ITA No.4528/Mum/2011**

(**निर्धारण वर्ष** / Assessment Years : 2007-08)

ACIT, CC-32, Mumbai	Vs.	Shri Govind Agarwal, 701, A-1, Lok Bharti CHS Ltd., Marol Maroshi Road, Marol, Andheri(E), Mumbai-400059
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : **ADOPA 4038 K**		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

AND

आयकर अपील सं./**ITA No.873,874/Mum/2011**

(**निर्धारण वर्ष** / Assessment Years : 2003-04 & 2004-05)

ACIT, CC-32, Mumbai	Vs.	Shri Govind Agarwal(HUF), 720/A-5, Lok Bharti CHS Ltd., Marol Maroshi Road, Marol, Andheri(E), Mumbai-400059
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : **AIEPA 3109 A**		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

AND

आयकर अपील सं./**ITA No.218,827,828,829/Mum/2011**

& CO No.203/M/2013(Arising out of ITA No.877/M/11)

(**निर्धारण वर्ष** / Assessment Years :2008-09, 2002-03, 2003-04 & 2005-06)

Manidevi Agarwal, 720, A-1, Lok Bharti CHS Ltd., Marol Maroshi Road, Marol, Andheri(E), Mumbai-400059	Vs.	ACIT, CC-32, Mumbai
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : **AAKPA 4962 H**		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

AND

आयकर अपील सं./**ITA No.825, 826, 3380 &3381/Mum/2011**

(**निर्धारण वर्ष** / Assessment Years : 2004-05, 2006-07 & 2007-08)

Shri Govind Agarwal(HUF), C/o M/s.Ravi & Dev Chartered Accountants, 377-B, First Floor, Jagannath Shankar Seth Marg, Chira Bazar, Mumbai-400002	Vs.	ACIT, CC-32, Mumbai
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : **AACHG 4144 B**		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

AND

आयकर अपील सं./**ITA No.3375 to 3377 & 3391/Mum/2011**

(**निर्धारण वर्ष** / Assessment Years :2003-04, 2005-06, 2006-07 & 2007-08)

Shri Govind Agarwal, C/o M/s.Ravi & Dev Chartered Accountants, 377-B, First Floor, Jagannath Shankar Seth Marg, Chira Bazar, Mumbai-400002	Vs.	ACIT, CC-32, Mumbai
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : **ADOPA 4038 K**		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

AND

आयकर अपील सं./**ITA No.4547/Mum/2011 & 957/Mum/2013**

(**निर्धारण वर्ष** / Assessment Years :2008-2009)

ACIT, CC-32, Mumbai	Vs.	Ms. Nikki Agarwal, 720, A-5, Lok Bharti CHS Ltd., Marol Maroshi Road, Marol, Andheri(E), Mumbai-400059
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : **AEIPA 3109 A**		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

राजस्व **की ओर से** /Revenue by : Shri Sanjiv Dutt

निर्धारिती **की ओर से** /Assessee by : Shri Naresh Jain & Mahaveer Jain

सुनवाई की तारीख / **Date of Hearing : 06/05/2016**

घोषणा की तारीख/**Date of Pronouncement 30/06/2016**

आदेश / O R D E R

***PER BENCH* :**

These are the appeals filed by the revenue and three different assessees being family members, against the order of CIT(A)-Mumbai, for the assessment years 2002-03, 2003-04, 2004-05, 2005-06, 2006-07, 2007-08, 2008-029, respectively.

2. Since common issues are involved in all the appeals, therefore, all the appeals have been heard *en masse* and are being disposed off by this consolidated order.

3. Ld. AR, at the outset, submitted that *albeit* the assessees in the present appeals are different, however, the search action was carried out in the premises of one of the assessee i.e. Shri Govind Agarwal and other two assessees i.e. Smt. Manidevi Agarwal & Ms. Nikki Agarwal, who are

the wife and daughter of Shri Govind Agarwal, therefore, they are also covered under the same search action. Hence, the facts and circumstances mentioned in case of assessee –Shri Govind Agarwal, be considered in deciding all the appeals.

4. Facts in brief are that the search was carried out at the residence and office premises of the assessee on 03.1.2008. After search assessment was framed u/s. 143(3) r/w s. 153A of the Act. Additions were made on account of sale of shares of different companies, unexplained expenditure incurred by the assessee and on account of disallowance u/s. 14A. Before the CIT(A) the assessee challenged the validity of the assessment framed u/s.143(3) r/w s. 153A on the plea that the assessments were not pending, therefore, in the absence of any incriminating material found during course of search no additions were warranted in the order framed u/s. 153A of the Act. The CIT(A) rejected the legal contention of the assessee but deleted the addition on account of sale of shares. Disallowance was also partly confirmed u/s.14A. In the case of Manidevi Agarwal, addition made on account of unexplained investment in shares of closely held companies amounting to Rs.1,10,61,750/- in the A.Y. 2006-07 was deleted. Similar addition in the shares of Data Base Finance Ltd. amounting to Rs.98,84,675/- were deleted by the CIT(A) in the A.Y. 2003-04. The addition made on account of unexplained investment in G.K. Fincap Ltd. and J N Fiscal Services P.

Ltd. amounting to Rs.89,41,000/- was also deleted by the CIT(A) in the A.Y. 2007-08.

5. In this case addition made in the A.Y. 2003-04 was on account of sale of shares of Data Base Finance Ltd., amounting to Rs.98,84,675/- which was deleted by the CIT(A) after giving detailed finding at pg. 7 para. The detailed finding recorded by the CIT(A) has not been controverted by bringing any positive material on record. Furthermore, we found that issue is also covered by the order of the ITAT in the case of Deepak Agarwal (son of the assessee) for A.Ys. 2003-04 to 2005-06 vide order dated 10.4.2014.

6. Similar addition made in the A.Y. 2003-04 on account of unexplained expenditure incurred by the assessee amounting to Rs.4,94,234/- was deleted by the CIT(A) after giving detailed finding at pg. 7 para 4.4. The finding so recorded has not been controverted. Furthermore, the issue is also covered by the order of ITAT in the case of Deepak Agarwal (son of the assessee) vide order dated 10.4.2014. Against the order of CIT(A) for the A.Ys. 2002-03, 2003-04, 2005-06, 2006-07 and 2007-08 both the assessee and the Revenue are in appeal before us.

7. In the case of Nikki Agarwal, addition was made by the A.O. u/s. 69 on account of unexplained investment in M/s. Dunston Goods P. Ltd. amounting to Rs.3,78,75,000/-. After giving detailed finding at pg. 11 of his appellate order for A.Y. 2008-09, the CIT(A) has deleted the addition.

The finding given by the CIT(A) has not been controverted by bringing any positive material on record. We also found that this issue is covered by the ITAT order in the case of Deepak Agarwal for A.Ys. 2006-07 and 2007-08 vide order dated 10.4.2014. As the facts and circumstances in the instant case are *pari materia* to the facts in the case of Deepak Agarwal decided by the tribunal in assessee's favour, we do not find any merit in the addition so made.

8. From the record we found that with reference to the same search A.O. has made addition in the hands of Govind Agarwal on account of investment in acquiring shares for M/s. G K Fincap Ltd and J N Fiscal Services Pvt. Ltd. at a lower price in the A.Y. 2007-08. The CIT(A) after giving detailed finding at pg.11, para 5 and pg. 17, deleted the addition of Rs.1,72,36,462/-. The finding recorded by the CIT(A) has not been controverted. We also found that the issue is covered by ITAT order in the case of Deepak Agarwal (son of the assessee) for A.Ys. 2006-07 and 2007-08 vide order dated 10.4.2014.

9. The issue with regard to the disallowance u/s. 14A in respect of exempt income in the A.Ys. 2003-04, 2005-06, 2006-07 and 2007-08 are covered by the order of the ITAT in the case of Deepak (son of the assessee) for A.Ys. 2003-04 to 2005-06 vide order dated 10.4.2014. We also found that similar issue has been decided in assessee's own case by the tribunal vide order dated 10.1.2014 for the A.Ys. 2002-03 and 2004-05. Similar issue has also been decided by the tribunal in the case of

other family members Govind Agarwal, HUF for A.Y. 2005-06 vide order dated 16.5.2013 and in case of Nikki Agarwal for A.Ys. 2003-04 to 2005-06 vide order dated 22.1.2014. As the facts and circumstances during the year under consideration are same, respectfully following the order of the Co-ordinate Bench in the case of other family members, we do not find any merit for the disallowance so made by the A.O.

10. With regard to the validity of the addition made u/s. 153A in the absence of incriminating material was stated to be covered by the ITAT order in assessee's own case for A.Ys. 2002-03 & 2004-05 in ITA Nos. 3389 and 3390 (combined order dated 10.1.2014), Govind Agarwal HUF for A.Y. 2005-06 (ITA No. 8917) dated 16.5.2013, Deepak Agarwal (son of assessee) for A.Ys. 2003-04 to 2005-06 (combined order dated 10.4.2014), Nikki Agarwal for A.Y. 2003-04 to 2005-06 (combined order dtd 22.01.2014).

11. Disallowance u/s.14A in respect of exempt income amounting to Rs.1,68,121/- in the A.Y. 2002-03 was also stated to be covered by the ITAT order in the case of Deepak Agarwal (son of assessee) for A.Y. 2003-04 to 2005-06 (combined order dtd. 10.4.2014), in assessee's own case for A.Y. 202-03 and 2004-05 in ITA No. 3389 and 3390(combined order dated 10.1.2014), Govind Agarwal HUF for A.Y. 2005-06 (ITA No. 8917) dated 16.5.2013, Nikki Agarwal for A.Y. 2003-04 to 2005-06 (combined order dtd 22.01.2014). Similarly, ground raised in the A.Ys. 2003-04, 2005-06 and 2006-07, with regard to the validity of the addition

made u/s. 143(3) as well as disallowance u/s. 14A was stated to be covered by the orders stated above.

12. On the other hand, it was contended by the ld. DR that once the search is conducted and notice is issued u/s.153A, the A.O. is statutorily required to frame the assessment for the six assessment years falling immediately preceding the year of search. Reliance was placed on the decision of Hon'ble Supreme Court in the case of CIT v. Calcutta Knitwears 362 ITR 673 (SC) , wherein Supreme Court observed that we have to look in the provisions of section 153A as the machinery provision. Reliance was also placed on the decision in the case of Hon'ble Kerala High Court in the case of CIT vs. O. Abdul Razak (350 ITR 71) in support of the proposition that clear admission in the statement recorded u/s. 132(4) is binding on the assessee. Reliance was also placed on the decision of Hon'ble Kerala High Court in the case of V. Kunhambu and Sons 219 ITR 235 in support of the proposition that the addition to the income on the basis of the statement taken u/s.132(4) of the Act is sustainable on facts of the case. Reliance was also placed on the decision of Hon'ble Delhi High Court in the case of Bhagirath Aggarwal (351 ITR 143) in support of the proposition that once there is a clear admission on the part of the assessee, that would constitute a good piece of evidence at hands of Revenue. The ld. DR also invited our attention to the statement recorded u/s. 131 of the IT Act.

13. With regard to the legal ground taken, submission of the ld. DR was as under:

> '*The appellant has taken a common/identical legal ground in all A.Ys. under consideration stating that the order passed by the CIT(A)-41, Mumbai confirming the assessment order u/s.143(3) r.w.s. 153A of the Income-tax Act, 1961 (hereinafter referred to as "the Act") is both bad in law and bad in facts and that in doing so, the CIT(A) did not appreciate that no addition could have been made while framing assessment u/s.153A of the Act in case of an already completed assessment if no undisclosed income was determinable from the material found as a result of search. In this connection, the appellant has mainly placed reliance on the ratio laid down by Hon'ble Bombay High court in the case of CIT v. Continental Warehousing Corporation 374 ITR 645 (Born) and Hon'ble IT AT, Special Bench in case of All Cargo Global Logistics Ltd v. DCIT 137 ITD 287 (Mum)(SB) wherein it has been held that the AO is required to make one assessment for each of the six years on the basis of the search and any other material existing or brought on record by the AO. In other cases, assessments will be made on the basis of the books of accounts and other documents found during the search and not produced during assessment and also on any other undisclosed income or property found during the search.*
> *2. Hon'ble Supreme Court of India in the case of CIT v. Calcutta Knitwears 362 ITR 673 (SC) wherein (in the context of provisions of sections 158BC and 158BD which held the field prior to insertion to sections 153A to 153D) it has been held that these provisions are machinery In this connection, kind attention of the Hon'ble Bench is invited to the judgment of the provisions. The relevant extract of the said judgment dealing with interpretation of machinery provisions is reproduced below:-*
>
> > *"*
> > *…….*
> > *35. It is also trite that while interpreting a machinery provision, the courts would interpret a provision in such a way that it would give meaning to the charging provisions and that the machinery provisions are liberally construed by the courts. In Mahim Patram Private Ltd. v. Union of India (UOI) and Ors., (2007) 3 SCC 668 this*
> > *Court has observed that:*
> > *"20. A taxing statute indisputably is to be strictly construed. [See J Srinivasa Rao v. Govt. of Andhra Pradesh and Anr., 2006 (13)SCALE 27 }. It is, however, also well-settled that the machinery provisions for calculating the tax or the procedure for its calculation are to be construed by ordinary*

rule of construction. Whereas a liability has been imposed on a dealer by the charging section, it is well-settled that the court would construe the statute in such a manner so as to make the machinery workable.

……
……

36. A reference to the observations of this Court in JK. Synthetics Limited and Birla Cement Works and another v. Commercial Taxes Officer and another (1994) 4 SCC 276 would be apposite:

"13. It is well-known that when a statute levies a tax it does so by inserting a charging section by which a liability is created or fixed and then proceeds to provide the machinery to make the liability effective. It, therefore, provides the machinery for the assessment of the liability already fixed by the charging section, and then provides the mode for the recovery and collection of tax, including penal provisions meant to deal with defaulters. Ordinarily the charging section which fixes the liability is strictly construed but that rule of strict construction is not extended to the machinery provisions which are construed like any other statute. The machinery provisions must, no doubt, be so construed as would effectuate the object and purpose of the statute and not defeat the same. (Whitney v. Commissioners of Inland Revenue 1926 A C 37, CIT v. Mahaliram Ramjidas (1940) 8ITR 442 , Indian United Mills Ltd. v. Commissioner of Excess Profits Tax, Bombay, [1955J 27 ITR 2 o (SC) and Gursahai Saigal v. CIT, Punjab [1963] 1 ITR 48 (SC) ".

37. It is the duty of the court while interpreting the machinery provisions of a taxing statute to give effect to its manifest purpose. Wherever the intention to impose liability is clear, the Courts ought not be hesitant in espousing a commonsense interpretation to the machinery provisions so that the charge does not fail. The machinery provisions must, no doubt, be so construed as would effectuate the object and purpose of the statute and not defeat the same (emphasis supplied) .... ".

3. Needless to say, the aforesaid judgment would apply with equal force and vigour in the context of provisions of sections 153A to 153D falling in Chapter XIV of the Act dealing with the "Procedure for Assessment". It is submitted that this judgement was not before the Hon'ble ITAT, Special Bench while deciding the case of All Cargo Global Logistics Ltd. cited above. Nor was this case referred to/ considered by Hon'ble Bombay High Court in the cases of M/s. Murli Agro Products Ltd. and Continental Warehousing Corporation. If the machinery provisions of sections 153A etc. are interpreted in light of the ratio of above judgement of Hon'ble Apex

Court, there would be no occasion for the appellant to contend that since no incriminating material was found in the course of search, the impugned assessments made by the A.O. are bad in law. It deserves to be noted that it was for the purpose of removing the mischief (viz., problems faced with special provision of assessment of undisclosed income under Chapter XIV -B of the Act) that unfettered powers were given to the Assessing Officers for making "assessment" through a notice of assessment u/s.153A for six previous year preceding the F. Y in which search/requisition took place, irrespective of whether any incriminating material /undisclosed income/undisclosed property is found during the course of search.

4. In view of the above, it is submitted that the legal ground taken up by the appellant in all the A.Y.s may be dismissed and assessments completed u/s.143(3) r.w.s.153A may be held to be valid.

14. We have considered the rival contentions carefully and gone through the orders of the authorities below. We had also deliberated on the judicial pronouncement referred by lower authorities in their respective hours as well as cited by the ld. AR and ld. DR during the course of hearing before us, in the context of factual matrix of the instant case. We found that the assessment was completed u/s.153A r.w. 143(3) of the Income-tax Act, 1961 consequent upon the search conducted u/s.132. An assessment pursuant to Sec.153A is different from regular assessment. The assessment u/s.153A is made only in cases where a search is initiated u/s.132 or books of account, other documents or after 29.08.2005, any assets are requisitioned u/s.132A. First proviso to Sec.153A(1) states that the AO shall assess or reassess the total income in respect of each assessment year falling within such six assessment years while the second proviso states that assessment or reassessment, if any, relating to any assessment year falling within the period of six

assessment years pending on the date of initiation of the search shall abate. This clearly means that completed assessment i.e. where order is passed u/s.143(3) or intimation u/s.143(1) is issued or time for issue of notice u/s.143(2) has elapsed, will not abate because no assessment is pending. A Search is not conducted to initiate reassessment but for finding undisclosed income, undisclosed property or undisclosed books of accounts/documents. Therefore, in relation to completed assessments, additions have to be made on the basis of incriminating document found for undisclosed income or undisclosed property or undisclosed books of accounts/documents. Had it not been so, it would have been very easy for the revenue to overcome the restrictions for initiating proceedings for re-assessment or review by just conducting search u/s.132. This would have made Sec.147, 148, 149, 150, 151 & 263 redundant. Obviously the legislature never intended to be so. Therefore, the basic purpose of assessment u/s.153A is to tax the undisclosed income and not to review/ re-examine the completed assessments. This is further confirmed from the fact that the legislature has not provided for abatement of completed assessments.

15. From the record we found that the co-ordinate bench in the assessee's own case for the A.Ys. 2003-04 and 2004-05 has decided the issue vide order dated 10.1.2004. Relevant observation of the Bench was as under:

> *9. We have heard both the parties on the legal issue relating to the sustainability or validity of the additions made in the*

assessments made u/s 153A read with section 143(3) of the Act in respect of completed assessments.

10. The stand of the Revenue is that the first proviso to section 153A empowers the AO to issue notice u/s 153A of the Act in respect of the 6 AYs prior to the assessment year in which the search took place. The relevance of the existence of incriminating material is not provided in the said provisions. As per the revenue there should not be any difference qua the completed assessments and the abated assessments for all six AYs in so far as the powers of the AO is concerned and he is empowered to issue notice u/s 153A and make additions either based in the incriminating material or otherwise.

11. Per contra, the case of the assessee is that the AO may be empowered to issue notices for all the six AYs in view of the cited decisions ie Jai Steel (India) Ltd (supra), Scope (P) Ltd (supra) etc. However, in case of completed assessments, AO is empowered to made additions only based on the incriminating materials and not otherwise Jai Steel (India) Ltd (supra), LMJ International Ltd (supra), Gurinder Singh Bawa (supra) etc. For making the routine additions, which are normally done in the regular assessments, the completed assessment need not be disturbed by invoking the provisions of section 153A of the Act if not for reiterating the returned or assessed income as the case may be. Judgment in the case of Jai Steel (India) Ltd (supra) supports the above legal proposition. As per the assessee, regarding the cases of abated assessments, considering the scheme of assessments u/s 153A, per contra, even the routine additions are done in these assessments.

12. We have heard the parties and their divergent stands on the legal issue and the validity of the instant assessment/reassessment with the routine additions u/s 68 and section 14A of the Act based on the accounted transactions. The instant case for the AY 2002-03 deals with the case of disturbing the 'completed assessment'. Earlier the assessment was completed u/s 143(1) of the Act. Completeness of the summary assessment is considered and held in favour of the assessee vide many judgments cited above. In the assessment u/s 153A, the AO made (i) Addition u/s 68 on account of artificially inflated investment in house duly disclosed in the balance sheet of the assessee Rs.31,33,070/-; and (ii) disallowance u/s 14A: Rs. 23,31,469/-. Admittedly, there is no incriminating material before the AO to support the above additions. The valuation report, which is garnered by the authorities constitutes mere estimates and the provisions of section 132 is not required to obtain such report from the DVO. As such, for making aforesaid additions of Rs 31,33,070/-, AO has not used even the said valuation report and the AO disallowed what is reported in the books. Similar is the case with the additions u/s 14A of the Act. Therefore, undisputedly, the impugned quantum additions are made merely based on the entries in the accounted books and certainly not based on either the unaccounted books of accounts of the

assessee or books not produced to the AO earlier or the incriminating material gathered by the investigation wing of the revenue. Considering the legal propositions place before us by the assessee's counsel, we are of the opinion, such assessments or additions are unsustainable in law.

13. For the sake completeness of the assessee, we insert here some of the extracts from relevant judgments and they are:

A. [2013 36 taxmann.com 523 (Rajasthan) in the case of Jai Steel (India) vs. ACIT - From Held portion:

….The requirement of assessment or reassessment under the said section has to be read in the context of sections 132 or 132A, inasmuch as, in case nothing incriminating is found on account of such search or requisition, then the question of reassessment of the concluded assessments does not arise, which would require more reiteration and it is only in the context of the abated assessment under second proviso which is required to be assessed.

……From a plain reading of the provision along with the purpose and purport of the said provision, which is intricately linked with search and requisition under sections 132 and 132A, it is apparent that:

(a) the assessments or reassessments, which stands abated in terms of second proviso to section 153A, the Assessing Officer acts under his original jurisdiction, for which, assessments have to be made;

(b) regarding other cases, the addition to the income that has already been assessed, the assessment will be made on the basis of incriminating material and

(c) in absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made.

…..The argument of the assessee that the Assessing Officer is also free to disturb income, expenditure or deduction de hors the incriminating material, while making assessment under section 153A is also not borne out from the scheme of the said provision which as noticed above is essentially in context of search and/or requisition.

Para 26 of the Judgment: 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 falling 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 an 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 tinkered only based on the incriminating material found during the course of search or requisition of documents.

B. [2012] 28 Taxmann.com 328 (Mumbai –Trib.) in the case of Gurinder Singh Bava vs. DCIT

…. Whether since assessment under section 153A was passed by Assessing Officer on basis of material available in return of income and there was no reference to any incriminating material found during search and since no assessment was abated, assessment under section 153A was to be quashed being made without jurisdiction available under section 153A - Held, yes [Para 6.2] [In favour of assessee]

Para 6.1 of the Order: The Special bench in the case of Alcargo Global Logistics Ltd. (supra), has held that provisions of section 153A come into operation if a search or requisition is initiated after 31.5.2003 and on satisfaction of this condition, the AO is under obligation to issue notice to the person requiring him to furnish the return of income for six years immediately preceding the year of search. The Special Bench further held that in case assessment has abated, the AO retains the original jurisdiction as well as jurisdiction under section 153A for which assessment shall be made for each assessment year separately. Thus in case where assessment has abated the AO can make additions in the assessment, even if no incriminating material has been found. But in other cases the Special Bench held that the assessment under section 153A can be made on the basis of incriminating material which in the context of relevant provisions means books of account and other documents found in the course of search but not produced in the course of original assessment and undisclosed income or property disclosed during the course of search. In the present case, the assessment had been completed under summary scheme under section 143(1) and time limit for issue of notice under section 143(2) had expired on the date of search. Therefore, there was no assessment pending in this case and in such a case there was no question of abatement. Therefore, addition could be made only on the basis of incriminating material found during search.

B. All Cargo Global Logistics Ltd. v. Deputy Commissioner of Income-tax, Central Circle-44 [2012] 23 taxmann.com 103 (Mum.) (SB)

Para 58 of SB decisions: Thus, question No.1 before us is answered as under :

(a) In assessments that are abated, the AO retains the original jurisdiction as well as jurisdiction conferred on him u/s 153A

for which assessments shall be made for each of the six assessment years separately ;

(b) In other cases, in addition to the income that has already been assessed, the assessment u/s 153A will be made on the basis of incriminating material, which in the context of relevant provisions means - (i) books of account, other documents, found in the course of search but not produced in the course of original assessment, and (ii) undisclosed income or property discovered in the course of search.

14. Thus, in case of the completed assessments either u/s 143(1) or 143(3), the above extracts are uniform in advocating against making additions in routine manner in the assessments made u/s 153A of the Act when there is no incriminating material gathered in the search action. Statutory notice u/s 153A of the Act can also be issued to reiterate the returned income or for making additions based on the incriminating material or unproduced books of account. Otherwise, additions made in routine matter as in the present appeal are not sustainable. Further, for the sake completeness of the order, we have perused the orders/judgments relied upon by Ld DR for the revenue and found they are distinguishable on facts for one reason or other. To start with, we have perused the judgment of Honble Hon'ble Delhi High Court in the case of Madugula Venu (supra) and find that, though explained the provisions in plain language, it does not dealt with the relevance or factum of incriminating material. Further, the judgment of Andhra Pradesh High Court in the case of Gopal Lal Bhadruka (supra) is not on the notices issued u/s 153A of the Act and the same is pronounced in the context of the notice u/s 153C of the Act. Further, also, the Coordinate Bench decision in the case of Scope (P) Ltd (supra) has granted relief to the assessee though the notice issued u/s 153A of the Act was upheld. However, this order has not considered the then existing decision of the Coordinate Bench decision in the case of Pratibha Industries Ltd (supra) which is relevant for the proposition that the completed assessment may not be disturbed in the absence of any incriminating material specific to the assessee. In fact, all these judgments take spirit from the Special Bench decision in the case of All Cargo Global Logistics Ltd (supra), which is relevant for the proposition that the assessment u/s 153A will be made on the basis of incriminating material such as books of accounts, other documents found in the search but not produced in the course of original assessment and undisclosed income or property discovered in the course of the search.

15. We also find that the CIT(A) made a reference to the incriminating material, which yielded disclosure of some undisclosed income. But, on perusal of the documents, we find that the CIT(A) entered into an error zone and the disclosure is only Rs 5 crores in this case and the same relates to the lands deals. In principle this disclosure has nothing do with the impugned additions

u/s 68 or 14A of the Act. In the instant case, specific to the assessee, no incriminating material with the details was referred either in the assessment order or in the order of the CIT (A) for making the impugned additions. As per the cited judgment in the case of Jai Steels Ltd, supra, the assessment u/s 153A is only for reiteration rather than making any additions in a routine manner without the strength of the incriminating materials. Similar view was taken up by the ITAT, Delhi 'H' Bench, in the case of V.K. Fiscal Services P Ltd vs. DCIT vide ITA Nos.5460 to 5465/Del/2012 (www.itatonline.org). In this regard, para 13 from the said order of the ITAT Delhi Bench (supra) is relevant and the same reads as under:

> *"13. Applying the above case laws to the facts of the case, we have to necessarily quash the assessment proceedings for AY 2004-2005, 2005-06, 2007-08, 2008-09 on the following grounds.*
>
> *(a) No books of accounts belonging to the assesse were found and seized in the premises of the other person. What was found was in the hard disk was only a confirmation of account that an attached annexures. Such documents cannot be said to be books of accounts or documents belonging to the assessee.*
>
> *(b) The Revenue has not produced the record of the searched person to demonstrate that satisfaction was recorded during the course of assessment proceedings in the case of M/s. Global Reality Ventures P. Ltd. On the date of recording of satisfaction, first notice u/s 153(c) was issued. There is no indication whatsoever, that the assessment proceedings in the case of Global Reality Ventures P. Ltd were in progress or not, at the point of time and that the AO during the course of that proceedings recorded this satisfaction. The procedure contemplated under the Act was not followed.*
>
> *(c) The satisfaction is recorded on 23rd July, 2010. The relevant AY would be 2011-12. The six preceding AYs relevant to this AY would be 2005-06 / 2006-07 / 2007-08 / 2008-09 / 2010-11. Thus, the notice issued u/s 153'C' for the AY 2004-05 is clearly barred by limitation.*
>
> *(d) Even otherwise, as there is no incriminating material found during the course of search, the AO should have dropped the proceedings initiated u/s 153'C' of the Act.*
>
> *(e) As there is no dispute that no assessment or reassessment has abated in this case for the reason, that the date of search, the date of search which in the case on hand would be 25.3.2010, by virtue of First Proviso to section 153'C', i.e., the date of passing an order u/s 127 transferring the cases of the assessee*

> *to the present Assessing Officer no assessment or reassessment was pending. When no assessment has abated, the question of making any addition or making disallowance which are not based on only material found during the search is bad in law."*

16. In these circumstances, we have no doubt about the absence of any seized material which are incriminating in nature to back the additions u/s 68 or 14A o the Act made in the assessment made u/s 153A of the Act for the AY under consideration. Regarding the DVO's report gathered during the search action, we find that the report suffers from certain deficiencies qua cost of construction of residential property and the land obtained thereto. The said report constitutes an opinion of the third party which cannot be used by the AO for making additions and such additions, if any, cannot be sustained legally. As such, we find that the AO has not used the said report of the DVO also for making additions of Rs. 31,33,007/-, the difference between accounted amount of Rs. 46,13,007/-, claimed as the amount spent on construction of house and acquisition of land as on 31.3.2002 minus Rs. Rs. 14.8 lakhs, the investment made on the land plots. AO made addition for assessee's failure to provide evidences / bills in support of the claim of expenditure on the construction. It the presumption of the AO that the plots since acquired only by July 2001, the assessee would not have spend Rs. 31,33,007/- by 31.3.2002. This is merely a presumption rather conclusion based on any evidences. Such additions are unsustainable in law in the assessments made u/s 153A r.w.s 143(3) of the Act.

17. Rajasthan High Court judgment in the case of Jai Steel (India) (supra), vide para 18, it is categorically mentioned that "the requirement of assessment or reassessment under the said section (153A) has to be read in the context of sections 132 or 132A of the Act, inasmuch as, in case nothing incriminating is found on account of search or requisition, then the question of reassessment of the concluded assessments does not arise, which would more reiteration……". Thus, the judgment of Hon'ble High court in the case of Jai Steel Ltd, supra and above decisions of the Tribunal are categorical in concluding that, in case of the concluded assessments like the present one, the additions are made only based on the incriminating material discovered during the search action. The facts of the Jai Steel Ltd (supra) are identical to the present one ie AO made additions by reassessing u/s 153A on the completed assessment u/s 143(1) of the Act. Thus, considering the judgment in the case of the Jai Steel Ltd (supra), the arguments on the legal issue raised before us stands covered. Therefore, considering the Rajasthan High Court's judgment in the case of Jai Steels Ltd, supra, we have no difficulty in (i) upholding the issue of notice u/s 153A of the Act and (2) in disapproving the making of the impugned additions u/s 68 and 14A of the Act, which are not backed by the incriminating materials. In the absence of

incriminating material, the role of the AO is only to reiterate the returned income filed in response to the notice u/s 153A of the Act. Accordingly, in substance, the common legal issue raised in the grounds for both the appeals of the assessee (ITA NO 3389&3390/M/2011) is allowed.

16. Finding and conclusion of Tribunal in the case of Deepak Agarwal (other family member of same group) reads as under :-

5. During the proceedings before us, Shri Devendra Mehta, ld Counsel for the assessee raised the above mentioned grounds and questioning the additions and the validity of the assessment u/s 153A of the Act. In this regard, Ld Counsel for the assessee submitted various arguments before us, which are common to the ones already mentioned in detail and adjudicated by us in connection with the appeals filed in the case of ***Shri Govind Agarwal vs. ACIT*** *vide ITA Nos.3389/M/2011 (AY: 2002-2003) and ITA No. 3390/M/2011 (AY: 2004-2005) vide order dated 10.01.2014. For the sake of completeness of this order, relevant portions of the said order of the Tribunal (supra) are reproduced here under:*

"6. ***Before the Tribunal:*** *During the proceedings before us, Ld Counsel for the assessee brought our attention to the contents of the relevant assessment order passed u/s 153A r w s 143(3) of the Act and demonstrated that* ***no seized material was used*** *for making the additions either on account of inflated investment or on account of disallowance u/s 14A of the Act. Fairly referring to the proceedings during the search action, Ld Counsel mentioned that it is the valuation report of the DVO which was garnered by the office of the DIT (inv) during the search action. This was the only material collected by the Revenue in the search, which was available for the AO both for issuing the notice as well as for making additions. He reasoned that the Valuation report can as well be obtained during the normal assessment or reassessment proceedings and there is no need for invoking the provisions of section 153A of the Act in this regard.*

7. Further, Ld Counsel has two fold arguments to make before us i.e., (i) considering the fact that no incriminating material was found from the assessee's premises during the search action, the notice u/s 153A was not required to be issued. Even it is issued validly, no addition can be made in the cases of completed assessments without the support of the incriminating material issued or acquired in search action u/s 132 / 132A of the Act. In this regard, Ld Counsel relied on the Rajasthan High Court judgment in the case of ***Jai Steel (India) Ltd*** *(supra); Coordinate Bench decisions in the case*

*of **Pratibha Industries Ltd** (supra) and Gurinder Singh Bawa (supra) and Special Bench decision in the case of **All Cargo Global Logistics Ltd** vs. DCIT 2012-TIOL-391-ITAT-Mum-SB. Ld Counsel argued in respect of the completed assessment, such as the present one, assessment will be made only on the basis of books of accounts or other documents not produced in the original assessment but in the course of the search and undisclosed income or property discovered in the course of the search. None of these conditions are met by the Revenue before issuing of the notice u/s 153A of the Act or before making additions. Therefore, as per the Ld counsel, the impugned notice is invalid one and additions should be deleted. Fairly referring to the Delhi High Court judgment in the case of CIT vs. Anil Kumar Bhatia vide ITA No.1626/2010, dated 7.8.2012 (Del.), Ld Counsel mentioned that this issue regarding the addition to be made in a completed assessment where no incriminating material was found, was left open. Para 23 of the said judgment is relevant in this regard. Further, relying on the order of the ITAT, Jodhpur in the case of **Dinesh Tabacco Industries** vs. DCIT vide ITA No.184 & 185/JU/2011 dated 22.2.2013, Ld Counsel reiterated that the notice becomes invalid when there is no incriminating material. Similar view was repeated by the Ld Counsel by relying on the decision of the ITAT, Kolkata in the case of **LMJ International Ltd** vs. DCIT, 119 TTJ 214 (Kol). The said decision of the of ITAT Kolkata (supra) is relevant for the proposition that where noting incriminating was found in course of search relating to assessments, assessment for such years cannot be disturbed. He culled out many other decisions which are as under.*

a) *Anil P Khimani vs. DCIT [2010 TIOL-177-ITAT-MUM]*
b) *Meghmani Organics Ltd vs. DCIT [2010] 36 DTR 187 (Ahd)*
c) *Suncity Allys Pvt. Ltd. vs. ACIT [2009] 124 TTJ 674 (Jodh)*
d) *ACIT vs. PACL India Ltd [ITA No.2637/ Del/2010]*
e) *Shri Deepen A Parekh vs. ACIT [ITA No.467/Mum/2011]*
f) *MGF Automobiles Ltd vs. ACIT [ITA No.4212 & 4213/Del/2011]*

*Further, Ld Counsel filed a copy of the order of the Tribunal in the case of **Govind Agarwal HUF** vs ACIT vide ITA No.217/Mum/2011 (AY 2008-2009) which is a part of the assessee's group and where notice u/s 153C was issued. Ld Counsel mentioned that the Tribunal has upheld the*

invalidity of such notice and deleted the additions made on account of gift emanated from the books of accounts.

(ii) The second aspect of his arguments relates to the treatment to be given to the DVO's report, if the said report constitutes any incriminating material. Mentioning that the Revenue did not consider the same as a incriminating material for the purpose of issuance of notice u/s 153A of the Act, Ld Counsel mentioned that the office of DIT (Inv) referred the impugned house property (Mangaldeep at Udaipur) to the valuation cell for identifying the ***market value*** *of the property,* ***not the cost of acquisition****. (Aarch Consulatants & Valuers, Mumbai) The valuers submitted a report on 16.2.2008 determining the value of the property at Rs. 3,67,09,000/- as the fair market value as against the disclosed amount of Rs. 1.56 Crs by the assessee in the books of accounts as on 31.3.2007. It is the submission of the assessee that such reports of the DVO ignored by the DIT office during the search proceedings cannot constitute incriminating material and the AO should not rely on such reports for issuance of notice u/s 153A of the Act and for making additions u/s 143(3) r.w.s 153A of the Act. As per the Ld Counsel such reports are mere estimates and the additions are not sustainable in the search assessment. In this regard, Ld Counsel relied on the judgment of the Hon'ble Supreme Court in the case of Assistant Commissioner of Income-tax v. Dhariya Construction Co, 328 ITR 515 which is relevant for the proposition that "having examined the records, we find in that case Department sought reopening of the assessment based on the opinion given by the DVO. The opinion given by the District Valuation Officer is not per se information for the purpose of reopening an assessment under section 147 of the Income-tax Act, 1961". AO has to apply his mind and form a belief there from. The Department was not entitled to reopen the concluded assessment based on such DVO's report. Such reports are mere an opinion of the valuer, the third party and never can be equated to the opinion of the AO and relied on the Guwahati High Court judgment in the case of Bhola Nath Majumdar v. Income-tax Officer 221 ITR 608 and the judgment of Hon'ble Rajasthan High Court in the case of Brig. B. Lall v. Wealth-tax Officer 127 ITR 308. In these cases, the concealment proceedings were quashed on this basis. Referring to the another judgment of Hon'ble Delhi High Court in the case of* ***CIT vs. Suraj Devi, 328 ITR 604 and in the case of CIT vs. Naveen Gera [2011] 328 ITR 516,*** *Ld Counsel mentioned that the additions cannot be made on the basis of the valuation report of the DVO in the absence of any incriminating material. The burden vests on the Revenue in such caes. Referring to the facts of the present case, Ld Counsel mentioned that the assessee disclosed investment of Rs. 46,13,007/- on the*

house as on 31.3.2002 whereas the AO came to the conclusion that the land value of Rs. 14.8 lakhs is the only investment on the house, no construction was undertaken by this date. AO came to such conclusion for assessee's failure to furnish the supporting bills to demonstrate the fact of part construction of the impugned residential property. It is a case of mere presumption and the additions are unsustainable on such presumption. AO has no evidence to infer that the assessee's figure of Rs. 46,13,007/- is bogus and Rs. 14.8 lakhs is the only investment on the said property. In fact, Rs. 14.8 lakhs is the cost of the land plots on which the house was constructed and assessee spent the balance of Rs. 31,33,007/- in construction of the house. Therefore, the proceedings initiated u/s 153A is required to be quashed and the addition based on the surmises of the AO should not be sustained.

8. On the other hand, ***Ld DR relied*** *heavily on the order of the AO and the CIT (A). In connection with the legal issue regarding the validity of the notice u/s 153A of the Act, Ld DR filed a copy of the order of the Tribunal in the case of Scope (P) Ltd vs. DCIT [2013] 33 Taxmann.com 167 (Mumbai Trib.) dated 20.3.2013 and stated that under the provisions of section 153A of the Act, AO is bound to proceed for all the 6 AYs immediately preceding AY relevant to the previous year in which search was conducted even if there is no incriminating material to indicate any undisclosed income during the original assessment completed u/s 143(3) for any year. This is the case where regular assessment u/s 143(3) was completed on 7.11.2007 prior to the date of search on 15.11.2007 and the addition was made u/s 14A of the Act and not based on any seized material found during the search. Though such disallowance was deleted for other reasons but the validity of the notice was upheld in this case. CIT-DR also brought our attention to the judgment of Andhra Pradesh High Court in the case of Gopal Lal Bhadruka vs. DCIT [2012] 27 Taxmann.com 167 (AP) in his favour. Of course, this is the case where assessments completed u/s 158BD of the Act and not u/s 153A as in the present case. Further, Ld DR also filed the judgment of Delhi High Court in the case of Madugula Venu vs. DIT [2013] 29 Taxmann.com 200 (Delhi), which is relevant for the proposition that the notice issued u/s 153A calling upon assessee to file the returns for earlier 6 AYs cannot be challenged on the ground that it would cause certain degree of hardship to assessee. Ld DR has brought our attention to para 7 of the said judgment of the Delhi High Court and mentioned that "the section couched in mandatory language which implies that once there is a search, the AO has no option but to call upon the assessee to file the returns of the income for the earlier six assessment years. It is not merely the undisclosed*

*income that will be brought to tax in such assessments, but the total income of the assessee, including both the income earlier disclosed and income found consequent to the search, would be brought to tax. The normal provisions relating to inquiry, affording opportunity etc., which are provided for in sections 142, 143 etc are to be followed by the assessing officer". Of course, the above explanation of the provisions does not refer to the present debate relating to the "**incriminating material"** based additions in the cases of completed assessments.*

Decision of the Tribunal:

9. We have heard both the parties on the legal issue relating to the sustainability or validity of the additions made in the assessments made u/s 153A read with section 143(3) of the Act in respect of completed assessments.

10. The stand of the Revenue is that the first proviso to section 153A empowers the AO to issue notice u/s 153A of the Act in respect of the 6 AYs prior to the assessment year in which the search took place. The relevance of the existence of incriminating material is not provided in the said provisions. As per the revenue there should not be any difference qua the completed assessments and the abated assessments for all six AYs in so far as the powers of the AO is concerned and he is empowered to issue notice u/s 153A and make additions either based in the incriminating material or otherwise.

*11. Per contra, the case of the assessee is that the AO may be empowered to issue notices for all the six AYs in view of the cited decisions ie **Jai Steel (India) Ltd** (supra), Scope (P) Ltd (supra) etc. However, in case of completed assessments, AO is empowered to made additions only based on the incriminating materials and not otherwise **Jai Steel (India) Ltd** (supra), **LMJ International Ltd** (supra)**, Gurinder Singh Bawa** (supra) etc. For making the routine additions, which are normally done in the regular assessments, the completed assessment need not be disturbed by invoking the provisions of section 153A of the Act if not for reiterating the returned or assessed income as the case may be. Judgment in the case of **Jai Steel (India) Ltd** (supra) supports the above legal proposition. As per the assessee, regarding the cases of abated assessments, considering the scheme of assessments u/s 153A, per contra, even the routine additions are done in these assessments.*

12. We have heard the parties and their divergent stands on the legal issue and the validity of the instant assessment/reassessment with the routine additions u/s 68 and section 14A of the Act based on the accounted transactions. The instant case for the AY 2002-03 deals with the case of disturbing the 'completed assessment'. Earlier

the assessment was completed u/s 143(1) of the Act. Completeness of the summary assessment is considered and held in favour of the assessee vide many judgments cited above. In the assessment u/s 153A, the AO made (i) Addition u/s 68 on account of artificially inflated investment in house duly disclosed in the balance sheet of the assessee Rs.31,33,070/-; and (ii) disallowance u/s 14A: Rs. 23,31,469/-. Admittedly, there is no incriminating material before the AO to support the above additions. The valuation report, which is garnered by the authorities constitutes mere estimates and the provisions of section 132 is not required to obtain such report from the DVO. As such, for making aforesaid additions of Rs 31,33,070/-, AO has not used even the said valuation report and the AO disallowed what is reported in the books. Similar is the case with the additions u/s 14A of the Act. Therefore, undisputedly, the impugned quantum additions are made merely based on the entries in the accounted books and certainly not based on either the unaccounted books of accounts of the assessee or books not produced to the AO earlier or the incriminating material gathered by the investigation wing of the revenue. Considering the legal propositions place before us by the assessee's counsel, we are of the opinion, such assessments or additions are unsustainable in law.

13. For the sake completeness of the assessee, we insert here some of the extracts from relevant judgments and they are:

C. [2013 36 taxmann.com 523 (Rajasthan) in the case of Jai Steel (India) vs. ACIT - From Held portion:

*….The requirement of assessment or reassessment under the said section has to be read in the context of sections 132 or 132A, inasmuch as, **in case nothing incriminating is found on account of such search or requisition, then the question of reassessment of the concluded assessments does not arise**, which would require more **reiteration** and it is only in the context of the abated assessment under second proviso which is required to be assessed.*

……From a plain reading of the provision along with the purpose and purport of the said provision, which is intricately linked with search and requisition under sections 132 and 132A, it is apparent that:

(a) the assessments or reassessments, which stands abated in terms of second proviso to section 153A, the Assessing Officer acts under his original jurisdiction, for which, assessments have to be made;

(b) regarding other cases, the addition to the income that has already been assessed, the assessment will be made on the basis of incriminating material and

(c) ***in absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made****.*

.....*The argument of the assessee that the Assessing Officer is also free to disturb income, expenditure or deduction de hors the incriminating material, while making assessment under section 153A is also not borne out from the scheme of the said provision which as noticed above is essentially in context of search and/or requisition.*

Para 26 of the Judgment: *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 falling 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 an 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 tinkered only based on the incriminating material found*** *during the course of search or requisition of documents.*

B. [2012] 28 Taxmann.com 328 (Mumbai –Trib.) in the case of Gurinder Singh Bava vs. DCIT

.... *Whether since assessment under section 153A was passed by Assessing Officer on basis of material available in return of income and there was no reference to any incriminating material found during search and since no assessment was abated, assessment under section 153A was to be quashed being made without jurisdiction available under section 153A - Held, yes [Para 6.2] [In favour of assessee]*

Para 6.1 of the Order: *The Special bench in the case of Alcargo Global Logistics Ltd. (supra), has held that provisions of section 153A come into operation if a search or requisition is initiated after 31.5.2003 and on satisfaction of this condition, the AO is under obligation to issue notice to the person requiring him to furnish the return of income for six years immediately preceding the year of search. The*

Special Bench further held that in case assessment has abated, the AO retains the original jurisdiction as well as jurisdiction under section 153A for which assessment shall be made for each assessment year separately. Thus in case where assessment has abated the AO can make additions in the assessment, even if no incriminating material has been found. But in other cases the Special Bench held that the assessment under section 153A can be made on the basis of incriminating material which in the context of relevant provisions means books of account and other documents found in the course of search but not produced in the course of original assessment and undisclosed income or property disclosed during the course of search. In the present case, the assessment had been completed under summary scheme under section 143(1) and time limit for issue of notice under section 143(2) had expired on the date of search. Therefore, there was no assessment pending in this case and in such a case there was no question of abatement. Therefore, addition could be made only on the basis of incriminating material found during search.

D. All Cargo Global Logistics Ltd. v. Deputy Commissioner of Income-tax, Central Circle-44 [2012] 23 taxmann.com 103 (Mum.) (SB)

Para 58 of SB decisions: *Thus, question No.1 before us is answered as under :*

(a) In assessments that are abated, the AO retains the original jurisdiction as well as jurisdiction conferred on him u/s 153A for which assessments shall be made for each of the six assessment years separately ;

(b) ***In other cases****, in addition to the income that has already been assessed, the assessment u/s 153A will be made* ***on the basis of incriminating material****, which in the context of relevant provisions means - (i) books of account, other documents, found in the course of search but not produced in the course of original assessment, and (ii) undisclosed income or property discovered in the course of search.*

14. Thus, in case of the completed assessments either u/s 143(1) or 143(3), the above extracts are uniform in advocating against making additions in routine manner in the assessments made u/s 153A of the Act when there is no incriminating material gathered in the search action. Statutory notice u/s 153A of the Act can also be issued to reiterate the returned income or for making additions based on the incriminating material or unproduced books of account. Otherwise, additions made in routine matter as in

the present appeal are not sustainable. Further, for the sake completeness of the order, we have perused the orders/judgments relied upon by Ld DR for the revenue and found they are ***distinguishable*** *on facts for one reason or other. To start with, we have perused the judgment of Honble Hon'ble Delhi High Court in the case of* ***Madugula Venu*** *(supra) and find that, though explained the provisions in plain language, it does not dealt with the relevance or factum of incriminating material. Further, the judgment of Andhra Pradesh High Court in the case of* ***Gopal Lal Bhadruka*** *(supra) is not on the notices issued u/s 153A of the Act and the same is pronounced in the context of the notice u/s 153C of the Act. Further, also, the Coordinate Bench decision in the case of* ***Scope (P) Ltd*** *(supra) has granted relief to the assessee though the notice issued u/s 153A of the Act was upheld. However, this order has not considered the then existing decision of the Coordinate Bench decision in the case of* ***Pratibha Industries Ltd*** *(supra) which is relevant for the proposition that the completed assessment may not be disturbed in the absence of any incriminating material specific to the assessee. In fact, all these judgments take spirit from the Special Bench decision in the case of* ***All Cargo Global Logistics Ltd*** *(supra), which is relevant for the proposition that the assessment u/s 153A will be made on the basis of incriminating material such as books of accounts, other documents found in the search but not produced in the course of original assessment and undisclosed income or property discovered in the course of the search.*

15. We also find that the CIT(A) made a reference to the incriminating material, which yielded disclosure of some undisclosed income. But, on perusal of the documents, we find that the CIT(A) entered into an error zone and the disclosure is only Rs 5 crores in this case and the same relates to the lands deals. In principle this disclosure has nothing do with the impugned additions u/s 68 or 14A of the Act. In the instant case, specific to the assessee, no incriminating material with the details was referred either in the assessment order or in the order of the CIT (A) for making the impugned additions. As per the cited judgment in the case of Jai Steels Ltd, supra, the assessment u/s 153A is only for reiteration rather than making any additions in a routine manner without the strength of the incriminating materials. Similar view was taken up by the ITAT, Delhi 'H' Bench, in the case of ***V.K. Fiscal Services P Ltd*** *vs. DCIT vide ITA Nos.5460 to 5465/Del/2012 (www.itatonline.org). In this regard, para 13 from the said order of the ITAT Delhi Bench (supra) is relevant and the same reads as under:*

"13. Applying the above case laws to the facts of the case, we have to necessarily quash the assessment proceedings

for AY 2004-2005, 2005-06, 2007-08, 2008-09 on the following grounds.

(f) No books of accounts belonging to the assesse were found and seized in the premises of the other person. What was found was in the hard disk was only a confirmation of account that an attached annexures. Such documents cannot be said to be books of accounts or documents belonging to the assessee.

(g) The Revenue has not produced the record of the searched person to demonstrate that satisfaction was recorded during the course of assessment proceedings in the case of M/s. Global Reality Ventures P. Ltd. On the date of recording of satisfaction, first notice u/s 153(c) was issued. There is no indication whatsoever, that the assessment proceedings in the case of Global Reality Ventures P. Ltd were in progress or not, at the point of time and that the AO during the course of that proceedings recorded this satisfaction. The procedure contemplated under the Act was not followed.

(h) The satisfaction is recorded on 23rd July, 2010. The relevant AY would be 2011-12. The six preceding AYs relevant to this AY would be 2005-06 / 2006-07 / 2007-08 / 2008-09 / 2010-11. Thus, the notice issued u/s 153'C' for the AY 2004-05 is clearly barred by limitation.

(i) Even otherwise, as there is no incriminating material found during the course of search, the AO should have dropped the proceedings initiated u/s 153'C' of the Act.

(j) As there is no dispute that no assessment or reassessment has abated in this case for the reason, that the date of search, the date of search which in the case on hand would be 25.3.2010, by virtue of First Proviso to section 153'C', i.e., the date of passing an order u/s 127 transferring the cases of the assessee to the present Assessing Officer no assessment or reassessment was pending. ***When no assessment has abated, the question of making any addition or making disallowance which are not based on only material found during the search is bad in law.****"*

16. In these circumstances, we have no doubt about the absence of any seized material which are incriminating in nature to back the additions u/s 68 or 14A o the Act made in the assessment made u/s 153A of the Act for the AY under consideration. Regarding the DVO's report gathered during

the search action, we find that the report suffers from certain deficiencies qua cost of construction of residential property and the land obtained thereto. The said report constitutes an opinion of the third party which cannot be used by the AO for making additions and such additions, if any, cannot be sustained legally. As such, we find that the AO has not used the said report of the DVO also for making additions of Rs. 31,33,007/-, the difference between accounted amount of Rs. 46,13,007/-, claimed as the amount spent on construction of house and acquisition of land as on 31.3.2002 ***minus*** *Rs. Rs. 14.8 lakhs, the investment made on the land plots. AO made addition for assessee's failure to provide evidences / bills in support of the claim of expenditure on the construction. It the presumption of the AO that the plots since acquired only by July 2001, the assessee would not have spend Rs. 31,33,007/- by 31.3.2002. This is merely a presumption rather conclusion based on any evidences. Such additions are unsustainable in law in the assessments made u/s 153A r.w.s 143(3) of the Act.*

17. Rajasthan High Court judgment in the case of Jai Steel (India) (supra), vide para 18, it is categorically mentioned that "the requirement of assessment or reassessment under the said section (153A) has to be read in the context of sections 132 or 132A of the Act, inasmuch as, in case nothing incriminating is found on account of search or requisition, then the question of reassessment of the concluded assessments does not arise, which would more reiteration……". Thus, the judgment of Hon'ble High court in the case of Jai Steel Ltd, supra and above decisions of the Tribunal are categorical in concluding that, in case of the concluded assessments like the present one, the additions are made only based on the incriminating material discovered during the search action. The facts of the Jai Steel Ltd (supra) are identical to the present one ie AO made additions by reassessing u/s 153A on the completed assessment u/s 143(1) of the Act. Thus, considering the judgment in the case of the Jai Steel Ltd (supra), the arguments on the legal issue raised before us stands covered. Therefore, considering the Rajasthan High Court's judgment in the case of Jai Steels Ltd, supra, we have no difficulty in (i) upholding the issue of notice u/s 153A of the Act and (2) in disapproving the making of the impugned additions u/s 68 and 14A of the Act, which are not backed by the incriminating materials. In the absence of incriminating material, the role of the AO is only to reiterate the returned income filed in response to the notice u/s 153A of the Act. Accordingly, in substance, the common ***legal issue raised in the grounds for both the appeals of the assessee (ITA NO 3389&3390/M/2011) is allowed.***

18. Regarding other two grounds on the merits of the additions raised in both the appeals, considering the relief granted to the assessee on the legal ground, we find the adjudication is only of academic importance. Therefore, we ***dismiss*** *the same academic.*

19. In the result, both the appeals of the assessee are ***partly allowed****."*

6. From the above, it is evident that the arguments relating to the validity of the notice u/s 153 are disapproved. Consequently, we confirm the validity of the notice issued u/s 153A of the Act. However, considering the judgment of the Rajasthan High Court judgment in the case of ***Jai Steel (India) Ltd*** *and other orders of the Tribunal (supra), we are of the opinion that the additions made by the AO in the absence of any incriminating material are not sustainable. Accordingly,* ***additions are deleted*** *and the ground no.1 raised by the assessee is* ***allowed****.*

7. ***Ground no.2*** *relates to the addition u/s 68 on account of '****unexplained gifts received by the asessee'.*** *In this regard, Ld Counsel for the assessee relied on the order of the Tribunal in the case of* ***M/s. Govind Agarwal (HUF) vs. DCIT*** *vide* ***ITA No.8917/M/2010****, dated 16.5.2013, for the AY 2005-06 and read out the relevant paras 6 & 7 of the said order of the Tribunal dated 16.5.2013 (supra) which read as under:*

"6. We have heard the rival contentions on the preliminary issue as to whether the addition can be made in the present case once the assessment for the assessment year 2005–06 has attained finality and no incriminating material was found during the course of search. On a perusal of the records and the findings of the Assessing Officer and the learned Commissioner (Appeals), we find that there is no reference to any seized material or any incriminating documents so as to suggest that addition made in the assessment order are based on any incriminating material found at the time of search. Once that is so and also that the assessment for the assessment year 2005–06 has attained finality before the date of search, then no addition can be made under section 153A. The Mumbai Special Bench decision of the Tribunal in All Cargo Global Logistic Ltd. (supra), after analyzing the relevant provisions of the Act, came to the following conclusion and ratio:–

"(a) In assessment that are abated, the Assessing Officer retains the original jurisdiction as well as jurisdiction conferred on him under section 153A for which assessments shall be made for each of the six assessment years separately.

(b) In other cases, in addition to the income that has already been assessed, the assessment under section 153A will be made on the basis of incriminating material which in the context of relevant provisions means books of account, other documents,

found in the course of search but not produced in the course of original assessment and undisclosed income or property discovered in the course of search."

7. In this case, the question answered in clause (b) would be applicable as the addition in the assessment order passed under section 153A, can be made only on the basis of incriminating material found in the course of search in case where the assessment has already been finalized. Thus, in this case, no addition can be made over and above the returned income which has become final prior to the date of search and there is no material found at the time of search. The aforesaid Mumbai Special Bench decision of the Tribunal in All Cargo Global Logistic Ltd. (supra) has also been reaffirmed and applied by the co–ordinate bench in Gurinder Singh Bawa (supra). The relevant observation of the Tribunal is reproduced herein below:–

"6. We have perused the records and considered the rival contentions carefully. The dispute raised is regarding legal validity of addition made by AO under section 153A of the Act. Under the provisions of section 153A, in all cases, where search is conducted under section 132 of the Act, AO is empowered to assess or reassess total income of six assessment years preceding the assessment year in which search was conducted. The section also provides that assessment or reassessment relating to any assessment year falling within period of six assessment year if pending on the date of initiation of search shall abate. There have been divergent views regarding scope of application of section 153A in cases where no incriminating material was found indicating any undisclosed income. Some of the Tribunal Benches had taken the view that in case no incriminating material was found AO had no jurisdiction to make assessment or reassessment under section 153A while some other Benches held that jurisdiction under section 153A was automatic to reassess six immediate preceding assessment years irrespective of the fact whether any incriminating material was found or not. Another aspect on which there had been divergent views was whether even if AO had jurisdiction under section 153A, addition can be made in assessment / reassessment only when some incriminating material has been found. All these aspects had been referred to the Special Bench of the Tribunal in case of Alcargo Global Logistics Ltd. and order of Special Bench dated 6.7.2012 has been referred.

> *6.1 The Special bench in the case of Alcargo Global Logistics Ltd. (supra), has held that provisions of section 153A come into operation if a search or requisition is initiated after 31.5.2003 and on satisfaction of this condition, the AO is under obligation to issue notice to the person requiring him to furnish the return of income for six years immediately preceding the year of search. The Special Bench further held that in case assessment has abated, the AO retains the original jurisdiction as well as jurisdiction under section 153A for which assessment shall be made for each assessment year separately. Thus in case where assessment has abated the AO can make additions in the assessment, even if no incriminating material has been found. But in other cases the Special Bench held that the assessment under section 153A can be made on the basis of incriminating material which in the context of relevant provisions means books of account and other documents found in the course of search but not produced in the course of original assessment and undisclosed income or property disclosed during the course of search. In the present case, the assessment had been completed under summary scheme under section 143(1) and time limit for issue of notice under section 143(2) had expired on the date of search. Therefore, there was no assessment pending in this case and in such a case there was no question of abatement. Therefore, addition could be made only on the basis of incriminating material found during search."*
>
> *Thus, on the facts of the case, we hold that the additions made by the Assessing Officer with regard to **unexplained gift of Rs. 10,00,000, made under section 68** and disallowance of Rs. 1,01,300 under section 14A, are **beyond the scope of section 153A / 153C**. Consequently, we set aside the impugned order passed by the learned Commissioner (Appeals) and on the preliminary ground itself, both the additions are deleted. Thus, the **issues** arising out of the ground are **treated as allowed."***

*8. Considering the above settled position of the issue, we are of the opinion that the disallowance made u/s 68 is uncalled for as the same is beyond the scope of section 153A / 153C of the Act. No incriminating material in support of the additions made u/s 68 of the Act was brought to our notice by the Revenue. Therefore, the addition made u/s 68 of the Act is deleted and the ground no.2 raised by the assessee is **allowed**.*

*9. **Ground no.3** relates to the disallowance u/s 14A of the Act. In this regard, Ld Counsel In this regard, Ld Counsel for the*

*assessee relied on the order of the Tribunal in the case of **M/s. Govind Agarwal (HUF) vs. DCIT** vide **ITA No.8917/M/2010**, dated 16.5.2013, for the AY 2005-06 and read out the relevant paras 6 & 7 of the said order of the Tribunal dated 16.5.2013 (supra) which read as under:*

> *"6. We have heard the rival contentions on the preliminary issue as to whether the addition can be made in the present case once the assessment for the assessment year 2005–06 has attained finality and no incriminating material was found during the course of search. On a perusal of the records and the findings of the Assessing Officer and the learned Commissioner (Appeals), we find that there is no reference to any seized material or any incriminating documents so as to suggest that addition made in the assessment order are based on any incriminating material found at the time of search. Once that is so and also that the assessment for the assessment year 2005–06 has attained finality before the date of search, then no addition can be made under section 153A. The Mumbai Special Bench decision of the Tribunal in All Cargo Global Logistic Ltd. (supra), after analyzing the relevant provisions of the Act, came to the following conclusion and ratio:–*
>
> > *"(a) In assessment that are abated, the Assessing Officer retains the original jurisdiction as well as jurisdiction conferred on him under section 153A for which assessments shall be made for each of the six assessment years separately.*
> >
> > *(b) In other cases, in addition to the income that has already been assessed, the assessment under section 153A will be made on the basis of incriminating material which in the context of relevant provisions means books of account, other documents, found in the course of search but not produced in the course of original assessment and undisclosed income or property discovered in the course of search."*
>
> *7. In this case, the question answered in clause (b) would be applicable as the addition in the assessment order passed under section 153A, can be made only on the basis of incriminating material found in the course of search in case where the assessment has already been finalized. Thus, in this case, no addition can be made over and above the returned income which has become final prior to the date of search and there is no material found at the time of search. The aforesaid Mumbai Special Bench decision of the Tribunal in All Cargo Global Logistic Ltd. (supra) has also been reaffirmed and applied by the co–ordinate bench in Gurinder Singh Bawa (supra). The relevant observation of the Tribunal is reproduced herein below:–*

"6. We have perused the records and considered the rival contentions carefully. The dispute raised is regarding legal validity of addition made by AO under section 153A of the Act. Under the provisions of section 153A, in all cases, where search is conducted under section 132 of the Act, AO is empowered to assess or reassess total income of six assessment years preceding the assessment year in which search was conducted. The section also provides that assessment or reassessment relating to any assessment year falling within period of six assessment year if pending on the date of initiation of search shall abate. There have been divergent views regarding scope of application of section 153A in cases where no incriminating material was found indicating any undisclosed income. Some of the Tribunal Benches had taken the view that in case no incriminating material was found AO had no jurisdiction to make assessment or reassessment under section 153A while some other Benches held that jurisdiction under section 153A was automatic to reassess six immediate preceding assessment years irrespective of the fact whether any incriminating material was found or not. Another aspect on which there had been divergent views was whether even if AO had jurisdiction under section 153A, addition can be made in assessment / reassessment only when some incriminating material has been found. All these aspects had been referred to the Special Bench of the Tribunal in case of Alcargo Global Logistics Ltd. and order of Special Bench dated 6.7.2012 has been referred.

6.1 The Special bench in the case of Alcargo Global Logistics Ltd. (supra), has held that provisions of section 153A come into operation if a search or requisition is initiated after 31.5.2003 and on satisfaction of this condition, the AO is under obligation to issue notice to the person requiring him to furnish the return of income for six years immediately preceding the year of search. The Special Bench further held that in case assessment has abated, the AO retains the original jurisdiction as well as jurisdiction under section 153A for which assessment shall be made for each assessment year separately. Thus in case where assessment has abated the AO can make additions in the assessment, even if no incriminating material has been found. But in other cases the Special Bench held that the assessment under section 153A can be made on the basis of incriminating material which in the context of

> *relevant provisions means books of account and other documents found in the course of search but not produced in the course of original assessment and undisclosed income or property disclosed during the course of search. In the present case, the assessment had been completed under summary scheme under section 143(1) and time limit for issue of notice under section 143(2) had expired on the date of search. Therefore, there was no assessment pending in this case and in such a case there was no question of abatement. Therefore, addition could be made only on the basis of incriminating material found during search."*
>
> *Thus, on the facts of the case, we hold that the additions made by the Assessing Officer with regard to unexplained gift of Rs. 10,00,000, made under section 68 and* ***disallowance of Rs. 1,01,300 under section 14A, are beyond the scope of section 153A / 153C.*** *Consequently, we set aside the impugned order passed by the learned Commissioner (Appeals) and on the preliminary ground itself, both the additions are deleted. Thus, the issues arising out of the ground are* ***treated as allowed."***

> *10. Considering the above settled position of the issue, we are of the opinion that the disallowance made u/s 14A is uncalled for as the same is beyond the scope of section 153A / 153C of the Act. No incriminating material was brought to our notice by the Revenue in support of the additions made u/s 14A of the Act. Therefore, the addition made u/s 14A of the Act is deleted and the ground no.3 raised by the assessee is* ***allowed****.*

17. Furthermore, we find that the jurisdictional High Court in the case of Continental Warehousing Corporation (Nhava Sheva) 374 ITR 645, vide order dated 21-4-2015 have considered the decision of Special Bench in the case of All Cargo and also the decision of Delhi High Court in the case of Anil Bhatia (supra), on which CIT(A) has relied for dismissing legal ground raised by assessee. After elaborate discussion the Hon'ble High Court held, Head Note, reads as under :-

> *A bare perusal of section 153A would indicate as to how a non-obstante clause has been inserted and with a defined intent. Where search is initiated under section 132 or books of account,*

other documents or any assets are requisitioned under section 132A after 31-5- 2003, that the Assessing Officer is in a position to and mandated to issue notice within the meaning of sub-section (1) of section 153A. That is because, Chapter XIII within which the powers of search and seizure and powers to requisition books of account are spelt out enable the revenue to take care of cases where it effects a search and seizure. That search and seizure is effected and after the same is effected, books of account, other documents, money, bullion, jewellery or other valuable article or thing is found as a result thereof that notwithstanding anything and within the meaning of the above provisions having been concluded, it is open for the revenue to make an assessment. It is also open to the revenue to make a reassessment in cases where it exercises the powers to requisition books of account etc. This is because it is of the view that the books of account are required to be summoned or taken into custody. It, therefore, issues a summons in that regard. It may also requisition the books of account or other documents for that might be useful and or any assets representing withholding or part income or property which has not been or would not have been disclosed for the purpose of the Indian Income-tax Act, 1922 or the Income-tax Act of 1961 by any person from whose possession or control they have been taken into custody. This is when the authorities have reason to believe that such powers need to be exercised. Therefore, the fetters and which are to be found in other provisions are removed and a notice of assessment in such cases is then issued. That is mandated by sub-section (1) of section 153A. It is not only the issuance of the notice but assessment or reassessment of total income of six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition has to be made.

- *There is much substance in the contentions of the assessee that the provisions such as section 153A enabling assessment in case of search or requisition making specific reference to the provisions which enable carrying out of search or exercise of power of requisition that the assessment in furtherance thereof is contemplated.*

- *Assessee's reliance upon the Division Bench judgment of this Court rendered in CIT v. Murli Agro Products Ltd. [2014] 49 taxmann.com 172 in that context is, therefore, well placed.*

- *The Division Bench outlined the ambit and scope of the powers conferred by section 153A and observed that on a plain reading of section 153A, it becomes clear that on initiation of the proceedings under section 153A, it is only the assessment/reassessment proceedings that are pending on the date of conducting search under section 132 or making requisition under section 132A stand abated and not the assessments/reassessments already finalised*

for those assessment years covered under section 153A. By a Circular No. 8 of 2003, dated 18-9-2003 (See 263 ITR(St) 61 at 107) the CBDT has clarified that on initiation of proceedings under section 153A, the proceedings pending in appeal, revision or rectification proceedings against finalised assessment/reassessment shall not abate. It is only because, the finalised assessments/reassessments do not abate, the appeal revision or rectification pending against finalised assessment/reassessments would not abate. Therefore, the argument of the revenue, that on initiation of proceedings under section 153A, the assessments/reassessments finalised for the assessment years covered under section 153A stand abated cannot be accepted. Similarly on annulment of assessment made under section 153A (1) what stands revived is the pending assessment/reassessment proceedings which stood abated as per section 153A(1).

- *Once it is held that the assessment has attained finality, then the Assessing Officer while passing the independent assessment order under section 153A read with section 143 (3) could not have disturbed the assessment/reassessment order which has attained finality, unless the materials gathered in the course of the proceedings under section 153A establish that the reliefs granted under the finalised assessment/reassessment were contrary to the facts unearthed during the course of 153A proceedings. If there is nothing on record to suggest that any material was unearthed during the search or during the 153A proceedings, the Assessing Officer while passing order under section 153A read with section 143(3) cannot disturb the assessment order*

- *The stand of revenue that these observations are made in passing or that they are not binding on instant Court is not agreeable because the essential controversy before the Bench was somewhat different. Revenue urged that was only in relation to the legality and validity of the order of the Commissioner under section 263. Had that been the case, the Division Bench was not required to trace out the history of section 153A and the power that is conferred thereunder. When the revenue argued before the Division Bench that the power under section 153A can be invoked and exercised even in cases where the second proviso to sub-section (1) is not applicable that the Division Bench was required to express a specific opinion. The provision deals with those cases where assessment or reassessment, if any, relating to the assessment years falling within the period of six assessment years referred to in sub-section (1) of section 153A were pending. If they were pending on the date of the initiation of the search under section 132 or making of requisition under section 132A, as the case may be, they abate. It is only pending proceedings that would abate and not where there are orders made of assessment or reassessment and which are in force on the date of initiation of*

the search or making of the requisition. As that specific argument was canvassed and dealt with by the Division Bench and that is how it was called upon to interpret section 153A , then, each of the above conclusions rendered by the Division Bench would bind the instant Court.

- *Even otherwise, Court is in agreement with the Division Bench when it observes as above with regard to the ambit and scope of the powers conferred under section 153A . Even if the exercise of power under section 153A is permissible still the provision cannot be read in the manner suggested by the revenue. Not only the finalised assessment cannot be touched by resorting to those provisions, but even while exercising the power can be exercised where a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A after 31-3- 2003. There is a mandate to issue notices under section 153(1)(a) and assess or reassess the total income of six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made. Thus, the crucial words 'search' and 'requisition' appear in the substantive provision and the provisos. That would throw light on the issue of applicability of the provision. It being enacted to a search or requisition that its construction would have to be accordingly. That is the conclusion reached by the Division Bench in Murli Agro (supra). These are the conclusions which can be reached and upon reading of the legal provisions in question.*

- *Therefore, the Special Bench's understanding of the legal provision is not perverse nor does it suffer from any error of law apparent on the face of the record.*

- *Further, revenue would submit that the above observations and conclusions of the Special Bench are specifically disapproved in CIT v. Anil Kumar Bhatia [2012] 24 taxmann.com 98/211 Taxman 453 (Delhi). However, this argument is not found to be accurate. Upon reading of the observations of the Delhi High Court as a whole and in entirety, it is not possible to agree with revenue that the High Court of Delhi reached a conclusion different than the view taken by the Division Bench.*

18. ITAT Delhi Bench in the case of Jakson Enterprises, ITA No.383/Del/2013, order dated 27-5-2015, held as under :-

9. Having gone through the orders of the authorities below, we find that the Learned CIT(Appeals) has rejected the contentions of the assessee on the issue of validity of assessment framed under sec. 153A read with sec. 143(3) of the Income-tax Act, 1961 in absence of incriminating material found during the course of search and in

the absence of the pendency of the assessment as on the date of search on the basis that for framing assessment under sec. 153A, no such requirement is there and the only requirement is that search has been conducted under sec. 132 of the Act.

10. Having gone through the decisions cited by the learned AR including the decision of Special Bench of the ITAT in the case of AL Cargo Global Logestic Ltd. vs. CIT (supra), we find that the ratio laid down therein, supports the contentions of the assessee on the issue. It reads as under:

> *"58. Thus, question No. 1 before us is answered as under :-*
>
> *(a) In assessments that are abated, the AO retains the original jurisdiction as well as jurisdiction conferred on him u/s 153A for which assessments shall be made for each of the six assessment year separately :*
>
> *(b) In other cases, in addition to the income that has already been assessed, the assessment u/s 153A will be made on the basis of incriminating material, which in the context of relevant provisions means (i) books of account, other documents, found in the course of search but not produced in the course of original 8 assessment, and*
>
> *(ii) undisclosed income or property discovered in the course of search."*

11. The issue raised before the Special Bench was as to whether scope of assessment u/s 153A encompasses additions not based on any incriminating material found during the course of search?

12. In the case of Kusum Gupta (supra) also the return was processed u/s 143(1) of the Act and time limit for issuance of notice u/s 143(2) had expired on the date of search and it was held that no assessment was pending in that case and thus there was no question of abatement of assessment. Therefore, the addition in the assessment u/s 153A would be made only on the basis of incriminating material found during the search. The Delhi Bench of the Tribunal in its recent decision on the issue in the case of Shri Kabul Chawla (supra) and others vide order dated 23.5.2014 has expressed the similar view. It has also discussed the decision of Hon'ble Jurisdictional Delhi High Court in the case of CIT vs. Anil Kumar Bhatia (2012) 211 Taxmann 453 (Del.), while deciding the issue. The relevant para No. 8 & 9 in this regard is being reproduced as under :-

> *"8. We are unable to accept the contention advanced on behalf of the Revenue for the reason that if both the pending and completed assessment were to be taken on same*

pedestal, then there was no need to enshrine second proviso to sec. 153A(1) providing that the pending assessments within the period of six assessment years shall abate. The Hon'ble Delhi High Court in the case of Anil Kumar Bhatia (supra) dealt with a situation in which some incriminating material was found in respect of a non-pending assessment. It was in that background that the Hon'ble High Court held that sec. 153A applies if incriminating material is found even if assessments are completed. The question as to whether any addition can be made in respect of completed assessments when no incriminating material was found, was apparently left open. However, we find that there are sufficient indirect hints given by the Hon 'ble Delhi High Court in the case of Anil Kumar Bhatia (supra) about not making of any addition in respect of an assessment year for which the assessment is already completed unless some incriminating material is found during the course of search. This can be seen from the following observations of the Hon'ble High Court :-

"20. A question may arise as to how this is sought to be achieved where an assessment order had already been passed in respect of all or any of those six assessment years, either under Section 143(1)(a) or Section 143(3) of the Act. If such an order is already in existence, having obviously been passed prior to the initiation of the search/requisition, the Assessing Officer is empowered to reopen those proceedings and reassess the total income, taking note of the undisclosed income, if any, unearthed during the search."

9. The above extracted observations of the Hon'ble High Court, which are though obiter dicta, make the point clear that where an assessment order has already been passed for a year(s) within the relevant six assessment years, then also the A.O is duty bound to reopen those proceedings and reassess the total income but by 'taking note of the undisclosed income if any, unearthed during the search'. The expression 'unearthed during the search' is quite significant to denote that in respect of completed or non-pending assessments, the Assessing Officer is albeit duty bound to assess or reassess the total income but there is a cap on the scope of additions in such assessment, being the items of income 'unearthed during the search'. In other words, the determination of 'total income' in respect of the assessment years for which the assessments are already completed on the date of search, shall not be influenced by the items of income other than those based on the material unearthed during the course of search. There is not and cannot be any quarrel over the proposition that the Assessing Officer has no option but to determine the total income of the assessee in

respect of the relevant six assessment years. However, the scope of such determination of total income is different in respect of the years for which the assessments are pending vis-a-vis the years for which assessments are non-pending. In respect to the assessment years for which the original assessments have already been completed on the date of search, the total income shall be determined by restricting additions only to those which flow from incriminating material found during the course of search. If no incriminating material is found in respect of such completed assessment, then the total income in the proceedings u/s 153A shall be computed by considering the originally determined income. If some incriminating material is found in respect of 11 such assessment years for which the assessment is not pending, then the 'total income' would be determined by considering the originally determined income plus income emanating from the incriminating material found during the course of search. In the other scenario of the assessments pending on the date of search which would abate in terms of second proviso to sec. 153A(1), the total income shall be computed afresh uninfluenced by the fact whether or not there is any incriminating material. In fact, this is the position which follows when we read the judgment of the Hon'ble Delhi High Court in Anil Kumar Bhatia (supra) in juxtaposition to the special bench order in the case of All Cargo Global Logistics Ltd. (supra). The other judgment relied by the Ld. DR in the case of Madugulu Venu (supra) also talks about the need for making fresh assessment in respect of the assessment years for which the assessments are not pending on the date of search but does not set out the scope of such assessment, which is the issue before us."

13. We, thus, find that the decision of the Hon'ble Jurisdictional Delhi High Court in the case of Anil Kr. Bhatia (supra) supports the case of the assessee that in absence of incriminating material found during the course of search an addition u/s 153A of the Act cannot be made in the assessment framed thereunder. The decisions relied upon by the ld. CIT, DR in the cases of Canara Housing Development Company vs. DCIT (supra) of Hon'ble Karnataka High Court and Filatex India P. Ltd. vs. CIT (supra) of Hon'ble Delhi High Court having distinguishable facts are not applicable in the present case. In the case of Filatex India Pvt. 12 Ltd. (supra), the question raised on the applicability of provisions u/s 153A was that "whether the Tribunal erred on facts and in law in not holding that re-computation of book profit, de-hors any material found during the course of search in the order passed u/s 153A of the Act was without jurisdiction, being outside the scope of proceedings under that section?" The other question was, "whether on the facts and circumstances of the case, the Tribunal erred in law in upholding the action of the AO in denying set off, of book loss unabsorbed

depreciation relatable to earlier assessment year in terms of clause (III) of Explanation 1 to section 115JB of the Act?" The relevant facts of that case noted in para no. 2 of the decision are that the AO in the proceedings u/s 153A of the Act, had made several additions, relying upon the incriminating material found in the course of search, which was conducted on 18.1.2006 and subsequent dates. In this paragraph of the decision it has been perused from the impugned order of the Tribunal that incriminating material including statement of Sanjay Agarwal, GM (Marketing) have resulted in additions, which have been upheld. The Hon'ble High Court has been pleased to note in this paragraph as "it is not the case of the appellant – assessee that initiation of proceedings u/s 153A was bad or unwarranted in law as no incriminating material was found during the search. The contention raised by the appellant – assessee is that the addition, which is the subject matter of questions no. (II) and (III), was/is not justified in the assessment order u/s 153, as no incriminating material was found concerning the addition u/s 115JB of the Act." The Hon'ble High Court has rejected this contention of the assessee with this finding that u/s 153A of the Act, the additions need not to be restricted or limited to the incriminating material, which was found during the course of search. Thus, it is clear from the facts of this case before the Hon'ble High Court that several additions relying upon the incriminating material found in the course of search were made by the AO in the assessment proceedings u/s 153A of the Act and addition u/s 115JB was made by the AO in absence of incriminating material concerning this addition. This addition was questioned by the assessee on the basis that there was no incriminating material found concerning the addition made in the assessment u/s 153A of the Act, which has been rejected by the Hon'ble High Court with the above finding. It was held by the Hon'ble High Court that there cannot be multiple assessments, once sec. 153A of the Act is applicable. Section 153A(1) postulates one assessment; putting the total income of six assessment years immediately preceding the assessment year relevant to the previous year in which search was conducted or requisition was made.

14. In para no. 3 of the judgment the Hon'ble Delhi High Court while discussing the cited decisions in the cases CIT vs. Chetan Das (2012), 254 CTR (Del) 292 and CIT vs. Anil Kr. Bhatia (2012), 2010-11 Taxman 453 (Del) cited by the ld. AR of the assessee appellant, has noted certain observations made and findings given by the Hon'ble Court therein. Thereafter in para no. 4 of the judgment, the Hon'ble High Court has held as under: "The first question, we notice was not raised by the appellant before the AO, CIT(A) and before the Tribunal. The appellant claims that the contention being legal can be raised at any stage. We have examined sec. 153A of the Act and find that the submission/contention has no merit".

15. When we peruse the facts of the case in the case of Filatax India Ltd. and the question raised therein it comes out that in that case admittedly during the course of search incriminating material including statements were found and resulted in additions and the addition made u/s 115JB of the Act was not based upon any incriminating material. Thus, the question raised before the Hon'ble High Court was as to whether the Tribunal has erred in law in not upholding that recomputation of book profit, de-hors any material found during the course of search in the order based u/s 153A of the Act was without jurisdiction, being outside the scope of proceedings under that section. The Hon'ble High Court after discussing the issue in detail has been pleased to decide the question against the assessee and has upheld the addition made u/s 115JB of the Act. Thus, having distinguishable facts this cited the decision in the case of Filatax India Ltd. (supra) is not helpful to the revenue.

16. So far as, the decision of Hon'ble Karnataka High Court in the case of Canara Housing Development Company (supra) relied upon by the ld. CIT DR is concerned, the issue raised before the Hon'ble High Court was regarding validity of revisional order passed u/s 263 of the Act by the ld. CIT partly upheld by the Tribunal and during that course the Hon'ble High Court has also been pleased to discuss the decision in the cases of Anil Kumar Bhatia (supra) and the decision of Special Bench of the Tribunal in the case of All Cargo Global Logistic Ltd. (supra). It has been observed by the Hon'ble High Court that the condition precedent for application of sec. 153A is that there should be a search u/s 132 and initiation of proceedings u/s 153A is not dependent on any undisclosed income being unearth during the such search. The Hon'ble Rajasthan High Court in the case of Jai Steel (supra) has been pleased to hold that if any books of accounts or other documents relevant to the assessment had not been produced in the course of original assessment and found in the course of search, such books of accounts or other documents have to be taken into consideration while assessing or re-assessing the total income under the provisions of sec. 153A of the Act. Even any undisclosed income or undisclosed property has been found after the conclusions of the search, same would also be taken into consideration. The requirement of assessment or re-assessment under the said section has to be read in the context of sections 132 or 132A of the Act, in much as, in case nothing incriminating is found on account of such search or requisition, then the question of re-assessment of the concluded assessment does not arise, which would require more reiteration and it is only in the context of the abated assessment under second proviso which is required to be assessed.

17. In the case of SSP Aviation Ltd. vs. DCIT (supra) where the validity of assessment framed u/s 153C was challenged it was held

that if the AO is satisfied that any money, bullion, Jewellery or other valuable article or thing or books of account or documents seized in the course of the search belongs to a person other than the person who was searched, then such assets or books of accounts or documents shall be handed over by him to the AO having jurisdiction over such other person. Once, that is done, the AO having jurisdiction over such other person shall proceed against him for making an assessment or reassessment of his income in accordance with the provisions of sec. 153A. The petitioner therein was not searched u/s 132 of the Act, however, some documents belonging to it were found during the search carried out in the premises of Puri Group of Companies.

18. We, thus, find that the ratio laid down by the Hon'ble Delhi High Court and Hon'ble Rajasthan High Court in the above cited and discussed decisions supports the case of the assessee that in absence of incriminating material found during the course of search no addition can be made u/s 153A of the Act where the original assessment was already framed on the date of search. The Hon'ble Karnataka High Court in the case of Canara Housing Development Company (supra) has, however, been pleased to express different view, however, as per the established proposition of law, we are bound to follow the decision of Hon'ble Jurisdictional Delhi High Court and since, the Hon'ble Karnataka High Court and the Hon'ble Rajasthan High Court have expressed different views on the issue, the view favourable to the assessee is to be followed. We, thus, reiterate that in absence of incriminating material found during the course of search no addition can be made in a case where original assessment was already framed on the date when search took place.

19. In absence of rebuttal of this material fact by the Revenue in the present case before us that no incriminating material was found during the course of search relating to the assessee for the assessment year under consideration to justify the additions made in the year by the Assessing Officer and assessment based on the original return of income filed under sec. 139 of the Act was not pending as on the date of search, we following the above cited decisions by the learned AR, discussed above, hold that the assessment framed under sec. 153A read with sec. 143(3) of the Income-tax Act, 1961 for the assessment year under consideration is not valid and the same is accordingly held as null and void. The related ground nos. 2 to 6 on the issue is thus allowed.

20. In view of the above findings, whereby the assessment itself has been held null and void, the other issues raised in other ground nos. 7 and 8 questioning the validity of the disallowance of deduction u/s 80IB on scrap sales (ground no.7) and disallowance made u/s 14A (ground no.8) have become infructuous and

academic only. These grounds thus do not require any adjudication. The same are being disposed off as such.

19. Similar view has been taken by ITAT Jodhpur in the case of Vishal Dembla, 40 taxmann.com 134, wherein it was held that where the assessee has already submitted his return prior to search which has attained finality and no incriminating document was found during the search, gifts already disclosed by the assessee in the return of income which has attained finality, could not be disturbed u/s.153A.

20. The Hon'ble jurisdictional High Court in the case of Murli Agro Products Ltd., 49 taxmann.com 172, held as under :-

Held :

The object of inserting sections 153A, 153B and 153C by Finance Act, 2003 by discarding the existing provisions relating to search cases contained in Chapter XIV B of the Act, as stated in the Memorandum explaining the provisions in the Finance Bill 2003 was that under the existing provisions relating to search cases, often disputes were raised on the question, as to whether a particular income could be treated as 'undisclosed income' or whether a particular income could be said to be relatable to the material found during the course of search, etc. which led to prolonged litigation. To overcome that difficulty, the legislature by Finance Act, 2003, decided to discard Chapter XIV B provisions and introduce sections 153A, 153B and 153C in the Act.

What section 153A contemplates is that, notwithstanding the regular provisions for assessment/reassessment contained in the Act, where search is conducted under section 132 or requisition is made under section 132A on or after 31-5-2003 in the case of any person, the Assessing Officer shall issue notice to such person requiring him to furnish return of income within the time stipulated therein, in respect of six assessment years immediately preceding the assessment year relevant to the previous year in which the search is conducted or requisition is made and thereafter assess or reassess the total income for those assessment years.

The second proviso to section 153A provides for abatement of assessment/reassessment proceedings which are pending on the date of search/requisition. Section 153A(2) provides that when the assessment made under section 153(A)(1) is annulled, the assessment or reassessment that stood abated shall stand revived.

Thus, on a plain reading of section 153A, it becomes clear that on initiation of proceedings under section 153A, it is only the assessment/reassessment proceedings that are pending on the date of conducting search under section 132 or making requisition under section 132A stand abated and not the assessment/reassessments already finalised for those assessment years covered under section 153A.

By a circular No. 8, dated 18-9-2003 the CBDT has clarified that on initiation of proceedings under section 153A, the proceedings pending in appeal, revision or rectification proceedings against finalised assessment/reassessment shall not abate. It is only because, the finalised assessments/reassessments do not abate, the appeal, revision or rectification pending against finalised assessments/reassessments would not abate.

Therefore, the argument of the revenue, that on initiation of proceedings under section 153A, the assessments/reassessments finalised for the assessments years covered under section 153A stand abated cannot be accepted. Similarly on annulment of assessment made under section 153A(1) what stands revived is the pending assessment/reassessment proceedings which stood abated as per section 153A(1). [Para 10]

In the instant case, the Assessing Officer while passing the independent assessment order under section 153A read with section 143(3) could not have disturbed the assessment/reassessment order which has attained finality, unless the materials gathered in the course of the proceedings under section 153A establish that the reliefs granted under the finalised assessment/reassessment were contrary to the facts unearthed during the course of 153A proceedings.

In the present case there was nothing on record to suggest that any material was unearthed during the search or during the 153A proceedings which would show that relief under section 80HHC was erroneous. In such a case, the Assessing Officer while passing the assessment order under section 153A read with section 143(3) could not have disturbed original assessment order relating to section 80HHC deduction and consequently the Commissioner could not have invoked jurisdiction under section 263 of the Act.

21. The ITAT Mumbai bench in the case of Jayendra P. Jhaveri, 46 taxmann.com 457 observed as under :-

Head Note :

So far as the question as to the processing of return under section 143(1) vis-à-vis assessment made under section 143(3) is concerned, it may further be observed that after processing of return under section 143(1) the same can be assessed under section 143(3) by issue of notice under section 143(2) subject to its issuance within the limitation period of 12 months from the end of the month in which return is furnished as per the proviso to clause (ii) of section 143(2) [as was existing at the time of relevant assessment year]. Once the limitation period as prescribed vide proviso to clause (ii) of sub-section (2) of section 143 is expired, it is not open to the Assessing Officer to assess the income under section 143(3) and the return filed by the assessee under section 139 is deemed to be accepted, which however, can be re-opened under section 147 subject to the fulfilment of ingredients of section 147 and within the time period as prescribed under section 149. So under such circumstances if the return is processed under section 143(1) and not under section 143(3) after the prescribed period of limitation, the same cannot be assessed under section 143(3) though it may be interpreted as mere intimation assessment or otherwise, but the same shall be deemed to be accepted by the Assessing Officer and it will not have any different colour other than the return which is processed under section 143(3).

Admittedly, in the case in hand, the return was processed under section 143(1) but the same has attained finality due to the expiry of limitation period of twelve months from the end of the month in which the return was filed. Hence, the assessment is deemed to be completed and not pending on the date of search on 14-8-2008. Admittedly, no incriminating material was found from the premises of the assessee during the search under section 132.

Once assessment under section 143(3) had been annulled by higher authorities on the ground of legality of notice under section 143(2), re-opening under section 147 on that very ground would mean nothing else but abuse of process of law. Hence, the contention of the revenue that as the return was processed under section 143(1), it was a mere intimation and the Assessing Officer had reason to believe that income had escaped assessment and it was open to the Assessing Officer to re-assess the income under section 153A, even without any incriminating material found during the search action, is not tenable.

The next argument of the revenue has been that since in the case in hand, no books of account were found during the search action that itself is the incriminating material against the assessee, has no force of law. Though the revenue may not be satisfied with the explanation of the assessee that the books of account were lost in flood, still the assessment or addition cannot be made on this ground. Such an inference of concealment of income cannot be made just on mere assumptions, presumptions or suspicion.

> *The next limb of argument of the revenue, while relying upon the authority of Supreme Court has been that the Court should not place reliance on the decisions without discussing as to how the factual situation fits to the factual situation of the decision on which reliance is placed. His contention is that one additional or different fact may make a world of difference between conclusions in two cases. There is no doubt about the above said proposition of law laid down by the Supreme Court. The Court must observe the facts and circumstances of the case under which a certain proposition of law is laid down by the Supreme Court and then to compare the same with the facts and circumstances of the case under adjudication before it. However, this proposition of law, put by the revenue, is of no help to the revenue but to the assessee only.*
>
> *In view of above, it is accordingly held that the reassessments made by Assessing Officer under section 153A, without any incriminating material being found during the search action are not in accordance with law and consequential result is that the return/original assessments which have acquired finality are to be reiterated.*

22. Similar view has been taken by ITAT Jodhpur Bench in the case of IOC Builders and Developers, 50 taxmann.com 396, Pune Tribunal in the case of SRJ Peety Steels (P) Ltd., 20 taxmann.com 101, Mumbai Tribunal in the case of Nikki Agarwal, ITA No.879/Mum/2011, order dated 22-1-2014, Mumbai Tribunal in the case of Shri Parag M. Sanghvi, ITA No.8027/Mum/2010, order dated 30-9-2015, Jaipur Tribunal in the case of M/s Jadau Jewellers & Manufacturers Pvt. Ltd., ITA No.686/JP/2014, order dated 14-12-2015, ITAT Delhi Bench in the case of M/s Rakam Money Matters Pvt. Ltd., ITA No.2821/Del/2011, order dated 10-16-2014.

23. In view of the above, we do not find any merit in the addition so made u/s. 143(3) r/w s. 153A of the Act in respect of completed assessments. As the addition itself has no legs to stand, we are not going

to the merit of the addition so made by the A.O. and partly deleted by the CIT(A).

Govind Agrawal

24. From the record we found that in respect of assessment year 2003-04 assessee has originally filed return of income on 28-11-2003, for the assessment year 2005-06 return was filed on 30-10-2005 and for the assessment year 2006-07 return was filed on 27-10-2006. In all these three years time period for issue of notice u/s.143(2) has already expired much prior to the date of search, which is 3rd January, 2008. It is also a matter of record as well as finding given by the Tribunal in respect of other family members of the present assessee to the effect that no incriminating material was found during the course of search. Following the judicial pronouncements discussed hereinabove as well decision of Tribunal in assessee's own case as well as other family members covered by the same search, we do not find any merit for the addition made by the AO u/s.143 r.w.s.153A of the I.T.Act in the A.Y. 2003-04, 2005-06 and 2006-07.

25. For the assessment year 2007-08, we found that return of income was filed on 31-10-2007 and the time limit of issue of notice was pending as on the date of search, accordingly the ground raised by assessee for not making any addition while framing assessment u/s.143(3) r.w.s.153A has no legs to stand, accordingly the same is dismissed.

26.1 Without prejudice to the legal ground raised by assessee for making addition u/s.153A in the absence of incriminating material, ld. AR& DR also argued the merit of the addition so made.

In this case addition so made by the AO u/s.69 of the Act in the A.Y. 2007-08, on account of unexplained investment in acquiring shares of M/s G.K.Fincorp and M/s J.N.Fiscal Services Pvt. Ltd. at lower price, were deleted by CIT(A) after having the following observations :-

> *"I have considered the facts of the case and the seized documents carefully, the arguments of both the sides were also considered. It is observed that during the course of search certain papers were found and seized which shows that the assessee has purchased the shares of three unlisted companies supra at a lower value than the fair market valuation. , However, no incriminating documents was seized which shows that the appellant and the family members has paid any amount over and above which is shown on these loose papers and in the books of accounts of the assessee. The statement recorded u/s. 132(4) of the assessee and the family members, it was stated that no payment was made other than the value of these shares shown in the books of accounts, The assessee has adopted profit earning/yield capitalization method in the valuation of these shares. On the other hand, the AO has adopted the NAV method for valuation' of shares and accordingly the difference computed was treated as unexplained investment u/s. 69 of the Income tax Act. In view of these facts, it is clear that there is no dispute that no incriminating document was found and seized during the course of search which proves that the assessee has paid more than the price entered in the books of accounts. The addition was made only on the basis of method rejected which was applied by the appellant i.e. profit earning and yield capitalization method and adopted the NAV method by the AO. Now question arises whether section 69 of the Income tax Act is applicable to the facts of these cases,' for better understanding provisions of section 69 is reproduced as under:*
>
> *"Where in the financial year immediately preceding the assessment year the assessee has made investments which are not recorded in-the books of account, if any, maintained by him for any source of income, and the assessee offers' no explanation about the nature and source of the investments or the explanation offered by him is not, in the opinion of the [Assessing] Officer, satisfactory, the value*

of the investments may be deemed to be the income of the assessee of such financial year."

On plain reading of the provision, it is clear that two conditions given in this section are to be satisfied cumulatively i.e. the assessee should have made investment which are not recorded in the books of accounts and the assessee offers either no explanation about the nature arid source of investment or explanation offered is not satisfactory in the opinion of the AO. 'In the present case, the assessee has made investment, in the purchase of shares and recorded in the books of accounts. No documentary evidence was found and seized to prove that the assessee has made investment over and above what is reflected in the books of accounts. In section 68 of the Income tax Act, the responsibility is on the assessee to prove the onus of credit entries in the books of accounts, however, u/s. 69 the onus shifts to the revenue to prove that the assessee has made unaccounted investment on the basis of any documentary evidence. To strengthen this view, the appellant has relied on the decision of the Hon'ble Delhi High Court in case of CIT vs. Naveen Gera 328 ITR 516, where it is held that in absence of incriminating material actual consideration as per agreement is to be accepted. In case of CIT vs. Smt. Suraj Devi 328 ITR 604, Hon'ble High Court has held that primary burden to prove under statement or concealment of income is on the revenue. Hon'ble Mumbai Tribunal in case of DCIT vs Rajgir Builders 70 ITD 226 has held where investments made was fully supported by entries in books of accounts and there being no evidence to show any undisclosed investment addition made on estimated basis is not justifiable. In view of the facts of the case and the judicial decisions of Hon'ble Courts it is held that no incriminating documents were found and seized which prove that the assessee as made any other payment over and above except the amount shown in the books of accounts. No addition can be made u/s. 69 of Income tax Act. Secondly, the method of valuation of shares adopted by the appellant i.e profit earning/yield capitalisation methods and the method by the AO i.e. NAV method; both are recognised but depends an the facts of the case a which particular method can be applied.' Further it is also well established fact and law that no addition can be made and the basis of computation method until and unless it is proved that any unexplained investment made by the assessee. It is also noticed that the facts of the present case are squarely covered by the decision of Hon'ble Mumbai Tribunal in case of Rupee Finance and Management Pvt. Ltd. vs. ACIT 119 TT J 643 supra has relied upon by the assessee where it is held as under:

"The undisputed facts in this case are that the assessee company has purchased certain shares at a price which is below the market value. There is no dispute of the fact that the price paid for the shares by the assessee company were the cost incurred by the

purchaser. It is also not disputed that, all these investments were recorded in the books of accounts. Under section 69 such value of the investment may be deemed to be the income of the assessee for the Financial Year, if they are not recorded in the books of accounts. Thus, Sec. 69 is not applicable in this case. The first appellate authority possibly realizing this difficulty has chosen to invoke Sec.28(4) and not to give a decisive finding as to whether Sec.69 is applicable or nol. It is not the case of the revenue that the assessee company has paid a certain amount in excess of what is recorded in the books of account for the purchase of the shares. There is not even an allegation, much less any evidence, that the apparent consideration is not the real consideration. The only grouse the revenue authority have is that the assessee company has purchased the shares at a price which is much lesser than the market price which. This, as already stated is not a disputed fact. Thus, on these facts, no addition is sustainable under section 69."

In totality of the facts and circumstances, it is held that the shares were purchased by the assessee and family members at lower price than the fair market value. The same price was entered in the books of accounts and no document even in the search was found and seized to prove that any further payment was made over and above the payment shown in the books of accounts. Merely on the basis of the method of accounting addition cannot be made unless and until it is proved that unexplained investment was made based on some documentary evidence, moreover, the provision of section 56(viia) was inserted by the Finance Act, 2010 w.e.f. 01.06.2010. Therefore, no. addition can be made under this section because it is not applicable from retrospective effect. Thus the addition made by the AO of Rs. Rs. 1,15,37,050/- for AY 2006-07 and Rs.1,72,36,462/- for A.Y.2007-08 u/s 69 of the Income tax Act is deleted. Hence, the ground of appeal is allowed.

27. We have considered rival contentions and found that a categorical finding has been recorded by CIT(A) to the effect that assessee had purchased shares at a lower price than the fair market value. It was also found that assessee had not made any payment over and above the payment shown the books of accounts. The finding so recorded by CIT(A) are as material on record, therefore do not require any interference on our part. Furthermore, the findings recorded by CIT(A) have not been

controverted by ld. DR by brining any positive material on record. We also found that issue under consideration is covered by the decision of the Tribunal in case of other family members of the assessee i.e. Deepak Agarwal (son of the assessee) by the order of Tribunal for assessment year 2006-07 & 2007-08 dated 10-4-2014. Accordingly, keeping in view the finding of CIT(A) vis-à-vis order of the Tribunal in the case of other family member of assessee on similar facts, we do not find any reason to interfere in the findings so recorded by CIT(A) for deleting the disallowance.

Govind Agarwal(HUF)

28. In this case, return for assessment year 2003-04 was filed on 28-11-2003, for assessment year 2004-05 on 12-8-2004 and for assessment year 2006-07 on 30-10-2006. In all the three years time period for issue of notice u/s.143(2) have already been expired much before the date of search which is 3rd January, 2008. Accordingly, there is no merit for making addition u/s.143 r.w.s.153A when no incriminating material was found during the course of search as per the finding recorded by the Tribunal in assessee's own case as well as in the other family members of the assessee as discussed above.

However, in the assessment year 2007-08 return of income was filed on July, 2007, accordingly time period for issue of notice u/s.143(2) was not expired, we, therefore, dismiss the ground raised by the

assessee for making addition u/s.153A for not finding any incriminating material.

29. Without prejudice to the legal ground, Ld. A.R. and Ld. D.R. have also argued the merit of additions so made and deleted by Ld. CIT(A). In the assessment year 2003-04 addition was made by AO in respect of sale of shares of Data Base Finance Ltd. amounting to Rs.96,36,795/- and also one account of unexplained expenditure incurred thereon amounting to Rs.4,81,840/-. By the impugned order, Ld. CIT(A) after giving detailed finding at page 11 and 12 of his appellate order deleted the addition so made. Against the order of Ld. CIT(A) Revenue is in further appeal before us.

30. We have considered rival contention and found that addition has been made by the AO on the basis of letter issued by BSE in which it was restricted that these shares were not routed through stock exchange. Accordingly, the AO treated the transaction as bogus. The Ld. CIT(A) has relied on the decision of Jodhpur Bench of Tribunal in case of Chandresh Kumar Maheshwari 120 TTJ 132 Jdh where it is held as under:

> "It was seen from records that the Assessing Officer had come to the conclusion that the amount of Rs. 66.90 lakhs found credited in the bank account of the assessee was unexplained credit simply on the ground that the assessee was not able to produce the broker before him for examination and basing on the statement of the assessee recorded under section 131, and the purchase price was paid by the assessee in eight installments spreading over a period of two months, but the assessee had produced the share certificate issued by 'C' for acquisition of 3,50,000 equity shares. Subsequently, those shares were sold by the assessee for

consideration of Rs. 70.40 lakhs through a stock broker 'R' and thereby earned long term capital gains of Rs. 66.90 lakhs. The 'C' was a public limited company where public were substantially interested. It s shares were listed in the Ahmedabad Stock Exchange. The said company was regularly filing statutory return as required under the Companies Act, 1956. If the Assessing Officer really doubted the genuineness of transaction, he ought to have obtained the list of shareholders coupled with the holding of the said shareholders together with the share certificate numbers and folio numbers of the shares held by each shareholder. This was cogent evidence, which went to the root of the matter to find as to the genuineness of the purchase and sale of shares by the assessee, but this was not done by the Assessing Officer though he had abundant powers under section 131. The Assessing Officer had also not written to the stock exchange of Ahmedabad as to the trading of those shares by the said broker in the stock exchange. In the absence of all these material facts, it could never be said that the transactions of purchase and sale conducted by the assessee through broker were not genuine. Therefore, it was opined that under the facts and circumstances of the case, the AOP was not able to make out any material except for presumptions and assumptions to come to the conclusion that the purchase and sale of shares claimed by the assessee were not genuine. More so, in the presence of letter communicated by the broker giving the details of shares purchased and sold on behalf of the assessee, mentioning therein the commission charged by him as well as proceeds available with him for purchase of shares as well as realisation of sale proceeds and crediting the same to the bank account of the assessee. Hence, the impugned order of the Commissioner(Appeals0 deleting the additions made by the Assessing Officer did not required any interference. As a result appeal filed by the Department was to be dismissed."

31. The Ld. CIT(A), after relying on the decision of Jodhpur Bench, observed that facts and circumstances of the present case are identical to this decision. The Ld. CIT(A) further held that AO has erred in relying on the letter of BSE by not interpreting the true meaning of this letter by holding that all transactions of sale/purchase of shares should be routed through stock exchange. However, the Ld. CIT(A) observed that in this letter it is clearly written that before 01.03.2004 it was not mandatory that

all transactions should be routed through stock exchange. In the totality of facts, it was held that the Assessee has made off market transactions and statements regarding u/s.132(4) was not corroborative with any documentary evidence found and seized during the course of search and post search inquires made by the Assessing Officer, therefore, the addition made on this account is not sustainable hence deleted.

32. The issue under consideration is squarely covered by the decision of the Jodhpur Bench as narrated above. Accordingly, we do not find any reason to interfere in the finding so recorded by the Ld. CIT(A) resulting into deletion of addition on account of sale of shares of Data Base Finance Ltd. As the addition on account of Data Base Finance Ltd. is deleted the addition of Rs.4,81,840/- on account of unexplained expenses relating to these shares were also deleted by Ld. CIT(A). We do not find any infirmity in the order of Ld. CIT(A) in so far as sale of Data Base Finance Ltd. was found to be genuine.

33. In the assessment year 2004-05, Revenue is aggrieved for deleting disallowance of Rs.3,978/- under section 14A. He found that Ld. CIT(A) has restored the matter back to the file of AO for determining expenditure incurred on earning exempt income after verification of records. We do not find any infirmity in the order of Ld. CIT(A).

34. Similarly, in the assessment year 2007-08 assessee is aggrieved for upholding addition of Rs.42,736/- under section 14A. This ground was

not pressed by Ld. A.R. The same is therefore dismissed illumine as not pressed.

35. In the assessment year 2006-07 assessee is aggrieved for disallowance under section 14A amounting to Rs.8,44,470/-. We find that Ld. CIT(A) has restored the matter back to the file of AO after having detailed finding at para 4.3 which has not been controverted. We do not find any reason to interfere in the order of Ld. CIT(A) for restoring the matter back to the file of AO for recomputing disallowance under section 14A.

Manidevi Agarwal

36. In this case, return of income for the assessment year 2002-03 was filed on 28-10-2002, for the assessment year 2003-04 on 28-11-2003 and for assessment year 2005-06 on 29-8-2005. In all the three assessment years time limit for issue of notice u/s.143(2) has already been expired much before date of search on 3-1-2008. Accordingly, there is no merit for the addition made u/s.143(3) r.w.s.153A for want of incriminating material having been found during the course of search.

However, in the assessment year 2006-07 and 2007-08, time limit for issue of notice u/s.143(2) was there, therefore, ground taken by the assessee for not making any addition u/s.143(3) r.w.s.153A does not survive, thus the legal ground so taken by the assessee in both these years are hereby dismissed.

37. Without prejudice to the legal ground so raised by the assessee for not making addition in the absence of incriminating material, ld. AR had also argued the merit of addition made u/s.69 of I.T.Act.

37.1 In this case addition made u/s.69 of the IT Act on account of unexplained investment in M/s Dunston Goods Pvt. Ltd. amounting to Rs.1,10,61,750/- in the A.Y. 2006-07 has been deleted by the CIT(A) after having the following observations :-

> *"I have considered the facts of the case and the seized documents carefully, the arguments of both the sides were also considered. It is observed that during the course of search certain papers were found and seized which shows that the assessee has purchased the shares of three unlisted companies supra at a lower value than the fair market valuation. , However, no incriminating documents was seized which shows that the appellant and the family members has paid any amount over and above which is shown on these loose papers and in the books of accounts of the assessee. The statement recorded u/s. 132(4) of the assessee and the family members, it was stated that no payment was made other than the value of these shares shown in the books of accounts, The assessee has adopted profit earning/yield capitalization method in the valuation of these shares. On the other hand, the AO has adopted the NAV method for valuation' of shares and accordingly the difference computed was treated as unexplained investment u/s. 69 of the Income tax Act. In view of these facts, it is clear that there is no dispute that no incriminating document was found and seized during the course of search which proves that the assessee has paid more than the price entered in the books of accounts. The addition was made only on the basis of method rejected which was applied by the appellant i.e. profit earning and yield capitalization method and adopted the NAV method by the AO. Now question arises whether section 69 of the Income tax Act is applicable to the facts of these cases,' for better understanding provisions of section 69 is reproduced as under:*
>
> > *"Where in the financial year immediately preceding the assessment year the assessee has made investments which are not recorded in-the books of account, if any, maintained by him for any source of income, and the assessee offers' no*

> *explanation about the nature and source of the investments or the explanation offered by him is not, in the opinion of the [Assessing] Officer, satisfactory, the value of the investments may be deemed to be the income of the assessee of such financial year."*

On plain reading of the provision, it is clear that two conditions given in this section are to be satisfied cumulatively i.e. the assessee should have made investment which are not recorded in the books of accounts and the assessee offers either no explanation about the nature arid source of investment or explanation offered is not satisfactory in the opinion of the AO. 'In the present case, the assessee has made investment, in the purchase of shares and recorded in the books of accounts. No documentary evidence was found and seized to prove that the assessee has made investment over and above what is reflected in the books of accounts. In section 68 of the Income tax Act, the responsibility is on the assessee to prove the onus of credit entries in the books of accounts, however, u/s. 69 the onus shifts to the revenue to prove that the assessee has made unaccounted investment on the basis of any documentary evidence. To strengthen this view, the appellant has relied on the decision of the Hon'ble Delhi High Court in case of CIT vs. Naveen Gera 328 ITR 516, where it is held that in absence of incriminating material actual consideration as per agreement is to be accepted. In case of CIT vs. Smt. Suraj Devi 328 ITR 604, Hon'ble High Court has held that primary burden to prove under statement or concealment of income is on the revenue. Hon'ble Mumbai Tribunal in case of DCIT vs Rajgir Builders 70 ITD 226 has held where investments made was fully supported by entries in books of accounts and there being no evidence to show any undisclosed investment addition made on estimated basis is not justifiable. In view of the facts of the case and the judicial decisions of Hon'ble Courts it is held that no incriminating documents were found and seized which prove that the assessee as made any other payment over and above except the amount shown in the books of accounts. No addition can be made u/s. 69 of Income tax Act. Secondly, the method of valuation of shares adopted by the appellant i.e profit earning/yield capitalisation methods and the method by the AO i.e. NAV method; both are recognised but depends an the facts of the case a which particular method can be applied.' Further it is also well established fact and law that no addition can be made and the basis of computation method until and unless it is proved that any unexplained investment made by the assessee. It is also noticed that the facts of the present case are squarely covered by the decision of Hon'ble Mumbai Tribunal in case of Rupee Finance and Management Pvt. Ltd. vs. ACIT 119 TT J 643 supra has relied upon by the assessee where it is held as under:

> *"The undisputed facts in this case are that the assessee company has purchased certain shares at a price which is below the market value. There is no dispute of the fact that the price paid for the shares by the assessee company were the cost incurred by the purchaser. It is also not disputed that, all these investments were recorded in the books of accounts. Under section 69 such value of the investment may be deemed to be the income of the assessee for the Financial Year, if they are not recorded in the books of accounts. Thus, Sec. 69 is not applicable in this case. The first appellate authority possibly realizing this difficulty has chosen to invoke Sec.28(4) and not to give a decisive finding as to whether Sec.69 is applicable or nol. It is not the case of the revenue that the assessee company has paid a certain amount in excess of what is recorded in the books of account for the purchase of the shares. There is not even an allegation, much less any evidence, that the apparent consideration is not the real consideration. The only grouse the revenue authority have is that the assessee company has purchased the shares at a price which is much lesser than the market price which. This, as already stated is not a disputed fact. Thus, on these facts, no addition is sustainable under section 69."*
>
> *In totality of the facts and circumstances, it is held that the shares were purchased by the assessee and family members at lower price than the fair market value. The same price was entered in the books of accounts and no document even in the search was found and seized to prove that any further payment was made over and above the payment shown in the books of accounts. Merely on the basis of the method of accounting addition cannot be made unless and until it is proved that unexplained investment was made based on some documentary evidence, moreover, the provision of section 56(viia) was inserted by the Finance Act, 2010 w.e.f. 01.06.2010. Therefore, no. addition can be made under this section because it is not applicable from retrospective effect. Thus the addition made by the AO of Rs.1,10,61,750/- for A.Y.2006-07 in dunston Goods Pvt. Ltd. and Rs.81,48,000/- in G.K.Fincap Ltd. and J.N. Fiscal Services Pvt. Ltd. for A.Y.2007-08 u/s.69 of the Income Tax Act is deleted. Hence, the ground of appeal is allowed.*

38. We found that the issue is also covered by the order of the Tribunal in case of son of the assessee i.e. Deepak Agarwal vide order dted 10-4-2014. We also found that the finding recorded by CIT(A) has not been

controverted by ld. DR. Following the reasoning given in para 29 we do not find any reason to interfere in the order of CIT(A).

38.1 Similar addition has been made by the AO in respect of shares of Data Base Finance Ltd. amounting to Rs.98,84,675/- in the assessment year 2003-04 which was deleted by Ld. CIT(A) after having detailed observation at page 7 para 4.4.

38.2. We have considered the rival contention and found that after giving detailed reasoning at para 4.4 of his appellate order the Ld. CIT(A) has deleted the addition so made. Finding so recorded by Ld. CIT(A) has not been controverted by bringing any positive material on record, accordingly we do not find any reason to interfere in the findings recorded by the Ld. CIT(A) resulting into deletion of addition made on account of sale of shares of Data Base Finance Ltd.

38.3 The Ld. CIT(A) has also deleted the addition made on account of unexplained expenditure incurred by assessee for arranging bogus long term capital gain amounting to Rs.4,94,234/- in the assessment year 2003-04. The Ld. CIT(A) has delete the same after recording detailed findings at page 7 para 4.4. In view of our observation hereinabove, while dealing with addition on account of sale of shares of Data Base Finance Ltd., we do not find any reason to interfere in the order of Ld. CIT(A). The detailed finding of CIT(A) so recorded by Ld. D.R. has not been controverted by the Ld. CIT(A) by bringing any positive material on record.

Furthermore, the findings are as per the material on record. We therefore do not find any reason to interfere in the same.

38.4 Disallowance made under section 14A on exempt income was restored by Ld. CIT(A) in the assessment year 2005-06 after having a detailed observation and finding at para 6.3 of his appellate order which has not been controverted. Accordingly, we do not find any reason to interfere in the findings so recorded by Ld. CIT(A) restoring the matter back to the file of AO to recomputed the disallowance on reasonable basis after apportionment of expenses.

38.5 In the assessment year 2007-08, disallowance under section 14A was restored by the Ld. CIT(A) to the file of AO for deciding as per binding decision of Hon'ble Bombay High Court. As the matter has been restored back to the file of AO there is no infirmity in the order of Ld. CIT(A).

38.6 In the assessment year 2008-09 assessee is aggrieved for disallowance of Rs.5,36,490/- under section 14A of the Income Tax Act. It was the contention of Ld. A.R. that assessee has not incurred any expenditure for earning of exempt income and moreover assessee was having sufficient funds interest free which has been invested for acquiring the shares. Therefore, no disallowance under section 14A is warranted. In the interest of justice, we restore this matter back to the file of AO for deciding afresh after considering factual position regarding incurring of any expenditure vis-à-vis availability of interest free funds with the assessee. We direct accordingly.

Nikki Agarwal (ITA No.4547/Mum/2011) (AY : 2008-09)

39. In this case the addition made in the assessment year 2008-09 u/s.69 on account of unexplained investment in M/s Dunston Goods Pvt. Ltd. amounting to Rs.3,78,75,000/- has been deleted by CIT(A) after having the following observation :-

> *"I have considered the facts of the case and the seized documents carefully, the arguments of both the sides were also considered. It is observed that during the course of search certain papers were found and seized which shows that the assessee has purchased the shares of three unlisted companies supra at a lower value than the fair market valuation. , However, no incriminating documents was seized which shows that the appellant and the family members has paid any amount over and above which is shown on these loose papers and in the books of accounts of the assessee. The statement recorded u/s. 132(4) of the assessee and the family members, it was stated that no payment was made other than the value of these shares shown in the books of accounts, The assessee has adopted profit earning/yield capitalization method in the valuation of these shares. On the other hand, the AO has adopted the NAV method for valuation' of shares and accordingly the difference computed was treated as unexplained investment u/s. 69 of the Income tax Act. In view of these facts, it is clear that there is no dispute that no incriminating document was found and seized during the course of search which proves that the assessee has paid more than the price entered in the books of accounts. The addition was made only on the basis of method rejected which was applied by the appellant i.e. profit earning and yield capitalization method and adopted the NAV method by the AO. Now question arises whether section 69 of the Income tax Act is applicable to the facts of these cases,' for better understanding provisions of section 69 is reproduced as under:*
>
> > *"Where in the financial year immediately preceding the assessment year the assessee has made investments which are not recorded in-the books of account, if any, maintained by him for any source of income, and the assessee offers' no explanation about the nature and source of the investments or the explanation offered by him is not, in the opinion of the [Assessing] Officer, satisfactory, the value of the investments may be deemed to be the income of the assessee of such financial year."*

On plain reading of the provision, it is clear that two conditions given in this section are to be satisfied cumulatively i.e. the assessee should have made investment which are not recorded in the books of accounts and the assessee offers either no explanation about the nature arid source of investment or explanation offered is not satisfactory in the opinion of the AO. 'In the present case, the assessee has made investment, in the purchase of shares and recorded in the books of accounts. No documentary evidence was found and seized to prove that the assessee has made investment over and above what is reflected in the books of accounts. In section 68 of the Income tax Act, the responsibility is on the assessee to prove the onus of credit entries in the books of accounts, however, u/s. 69 the onus shifts to the revenue to prove that the assessee has made unaccounted investment on the basis of any documentary evidence. To strengthen this view, the appellant has relied on the decision of the Hon'ble Delhi High Court in case of CIT vs. Naveen Gera 328 ITR 516, where it is held that in absence of incriminating material actual consideration as per agreement is to be accepted. In case of CIT vs. Smt. Suraj Devi 328 ITR 604, Hon'ble High Court has held that primary burden to prove under statement or concealment of income is on the revenue. Hon'ble Mumbai Tribunal in case of DCIT vs Rajgir Builders 70 ITD 226 has held where investments made was fully supported by entries in books of accounts and there being no evidence to show any undisclosed investment addition made on estimated basis is not justifiable. In view of the facts of the case and the judicial decisions of Hon'ble Courts it is held that no incriminating documents were found and seized which prove that the assessee as made any other payment over and above except the amount shown in the books of accounts. No addition can be made u/s. 69 of Income tax Act. Secondly, the method of valuation of shares adopted by the appellant i.e profit earning/yield capitalisation methods and the method by the AO i.e. NAV method; both are recognised but depends an the facts of the case a which particular method can be applied.' Further it is also well established fact and law that no addition can be made and the basis of computation method until and unless it is proved that any unexplained investment made by the assessee. It is also noticed that the facts of the present case are squarely covered by the decision of Hon'ble Mumbai Tribunal in case of Rupee Finance and Management Pvt. Ltd. vs. ACIT 119 TT J 643 supra has relied upon by the assessee where it is held as under:

> *"The undisputed facts in this case are that the assessee company has purchased certain shares at a price which is below the market value. There is no dispute of the fact that the price paid for the shares by the assessee company were the cost incurred by the purchaser. It is also not disputed that, all these investments were recorded in the books of accounts. Under section 69 such value of the investment*

may be deemed to be the income of the assessee for the Financial Year, if they are not recorded in the books of accounts. Thus, Sec. 69 is not applicable in this case. The first appellate authority possibly realizing this difficulty has chosen to invoke Sec.28(4) and not to give a decisive finding as to whether Sec.69 is applicable or nol. It is not the case of the revenue that the assessee company has paid a certain amount in excess of what is recorded in the books of account for the purchase of the shares. There is not even an allegation, much less any evidence, that the apparent consideration is not the real consideration. The only grouse the revenue authority have is that the assessee company has purchased the shares at a price which is much lesser than the market price which. This, as already stated is not a disputed fact. Thus, on these facts, no addition is sustainable under section 69."

In totality of the facts and circumstances, it is held that the shares were purchased by the assessee and family members at lower price than the fair market value. The same price was entered in the books of accounts and no document even in the search was found and seized to prove that any further payment was made over and above the payment shown in the books of accounts. Merely on the basis of the method of accounting addition cannot be made unless and until it is proved that unexplained investment was made based on some documentary evidence, moreover, the provision of section 56(viia) was inserted by the Finance Act, 2010 w.e.f. 01.06.2010. Therefore, no. addition can be made under this section because it is not applicable from retrospective effect. Thus the addition made by the AO of Rs. Rs.3,78,75,000/- u/s 69 of the Income tax Act is deleted. Hence, the ground of appeal is allowed.

40. We have considered rival contentions. The findings recorded by the CIT(A) have not been controverted by ld. DR by brining any positive material on record. Moreover issue is also covered by the order of ITAT in the case of Deepak Agarwal for the assessment year 2006-07 & 2007-08, order dated 10-4-2014. Respectfully following the order of the Tribunal, in the case of family members of the assessee vis-à-vis the findings recorded by CIT(A), we do not find any reason to interfere in the order of

CIT(A) deleting the addition made u/s.69 of the Act in respect of investment in M/s Dunston Goods Pvt. Ltd..

ITA No.957/Mum/2013(Nikki Agarwal)

41. Similar addition so made by the AO, has been deleted by the CIT(A) after having the following observations :-

> *5.1 As regards the addition of Rs.3,78,75,000/- (ground No.1), it is clear that the said addition has been made for no reason other than the fact that the same addition was made by the AO in the order u/s.143(3) r.w,s. 153.A dated 31.12.2009. It is also admitted by the Assessing Officer in para 1 of the assessment order that the said addition made was deleted by ld. CIT(A)-41, Mumbai vide order in appeal No. ACCC.32/IT-468/09-10 dated 25.03.2011. Once the addition originally made has been deleted by the ld. CIT(A) and the same has not been overruled by a higher Appellate Authority, no addition could have been made by the Assessing Officer in the fresh assessment proceedings u/s: 143(3) r.w.s. 153A for the only reason that the same addition was made in the original assessment order u/s 143(3) r.w.s. 153A dated 31.12.2009. Since the said addition stands deleted by ld. CIT(A), the addition made in the assessment order which is subject matter of the present appeal cannot be sustained. The same is, therefore, directed to be deleted. Ground No.1 filed by the assessee is' allowed"*

42. We have considered rival contentions. The CIT(A) had deleted the addition on the plea that same addition made by AO vide order dated 31-12-2009 had been deleted by CIT(A) vide order dated 25-3-2011.The findings so recorded by CIT(A) have not been controverted by ld. DR. It was also brought to our notice the issue is covered by the order of Tribunal in the case of one of the family member of the assessee for the assessment year 2006-07 & 2007-08. As we have already upheld the order of CIT(A) on the same issue hereinabove, we do not find any reason to interfere in the order of CIT(A).

43. During the course of hearing before us the Ld. D.R. has raised an additional ground that as per section 2(24)(iv) the income on account of purchase of shares by Govind Agarwal, Manidevi Agarwal and Nikki Agarwal below its value should be taxed.

44. We have considered the rival contentions. As per our considered view, provisions of section 2(24)(iv) applies to director or person, having substantial interest in company, if such person receives some benefit or perquisite from the company. From the record we found that the assessee has purchased shares from open market and these shares are not issued/allotted by the company. No benefit or perquisite is obtained by assessee from the company hence section 2(24)(iv) is not applicable in the present case.

45. In view of the above discussion, we do not find any merit in the additional ground so raised by the Ld. D.R. in respect of all the three assessees under consideration.

46. In the result, the appeals of the assessee's are allowed in part, in terms indicated hereinabove, whereas the Revenue's appeals are dismissed.

Order pronounced in the open court on this 30 /06/2016.

Sd/-	**Sd/-**
(SANJAY GARG)	**(R.C.SHARMA)**
न्यायिक सदस्य / JUDICIAL MEMBER	**लेखा सदस्य / ACCOUNTANT MEMBER**

मुंबई Mumbai; दिनांक Dated :30 / 06/2016

प्र.कु.मि/pkm, नि.स/ PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A), Mumbai.
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार
(Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / **ITAT, Mumbai**