

आयकर अपीलीय अधिकरण "D" न्यायपीठ मुंबई में।

**IN THE INCOME TAX APPELLATE TRIBUNAL "D" BENCH, MUMBAI
BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER AND SHRI
RAMIT KOCHAR, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No. 3192/Mum/2014
(निर्धारण वर्ष / Assessment Year : 2005-06)
आयकर अपील सं./I.T.A. No. 3193/Mum/2014
(निर्धारण वर्ष / Assessment Year : 2006-07)
आयकर अपील सं./I.T.A. No. 3194/Mum/2014
(निर्धारण वर्ष / Assessment Year : 2007-08)
आयकर अपील सं./I.T.A. No. 3195/Mum/2014
(निर्धारण वर्ष / Assessment Year : 2008-09)
आयकर अपील सं./I.T.A. No. 3196/Mum/2014
(निर्धारण वर्ष / Assessment Year : 2009-10)

Dy. Commissioner of Income Tax – Central Circle – 23, R. No. 409, 4 th floor, Aayakar Bhavan, M.K. Road, Churchgate, Mumbai – 400 020.	बनाम/ v.	Shri Rasesh B. Kanakia, 5 th Floor,349,Business Point, Western Express Highway, Andheri(E) Mumbai – 400 057.
स्थायी लेखा सं./PAN :AABPK3454F		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

Revenue by	Shri A.K.Srivastava – CIT DR
Assessee by :	Shri Vijay Mehta,

सुनवाई की तारीख /**Date of Hearing** : 10-02-2016
घोषणा की तारीख /**Date of Pronouncement** : 10-02-2016

आदेश / ORDER

PER BENCH:

These five appeals by the Revenue are directed against five separate orders of the learned Commissioner of Income Tax (Appeals)- 40 , Mumbai (Hereinafter called “the CIT(A)”) all dated 18-2-2014 pertaining to the assessment years 2005-06 to 2009-10. Since similar grounds of appeal are raised in all these five appeals, we have disposed of all these five appeals by this common order for the sake of convenience and brevity.

2. The common grounds of appeal raised by the Revenue in all these five appeals filed with the Tribunal reads as under:-

“1. Whether on the facts and circumstances of the case and in law, the CIT(A) was correct in holding that there existed a nexus between the interest expense and interest income solely on the basis of the Bank Statements.

2. The Appellant craves to leave, to add, to amend and / or to alter any of grounds of appeal, if need be.

3. The Appellant, therefore, prays that on the grounds stated above, the order of the CIT(A)-40, Mumbai may be set aside and that of the Assessing Officer restored.”

3. We shall take Revenue’s appeal in ITA No. 3192/Mum/2014 for the assessment year 2005-06 as lead appeal.

4. The Brief facts of the case are that the assessee is Chairman of Kanakia Spaces Pvt. Ltd. and is in-charge of the overall administration and business development . The Kanakia Group is primarily engaged in the real estate, hospitality, entertainment and education sectors of the economy.

5. There was a search and seizure action u/s 132 of the Income Tax Act, 1961 (Hereinafter called "the Act") conducted by the Investigation Unit-V(2) , Mumbai, on 29-03-2011 at the business and residential premises of the Directors of the assessee's group companies which was concluded on 24-05-2011. During the course of the search proceedings u/s 132(1) of the Act, cash of Rs. 7,12,340/- along with jewellery of Rs. 2,57,80,635/- was found from the residential premises of the assessee. The cash of Rs.6,00,000/- was seized during the course of search operations from the assessee but there was no seizure of jewellery from the assessee during the course of the search proceedings u/s 132(1) of the Act. However, during the course of search operations against different assessee's of the group, books of accounts, documents, valuables, diaries and other loose papers were seized. Based upon the search and post search enquiries, the assessee made disclosure of jewellery of Rs.27,34,940/- and cash of Rs.6,00,000/- , aggregating to disclosure of Rs.33,34,940/- by the assessee.

6. Notice u/s 153A of the Act was issued to the assessee on 04.01.2012 and in response thereof the assessee filed his return of income on 31.01.2012 declaring total income of Rs. 20,04,659/-. Notices dated 09-7-2012 u/s 143(2) and 142(1) of the Act were issued to the assessee and served upon the assessee. During the course of the assessment proceedings u/s 153A of the Act, the assessee replied the relevance of the seized material. The learned assessing officer(Hereinafter called "the AO") observed that the assessee has earned interest income of Rs. 92,99,866/- and claimed interest expenses of Rs. 91,87,619/- against the same. The break up is as under:-

Name of the party	Interest (Rs)	Amount(Rs.)
INTEREST EARNED		
Babubhai Kanakia	92,96,982	
Income Tax Refund	2,884	92,99,866
INTEREST PAID		

Thakur Fininvest P Ltd.	90,24,661	
L H Joshi	54,000	
Bank Interest	1,08,958	(91,87,619)
TOTAL:		1,12,247

The assessee offered the balance net interest of Rs. 1,12,247/- to tax along with certain other disallowances , as assessed in the order dated 31-12-2009 passed u/s 143(3) read with section 153A of the Act pursuant to the first search conducted by Revenue on 19-07-2007. The A.O. observed that the assessee claimed deduction against income from other sources u/s 57(iii) of the Act , which stipulates as under:-

“(iii) any other expenditure (not being in the nature of capital expenditure) laid out or expended wholly and exclusively for the purpose of making or earning such income”.

The A.O. observed that the expenditure claimed by the assessee as a deduction against income from other sources has to be expended wholly and exclusively for earning such income. The assessee was show caused vide notice dated 12.03.2013 to explain the claim of deduction of interest expenses against the interest income , the assessee replied vide letter dated 25-3-2013, which is reproduced below:-

“This is in reference to your Show Cause Notice u/s. 142 (1) of the Income tax Act, 1961 dated 12.03.2013. In response to the said notice, under the instructions from our above client, we submit as under:

Regarding interest expenses claimed against interest income, we reply is as under-

We have to draw your honour’s attention towards the fact that similar issue was already considered in the order that was passed in connection with the earlier search. Since, order was passed under section 153A, it was also passed with the approval of the then Learned Additional Commissioner Income Tax, Central Range - 7, Mumbai. We draw your honour's attention to the order for AY, 2007-08 that was passed u/s. 153 A on 31/12/2009.

Relevant part from the said order is reproduced as under:

“I have considered the submission of the assessee and the facts and circumstances of the case. The assessee has paid interest of Rs.54,000/- to Shri L H Joshi on a loan of Rs. 3,00,000/- @ 18%. The interest paid to Shri L H Joshi was disallowed for the reasons discussed in earlier assessment years. There is no difference in the facts of the case. Accordingly, interest of Rs. 54,000/- paid to Shri L H Joshi is disallowed and added to the total income.

Keeping in view of the facts of the case, the interest of Rs.54,000/- is disallowed out of interest paid.”

Copy of the order is enclosed for reference.

As it is evident from the above, the claim of interest paid of Rs.91,33,619/- was allowed to the assessee after disallowing sum of Rs.54,000/- considering facts of the case.

On the basis of the same, in the return filed u/s 153A , assessee had already disallowed sum of Rs.54,000/- out of total interest paid of Rs.91,87,619/- . Thus, claim of interest expense needs to be allowed to the assessee.

Moreover , without prejudice to the above,

We have to submit that the issue of netting of interest has not emerged in the present search. Your honour will appreciate that the special bench of Mumbai ITAT in the case of All Cargo Global Logistics Ltd. v. Deputy Commissioner of Income-tax, Central Circle-44 [2012] 23 taxmann.com 103 (Mum) (SB) held that in case of assessments which do not abate pursuant to issue of notice under section 153A, in addition to income that has already been assessed, assessment will be made on basis of incriminating material found in course of search but not produced in course of original assessment and undisclosed income or property discovered in course of search.

In view of the above decision, in the absence of any incriminating material in the case of the assessee, no further disallowance of interest is possible and accordingly no disallowance of such interest can be made in the case Of the assessee.

We hope that above explanations will meet your requirements.”

The A.O. after considering the replies of the assessee held that the assessee is not able to establish the nexus between the funds used for giving interest

bearing loans to other parties , on which interest has been earned; and the funds which have been taken on interest bearing loan from other parties. The AO held that only if the funds taken on interest bearing loan, were advanced by the assessee to other parties from whom he is charging interest; can he claim deduction of interest paid on interest earned, as per law. The AO held that the assessee's submission is completely silent on the aspect of nexus between the funds as above and hence the assessee had failed to establish this nexus at all. The necessary and sufficient condition laid down in the statute is not satisfied and the AO held that he has reasonable belief that the capital of the assessee has been utilized for the other purposes and therefore the assessee is not entitled to claim deduction u/s 57(iii) of the Act and thus the deduction of Rs. 91,87,619/- claimed by the assessee was disallowed by the A.O. vide assessment orders dated 28-03-2013 passed u/s 153A of the Act read with Section 143(3) of the Act.

The A.O. also considered the alternative submission of the assessee that there is a change of opinion with respect to the claim of interest in comparison to the last assessment completed u/s 153A of the Act vide orders dated 31.12.2009. The assessee vide letter dated 25-3-2013 has submitted that similar issue was considered while passing the order dated 31.12.2009 u/s 153A of the Act which was passed with the approval of Addl. CIT, Central Range -7, Mumbai. The assessee has also relied upon the decision of Special Bench decision of ITAT in the case of All Cargo Global Logistics Ltd. v. DCIT (2012) 23 taxmann.com 103 (Mum)[SB] and the relevant extracts of the decision are as under:-

“In case of assessments which do not abate pursuant to issue of notice under section 153A in addition to income that has already been assessed, assessment will be made on basis of incriminating material found in course of search but not produced in course of original assessment and undisclosed income or property discovered in course of search.”

Thus , the assessee contended in nutshell that once the assessment has already been finalized earlier after due deliberation on the same issue and that no incriminating material has been found during the course of search on the same issue, additions cannot be made by the A.O. The A.O. however, rejected the contentions of the assessee by holding that in case notice u/s 153A of the Act was issued and the assessment is deemed to be de-novo and the A.O. is at liberty to take a different view than the view taken in the earlier assessments even if the assessments have been earlier completed u/s 143(3) r.w.s. 153A of the Act and the assessment cannot be restricted to the seized material only. As per AO, the mandate of section 153A of the Act gives the assessee an opportunity to file his correct return of income once again after the search has been conducted and it does not absolve the assessee of the responsibility to furnish the correct return of income as per the provisions of law. The A.O. held that it is the mandate of the law that the A.O. shall assess or reassess the total income of the assessee in the six immediately preceding assessment years, in respect of the year of search. The A.O. shall assess or reassess the total income of six assessment years immediately preceding the search year. Thus the A.O. in the assessment proceedings u/s 153A of the Act shall examine all the issues that could be taken up in pursuance of filing of regular return of income and the concept of undisclosed income does not prevail any longer while framing the assessments/reassessments under the provisions of section 153A of the Act. The legislature has purposely omitted the undisclosed income from the new provisions therefore the assessment or reassessment shall be made as a normal scrutiny assessment u/s 143(3) of the Act, taking into effect the material/documents found in the course of search action, if any. The A.O. held that assessment includes reassessment and therefore even if the income of an earlier year may be undergoing the process of reassessment, it can still be assessed afresh on the basis of the material which was already on record at the time of completion of the original

assessment. The AO held that the issue of 'incriminating document found during the course of search is not a binding principle on the AO. The A.O. relied upon the ratio of the decision of Hon'ble Delhi High Court in the case of CIT v. Anil Kumar Bhatia delivered on 7th August, 2012 and held that the decision of Special Bench of ITAT in the case of All Cargo Global Logistics (supra) is contrary to the decision of Hon'ble Delhi High Court's decision (supra) and since decision of Hon'ble Delhi High Court is a later decision, it shall supersede the Special Bench decision dated 06-07-2012 in the case of All Cargo Global Logistics (supra). The AO held that the total income can be assessed de-novo of the assessee based upon sound reasoning and a well reasoned order, on any issue, hence, the alternative contention of the assessee is rejected and interest income is assessed at Rs. 92,99,866/- and claim of deduction of interest of Rs.91,87,619/- against interest income was disallowed vide assessment order dated 28-03-2013 passed u/s 143(3) of the Act read with Section 153A of the Act.

7. Aggrieved by the assessment orders dated 28-03-2013 passed by the A.O. u/s 143(3) of the Act read with Section 153A of the Act, the assessee preferred first appeal before the CIT(A).

8. Before the CIT(A), the assessee submitted that the A.O. erred in disallowing the assessee's claim of deduction of Rs. 78,51,111/- towards interest paid on loans while the A.O. taxed the entire interest income of Rs. 92,99,866/- on the ground that there was no direct correlation between the loan taken and loan advanced. The assessee submitted that the assessee voluntarily disallowed interest of Rs. 13,36,508/- which included an amount of Rs.54,000/- paid to Sh. L H Joshi on loan taken from him and Rs.12,82,508/- u/s 14A of the Act and this was accepted by the A.O. during the course of search assessment proceedings u/s 153A of the Act pursuant to first search u/s 132(1) of the Act initiated on 19-07-2007, vide order dated

31-12-2009. The assessee submitted that the A.O. failed to consider that the search u/s 132(1) of the Act was for the first time carried out on 19.07.2007 and vide the assessment order framed u/s 153A of the Act dated 31-12-2009, such claim of the assessee has been examined in detail by the A.O. who allowed the same. The assessee further submitted that no incriminating material was found or unearthed during the course of second search conducted on 29-3-2011 and as entire issue had already been examined in detail during the course of the earlier search assessment proceedings pursuant to the first search carried out u/s 132(1) of the Act on 19.07.2007, disallowance made is uncalled for as it amounts to change of opinion at the end of A.O. to the same material facts and hence the addition made is unjustified.

The assessee submitted before the CIT(A) that the order passed u/s 143(3) read with Section 153A of the Act dated 31-12-2009 and present assessment orders dated 28.03.2013 passed u/s 153A of the Act read with Section 143(3) of the Act, there is no change in the material facts. Earlier the A.O. was convinced that there is nexus between the interest income and interest expenses and since the order passed with the approval of learned Addl. CIT, the same finding needs to be accepted by the successor officer unless there is any new finding or material change, hence, consistency needs to be followed in the income tax proceedings. The assessee relied on the following case laws to support its contentions:-

- “(i) Radha Swami Satsang v. CIT (1962) 193 ITR 321 (SC)
- (ii) CIT v. Darius Pandole (2011) 330 ITR 485 (Bom)
- (iii) DCIT v. Gujarat Narmada Valley Fertilizers Co. Ltd. (2013) 215 Taxman 616 (Gujarat)
- (iv) Consolidated Fibres & Chemicals Ltd. v. CIT - 273 ITR 353 (Cal.)
- (v) CIT, West Bengal-3 v. Rajan Prasad Moody - 115 ITR 516

- (vi) CIT v. Sujani Textile Pvt. Ltd. - 151 ITR 653
- (vii) CIT v. Amritaben Shah – 238 ITR 777 (Del.)
- (viii) CIT v. Neo Poly Pack Pvt. Ltd. - 245 ITR 492
- (ix) Parshuram Pottery Works Co. Ltd. v. ITO - 106 ITR 1 (SC)”

Thus, the assessee contended that the addition of Rs. 78,51,111/- made by the AO to the income of the assessee needs to be deleted on account of consistency as no new material fact has come on record.

The CIT(A) after considering the facts of the case and submission of the assessee and the orders of the A.O. observed that the earlier search and seizure action u/s 132(1) of the Act was carried out in the year 2007 on 19.07.2007 and subsequently the assessment order u/s 153A read with section 143(3) of the Act was passed on 31-12-2009 for the assessment years 2005-06 to 2008-09 , wherein no disallowance of interest paid on loan taken was made under identical circumstances and the assessee’s claim towards payment of interest on funds borrowed was allowed as expenditure u/s 57(iii) of the Act and the contention of the assessee that when there is no incriminating material found during the course of search u/s 132(1) of the Act carried out for the second time on 29-3-2011 and no new material facts have been brought on record in the assessment proceedings, the addition cannot be sustained and the A.O.’s action in disallowing the claim of the assessee toward interest is totally unjustified and unwarranted. The CIT(A) also observed that since the assessee is offering income from interest, equity demands that any expenditure incurred in the nature of interest on loan taken should also be allowed. The facts revealed that the funds have come to the bank account of the assessee and the loans have been given from the same bank account of the assessee, therefore, the flow of funds i.e. incoming and outgoing is not in dispute. Since the issue has already been examined in the hands of the assessee at the time of earlier search assessment’s u/s 153A

read with Section 143(3) of the Act vide order dated 31-12-2009 and there is no reason to disallow such a claim two years later through another assessment orders on same set of material facts and further no incriminating material having been found or unearthed against the assessee during the course of second search proceedings u/s. 132(1) of the Act on 29.03.2011, rule of consistency has to be followed as laid down by several decisions referred to by the assessee , the CIT(A) held that interest expenditure on loan taken is a valid and allowable claim in the eye of law and should be allowed. The CIT(A) also held that the assessee has voluntarily disallowed total interest of Rs. 13,36,508/- (Rs.54,000 + Rs.12,82,508/-) in the return of income filed by the assessee appears to be fair and reasonable. The assessee has offered for taxation interest income of Rs.14,48,755/- . The CIT(A) observed that in the current year average loan taken works out to Rs. 5,13,44,989/- and average loan given works out to Rs. 8,08,43,322/-, thus , the loan given is higher than the loan taken , and , therefore no disallowance is called for, except an amount of Rs.54,000/- in case of Sh. L H Joshi , from whom a loan of Rs.3,00,000/- was taken in earlier years, which has been treated as unexplained, and , therefore the interest paid to him is being disallowed, which has been accepted by the assessee. Further disallowance of Rs. 12,82,508/- u/s 14A of the Act on investment in shares amounting to Rs.6.49 crores , dividend income from which has been claimed as exempted income . The total disallowance of interest of Rs. 13,36,508/- which has been voluntarily disallowed by the assessee appears to be fair and reasonable. The CIT(A) on perusal of Bank statement of the assessee gave categorical finding that by an large , there is direct and strong co-relation between loan given and taken. The CIT(A) observed that the AO has not doubted the genuineness of loan taken and loan given. Thus, as per CIT(A) addition of Rs. 78,51,111/- is unsustainable and unjustified and directed the A.O. to delete the same vide orders dated 18.02.2014.

9. Aggrieved by the orders of the CIT(A) dated 18.02.2014, the Revenue is in appeal before the Tribunal.

10. The ld. CIT-D.R. relied upon the order of the A.O. and contended that the A.O. has rightly disallowed the expenses of Rs. 78,51,111/- as per the well reasoned order passed by the A.O.

11. The ld. Counsel for the assessee submitted that identical issue arose in the case of Brother of the assessee, Mr Himanshu B. Kanakia for the assessment year's 2007-08 to 2009-10 and the Mumbai Tribunal in ITA No's. 3187-3189/Mum/2014 vide orders dated 18-01-2016 has considered the matter in detail and allowed the appeal and the decision of the Mumbai Tribunal in the afore-stated appeal is squarely applicable to the case of the assessee and the appeals should be allowed. The ld counsel for the assessee filed copies of the orders dated 18-01-2016 of the Tribunal in the afore-stated appeals. The ld Counsel submitted that there was first search u/s 132(1) of the Act by Revenue against the assessee on 19-07-2007 and there was also second search against the assessee u/s 132(1) of the Act by the Revenue on 29-03-2011. The ld. Counsel submitted that no incriminating material has been found during the course of second search on 29-03-2011 with respect to the additions made by the AO in the impugned assessment year vide orders dated 28-03-2011 passed u/s. 143(3) read with Section 153A of the Act. The assessments framed by the Revenue against the assessee for the assessment year 2005-06 is un-abated assessment as per provisions of Section 153A of the Act and since no incriminating material was found during the course of search, no addition is warranted in the case of the assessee.

12. We have considered the rival contention and also perused the material available on record. We find that the issue in this appeal is squarely covered by the decision vide orders dated 18-01-2016 of the

Mumbai Tribunal in ITA No's. 3187-3189/Mum/2014 , in which one of us (Accountant Member) was member of the Division Bench who adjudicated the afore-stated appeal's whereby Revenue appeal's were dismissed, which is reproduced below :

“These three appeals by the Revenue are directed against three separate orders of the learned Commissioner of Income Tax (Appeals)- 40 , Mumbai (Hereinafter called “the CIT(A)”) all dated 18-2-2014 pertaining to the assessment years 2007-08 to 2009-10. Since similar grounds of appeal are raised in all these three appeals, we have disposed of all these three appeals by this common order for the sake of convenience and brevity.

2. *The common grounds of appeal raised by the Revenue in all these appeals filed with the Tribunal reads as under:-*

“1. Whether on the facts and circumstances of the case and in law, the CIT(A) was correct in holding that there existed a nexus between the interest expense and interest income solely on the basis of the Bank Statements.

2. The Appellant craves to leave, to add, to amend and / or to alter any of grounds of appeal, if need be.

3. The Appellant, therefore, prays that on the grounds stated above, the order of the CIT(A)-40, Mumbai may be set aside and that of the Assessing Officer restored.”

3. *We shall take Revenue's appeal in ITA No. 3187/Mum/2014 for the assessment year 2007-08 as lead appeal.*

4. *The Brief facts of the case are that the assessee is Managing Director of Kanakia Spaces Pvt. Ltd. and in-charge of the project planning and construction activity. The Kanakia Group is primarily engaged in the real*

estate, hospitality, entertainment and education sectors of the economy. The assessee group has numerous commercial and residential projects in Mumbai with quality construction and layouts.

5. There was a search and seizure action u/s 132 of the Income Tax Act, 1961 (Hereinafter called "the Act") conducted by the Investigation Unit-V(2), Mumbai, on 29-03-2011 at the business and residential premises of the Directors of the assessee's group companies which was concluded on 24-05-2011. During the course of the search proceedings u/s 132(1) of the Act, cash of Rs. 28,550/- along with jewellery of Rs. 1,68,36,786/- was found from the residential premises of the assessee. However, there was no seizure of cash and jewellery from the assessee during the course of the search proceedings u/s 132(1) of the Act. However, during the course of search operations against different assessee's of the group, books of accounts, documents, valuables, diaries and other loose papers were seized. Based upon the search and post search enquiries, the assessee made disclosure of Rs. 49,750/- as sale of scrap.

6. Notice u/s 153A of the Act was issued to the assessee on 04.01.2012 and in response thereof the assessee filed his return of income on 31.01.2012 declaring a total income of Rs. 14,74,33,828/-. Notices dated 11-7-2012 u/s 143(2) and 142(1) of the Act were issued to the assessee and served upon the assessee. During the course of the assessment proceedings u/s 153A of the Act, the assessee replied the relevance of the seized material. The learned assessing officer (Hereinafter called "the AO") observed that the assessee has earned interest income of Rs. 99,01,472/- and claimed interest expenses of Rs. 96,24.943/- against the same. The break up is as under:-

<i>Name of the party</i>	<i>Interest (Rs)</i>	<i>Amount(Rs.)</i>
<i>INTEREST EARNED</i>		
<i>Kanakia Constructions Pvt. Ltd.</i>	<i>5805208</i>	
<i>Kanakia Hospitality Pvt. Ltd.</i>	<i>1833985</i>	
<i>Supreme Real Estate Developers P. Ltd.</i>	<i>2262279</i>	<i>99,01,472</i>
<i>INTEREST PAID</i>		
<i>Babubhai M. Kanakia</i>	<i>1395443</i>	
<i>Evergreen Financial Services</i>	<i>8139500</i>	
<i>M J Chotani</i>	<i>90000</i>	<i>(96,24,943)</i>
<i>TOTAL:</i>		<i>2,76,529</i>

The assessee offered the balance net interest of Rs. 2,76,529/- to tax along with certain other disallowances , as assessed in the order dated 31-12-2009 passed u/s 143(3) read with section 153A of the Act pursuant to the first search conducted by Revenue on 19-07-2007. The A.O. observed that the assessee claimed deduction against income from other sources u/s 57(iii) of the Act , which stipulates as under:-

“(iii) any other expenditure (not being in the nature of capital expenditure) laid out or expended wholly and exclusively for the purpose of making or earning such income”.

The A.O. observed that the expenditure claimed by the assessee as a deduction against income from other sources has to be expended wholly and exclusively for earning such income. The assessee was show caused vide notice dated 12.03.2013 to explain the claim of deduction of interest expenses against the interest income , the assessee replied vide letter dated 25-3-2013, which is reproduced below:-

“This is in reference to your Show Cause Notice u/s. 142 (1) of the Income tax Act, 1961 dated 12.03.2013. In response to the said notice, under the instructions from our above client, we submit as under:

Regarding interest expenses claimed against interest income, we reply is as under-

We have to draw your honour's attention towards the fact that similar issue was already considered in the order that was passed in connection with the earlier search. Since, order was passed under section 153A, it was also passed with the approval of the then Learned Additional Commissioner Income Tax, Central Range - 7, Mumbai. We draw your honour's attention to the order for AY, 2007-08 that was passed u/s. 153 A on 31/12/2009.

Relevant part from the said order is reproduced as under:

I have considered the submission of the assessee and the facts and circumstances of the case. The assessee has paid interest of Rs.90,000/- to Shri M J Chotani on a loan of Rs. 5,00,000/- @ 18%. The interest paid to Shri M.J. Chotani was disallowed for the reasons discussed in earlier assessment years. There is no difference in the facts of the case. Accordingly, interest of Rs. 90,000/- paid to Shri M.J. Chotani is disallowed and added to the total income.

Further, the assessee has received interest of Rs. 99,01,472/- on the average value of loans given during the year Rs. 8,25,12,267/- as against, the assessee has paid interest of Rs. 95,34,933/- (excluding the interest of Rs. 90,000/- paid to Shri M.J. Chotani as discussed above) on average value of loan received during the year of Rs. 11,43,43,933/- (excluding the loan of Rs. 5,00,000/- received from Shri M.J. Chotani). The assessee has paid excess interest Rs, 38,19,800/- (@ 12% on the excess average value of loans given of Rs.3,18,31,666/-).

Keeping in view of the facts of the case, the interest of Rs. 38,19,800/- is disallowed out of interest paid." Copy of the order is enclosed for reference.

As it is evident from the above, the claim of interest paid of Rs.57,15,143/- was allowed to the assessee after disallowing sum of Rs. 39,09,800/- considering facts of the case.

On the basis of the same, in the return filed u/s. 153 A, assessee had already disallowed sum of Rs. 39,09,800/- out of total interest paid of Rs. 96,24,943/-. Thus, claim of interest expense needs to be allowed to the assessee.

Moreover, without prejudice to the above,

We have to submit that the issue of netting of interest has not emerged in the present search. Your honour will appreciate that the special bench of Mumbai ITAT in the case of All Cargo Global Logistics Ltd. v. Deputy Commissioner of Income-tax, Central Circle-44 [2012] 23 taxmann.com 103 (Mum) (SB) held that in case of assessments which do not abate pursuant to issue of notice under section 153A, in addition to income that

has already been assessed, assessment will be made on basis of incriminating material found in course of search but not produced in course of original assessment and undisclosed income or property discovered in course of search.

In view of the above decision, in the absence of any incriminating material in the case of the assessee, no further disallowance of interest is possible and accordingly no disallowance of such interest can be made in the case Of the assessee.

We hope that above explanations will meet your requirements.”

The A.O. after considering the replies of the assessee held that the assessee is not able to establish the nexus between the funds used for giving interest bearing loans to other parties , on which interest has been earned; and the funds which have been taken on interest bearing loan from other parties. The AO held that only if the funds taken on interest bearing loan, were advanced by the assessee to other parties from whom he is charging interest; can he claim deduction of interest paid on interest earned, as per law. The AO held that the assessee's submission is completely silent on the aspect of nexus between the funds as above and hence the assessee had failed to establish this nexus at all. The necessary and sufficient condition laid down in the statute is not satisfied and the AO held that he has reasonable belief that the capital of the assessee has been utilized for the other purposes and therefore the assessee is not entitled to claim deduction u/s 57(iii) of the Act and thus the deduction of Rs. 96,24,943/- claimed by the assessee was disallowed by the A.O. vide assessment orders dated 28-03-2013 passed u/s 153A of the Act read with Section 143(3) of the Act.

The A.O. also considered the alternative submission of the assessee that there is a change of opinion with respect to the claim of interest in comparison to the last assessment completed u/s 153A of the Act vide orders dated 31.12.2009. The assessee vide letter dated 25-3-2013 has

submitted that similar issue was considered while passing the order dated 31.12.2009 u/s 153A of the Act which was passed with the approval of Addl. CIT, Central Range -7, Mumbai. The assessee has also relied upon the decision of Special Bench decision of ITAT in the case of All Cargo Global Logistics Ltd. v. DCIT (2012) 23 taxmann.com 103 (Mum)[SB] and the relevant extracts of the decision are as under:-

“In case of assessments which do not abate pursuant to issue of notice under section 153A in addition to income that has already been assessed, assessment will be made on basis of incriminating material found in course of search but not produced in course of original assessment and undisclosed income or property discovered in course of search.”

Thus , the assessee contended in nutshell that once the assessment has already been finalized earlier after due deliberation on the same issue and that no incriminating material has been found during the course of search on the same issue, additions cannot be made by the A.O. The A.O. however, rejected the contentions of the assessee by holding that in case notice u/s 153A of the Act was issued and the assessment is deemed to be de novo and the A.O. is at liberty to take a different view than the view taken in the earlier assessments even if the assessments have been earlier completed u/s 143(3) r.w.s. 153A of the Act and the assessment cannot be restricted to the seized material only. As per AO, the mandate of section 153A of the Act gives the assessee an opportunity to file his correct return of income once again after the search has been conducted and it does not absolve the assessee of the responsibility to furnish the correct return of income as per the provisions of law. The A.O. held that it is the mandate of the law that the A.O. shall assess or reassess the total income of the assessee in the six immediately preceding assessment years, in respect of the year of search. The A.O. shall assess or reassess the total income of six assessment years

immediately preceding the search year. Thus the A.O. in the assessment proceedings u/s 153A of the Act shall examine all the issues that could be taken up in pursuance of filing of regular return of income and the concept of undisclosed income does not prevail any longer while framing the assessments/reassessments under the provisions of section 153A of the Act. The legislature has purposely omitted the undisclosed income from the new provisions therefore the assessment or reassessment shall be made as a normal scrutiny assessment u/s 143(3) of the Act, taking into effect the material/ documents found in the course of search action, if any. The A.O. held that assessment includes reassessment and therefore even if the income of an earlier year may be undergoing the process of reassessment, it can still be assessed afresh on the basis of the material which was already on record at the time of completion of the original assessment. The AO held that the issue of 'incriminating document found during the course of search' is not a binding principle on the AO. The A.O. relied upon the ratio of the decision of Hon'ble Delhi High Court in the case of CIT v. Anil Kumar Bhatia delivered on 7th August, 2012 and held that the decision of Special Bench of ITAT in the case of All Cargo Global Logistics (supra) is contrary to the decision of Hon'ble Delhi High Court's decision (supra) and since decision of Hon'ble Delhi High Court is a later decision, it shall supersede the Special Bench decision dated 06-07-2012 in the case of All Cargo Global Logistics (supra). The AO held that the total income can be assessed de-novo of the assessee based upon sound reasoning and a well reasoned order, on any issue, hence, the alternative contention of the assessee is rejected and interest income is assessed at Rs. 99,01,472/- and claim of deduction of interest of Rs.96,24,943/- against interest income was disallowed vide assessment order dated 28-03-2013 passed u/s 143(3) of the Act read with Section 153A of the Act.

7. Aggrieved by the assessment orders dated 28-03-2013 passed by the A.O. u/s 143(3) of the Act read with Section 153A of the Act, the assessee preferred an first appeal before the CIT(A).

8. Before the CIT(A), the assessee submitted that the A.O. erred in disallowing the assessee's claim of deduction of Rs. 47,22,282/- towards interest paid on loans while the A.O. taxed the entire interest income of Rs. 99,01,472/- on the ground that there was no direct correlation between the loan taken and loan advanced. The assessee submitted that the assessee voluntarily disallowed interest of Rs. 39,09,800/- which included an amount of Rs.90,000/- paid to Sh. M.J.Chotani on loan taken from him which was treated as unexplained in earlier years and an amount of Rs.38,19,800/- on the difference of average loan taken on which interest was paid vis-à-vis average loan given on which interest was received, at the rate of 12%. Besides, the assessee disallowed voluntarily an amount of 9,92,861/- as interest u/s 14A of the Act and this was accepted by the A.O. during the course of search assessment proceedings u/s 153A of the Act pursuant to first search u/s 132(1) of the Act initiated in the year 2007, vide order dated 31-12-2009. The assessee submitted that the A.O. failed to consider that the search u/s 132(1) of the Act was for the first time carried out on 19.07.2007 and vide the assessment order framed u/s 153A of the Act dated 31-12-2009, such claim of the assessee has been examined in detail by the A.O. who allowed the same. The assessee further submitted that no incriminating material was found or unearthed during the course of second search conducted on 29-3-2011 and as entire issue had already been examined in detail during the course of the earlier search assessment proceedings pursuant to the first search carried out u/s 132(1) of the Act on 19.07.2007, disallowance made is uncalled for as it

amounts to change of opinion at the end of A.O. to the same material facts and hence the addition made is unjustified.

The assessee submitted before the CIT(A) that the order passed u/s 143(3) read with Section 153A of the Act dated 31-12-2009 and present assessment orders dated 28.03.2013 passed u/s 153A of the Act read with Section 143(3) of the Act, there is no change in the material facts. Earlier the A.O. was convinced that there is nexus between the interest income and interest expenses and since the order passed with the approval of learned Addl. CIT, the same finding needs to be accepted by the successor officer unless there is any new finding or material change, hence, consistency needs to be followed in the income tax proceedings. The assessee relied on the following case laws to support its contentions:-

- “(i) Radha Swami Satsang v. CIT (1962) 193 ITR 321 (SC)*
- (ii) CIT v. Darius Pandole (2011) 330 ITR 485 (Bom)*
- (iii) DCIT v. Gujarat Narmada Valley Fertilizers Co. Ltd. (2013) 215 Taxman 616 (Gujarat)*
- (iv) Consolidated Fibres & Chemicals Ltd. v. CIT - 273 ITR 353 (Cal.)*
- (v) CIT, West Bengal-3 v. Rajan Prasad Moody - 115 ITR 516*
- (vi) CIT v. Sujani Textile Pvt. Ltd. - 151 ITR 653*
- (vii) CIT v. Amritaben Shah – 238 ITR 777 (Del.)*
- (viii) CIT v. Neo Poly Pack Pvt. Ltd. - 245 ITR 492*
- (ix) Parshuram Pottery Works Co. Ltd. v. ITO - 106 ITR 1 (SC)”*

Thus, the assessee contended that the addition of Rs. 47,22,282/- made by the AO to the income of the assessee needs to be deleted on account of consistency as no new material fact has come on record.

The CIT(A) after considering the facts of the case and submission of the assessee and the orders of the A.O. observed that the earlier search and seizure action u/s 132(1) of the Act was carried out in the year 2007 on 19.07.2007 and subsequently the assessment order u/s 153A read with section 143(3) of the Act was passed on 31-12-2009 for the assessment years 2005-06 to 2008-09 , wherein no disallowance of interest paid on loan taken was made under identical circumstances and the assessee's claim towards payment of interest on funds borrowed was allowed as expenditure u/s 57(iii) of the Act and the contention of the assessee that when there is no incriminating material found during the course of search u/s 132(1) of the Act carried out for the second time on 29-3-2011 and no new material facts have been brought on record in the assessment proceedings, the addition cannot be sustained and the A.O.'s action in disallowing the claim of the assessee toward interest is totally unjustified and unwarranted. The CIT(A) also observed that since the assessee is offering income from interest, equity demands that any expenditure incurred in the nature of interest on loan taken should also be allowed. The facts revealed that the funds have come to the bank account of the assessee and the loans have been given from the same bank account of the assessee, therefore, the flow of funds i.e. incoming and outgoing is not in dispute. Since the issue has already been examined in the hands of the assessee at the time of earlier search assessment's u/s 153A read with Section 143(3) of the Act vide order dated 31-12-2009 and there is no reason to disallow such a claim two years later through another assessment orders on same set of material facts and further no incriminating material having been found or unearthed against the assessee during the course of second search proceedings u/s. 132(1) of the Act on 29.03.2011, rule of consistency has to be followed as laid down by several decisions referred to by the assessee , the CIT(A) held that interest expenditure on loan taken is a

valid and allowable claim in the eye of law and should be allowed. The CIT(A) also held that the assessee has voluntarily disallowed total interest of Rs. 49,02,661/- (Rs.90,000 + Rs.38,19,800/- + Rs. 9,92,861/-) in the return of income filed by the assessee appears to be fair and reasonable. The assessee has offered for taxation interest income of Rs.51,79,190/- . The CIT(A) observed that in the current year average loan taken works out to Rs. 11,48,43,933/- and average loan given works out to Rs. 8,25,12,267/-, thus the difference of Rs. 3,23,31,666/-, the effective rate of interest works out to 12% i.e. 38,19,800/- which interest has been disallowed voluntarily by the assessee in the return of income filed with the Revenue, which is fair and reasonable. The assessee also disallowed interest of Rs. 90,000/- paid to Sh. M J Chotani and further disallowance of Rs. 9,92,861/- u/s 14A of the Act on average investment in shares amounting to Rs.5,13,43,681/- , dividend income from which has been claimed as exempted income . The total disallowance of interest of Rs. 49,02,661/- which has been voluntarily disallowed by the assessee appears to be fair and reasonable. The CIT(A) on perusal of Bank statement of the assessee gave categorical finding that there is strong direct co-relation between loan given and taken. The CIT(A) observed that the AO has not doubted the genuineness of loan taken and loan given. Thus, as per CIT(A) addition of Rs. 47,22,282/- is unsustainable and unjustified and directed the A.O. to delete the same vide orders dated 18.02.2014.

9. Aggrieved by the orders of the CIT(A) dated 18.02.2014, the Revenue is in appeal before the Tribunal.

10. The ld. D.R. relied upon the order of the A.O. and contended that the A.O. has rightly disallowed the expenses of Rs. 47,22,282/- as per the well reasoned order passed by the A.O.

11. The ld. Counsel for the assessee submitted that there are two search and seizure action u/s 132(1) of the Act conducted in the case of the assessee, one in the year 2007 on 19.07.2007 and another on 29-3-2011. The ld. Counsel submitted that for the assessment year 2007-08, the return of income was filed u/s 153A of the Act in respect of first search on 11th September, 2008 and the assessment order was passed u/s 143(3) r.w.s. 153(A) of the Act on 31-12-2009. The ld. Counsel submitted that the assessments have been concluded in the case of the assessment year 2007-08 on 31.12.2009 which is prior to the date of second search on 29-03-2011 and hence the assessment for the assessment year 2007-08 are concluded assessments which cannot be disturbed on same set of facts while framing assessment u/s 153A r.w.s. 143(3) of the Act in pursuant to second search unless there is any incriminating material found or unearthed during the course of second search on 29-03-2011. The ld. Counsel stated before us that there is no incriminating material found or unearthed during the course of second search conducted on 29-3-2011 with respect to the issue in dispute i.e. allowability of claim of deduction of interest paid on loans borrowed against interest income on loan advances by the assessee, hence, in view of the ratio of decision of Special Bench of ITAT in the case of All Cargo Global Logistics Ltd. v. DCIT [2012] 23 taxmann.com 103 (Mum) [SB] , this addition of Rs.47,22,282/- being disallowance of the interest cannot be sustained. The ld. Counsel further relied upon the order of the CIT(A).

12. We have considered the rival contention and also perused the material available on record. We find that this issue of allowability of deduction of interest paid on loan borrowed by the assessee amounting to Rs.47,22,282/- against the interest income of Rs.99,01,472/- earned by the assessee from loan advanced has

already been examined and accepted by the A.O. in course of proceedings for the assessments u/s 153A of the Act pursuant to the first search and seizure operations u/s 132(1) of the Act conducted in the year 2007 on 19.07.2007 by the Revenue whereby the interest expenditure of Rs.47,22,282/- incurred on loans borrowed has been accepted and allowed as deduction from the interest income of Rs.99,01,472/- earned on the loans advanced by the assessee. We have observed that it has not been brought to our notice by both the rival parties that any incriminating material has been found or unearthed during the second search u/s 132(1) of the Act conducted by the Revenue on 29-3-2011 related to the claim of deduction of interest expenditure of Rs.47,22,282/- on the loans borrowed against the interest income of Rs.99,01,472/- earned by the assessee on the loans advanced. We have also observed that the assessments u/s 153A of the Act pursuant to first search on 19.07.2007 have been concluded for the assessment year 2007-08 on 31.12.2009 which is prior to the date of second search conducted by Revenue on 29-03-2011 and hence in our considered view, no addition can be made with respect to the claim of deduction of interest expenditure of Rs.47,22,282/- payable on loans borrowed by the assessee against the interest income from the loans advanced by the assessee company on the same set of material facts as existing while framing assessments u/s 153A read with Section 143(3) of the Act on 31.12.2009, in the absence of any incriminating material found during the course of second search on 29-03-2009 . The decision in the case of All Cargo Global Logistics Ltd. (supra) relied upon by the assessee is squarely applicable to this case that In case of assessments which do not abate pursuant to issue of notice under section 153A, in addition to income that has already been assessed, assessment will be made on basis of incriminating material found in

course of search but not produced in course of original assessment and undisclosed income or property discovered in course of search. The decision of Hon'ble Bombay High Court in the case of CIT v. Continental Warehousing Corporation (Nhava Sheva) Limited (2015) 58 taxmann.com 78 (Bombay) is also squarely applicable to the instant appeal whereby Hon'ble Bombay High Court has held that no addition can be made in respect of assessments which have become final if no incriminating material is found during search. The Hon'ble Delhi High Court in the case of CIT v. Kabul Chawla (2015) 61 taxmann.com 412(Delhi) has taken a similar view by holding that completed assessments can be interfered with by Assessing Officer while making assessment under section 153A of the Act only on basis of some incriminating material unearthed during course of search which was not produced or not already disclosed or made known in course of original assessment.

However, We also note that in the case of CIT v. Continental Warehousing Corporation (Nhava Sheva) Ltd. , Hon'ble Supreme Court has granted special leave and admitted appeal of Revenue in SLP No. (C) No. 18506 of 2015, dated October, 12, 2015 against the Hon'ble Bombay High Court ruling that no addition can be made in respect of assessment which has become final if no incriminating material is found during the course of search.

Respectfully following the binding decision of the Hon'ble Jurisdictional High Court i.e. Hon'ble Bombay High Court in the case of Central Warehousing Corporation (Nhava Sheva) Limited(supra) as well decision of Hon'ble Delhi High Court in the case of Kabul Chawla(supra) and Special Bench decisions in All Cargo Global Logistics Ltd. (supra) , we

uphold the orders of the CIT(A) and delete the additions made by the AO of Rs.47,22,282/- on account of disallowance of the claim of the interest expenditure incurred by the assessee on loans borrowed against the interest income of Rs. 99,01,472/- , on the short ground itself by holding that completed assessments can be interfered with by the AO while making assessment under section 153A of the Act only on basis of some incriminating material unearthed during the course of search which was not produced or not already disclosed or made known in course of original assessment and undisclosed income or property discovered in course of search , while in the instant appeal the AO has in the assessments framed vide orders dated 31.12.2009 u/s. 153A read with Section 143(3) of the Act in pursuance to the first search on 19.07.2007 has duly examined and allowed the claim of the assessee for deduction of interest of Rs.47,22,282/- being interest paid on loan borrowed against the interest income earned on loans advanced by the assessee and no new incriminating material has been found or unearthed during the course of second search on 29-03-2011 . The relevant extract of the assessment orders u/s 153A of the Act dated 31.12.2009 in pursuance of first search u/s 132(1) of the Act on 19.07.2007, are as under:

“I have considered the submission of the assessee and the facts and circumstances of the case. The assessee has paid interest of Rs.90,000/- to Shri M J Chotani on a loan of Rs. 5,00,000/- @ 18%. The interest paid to Shri M.J. Chotani was disallowed for the reasons discussed in earlier assessment years. There is no difference in the facts of the case. Accordingly, interest of Rs. 90,000/- paid to Shri M.J. Chotani is disallowed and added to the total income.

Further, the assessee has received interest of Rs. 99,01,472/- on the average value of loans given during the year Rs. 8,25,12,267/- as against, the assessee has paid interest of Rs. 95,34,933/- (excluding the interest of Rs. 90,000/- paid to Shri M.J. Chotani as discussed above) on average value of loan received during the year of Rs. 11,43,43,933/- (excluding the loan of Rs. 5,00,000/- received from Shri M.J. Chotani). The assessee has paid excess interest Rs. 38,19,800/- (@ 12% on the excess average value of loans given of Rs.3,18,31,666/-).

Keeping in view of the facts of the case, the interest of Rs. 38,19,800/- is disallowed out of interest paid.”

Thus, as could be seen from the above that the AO has duly examined the claim of the assessee with respect to the deduction of interest expenses on loan borrowed from the interest income earned from the loans advanced and has disallowed Rs.38,19,800/- and Rs.90,000 out of the interest expenditure claim of Rs. 96,24,943/- . Apart from the above, the assessee has also voluntarily offered disallowance of interest of Rs.9,92,861/- u/s 14A of the Act. Thus, the assessee claimed deduction of balance amount of interest expenditure of Rs.47,22,282/- towards loan borrowed against interest income of Rs.99,01,472/- from loan advances , which claim was duly examined and allowed by the AO while framing the assessment orders dated 31.12.2009 u/s 153A read with Section 143(3) of the Act pursuant to first search on 19.07.2007 and no new incriminating material was found or unearthed during search u/s 132(1) of the Act, having being brought on record before the Tribunal and the assessment framed vide orders dated 31.12.2009 being concluded assessment as framed prior to date of second search on 29/03/2011, we are of considered view that the concluded assessments in the instant appeal cannot be disturbed on the same set of material facts as prevailing when the assessment was framed u/s 153A read with Section 143(3) of the Act on 31.12.2009 in pursuant to first search on 19.07.2007 and hence, we dismiss the appeal filed by the Revenue. We order accordingly.

13. *With respect to the Revenue’s appeals in ITA No. 3188/M/2014 for the assessment year 2008-09 and ITA No. 3189/Mum/2014 for the assessment year 2009-10, our above decision in ITA No 3187/Mum/2014 for the assessment year 2007-08 shall apply mutatis*

mutandis to the appeals for the assessment years 2008-09 & 2009-10 also. We order accordingly.

14. In the result, all the three appeals filed by the Revenue are dismissed.”

We have observed that issue in this appeal is identical to the issue in ITA No's. 3187-3189/Mum/2014 which was adjudicated by Mumbai Tribunal vide orders dated 18-01-20116 whereby Revenue appeals were dismissed , in the case of brother of the assessee Mr Himanshu B. Kanakia and Respectfully following the decision of the Mumbai Tribunal in afore-stated appeal's , we dismiss the appeal of the Revenue. We order accordingly.

13. With respect to the Revenue's appeals in ITA No. 3193/M/2014 for the assessment year 2006-07, ITA No 3194/Mum/2014 for the assessment year 2007-08, ITA No. 3195/Mum/2014 for the assessment year 2008-09 and ITA No. 3196/Mum/2014 for the assessment year 2009-10, our above decision in ITA No 3192/Mum/2014 for the assessment year 2005-06 shall apply mutatis mutandis to the appeals for the assessment years 2006-07 to 2009-10 also. We order accordingly.

14. In the result, all the five appeals filed by the Revenue are dismissed.

Order pronounced in the open court on 10th February, 2016.

आदेश की घोषणा खुले न्यायालय में दिनांक: 10.02.2016 को की गई ।

Sd/-

(Amit Shukla)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated 10.02.2016

Sd/-

(RAMIT KOCHAR)
ACCOUNTANT MEMBER

Neelam PS

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

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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