

IN THE INCOME TAX APPELLATE TRIBUNAL
"F" Bench, Mumbai
Before Shri Jason P. Boaz (AM) & Shri Sandeep Gosain (JM)

I.T.A. No. 3522/Mum/2014
(Assessment Year 2004-05)

I.T.A. No. 3523/Mum/2014
(Assessment Year 2008-09)

M/s. Vina Viren Ahuja 1, Neelkantha Road No. 6 Chembur Mumbai-400 071. (Appellant)	Vs.	DCIT CC-47 Mumbai (Respondent)
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PAN No.AAACPA4809M

Assessee by	Shri J.P. Bairagra
Department by	Shri G.M. Doss
Date of Hearing	5.8.2016
Date of Pronouncement	21.9.2016

ORDER

Per Sandeep Gosain, JM :-

Both these appeals are filed by the assessee against the order of learned CIT(A) for A.Y. 2004-05 & 2008-09.

2. Brief facts of the case are that both the appeals have been filed against the orders passed by the Assessing Officer u/s. 143(3) read with section 153A. The assessee is a wife of Shri Viren Ahuja who is the main director of Bermaco/Flemingo group of companies. The assessee running her own proprietorship firm in the name and style of Venus Designs which is engaged in the business of export of home furnishings and sale of handicrafts. The search and seizure action u/s. 132 was carried out at the residence and business premises of Bermaco/Flemingo group on 31.10.2009. However, no incriminating material or any other papers relating to the assessee were found during the course of search. However assessment order u/s. 153A read with section 143(3) of I.T. Act was passed vide order dated 29.12.2011.

3. Aggrieved by the assessment order the assessee preferred an appeal before learned CIT(A) for A.Y. 2004-05 & 2008-09. Since ground in both the appeals are identical hence we reproduce grounds from A.Y. 2004-05 :-

1. *The learned CIT(A) has erred in law and in facts in not holding that the notice issued u/s. 153A and the consequential assessment order are bad in law and without jurisdiction.*
2. *The learned CIT(A) has erred in law and in facts in confirming the addition of Rs. 48,00,000/- made by the Assessing Officer u/s. 68 of the Act in the assessment order passed u/s. 153A r.w.s. 143(3) of the Act which is illegal and bad in law.*
3. *The learned CIT(A) ought to have held that the addition of '48,00,000/- made by the Assessing Officer while passing the order u/s.153A r.w.s. 143(3) of the Act was bad in law as the same is not based on any incriminating material found during the course of search for non-abated year.*
4. *The learned CIT(A) has erred in law and in facts in passing the order in violation of principles of natural justice.*
5. *The learned CIT(A) has erred in law and in facts in passing the order which is illegal and bad in law.*
6. *The appellant craves leave to add to, alter, amend and /or delete all or any of aforesaid grounds of appeal.*

4. Ground No. 4,5&6 in both the appeals are general in nature therefore the same are dismissed.

Ground No. 1

5. The present ground has been dealt with by learned CIT(A) in para 5 to 6.1 of his order. Learned AR assailed the order passed by learned CIT(A) on the ground that the Special bench in the case of All Cargo Global Logistics Ltd. Vs. DCIT (137 ITD 267) has held that provisions of Section 153A come into operation if a search or requisition is initiated after 31/05/2003 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 is abated, the AO retains the original jurisdiction as well as jurisdiction u/s 153A for which assessment shall be made for each assessment year separately. It was submitted that 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 u/s.153A can be made on the basis of the 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 u/s 143(1) and time limit for issue of notice u/s 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. For this proposition we have relied on the latest decision of:-

- a) ITAT Mumbai Bench in the case of Shri Gurinder Singh Bawa v/ s. DCIT - 28 taxmann.com 328
- b) ITAT Mumbai Bench in the case of Anil P. Khimani vs. DCIT
- c) ITAT Jodhpur Bench in the case of Vishal Dembla vs. DCIT - 157 TTJ 189
- d) High Court of Bombay on the case of CIT v. Murli Agro Products Ltd.
- e) ITAT Mumbai Bench in case of ACIT v. Jayendra P. Jhaveri
- f) Bombay High Court, CIT II, Thane Vs. Continental Warehousing Corporation (Nhava Sheva) Ltd. [2015] 58
- g) taxmann.com 78 (Bombay) On similar facts Zeenat Sanghvi, ITA No. 8026/M/2010 dated 19-12-2014
- h) Hon. Delhi High Court in the case of Kabul Chawla in ITA Nos. to 709/2014 dated 28th August, 2015

6. We have perused the Judgements relied upon by learned AR and on perusal of the same we find that under similar circumstances Hon'ble Jurisdictional High Court in the case of Continental Warehousing Corporation (Nhava Sheva) Ltd. (58 taxmann.com 78) has held that Section 153A of the Income-tax Act, 1961 - Search and seizure - Assessment in case of (Scope of) - Whether in a case where pursuant to issue of notice under section 153A1 assessments are abated, Assessing Officer retains original jurisdiction as well as jurisdiction conferred on him under section 153A for which assessments shall be made for each of six assessment years separately - Held, yes -Whether no addition can be made in respect of unabated

assessments which have become final if no incriminating material is found during search - Held, yes in favour of assessee. Relevant para No. 28 read as under :-

28. *In dealing with those arguments, the Division Bench outlined the ambit and scope of the powers conferred by section 153A and observed thus*

"(8) We find it difficult to accept the above contention raised on behalf of the revenue. 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 Income-tax Act, as stated in the Memorandum explaining the provisions in the Finance Bill 2003 (see 260 ITR (St) 191 at 219) 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 IT Act.

(9) that Section 153A contemplates is that, notwithstanding the regular provisions for assessment/reassessment contained in the IT 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 153A(1) is annulled, the assessment or reassessment that stood abated shall stand revived.

(10) Thus on a plain reading of Section 153A of the Income-tax Act, 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 of the Act stand abated and not the assessments/reassessments already finalised for those assessment years covered under Section 153A of the Act. 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 finalized 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 of the Income-tax Act 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).

(11) In the present case, as contended by Shri Mani, learned counsel for the assessee, the assessment for assessment year 1998-99 was finalised on the 29-12-2000 and search was conducted thereafter on 3-12-2003. Therefore, in the facts of the present case, initiation of proceedings under Section 153A would not affect the assessment finalised on 29-12-2000.

(12) Once it is held that the assessment finalised on 29.12.2000 has attained finality, then the deduction allowed under section 80 HHC of the Income-tax Act as well as the loss computed under the assessment dated 29-12-2000 would attain finality. In such a case, the A.O. while passing the independent assessment order under Section 153A read with Section 143 (3) of the I.T. Act 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 of the Income- tax Act establish that the reliefs granted under the finalised assessment/reassessment were contrary to the facts unearthed during the course of 153 A proceedings.

(13) In the present case, there is nothing on record to suggest that any material was unearthed during the search or during the 153A proceedings which would show that the relief under Section 80 HHC was erroneous. In such a case, the A.O. while passing order under Section 153A read with Section 143(3) could not have disturbed the assessment order finalised on 29.12.2000 relating to Section 80 HHC deduction and consequently the C.I.T. could not have invoked jurisdiction under Section 263 of the Act."

7. We have also considered the Judgment rendered by Hon'ble Jurisdictional High Court in the case of Murli Agro Products Ltd. (49 taxmann.com 172), wherein it was held that section 153A, read with section 263 of the Income-tax Act, 1961 - Search and seizure - assessment in case of search or requisition (Deduction wrongly allowed) - assessment year 1998-99 - Whether where there was nothing on record to suggest that any material was unearthed during search or during proceedings initiated under section 153A showing that certain relief in form of deduction was wrongly allowed to assessee, Commissioner could not invoke jurisdiction under section 263 on ground that assessment order passed under section 153A, read with section 143(3) was erroneous or prejudicial to interest of revenue - Held, yes [Paras 13 and 14] [In favour of assessee].

8. From the conjoint reading of the Judgment referred by learned AR, we are of

the view that in the case where the assessment has abated, the Assessing Officer can make additions in the assessment, even if no incriminating has been found. But in other cases the Special Bench held that the assessment u/s. 153A can be made on the basis of the 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 u/s. 143(1) and time limit for issue of notice u/s. 143(2) expired before the date of search. Therefore, there was no assessment pending in this case and in such a case there was no assessment pending in this case and in such a case there was no question of abatement.

9. On the other hand learned Departmental Representative could not counter or rebut the contentions raised by learned AR and learned Departmental Representative could not differentiate the Judgments cited and relied upon by learned AR. Therefore considering the factual position as well as settled legal position, we hold that the additions could be made only on the incriminating material found during search and since no incriminating material found during search therefore additions made were unsustainable in the eyes of law. Accordingly we delete the additions made by the Assessing Officer and confirmed by learned CIT(A).

Ground No. 2&3

10. Ground No. 2&3 are technical in nature therefore the same are dismissed in view of details findings given by us.

11. In the result, both the appeals filed by assessee are allowed.
Order has been pronounced in the Open Court on 21.9.2016.

Sd/-
(JASON P. BOAZ)
ACCOUNTANT MEMBER

Sd/-
(SANDEEP GOSAIN)
JUDICIAL MEMBER

Mumbai; Dated : 21/9/2016

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

//True Copy//

Ps. Ashwini

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai