IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "B", MUMBAI

Before Shri P K Bansal, Vice President &
Shri Pawan Singh, Judicial Member

ITA No. 5198/Mum/2013 A.Y. 2003-04,
ITA No. 5199/Mum/2013 A.Y. 2004-05
ITA No. 5200/Mum/2013 A.Y. 2005-06
ITA No. 5201/Mum/2013 A.Y. 2006-07
ITA No. 1458/Mum/2012 A.Y. 2007-08
ITA No. 3226/Mum/2015 A.Y. 2004-05
ITA No. 3227/Mum/2015 A.Y. 2005-06
ITA No. 3228/Mum/2015 A.Y. 2006-07

Mrs. Nazneen Farooq Sarang, 302 Shabnam Apartment, 33, S.V.Road, Andheri (W) Mumbai 400 058 PAN BEJPS3282N	Vs.	DCIT Central Circle 36, Mumbai
(Appellant)		(Respondent)

For the Appellant : S/Shri Piyush Chhajed & M P Chhajed
For the Respondent: S/Shri Anand Mohan & Suman Kumar

Date of Hearing : 12.09.2017		Date of Pronouncement : 09.10.2017

O R D E R

Per P K Bansal, Vice-President:

All these appeals have been filed by the assessee against respective orders of the CIT(A). ITA Nos. ITA No. 5198, 5199, 5200, 5201/Mum/2013 for A.Ys. 2003-04, 2004-05, 2005-06, 2006-07 & ITA No. 1458/Mum/2012 for A.Y. 2007-08 relate to quantum appeal while ITA Nos. 3226, 3227 & 3228/Mum/2015 for A.Y. 2004-05, 2005-06 & 2006-07 relate to levy of penalty u/s 271(1)(c) in respect of the addition made in the quantum appeal.

2. We shall first take up the quantum appeal in ITA Nos. 5198, 5199, 5200, 5201/Mum/2013 for A.Ys. 2003-04, 2004-05, 2005-06, 2006-07 & ITA No. 1458/Mum/2012 for A.Y. 2007-08. The assessee has raised common grounds of appeal in ITA Nos. 5198, 5199, 5200, 5201/Mum/2013, except for the change in figures. The ground raised in A.Y. 2003-04 reads as under:

> *"1. On the facts and circumstances of the case, the Learned Assessing Officer erred in assuming jurisdiction U/s. 153A of the Income Tax Act and consequently passing the Order U/s 143(3) read with Section 153A particularly when the proceedings U/s. 132 itself were illegal and bad in law.*
>
> *2. On the facts and circumstances of the case, the Learned Commissioner of Income Tax (Appeals) erred in confirming the addition of Rs.5,85,600/- U/s. 68 without appreciating that the cash deposits in the bank were duly explained by the Cash Book filed during the assessment proceedings."*

In ground no.2 for A.Y. 2004-05, 2005-06 and 2006-07, the figure Rs 5,85,600/- be read as ₹ 4,31,800/-, ₹ 12,52,200/- and ₹ 11,43,000/- respectively.

3. In ITA No. 1458/Mum/2012 for A.Y. 2007-08, the assessee has taken the following effective ground of appeal:

> *"1. On the facts and circumstances of the case, the Learned Assessing Officer erred in issuing Notice U/s. 153A of the Income Tax Act since the Assessee was not a search party and there was no warrant of authorization or Panchnama made on date of search i.e. 24/2/2009 & 25/2/2009. Consequently, the assessment made U/s. 143(3) read with Section 153A needs to be quashed since the same is without jurisdiction.*

2. On the facts and circumstances of the case, the Learned Commissioner of Income Tax (Appeals) erred in confirming the addition of Rs.2,73,850/- as Cash Credit U/s. 68 ignoring the cash book filed wherein the cash deposits were substantiated by the previous cash withdrawals from the bank.

3. On the facts and circumstances of the case, Learned Commissioner of Income Tax (Appeals) erred in confirming the addition of ₹ 56,00,000/- U/s. 69(c) towards investment in residential flat without appreciating that the said flat was agreed to be bought in name of Assessee's husband and the amounts paid were already reflected in his account and further more the said flat was finally never acquired due to non-payment of the agreed amount."

4. Brief facts of the case are that the assessee has filed her return of income for each of the assessment year, which was processed u/s. 143(1) as under:

Assessment Year	**Date of Filing return**	**Returned income (₹)**
2003-04	29.03.2004	1,14,200/-
2004-05	28.03.2005	1,31,490/-
2005-06	28.03.2006	1,37,450/-
2006-07	30.03.2007	1,28,750/-
2007-08	28.03.2008	1,32,480/-

A search and seizure operation was carried out u/s. 132 of the Income tax Act in Hicons & Pranay Group of cases including the assessee on 24.02.2009. Subsequent to the search, the case of the assessee was centralized with DCIT Central Circle 36, Mumbai on 18.01.2010. Notices u/s. 153A dated 20.07.2010 were issued in the case of the case of the assessee for each of

the aforesaid assessment years. In response to the notice, the assessee filed return on 12.11.2010 declaring income as under:

Assessment Year	**Returned income (₹)**
2003-04	1,14,200/-
2004-05	1,31,490/-
2005-06	1,37,450/-
2006-07	1,28,750/-
2007-08	1,63,850/-

Subsequently, notice u/s. 143(2) r.w.s. 153A were served on the assessee and after hearing the assessee the assessment in each of the assessment year was completed on the income as detailed below:

Assessment Year	**Returned income (₹)**
2003-04	6,99,800/-
2004-05	5,63,290/-
2005-06	13,89,650/-
2006-07	12,72,020/-
2007-08	60,37,690/-

Thus, making the following additions in each assessment year

Assessment Year	**Income Added (₹)**	**Under Section**
2003-04	5,85,600/-	68
2004-05	4,31,800/-	68
2005-06	12,52,200/-	68
2006-07	11,43,000/-	68
2007-08	2,73,850/-	68
	56,00,000/-	69C

So far as the addition made in each of the assessment year u/s. 68 is concerned, they have been made on the basis of cash deposit made by the assessee in the following bank accounts

Assessment Year **Banks**	**2003-04**	**2004-05**	**2005-06**	**2006-07**	**2007-08**
Malad 6370	4,03,000	1,09,000	4,80,000	8,00,000	3,000
Syndicate 50612010044496	-	3,22,500	1,67,500	3,43,000	
Corporation 15124	1,50,500		6,03,000		2,70,850
Corporation 15125	10,900		500		
Corporation 15126	10,900	300	1,200		
Corporation 15127	10,300				
	5,85,600	**4,31,800**	**12,52,200**	**11,43,000**	**2,73,850**

The additions have been made by the Assessing Officer in respect of the cash deposited by the assessee in the respective bank in respective assessment years. So far as the addition of ₹ 56,00,000/- is concerned, the Assessing Officer made this addition u/s. 69C in the A.Y 2007-08 on the basis of the declaration of assessee's husband Shri Mohammed Farooq, wherein he has stated that his wife has purchased a flat No.603, 'B' Wing, Heritage Housing Development (India) Pvt. Ltd. having carpet area of 1045 sq.ft. at Santacruz, for ₹ 61 lacs. He further stated that out of 61 lacs, ₹ 25 lacs to ₹ 30 lacs was paid by cheque and the remaining amount was paid in cash and balance is to be paid before possession of the flat, which will be given in three to six months. The Assessing Officer noted from the balance sheet of the assessee that she has shown only a sum of ₹ 5 lacs being paid to Heritage Housing Development. In the absence of any convincing explanation the Assessing

Officer added the balance sum of ₹ 56 lacs to the income of the assessee. On appeal, the CIT(A) confirmed the order of the Assessing Officer.

5. Before us, the learned AR vehemently contended that the assessments passed in consequence of notice u/s. 153A are invalid and void ab initio, as in this case the additions have not been made on the basis of any incriminating material found during the course of search. In fact, there was no search warrant in the name of the assessee on 24.02.2009, as submitted by the learned DR vide his letter dated 14.12.2015, the search warrant in the name of the assessee was issued on 06.03.2009 only for the purpose of searching locker no.82, Syndicate bank, which was not even in the name of the assessee. Our attention was also drawn towards Panchnama as Annexure 'A' to letter of the CIT-DR, dated 14.12.2015, in this regard. It was also pointed out that the assessment u/s. 153A was made on the basis of the search taken place on 24.02.2009. It was further submitted that in each of the assessment years, the assessee has submitted the return before the search. Therefore, the assessment order u/s. 153A is invalid.

6. The learned DR, on the other hand, vehemently contended that in all these assessment years, the assessment was completed u/s. 143(3) r.w.s. 153A of the I.T.Act. He relied on the decision of Hon'ble Kerala High Court in the case of CIT vs. M/s. St. Francis Clay Decor Tiles [385 ITR 624], in which it was held that u/s. 153A the phraseology 'incriminating' was any material

which was unearthed during search operations or any statement made during the course of search by the assessee is a valuable piece of evidence in order to invoke section 153A of the Income-tax Act, 1961. He also drew our attention towards the panchnama as well as the statement of the assessee's husband recorded during the course of search, a copy of which is available as Annexure 'B' to the letter of the CIT-DR dated 14.12.2015. Reliance was also placed on the decision of Hon'ble Delhi High Court in the case of Filatex India Ltd vs CIT (2014) 229 Taxman 555 as well as Judgment of Hon'ble Karnataka High Court in the case of Canara Housing Development Company Ltd. vs. DCIT 274 CTR 122 for the proposition of law that during assessment u/s. 153A, additions need not be restricted or limited to incriminating material found during course of search.

7. We have heard the rival submissions and carefully considered the same along with the orders of the tax authorities below. We noted that the Assessing Officer in each of the assessment years has clearly mentioned that the search has taken place on 24.02.2009 in the case of Hicons & Pranay Group of cases including the assessee. While the CIT-DR vide his letter dated 14.02.2015 filed copy of warrant of authorization, informed that these authorization is dated 05.03.2009 and executed on 06.03.2009 and, in view of this authorization, a panchnama was executed on 06.03.2009 at 9.50 a.m. Copy of the panchnama is annexed to the said letter as Annexure –A. We

noted that in para 2 of the said panchnama that day's search was in continuation of the proceedings of 24.02.2009. Similar panchnama was also filed by the assessee as paper-book at pages 2 and 3. This panchnama was also drawn on 06.03.2009, wherein also under para 2, we find similar language. From this it is apparent that the search has taken place in the case of the assessee on 24.02.2009 and the warrant of authorization dated 05.3.2009 was in continuation of the search warrant dated 24.02.2009 and was issued only in respect of locker No.82, Syndicate Bank, Malad Branch, Mumbai. In view of this fact, we rechecked the submission of the learned AR that there was no search in the case of the assessee on 24.02.2009. Now the question before us arises whether the additions made by the Assessing Officer are on the basis of the material found in the course of the search. It is not disputed that in respect of all these assessment years the assessee has filed return before the date of the search. The returns so filed were also processed u/s. 143(1) prior to the date of the search. Since the assessment has already been completed for each of the assessment year by processing the return u/s. 143(1), therefore these assessments were not pending and were not abated. We have also gone through case laws as relied upon by both the parties. We noted that the Hon'ble Bombay High Court in the case of CIT vs. Continental Warehousing Corporation (Nhava Sheva) Ltd. (supra). approved the decision of the Special Bench of this Tribunal in the case of All Cargo Global Logistics Ltd vs. DCIT 137 ITD 287 under various paragraph of

its order on the question of whether any addition can be made while completing assessment u/s. 153A on the basis of the material which was not found during the course of search, where assessment have not been unabated. Head notes of the order reported read 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 153 A. 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. [Para 22]*

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. [Para 23]

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. [Para 24]

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 153 A, 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 [Para 28]

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.[Para 29]

• 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 153 A is permissible still the provision cannot be read in the manner suggested by the revenue. Not only the finalised N 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.[Para 30]

•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. [Para 31]

• 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.[Para 35]

8. We have also gone through the decision of the Special Bench of This Tribunal in the case of All Cargo Global Logistics Ltd (supra), wherein the Bench was constituted to decide the following question of law:

"Whether, on the facts and in law, the scope of assessment u/s 153A encompasses additions, not based on any incriminating material found during the course of search?

We noted that Before the Special Bench, Ld Sr. Counsel relied on the decision of LMG International Ltd as is apparent from para 16 of that order. We noted that in the said judgment in para 52 of its order, the Tribunal has held that section 153A comes into operation if a search or requisition is initiated after

31.5.2003. On the satisfaction of this condition, the Assessing Officer is under obligation to issue notice to the persons requiring him to furnish the return of income of immediately preceding six years from the year of search. This finding implied that the proceedings U/s.153A is not to be restricted to the years for which incriminating material is found during the search. Ultimately, in respect of question referred to the Special Bench, the Special Bench in para 58 of its order held 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 t he 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 t he course of search but not produced in the course of original assessment, and; (ii) undisclosed income or property discovered in the course of search".*

In view of this decision, no doubt, the addition in the case of the assessee can be made by the Assessing Officer only on the basis of incriminating material found during the course of search. No doubt, before us learned DR has placed reliance on the decision of Hon'ble Delhi High Court in the case of Filatex India Ltd vs CIT (supra), as well as Judgment of Hon'ble Karnataka High Court in the case of Canara Housing Development Company Ltd. (supra), in which it was held by the respective High Court held that the

assessing authority shall determine the total income of the assessee taking-into consideration the materials which was the subject-matter of earlier return and the undisclosed income unearthed during search and also any other income which comes to his notice. But when we have jurisdictional High Court decision, that will be binding before us and, thus, we are bound to follow the decision of the Hon'ble Bombay High Court in the case of CIT vs. Continental Warehousing Corporation (Nhava Sheva) Ltd. (supra).

9. Now coming to the addition made by the Assessing Officer, we noted, on the basis of the facts involved that the additions in A.Ys. 2003-04, 2004-05, 2005-06, 2006-07 and 2007-08 made u/s. 68 relate to the cash deposited by the assessee in its bank accounts. But it is a fact that these bank accounts were not found during the course of the search. Even the learned DR did not produce any material showing that these banks accounts were found during the course of search. In these circumstances, we are bound to delete the addition made u/s. 68 in each of the assessment years. Thus, ground no.2 of the assessee's appeal in each of the assessment yeas is allowed and we delete the additions made u/s. 68 of ₹ 5,85,600/- ₹ 4,31,800/-, ₹ 12,52,200/- ₹ 11,43,000/- and ₹ 2,73,850/- respectively.

10. Now remains ground no.3 in A.Y. 2007-08 relating to the addition of ₹ 56 lacs made by the Assessing Officer u/s. 69C towards investment in the residential flat. We heard the rival submissions in this regard. The learned

AR, before us vehemently contended that this addition has been made by the Assessing Officer on the basis of the reply furnished by the assessee in response to query no.4(v) dated 11.04.2009 and this is not based on any incriminating material found during the course of the search. The learned DR has relied on the statement recorded u/s 132 (4) of assessee's husband Shri Mohammed Farooq, on 24.02.2009, wherein he has stated that his wife has purchased a flat No.603, 'B' Wing, Heritage Housing Development (India) Pvt. Ltd. having carpet area of 1045 sq.ft. at Santacruz, and that the investment of ₹ 61 lacs was made by the assessee for which payment has been made during 2006-07. Subsequently, in reply to question no.1, the husband of the assessee stated that in respect of the said flat a sum of ₹ 20 lacs had been given in cash. It is a fact that the assessee is a Muslim lady and as per their religion they are not permitted to show their face to any person outside family. Therefore, we noted, under these circumstances, the Revenue has taken the statement of the assessee's husband. . The statement under these circumstances given by husband of the assessee, in our opinion, will be binding on the assessee.

11. Now the question before us arise whether the statement so recorded will be regarded as incriminating material for the purpose of making addition in unabated assessment. The learned DR in this regard relied on the decision of Hon'ble Kerala High Court in the case of CIT vs. M/s. St. Francis Clay Decor

Tiles (supra). We noted, in this decision, the Hon'ble High Court defined the phraseology "incriminating" and took the view that incriminating will mean any material unearthed during search operations or any statement made during the course of search by the assessee will be a valuable piece of evidence in order to invoke section 153A of the Act. No contrary decision was brought to our knowledge by the learned AR but as a alternative, he submitted that the assessee has paid a sum of ₹ 5 lacs through cheque out of her bank account while a sum of ₹ 20 lacs was paid by her husband Shri Mohammed Farooq and the said amount has duly been shown by him in his IT Return, a copy of which was filed before us. Thus, it was contended that if any addition has to made, the sum of ₹ 20 lacs has also to be treated as source of investment along with the sum of ₹ 5 lacs, as has been allowed by the Assessing Officer. We noted that in this case, the assessee has made an investment of ₹ 61 lacs as has been disclosed by the assessee's husband in the statement recorded u/s. 132(4). Out of the said sum of ₹ 61 lacs, ₹ 5 lacs has been paid by the assessee and ₹ 20 lacs has been paid by the assessee's husband, which has been shown in his IT return copy of which has filed before us. For the balance amount of ₹ 36 lacs, the assessee has not proved any source. Therefore, we confirm the addition of ₹ 36 lacs as undisclosed investment u/s. 69C of the I.T Act. Thus, ground no.3 in A.Y. 2007-08 is partly allowed, thereby reducing the addition of ₹ 56 lacs to ₹ 36 lacs.

The quantum appeals for A.Ys. 2003-04 to 2006-07 are allowed and the appeal for A.Y. 2007-08 is partly allowed.

12. Now coming to the appeals relating to penalty imposed u/s. 271(1)(c) for the A.Y. 2004-05 , 2005-06 and 2006-07. We noted that the penalty has been levied and confirmed by the CIT(A) on the additions in each of the assessment year. Since, we have deleted the additions in the preceding paragraphs while dealing with the quantum appeals, the penalty will also get deleted.

13. In the result, appeals for A.Ys. 2003-04 to 2006-07 are allowed and the appeal for A.Y. 2007-08 is partly allowed.

Order pronounced in the open court on 9th day of October, 2017.

Sd/-	**Sd/-**
(Pawan Singh)	(P K Bansal)
JUDICIAL MEMBER	**VICE-PRESIDENT**

Mumbai; Dated: 9th October, 2017

SA

Copy of the Order forwarded to :

1. The Appellant.
2. The Respondent.
3. The CIT(A),Mumbai
4. The CIT
5. DR, 'B' Bench, ITAT, Mumbai

BY ORDER,

#True Copy #

Assistant Registrar
Income Tax Appellate Tribunal, Mumbai