

“1) On the facts and in the circumstances of the case and in law, the Id CIT(A) erred in allowing the assessee’s appeal relying on the Mumbai Special Bench of ITAT in the case of All Cargo Global Logistics Ltd. (ITA No. 5108 to 5022/Mum/2010 dated 06.07.2012) without appreciating the fact that the above decision of the Mumbai Special Bench of ITAT which is upheld by the Hon’ble Bombay High Court has not been accepted by the department and SLP has been filed in the Supreme Court and the same is admitted by the Supreme Court.

The appellant prays that the order of the CIT(A) on the above grounds be set aside and that of the Assessing Officer be restored.”

3. Briefly put, the controversy in the present appeal revolves around the scope of additions that can be made by the Assessing Officer in an assessment finalised u/s 143(3) r.w.s. 153C of the Act in a case where the assessment originally made u/s 143(3) of the Act does not abate. As per the CIT(A), in such a situation, the only addition that is permissible in an assessment finalised u/s 143(3) r.w.s. 153C of the Act is that which is based on incriminating material found in the course of search. For the said proposition, the CIT(A) has relied upon the decision of the Special Bench of the Tribunal in the case of All Cargo Global Logistics Ltd. which has further been upheld by the Hon'ble Bombay High Court in the case reported in 374 ITR 645 (Bom.). The CIT(A) has also relied upon the judgment of Hon'ble Rajasthan High Court in the case of *Jai Steel (India), Jodhpur vs. ACIT, [2013] 36 taxmann.com 523* for a similar proposition. Against such a decision of the CIT(A), Revenue is in appeal before us.

4. As the Grounds of appeal raised by the Revenue reveal, the only plea is that the judgment of the Hon'ble Bombay High Court in the case

of All Cargo Global Logistics Ltd. (supra) has not been accepted by the Department inasmuch as an SLP has been filed before the Hon'ble Supreme Court, which is pending. Quite clearly, filing of SLP before the Hon'ble Supreme Court does not affect the binding nature of the judgment of the Hon'ble Bombay High Court which continues to subsist and, therefore, the argument raised by the Revenue before us is devoid of any merit.

5. So however, in order to impart completeness to the order, the following discussion is relevant. The respondent-assessee is a part of Rohan group of cases where a search and seizure action u/s 132 of the Act was carried out by the Department on 26.05.2011. Consequent to the search action, a notice u/s 153C of the Act dated 10.09.2013 was issued to the assessee calling for return of income and in response, assessee filed its return of income declaring total income of Rs.3,91,45,468/-, which was the same as was declared in the return originally filed u/s 139 of the Act dated 27.11.2006 for the instant assessment year. Notably, the return of income filed u/s 139 of the Act had been subject to a scrutiny assessment u/s 143(3) of the Act on 31.12.2008 whereby the income was assessed at Rs.3,91,45,468/-. In view of the aforesaid situation, therefore, the original assessment dated 31.12.2008 did not abate in terms of the second proviso to Sec. 153A(1) of the Act. Since the original assessment did not abate, the proposition of law laid down by the Hon'ble Bombay High Court in the case of Allcargo Global Logistics Ltd. (supra) gets triggered, which permits the Assessing Officer to make additions in the ensuing assessment u/s 143(3) r.w.s 153 of the Act only with reference to the incriminating

materials found in the course of search. Now, as per the assessment order, the Assessing Officer has made three additions to the returned income, namely, Prior period expenses – Rs.54,78,729/-; Depreciation on building rented out – Rs.12,11,572/-; and, disallowance of Building Repair expenses – 15,06,467/-. In this context, we have perused the relevant discussion in the assessment order and find that so far as the disallowance of Prior period Expenses is concerned, the same has been made by taking recourse to the Tax Audit Report of the assessee, which was also available at the time of original assessment proceedings. Secondly, with regard to the depreciation on building rented out, the relevant discussion shows that assessee had capitalised during the year under consideration the value of the building, part of which was rented out. The Assessing Officer adopted an ad-hoc basis to determine the let-out portion, and on such proportionate value of building, depreciation has been denied. Thirdly, the Assessing Officer examined the building repair expenses and found that there was no material to segregate as to which part of the expenses related to the portion of building which was used for the purposes of business. The Assessing Officer also noted that a similar issue was discussed in Assessment Years 2008-09 and 2009-10 in the original assessment proceedings. Accordingly, on an ad-hoc basis, he has disallowed a portion of the repair expenses. The manner in which the aforesaid three additions have been made by the Assessing Officer clearly brings out that they are not emanating from any incriminating material found in the course of search. In fact, in the assessment order itself, there is no reference made to any incriminating material found during the search in order to justify the aforesaid additions. Therefore, on facts, in our view, the

CIT(A) made no mistake in relying upon the judgment of the Hon'ble Bombay High Court in the case of *Allcargo Global Logistics Ltd. (supra)* and deleted the aforesaid additions. The order of the CIT(A) is thus affirmed and accordingly, Revenue fails in its appeal.

6. In the result, appeal of the Revenue is dismissed.

Order pronounced in the open court on 27th October, 2017.

Sd/-
(RAM LAL NEGI)
JUDICIAL MEMBER

Mumbai, Date : 27th October, 2017

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Copy to :

- 1) The Appellant
- 2) The Respondent
- 3) The CIT(A) concerned
- 4) The CIT concerned
- 5) The D.R, "A" Bench, Mumbai
- 6) Guard file

Sd/-
(G.S. PANNU)
ACCOUNTANT MEMBER

By Order

Dy./Asstt. Registrar
I.T.A.T, Mumbai