THE INCOME TAX APPELLATE TRIBUNAL
"F" Bench, Mumbai
Before Shri B.R. Baskaran (AM) & Shri Ravish Sood (JM)

I.T.A. No. 4238/Mum/2016 (Assessment Year 2007-08)
I.T.A. No. 4241/Mum/2016 (Assessment Year 2009-10)

DCIT CC-6(4) Room No. 1925 19th Floor Air India Building Nariman Point Mumbai-400 020.	Vs.	M/s. J.M. Baxi & Co. 16, Bank Street Fort Mumbai-400 001. PAN : AAAFJ5198E
(Appellant)		(Respondent)

Assessee by	Shri Y.P. Trivedi & Ms. Usha Dalal
Department by	Shri Jasbir Chauhan
Date of Hearing	2.11.2017
Date of Pronouncement	2.11.2017

O R D E R

Both the appeals filed by the Revenue are directed against the order passed CIT(A)-54, Mumbai and they relate to A.Y. 2007-08 & 2009-10. Both appeals were heard together and hence they are being disposed of by this common order, for the sake of convenience. The Revenue is aggrieved by the decision of CI(A) in deleting the disallowance made u/s. 14A of the Act in both years by following decision rendered by Hon'ble Bombay High Court in the case of CIT Vs. Continental Warehousing Corporation (Nhava Sheva) Ltd. (374 ITR 645).

2. We heard the parties and perused the record. The assessee was subjected to search on 20.3.2012 and consequently the present years were completed by the AO u/s. 143(3) read with section 153A of the Act. In the assessment proceedings the AO made disallowance u/s. 14A of the Act in both the years under consideration. The case of the assessee is that years under consideration fall under the category of unabated assessments since regular assessments of both the years have been completed by the AO prior to the date of commencement of search. It was further submitted that the search official did not unearth any incriminating material relating to the addition made u/s.

14A of the Act and hence the impugned addition cannot be made by the AO in the case of completed assessment, as held by Hon'ble Bombay High Court in the case of Continental Warehousing Corporation (Nhava Sheva) Ltd. (supra).

3. The Ld. CIT(A) was convinced with the contentions of the assessee and accordingly deleted the addition made u/s 14A of the Act in both the years. For the sake of convenience, we extract below the operative portion of the order passed by CIT(A) in assessment year 2007-08:-

> *7.4.1 I have considered the submissions of the appellant and perused the materials available on record. The appellant has requested to delete the disallowance of Rs. 37,00,8407- made u/s 14A of the Act rw Rule 8D. The appellant's main contentions are that it had not received any exempt income during the year and hence no disallowance u/s 14A of the Act can be made. It was also argued that the disallowance u/s 14A of the Act cannot exceed the amount of exempt income. It has further been argued that no interest bearing funds have been utilized for making investments, income from which will be exempt and the appellant has sufficient own or interest free funds for covering such investments. It was further argued that the firm has made investments in 100% wholly owned subsidiaries (WOS) outside India and dividends/profits received/receivable from such investments in WOS are fully taxable in India and hence cannot be considered as exempt income and hence to be excluded for the purpose of calculation for 14A disallowances. It has further been argued that the investments have been made in group companies and hence very minimal expenditure need to considered for making such investments. The appellant has also raised preliminary objection that for the assessment year under consideration the assessment was already finalized u/s 143(3) of the Act on 31.12.2009 and as on date of initiation of search no assessment proceedings for the relevant assessment year was pending and hence the assessment order u/s 143(3) of the Act dated 31.12.2009 was .not abated and hence had become final. It has also been argued that such completed assessment, i.e. the assessment which does not get abated can only be disturbed on the basis of any incriminating document/material found during the course of search proceedings and in respect of disallowance made u/s 14A of the Act no incriminating document/material was found during the course of search. In view of same it has further been argued that the Ld. AO ought not to have made disallowance/addition u/s 14A of the Act under consideration while finalizing the assessment u/s 143(3) rws 153A of the Act which is the subject matter of appeal. The contentions of the appellant have been considered. From the impugned assessment order u/s 143(3) rws 153A of the Act dated 07.03.2014 it is observed that while making disallowance u/s 14A of the I Act at Rs. 37,00,8407- the Ld. AO has not made any*

reference to the books of account or other documents not produced in the course of original assessment but found in the course of search. As discussed above, the Hon'ble Bombay High Court in the case of CIT vs. Continental Warehousing Corporation (Nhava Sheva) Ltd (supra), while defining the scope of assessment u/s 153A of the Act has held as under.

> *"(a) In so far as pending assessment ore concerned, the jurisdiction to make original assessment and assessment u/s 153A merge into one and only one assessment for each assessment year shall be made separately on the basis of the findings of the search and any other material existing or brought on the record of the AO*
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> *(b) in respect of non-abated assessments, the assessment will be made on the basis of books of account or other documents not produced in the course of original assessment but found in the course of search, and undisclosed income or undisclosed property discovered in the course of search"*

Further the Hon'ble ITAT, Mumbai in the case of Parag M Sanghvi vs. ACIT, reported in 63 taxmann.com, after following the decision of the Hon'ble Bombay High Court in the case of CIT vs. Continental Warehousing Corporation (Nhava Sheva) Ltd (supra), has held as under.

> *"7. We have carefully considered the rival submissions. Section 153A of the Act postulates the assessment in cases of search or requisition under section 132 or under section 132A of the Act respectively. The said section envisages that the Assessing Officer shall assess or reassess the total income for six assessment years immediately preceding the assessment year relevant to the previous year in which search was conducted. The second proviso to section 153A (1) of the Act also prescribes that assessment or reassessment, if any, relating to any assessment year falling within the period of six years referred to in sub-section (I) of section 153A of the Act, which is pending on the date of initiation of search or making of requisition as the case may be, shall abate. In other words, in so far as the pending assessments are concerned, the competence of the Assessing Officer to make the original assessment converges with the assessment to be made U/s. 153A of the Act, i.e. only one assessment shall be made for such assessment years based on the findings of the search as well as any other material existing or brought on record by the Assessing Officer. Notably, there would assessments in the period of the six assessment years identified in section 153A(1) of the Act, which would have become final (i.e. not pending on the date of search) such assessments do not abate in terms of the second proviso to sec. 153A(1) of the Act. The scope and ambit of such an assessment*

is the controversy before us. In this context, it would be pertinent to refer to the judgment of the Hon'ble Bombay High Court in the case of CIT v. Continental Warehousing Corpn. (Nhava - Sheva) [2015] 58 taxmann.com 78 wherein the scope of an assessment under section 153 A of the Act has been considered. One of the points addressed by the Hon'ble High Court was whether the scope of assessment under section 153A of the Act envisages additions, which are otherwise not based on any incriminating material found during the course of search. As per Hon'ble High Court, no addition could be made in respect of the assessment that had become final in the event no incriminating material was found curing the course of search. The Hon'ble High Court also noticed its earlier judgment in the case of Murali Agro-products Ltd. (supra) and has elaborately culled out the scope and ambit of the assessment and reassessment of total income under section 153A(1) of the Act read with the proviso thereof. The Hon'ble Bombay High Court in Continental Warehousing Corpn. (Nhava-Sheva) case (supra) has ruled that an unabated assessment under section 153A(1) would not encompass an addition, if no incriminating material is found during the course of search, because in such a case, the original assessment had become final. This proposition has been canvassed by the Ld. Representative for the assessee before us in order to assail the addition of Rs. 1,29,53,8231- made by the Assessing Officer treating the gifts received from Non-resident individuals as unexplained, within the meaning of section 68 of the Act.

7.1 In the present case, we have perused the orders of the lower authorities and find that there is nothing on record to suggest that any material was found during the course of search which would show that the impugned gifts received from the two Non-Resident individuals were in-genuine or were contrary to the stated position. Notably, the assessee has asserted before the lower authorities that gifts of Rs. 77,03,8231- from Shri Ashok Pamani and Rs. 52,50,000/-from Shri Raj Sitadas Motwani were received through banking channels. The assessee had furnished copies of the gift deeds, copies of the Passport and bank statement of the donees to establish the genuineness of the gifts. The discussion in the respective orders of the authorities below also reveal that documents showing the PAN of Shri Ashok Pamani were a/so furnished by the assessee. Before us, the Ld. Representative for the assessee also referred to page 29 of the Paper Book, wherein is placed a copy of an Article published in the magazine containing a write-up about the financial and business interest of the two donors, which prima facie show the creditworthiness of the donees. Be that as it may, we are not presently dealing with the merits of the efficacy of the ingredients of section 68 of the Act, but we are

only trying to ascertain as to whether any incriminating material was unearthed during the course of search which would show that the gifts were ingenuine. On this aspect, we find that there is no material referred to by the Revenue to say that any incriminating material was unearthed during the search. Therefore, in this factual background, we do not find any justification for the Assessing Officer to make the impugned addition in an assessment finalized under section 153A of the Act in the absence of any incriminating material having been found during the course of search, qua the impugned gifts from the Non-Resident individuals. We may categorically mention here that on the date of initiation of search, qua the assessment year 2004-05 under consideration, assessment was not pending and, accordingly, the assessment for this year did not abate in terms of the second proviso to Section 153A(1) of the Act. Therefore, the ratio of the judgment of Hon'ble Bombay High Court in the case of Continental Warehousing Corpn. (Nhava-Sheva) (supra) is clearly attracted and the impugned addition could not have been made in respect of an unabated assessment which had become final in the absence of any incriminating material having been found in the course of search, qua the impugned gift. Thus, we set aside the order of CIT(A) and direct the Assessing Officer to delete the addition of Rs. 129,53,8231- as the same is purported to be beyond the scope and ambit of an assessment envisaged under section 153A of the Act. Thus, on this aspect assessee succeeds."

7.4.2 From the facts available on records, it is observed that the Ld. AO has not brought out the fact that the impugned disallowance u/s 14A of the Act has been made on the basis of "books of account or other documents not produced in the course of original assessment but found in the course of search/incriminating material found during the course of search". Further the assessment of the relevant assessment year was already completed on 31.12.2009, i.e. before the date of initiation of search on 20.03.2012 and hence not abated. In view of facts & law discussed above and respectfully following the decision of Hon'ble Bombay High Court in the case of CIT vs. Continental Warehousing Corporation (Nhava Sheva) Ltd (supra) and Hon'ble ITAT, Mumbai in the case of Parag M Sanghvi vs. ACIT (supra), it is held that the Ld. AO was not justified in disallowing the impugned sum of Rs. 37,00,8407- u/s 14A of the Act and the same is liable to be deleted without going into the merits of disallowance. Hence, the Ld. AO is directed to delete the said disallowance of Rs. 37,00,8407-. Accordingly, the Ground No. 1 with sub grounds is ALLOWED."

4. We notice that the LdCIT(A) has followed the binding decision rendered by Hon'ble Bombay High Court. Hence we do not find any reason to interfere with his order passed on this issue.

5. In the result, both the appeals filed by the Revenue are dismissed.

Order has been pronounced in the Court on 2.11.2017.

Sd/-	Sd/-
(RAVISH SOOD)	(B.R.BASKARAN)
JIDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai; Dated :02/11/2017

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.

BY ORDER,

//True Copy//

(Asstt. Registrar/Senior PS)

PS ITAT, Mumbai