IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "G", MUMBAI

Before Shri C.N. Prasad (JUDICIAL MEMBER)

AND
Shri G Manjunatha (ACCOUNTANT MEMBER)

ITA No.	PAN	A.Y.	Appellant	Respondent
5371/M/15	AAACW0744L	2006-07	M/s Welspun Corp Ltd, 7th Floor, Welspun House, Kamala Mill Compound, SB Marg, Lower Parel, Mumbai	DCIT, Cent.Cir.22, Mumbai
5372/M/15	-do-	2005-06	-do-	-do-
5379/M/15	AAACW1259N	2005-06	M/s Welspun India Ltd, 9th Floor, "B" Wing, Trade World, Kamala Mills Compound, Senapati Bapat Marg, Lower Parel, Mumbai-13	-do-
5378/M/15	-do-	2006-07	-do-	-do-
5377/M/15	-do-	2007-08	-do-	-do-
5724/M/15	-do-	2005-06	Dy.CIT, Cent.Cir.3(3), Mumbai	M/s Welspun India Ltd, Mumbai
5719/M/15	-do-	2006-07	-do-	-do-
5716/M/15	-do-	2007-08	-do-	-do-
5720/M/15	AACW07441	2005-06	-do-	M/s Welspun Corp Ltd, 7th Floor, Welspun

				House, Kamala Mill Compound, SB Marg, Lower Parel, Mumbai
5717/M/15	-do-	2006-07	-do-	-do-

Assessee by	Shri Mitesh Shah
Revenue by	Shri Parag Vyas

Date of hearing	22-03-2018
Date of pronouncement	-04-2018

O R D E R

Per Bench :

This bunch of 10 appeals filed by two different assessees as well as the revenue are directed against separate, but identical orders of the CIT(A)-51, Mumbai dated 10-09-2015 and they pertain to AY 2005-06, 2006-07 & 2007-08. Since facts are identical and issues also common, for the sake of convenience, these appeals were heard together and are disposed of by this common order.

2. The assessee, as well as the revenue have taken more or less common grounds of appeal in all the appeals. For the sake of brevity, grounds of appeal raised by the assessee as well as the revenue for AY2005-06 are extracted below:-

Revenue– ITA 5720 /M/2015 (Welspun Corp Ltd)

> "On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in deleting the disallowance made U/S.14A without appreciating that Rule 8D is squarely applicable."

ii. "On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in deleting the addition on account of unexplained cash credit without appreciating that the assessee has not provided any documentary evidences to prove the genuineness of the transaction."

iii. "On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in deleting the addition of Rs.90,53,404/- on account of professional fees u/s.40(a)(ia) r.w.s.37(l) of the IT Act ignoring the fact that no TDS was deducted on this."

iv. "On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in deleting the addition of Rs.27,67,423/- on account of depreciation on fixed assets in respect of professional fees capitalized in fixed assets/'

v. "On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in deleting the addition of Rs.34,28,891/- by way of disallowing of depreciation u/s.40(a)(ia) in respect of pre-operative expenses capitalized in fixed assets."

vi. "On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in deleting the addition of Rs.24,00,OOO/- by way of disallowing FCCB Premium."

vii. "On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in deleting the addition of Rs.21,96,OOO/- by way of disallowing depreciation in "On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in deleting the addition of Rs. 78, 39,000/- by way of disallowing depreciation on fixed assets in respect of FCCB Premium and FCCB issue expenses first debited to pre-operative expenses and thereafter capitalized in the fixed assets/' "On the facts and in the circumstances of the case and in law, the CIT(A) erred in deleting the addition on account of book profit of Rs.l8,13,330/-without appreciating that there is no brought forward book loss available to the assessee." '

x. "On the facts and in the circumstances of the case and in law, the Ld CIT(A) erred in deleting the addition made to book on account of disallowance u/s.14A of the IT Act."

Revenue –ITA No.5377/Mum/2015 (M/s Welspun India Ltd)

The ground or grounds of appeal are without prejudice to one another.

1.a) On the facts and in the circumstanees of the case and in law, the Id. C1T(A) erred in not appreciating that:-(i) the order passed u/s.143(3) r.w.s.!53A by the AO is without jurisdiction and bad in law as the jurisdiction u/s. 153A is vitiated;

and (ii) the additions made by the AO are beyond the scope of provisions of section 153A.

2.a) On the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in confirming the addition to the extent of ? 1,00,000/-made by the AO to the income of the Appellant by way of disallowing certain expenditure claimed to have been incurred relating to exempt income invoking the provisions of section 14A.

b) The Id. CIT(A) failed to appreciate that:-

(i) having regard to the accounts there is no reason and basis in reaching to dis-satisfaction with the correctness of the claim of the Appellant that no expenditure was incurred in relation to dividend income which does not form part of the total income; and

(ii) the investment in shares was made out of business strategy and there was no major change in such investment.

c) In reaching to the conclusion and confirming such addition the Id. C1T(A) omitted to consider relevant factors, considerations, principles and evidences while he was overwhelmed, influenced and prejudiced by irrelevant considerations and factors.

3. On the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in confirming the addition to the extent of ? 1,00,000/-made by the AO to the book profit of the Appellant by way of adding back disallowance made U/S.14A and thereby erred in enhancing the book profit artificially.

The Id. CIT(A) erred in holding that levy of interest u/s. 234D of the Income Tax Act, 1961 is consequential. The Appellant denies its liability for such interest.

5 . The Id. CIT(A) erred in holding that ground raised disputing initiation of the penalty proceedings u/s.271(l}(c) of the Income Tax Act, 1961 is premature. The Appellant denies its liability for such penalty.

Assessee – ITA 5372/Mum/2015 (M/s Welspun Corp Ltd)

The ground or grounds of appeal are without prejudice to one another.

1.a) On the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in not appreciating that:-(i) the order passed u/s. 143(3) r.w.s.!53A by the AO is without jurisdiction and bad in law as the jurisdiction u/s. 153A is vitiated; and

(ii) the additions made by the AO are beyond the scope of provisions of section 153A.

2.a) On the facts and in the circumstances of the case arid *in* law, the Id. CIT(A) erred in confirming the addition to the extent of ? 50,000/- made by the AO to the income of the Appellant by way of disallowing certain expenditure claimed to have been incurred relating to exempt income invoking the provisions of section 14A.

b) The Id. CIT(A) failed to appreciate that:-

(i) having regard to the accounts there is no reason and basis in reaching to dis-satisfaction with the correctness of the claim of the Appellant that no expenditure was incurred in relation to dividend income which does not form part of the total income; and

(ii) the investment in shares was made out of business strategy and there was no major change in such investment.

c) In reaching to the conclusion and confirming such addition the Id. CIT(A) omitted to consider relevant factors, considerations, principles and evidences while he was overwhelmed, influenced and prejudiced by irrelevant considerations and factors.

3. On the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in confirming the addition to the extent of ? 50,GOO/- made by the AO to the book profit of the Appellant by way of adding back disallowance made u/s.!4A and thereby erred in enhancing the book profit artificially.

4. The Id. CIT(A) erred in holding that levy of interest u/s. 234B, 234C, 234D and 220(2) of the Income Tax Act, 1961 is consequential. The Appellant denies its liability for such interest.

5 . The Id. CIT(A) erred in holding that ground raised disputing initiation of the penalty proceedings u/s.271(l)(c) of the Income Tax Act, 1961 is premature. The Appellant denies its liability for such penalty."

Assessee – ITA 5379/Mum/2015 (M/s Welspun India Ltd)

The ground or grounds of appeal are without prejudice to one another.

1.a) On the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in not appreciating that:-

(i) the order passed u/s. 143(3) r.w.s.!53A by the AC is without jurisdiction and bad in law as the jurisdiction u/s. 153A is vitiated; and

(ii) the additions made by the AC arc beyond the scope of provisions of section 153A.

2.a) On the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in confirming the addition to the extent of ^ 50,000/- made by the AO to the income of the Appellant by way of disallowing certain expenditure claimed to have been incurred relating to exempt income invoking the provisions of section 14A.

b) The Id. C1T(A) failed to appreciate that:-

(i) having regard to the accounts there is no reason and basis in reaching to dis-satisfaction with the correctness of the claim of the Appellant that no expenditure was incurred in relation to dividend income which does not form part of the total income; and

(ii) the investment in shares was made out of business strategy and there was no major change in such investment.

c) In reaching to the conclusion and confirming such addition the Id. CIT(A) omitted to consider relevant factors, considerations, principles and evidences while he was overwhelmed, influenced and prejudiced by irrelevant considerations and factors.

3. On the facts and in the circumstances of the case and in law, (he Id. CIT(A) erred in confirming the addition to the extent of ? 50,000/ - made by the AO to the book profit of the Appellant by way of adding back disallowance made u/s.14A and thereby erred in enhancing the book profit artificially.

4. The Id. CIT(A) erred in holding that levy of interest u/s.234B, 243C, 234D and 220(2) of the Income Tax Act, 1961 arc consequential. The Appellant denies its liability for such interest.

5 . The Id. CIT(A) erred in,'holding that ground raised disputing initiation of the penalty proceedings[1].'u/s.271(l)(c) of the Income Tax Act, 1961 is premature. The Appellant denies its liability for such penalty. The Appellant craves leave to add, alter, amend or delete any or all of the above grounds of appeal. '

3. From these grounds of appeal, the assessee, in addition to challenging the addition sustained by the Ld.CIT(A), has also taken a legal plea questioning the validity of assessments framed u/s 143(3) r.w.s. 153A for AYs 2005-06 to 2007-08 on the ground that the assessment for AYs 2005-06 to 2007-08 are unabated, therefore, in absence of any seized material found as a result of search, no addition can be made. The assessee also taken a ground challenging the action of the Ld.CIT(A) in sustaining various addition for all assessment years. The revenue, from their grounds of appeal has challenged the action of the Ld.CIT(A) in deleting various additions made by the AO for all assessment years.

4. The brief facts of the case extracted from ITA No.5379/Mum/2015 for AY 2005-06 are that a search & seizure action u/s 132 of the Income-tax Act, 1961 was carried out on 13-10-2010 at the business / residential premises of Welspun group of concerns, in which the assessee was also covered. In this case, the assessee has filed its return of income for AY 2005-06 u/s 139(1) of the Income-tax Act, 1961. The assessment was

originally completed u/s 143(3) on 24-12-2007 wherein certain additions were made in respect of depreciation and interest. The assessee carried the matter in appeal before the first appellate authority and the CIT(A)-7, Mumbai, vide his order dated 16-05-2008 deleted all additions made by the AO. In further appeal before ITAT by the department, the ITAT, vide its order dated 30-04-2010 upheld the order of CIT(A). Subsequently, the CIT(A)-7, Mumbai, vide order u/s 263 dated 24-03-2010 set aside the assessment order passed u/s 143(3) dated 24-12-2007. On appeal before the ITAT, the ITAT, vide order dated 03-07-2015 in ITA No.3374/Mum/2010 set aside the order passed by the CIT(A) and restored the assessment order passed by the AO u/s 143(3).

5. Consequent upon the search on 13-10-2010, the AO issued notice u/s 153A for six assessment years immediately preceding the year in which search took place and called upon the assessee to furnish true and correct return in respect of six assessment years. In response, assessee filed its returns of income on 09-09-2011 declaring total income at Nil under the normal provisions and book profit of Rs.31,33,31,530 u/s 115JB of the Income-tax Act, 1961. The case has been selected for scrutiny and notices u/s 143(2) and 142(1) along with detailed questionnaire were issued and duly served on the assessee. In response to the said notice, the authorized representative of the

assessee appeared from time to time and furnished the details as called for. The assessment has been completed u/s 143(3) r.w.s. 153A of the Act on 26-03-2013 determining the total income at Rs.9,02,60,260 by disallowing expenses incurred in relation to exempt income u/s 14A of the Income-tax Act, 1961.

6. Aggrieved by the assessment order, assessee preferred an appeal before the CIT(A). Before the CIT(A), the assessee has taken a legal ground questioning the validity of assessments framed u/s 143(3) r.w.s. 153A for AYs 2005-06 to 2007-08 on the ground that the AO has made various additions without any reference to incriminating material found as a result of search which is bad in law and the whole proceedings was vitiated. The assessee has filed elaborate written submissions in respect of its legal ground which has been reproduced by the Ld.CIT(A) in his order at para 6.3 on pages 6 to 9. The sum and substance of the arguments of the assessee before the CIT(A) were that assessment for the assessment years 2005-06 to 2007-08 are unabated / concluded as on the date of search and hence, the AO has no jurisdiction to make additions without reference to any seized material found as a result of search. The assessee further submitted that in the case of concluded assessment, the AO has jurisdiction to make additions on the issues where the department has found certain seized materials. Insofar as

abated assessments and assessments which are pending as on the date of search, the AO can assume jurisdiction to assess / re-assess total income on the basis of regular books of account and incriminating material found as a result of search. In this case, the AO has made various additions which are not supported by any seized material found as a result of search. Therefore, the assessment order passed without reference to any seized material is bad in law and liable to be quashed.

7. The Ld.CIT(A), after considering relevant submissions of the assessee and also relying upon the case law cited by the assessee including the decision of ITAT, Mumbai Special Bench in the case of All Cargo Global Logistics Ltd vs DCIT 137 ITD 287, observed that there is no merit in the arguments of the assessee that the AO cannot make any addition in respect of unabated assessments in the absence of any incriminating material as the provisions of section 153A is very clear inasmuch as where the search has taken place u/s 132, the AO is empowered to assess / re-assess the total income which includes disclosed and undisclosed income of six years immediately preceding the year in which search took place. The power to re-assess is very obviously and not based on seized materials. If a harmonised interpretation is given to the provisions which will follow that the power to re-assess would mean subjecting a completed assessment to another

fresh assessment. There is no express or implied requirement u/s 153A for any addition to be confined to incriminating material found in the search. The requirement of any incriminating material before an addition is made u/s 153A cannot be assumed when unambiguously it is not there and such an attempt would amount to reforming the legislation. Insofar as the assessee's reliance on the Special Bench decision in the case of All Cargo Global Logistics Ltd vs DCIT (supra), the Ld.CIT(A) observed that although the Hon'ble High Court has approved the Special Bench decision, it is seen that the said decision has not been accepted by the department and preferred appeal against the order before the Supreme Court, therefore not followed. With these observations, the CIT(A) rejected the legal ground raised by the assessee. The relevant portion of the order of CIT(A) is extracted below:-

> "6.4 I have carefully considered the findings of the AO contained in the assessment order as well as contentions of the appellant. I have perused the copy of the Warrant Authorisation and the Panchnama. It is undisputed fact that the Warrant of Authorisation contains the name of the appellant. It is also undisputed fact that the Warrant of Authorisation was served upon the appellant whose premises .were ' being searched. As regards contention of the appellant regarding scope of the provisions of assessment to be made u/s. 153A, I find no merits in the arguments of the appellant. U/s. 153A, the AO is empowered to assess or reassess the "total income" (which includes the disclosed and undisclosed income) of 6 years. This is a significant departure from the earlier block assessment scheme (S.158BC) in which only the undisclosed income could be assessed u/s. 153A, there can be only one assessment order in respect of each of the six assessments years, in which both the disclosed and the undisclosed income would be brought to tax. The power to reassess very obvious entails a repeat assessment of an already completed assessment and if it were the intention of the Legislature to confine the proceedings u/s.153A to only pending proceedings, the power to reassess would obviously not have been there. If harmoniously read, logical conclusion

will follow that the power to reassess would mean subjecting a completed assessment to another fresh assessment. As regards decision of the special Bench in the case of **M/s. All Cargo Global Logistics Ltd. (Mum)** approved by the Bombay High Court, it is seen that the said decision went in error and has not been accepted by the Income Department and the Department has preferred appeal against the said order before the Supreme Court. In my view, consequent upon the initiation of search all the aspects of the return are open for investigation and that is no adverse material found during the search, addition can still be made if the facts and circumstances so warrant. There is no express or implied requirement u/s,153A for any addition to be confirmed to incriminating material found in the search. The requirement of any incriminating material before an addition is made U/S.153A cannot be assumed when unambiguously it is not there and such an attempt will amount to reforming the legislation. In this context useful reference can be made to the State of Kerala V/s. Mathai Verghese 4 SCO 746 (P.749) where is has been observed that the courts cannot reframe the legislation for the very good reasons that it has no power to legislate.

6.5 In view of the above I hold that the assessment u/s. 143(3) r.w.s.!53A is within jurisdiction arid valid. This ground of appeal is accordingly dismissed."

8. Aggrieved by the order of the CIT(A), assessee is in appeal before us.

9. The first issue that came up for our consideration from assessee's appeal in grounds 1(a)(i) and 1(a)(ii) is with regard to the validity of additions made by the AO in the assessments framed u/s 143(3) r.w.s. 153A of the Act. The Ld.AR for the assessee submitted that the assessment order passed u/s 143(3) r.w.s. 153A by the AO is without jurisdiction and bad in law as the AO has made various additions without reference to any seized material found as a result of search. Therefore, the additions made by the AO is bad in law and liable to be quashed. The Ld.AR further submitted that the additions made by the AO are

beyond the scope of provisions of section 153A as the provisions are very clear in respect of search assessments where the AO can assessee / re-assess the total income in respect of six assessment years, if the department has found incriminating material during the course of search. The Ld.AR further submitted that the assessments for AY 2005-06 to 2007-08 have been unabated / concluded as on the date of search and no proceedings were pending. In case of unabated assessments, the AO has no jurisdiction to make any addition towards returned income in absence of any incriminating material found as a result of search. The Ld. AR further submitted that the law is very clear inasmuch as in case of abated assessments and re-assessments which are pending as on the date of search, the AO can assume jurisdiction to assessee / re-assess the total income which is found during the course of search. In this case, the search took place on 13-10-2010. The assessment for AY 2005-06 has been concluded u/s 143(3) on 24-12-2007. There is no proceedings pending as on the date of search which is evident from the fact that the assessment has been completed u/s 143(3) before the date of search. The Ld.AR further submitted that in respect of assessment years 2006-07 & 2007-08 either the assessments have been completed u/s 143(3) or 143(1) on or before the date of search and also the time limit for issue of notice u/s 143(2) has been

expired as on the date of search and hence, the assessments are unabated for AYs 2005-06 to 2007-08. Therefore, the AO is precluded from making any addition in the absence of any incriminating materials found as a result of search for the assessment years which are unabated as on the date of search. In this regard, he relied upon the decision of Hon'ble Bombay High Court in the case of CIT vs Continental Warehousing Corporation (Nava Sheva) Ltd (2015) 374 ITR 645 (Bom) and Division Bench of the Hon'ble Bombay High Court in the case of CIT vs Murli Agro Products Ltd (2014) 49 Taxman.172. The Ld.AR also relied upon the decision of ITAT, Mumbai Special Bench in the case of All Cargo Global Logistics td vs DCIT (2012) 137 ITD 287 (Mum)(SB).

10. The Ld.Senior Counsel appearing for the revenue submitted that once a search is taken place, the assessment for six assessment years gets reopened and the AO will get jurisdiction to assessee / re-assess total income of those six assessment years, whether or not any incriminating material is found during search. The Ld.Senior Counsel further argued that the provisions of section 153A of the Act shall be applicable upon initiation of search proceedings u/s 132 of the Act, in which case, the concluded assessments will be reopened as per the provisions of section 153A of the Act, and such reopening is not dependent upon existence or otherwise of any undisclosed income. The

Ld.Senior Counsel further submitted that u/s 153A of the Act, the AO has been given the power to assessee / re-assess total income of six assessment years in a separate assessment order. The AO is empowered to reopen those proceedings and re-assess total income taking note of undisclosed income, if any, unearthed during search. Once the proceedings are initiated u/s 153A of the Act, the legal effect is that even in the case where the assessment order is passed, it stands reopened and in the eyes of law there is no order of assessments. The Ld.Senior Counsel further submitted that once the assessment is reopened, the assessing authority can take note of the income disclosed in the earlier return any undisclosed income found during the course of search and also any other income which is not disclosed in the earlier return or which is not unearthed during search in order to find out total income of each year and then pass assessment order. Therefore, there is no merit in the contention of the assessee that the AO is having no jurisdiction to make addition in the concluded assessments.

11. The Ld.Senior Counsel, further referring to the decision cited by the assessee in the case of CIT vs Continental Warehousing Corporation (Nava Sheva) Ltd (supra) and the decision of the ITAT, Mumbai Special Bench in the case of All Cargo Global Logistics td vs DCIT (supra), submitted that the Hon'ble Bombay High Court and the

ITAT on the subject did not deal with the issue as to what can be regarded as pending assessments / re-assessments in the light of provisions of section 147. Therefore, it is relevant to determine what is meant by the term “pending assessment / unabated assessments and abated assessments”. The Ld.Senior Counsel further submitted that does it mean that a notice for assessment u/s 143(2) in relation to assessment u/s 143(3) is required or a notice u/s 148 is required for re-assessment u/s 147 for the assessment / re-assessment to be considered pending. Does it mean that it includes all cases where a notice for assessment or re-assessment can be validly come under the provisions of the Act. If it is interpreted that the term “pending assessment / re-assessments” include cases where considering the provisions of section 149, there is still time to issue notice u/s 148, then all that can be done u/s 147 can be done u/s 153A. The Ld.Senior Counsel referring to the provisions of section 153A and the decision of Hon’ble Supreme Court in the case of CIT vs Hindustan Bulk Carriers 259 ITR 449 (SC) submitted that the provisions of one section of the statute cannot be used to defeat those of another unless it is impossible to effect resilient between them. Thus, a construction that reduces one of the provisions to a useless lumber or dead letter is not a harmonised construction. To harmonise is not to destroy. The Ld.Senior Counsel

filed elaborate written submissions on the issue which is reproduced hereunder:-

> "These submissions are in addition to the contentions of the Department on Merits
> Section 153 A of the Act reads as under:
> *Assessment in case of search or requisition.*
> *153A. (1) Notwithstanding anything contained in section 139, section 147. section 148, section 149, section 151 and section 153, in the case of a person where a search is initiated under section 132or books of account, other documents or any assets are requisitioned under section 132A after the 31st day of May, 2003, the Assessing Officer shall—*
> *(a) issue notice to such person requiring him to furnish within such period, as may be specified in the notice, the return of income in respect of each assessment year falling within six assessment years referred to in clause (b), in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139;*
> *(b) 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*
> *Provided that the Assessing Officer shall assess or reassess the total income in respect of each assessment year falling within such six assessment years.:*
> *Provided further that assessment or reassessment, if any, relating to any assessment year falling within the period of six assessment years referred to in*
>
> *this* ***sub-section pending on the date of initiation of the search*** *under section 132 or making of requisition under section 132A, as the case may be,* ***shall abate***
> *(2) If any proceeding initiated or any order of assessment or reassessment made under sub-section (1) has been annulled in appeal or any other legal proceeding, then, notwithstanding anything contained in sub-section (I) or section 153, the assessment or reassessment relating to any assessment year which has abated under the second proviso to sub-section (I), shall stand revived with effect from the date of receipt of the order of such annulment by the Principal Commissioner or Commissioner :*

Provided that such revival shall cease to have effect, if such order of annulment is set aside.

Explanation.—For the removal of doubts, it is hereby declared that,—

(i) save as otherwise provided in this section, section 153B and section 153C. all other provisions of this Act shall apply to the assessment made under this section;

(ii) in an assessment or reassessment made in respect of an assessment year under this section, the tax shall be chargeable at the rate or rates as applicable to such assessment year.

Since pending assessment/reassessment abates it is relevant to determine what is meant by the term pending assessment /reassessment.

Does it mean that a notice for assessment under section 143(2) in relation to assessment under section 143(3) is required or a notice under section 148 is required for assessment/reassessment under section 147 for the assessment /reassessment to be considered pending?

or

Does it mean that it includes all cases where a notice for assessment/reassessment can be validly given under the provisions of the Act?

If it is interpreted that the term pending assessment/reassessment includes cases where considering the provisions of section 149 there is still time to issue notice under section 148 then all that can be done under section 147 can be done under section 153A.

If it is interpreted that the term pending assessment/ reassessment does not include cases where 148 notice can still be issued than it would necessarily follow that within the period provided under section 149 notice for the said Assessment Year under section 148 can still be issued and assessment under section 147 can be carried out. This is so because merely because a search is carried out the independent right of assessment/reassessment under section 147 does not abate unless the assessment/reassessment (not treated as pending) itself abates.

This would in turn mean that simultaneously there could be two assessments under section 153A and section 147 possible. The scope of assessment/reassessment under section 147(since in case of unabated assessment/reassessment the scope of section 153 A has been held to be limited to additions on the basis of material)being wider an absurdity is created of two simultaneous assessments dealing with the same income for the same Assessment Year.

Also since 147 assessments are to be completed within a period of nine months from end of the Financial Year in which the notice under section 147 is issued and since 153A assessments can be completed **within** 2 years/ **now 21 months** from the end of Financial Year in which the search takes place another absurdity may be created since 147 reassessments also have to take into account the income taxable under section 153A(which itself may not have been completed)

There are a cantena of decisions which hold that an absurd construction should be avoided and the provisions have to be interpreted in a workable manner.

For example see CIT VS Hindustan Bulk Carriers 259 ITR 449(SC)

The provisions of one section of the statute cannot be used to defeat those of another unless it is impossible to effect reconciliation between them. Thus a construction that reduces one of the provisions to a "useless lumber" or "dead letter" is not a harmonised construction. To harmonise is not to destroy.

Since the interpretation that pending assessments would only include cases where notices under section 143(2) /148 have been issued and are pending at the time of search and exclude 148 notices which could have been issued being within limitation leads to an absurdity as specified above such an interpretation has to be avoided and the term

pending assessments/reassessments have to be interpreted to include cases where there is still time to issue notice under section 148 and carry out Assessment/Reassessment under section 147.

Thus in the present matters assessments under section 153 A can include all issues which can be gone into under section 143(3) /147 of the Act (except those already addressed in an existing 143(3)/147 order order) as the case may be and is not limited to material seized during search.

Since Bombay High Court decisions in the case of Continental Warehousing reported in [2015]374ITR645(Bom) and others as also the decisions of the IT AT on the subject do not deal with the issue as to what can be regarded as pending assessments/reassessments the Hon'ble Tribunal may consider and decide.

Completed assessments/reassessments do not abate and in respect of these completed assessments if any expenditure/deduction is allowed or receipt is not taxed after proper examination then for such assessments action under section 153 A in respect of the same issue can be taken only based upon fresh material available before the Assessing Officer based upon search for example proof of bogus claims.

However the right of the Assessing Officer to consider issues which he can consider while assessing/reassessing under section 147 remain and can be gone into under section 153A even for periods relevant to Assessment Years where 143(3) assessments may or may not have taken place."

12. We have heard both the parties, perused material available on record and gone through the orders of authorities below. In this case, search & seizure action u/s 132 of the Act was conducted on 13-10-

2010. The facts borne out from the record reveals that the AO has made various additions for AY 2005-06 to 2007-08 without reference to any incriminating material is found as a result of search. This fact is not disputed by the Ld.Senior Counsel appearing for the revenue. According to the AO, once proceedings are initiated u/s 153A, he is empowered to assess / re-assess total income of six assessment years immediately preceding the year in which search took place whether or not any incriminating material found as a result of search. The AO further observed that the provisions of section 153A is very clear and there is no ambiguity, as such, once search is taken place, the assessments of six assessment years get reopened whether those assessments have been completed u/s 143(3) or 143(1) of the Act. It is irrelevant whether there is any incriminating material found as a result of search. It is the contention of the assessee that the assessments for AY 2005-06 to 2007-08 are unabated as on the date of search which is evident from the fact that as on the date of search, i.e. 13-10-2010, the assessments have been completed either u/s 143(3) or u/s 143(1) and also the time limit for issue of notice u/s 143(2) has been expired. The assessee further contended that as per the provisions of section 153A, the assessments or re-assessments, if any, relating to any assessment year falling within the period of six assessment years referred to in this

section pending on the date of initiation of the search u/s 132 or making of requisition u/s 132A, as the case may be, shall abate and the AO has jurisdiction to assess / re-assess total income of six assessment years on the basis of books of account and any incriminating material found as a result of search. In case of assessments, which are unabated / concluded as on the date of search and no proceedings are pending as on the date of search, the AO is precluded from making any addition to returned income without reference to any seized materials. In this case, the search has been taken place on 13-10-2010 and the assessments for AYs 2005-06 to 2007-08 have been unabated. The AO has made various additions towards disallowance of expenses incurred in relation to exempt income u/s 14A, disallowance of backward incentives and other additions which are not based on any incriminating material found as a result of search and which are made on the basis of regular books of account and financial statements filed alongwith regular return of income filed u/s 139(1) of the Act.

13. Having heard both the sides, we find merit in the arguments of the assessee for the reason that the issue is no longer res integra. The Hon'ble Bombay High Court in the case of CIT vs Continental Warehousing Corporation (Nava Sheva) Ltd (supra) has held that in the absence of any seized material found as a result of search, no addition

can be made in respect of unabated / concluded assessments which have become final as on the date of search in the absence of any incriminating materials. This legal proposition is further supported by the decision of Division Bench of the Hon'ble Bombay High Court in the case of CIT vs Murli Agro Products Ltd (supra), wherein it was held that no addition can be made in respect of unabated assessments which have become final if no incriminating material is found during search. The ITAT, Mumbai Special Bench in the case of All Cargo Global Logistics td vs DCIT (supra) has taken a similar view wherein it was categorically held that the AO is not empowered to make any addition in the absence of any incriminating material in respect of assessments that have been unabated / concluded as on the date of search. The co-ordinate bench of ITAT in the case of Lakamashi J Gala vs DCIT in ITA Nos. 2402 to 2406/Mum/2015 & ITA Nos. 2534 to 2537/Mum/2015 dated 19-01-2018 had considered similar issue in the light of the decision of Hon'ble Bombay High Court in the case of CIT vs Continental Warehousing Corporation (Nava Sheva) Ltd (supra) and held that the AO is precluded from making any addition in case of unabated assessments in absence of any incriminating material found during the course of search. The relevant portion of the order is extracted below:-

10. We have heard both the parties, perused the material available on record and gone through the orders of the Authorities below. In this case the search and seizure action under Section 132 of the Act, was conducted on 20th April, 2010. The facts born out from the record reveals that during the course of search incriminating material relating to the assessee was found and seized. The AO has passed ex-parte assessment order under Section 144 r.w.s. 153A of the Act and made various additions towards cessation of liability under Section 41(1)(a), unexplained cash credit under Section 68 towards unsecured loans, disallowance of interest expenses, disallowance of consultancy expenses, disallowance of 80C/80D deductions, addition towards unexplained credit card expenditure and addition on account of undisclosed jewellery and unexplained purchase of Appeal Ipod. The AO further observed that the assessee is non-cooperative and not filed any details in respect of various notices and questionnaire issued. The AO has made various additions towards unsecured loans, unproved sundry creditors, consultancy expenses, disallowance of interest expenses and deductions claimed under Section 80C/80D and unexplained credit card expenses. But, except for addition made on account of undisclosed jewellery and unexplained purchase of Apple Ipod and also unexplained expenditure made on loose papers, the AO has not referred to any incriminating material found as a result of search in all other additions made for all the assessment years. It is the claim of the assessee that the additions made by the AO towards unsecured loans, cessation of liability, disallowance of interest expenses, disallowance of consultancy expenses and disallowance of deduction claimed under Section 80C/80D are based on the return of income filed by the assessee without there being any incriminating material found as a result of search. The assessee further contended that in the assessment framed under Section 153A, AO is not empowered to make any addition in the absence of seized material in respect of assessments that have been unabated or already completed as on the date of search.

2. *Having heard both the sides and considering the material on record, we find that the additions made by the AO towards unsecured loans under Section 68 of the Act, cessation of liability under Section 41(1)(a), unexplained credit card*

expenditure under Section 69C, disallowance of interest expenses, consultancy expenses and denial of deduction claimed under Section 80C/80D are not based on any reference to the incriminating material found and seized as a result of search. We further observes that the Hon'ble Bombay High Court, in the case of Continental Warehousing Corporation (Nava Sheva) Ltd. (supra) has held that in the absence of any seized material found during the search no addition can be made in respect of unabated assessments which have become final as on the date of search. This legal proposition is further supported by the decision of the Division Bench of the Hon'ble Bombay High Court, in the case of Murli Agro Products Ltd. (supra) wherein it was held that no additions can be made in respect of unabated assessments which have become final, if no incriminating material is found during the search. The ITAT, Mumbai Special Bench in the case of All Cargo Global Logistics Ltd. vs. ACIT (supra) has taken similar view wherein it was categorically observed that the AO is not empowered to make any addition in the absence of any seized material in respect of assessments that have unabated/concluded as on the d ate of search. In this case, the search took place on 20th April, 2010. Admittedly, as on the date of search the assessment for A.Y. 2004-05 to A.Y. 2008-09 have been unabated. The time limit for issue of notice under Section 143(2) has also expired as on the date of search. Therefore, we are of the considered view that the AO cannot make any additions in respect of unabated assessments, if no incriminating material is found during the search for A.Y. 2004-05 to A.Y. 2008-09.

14. In this view of the matter and respectfully following the decision of Hon'ble Bombay High Court in the case of of CIT vs Continental Warehousing Corporation (Nava Sheva) Ltd (supra) and also consistent with the view taken by the co-ordinate bench, we are of the considered view that the AO is precluded from making any addition to return of income in the absence of incriminating material found as a result of search for unabated / concluded assessments. In this case, the search

has been taken place on 13-10-2010 and the assessment for AY 2005-06 to 2007-08 have been unabated / concluded as on the date of search. Therefore, we are of the considered view that the addition made by the AO without reference to any seized material have no leg to stand; hence, we delete all additions made by the AO for AYs 2005-06 to 2007-08. Since we have quashed the assessment orders passed by the AO, the other grounds taken by the assessee insofar as merits of the issues are concerned and the grounds taken by the revenue on merits have not been specifically adjudicated upon as they merely become academic in nature.

15. In the result, the appeals filed by the assesses in ITA No.5371, 5372/M/2015, 5377, 5378 &5379/M/2015 are allowed and appeals filed by the revenue in ITA Nos. 5716 & 5717/M/2015 and ITA Nos 5719, 5720 & 5724/M/.2015 are dismissed.

Order pronounced in the open court on _____April, 2018.

(C.N. Prasad)	(G Manjunatha)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, Dt : April, 2018
Pk/-

Copy to :

1. Applicant
2. Respondent
3. CIT(A)
4. CIT
5. DR

/True copy/ By order

Sr.PS, ITAT, Mumbai