

आयकर अपीलिय अधिकरण, जयपुर न्यायपीठ, जयपुर  
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, JAIPUR

श्री विजय पाल रॉव, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष  
BEFORE: SHRI VIJAY PAL RAO, JM AND SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA No. 477/JP/2018  
निर्धारण वर्ष/Assessment Year : 2012-13.

M/s. Bannalal Jat constructions Pvt. Ltd. Bus Stand, Jahajpur, District Bhilwara.	बनाम Vs.	The ACIT, Central Circle, Ajmer.
स्थायी लेखा सं./जीआईआर सं./PAN No. AACCB 9357 J		
अपीलार्थी /Appellant		प्रत्यर्थी /Respondent

निर्धारिती की ओर से / Assessee by : Shri P.C. Parwal (CA)  
राजस्व की ओर से / Revenue by : Smt. Rolly Agarwal (CIT)

सुनवाई की तारीख / Date of Hearing : 09.07.2018.  
घोषणा की तारीख / Date of Pronouncement : 07/09/2018.

आदेश / ORDER

PER VIJAY PAL RAO, JM :

This appeal by the assessee is directed against the order dated 19<sup>th</sup> January, 2018 of Id. CIT (A)-2, Udaipur for the assessment year 2012-13. The assessee has raised the following grounds :-

- “ 1. The Id. CIT (A) has erred on facts and in law in confirming the disallowance of expenditure of Rs. 3,16,194/- incurred for increase in the authorized share capital of the company by holding the same as capital expenditure ignoring that the capital was increased for the meeting the working capital requirement and thus allowable as revenue expenditure.
- 1.1. The Id. CIT (A) has erred on facts and in law in confirming the above disallowance in the assessment framed u/s 153A even when the assessment proceedings for the year under consideration has not abated.

2. The assessee craves to amend, alter and modify any of the grounds of appeal.
3. The appropriate cost be awarded to the assessee.

2. The assessee is a company and engaged in the execution of Government contracts. The assessee filed its return of income on 27<sup>th</sup> September, 2012 declaring total income of Rs. 36,37,320/-. A search and seizure action was carried out at the residential and various business premises of the assessee on 10.10.2014. Subsequently, the AO issued notice under section 153A on 22.12.2014. In response to the notice, the assessee filed return of income declaring total income of Rs. 36,37,320/- as declared in the original return of income. In the assessment framed under section 153A, the AO made disallowance of Rs. 3,16,194/- on account of the expenditure incurred on increase of authorized capital. The assessee in the present appeal has challenged the addition made by the AO and also raised a legal issue in ground no. 1.1 of the grounds of appeal. The Id. A/R of the assessee has submitted that the time limit for issuing the notice under section 143(2) was expired on 30<sup>th</sup> September, 2014 prior to the date of search under section 132 on 10.10.2014. Thus the Id. A/R has submitted that the assessment was not pending as on the date of search and hence the assessment completed under section 153A is a reassessment and not the assessment and, therefore, the AO cannot make any addition/disallowance in the order passed under section 153A except based on incriminating material found during the course of search and seizure proceedings. The Id. A/R has pointed out that the disallowance of Rs. 3,16,194/- was made by the AO without referring to any incriminating document or material found during the

search and seizure action. Thus he has submitted that the addition made by the AO without any incriminating material found in the search is not sustainable in law and, therefore, the same is illegal and bad. In support of his contention he has relied upon the decision of Hon'ble Jurisdictional High Court in the case of Jai Steel (India) vs. ACIT, 219 Taxman 233 (Raj.). He has also relied upon the decision of Hon'ble Gujarat High Court in case of Saumya Construction Pvt. Ltd., 387 ITR 529 (Guj.). The Id. A/R has also relied upon various other decisions on this point including the decision of Hon'ble Delhi High Court in case of CIT vs. Kabul Chawla, 126 DTR 130 (Delhi).

3. On the other hand, the Id. D/R has relied upon the orders of the authorities below and submitted that even in a case where undisclosed income or undisclosed property has been found as a consequence of search, the same would also be taken into consideration. The requirement of the assessment or reassessment under section 153A has to be read in context of section 132 or 132A of the IT Act inasmuch as in case nothing incriminating is found on account of search or requisition, once there is a search under section 132, section 153A of the Act would be triggered and assessment or reassessment to ascertain the total income of the assessee is required to be done. The AO is duty bound to determine the total income of the assessee for six years immediately preceding the assessment year relevant to the previous year in which search is conducted. The total income, therefore, will cover not only the income emanating from the declared source or any material placed before the AO but from all sources including undisclosed one or based on unplaced material before the AO. The Id. D/R has further submitted that the decisions relied upon the assessee have not been accepted by the department and the SLPs against

the decisions of Hon'ble Bombay High Court in the case of M/s. All Cargo Global Logistics as well as in case of Continental Warehousing Corporation have been admitted by the Hon'ble Supreme Court. Similar SLP in the case of Kabul Chawla has also been filed by the revenue which has been admitted by the Hon'ble Supreme Court. When the expenditure which is not an allowable claim being incurred for increase in share capital then the disallowance of same is justified by framing the assessment under section 153A of the Act. The Id. D/R has further submitted that there is no original assessment under section 143(3) in the case of the assessee, therefore, the assessment framed under section 153A is the only assessment in this case.

4. We have considered the rival submissions as well as the relevant material on record. There is no dispute that the time limit for issuing notice under section 143(2) on the return of income filed by the assessee under section 139(1) was expired on 30<sup>th</sup> September, 2014. Therefore, on the date of search on 10.10.2014 the assessment on the original return of income was not pending. Hence it is a case of reassessment of total income of the assessee and not the case of abated assessment and consequently regular assessment under section 153A of the Act. Once it is a case of reassessment under section 153A pursuant to the search and seizure action under section 132 of the Act, then the addition in the total income of the assessee can be made only on the basis of incriminating seized material found during the course of search. This issue has been considered and decided by the various High Courts including the Hon'ble Jurisdictional High Court in the case of *Jai Steel (India) vs. ACIT (supra)* wherein the Hon'ble High Court has held in para 21 to 26 and 29 as under :-

**21.** *The argument raised by the counsel for the appellant to the effect that once a notice under Section 153A of the Act is issued, the assessments for six years are at large both for the AO and assessee has no warrant in law.*

**22.** *In the firm opinion of this Court from a plain reading of the provision along with the purpose and purport of the said provision, which is intricately linked with search and requisition under Sections 132 and 132A of the Act, it is apparent that:*

- (a) *the assessments or reassessments, which stand abated in terms of II proviso to Section 153A of the Act, the AO acts under his original jurisdiction, for which, assessments have to be made;*
- (b) *regarding other cases, the addition to the income that has already been assessed, the assessment will be made on the basis of incriminating material and*
- (c) *in absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made.*

*Though such a claim by the assessee for the first time under Section 153A of the Act is not completed, the case in hand, has to be considered at best similar to a case where in spite of a search and/or requisition, nothing incriminating is found. In such a case though Section 153A of the Act would be triggered and assessment or reassessment to ascertain the total income of the person is required to be done, however, the same would in that case not result in any addition and the assessments passed earlier may have to be reiterated.*

**23.** *The reliance placed by the counsel for the appellant on the case of Anil Kumar Bhatia (supra) also does not help the case of the assessee. The relevant extract of the said judgment reads as under:—*

*"19. Under the provisions of Section 153A, as we have already noticed, the Assessing Officer is bound to issue notice to the assessee to furnish returns for each assessment year falling within the six assessment years immediately preceding the assessment year relevant to the previous year in which the search or requisition was made. Another significant feature of this Section is that the Assessing Officer is empowered to assess or reassess the "total income" of the aforesaid years. This is a significant departure from the earlier block assessment scheme in which the block assessment roped in only the undisclosed income and the regular assessment proceedings were preserved, resulting in multiple assessments. Under Section 153A, however, the Assessing Officer has been given the power to assess or reassess the 'total income' of the six assessment years in question in separate assessment orders. This means that there can be only one assessment order in respect of each of the six assessment years, in which both the disclosed and the undisclosed income would be brought to tax.*

*20. A question may arise as to how this is sought to be achieved where an assessment order had already been passed in respect of all or any of those six assessment years, either under Section 143(1)(a) or Section 143(3) of the Act. If such an order is already in existence, having obviously been passed prior to the initiation of the search/requisition, the Assessing Officer is empowered to reopen those proceedings and reassess the total income, taking note to the*

*undisclosed income, if any, unearthed during the search. For this purpose, the fetters imposed upon the Assessing Officer by the strict procedure to assume jurisdiction to reopen the assessment under Sections 147 and 148, have been removed by the non obstante clause with which sub-section (1) of Section 153A opens. The time-limit within which the notice under Section 148 can be issued, as provided in Section 149 has also been made inapplicable by the non obstante clause. Section 151 which requires sanction to be obtained by the Assessing Officer by issue of notice to reopen the assessment under Section 148 has also been excluded in a case covered by Section 153A. The time-limit prescribed for completion of an assessment or reassessment by Section 153 has also been done away with in a case covered by Section 153A. With all the stops having been pulled out, the Assessing Officer under Section 153A has been entrusted with the duty of bringing to tax the total income of an assessee whose case is covered by Section 153A, by even making reassessments without any fetters, if need be.*

*21. Now there can be cases where at the time when the search is initiated or requisition is made, the assessment or reassessment proceedings relating to any assessment year falling within the period of the six assessment years mentioned above, may be pending. In such a case, the second proviso to sub-section (1) of Section 153A says that such proceedings "shall abate". The reason is not far to seek. Under Section 153A, there is no room for multiple assessment orders in respect of any of the six assessment years under consideration. That is because the Assessing Officer has to determine not merely the undisclosed income of the assessee, but also the 'total income' of the assessee in whose case a search or requisition has been initiated. Obviously there cannot be several orders for the same assessment year determining the total income of the assessee. In order to ensure this state of affairs namely, that in respect of the six assessment years preceding the assessment year relevant to the year in which the search took place there is only one determination of the total income, it has been provided in the second proviso of sub-Section (1) of Section 153A that any proceedings for assessment or reassessment of the assessee which are pending on the date of initiation of the search or making requisition "shall abate". Once those proceedings abate, the decks are cleared, for the Assessing Officer to pass assessment orders for each of those six years determining the total income of the assessee which would include both the income declared in the returns, if any, furnished by the assessee as well as the undisclosed income, if any, unearthed during the search or requisition. The position thus emerging is that the search is initiated or requisition is made, they will abate making way for the Assessing Officer to determine the total income of the assessee in which the undisclosed income would also be included, but in case where the assessment or reassessment proceedings have already been completed and assessment orders have been passed determining the assessee's total income and such orders subsisting at the time when the search or the requisition is made, there is no question of any abatement since no proceedings are pending. In this latter situation, the Assessing Officer will reopen the assessments or reassessments already made (without having the need to follow the strict provisions or complying with the strict conditions of Sections 147,*

148 and 151) and determine the total income of the assessee. Such determination in the orders passed under Section 153A would be similar to the orders passed in any reassessment, where the total income determined in the original assessment order and the income that escaped assessment are clubbed together and assessed as the total income. In such a case, to reiterate, there is no question of any abatement of the earlier proceedings for the simple reason that no proceedings for assessment or reassessment were pending since they had already culminated in assessment or reassessment orders when the search was initiated or the requisition was made." (Emphasis supplied)

24. The said judgment also in no uncertain terms holds that the reassessment of the total income of the completed assessments have to be made taking note of the undisclosed income, if any, unearthed during the search and the income that escaped assessments are required to be clubbed together with the total income determined in the original assessment and assessed as the total income. The observations made in the judgment contrasting the provisions of determination of undisclosed income under Chapter XIVB with determination of total income under Sections 153A to 153C of the Act have to be read in the context of second proviso only, which deals with the pending assessment/reassessment proceedings. The further observations made in the context of de novo assessment proceedings also have to be read in context that irrespective of the fact whether any incriminating material is found during the course of search, the notice and consequential assessment under Section 153A have to be undertaken.

25. The argument of the learned counsel that the AO is also free to disturb income, expenditure or deduction de hors the incriminating material, while making assessment under Section 153A of the Act is also not borne out from the scheme of the said provision which as noticed above is essentially in context of search and/or requisition. The provisions of Sections 153A to 153C cannot be interpreted to be a further innings for the AO and/or assessee beyond provisions of Sections 139 (return of income), 139(5) (revised return of income), 147 (income escaping assessment) and 263 (revision of orders) of the Act.

26. The plea raised on behalf of the assessee that as the first proviso provides for assessment or reassessment of the total income in respect of each assessment year falling within the six assessment years, is merely reading the said provision in isolation and not in the context of the entire section. The words 'assess' or 'reassess' have been used at more than one place in the Section and a harmonious construction of the entire provision would lead to an irresistible conclusion that the word 'assess' has been used in the context of an abated proceedings and reassess has been used for completed assessment proceedings, which would not abate as they are not pending on the date of initiation of the search or making of requisition and which would also necessarily support the interpretation that for the completed assessments, the same can be tinkered only based on the incriminating material found during the course of search or requisition of documents.

27. xxxx xxxx

28. xxxx xxxx

*29. The argument of the counsel for the appellant if taken to its logical end would mean that even in cases where the appeal arising out of the completed assessment has been decided by the CIT(A), ITAT and the High Court, on a notice issued under Section 153A of the Act, the AO would have power to undo what has been concluded up to the High Court. Any interpretation which leads to such conclusion has to be repelled and/or avoided as held by the Hon'ble Supreme Court in the case of K.P. Varghese (supra)."*

It is pertinent to note that a similar view has been taken in a series of decisions by the Hon'ble Delhi High Court, Hon'ble Gujarat High Court as well as Hon'ble Bombay High court as relied upon by the Id. A/R. Thus it is held by the Hon'ble Jurisdictional High Court that the assessment or reassessment of 6 years is a mandatory requirement pursuant to the search under section 132 of the Act. However, in the absence of any incriminating material found, the same would not result in any addition and assessment passed earlier may have to be reiterated. Thus the AO cannot resort to the provisions of section 153A to fill up the lacuna left in the original assessment or not doing the original assessment except reassessment of the total income and addition, if any, based on incriminating material found during the course of search proceedings. In the case in hand, undisputedly no incriminating material was found to reveal any income not disclosed by the assessee in the return of income filed under section 139(1) of the IT Act. Rather the addition is made by the AO on account of disallowance of expenditure treating the same as capital in nature. Therefore, the issue of disallowance of expenditure is a debatable one and the disallowance is based on difference of opinion between the assessee and the AO. Hence when the original assessment was not pending as on the date of search then the AO cannot use the proceedings under section 153A to make an addition purely on the basis of difference of opinion. The Id. CIT (A) though accepted the binding

precedents in favour of the assessee, however declined to follow the same on the ground that the revenue has not accepted those decisions of the High Courts and filed the SLP before the Hon'ble Supreme Court. It is pertinent to note that the Id. CIT (A) is a quasi-judicial authority and is not supposed to function as a taxing authority. In case the department has not accepted the decisions of Hon'ble High Courts, then the AO is at liberty to make the addition to keep the issue alive but the Appellate Authority is bound by the decision of Hon'ble Jurisdictional High Court so long the same is not reversed by the Hon'ble Supreme Court. Hence it was not proper on the part of the Id. CIT (A) to refuse to follow the binding precedent. Accordingly, we set aside the impugned orders of the authorities below qua this issue and delete the addition made by the AO. Since the addition made by the AO in the assessment framed under section 153A is deleted for want of incriminating material, therefore, ground no. 1 of the assessee's appeal becomes infructuous in view of our finding on the issue raised in ground no. 1.1.

5. In the result, appeal of the assessee is allowed.

Order is pronounced in the open court on 07/09/2018.

Sd/-  
(विक्रम सिंह यादव)  
(VIKRAM SINGH YADAV )  
लेखा सदस्य/Accountant Member

Sd/-  
(विजय पाल राँव )  
(VIJAY PAL RAO)  
न्यायिक सदस्य/Judicial Member

Jaipur

Dated:- 07/09/2018.

Das/

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. The Appellant- Shri Bannalal Jat Constructions Pvt. Ltd., Bhilwara.
2. The Respondent – The ACIT, Central Circle, Ajmer.
3. The CIT(A).
4. The CIT,
5. The DR, ITAT, Jaipur
6. Guard File (ITA No. 477/JP/2018)

आदेशानुसार / By order,

सहायक पंजीकार / Assistant. Registrar

