

INCOME TAX APPELLATE TRIBUNAL  
 DELHI BENCH "D": NEW DELHI  
 BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER  
 AND  
 SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 838/Del/2014, 4161 & 4162/Del/2013  
 (Assessment Year: 2003-04 to 2005-06)

M/s. L.T. Foods Ltd (previously M/s. LT Overseas Ltd), Unit No. 134, First Floor, Rectangle I, Saket District Centre, New Delhi	Vs.	ACIT, Central Circle-19, New Delhi
(Appellant)		(Respondent)

ITA No. 4043 & 4044/Del/2013  
 (Assessment Year: 2004-05 & 2005-06)

Dy Commissioner of Income Tax, Central Circle-19, New Delhi	Vs.	M/s. L.T. Foods Ltd (previously M/s. LT Overseas Ltd), Unit No. 134, First Floor, Rectangle I, Saket District Centre, New Delhi
(Appellant)		(Respondent)

Assessee by :	Shri J. K. Mishra, CIT DR
Revenue by:	Shri Ajay Vohra, Sr. Adv Shri Rohit Jain, Adv Ms. Deepanshree Rao, CA Shri Vibhu Gupta, CA
Date of Hearing	08/04/2019
Date of pronouncement	03/07/2019

ORDER

PER PRASHANT MAHARISHI, A. M.

1. This is an appeal of one assessee for three years involving similar issues therefore they were argued together and now disposed of by this common order.

**ITA NO 838/Del/2014 For AY 2003-04 ( By Assessee)**

2. This appeal is filed by the assessee the order of the Commissioner of income tax (appeals) – XXXIII, New Delhi dated 10/10/2013.
3. The assessee has raised the following grounds of appeal in ITA No. 838/Del/2014 for the Assessment Year 2003-04:-

- “1. *That the Commissioner of Income-tax (Appeals) erred on facts and in law in not holding that the assessment completed vide order dated 19.08.2011 under section 143(3) r.w.s. 153A of the Income-tax Act (‘the Act’), is beyond jurisdiction, bad in law and void-ab- initio.*
2. *That the Commissioner of Income-tax (Appeals) erred on facts and in law in holding that the issue of legality of search initiated under section 132 of the Act cannot be adjudicated by the first appellate authority.*
3. *That the Commissioner of Income-tax (Appeals) erred on facts and in law in not holding that the impugned assessment under section 153A having been completed de-hors any incriminating material/ document being found/ seized during the course of search conducted under section 132 of the Act in the case of the appellant, is illegal and bad in law.*
4. *That the Commissioner of Income-tax (Appeals) erred on facts and in law in not deleting various additions/ disallowances made by the assessing officer de-hors any material/ document found during the course of search.*
5. *That the Commissioner of Income-tax (Appeals) erred on facts and in law in affirming the action of the assessing officer in relying upon erroneous findings given in the special audit report furnished under section 142(2A) of the Act, without judiciously appreciating thg details/ explanation furnished by the appellant.*

**Without prejudice**

5. *That the Commissioner of Income-tax (Appeals) erred on facts and in law in sustaining the disallowance of cash*

*expenditure amounting to Rs. 8,620 under section 40A(3) of the Act.*

- 5.1. That the Commissioner of Income-tax (Appeals) erred on facts and in law in not appreciating that the actual amount of cash expenditure incurred by the appellant was only Rs.25,000/- as against Rs.43,102/- considered by the assessing officer.*
- 5.2. That the Commissioner of Income-tax (Appeals) erred on facts and in law in sustaining the disallowance of cash expenditure under section 40A(3) of the Act even though the said disallowance was made de-hors any document/material found during the course of search.*
- 6. That the Commissioner of Income-tax (Appeals) erred on facts and in law in affirming the action of the assessing officer in withdrawing the entire claim of deduction under section 80HHC of the Act.*
  - 6.1. That the Commissioner of Income-tax (Appeals) erred on facts and in law in not appreciating that the assessing officer ought to have recomputed deduction under section 80HHC, consistent with the fact that: (a) reassessment proceedings had been initiated under section 148 of the Act on the issue of deduction under that section; and (b) he himself proceeded to re-compute deduction under that section in the assessment order.*
  - 6.2. That the Commissioner of Income-tax (Appeals) erred on facts and in law in not holding /C/that the accrued advance license fees amounting to Rs.3,11,88,864/- was includable in the eligible business income of the appellant, for the purpose of determining deduction allowable under section 80HHC of the Act.*
  - 6.3 That the Commissioner of Income-tax (Appeals) erred on facts and in law not adjudicating the issue of deductibility of allocated interest cost of Rs.10,70.23.2Id :n export of trading goods, for the purpose of deduction under section 80HHC of the Act.*
  - 6.4. That the Commissioner of Income-tax (Appeals) erred on facts and in law in not adjudicating the issue of inclusion of the following business income viz. (i) Processing & Fobbing charges of Rs.1,33,90.665/-: (ii) Insurance claim received of Rs. 1,00,061/- and (iii) Sale of Scrap of Rs.57,949/- for the purpose of deduction under section 80HHC of the Act.*

- 6.5. *That the Commissioner of Income-tax (Appeals) erred on facts and in law in affirming ' the action of the assessing officer in reducing 100% of 'other income' for the purpose of determining deduction allowable under section SOHHC of the Act.*
7. *That the Commissioner of Income-tax Appeals erred on facts and in law upholding the action of the assessing officer 1:1 levying interest under section 234A of the Act.*
- 7.1 *That the Commissioner of Income-tax (Appeals) erred on facts and in law in not appreciating that there was no warrant to levy interest under section 234A in the case of the appellant, as there was no default in filing the return of income under section 153A of the Act.*
4. Brief facts of the case shows that the assessee is a company engaged in the business of manufacturing and trading of rice. It filed its return of income on 2/10/2003 declaring total income of Rs. 2555011/- after availing deduction u/s 80 HHC at INR 3 8289254/- and under section 80 G of INR 1 77500/-. This return was processed u/s 143 (1) of the income tax act on 20/1/2004 at the returned income. Assessment u/s 143 (3) of the act also completed on 29/3/2006 at the total income of INR 3 0933761/- by restricting the deduction u/s 80 HHC of INR 219273253/-. In the assessment, certain other additions were also made. The assessee preferred an appeal before the learned CIT (A) – VII, New Delhi. He passed an order on 26/9/2006 and decided the certain issues in favor of the assessee and subsequently in appeal effect order dated 24/4/2007 , income was reduced to INR 23513969/- . The revenue preferred an appeal before the coordinate bench who upheld the decision of the learned CIT – A. The revenue also raised the issue before the honourable High Court. Subsequently the assessee filed an application u/s 154 of the income tax act on 14/9/2007 claiming additional deduction u/s 80 HHC. The above

application was rejected as per order u/s 1 54 of the act on 18/12/2007. The assessee preferred an appeal against the above order before the learned CIT – A and the learned CIT – A as per his order dated 10/2/2009 dismissed appeal of the assessee both in law as well as on the facts. Against this order of the learned CIT – A, the assessee preferred appeal before the coordinate bench which is pending.

5. Meanwhile a notice u/s 148 of the income tax act was issued by the AO on 15/11/2008 after recording the satisfaction related to excess deduction u/s 80 HHC of the income tax act to the extent of INR 1.81 Crores.
6. Subsequently search under section 132 of the income tax act took place on 'Dawat' group of cases on 10/2/2009. Therefore, notice u/s 153A of the act was issued to the assessee on 7/10/2009. The assessee submitted its return of income on 22/1/2010 in response to the above notice declaring the total income of INR 1 3329750 after claiming deduction under section 80 HHC of the act of Rs. 29492748/- as against the same allowed under section 143 (3) of INR 19273253/-. Subsequently the assessment commenced and assessee raised several objections. Assessment under section 153A of the income tax act was passed on 19/8/2011 wherein the total income of the assessee was assessed at INR 42806384/-. The deduction claimed by the assessee u/s 80 HHC of the income tax act was reworked at Rs. Nil. Certain other disallowances were also made.
7. The assessee challenged the same before the learned CIT – A. The learned CIT – A considered the argument and grounds of appeal of the assessee with respect to the validity of initiation of

search and consequent addition dismissed them vide para number 3.3 of his order. The other grounds of appeal with respect to the several addition made by the learned assessing officer were dealt with by the learned CIT – A. Consequently, the appeal of the assessee was partly allowed. Therefore, assessee aggrieved with the order of the learned CIT – A has preferred this appeal.

8. The learned authorised representative submitted that the assessment has been made pursuant to the search u/s 132 of the income tax act u/s 153 A of the act. He submitted that original assessment proceedings u/s 143 (3) of the income tax act was concluded as per order dated 29/3/2006 restricting the deduction claimed under section 80 HHC of the act. On appeal, CIT(A) vide order dated 24.04.2007 decided the issue of restriction of deduction under section 80HHC against the assessee and other issues in its favour. No further appeal preferred by assessee against the order of CIT (A). Thereafter, application dated 14.09.2007 filed by the assessee under section 154 of the Act for making additional claim of deduction under section 80HHC of the Act. – Rectification application stood dismissed by the assessing Officer as well as confirmed by the learned CIT – A and the coordinate bench.
9. He further submitted that after that, reassessment proceedings under section 148 of the act was initiated as per notice dated 15/11/2008 on the issue of excess deduction claimed under section 80 HHC of the act to the extent of INR 18,100,000. The above assessments stood abated pursuant to search proceedings in the case of the assessee.

10. He submits that now u/s 153A , if the reassessment proceedings are valid, then, whole assessment is open before the 1d AO and also the incriminating material found for making any addition.
11. He submits that reassessment is not valid in the present case for the reason that:-
  - a. Reassessment has been made beyond four years and there is no reason to believe that assessee has failed to disclose any facts fully and truly.
  - b. Reassessment proceedings were initiated u/s 148 of the income tax act to re-examine claim of deduction u/s 80 HHC of the income tax act, which shows that there is a change of opinion.
  - c. No new Tangible material has come in to the possession of 1d AO to reopen the case.
  - d. As CIT A has examined the claim, The issue has merged with the order of the 1d CIT (A) which has been considered and decided by the 1d CIT (A) , SO there cannot be any reopening for examination of claim of deduction u/s 80 HHC of the act.

He therefore submitted that as the reassessment proceedings itself is invalid, the jurisdiction for making any addition/disallowance can only be with respect to incriminating material only. He the stated that if the reopening of the assessment is quashed as invalid than nothing further is required to be adjudicated.

12. On the issue whether the validity of reopening can be questioned u/s 153A of the act he submitted that in proceedings under section 153A even the jurisdictional issues can be raised by the

assessee. For this proposition, he referred to the decision of the All Cargo Logistics Ltd of special bench which has been confirmed by the honourable Bombay High Court in 374 ITR 645.

13. With respect to the other disallowance of INR 8 620/- under section 40A (3) of the act he stated that there is no incriminating material found during the course of search and merely on the basis of the comments in special audit report the addition cannot be made. He further stated that addition could only be made in case of concluded assessment only based on the incriminating material found during the course of search.
14. The learned departmental representative vehemently supported the order of the learned assessing officer and stated that in the 148 proceedings the issue of the allowability of deduction u/s 80 HHC of the income tax act was in question. He submitted that the learned CIT – A has considered the decision with different aspect whereas in the assessment order the learned assessing officer has looked into the correct claim of the assessee u/s 80 HHC of the income tax act. He otherwise stated that the assessment proceedings under section 148 of the income tax act was pending at the time of the search and therefore the learned assessing officer has correctly recomputed the deduction allowable to the assessee u/s 80 HHC of the income tax act at Rs. Nil. He further stated that this is an appeal against the order of the learned assessing officer under section 153A of the income tax act and the assessee is raising that the 148 proceedings initiated by the learned assessing officer is invalid, which is not the subject matter of appeal and therefore it cannot be raised now.

15. We have carefully considered the rival contention and perused the orders of the lower authorities. There is no dispute with respect to the assessment proceedings under section 153A of the income tax act. The dispute is in the facts and circumstances of the present case what is the scope of section 153A of the act. Admittedly , reassessment proceedings u/s 148 are pending on the date of initiation of search, thus whole of the assessment gets unabated and AO has right to make the assessment as if it is a fresh assessment, albeit as per the provision of section 147 of the act. Thus, where reassessment proceedings are pending, the ld AO is empowered to make adjustments to the total income in accordance with the provision of section 147 of the act as well as any incriminating material found during search.
16. However, it is mandatory that such reassessment proceedings should be validly initiated. Further we do not find any bar in the Act that when assessment is made us 153 A of the act, assessee cannot question that reassessment proceedings are not valid. It is a jurisdictional issue, if jurisdiction is bad consequently, the subsequent proceedings also becomes bad.
17. Therefore, we proceed to examine whether the reassessment is validly initiated or not. The reasons recorded for reopening of the assessment are placed at page number 142 of the paper book as under:-

“Scrutiny assessment was completed on total income of INR 3 0933761/- on 29/3/2006. In this connection, on examination of the assessment records it is found that while calculating deduction u/s 80 HHC, profit of the overseas Branch of INR 1 0.93 lakhs was added

to the profit instead of subtracting it from the eligible profit for deduction in respect of trading goods. Moreover, while calculating the profit eligible for deduction in respect of manufactured goods, expenses related to domestic sales. But there is no provision in the act for adding expenditure related to domestic sales in the eligible profit. The mistake resulted in over statement of profit for the purpose of calculation of deduction u/s 80 HHC, which resulted in excess allowance of deduction of INR 1.81 crores.

I have reasons to believe that the income chargeable to tax for the assessment year 2003 – 2004 has escaped assessment to the tune of INR 1.81 crores within the meaning of section 147/148.”

18. On careful analysis of the reasons recorded by the learned assessing officer it is important to note following facts:-
  - a. Original assessment u/s 143 (3) of the act was passed on 29/3/2006 and notice u/s 148 of the income tax act has been issued on 18/11/2008. In the reasons recorded for the reopening of the assessment the learned assessing officer has nowhere stated that what is the failure on the part of the assessee to fully and truly disclose the material facts for the computation of the total income.
  - b. In the reasons recorded itself, the learned assessing officer has stated that there is a mistake in calculation, which has

resulted in over statement of export the purpose of calculation of deduction u/s 80 HHC of the income tax act. Therefore, it is apparent that the learned assessing officer himself in stating that it is a mistake and there is no escapement of income because of failure on the part of the assessee.

- c. Further, in the reasons recorded for reopening we did not find anything which shows that there is a tangible material coming into the possession of the learned assessing officer to reopen the assessment.
- d. Further, in the original assessment proceedings it has been stated that the profit u/s 80 HHC of the income tax act was computed in the original assessment proceedings, which is also the subject matter of appeal before the 1<sup>st</sup> appellate authority. Therefore, it is apparent that it is merely a change of opinion on a particular aspect of the computation of deduction u/s 80 HHC of the income tax act.
- e. Even in the according to the provisions of section 147 of the income tax act the learned Assessing Officer may assess or reassess such income, other than the income involving matters which are the subject matters of any appeal, reference or revision, which is chargeable to tax and has escaped assessment. In the present case the provisions of section 80 HHC of the income tax act has been considered by the learned CIT – A also and therefore same is beyond the scope of section 147 of the income tax act as income involving the matters of section 80 HHC of the income tax act is the subject matter of appeal. Thus, the provisions of

section 147 also passed touching such matters which has been considered by the learned CIT – A.

19. In view of all the above facts, it is apparent that the reopening of the assessment proceedings initiated by the learned assessing officer is not sustainable in law. Therefore, we reverse the order of the learned CIT – A on this aspect and held that the reassessment proceedings initiated by the learned assessing officer is unsustainable. Thus, as on the date of initiation of search, no assessment proceedings were pending before the learned assessing officer.
20. Thus, it leaves us to the aspect of the provisions of section 153A of the income tax act and its scope. As we have already quashed the reassessment proceedings, the only issue left is the addition made by the learned assessing officer other than what was the subject matter of the provisions of section 148 of the income tax act, whether were made on the basis of any incriminating material found during the course of search or not. The honourable Delhi High Court in case of CIT vs Kabul Chawla 380 ITR 573 has held that in such assessment u/s 153A of the income tax act, in concluded assessment, the addition can be made only on the basis of incriminating material found during the course of search. The learned departmental representative could not show us any material found during the course of search based on which the additions/disallowances other than the computation of the claim of deduction u/s 80 HHC of the income tax act was made. In view of this, as the additions have been made without having any incriminating material found during the course of search, we reverse the order of the 1d CIT

(A) and direct the learned assessing officer to delete those additions/disallowances.

21. Accordingly, appeal filed by the assessee for AY 2003-04 is allowed.
22. Now we come to the appeals for AY 2004-05 preferred by both the parties against the order of the dl CIT (A) \_ XXXIII, New Delhi dated 25/3/2013 wherein appeal of the assessee is partly allowed.
23. The assessee has raised the following grounds of appeal in ITA No. 4161/Del/2013 for the Assessment Year 2004-05:-

- “1. That the search conducted under Section 132 is illegal, bad in law and without jurisdiction and the assessment made U/s 153A is also bad in law and without jurisdiction.*
- 2. That the notice U/s 153A and the assessment order passed U/s 153A is illegal, bad in law and without jurisdiction.*
- 3. That the CIT(Appeals) has in view of the facts and circumstances of the case, erred on facts and in law in not deleting the additions made by the AO since the AO has exceeded his power and jurisdiction in making additions that are totally unconnected to the material seized by the search party from the premises of the assessee.*
- 4. That the CIT(A) has in view of the facts and circumstances of the case, erred on facts and in law in framing the assessment order more so when the assessment was already framed and no assessment proceedings were pending.*
- 5. That the CIT(A) has in view of the facts and circumstances of the case, erred on facts and in law in framing the assessment order when there is no pending assessment and the assessment has not abated .*
- 6. That reference to special audit under section 142(2A) is illegal and bad in law and the report submitted by the special auditor is illegal, bad in law and without jurisdiction.*
- 7. That the CIT(A) has in view of the facts and circumstances of the case , erred on facts and in law in upholding the special audit report since the auditor had exceeded the points of*

reference while preparing and submitting the report to the revenue authorities.

8. That the CIT(A) has in view of the facts and circumstances of the case , erred on facts and in law in upholding the additions made by the AO on the basis of the special audit report .
9. That in view of the facts and circumstances of the case and in law the A.O. has erred in completing the assessment U/s 153A at a total income of Rs. 4,15,65,807/- as against returned income of Rs. 90,68,160/- when there is no seized material pertaining to this year. The additions made are unjust, unlawful, bad in law, without jurisdiction and are also highly excessive.

#### **Disallowance of payment in Contravention of Section 40A(3)**

10. That, in view of the facts and circumstances of the case and in law, the A.O. and subsequently CIT(A) has erred in law and on facts in holding that the assessee has made cash payments to various concern which are to be disallowed U/s 40A(3) of the Act.
11. That, in view of the facts and circumstances of the case, the A.O. and subsequently CIT(A) has failed to appreciate that payment of Rs. 67,100/- (Disallowance made @ 20% Rs. 13,420/-) is made out of commercial expediency and is allowable expenditure.
12. That A.O., in view of the facts and circumstances of the case, has erred in law and on facts in disallowing payments of Rs. 3,59,252/- (Disallowance made @ 20% Rs. 71,850/-) U/s 40A(3) paid as freight and CIT(A) has erred in law and on facts in upholding the same. The CIT(A) has failed to appreciate that payment is made out of commercial expediency and is allowable expenditure.

#### **Addition on account of personal expenses**

13. That the CIT(A) has in view of the facts and circumstances of the case, erred on facts and in law in upholding the additions made by the AO of Rs 63,000/- on account of alleged personal expenses.

#### **Addition U/s 14A r/w Rule 8D**

14. That in view of the facts and circumstances of the case and in law the A.O./CIT(A) has erred in making disallowance to

*the tune of Rs. 29,763/- u/s 14A read with Rule 8D of the Act. The disallowance made is unjust, unlawful and is also highly excessive.*

**Disallowance of Deduction u/s 80HHC**

15. *That in view of the facts and circumstances of the case and in law the A.O./CIT(A) has erred in allocation of interest cost of Rs. 9.82,21,881/- as indirect cost attributable to the export of trading goods.*
  16. *That the explanation given evidence produced, material placed and available on record has not been properly considered and judicially interpreted and the same do not justify the additions/ allowances made. In any case the additions upheld by the CIT(A) are highly excessive.*
  17. *That the various observations made by the CIT(A) are illegal, bad in law and factually incorrect and based on surmises and conjectures.*
  18. *That the interest u/s 234A, 234B, and 234D has been wrongly and illegally charged as there is no delay in filing of return and there is no default of payment of Advance tax as the receipt / income is liable to TDS and it could not have anticipated such additions. In any case the interest charged has been wrongly worked out and is excessive.*
  19. *That all the above grounds are independent to each other and mutually exclusive.*
  20. *The Appellant craves leave to add, amend, alter and/or delete any of the above grounds of appeal at or before the time of hearing.”*
24. The revenue has raised the following grounds of appeal in ITA No. 4043/Del/2013 for the Assessment Year 2004-05:-
- “1. *On the facts and in the circumstances of the case, the CIT(A) has erred in directing the ' Assessing Officer to allow deduction under section 80IB(11A) of the Income tax Act, 1961 MA”*
  2. *On the facts and in the circumstances of the case, the CIT(A) has erred in holding that the assessee is engaged in the integrated business of transportation handling and storage of food grains and conditions contained in section 80IB(11 A) are fulfilled and, therefore, is entitled CA to the deduction under section 80IB(11 A) of the Act,*

3. *On the facts and in the circumstances of the case, the CIT(A) has failed to appreciate the bare facts of the case that the plant & machinery put to use prior to 01.04.2001 in Bahalgarh Unit, constituted more the 20% due to which condition for allowing deduction was not fulfilled.*
  4. *On the facts and in the circumstances of the case, the 80IB(11A) has erred in deleting the addition of Rs. 16339670/- made by the Assessing Officer under section 69 of the Income tax Act, 1961*
  5. *The order of the CIT(A) is erroneous and is not tenable on facts and in law.”*
25. The brief facts of the case shows that original return of income was filed on 30/9/2005 declaring total income of INR 7928840/-. The assessee claimed deduction u/s 80 HHC of the act at INR 3 9392912/-. The return was processed u/s 143 (1) of the income tax act on 6/10/2004 on the returned income. Subsequently the return was revised on 31/3/2006 and the income declared therein was nil. In the revised return assessee claimed deduction u/s 80 HHC of the act at INR 3 9392912/-. Assessee also claimed deduction u/s 80 IB of the income tax act of INR 2 7527680/-. The assessment u/s 143 (3) of the act was completed on 15/12/2006 at the total income of INR 2 3188945/-. In the assessment proceedings, the disallowance of deduction u/s 80 HHC of the act was made however deduction u/s 80 IB of the act was allowed. However assessee mood an application under section 154 of the income tax act on 26/12/2006 which was adjudicated by the learned assessing officer on 15/2/2007 and thereafter no proceedings were pending.
26. Search took place on 10/2/2009. Thus on the date of search, assessment proceedings for this assessment year was complete. Therefore, any adjustment to the total income of the assessee is

required to be made under the provisions of section 153A of the income tax act for which notices have been issued by the learned assessing officer to the assessee, only based on incriminating material found during the course of search.

27. In assessment order u/s 153A of the income tax act the learned assessing officer computed the total income of the assessee at Rs. 41565807/- against the total income assessed u/s 154 of the income tax act of Rs. 49247908/-. The deduction u/s 80 HHC of the income tax act was worked out and the deduction u/s 80 IB of the income tax act was reduced to Rs. Nil in the assessment order u/s 153A of the act. The learned CIT – A partly allowed the appeal of the assessee and therefore both the parties are in appeal before us.
28. The learned authorised representative submitted that the present assessment is a completed/concluded assessment and therefore if any addition is required to be made should be based on the incriminating material found during the course of search. He stated that there is no incriminating material found during the course of search with respect to the additions disallowances made by the learned assessing officer. He therefore submitted that same required to be deleted.
29. The learned departmental representative vehemently supported the order of the learned assessing officer and learned CIT – A stating that there is no requirement of having any incriminating material for making any addition u/s 153A of the income tax act as the law does not provide so.
30. We have carefully considered the rival contention and perused the orders of the lower authorities. Admittedly, search under section 132 of the Act undertaken in the case of “Dawaat Group”,

including the assessee on 10.02.2009. As on that date, No proceedings pending before the assessing officer as on the date of search and hence no proceedings 'abated'. Further no incriminating material found during the course of search, as for the purpose of making the disallowance in addition made in the assessment order no reference has been made to any incriminating material found during the course of search. The learned CIT DR also did not show us any material which was found during the course of search in which could have resulted into making those additions. As held by the honourable Delhi High Court in CIT vs Kabul Chawla 380 ITR 573 that in case of concluded assessment the additions/disallowances can only be made on the basis of the incriminating material found during the course of search. Apparently, no such incriminating material has been found. Therefore, apparently the additions have been made in the concluded assessment proceedings for this year without having any incriminating material. Therefore the disallowance of payment in contravention is of the provisions of section 40A (3) of the income tax act of INR 1 3420/-, addition on account of personal expenses of INR 6 3000/-, disallowance u/s 14 A of the income tax act of Rs. 29763/-, the disallowance of deduction u/s 80 HHC of the income tax act are all made without having any incriminating material found during the course of search. Therefore, these additions cannot be sustained in assessment order passed u/s 153A of the income tax act. Hence we reverse the order of the learned CIT – A in confirming the above additions. Accordingly, appeal of the assessee to that extent is allowed.

31. Now coming to the appeal of the revenue, which is against the deletion of disallowance u/s 80 IB of the income tax act, Such disallowances were also made by the learned AO without having any incriminating material found during the course of search. Therefore, for the reasons given by as while deciding the appeal of the assessee for assessment year 2004 – 5, we also dismiss the appeal of the revenue.
32. Accordingly, appeal for assessment year 2004 – 05 of the assessee in ITA number 4161/del/2013 is allowed and appeal of the revenue in ITA number 4043/del/2013 is dismissed.
33. Now we come to the appeal of the parties for assessment year 2005 – 06 wherein the assessee has filed appeal in ITA number 4162/del/2013 and the learned assessing officer has filed appeal in ITA number 4044/Del/2013 against the order of the learned CIT – A XXXIII passed on 25/03/2013.
34. The assessee has raised following grounds of appeal in ITA No. 4162/Del/2013 for the Assessment Year 2005-06:-
1. *That the search conducted under Section 132 is illegal, bad in law and without jurisdiction and the assessment made U/s 153A is also bad in law and without jurisdiction.*
  2. *That the notice U/s 153A and the assessment order passed U/s 153A is illegal, bad in law and without jurisdiction.*
  3. *That the CIT(Appeals) has in view of the facts and circumstances of the case, erred on facts and in law in not deleting the additions made by the AO since the AO has exceeded his power and jurisdiction in making additions that are totally unconnected to the material seized by the search party from the premises of the assessee.*
  4. *That the CIT(A) has in view of the facts and circumstances of the case, erred on facts and in law in framing the assessment order more so when the assessment was*

*already framed and no assessment proceedings were pending.*

5. *That the CIT(A) has in view of the facts and circumstances of the case, erred on facts and in law in framing the assessment order when there is no pending assessment and the assessment has not abated .*
6. *That reference to special audit under section 142(2A) is illegal and bad in law and the report submitted by the special auditor is illegal, bad in law and without jurisdiction.*
7. *That the CIT(A) has in view of the facts and circumstances of the case , erred on facts and in law in upholding the special audit report since the auditor had exceeded the points of reference while preparing and submitting the report to the revenue authorities.*
8. *That the CIT(A) has in view of the facts and circumstances of the case, erred on facts and in law in upholding the additions made by the AO on the basis of the special audit report .*
9. *That in view of the facts and circumstances of the case and in law the A.O. has erred in completing the assessment U/s 153A at a total income of Rs. 17,01,29,886/- as against returned income of Rs. 1,44,13,190/- when there is no seized material pertaining to this year. The additions made are unjust, unlawful, bad in law, without jurisdiction and are also highly excessive.*

**Disallowance of payment in Contravention of Section 40A(3)**

10. *That, in view of the facts and circumstances of the case and in law, the A.O. and subsequently CIT(A) has erred in law and on facts in holding that the assessee has made cash payments to various concern which are to be disallowed U/s 40A(3) of the Act.*
11. *That, in view of the facts and circumstances of the case, the A.O. and subsequently CIT(A) has failed to appreciate that payment of Rs. 2,97,814/- is made out of commercial expediency and is allowable expenditure. The disallowance made is unjust, unlawful and highly excessive.*
12. *That A.O., in view of the facts and circumstances of the case, has erred in law and on facts in disallow sum of Rs. 30,671/- U/s 40A(3) paid as freight and CIT(A) has erred in law and on facts in upholding the same. The CIT(A) has failed to appreciate that payment is made out of commercial*

*expediency and is allowable expenditure. The disallowance made is unjust, unlawful and highly excessive.*

**Disallowance of expenses on account of Non-Deduction and Short- Deduction of TPS**

13. *That CIT(A), in view of the facts and circumstances of the case, has erred in law and on facts in only allowing the part relief in respect of disallowance made U/s 40(a)(ia) by the AO. The CIT(A) should have deleted the entire addition/disallowance on this account.*
14. *Without prejudice to the above, the CIT(A), in view of the facts and circumstances of the case, has erred in law and on facts in holding that where TDS has been deducted at lesser rate the disallowance U/s 40(a)(ia) of the Act is required to be made. The CIT(A) has failed to appreciate that no disallowance U/s 40(a)(ia) of the Act is required to be made where TDS has been deducted at lesser rate.*
15. *That CIT(A), in view of the facts and circumstances of the case, has erred in law and on facts in upholding the addition/disallowance U/s 40(a)(ia) on account of freight charges paid to various/different truck owner. The CIT(A) has also failed to appreciate that provision of Section 194C are not applicable to such payment and no TDS is required to be made on such payment.*
16. *That CIT(A) has failed to appreciate that the provision of Section 40(a)(ia) are not applicable in respect of disallowances made by the AO and disallowance are unjust, unlawful and without any legal basis.*

**Addition on account of personal expenses**

17. *That the CIT(A) has in view of the facts and circumstances of the case, erred on facts and in law in upholding the additions made by the AO of Rs 62,395/- on account of alleged personal expenses.*
18. *That the explanation given evidence produced, material placed and available on record has not been properly considered and judicially interpreted and the same do not justify the additions/ allowances made. In any case the additions upheld by the CIT(A) are highly excessive.*
19. *That the various observations made by the CIT(A) are illegal, bad in law and factually incorrect and based on surmises and conjectures.*

20. *That the interest u/s 234A, 234B, 234D and 244A has been wrongly and illegally charged as there is no delay in Filing of return and there is no default of payment of Advance tax as the receipt / income is liable to TDS and it could not have anticipated such additions. In any case the interest charged has been wrongly worked out and is excessive.*
21. *That all the above grounds are independent to each other and mutually exclusive.”*
35. The revenue has raised the following grounds of appeal in ITA No. 4044/Del/2013 for the Assessment Year 2005-06:-
- “1. *On the facts and in the circumstance of the case, the CIT(A) has erred in directing the Assessing Officer to allow deduction under section 80IB(11A) of the Income tax Act, 1961.*
2. *On the facts and in the circumstances of the case, the CIT(A) has erred in holding that the assessee is engaged in the integrated business of transportation , handling and storage of food grains and conditions contained in section 80IB(11A) are fulfilled and, therefore, is entitled to the deduction under section 80IB(11 A) of the Act.*
3. *On the facts and in the circumstances of the case, the CIT(A) has failed to appreciate the facts of the case that the plant & machinery put to use prior to 01.04.2001 in bahalgarh Unit constituted more than 20% due to which the condition for allowing deduction was not fulfilled.*
4. *On the facts and in the circumstances of the case, in respect of addition of Rs 14.96 crores made by the A.O, the CIT(A) has erred in directing the Assessing Officer to verify the quantity of stock with reference to the books of account and the statements sent by the assessee to the bank when this exercise had been duly made by the A.O. during the course of assessment proceedings and the assessee had not produced the stock register either during the search proceedings or even during the assessment proceedings and when the valuation of stock shown to the bank was much higher than the stock as per books of account.*
5. *The order of the CIT(A) is erroneous and is not tenable on facts and in law.”*
36. The brief facts of the case shows that original assessment proceedings u/s 143 (3) of the income tax act was concluded as

per order dated 18/12/2007. Such assessment order was passed in response to the original return of income filed by the assessee on 29/10/2005 declaring total income of INR 1 0640958/-. The assessee claimed deduction u/s 80 IB of the income tax act at INR 3 0178411/-. The return was processed u/s 143 (1) of the act on a 28/3/2006. The assessment u/s 143 (3) of the act was completed on 18/12/2007 at the total income of INR 1 4451319/- and the deduction u/s 80 IB to the extent of Rs. 28592709/- was allowed to the assessee. The learned assessing officer made only addition/disallowance is with respect to the staff training expenses incurred on directors on to the tune of Rs. 2224659/-. The assessee did not file any appeal against the order passed by the learned assessing officer u/s 143 (3) of the income tax act.

37. Subsequently search took place of on 10/2/2009. The notices u/s 153A of the income tax act was also issued to the assessee against which the assessee filed the return of income and consequently the assessment u/s 153A) of the income tax act was passed on 19/8/2011 wherein the learned assessing officer has made the disallowance is u/s 40A (3) of the income tax act as well as certain other disallowances. The total taxable income of the assessee was determined at INR 1 70129886/-. On appeal before the learned CIT – A appeal of the assessee was partly allowed. Therefore, both the parties are in appeal before us.
38. Coming to the appeal of the assessee wherein it has been contested that the additions made by the learned assessing officer are bad in law as there is no incriminating material found during the course of search. It is further stated that the assessment proceedings to the concluded on the date of initiation

of the search and therefore if any additions/disallowances are required to be made should be made only on the basis of the incriminating material found during the course of search.

39. The learned departmental representative vehemently supported the order of the learned assessing officer and reiterated the argument that there is no requirement of having any incriminating material to make any addition u/s 153A of the income tax act.
40. We have carefully considered the rival contention and perused the orders of the lower authorities. It is apparent that on the date of initiation of search on 10/2/2009 the assessment proceedings u/s 143 (3) of the income tax act was completed on 18/12/2007. Therefore on the date of search no assessment proceedings were pending for the impugned assessment year. Therefore if any addition is required to be made by the learned assessing officer should have been made on the basis of the seized material found during the course of search. We have perused the various additions/disallowances made by the learned assessing officer and found that there is no discretion of any seized material found during the course of search based on which these disallowances/additions have been made. The learned departmental representative also could not show us any seized material based on which the said additions have been made. Therefore, respectfully following the decision of the honourable Delhi High Court in CIT vs Kabul Chawla (supra) the above additions deserve to be deleted. Accordingly we direct the learned assessing officer to delete the disallowance of payment in contravention is of provisions of section 40A (3) of the income tax act, disallowance of expenses on account of non-deduction and

short deduction of tax at source and addition on account of personal expenditure. In the result, we reverse the order of the learned CIT – A income from the above disallowances and allow the appeal of the assessee to these extent.

41. Coming to the appeal of the revenue which is against the disallowance deleted u/s 80 IB of the income tax act. The above addition has also been made by the learned assessing officer without having any incriminating material found during the course of search. Therefore for the reasons given by us while allowing the appeal of the assessee directing the learned assessing officer to delete the various disallowances made, for the similar reasons, in absence of any incriminating material found based on which the disallowance has been made, we dismiss the appeal of the revenue.
42. Accordingly, appeal for assessment year 2005 – 06 filed by both the parties are disposed of wherein appeal of the assessee in ITA number 4162/Del/2013 is allowed an appeal filed by the learned assessing officer in ITA number 4044/Del/2013 is dismissed.
43. Accordingly, all the appeals pertaining to the assessee for assessment year 2003 – 04 to 2005 – 06 are disposed of by this consolidated order.

Order pronounced in the open court on 03/07/2019.

-Sd/-  
(BHAVNESH SAINI)  
JUDICIAL MEMBER

-Sd/-  
(PRASHANT MAHARISHI)  
ACCOUNTANT MEMBER

Dated: 03/07/2019  
A K Keot

Copy forwarded to

1. Applicant
2. Respondent

3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR  
ITAT, New Delhi