

**आयकर अपीलीय अधिकरण "C" न्यायपीठ मुंबई में।**

**IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH, MUMBAI**

श्री महावीर सिंह, न्यायिक सदस्य एवं श्री वसीम अहमद, लेखा सदस्य के समक्ष ।

BEFORE SRI MAHAVIR SINGH, JM AND SRI WASEEM AHMED, AM

**आयकर अपील सं./ ITA No. 5680/Mum/2018**

(निर्धारण वर्ष / Assessment Year 2009-10)

**आयकर अपील सं./ ITA No. 5681/Mum/2018**

(निर्धारण वर्ष / Assessment Year 2010-11)

PKSS Infrastructure Pvt. Ltd. 142, Garuda House, Upper Govind Nagar Malad (East), Mumbai-400 097	बनाम/ Vs.	The Dy. Commissioner of Income Tax, CC-4(1), 19 <sup>th</sup> floor, Air India Bldg., Mumbai-400 021
<b>(अपीलार्थी / Appellant)</b>		<b>(प्रत्यर्थी/ Respondent)</b>
<b>स्थायी लेखा सं./ PAN No. AAACP6450A</b>		

**आयकर अपील सं./ ITA No. 5803/Mum/2018**

(निर्धारण वर्ष / Assessment Year 2009-10)

**आयकर अपील सं./ ITA No. 5802/Mum/2018**

(निर्धारण वर्ष / Assessment Year 2010-11)

The Dy. Commissioner of Income Tax, CC-4(1), 19 <sup>th</sup> floor, Air India Bldg., Mumbai-400 021	बनाम/ Vs.	PKSS Infrastructure Pvt. Ltd. 142, Garuda House, Upper Govind Nagar Malad (East), Mumbai-400 097
<b>(अपीलार्थी / Appellant)</b>		<b>(प्रत्यर्थी/ Respondent)</b>

अपीलार्थी की ओर से / <b>Appellant by</b>	:	Shri Dharmesh Shah, Ms. Mitali Gopani, ARs
प्रत्यर्थी की ओर से / <b>Respondent by</b>	:	Shri Awungshi Gimson, DR

सुनवाई की तारीख / <b>Date of hearing:</b>	14.11.2019
घोषणा की तारीख / <b>Date of pronouncement:</b>	29.11.2019

**आदेश / ORDER****महावीर सिंह, न्यायिक सदस्य/****PER MAHAVIR SINGH, JM:**

These appeals are arising out of orders of the Commissioner of Income Tax (Appeals)]-52, Mumbai [in short CIT(A)], in Appeal Nos. CIT(A)-52/DC CC-4(1)/IT-39,40/16-17 vide even dated 31.07.2018. The Assessments were framed by the Dy. Commissioner of Income Tax, Circle-4(1), Mumbai (in short ACIT/ AO) for the A.Ys. 2009-10, 2010-11 vide even dated 02.0.3.2016, under section 143(3) of the Income-tax Act, 1961 (hereinafter 'the Act').

2. The first common issue in these two appeals is as regards to the order of CIT(A) confirming the action of the AO in framing order under section 143(3) read with section 154 of the Act without appreciating that the assessment is not based on any incriminating material even during the course or search or as a result of search. The facts and circumstances are exactly identical in both the years i.e. AYs 2009-10 and 2010-11. The grounds raised in both the years by the assessee are identically worded and the grounds as raised in AY 2009-10 in ITA No. 5680/Mum/2018 read as under: -

*"1. On the facts and circumstances, the Hon'ble Commissioner of Income-Tax (Appeals) has erred in confirming the action of the action of the Assessing Officer that the Order passed under section 143(3) read with section 153A is*



*bad-in-law, without complying with the principles of natural justice.*

*2. On the facts and the circumstances, the Hon'ble Commissioner of Income Tax (Appeal) has erred in confirming the action of the Assessing Officer in making the addition on account of receipt of share application money/ capital amounting to ₹4,75,00,000/- without appreciating that no incriminating evidences has been found as a result of search in respect of the same."*

3. Briefly stated facts are that the assessee company has joint venture promoted by Sangam India Ltd., M/s Sahakar Global Ltd. and Shri PK Agarwal. The assessee company is engaged in the business of toll collection, sand dredging etc. and construction business etc. A search action by the Income Tax Department was conducted under section 132 of the Act on the assessee on 27.02.2014. This search was a result of search conducted by Investigation Wing on Shri Pravin Kumar Jain on 01.10.2013. The said search action on Pravin Kumar Jain of cases revealed that these concerns controlled directly or indirectly by Shri Pravin Kumar Jain are engaged in the activity of providing accommodation entries to various beneficiaries in the form of bogus purchases, loans, share capital etc. In view of the findings of the search action in the case of entry provider Shri Pravin Kumar Jain, a search in assessee's group of cases

was conducted under section 132 of the Act on 27.02.2014. During the course of search statement of Pravin Kumar Agarwal was recorded, who in his statement under section 132(4) of the Act admitted introducing unaccounted funds by the way of bogus application money as well as share capital at a huge premium through the concerns controlled by Shri Praveen Jain. Shri Pravin Kumar Agarwal admitted that amount of ₹7.20 crores was introduced for AY 2009-10, which was later on retracted before the AO during assessment proceedings by filing affidavit dated 24.08.2015. The AO while completing the assessment under section 153A read with section 143(3) of the Act vide order dated 02.03.2016 added the amounts received as share capital application/ share premium under section 68 of the Act as undisclosed being bogus amounting to ₹7.20 crores. Aggrieved, assessee preferred the appeal before CIT(A). Before CIT(A), the assessee challenged the assessment framed by AO under section 153A of the Act on the ground that there was no incriminating material found during the search and the assessment for the relevant assessment year 2009-10 is a non-abated assessment. Therefore, the AO in the absence of any incriminating material could not have disturbed the assessment order. But the CIT(A) confirmed the action of the AO vide Para 7.3, 7.4 and 7.9 as under: -

*"7.3 From the aforesaid, it can be observed that a non-abated assessment can be disturbed by the AO while making assessment u/s 143(3) rw.s. 153A only on the basis of some incriminating material*

*unearthed during the search action. In the instant case, by the date of the search action, the time limit for selecting the case for scrutiny by issuing notice u/s 143(2) had already lapsed and therefore, the assessment for the relevant year was a non-abated assessment which could have been disturbed only on the basis of some incriminating material found during the search action. However, in the instant case, there was enough incriminating material found in course of the search action for the said addition made u/s 68 in respect of share application money as well as share capital received at a huge premium, as demonstrated in the subsequent paras.*

*7.4 In this case, there is no dispute that Praveen Jam, entry operator in course of his search action had admitted that he through the concerns directly/indirectly controlled by him is solely engaged in the business of providing accommodation entries. Further, there is no dispute that the share application money as well as share capital at a huge premium received by the assessee included amounts received from the concerns of Praveen*



*Jam. There is also no dispute that Shri Pravin Kumar Agrawal, Shri Rampal Soni and other Directors of the assessee company had accepted in course of the search action that the share application money as well as share capital introduced in the assessee company is bogus. Further, it is a fact that share certificate issued to the said shareholders were found at the time of the search action which leads to suspicion about the genuineness of the said share application money as well as share capital received. Also, it is a fact that a major difference in the cash in hand as per books and the cash physically found was noted at the time of search action in the case of MIs Sahakar Global Ltd (related concern), which was explained to have arisen due to the cash utilized for availing accommodation entries through entry operators. Moreover, incriminating statements were recorded of Shri Pravin Kumar Agarwal, Shri Rampal Soni and also other directors of the assessee.*

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7.8 As per the aforesaid decisions of the Hon'ble Court, it can be concluded that adverse statements on oath recorded at the time of the search action can be considered to be sufficient incriminating material unearthed on account of the search action. In the instant case, it is observed that incriminating statements on oath were recorded of Shri Pravin Kumar Agarwal, Shri Rampal Soni and also of the other directors of the assessee on the share application money as well as share capital introduced at a huge premium from various concerns including the concerns of Pravin Jain. In view of the said decisions of the Hon'ble Supreme Court in the case of P.R. Metrani (supra) and the Hon'ble Allahabad High court in the case of Gargi/ Devi Jwala Prasad, these adverse statements clearly also constituted sufficient incriminating material unearthed on account of the search action to warrant appropriate action under section 153A read with section 143(3).

7.9 In view of the above detailed discussion, no infirmity is found in the action of the AO in undertaking action

*under section 153A 4.2.s 143(3) and making the said addition under section 68 since there was enough evidence to incriminate the assessee in the form of statements recorded of Shri Pravin Kumar Agarwal, Shri Rampal Soni and the other directors of the assessee and also the suspicion based on the presence of share certificates issued to the shareholders as well as detection of major difference in cash in hand as per books and the cash physically found in the case of M/s Sahakar Global Ltd.(related concern) at the time of search action, which was explained to have arisen due to cash utilized for availing accommodation entries. Accordingly, it is held that there is no infirmity in the action of the AO in disturbing the non-abated assessment for the relevant year."*

Aggrieved, now assessee is in appeal before Tribunal.

4. Before us, the learned Counsel for the assessee stated that the CIT(A) has rejected the legal ground on the issue that incriminating material was found from the premises of the assessee during the course of search in the shape of share certificate issued to the said shareholders which led to suspicion about genuineness of the said share application money as well



as share capital. The learned Counsel for the assessee before us filed paper book wherein he has filed copy of reply to the DDIT investigation, wing 1(1) dated 15.05.2014 stating that the relevant share certificates were produced before the DDIT investigation Wing by the assessee and the relevant reply read as under: -

*"During the course of proceeding, directors have been asked to furnish original share certificates/ share register evidencing allotment of shares of the company. On the demand, the company had asked for original share certificates from their company secretary's office which were produced to tax authorities for their verification which were available at the secretary's office of the purpose of transfer in d-mat form. "*

5. In view of the above, the learned Counsel contended that these details were produced by the assessee itself for the purpose of verification which were in-turn available at the secretary's office for the purpose of transfer of these share certificates in demat form. Even otherwise, the learned Counsel for the assessee stated that the share certificates cannot be said to be incriminating material. In any case for this, he placed reliance in the case of Agson Global Pvt. Ltd. Vs. ACIT in ITA No. 3741 to 3746/Del/2019 & Ors. dated 31.10.2019, wherein

Tribunal has considered this issue vide Para 62 to 65 as under:

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*"62. In another decision of the coordinate bench in ITA number 1451, 1452, 1453 dated 1/3/2008 for assessment year 2007 – 08 – 09 – 10 wherein on identical facts and circumstances, where 1 of us is a co-author of the judgment, following documents were found: -*

*5.1 The perusal of the above details reveals that the assessee has received share premium from above companies. Certain documents were found and seized from the residence of the assessee company, Sh. Vinod Goel which are as under;*

*1. Annexure No 1. Memorandum and Articles of Association Annexure A-3, A-6, A-7, A-97 A10, A-11, A-12, A-13 a A-14*

*2. Bank statements –DO*

*3. Blank share transfer forms – Do*

*4. Blank special power of attorneys in original signed by the authorized signatory-*

*Do5. affidavits by Director of the concerned companies stating therein that their company has applied for equity shares of M/s Goel International Pvt. Ltd –*

*Do6 Blank receipts against the shares held by the company in M/s Goel International Pvt. Ltd, signed by the Director of company.*

*Photocopies of AnnexureA-3 showing details of Incriminating documents as mentioned above in the case of one company who had invested in the shares of the assessee company is enclosed alongwith this order. Exactly similar evidence is found in case of other companies also who had made investment in the shares of the assessee company, which are marked as Annexures mentioned above.*

*Dealing with all these documents in para number 9.4 of the decision the coordinate bench dealt with the issue as under: -*

*9.4 Furthermore, three blank documents were found with respect*

*to these companies. These are blank share transfer forms, special power of attorney signed by the authorized signatories and blank receipts against the shares. All these three documents are admittedly non-executed and do not show any transactions. Had there been any transaction recorded on blank share transfer forms, receipts regarding any money or transfer in favour of any person, it would have made them suspicious. The entries in those forms are not at all made, but are merely blank. The assessee has given detailed explanation why they were found at the place of assessee. The Assessing Officer has not examined the signatories of these documents to arrive at the true nature of the transactions. The Assessing Officer is just making an assumption that these are the documents which would have been used by the assessee for transferring those shares in the name of the promoters or their group concerns at a price which is*

*far less than the price of shares issued. It is not the case of the Assessing Officer that either such shares are subsequently transferred at lower price, or such shares stood disposed of by the investor companies. In view of this, the case of the Revenue is merely based on assumption and surmises.*

*63. Therefore, apparently compared to all those decisions cited above which are referred by the learned authorised representative where such forms and documents were found in original, the case of the assessee is on far better footing that only in case of few shareholders these documents were found which were also not in original but only photocopies. It is also confirmed repeatedly by the learned assessing officer present in the hearing as well as in his letter to the bench that original of these documents were not found during the course of search.*

*64. Even otherwise, provisions of section 61 of the evidence act prescribe that the contention of a document may be proved*

*either by primary evidence or by secondary evidence. According to section 67, thereof primary evidence means the document itself reduced for the inspection of the court. Explanation to of section 60 provides that copy of a common original are not primary evidence. Thus, even otherwise the photocopy cannot be primary evidence. As such, it cannot also be classified as a document. In absence of any other material, even such photocopy cannot be treated to be secondary evidence also. Such documents are only overly being claim to be a photocopy without claiming that what was photographed was the original order that it was compared with the original. Therefore, the photocopy to be admissible as evidence has to be a certified 1. Thus for the income tax proceedings the learned assessing officer should have summoned all those investors to verify whether these documents are really executed or not.*

*65. In view of this, whether such documents can be said to be incriminating documents or not has been answered by all these decisions of the coordinate*

*benches in favour of the assessee. Therefore, we are of the view that for assessment year 2012 - 13 to assessment year 2014-15, there were no incriminating evidences with respect to the share capital based on which the addition can be made. Accordingly, Ground no 1, 2 for AY 2012-13, 2013-14 and 2014-15 is allowed."*

6. The learned Counsel for the assessee also stated that the CIT(A) while confirming the assumption of jurisdiction on the basis of statement recorded during the course of search argued that the statements recorded standalone cannot be the basis for treating the documents as incriminating. For this, the learned Counsel for the assessee relied on the decision of Co-ordinate Bench of Delhi Tribunal in the case of DCIT vs. Smt. Shivali Mahajan & Ors. in ITA No. 5585/Del/2015 vide order dated 19.03.2019, wherein it is held as under: -

*"16. Now, coming to question No.2, we find that this issue is also covered by the decision of Hon'ble Jurisdictional High Court in the case of Harjeev Aggarwal (supra) and Best Infrastructure (India) (P.) Ltd. (supra). In the case of Harjeev Aggarwal (supra), Hon'ble Jurisdictional High Court considered the evidentiary value of the statement recorded during*

*the course of search. The relevant portion is paragraph 19, 20 & 24, which are reproduced below for ready reference: -*

*19. In view of the settled legal position, the first and foremost issue to be addressed is whether a statement recorded under Section 132(4) of the Act would by itself be sufficient to assess the income, as disclosed by the assessee in its statement, under the Provisions of Chapter XIV-B of the Act.*

*20. In our view, a plain reading of Section 158BB(1) of the Act does not contemplate computing of undisclosed income solely on the basis of a statement recorded during the search. The words "evidence found as a result of search" would not take within its sweep statements recorded during search and seizure operations. However, the statements recorded would certainly constitute information and if such information is relatable to the evidence or material found during search, the same could certainly be used in*

*evidence in any proceedings under the Act as expressly mandated by virtue of the explanation to Section 132(4) of the Act. However, such statements on a standalone basis without reference to any other material discovered during search and seizure operations would not empower the AO to make a block assessment merely because any admission was made by the assessee during search operation.*

*24. If the Revenue's contention that the block assessment can be framed only on the basis of a statement recorded under Section 132(4) is accepted, it would result in ignoring an important check on the power of the AO and would expose assessee to arbitrary assessments based only on the statements, which we are conscious are sometimes extracted by exerting undue influence or by coercion. Sometimes statements are recorded by officers in circumstances which can most charitably be described as oppressive and in most such cases,*

are subsequently retracted.

Therefore, it is necessary to ensure that such statements, which are retracted subsequently, do not form the sole basis for computing undisclosed income of an assessee.

17. Thus, Hon'ble Jurisdictional High Court has held "The words "evidence found as a result of search" would not take within its sweep statements recorded during search and seizure operations". Their Lordships further observed "However, such statements on a standalone basis without reference to any other material discovered during search and seizure operations would not empower the AO to make a block assessment merely because any admission was made by the assessee during search operation". In paragraph 24, their Lordships have mentioned about the prevailing practice of extracting statement by exerting undue influence or coercion by the search party. Though the above decision in the case of Harjeev Aggarwal is with reference to the meaning of undisclosed income u/s 158BB of the Income-tax Act, however, in our opinion, the above observation of Hon'ble

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*Jurisdictional High Court would be squarely applicable while considering the evidentiary value of the statement while making the assessment u/s 153A."*

7. On the other hand, the learned CIT DR relied on the assessment order and the order of CIT(A). He stated that shares certificate issued to the shareholders were found at the time of search action, which leads to suspicion of the genuineness of the shareholders and also this fact was admitted by Shri Pravin Kumar Agarwal dated 28.02.2014 and 23.04.2014 recorded under section 132 of the Act admitting receipt of money on account of issuance of bogus share application money. The learned CIT DR, in view of the above argued that the AO has rightly assumed jurisdiction under section 153A of the Act and framed assessment accordingly.

8. We have heard the rival contentions and gone through the facts and circumstances of the case. Admittedly, a search under section 132 of the Act was carried out on the premises of the assessee on 27.02.2014. The assessee filed its return of income originally on 27.09.2009 for AY 2009-10 and assessment was completed under section 143(3) of the Act dated 30.11.2011 during which the assessee filed complete details in regard to share application money received from various parties during the financial year 2008-09 relevant to this AY 2009-10. On the date of the search on 27.02.2014, this assessment was unabated because no action was pending against this assessment. It is also a fact that during the course



of search the shares certificates relating to these parties were not seized rather these are submitted by assessee before the investigation wing during inquiry proceedings carried out in lieu of search under section 132 of the Act vide letter dated 15.05.2014. These shares certificates were lying with the Secretary's Office for Demat. Now, the question arises the statement recorded under section 132 of the Act of Shri Pravin Kumar Aggarwal and Ram Pal Soni during the course of search, which were later on retracted by the respective persons, can be considered as incriminating material for the purpose of framing under section 153A of the Act. This has been answered by coordinate Bench of this Tribunal in the above cited two case laws namely; Agson Global Pvt. Ltd. Vs. ACIT in ITA No. 3741 to 3746/Del/2019 & Ors. dated 31.10.2019 & DCIT vs. Smt. Shivali Mahajan & Ors. in ITA No. 5585/Del/2015 vide order dated 19.03.2019. In both the judgments, the issues raised by the lower authorities that share certificates and the statement recorded during the course of search can be considered as incriminating material, has been answered and answered in favour of assessee that these two cannot be considered as incriminating material on standalone basis. Once, the assessment was completed and has not abated for relevant AY and there is no incriminating material found during the course of search, no assessment can be framed under section 153A of the Act in the absence of incriminating material and hence this issue is squarely covered by the decision of the Hon'ble Bombay High Court in the case of CIT vs. Continental Warehousing Corporation (Nhava Sheva) Ltd. (2015) 374 ITR 645 (Bom).



9. We find that this issue now stands covered in favour of assessee and against the Revenue by the decision of Hon'ble Bombay High Court in the case of Continental Warehousing Corporation (Nhava Sheva) Ltd. (supra), wherein considering the judgment of the Special Bench of the Mumbai Tribunal in the case of All Cargo Global Logistics 137 ITD 287(SB) (Mum), considered this issue that, whether there is scope of assessment u/s. 153A of the Act in respect to completed assessment which is limited only to undisclosed income and undisclosed assets found during the course of search or not? Hon'ble High Court held that on a plain reading of section 153 of the Act it becomes clear that on initiation of the proceedings u/s. 153A of the Act, it is only the assessment/reassessment proceedings that are pending on the date of search u/s. 132 of the Act stand abated and not the assessments/reassessments already final for those assessment years which are covered u/s. 153A of the Act. Hon'ble High Court discussed the CBDT Circular No. 8 of 2003 dated 18.09.2003 reported in 263 ITR (st.) 61 at page 107 wherein CBDT has clarified that on initiation of proceedings u/s. 153A of the Act the proceedings pending in appeal, revision or rectification proceedings against final assessment shall not abate. It is only because the final assessments do not abate the appeal, revision or rectification pending against final assessments would not abate. Therefore, Hon'ble High Court rejected the arguments of the Revenue that on initiation of proceedings u/s. 153A of the Act, the reassessment final for assessment years covered u/s. 153A of the Act stands abated. Only the pending assessments get

revived u/s. 153A of the Act. Hon'ble High Court further held that once assessment has attained finality, then the AO while passing independent assessment order u/s. 153A/143(3) of the Act could not disturb the assessment order which has attained finality unless the material gathered in the course of search u/s. 132/153A of the Act established that the finality attained in the assessment were contrary to the facts unearthed during the course of search. The relevant portion of the judgment reads as under: -

*"31. We, therefore, hold that the Special Bench's understanding of the legal provision is not perverse nor does it suffer from any error of law apparent on the face of the record. The Special Bench in that regard held as under:-*

*"The provision under section 153A is applicable where a search or requisition is initiated after 31.5.2003. In such a case the AO is obliged to issue notice u/s 153A in respect of 6 preceding years, preceding the year in which search etc. has been initiated. Thereafter he has to assess or reassess the total income of these six years. It is obligatory on the part of the AO to assess or reassess total income of the six years as provided in section 153A(1)(b) and reiterated in the 1st*

*proviso to this section. The second proviso states that the assessment or reassessment pending on the date of initiation of the search or requisition shall abate. We find that there is no divergence of views in so far as the provision contained in section 153A till the 1st proviso. The divergence starts from the second proviso which states that pending assessment or reassessment on the date of initiation of search shall abate. This means that an assessment or reassessment pending on the date of initiation of search shall cease to exist and no further action shall be taken thereon. The assessment shall now be made u/s 153A. The case of Ld. Counsel for the assessee is that necessary corollary to this provision is that completed assessment shall not abate. These assessments become final except in so far and to the extent as undisclosed income is found in the course of search. On the other hand, it has been argued by the Ld. Standing Counsel that abatement of pending assessment is only for the purpose of avoiding two assessments for the same year, one being regular*

*assessment and the other being assessment u/s 153A. In other words these two assessments coalesce into one assessment. The second proviso does not contain any word or words to the effect that no reassessment shall be made in respect of a completed assessment. The language is clear in this behalf and therefore literal interpretation should be followed. Such interpretation does not produce manifestly absurd or unjust results as section 153A (i)(b) and the first proviso clearly provide for assessment or reassessment of all six years. It may cause hardship to some assesses where one or more of such assessments has or have been completed before the date of initiation of search. This is hardly of any relevance in view of clear and unambiguous words used by the legislature. This interpretation does not cause any absurd etc. results. There is no casus omissus and supplying any would be against the legislative intent and against the very rule in this behalf that it should be supplied for the purpose of achieving legislative intent. The submissions of the Ld. Counsels are*

*manifold, the foremost being that the provision u/s 153A should be read in conjunction with the provision contained in section 132(1), the reason being that the latter deals with search and seizure and the former deals with assessment in case of search etc, thus, the two are inextricably linked with each other.*

*Before proceeding further, we may now examine the provision contained in subsection (2) of section 153, which has been dealt with by Ld. Counsel. It provides that if any assessment made under subsection (1) is annulled in appeal etc., then the abated assessment revives. However, if such annulment is further nullified, the assessment again abates. The case of the Ld. Counsel is that this provision further shows that completed assessments stand on a different footing from the pending assessments because appeals etc. proceedings continue to remain in force in case of completed assessments and their fate depends upon subsequent orders in appeal. On consideration of the provision and the submissions, we find that this provision also makes it clear that the abatement of pending proceedings is not*

*of such permanent nature that they cease to exist for all times to come. The interpretation of the Ld. Counsel, though not specifically stated, would be that on annulment of the assessment made u/s 153(1), the AO gets the jurisdiction to assess the total income which was vested in him earlier independent of the search and which came to an end due to initiation of the search.*

*The provision contained in section 132 (1) empowers the officer to issue a warrant of search of the premises of a person where any one or more of conditions mentioned therein is or are satisfied, i.e. - a) summons or notice has been issued to produce books of account or other documents but such books of account or documents have not been produced, b) summons or notice has been or might be issued, he will not produce the books of account or other documents mentioned therein, or c) he is in possession of any money or bullion etc. which represents wholly or partly the income or property which has not been and which would not be disclosed for the purpose of assessment, called as undisclosed income*

*or property. We find that the provision in section 132 (1) does not use the word "incriminating document". Clauses (a) and (b) of section 132(1) employ the words "books of account or other documents". For harmonious interpretation of this provision with provision contained in section 153A, all the three conditions on satisfaction of which a warrant of search can be issued will have to be taken into account.*

*Having held so, an assessment or reassessment u/s 153A arises only when a search has been initiated and conducted. Therefore, such an assessment has a vital link with the initiation and conduct of the search. We have mentioned that a search can be authorised on satisfaction of one of the three conditions enumerated earlier. Therefore, while interpreting the provision contained in section 153A, all these conditions will have to be taken into account. With this, we proceed to literally interpret to provision in 153A as it exists and read it alongside the provision contained in section 132(1).*

*The provision comes into operation if a search or requisition is initiated after 31.5.2003. On satisfaction of this condition, the AO is under obligation to issue notice to the person requiring him to furnish the return of income of six years immediately preceding the year of search. The word used is "shall" and, thus, there is no option but to issue such a notice. Thereafter he has to assess or reassess total income of these six years. In this respect also, the word used is "shall" and, therefore, the AO has no option but to assess or reassess the total income of these six years. The pending proceedings shall abate. This means that out of six years, if any assessment or reassessment is pending on the date of initiation of the search, it shall abate. In other words pending proceedings will not be proceeded with thereafter. The assessment has now to be made u/s 153A (1)(b) and the first proviso. It also means that only one assessment will be made under the aforesaid provisions as the two proceedings i.e. assessment or reassessment proceedings and proceedings under this provision merge*

*into one. If assessment made under sub-section (1) is annulled in appeal or other legal proceedings, then the abated assessment or reassessment shall revive. This means that the assessment or reassessment, which had abated, shall be made, for which extension of time has been provided under section 153B.*

*The question now is - what is the scope of assessment or reassessment of total income u/s 153A (1) (b) and the first proviso? We are of the view that for answering this question, guidance will have to be sought from section 132(1). If any books of account or other documents relevant to the assessment had not been produced in the course of original assessment and found in the course of search in our humble opinion such books of account or other documents have to be taken into account while making assessment or reassessment of total income under the aforesaid provision. Similar position will obtain in a case where undisclosed income or undisclosed property has been found as a consequence of search. In other words,*

*harmonious interpretation will produce the following results: -*

*a) In so far as pending assessments are concerned, the jurisdiction to make original assessment and assessment u/s 153A merge into one and only one assessment for each assessment year shall be made separately on the basis of the findings of the search and any other material existing or brought on the record of the AO,*

*(b) in respect of non-abated assessments, the assessment will be made on the basis of books of account or other documents not produced in the course of original assessment but found in the course of search, and undisclosed income or undisclosed property discovered in the course of search."*

10. Accordingly, in view of the given facts and circumstances, we are of the view that this issue is squarely covered in favour of assessee and against the Revenue and hence, we allow this jurisdictional issue in favour of assessee and reverse the order of CIT(A) on this issue. Accordingly, assessment framed under section 153A of the Act is quashed.



11. The similar issue is raised in AY 2010-11 in ITA No.5681/Mum/2018 and both, learned Counsel for the assessee as well as learned CIT DR, agreed that the issue is exactly identical and facts and circumstances are also identical. Hence, taking a consistent view in this year also, we allow this jurisdictional issue in favour of assessee.

12. Since, we have adjudicated the issue in favour of assessee and quashed the assessment in both the years, the issue on merits in assessee's appeal and the issues raised in Revenue's appeal will become academic and hence, not adjudicated.

**13. In the result, the appeals of assessee are allowed and that of the Revenue are dismissed.**

Order pronounced in the open court on 29.11.2019

Sd/-

(वसीम अहमद / WASEEM AHMED)

(लेखा सदस्य / ACCOUNTANT MEMBER)

मुंबई, दिनांक/ Mumbai, Dated:29.11.2019

सुदीप सरकार, व.निजी सचिव / Sudip Sarkar, Sr.PS

Sd/-

(महावीर सिंह /MAHAVIR SINGH)

(न्यायिक सदस्य/ JUDICIAL MEMBER)

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai