

**IN THE INCOME TAX APPELLATE TRIBUNAL "G", BENCH MUMBAI**  
**BEFORE SHRI G. MANJUNATHA, ACCOUNTANT MEMBER**  
**&**  
**SHRI RAVISH SOOD, JUDICIAL MEMBER**

**ITA No's.502 & 503/Mum/2019**  
**(Assessment Years: 2005-06 & 2006-07)**

DCIT, Central Circle-1(2) 906, 9 <sup>th</sup> Floor Pratishtha Bhavan Old CGO Bldg., (Annexe) M.K.Road Mumbai-400 020	Vs.	Starlog Enterprises Ltd. (formerly known as ABG Infralogistics Ltd.) 5 <sup>th</sup> Floor, Bhupati chambers, 13 Mathew Road, Opera House Mumbai-400 004
		<b>PAN/GIR No. AAACA3293L</b>
<b>(Appellant)</b>	..	<b>(Respondent)</b>

Assessee by	None
Revenue by	Ms. Anupama D. Shukla, DR
<b>Date of Hearing</b>	<b>27/02/2020</b>
<b>Date of Pronouncement</b>	<b>20/05/2020</b>

**आदेश / ORDER**

**PER G.MANJUNATHA, Accountant Member:**

These two appeals filed by the revenue are directed against separate, but identical orders of the Ld. Commissioner of Income Tax (Appeals)-47, Mumbai, both dated 01/11/2018 for the Asst. Years 2005-06 & 2006-07. Since, facts are identical and issues are common, for the sake of convenience, these appeals were heard together and are disposed-off by this consolidated order.

**ITA.No.502/Mum/2019 for AY 2005-06:-**

2. The revenue has, more or less raised common grounds of appeal for both assessment years. Therefore, for the sake of brevity, grounds of appeal filed for the AY 2005-06 are reproduced as under:-

1. *"On the facts and the circumstances of the case and in law the Ld. CIT(A) erred in granting relief of Rs. 1,59,75,951/- to the assessee on account of 80IA(4) stating that no disallowance u/s 153A of the Act, is called for as there are no incriminating materials found during the search and the assessment has reached its finality and was not abated at the initiation proceedings u/s. 132(1) of the Income Tax Act, 1961".*

2. *"On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred, in holding that no addition can be made u/s 153A of the Act, once the assessment has reached to finality u/s 143(3) of the Act, and no incriminating documents have been found and seized in the case of the assessee during the course of search and seizure action relying upon the decision of the jurisdictional Bombay High Court decisions in the case of continental warehousing Corpn., M/s All Cargo Global Logistics and M/s Murli Agro Products without appreciating that the revenue has not accepted these decisions and has filed SLP in the Hon'ble Apex Court."*

3. The brief facts of the case are that the assessee company is engaged in the business of providing equipment's and Charter Hire & Leasing of Heavy duty cranes to port and other business organizations, both in private and public sector. The assessee has claimed deducted u/s 80IA(4) of the I.T.Act, 1961, in respect of profit derived from its business activities. In the scrutiny assessment finalized u/s 143(3) of the I.T.Act, 1961, the claim of deduction u/s 80IA(4) of the I.T.Act, 1961 has been disallowed on the ground that the assessee is engaged in the business of works contract, but not as a developer and consequently, it is not entitled for deduction u/s 80IA(4) of the I.T.Act, 1961. The matter has since transited to the Hon'ble Bombay High Court and the Hon'ble Bombay High Court, vide its order dated 05/02/2010 in ITA Nos. 1687/2010 & 2291/2009

has upheld the claim of the deductions claimed u/s 80IA(4) of the I.T.Act, 1961. The department had filed a Special Leave Petition (SLP) before the Hon'ble Supreme court, but the Hon'ble Supreme Court has dismissed the SLP filed by the department and upheld the findings of Hon'ble Bombay High Court, giving the benefit of deductions claimed u/s 80IA(4) of the I.T.Act, 1961.

4. A search and seizure operation u/s 132 of the I.T.Act, 1961 was conducted in the case of assessee group on 07/10/2009. Consequent to the search operation, the case was taken up for assessment and accordingly, notice u/s 153A of the I.T.Act, 1961 was issued. In response to notice, the assessee had filed the return of income on 22/01/2010, declaring total income of Rs.4,55,05,830/- Thereafter, the case has been selected for scrutiny and notice u/s 143(2) of the I.T.Act, 1961, dated 27/08/2010 along with questionnaire was issued and duly served on the assessee. Meanwhile, the assessee had challenged notice issued u/s 153A, dated 23/12/2009 by way of writ with Hon'ble Bombay High court and challenged the validity of the search in absence of incriminating evidence found as a result of search. However, the writ petition filed before the Hon'ble Bombay High Court has been, subsequently withdrawn and accordingly, the Hon'ble Court has not expressed any opinion on the validity of search proceedings. Thereafter, the Ld. AO has completed u/s 143(3) r.w.s. 153A of the I.T.Act, 1961 on 25/06/2015 and determined total income at Rs.6,14,81,780/-, after making additions towards disallowances of deductions claimed u/s 80IA(4) of the I.T.Act, 1961 by reallocating certain expenses from non eligible business to eligible business.

5. Aggrieved by the assessment order, the assessee has preferred an appeal before the Ld.CIT(A). Before the Ld.CIT(A), the assessee has filed elaborate written submissions on the issue, which has been reproduced at para 9 on pages 15 to 21 of Ld.CIT(A) order. The sum and substance of arguments of the assessee before the Ld.CIT(A) are that the deductions claimed u/s 80IA(4) of the I.T.Act, 1961, has attained the finality and the matter travelled up to the Hon'ble Supreme Court, where the Hon'ble Supreme Court has upheld the claim of the assessee regarding deductions claimed u/s 80IA(4) of the I.T.Act, 1961. Therefore, no additions could be made in respect of said issue in the assessment framed u/s 153A of the I.T.Act, 1961, without any reference to incriminating material found as a result of search. The Ld.CIT(A) after considering relevant submissions of the assessee and also, taken note of remand report issued by the Ld. AO, came to the conclusion that the additions made by the Ld. AO, towards disallowances of deductions claimed u/s 80IA(4) of the I.T.Act, 1961, has no reference to any incriminating material found as a result of search. Therefore, in absence of any incriminating material found as a result of search, no addition could be made in the assessments framed u/s 143(3) r.w.s. 153A of the I.T.Act, 1961, when the assessment has not been abated as on the date of search. The relevant findings of the Ld.CIT(A) are as under:-

*10.0 I have considered the submissions of the appellant company, the assessment order, and perused the other materials available on record on this issue. The Ground No. 1 to 3 of the present appeal are interconnected and interrelated to each other and hence, are taken up together for adjudication.*

Remand Proceedings:

*10.1 At the outset, it is stated that the Appellant has filed written submissions., vide letter dated 17.07.2018, during the course of*

the appellate proceedings in support of the various grounds of appeal. Before taking a decision on the issue, vide letter No. CIT(A)-47/Starlog Enterprises Ltd./Remand Report/2018-19 dated 23.07.2018, a letter was issued to the A.O. for giving comments on the submissions of the Appellant. In this regard, the letter issued to the A.O. is reproduced, hereunder:-

"To  
The Dy. Commissioner of Income Tax,  
Central Circle-1(2). Mumbai.  
Sub :Appeals in the case of M/s. Star log Enterprises Ltd, formerly  
known as M/s. AEG Infraloistics Ltd. - A.Yrs 2005-06 & 2006-07 -  
Remand Report- Reg. -  
Please refer to the above.

2. In the appeals filed by the above mentioned assessee for assessment years 2005-06 & 2006-07, the appellant has claimed that no incriminating documents have been found during the course of search operation carried out on the appellant on 07.10.2009. Accordingly, it has been stated that no disallowance can be made u/s 80IA(4) in an assessment made u/s 153A r.w.s 143(3) of the Income Tax Act 1961, in view of the judgment of the Hon'ble Bombay High Court in the case of CIT Vs. Continental Warehousing Corporation 2015) 279 CTR 0389 (Bom).

3. In view of the above facts and circumstances, you are hereby directed to furnish the incriminating documents/statements recorded on the basis of which disallowance u/s 80 IA (4) has been made in the assessment order passed u/s 153A r.w.s 143(3) of the Act.

4. Your remand report in the matter should reach this office through the Addl.CIT, Range-1, Mumbai, latest by 10.08.2018

(RAJESHWAR YADAV)  
Commissioner of Income Tax (A)-47,  
Mumbai.

Encl. as above

Copy to:

1. The Pr. Commissioner of Income Tax (Central)-1, Mumbai - for kind information.
2. The Addl Commissioner of Income Tax, Central Range-1, Mumbai - for information and to ensure timely submission of the reply by the AO.

(RAJESHWAR YADAV)  
Commissioner of Income Tax (A)-47  
Mumbai".

10.2 In view of the above, the Addl. CIT Central Range-1, Mumbai had vide letter No. Addl. CIT.CR./RR/Starlog Enterprises/ 2018-19 dated 13.08.2018 forwarded the Remand Report of the A.O., which is reproduced hereunder:-

"To

The Commissioner of Income Tax (A)~47,  
Prathistha Bhavan,  
Mumbai.

(Through Addl.C.I.T., Central Range-1, Mumbai)  
Sir,

Sub: Furnishing of Remand Report in the case of M/s. Starlog Enterprises formerly known as M/s. AEG Infralogistics Ltd. for A. Y. 2005-06 and 2006-0 - regarding –

Ref: CIT(A)-47/Starlog Enterprises Ltd./Rem.Rep./2018-19 dated 23.07.2018  
Kindly refer to the above.

2. Vide letter dated 23.07.2018 under reference, it, was brought to notice that the assessee, M/s. Starlog Enterprises formerly known as M/s. ABG Infralogistics Ltd. had objected to the disallowance made u/s.80IA(4) in the assessment made u/s. 153A rws. 143(3) of the Act for AY 2005-06 & 2006-07 on the ground that no incriminating documents had been found during the course of search operation carried out on the assessee on 07.10.2009 in view of the judgement of Hon'ble Bombay High Court in the case of CIT Vs. Continental Warehousing Corporation (2015) 279 CTR 0389 (Bom.).

3. In view of the above submission of the assessee, I have been directed to furnish the incriminating documents/statements recorded on the basis of which disallowance made u/s. 80IA(4) has been made in the assessment order passed/s. 153A rws. 143(3) of the Act.

4. In this connection, on perusal of Appraisal Report of ABG Group, it is seen from Annexure - 6E to the report that the AO was asked to make further enquiries in the case of ABG Infralogistics Ltd. on the below mentioned issues, which includes deduction u/s. 80IA of the Act claimed by the assessee:

1. Details of slump sale between ABG Infralogistics and ABG Bulk Handling P.Ltd.
2. Details of claim of 80IA.
3. Comparison of turnover of the company in the years in which 80IA claimed vis-a-vis the years in which no 80IA claimed.
4. Details of properties purchased and the source of the same.
5. Details of sale and lease back transactions.

5. Copy of the Annexure 6E containing aforesaid information in the Appraisal Report is enclosed for kind perusal.

Submitted.

Yours faithfully, (Rajgopal  
K. Parthasarathy) DCIT, Central  
Circle -1(2), Mumbai."

10.3 A perusal of the Remand Report, as also the assessment order reveals has failed to brine on record any incriminating material or adverse statement in relation to the disallowance made u/s 80IA(4) of the Act in the impugned

assessment order. It is pertinent to note here that in this case the original assessment u/s 143(3) of the Act was already completed u/s 143(3) of the Act on 26.12.2007, before the search operation was conducted on the Appellant on 07.10.2009. Thus, this is a case of completed assessment and hence the assessment has not abated in the present case. In the case of the completed assessments, the AO can make addition, only on the basis of incriminating material found during the course of the search operation in the assessment order passed u/s 153 A. In the present case at hand, admittedly there is no incriminating materials, which have been found during the course of search operation in relation to the claim of deduction u/s 80IA of the Act.

10.4 I have also taken note of the fact that in the Remand Report, the AO has mentioned that as per Annexure 6E of the Appraisal Report, the AO was asked to make enquiries in case of M/s ABG Infralogistics Ltd on the claim of deduction u/s 80-IA of the Act. This general observation of the A.O. based on the Appraisal Report can't be construed to be an incriminating document. I agree with the submission of the appellant that making further enquiries does not in any way tantamount to having incriminating evidence. In the absence of any incriminating evidence, an enquiry would only become general in nature and, as such, outside the purview of Section 153A of the Act.

10.5 I am also constrained to note that the Appellant has undergone a detailed scrutiny assessment u/s 143(3) of the Act at the first stage and the deduction u/s 80-IA(4) was disallowed by the A.O. in the original assessment order. The matter was decided in favour of the Appellant Company by the Hon'ble Bombay High Court. The Department had filed an SLP before the Hon'ble Supreme which was finally dismissed by the Hon'ble Apex Court. Thus, the issue of claim of deduction u/s 80-IA(4) of the Act had went right up to the Hon'ble Supreme Court, which has finally decided the issue in favour of the Appellant.

10.6 It is wrong on the part of the A.O. to have a second inning on the issue of deduction u/s 80IA of the Act in the guise of making an assessment u/s 153A of the Act, particularly when nothing incriminating have been found during the course of the search operation. The A.O. has in Para 5.1 of the impugned assessment order passed u/s 153A of the Act had clearly noted that the expenses debited in the profit and loss account were not subjected to investigation in the original assessment and hence are investigated for the first time in the assessment u/s 153A of the Act.

10.7 I am of the considered opinion that the provisions of section 153A of the Act doesn't give a mandate to the A.O. to rectify the omissions and commissions made in the original assessment order. The scope of the assessment u/s 153A of the Act in the case of completed assessments is limited to only incriminating documents. Thus, the AO is not empowered to disturb the claim of deduction u/s 80IA of the Act by apportioning common expenses in the case of a completed assessment, specifically when there is no incriminating material on record. In the absence of incriminating documents, the action of the A.O. in making a disallowance u/s 80IA of the Act, while making an assessment u/s 153A of the Act is totally against the various judicial pronouncements and legal precedents on the issue.

10.8 I have also noted that after the AO had issued a notice u/s 153A of the Act, the Appellant had filed a writ petition with the Hon'ble Bombay High Court. The Appellant had withdrawn the said writ petition and the Hon'ble Bombay High Court has disposed of the said writ petition, vide order dated 29,04.2015. Though, the Hon'ble Bombay High Court had refrained from expressing any opinion on merits, but in Para 3 of the said order have highlighted certain contentions of the Appellant, which needs special reference and hence, are reproduced hereunder:-

(a) The notice u/s 153A is not legal and valid as the foundation for it is not any incriminating material found during the search which is conducted and carried out.

(b) That there is absolutely no connection or nexus with the party whose premises were searched and nothing incriminating in relation to the petitioner and its business was unearthed during such search.

(c) The proceedings that have been commenced and vide the above notice under sub section (1) and clause (a) of Section 153A of the Income-tax Act, 1961, are only to revisit the factual as also the legal conclusions rendered in favour of the petitioner-assessee on the applicability of Section 80IA(4) of the Income-tax Act, 1961, and which conclusions have gained finality right up to the Hon'ble Supreme Court of India.

10.9 I am also constrained to note that these contentions were raised by the appellant before the A.O., but the AO has failed to address these vital issues either during the course of the assessment proceedings or during the course of the Remand proceedings.

10.10 The Section 153A(1) starts with a non-obstante clause and disregards the normal provisions of the assessment prescribed under the Act in the case of a search operation carried out u/s 132 of the Act. By virtue of clause (a) of section 153A(1), the AO is required to issue notice requiring the assessee to file the return of income for the six assessment years prior to date of search. The further consequences of a search carried out u/s 132 are mentioned in clause (b), whereby the A.O. is required to assess or reassess the total income of those six years. As such, the AO has no option but to make an assessment in respect of all the concerned six years. He has to bring the proceedings to a logical conclusion by making an assessment of the returns filed for all the six years. Having said so, the next question, which needs to be addressed is - what issues can be taken up for assessment u/s 153A / 153C of the Act, in a case where at the time of the search operation, the original assessment was already completed.

10.11 In such a scenario, the second proviso to Section 153A(1) specifies that any assessment or reassessment falling within the period of six assessment years pending on the date of initiation of search under section 132 or requisition of books under section 132A as the case may be, shall abate. In this regard, the relevant proviso is reproduced below:-

5. 153A. ".....Provided further that assessment or reassessment, if any, relating to any assessment year falling within the period of

*six assessment years and for the relevant assessment year or years referred to in this subsection pending on the date of initiation of the search under section 132 or making of requisition under section 132A, as the case may be, shall abate".*

10.12 Further, in Para 65.5 of the CBDT Circular No. 7/2003 dated 05.09.2003 giving explanatory notes on the provisions relating to direct taxes in the Finance Act, 2003, the CBDT has clarified as under:-

*"65.5 The Assessing Officer shall assess or reassess the total income of each of these six assessment years. Assessment or reassessment, if any, relating to any assessment year falling within the period of six assessment years pending on the date of initiation of the search under section 132 or requisition under section 132A, as the case may be, shall abate. It is clarified that the appeal, revision or rectification proceedings pending on the date of initiation of search under section 132 or requisition shall not abate. Save as otherwise provided in the proposed section 153A, section 153B and section 153C, all other provisions of this Act shall apply to the assessment or reassessment made under section 153A. It is also clarified that assessment or reassessment made under section 153A shall be subject to interest, penalty and prosecution, if applicable. In the assessment or reassessment made in respect of an assessment year under this section, the tax shall be chargeable at the rate or rates as applicable to such assessment year."*

10.13 The word 'abate' means to stop or to put an end. The objective of the above proviso is clearly to eliminate the multiplicity of assessment or reassessment proceedings, which are pending on the date of search or requisition of records, as the case may be, and which are now required to be undertaken afresh in view of section 153A / 153C of the Act.

10.14 The word 'pending' occurring in the second proviso to Section 153A of the Act, is also significant. It is qualified by the words 'on the date of initiation of the search', which makes it clear that on initiation of the proceedings u/s. 153A or 153C, as the case may be, it is only the assessment/reassessment proceedings that are pending on the date of conducting search under Section 132 or making requisition under section 132A of the Act, stand abated. As a corollary, the assessments / reassessments already completed and falling within the six years period referred to in section 153 A of the Act are to be considered final and cannot be altered.

10.15 The Special Bench of Hon'ble Mumbai ITAT in the case of **All Cargo Global Logistics Ltd vs DCIT(2012) 147 TTJ 0513 (SB) : (2012) 74 DTR 0089 (SB) : (2012) 137 ITD 0287 (SB) : (2012) 18 ITR 0106 (SB)** has observed as under:

*"52. 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.*

*10.16 It has been categorically observed in the above mentioned judgment that only the pending proceedings, as on the date of search shall abate meaning thereby that the completed proceedings attains finality.*

*10.17 The use of the phrase 'so far as may be section 153A(l)(a) implies that all the provisions of the Act as contained under Chapter XIV prescribing the procedure for assessment or under any other Chapter of the Act with respect to the return of income filed U/s. 139 shall be applicable to the returns filed pursuant to notice issued U/s. 153A/153C of the Act. The applicability of those provisions which are inconsistent with the provisions of section 153A are restricted by the use of the phrase 'so far as may be'.*

*10.18 As such, for the assessments proceedings which are abated, the AO gets all the powers prescribed under the law, as if the assessment is being made for the first time. Thus, if the assessment is made for the first time, all the provisions of assessment, relevant for making of an assessment u/s. 143(3) shall be applicable. In the case of re-assessment, the principles pertaining to assessment u/s 147/148 of the Act shall become applicable. As far as the assessments/reassessments, which do not abate or which have attained finality, principle of time barring rule comes into play. The assessee acquires a right as to the finality of proceedings. Quietus of the completed assessments can be disturbed, only in a case, where incriminating seized material is found, during the course of the search operation u/s 132 of the Act. Further, as observed above, the objective behind the second proviso to section 153A(1) is to eliminate multiplicity of proceedings. In such cases it is only the seized material and undisclosed income emanating out of the search proceedings, which is relevant for the purpose of assessment.*

*10.19 The Hon'ble Bombay High Court in the case of CIT vs. Continental Warehousing Corporation [374 ITR 645], has held that when the assessment has attained finality, then the AO while passing the independent assessment order u/s 153A of the Act can't disturb the assessment / reassessment order which has attained finality, unless the materials gathered in the course of the proceedings u/s 132 of the Act establish that the reliefs granted under the finalized assessment/reassessment were contrary to the facts unearthed during the course of search operation.*

*10.20 In the case referred, supra, the Hon'ble Bombay High Court has upheld the following observations of Hon'ble ITAT:-*

" i. On a plain reading of Section 153A of the Income-tax Act, it becomes clear that on initiation of the proceedings under Section 153A, it is only the assessment / reassessment proceedings that are pending on the date of conducting search under Section 132 or making requisition under Section 132A of the Act stand abated and not the assessments/reassessments already finalised for those assessment years covered under Section 153A of the Act.

ii By a circular No. 8 of 2003 dated 18-9-2003 (See 263 ITR (St) 61 at 107) the CBDT has clarified that on initiation of proceedings under Section 153A, the proceedings pending in appeal, revision or rectification proceedings against finalised assessment/ reassessment shall not abate. It is only because, the finalized assessments/reassessments do not abate, the appeal revision or rectification pending against finalised assessment/reassessments would not abate.

iii, Therefore, the argument of the revenue, that on initiation of proceedings under Section 153A, the assessments/reassessments finalised for the assessment years covered under Section 153A of the Income-tax Act stand abated cannot be accepted. Similarly on annulment of assessment made under Section 153A(1) what stands revived is the pending assessment/reassessment proceedings which stood abated as per section 153A(1)."

10.21 A similar view has been taken by the Hon'ble Bombay High Court (Nagpur Bench) in case of Murlia Agro Products Ltd Vs. CIT49 Taxman.com 172in ITA No 36 of 2009, wherein it has been held that on initiation of proceedings U/s. 153A, it is only the assessment proceedings that are pending on the date of conducting search U/s. 132 or making requisition U/s. 132A of the Act that stand abated and not the assessments already finalised. The relevant excerpts of the judgment are reproduced hereunder:-

"9. What Section 153 A contemplates is that, notwithstanding the regular provisions for assessment/ reassessment contained in the IT Act, where search is conducted under Section 132 or requisition is made under Section 132A on or after 31/5/2003 in the case of any person, the Assessing Officer shall issue notice to such person requiring him to furnish return of income within the time stipulated therein, in respect of six assessment years immediately preceding the assessment year relevant to the previous year in which the search is conducted or requisition is made and thereafter assess or reassess the total income for those assessment years. The second proviso to Section 153 A provides for abatement of assessment/reassessment proceedings which are pending on the date of search/requisition. Section 153A(2) provides that 'when the assessment made under Section 153A(1) is annulled, ' the assessment or reassessment that stood abated shall stand received

10. Thus on a plain reading of Section 153A of the Income-tax Act, it becomes clear that on initiation of proceedings under Section 153A, it is

*only the assessment/reassessment proceedings that are pending on the date of conducting search under Section 132 or making requisition under Section 132A of the Act stand abated and not the assessment/reassessments already finalized for those assessment years covered under Section 153A of the Act. By a circular No.8 of 2003 dated 18-9-2003 (See 263 ITR (St) 61 at 107) the CBDT has clarified that on initiation of proceedings under Section 153A, the proceedings pending in appeal, revision or rectification proceedings against finalized assessment/reassessment shall not abate. It is only because, the finalized assessments/reassessments do not abate, the appeal, revision or rectification pending against finalized assessments/reassessments would not abate. Therefore, the argument of the revenue, that on initiation of proceedings under Section 153A, the assessments/reassessments finalized for the assessment years covered under Section 153A of the Income-tax Act stand abated cannot be accepted. Similarly on annulment of assessment made under Section 153A(1) what stands revived is the pending assessment/reassessment proceedings which stood abated as per section 153A(1).*

*11. In the present case, as contended by Shri Mani, learned counsel for the assessee, the assessment for the assessment year 1998-99 was finalized on 29-12-2000 and search was conducted thereafter on 3-12-2003. Therefore, in the facts of the present case, initiation of proceedings under Section 153A would not affect the assessment finalized on 29-12-2000.*

*12. Once it is held that the assessment finalized on 29.12.2000 has attained finality, then the deduction allowed under section 80HHC of the Income-tax Act as well as the loss computed under the assessment dated 29-12-2000 would attain finality. In such a case, the A.O. while passing the independent assessment order under Section 153A read with Section 143(3) of the IT. Act could not have disturbed the assessment/reassessment order which has attained finality, unless the materials gathered in the course of the proceedings under Section 153A of the Income-tax Act establish that the reliefs granted under the finalized assessment/reassessment were contrary to the facts unearthed during the course of 153A proceedings.*

*13. In the present case, there is nothing on record to suggest that any material was unearthed during the search or during the 153A proceedings which would show that the relief under Section 80 HHC was erroneous. In such a case, the A.O. while passing the assessment order under Section 153A read with Section 143(3) could not have disturbed the assessment order finalised on 29.12.2000 relating to Section 80 HHC deduction and consequently the C.L.T. could not have invoked jurisdiction under Section 263 of the Act."*

*10.22 In the above mentioned judgment, the Hon'ble Bombay High Court has held that no addition can be made in respect of assessments which have become final, if no incriminating material is found during the course of search. It has been held that once the original assessment has attained finality, then the Assessing Officer while passing the assessment order U/s. 153A r.w.s. 143(3)*

cannot disturb the assessment/ reassessment order, which has attained finality, unless the material gathered during the course of the search proceedings establishes something contrary to it. If there is nothing on record to suggest that any incriminating material was unearthed during the search, the AO, while passing order U/s. 153A r.w.s. 143(3) cannot disturb the original assessment order passed U/s. 143(3) of the Act.

10.23 On this issue the Special Bench of Hon'ble Mumbai ITAT in the case of AH Cargo Global Logistics Ltd vs DCIT(2012) 147 TTJ 0513 (SB) : (2012) 74 DTR 0089 (SB) : (2012) 137 ITD 0287 (SB) : (2012) 18 ITR 0106 (SB) has also observed as under:-

58. Thus, question No.1 before us is answered as under:

a) In assessments that are abated, the AO retains the original jurisdiction as well as jurisdiction conferred on him u/s 153A for which assessments shall be made for each of the six assessment years separately;

b) In other cases, in addition to the income that has already been assessed, the assessment u/s 153A will be made on the basis of incriminating material, which in the context of relevant provisions means - (i) books of account, other documents, found in the course of search but not produced in the course of original assessment, and (ii) undisclosed income or property discovered in the course of search."

10.24 The Hon'ble Mumbai Tribunal in the case of Guruprerana Enterprises v. ACIT (57 DTK 465), has held that only the assessments pending before the AO for completion shall abate u/s. 153A and the issues decided in the assessment cannot be reconsidered and re-adjudicated, unless there is some fresh material found during the course of search hi relation to such points.

10.25 The Hon'ble Delhi High Court in the case of CIT vs. RRJ Securities [2016] 380 ITR 612, has clearly held that in the absence of any incriminating material, the concluded assessments could not be interfered U/s. 153A of the Act. In the facts of that case, it was held that the documents seized have no reference to the income of the assessee for relevant assessment year and, thus, the AO has no jurisdiction to make the re-assessment U/s. 153A.

10.26 The Hon'ble Delhi High Court in the case of Pr. CIT vs. Lata Jain (ITA 274 and 276 of 2016), considering the ratio laid down in the case of CIT vs. Kabul Chawla [2016] 380 ITR 573, has held that section 153A assessment cannot be made for the assessment years in which incriminating material is not recovered even though incriminating material may be recovered for other years in the block of 6 years.

**10.27 In case of MGF Automobiles Ltd, vs. ACIT (ITA No.4212/Del/2011), the Hon'ble Delhi ITAT observed as under:-**

"...there are three possible circumstances that emerge on the date of initiation of search u/s 132(1): (a) proceedings are pending; (b) proceedings are not pending but some incriminating material found in the

course of search indicating undisclosed income and/or assets and (c) proceedings are not pending and no incriminating material has been found. In circumstance (a), since the proceedings are pending, they are abated and the AO gets a free hand to make the assessment. In circumstance (b), there is no question of abatement as the proceedings are not pending and the AO has to pass an assessment order u/s 153A to assess the undisclosed income. In circumstance (c), the AO has to pass an assessment order though as there is no incriminating material no income can be assessed. On facts, as the assessments were completed and there was no incriminating material found during the search, the AO was not entitled to make any addition."

10.28 In the case of *Guruinder Singh Bawa v DCIT*, (2012) (28 taxmann.com 328), the Hon'ble Mumbai ITAT has held that where in search assessment under section 153A, all assessments pertaining to six immediately preceding assessment years were complete, the AO can't make any addition there-under, unless there is any incriminating material recovered during search.

10.29 Further, in the case of *CIT Vs Kabul Chawla* 380 ITR 573 (Delhi HC), the Hon'ble Delhi High Court has clearly mentioned as follows:-

"Completed assessments can be interfered with by the AO while making the assessment under section 153A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment."

10.30 The Hon'ble Delhi High Court in a recent decision in the case of *Pr. CIT vs. Meeta Gutgutia* [2017-TIOL-1000-HC-DEL-ITL] has affirmed the view that can be made for a particular assessment year without there being an incriminating material that relates to the said assessment year which would justify such an addition. The Hon'ble Supreme Court in the case of **Principal Commissioner of Income-tax, Central IT, New Delhi Vs. Meeta Gutgutia** [2018] 96 taxmann.com 468 (SC) has dismissed the SLP in the case and thus upheld the decision of Hon'ble Delhi High Court that invocation of section 153A to re-open concluded assessments of assessment years earlier to year of search was not justified in absence of incriminating material found during search qua each such earlier assessment year.

10.31 In view of the aforesaid detailed discussion and judicial precedents, I am of the view that assessments which are completed U/s 143(3) do not abate. Further, proceedings U/s. 153A do not empower the AO to re-adjudicate the same issues again, unless fresh incriminating material is found during the course of search. The Assessing Authority cannot disturb the assessment order which has attained finality, unless the material gathered during the course of search, establishes that the income computed in the finalized assessment was not in accordance with the facts unearthed during the course of search.

**10.32** *In view of the above legal and factual position, the **Ground No. 1 to Ground No. 3** of the present appeal are **allowed**.*

6. The Ld. DR submitted that the Ld.CIT(A) has erred in granting relief to the assessee on account of deductions claimed u/s 80IA(4) of the I.T.Act, 1961 stating that no disallowances towards deductions claimed u/s 80IA(4) of the I.T.Act, 1961 is called for in the assessment framed u/s 153A of the I.T.Act, 1961, as there are no incriminating material found during the course of search and the assessment has reached its finality and was not abated at the time of initiation of proceedings u/s 132(1) of the I.T.Act, 1961. The Ld. DR, further submitted that the Id.CIT(A) has failed to appreciate the fact that although, the issue is squarely covered in favour of the assessee by the decision of Hon'ble Bombay High Court, in the case of Continental Warehousing Corporation (Nhava Seva) Ltd. vs CIT (374 ITR 645), but, fact remains that the department has not accepted the decision of the Hon'ble Bombay High court and a SLP has been filed before the Supreme Court, which is pending for disposal.

7. None appeared for the assessee. We have heard the Ld. DR, perused the material available on record and gone through orders of the authorities below, along with case laws considered by the Ld.CIT(A). We find that the issue involved in present appeal is squarely covered in favour of the assessee by the decision of Hon'ble Bombay High Court, in the case of CIT vs Continental Warehousing Corporation (Nhava Seva) Ltd (supra), where the Hon'ble High court categorically held that when, the assessment has attained finality and was not abated as on the date of search, no additions could be made in assessments framed u/s 153A of the

I.T.Act, 1961, in absence of any incriminating material found as a result of search. This legal proposition has been further strengthened by the decision of Hon'ble Delhi High Court, in the case of CIT vs Kabul Chawla 380 ITR 573, where a similar view has been expressed by the Hon'ble High court. In yet another decision of the Hon'ble Delhi High court in the case of PCIT vs Meeta Gutgutia (supra) a similar view has been expressed. The Hon'ble Supreme Court, in the case of PCIT vs Meeta Gutgutia (2018) 96 taxmann 468 has dismissed the SLP in the case and thus, upheld the decision of Hon'ble Delhi High Court that invocation of section 153A of the I.T.Act, 1961 to reopen concluded assessments of assessment years earlier to year of search was not justified in absence of incriminating material found during search qua each such assessment year. In this case, on perusal of facts available on record, we find that the Ld.CIT(A) has recorded categorical finding that there is no reference to any incriminating material found as a result of search, in respect of additions made towards disallowances of deductions claimed u/s 80IA(4) of the I.T.Act, 1961. The Ld.CIT(A) has also, recorded a categorical finding that the issue has attained the finality in view of decision of Hon'ble Bombay High court, where the High Court has upheld the claim of deductions claimed u/s 80IA(4) of the I.T.Act, 1961. Therefore, we are of the considered view that in absence of any incriminating material found as a result of search, no additions could be made in the assessment framed u/s 143(3) r.w.s. 153A of the I.T.Act, 1961, when the assessment year in question was unabated as on the date of search. In this case, there is no doubts with regard to the fact that the assessment year in question was unabated as on the date of search. Therefore, we are of the considered view that there is no error in the findings recorded

by the Ld.CIT(A) to delete additions made by the Ld. AO towards disallowances of deductions claimed u/s 80IA(4) of the I.T.Act, 1961. Hence, we are inclined to uphold the findings of the Ld.CIT(A) and reject ground taken by the revenue.

8. In the result, appeal filed by the revenue is dismissed.

**ITA No.503/Mum/2019 for AY 2006-07:**

9. The facts and issues involved in this appeal are identical to the facts and issues, which we had considered in ITA No.502/Mum/2019 for AY 2005-06. The reasons given by us in preceding paragraph shall *mutatis mutandis* apply to this appeal, as well. Therefore, for detailed reason given in preceding paragraph in ITA No.502/Mum/2019, we are inclined to uphold the findings of Ld.CIT(A) and reject ground taken by the revenue.

10. In the result, appeal filed by the revenue is dismissed.

11. As a result, appeals filed by the revenue for AY 2005-06 and 2006-07 are dismissed.

Order pronounced in the open court on this 20/05/2020

**Sd/-**  
**(RAVISH SOOD)**  
JUDICIAL MEMBER

**Sd/-**  
**(G. MANJUNATHA)**  
ACCOUNTANT MEMBER

Mumbai; Dated: 20/05/2020  
Thirumalesh Sr.PS

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

सत्यापित प्रति //True Copy//

BY ORDER,

(Asstt. Registrar)  
ITAT, Mumbai