IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH : BANGALORE
BEFORE SHRI. A.K GARODIA, ACCOUNTANT MEMBER
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER

ITA No.1917/Bang/2016
Assessment Year : 2007–08

M/s GMR Energy Ltd., 25/1, Skip House, Museum Road, Bengaluru-560 025. **PAN – AAACT 8420 A**	**Vs.**	The Dy. Commissioner of Income Tax, Central Circle-2(2), Bengaluru.
APPELLANT		**RESPONDENT**

Appellant by	:	Shri Sunil Jain, C.A
Respondent by	:	Shri T Roumuan Paite, CIT (DR)

Date of Hearing	:	02-09-2020
Date of Pronouncement	:	09-09-2020

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER

Present appeal has been restored back to this *Tribunal* by *Hon'ble Karnataka High Court by order dated 08/01/2019 passed in ITA No. 358-360 of 2018.*

Brief Facts of this case are as under:-

2. From order of *Hon'ble High Court (supra)*, it appears that, this *Tribunal* by order dated 21/11/2017 remitted the issue to

Ld.CIT(A), for fresh decision by considering judgment of *Hon'ble High Court* in case of *CIT vs Lancy Constructions (supra)*, with specific direction to verify, whether, there was incriminating material found during course of search, for assuming jurisdiction under section 153A of the Act. Against this order of Tribunal, revenue preferred appeal before *Hon'ble Karnataka High Court*.

3. On perusal of order passed *Hon'ble Karnataka High Court*, we not that following substantial questions of law were framed:

> *" i. Whether on facts and in circumstances of the case and in law the Tribunal was correct in law in holding that incriminating material is necessary condition for proceedings under section 153A of the Act by following judgment of this court in case of CIT vs Lancy Constructions ?*
>
> *ii. whether on the facts and in the circumstances of the case, the Tribunal is right in remitting back the matter to CIT (A) for fresh decision by considering the judgment of this Hon'ble High Court in case of CIT vs Lancy Constructions (383 ITR 168) and with a specific direction to verify the finding of incriminating material during the course of search which goes to the basic question of assumption of jurisdiction under section 153A of the Act?"*

4. *Hon'ble High Court* observed that, decision by coordinate bench of *Hon'ble Karnataka High Court* in case of *Canara Housing Development Company vs. DCIT* reported in *62 taxmann.com 250*, was not considered in *Lancy constructions case(supra)*, and also

that, *Lancy constructions case* was dismissed at the stage of admission without notice to assessee as, no substantial question of law arose for consideration therein.

Hon'ble High Court expressed its view that the judgment reported in Lancy's case cannot be said to be applicable in law or that it is binding for any reason whatsoever.

5. On this background *Hon'ble Court* answered first question as under:

> *"8. Under the circumstances, when the Tribunal has relied on the judgment in Lancy's case, we are of the view that a grave error has been committed. Therefore, the only issue that Lancy's case has been wrongly followed, the impugned order requires to be set-aside. Since no other issues were raised before the Tribunal, we deem it just and necessary that the matter be remanded to the tribunal for fresh consideration in accordance with law based on the aforesaid observations. The Tribunal is entitled to consider the appropriate law on the issue, including other judgements not considered."*

Hon'ble Court, allowing the appeal filed by revenue, remanded the appeal to this *Tribunal* for fresh consideration in accordance with law

6. Ld.AR once again placed his arguments challenging validity of proceedings under section 153A raised in **Ground No.1.**

7. On the contrary, Ld.CIT.DR submitted that even if there is no incriminating material that was seized leading to undisclosed income, proceedings under section 153A could be invoked on an issue that has been subject matter of consideration in original assessment proceedings. He placed reliance on decision of *Hon'ble Karnataka High Court* in case of *Canara Housing Development company vs CIT (supra).*

8. We have perused records filed before us.

8.1. We have perused submissions advanced by both sides in light of records placed before us. Primary issue that leads to root cause of the remand by *Hon'ble High Court,* is whether, there was incriminating material found in the course of search for section 153A to be invoked.

8.2. We have perused decision of *Hon'ble Karnataka High Court* in case of *Canara Housing Development Co. (supra).* We note that, para 2 of the judgment record the facts wherein it has been categorically observed by *Hon'ble High Court* that, in course of search, incriminating material leading to undisclosed income was seized. We also note that, question raised before *Hon'ble Karnataka High Court* in case of *Canara Housing Development Co. (supra)* was that:

> *"Whether once proceedings under section 153A of the Act is initiated, whether the Commissioner of income tax can invoke the power under Section 263 of the Act to review the order of assessment passed by the Assessing Authority?*

8.3. Further, we also note that, *Tribunal*, while deciding this issue in case of Canara Housing Development Company, followed decision of *Special Bench* of the *Tribunal* rendered in case of *Al Cargo Global Logestic Ltd vs DCIT* reported in *(2012) 18 ITR 106 (Trib.)* and held that, CIT can invoke revisionary power under section 263 against original assessment is order.

8.4. Before us, decision of *Hon'ble Bombay High Court* in case of *CIT vs Continental Warehousing Corporation (Nhava Sheva) Ltd* reported in *374 ITR 645* has been referred to by Ld.AR, wherein, on identical issue, *Hon'ble Court* discussed in great detail decision by *Hon'ble Karnataka High Court* in case of *Canara housing* (supra). *Hon'ble Bombay High Court* noted that, in case of *Canara Housing (supra)*, *Hon'ble Karnataka High Court* allowed appeal of assessee and set aside order passed by CIT under section 263. Referring to *para 11* of decision by *Hon'ble Karnataka High Court* in case of *Canara housing (supra)*, *Hon'ble Bombay High Court* in *Para 37,* rejected argument advanced by revenue, similar to what has been argued by Ld.CIT DR before us.

We therefore reject argument advanced by Ld. CIT DR.

8.5. The moot question to ascertaine validity of proceedings under section 153A in a completed assessment is that whether there has been incriminating material unearthed during the course of search that leads to undisclosed income in the hands of assessee.

Coming to the facts before us, in the order passed by Ld.CIT(A), we note that, assessee alleged in Ground No.4 that no incriminating

materials were found during course of search. For sake of convenience, **Ground no.4** raised by assessee is reproduced as under:

> *"4. The assessing officer failed to appreciate and ought to have held that in the present case, no incriminating material has been found which requires real examination/review of any of the items which were subject matter of examination in course of original assessment proceedings, in the proceedings under section 153A r.w.s 143 (3) of the Income tax Act, 1961."*

8.6. On this ground, Ld.CIT(A) recorded its findings in para 6.1 and observed as under:

> *"Therefore, it is clear that the Hon'ble Jurisdictional High Court has held that the undisclosed income or incriminating material is not the precondition for issue of notice under section 153A. If a search has taken place, section 153A is automatically triggered. The Assessing Officer has the power to assess and reassess the total income of the issue in which the undisclosed income found, if any, needs to be brought to tax."*

From the above para, reproduced from order of Ld.CIT(A), it comes out that, he proceeded on the basis that, if search has taken place, section 153A is triggered, and finding of incriminating material in search is not relevant.

8.7. In our opinion, there is no categorical observation by Ld.CIT(A) regarding any incriminating material that was unearthed and seized leading to undisclosed income that was not considered**.** Even

Ld.CIT.DR could not point out any categorical observation by authorities below wherein this issue has been addressed.

8.8. In our opinion unless there is a factual observation regarding availability of incriminating material seized during course of search leading to undisclosed income in the hands of assessee for year under consideration, issue cannot be answered in accordance with law.

8.9. Therefore, we find it proper to remand this issue back to Ld.CIT(A) to discern from assessment records of their being any incriminating material seized during course of search. Ld.CIT(A) is directed to give a finding in respect of the same in the light of all decisions relied upon by both sides on this issue.

Accordingly we send back this appeal back to Ld.CIT(A)

In the result appeal filed by assessee stands allowed for statistical purposes.

Order pronounced in the open court on 9th Sept, 2020.

Sd/-	Sd/-
(A.K GARODIA)	**(BEENA PILLAI)**
Accountant Member	**Judicial Member**

Bangalore,
Dated, the 9th Sept, 2020.
/Vms/

Copy to:

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

By order

Assistant Registrar,
Income-Tax Appellate Tribunal.
Bangalore.

		Date	**Initial**	
1.	Draft dictated on	On Dragon		Sr.PS
2.	Draft placed before author	-09-2020		Sr.PS
3.	Draft proposed & placed before the second member	-09-2020		JM/AM
4.	Draft discussed/approved by Second Member.	-09-2020		JM/AM
5.	Approved Draft comes to the Sr.PS/PS	-09-2020		Sr.PS/PS
6.	Kept for pronouncement on	-09-2020		Sr.PS
7.	Date of uploading the order on Website	-09-2020		Sr.PS
8.	If not uploaded, furnish the reason	-09-2020		Sr.PS
9.	File sent to the Bench Clerk	-09-2020		Sr.PS
10.	Date on which file goes to the AR			
11.	Date on which file goes to the Head Clerk.			
12.	Date of dispatch of Order.			
13.	Draft dictation sheets are attached	No		Sr.PS