

**IN THE INCOME TAX APPELLATE TRIBUNAL (VIRTUAL COURT)  
"SMC" BENCH, MUMBAI**

**BEFORE SHRI C.N. PRASAD, HON'BLE JUDICIAL MEMBER**

**ITA NO. 982/MUM/2020 (A.Y. 2011-12)**

Reena A. Ajmera 4th Floor, Ajmera House Pathakwadi, L.T. Marg Mumbai - 400002  <b>PAN: AAGPA6019D</b>	v.	DCIT, Central Circle – 2(2) Room No. 806, 8 <sup>th</sup> Floor Old. CGO Building Maharshi Karve Road Mumbai
<b>(Appellant)</b>		<b>(Respondent)</b>

<b>Assessee by</b>	:	<b>Ms. Dinkle Hariya</b>
<b>Department by</b>		<b>Shri Sanjay J. Sethi</b>
<b>Date of Hearing</b>	:	<b>21.01.2021</b>
<b>Date of Pronouncement</b>	:	<b>09.02.2021</b>

**ORDER**

**PER C.N. PRASAD (JM)**

1. This appeal is filed by the assessee against order of the Learned Commissioner of Income Tax (Appeals)– 48, Mumbai [hereinafter in short "Ld.CIT(A)"] dated 29.11.2019 for the A.Y. 2011-12.
2. Assessee in her appeal raised following grounds: -

**"1. NATURAL JUSTICE**

1.1 *The Learned Commissioner of Income - tax (Appeals) - 48, Mumbai ["Ld. CIT (A)"] erred in not granting proper, sufficient and adequate opportunity of being heard to the Appellant while framing the appellate order.*

1.2 *It is submitted that, in the facts and the circumstances of the case, and in law, the appellate order so framed be held as bad and illegal, as:*

- (i) The same is framed in breach of the principles of natural justice; and*
- (ii) The same is passed without application of mind to the facts and the submissions brought on record by the Appellant.*

**WITHOUT PREJUDICE TO THE ABOVE****2. REASSESSMENT**

2.1 *The Ld. CIT (A) erred in confirming the action of the A.O. in initiating assessment proceedings and framing the assessment of the Appellant by invoking the provisions of section 153A of the Income tax Act, 1961 ["the Act"].*

2.2 *While doing so, the A.O. failed to appreciate that:*

- (i) The case of the appellant did not fall within the parameters laid down by section 153A of the Act;*
- (ii) The necessary preconditions for initiating and completion thereof were not satisfied.*

2.3 *It is submitted that in the facts and the circumstances of the case, and in law, the reassessment framed is bad, illegal and void.*

**WITHOUT FURTHER PREJUDICE TO THE ABOVE;**

3.1 *The Ld. CIT (A) erred in confirming the addition made by the A.O. of Rs.27,00,630/- u/s. 68 of the Act, on account of alleged bogus / unexplained long term capital gain.*

3.2 *While doing so, the Ld. CIT(A) erred in:*

- (i) Being his action on wrong/erroneous facts.*
- (ii) Being his action only on surmises, suspicion and conjecture;*
- (iii) Taking into account irrelevant and extraneous considerations; and*

(iv) *Ignoring relevant material and considerations as submitted by the appellant.*

3.3 *It is submitted that in the facts and the circumstances of the case, and in law, no such addition was called for.*

3.4 *Without prejudice to the above, assuming - but not admitting - that some addition was called for, it is submitted that the computation of the addition made by the A.O. is arbitrary, excessive and not in accordance with the law.*

**WITHOUT FURTHER PREJUDICE TO THE ABOVE**

4.1 *The Ld. CIT (A) erred in confirming the addition made by the A.O. of Rs.1,41,783/- u/s. 69 of the Act, on account of alleged estimated unexplained expenses.*

4.2 *While doing so, the Ld. CIT (A) erred in:*

- (i) *Basing his action only on surmises, suspicion and conjecture;*
- (ii) *Taking into account irrelevant and extraneous considerations; and*
- (iii) *Ignoring relevant material and considerations as submitted by the Appellant.*

4.3 *It is submitted that in the facts and the circumstances of the case, and in law, no such addition was called for.*

4.4 *Without prejudice to the above, assuming - but not admitting - that some addition was called for, it is submitted that the computation of the addition made by the A.O. is arbitrary, excessive and not in accordance with the law.*

**LIBERTY**

5. *The Appellant craves leave to add, alter, delete or modify all or any the above ground at the time of hearing."*

**3.** Ld. Counsel for the assessee at the time of hearing submitted that Ground No. 1 of grounds of appeal which is relating to natural justice before the Ld.CIT(A) is not seriously pressed. In view of the submission Ground No.1 is not adjudicated and dismissed as not pressed.

**4.** Coming to Ground No. 2 of grounds of appeal, Learned Counsel for the assessee submitted that the assessment made u/s. 153A is bad in law as there is no incriminating material found in the course of search and the assessment is not abated. Learned Counsel for the assessee submitted that assessee filed return of income on 20.07.2011 and return was processed u/s. 143(1) of the Act on 21.09.2011. Accordingly, the time limit to issue notice u/s. 143(2) expired on 30.09.2012 upon expiry of six months from the end of the Financial Year in which return was furnished for the relevant assessment year.

**5.** Learned Counsel for the assessee submitted that thereafter a search was conducted on 25.07.2013 almost a year after the expiry of the limitation period for issue of notice u/s. 143(2) of the Act and there was no assessment or re-assessment proceeding pending as on the date of search. Therefore, it is submitted that the present assessment year was an unabated assessment year in as much as the assessment already attained finality and such finality could not be disturbed unless incriminating material was found during the course of the search.

**6.** Referring to Panchanamas Learned Counsel for the assessee submitted that in the present case no incriminating material was found in

the hands of the assessee during the search proceedings against the assessee. It is submitted that there is no reference to any incriminating material found from the possession and control of the assessee in the Assessment Order. Inviting our attention to Page Nos. 334 and 335 of the Paper Book, which is the remand report dated 09.01.2015 Ld. Counsel for the assessee submits that in any case in the remand report Assessing Officer has categorically accepted that there was no incriminating material found during the course of the search. Therefore, Ld. Counsel for the assessee submits that it is well settled legal position that no addition can be made while completing the assessment u/s.153A of the Act in case of unabated assessment if no incriminating material was found in the course of the search.

**7.** Reliance was placed on the following decisions in support of her contentions: -

- (i). *Pr.CIT v. Meeta Gutgutia [ 82 taxmann.com 287 (Del)] SLP dismissed by Hon'ble Supreme Court which is reported in 96 taxmann.com 468 (SC).*
- (ii). *CIT v. Gurinder Singh Bawa [386 ITR 483 (BOM)]*
- (iii). *CIT v. Kabul Chawla [380 ITR 573 (Del)]*
- (iv). *CIT v. Continental Warehousing Corporation [374 ITR 645 (BOM)]*
- (v). *CIT v. Anil Kumar Bhatia [352 ITR 493 (Del)]*
- (vi). *Brij Bhushan Singal & Ors v. ACIT in ITA.Nos. 1412 to 141/Del/18 order dated 31.10.2018*
- (vii). *Shri Sanjay and Smt. Aarti Singal v. DCIT in ITA.Nos. 706, 707, 709/Chd/18, order dated 07.02.2020.*

**8.** Ld. DR vehemently supported the orders of the authorities below.

**9.** Heard rival submissions, perused the orders of the authorities below. In this case assessee filed return on 20.07.2011 and the same was processed u/s. 143(1) of the Act on 21.09.2011 and time limit for issue of notice u/s. 143(2) lapsed on 30.09.2012 and no assessment or re-assessment proceedings were pending as on the date of search. Therefore, admittedly in this case the assessment is unabated on the date of search i.e. 25.07.2013 since there were no pending proceedings either u/s. 143(3) or 148 of the Act.

**10.** Hon'ble Bombay High Court in the case of CIT *v.* Continental Warehousing Corporation (supra) held that –

*"In a case where pursuant to issue of notice under section 153A assessments are abated. Assessing Officer retains original jurisdiction as well as jurisdiction conferred on him under section 153A for which assessments shall be made for each of six assessment years separately. No addition can be made in respect of unabated assessments which have become final if no incriminating material is found during search".*

**11.** Hon'ble Bombay High Court in the case of CIT *v.* Gurinder Singh Bawa (supra) held that –

*"In the present case, the assessment had been completed under summary scheme under section 143(1) and time limit for issue of notice under section 143(2) had expired on the date of search. Therefore, there was no assessment pending in this case and in such a case there was no question of abatement. Therefore, addition could be made only on the basis of incriminating material found during search.*

6.2 In this case, the AO had made assessment on the information/material available in the return of income. The information regarding the gift was available in the return of income as capital account had been credited by the assessee by the amount of gift. Similar was the position in relation to addition under section 2(22)(e). The AO had not referred to any incriminating material found during the search based on which addition had been made. Therefore, following the decision of the Special Bench (supra), we hold that the AO had no jurisdiction to make addition under section 153A. The addition made is therefore deleted on this legal ground”.

**12.** Hon'ble Delhi High Court in the case of CIT v. Anil Kumar Bhatia (supra) held that –

*"during the search of the assessee's premises, no document or incriminating material, except the one unsigned undertaking for the loan was found. There was no corroborative material seized in the course of search. The income tax returns for the assessment years 2000-01 to 2005-06 (six years) were filed prior to the search and in the normal course, suo moto disclosing the particulars of the subject additions and these returns stood accepted under Section 143(1) of the Act. Since on the date of the initiation of the search, no assessment was pending as they had all abated, the Assessing Officer has wrongly invoked Section 153A of the Act. The assessment contemplated by Section 153A is not a denovo assessment and the additions made therein have to be necessarily restricted to the undisclosed income unearthed during the search. The Section has to be strictly interpreted. It is not an assessment such as a normal or regular scrutiny assessment”.*

**13.** The Hon'ble Delhi High Court in the case of CIT v. Kabul Chawla (supra) held that –

*"completed assessments can be interfered with by Assessing Officer while making assessment under section 153A only on basis of some incriminating material unearthed during course of search which was not produced or not already disclosed or made known in course of original assessment. Pursuant to search carried out in case of the*

*assessee, a notice under section 153A(1) was issued. In course of assessment, Assessing Officer made addition to assessee's income in respect of deemed dividend. It was undisputed that assessment for assessment years in question had already been completed on date of search. Since no incriminating material was unearthed during the search, no additions could have been made to income already assessed. Consequently, the impugned addition was to be deleted".*

**14.** The Hon'ble Delhi High Court followed this decision in the case of CIT *v.* RRJ Securities Ltd., [380 ITR 612].

**15.** The Hon'ble Delhi High Court in the case of Pr.CIT *v.* Meeta Gutgutia (supra) held that invocation of section 153(A) 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 earlier assessment years.

**16.** In all the above decisions of various Hon'ble High Court's, the legal position is that no addition can be made in case of an unabated assessment if no incriminating material is found in the course of search. On a perusal of the Assessment Order I noticed that there was no reference to any of the incriminating material found and seized in the premises of the assessee in the course of the search proceedings. The Assessing Officer in the Assessment Order refers to the seized incriminating material in the case of one Shri Shirish C. Shah and the post

search enquiries made in his case to make an addition in the hands of the assessee denying the long term capital gain claimed by the assessee. I also noticed from the remand report dated 09.01.2017 furnished by the Dy. CIT, CC-2(2), Mumbai to the Ld.CIT(A) -48 in the course of appeal proceedings wherein the Assessing Officer stated as under: -

*"Sir, in the present case under consideration, though no incriminating material was found, the assessee admitted undisclosed Income in his statement u/s.132(4) of the Income Tax Act 1961. It is totally immaterial that the assessee later on retracted the statements recorded u/s 132(4) of the Income Tax Act 1961. Therefore assessment of AY 2011-12 and AY 2012-13 which was made on the basis of undisclosed income admitted during the course of search is totally valid assessment and does not get affected by the decision of Hon'ble Bombay High Court in the case of Continental Warehousing (Supra)".*

**17.** In this case it appears that except the statement of the assessee u/s. 132(4) agreeing for the addition there is no seized incriminating material found in the premises of the assessee in the course of assessment proceedings. When there is no incriminating material found in the course of search in assessee's premises the addition/disallowance cannot be made merely on the statements recorded in the course of the search proceedings.

**18.** In the case of Brij Bhushan Singal & Ors v. ACIT (supra) the Delhi Bench of the Tribunal held as under: -

"117. From the aforesaid Circulars, it is clear that the assessments made pursuant to search operation are required to be based on incriminating materials discovered as a result of search operation in the case of the assessee and not on the recorded statement. In the instant case, the persons who gave the statements, retracted the same and even the opportunity to cross-examine was not afforded to the assessee. In our opinion, it cannot be said that those statements on the basis of which impugned additions were made by the AO, were incriminating material found during the course of search. As we have already noted that no incriminating material was found during the course of search and the additions were made by the AO while framing the assessments u/s 153A of the Act, the said additions need to be restricted or limited only to incriminating material found during the course of search. However, in the present case, no such incriminating material was found during the course of search from the possession of the assessee.

....

121. In the present case also, the AO made the additions on the basis of the statements of third parties recorded u/s 132(4)/133A of the Act and third parties evidences/documentation. However, no live nexus with the incriminating material found in the course of search in the case of the assessee was established. The statements of the third parties were recorded behind the-back of the assessee but the opportunity of cross-examination of such parties was not allowed to the assessee, even the statements were retracted later on. It is well settled that the presumption u/s 132(4A)/292C of the Act, is available only in the case of the person in whose possession and control, the documents are found but it is not available in respect of the third parties. In the present case, there was no independent evidence to link the seized documents found in the premises of the third party with any incriminating material found in the course of search operation at the premises of the assessee. Therefore, the entries in the documents seized from third party's premises would not be sufficient to prove that the assessee was indulged in such transactions. In the present case, the pen drive of Sh.Ankur Agarwal corroborated/substantiated, the share transactions carried out by the assessee which were duly found recorded in the regular books of the assessee and the said pen drive did not contain anything incriminating against the assessee. Therefore, merely on the basis of

*the statement of Sh. Ankur Agarwal, the addition made u/s 153A of the Act was also not justified, particularly when Sh. Ankur Agarwal retracted his statement later on. In the instant case, the AO also failed to establish any link/nexus of the alleged cash trail. We, therefore, by considering the totality of the facts and the various judicial pronouncement discussed in the former part of this order are of the view that the additions made by the AO and sustained by the Ld. CIT(A) u/s 153A of the Act in the absence of any incriminating material found during the course of search u/s 132(1) of the Act in respect of unabated assessment years i.e. the assessment years 2010-11 to 2012-13 were not justified."*

As could be seen from the above the Delhi Bench of the Tribunal considering various circulars of CBDT held that the assessments made pursuant to search operation are required to be based on incriminating material discovered as a result of search operation in assessee's case but not on the recorded statements.

**19.** In the facts and circumstances explained above and in view of the above judicial pronouncements since no incriminating material found in the course of search in the premises of assessee, assessment made making addition by the Assessing Officer in respect of long term capital gain is bad in law. Thus, I direct the Assessing Officer to delete the addition made in respect of long term capital gain.

**20.** As I have decided that the assessment made by the Assessing Officer is bad in law on the preliminary ground, I am not inclined to go

into merits of the addition/disallowance made by the Assessing Officer at this stage as it would only become academic in nature.

**21.** In the result, appeal of the assessee is allowed.

Order pronounced on 09.02.2021 as per Rule 34(4) of ITAT Rules by placing the pronouncement list in the notice board

Sd/-

**(C.N. PRASAD)**  
**JUDICIAL MEMBER**

Mumbai / Dated 09/02/2021  
Giridhar, Sr.PS

**Copy of the Order forwarded to:**

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

//True Copy//

BY ORDER

(Asstt. Registrar)  
**ITAT, Mum**