

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

**BEFORE: SHRI M.BALAGANESH, ACCOUNTANT MEMBER
&**

SHRI AMARJIT SINGH, JUDICIAL MEMBER

**ITA No.01/Mum/2021
(Assessment Year :2012-13)**

**ITA No.36/Mum/2021
(Assessment Year :2013-14)**

&

**ITA No.37/Mum/2021
(Assessment Year :2014-15)**

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|---|-----|--|
| M/s. Pegasus Properties P. Ltd., 2413, 1 st Floor Kumar Capital, East Street Camp, Pune Maharashtra – 411 001 | Vs. | Deputy Commissioner of Income Tax, Central Circle 2(3) 8 th Floor, CGO Annexe Building, M.K.Road Marine Lines, Mumbai – 400 020 |
| PAN/GIR No.AAECP1420E | | |
| (Appellant) | .. | (Respondent) |

| | |
|------------------------------|-------------------|
| Assessee by | Shri M.P. Lohia |
| Revenue by | Shri Alok Singh |
| Date of Hearing | 21/10/2021 |
| Date of Pronouncement | 21/10/2021 |
| | |

आदेश / O R D E R

PER M. BALAGANESH (A.M.):

These appeals in ITA Nos.01/Mum/2021, 36/Mum/2021 & 37/Mum/2021 for A.Yrs.2012-13, 2013-14 & 2014-15 respectively arise

out of the order by the Id. Commissioner of Income Tax (Appeals)-48, Mumbai in appeal Nos.CIT(A)-48/IT-25/DCCC-2(3)/2019-20, CIT(A)-48/IT-24/DCCC-2(3)/2019-20 & CIT(A)-48/IT-23/DCCC-2(3)/2019-20 respectively dated 29/10/2020, 23/11/2020 & 27/11/2020 respectively (Id. CIT(A) in short) against the order of assessment passed u/s.153C r.w.s. 143(3) of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 26/04/2019 by the Id. Dy. Commissioner of Income Tax, Central Circle-2(3), Mumbai (hereinafter referred to as Id. AO).

As identical issues are involved in all these appeals, they are taken up together and disposed of by this common order for the sake of convenience.

2. The Id. AR at the time of hearing stated that ground No.2 raised by the assessee is challenging the addition made on account of deemed rental income of unsold stock in the absence of incriminating material found during the course of search. He stated that if this ground is decided in favour of the assessee, then the adjudication of other grounds would be purely academic in nature. Accordingly, with the consent of both the parties, the ground No. 2 raised by the assessee is first taken up for adjudication.

3. The brief facts of this issue are that assessee is a private limited company engaged in the business of building, maintenance, operating of information technology parks and industrial parks and residential projects. The following table would explain the primary facts for all these three assessment years:-

| Sr. No. | Particulars | A.Y. 2012-13 | A.Y. 2013-14 | A.Y. 2014-15 |
|--------------------|------------------------------------|-------------------------|-------------------------|-------------------------|
| 1. | Date of filing of return of income | 27/09/2012 | 28/09/2013 | 27/09/2014 |
| 2. | Sec.143(3) assessment completed | 30/03/2015 | 23/03/2016 | 29/12/2016 |
| 3. | Date of search u/s.132 | 21/07/2017 | 21/07/2017 | 21/07/2017 |

3.1. A search and seizure action u/s.132 of the Act was initiated on ABIL group on 21/07/2017. The various residences of partners/ Directors of the group as well as business premises situated in Mumbai and Pune were covered by the search action. We find that for the A.Y.2012-13, the assessee had originally filed the return of income on 27/09/2012 declaring total income of Rs.44,76,762/-. Pursuant to the search, the assessee was issued notice u/s.153C of the Act. In response to the said notice, the assessee filed return of income for each of the assessment years under consideration. As could be seen from the aforesaid table that as on the date of search i.e. on 21/07/2017, the assessment for the A.Yrs 2012-13, 2013-14 and 2014-15 became unabated (i.e. concluded assessments). The law is very well settled that in respect of concluded assessments as on the date of search, no additions could be made either in assessments framed u/s.153A or u/s.153C of the Act without there being any incriminating material found during the course of search relating to such assessment years. In other words, if there is no incriminating material found during the course of search, the concluded assessments shall not be disturbed by the Id. AO while framing the search assessments either u/s.153A or u/s.153C of the Act. Reliance in this regard is placed on the decision of the Hon'ble Jurisdictional High Court in the case of CIT vs. Continental Warehousing Corporation reported in 374 ITR 645 (Bom). From the perusal of the order of the Id. AO, we find that the Id. AO had not indicated any seized document reference while making addition on

account of deemed rental income in respect of unsold flats lying with the assessee. We also find that the Id. AO had already added the very same addition of deemed rental income in respect of unsold stocks in the regular assessments completed u/s.143(3) of the Act for the A.Yrs 2013-14 and 2014-15 on 23/02/2016 and 29/12/2016 respectively. That matter had travelled up to this Tribunal and this Tribunal for A.Yrs. 2013-14 and 2014-15 in ITA No.3081/PUN/2017 and ITA No.646/PUN/2018 respectively dated 07/11/2019 had deleted the said addition on merits. This itself conclusively proves that there could not have been any incriminating material found during the course of search with regard to the addition made on account of deemed rental income on unsold flats. The assessee had raised this legal ground before the Id. CIT(A) by way of an additional ground which was duly admitted by the Id. CIT(A). We find that the Id. CIT(A) in para 4.2 of his order had categorically stated that the incriminating material was found in respect of unaccounted cash in the course of search, which had ultimately triggered the initiation of proceedings u/s.153C of the Act in the case of the assessee company herein. In our considered opinion, what is relevant is the availability of incriminating material qua the addition made in the search assessments where assessments had already become unabated on the date of search. As could be seen from para 4.2 of the order of the Id. CIT(A), no reference of any incriminating material were mentioned in the orders of the lower authorities qua the addition made on account of deemed rental income in respect of unsold flats. Hence, it could be safely concluded that the entire addition for all the three assessment years under consideration have been made in the absence of incriminating material found during the course of search qua the addition on account of deemed rental income. Hence, the ratio laid down by the Hon'ble Jurisdictional High Court in the case of Continental Warehousing Corporation referred to supra squarely

applies in the instant case. The relevant operative portion of the said order of Hon'ble Jurisdictional High Court is reproduced hereinabove.

“28. In dealing with those arguments, the Division Bench outlined the ambit and scope of the powers conferred by section 153A and observed thus :

“(8) We find it difficult to accept the above contention raised on behalf of the revenue. The object of inserting Sections 153A, 153B and 153C by Finance Act, 2003 by discarding the existing provisions relating to search cases contained in Chapter XIV B of the Income-tax Act, as stated in the Memorandum explaining the provisions in the Finance Bill 2003 (see 260 ITR (St) 191 at 219) was that under the existing provisions relating to search cases, often disputes were raised on the question, as to whether a particular income could be treated as ‘undisclosed income’ or whether a particular income could be said to be relatable to the material found during the course of search, etc. which led to prolonged litigation. To overcome that difficulty, the legislature by Finance Act 2003, decided to discard Chapter XIV B provisions and introduce Sections 153A, 153B and 153C in the IT Act.

(9) What Section 153A 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 153A 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 153(A)(1) is annulled, the assessment or reassessment that stood abated shall stand revived.

(10) Thus 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. 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 finalised assessments/reassessments do not abate, the appeal revision or rectification pending against finalised assessment/reassessments would not abate. 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).

(11) In the present case, as contended by Shri Mani, learned counsel for the assessee, the assessment for assessment year 1998-99 was finalised on the 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 finalised on 29-12-2000.

(12) Once it is held that the assessment finalised on 29.12.2000 has attained finality, then the deduction allowed under section 80 HHC 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 I.T. 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 finalised assessment/reassessment were contrary to the facts unearthed during the course of 153 A 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 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.I.T. could not have invoked jurisdiction under Section 263 of the Act."

29. We are not in agreement with Mr. Pinto that these observations are made in passing or that they are not binding on us because the essential controversy before the Bench was somewhat different. He urges that was only in relation to the legality and validity of the order of the Commissioner under section 263 of the IT Act. Had that been the case, the Division Bench was not required to trace out the history of section 153A of the IT Act and the power that is conferred thereunder. When the Revenue argued before the Division Bench that the power under section 153A can be invoked and exercised even in cases where the second proviso to sub-section (1) is not applicable that the Division Bench was required to express a specific opinion. The provision deals with those cases where assessment or reassessment, if any, relating to the assessment years falling within the period of six assessment years referred to in sub-section (1) of section 153A were pending. If they were pending on the date of the initiation of the search under section 132 or making of requisition under section 132A, as the case may be, they abate. It is only pending proceedings that would abate and not where there are orders made of assessment or reassessment and which are in force on the date of initiation of the search or making of the requisition. As that specific argument was canvassed and dealt with by the Division Bench and that is how it was called upon to interpret section 153A of the IT Act, then, each of the above conclusions rendered by the Division Bench would bind us.

30. Even otherwise, we agree with the Division Bench when it observes as above with regard to the ambit and scope of the powers conferred under section 153A of the Act. Since we are not required to trace out the history and we can do nothing better than to reproduce the observations and conclusions as above that we are not repeating the same. Even if the exercise of power under section 153A is permissible still the provision cannot be read in the manner suggested by Mr. Pinto. Not only the finalised assessment cannot be touched by resorting to those

provisions, but even while exercising the power can be exercised where a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A after 31st March, 2003. There is a mandate to issue notices under section 153(1)(a) and assess or reassess the total income of six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made. Thus, the crucial words "search" and "requisition" appear in the substantive provision and the provisos. That would throw light on the issue of applicability of the provision. It being enacted to a search or requisition that its construction would have to be accordingly. That is the conclusion reached by the Division Bench in Murli Agro Products Ltd. (supra) with which we respectfully agree. These are the conclusions which can be reached and upon reading of the legal provisions in question."

3.2. In view of the aforesaid observations and respectfully following the judicial precedent relied upon hereinabove, we hold that the addition towards deemed rental income on unsold flats was made without any incriminating material found during the course of search for the A.Ys. 2012-13, 2013-14 and 2014-15, being unabated assessments on the date of search. Accordingly, the ground No.2 raised by the assessee is allowed for all the assessment years under consideration.

3.3. Since relief is granted to the assessee on technical ground, there is no need for adjudication of other grounds raised by the assessee on merits. Accordingly, the grounds raised by the assessee are allowed.

4. In the result, appeals of the assessee are allowed.

Order pronounced in open Court on 21/10/2021

Sd/-
(AMARJIT SINGH)
JUDICIAL MEMBER

Sd/-
(M.BALAGANESH)
ACCOUNTANT MEMBER

Mumbai; Dated 21/10/2021
KARUNA, 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.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai