IN THE INCOME TAX APPELLATE TRIBUNAL, 'A' MUMBAI

BEFORE: SHRI M.BALAGANESH, ACCOUNTANT MEMBER
&
SHRI KULDIP SINGH, JUDICIAL MEMBER

ITA No.634/Mum/2021
(**Assessment Year :2011-12**)

Dy. Commissioner of Income Tax-CC-2(3) Room No.803, 8th Floor Pratishtha Bhavan Old CGO Building Annexe M.K.Road, Mumbai-400020	Vs.	Shri Avinash Nivrutti Bhosale 2, ABIL House Ganesh Khind Road Hill Corner, Pune City, Pune- 411 007
PAN/GIR No. ABTPB8151F		
(Appellant)	..	**(Respondent)**

ITA No.852/Mum/2021
(**Assessment Year :2012-13**)

Shri Avinash Nivrutti Bhosale 2, ABIL House Ganesh Khind Road Hill Corner, Pune City, Pune- 411 007	Vs.	Dy. Commissioner of Income Tax-CC-2(3) Room No.802, 8th Floor Pratishtha Bhavan Old CGO Building Annexe M.K.Road, Mumbai-400020
PAN/GIR No. ABTPB8151F		
(Appellant)	..	**(Respondent)**

ITA No.121/Mum/2021
(**Assessment Year :2012-13**)

Dy. Commissioner of Income Tax-CC-2(3) Room No.802, 8th Floor Pratishtha Bhavan Old CGO Building Annexe M.K.Road, Mumbai-400020	Vs.	Shri Avinash Nivrutti Bhosale 2, ABIL House Ganesh Khind Road Hill Corner, Pune City, Pune- 411 007
PAN/GIR No. ABTPB8151F		
(Appellant)	..	**(Respondent)**

Revenue by	Ms. Shailaja Rai
Assessee by	Shri Vijay Mehta
Date of Hearing	**18/01/2022**
Date of Pronouncement	**28/01/2022**

आदेश / O R D E R

PER M. BALAGANESH (AM):

ITA No.634/Mum/2021 (A.Y.2011-12)

This appeal in ITA Nos.634/Mum/2021 for A.Y.2011-12 arise out of the order by the ld. Commissioner of Income Tax (Appeals)-48, Mumbai in appeal No. CIT(A)-48/I.T.72/DCCC-2(3)/2019-20 dated 11/02/2021 (ld. CIT(A) in short) against the order of assessment passed u/s.153A r.w.s. 143(3) of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 28/05/2019 by the ld. Dy. Commissioner of Income Tax, Central Circle-2(3), Mumbai (hereinafter referred to as ld. AO).

ITA No.852/Mum/2021 (A.Y.2012-13) & ITA No.121/Mum/2021 (A.Y.2012-13

These cross appeals in ITA Nos.852/Mum/2021 & 121/Mum/2021 for A.Y.2012-13 arise out of the order by the ld. Commissioner of Income Tax (Appeals)-48, Mumbai in appeal No. CIT(A)-48/I.T.71/DCCC-2(3)/2019-20 dated 25/11/2020 (ld. CIT(A) in short) against the order of assessment passed u/s.153A r.w.s. 143(3) of the Income Tax Act, 1961

(hereinafter referred to as Act) dated 29/05/2019 by the ld. Dy. Commissioner of Income Tax, Central Circle-2(3), Mumbai (hereinafter referred to as ld. AO).

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

ITA No.634/Mum/2021 (A.Y.2011-12)

2. The only effective issue to be decided in this appeal is as to whether the ld. CIT(A) was justified in allowing the claim of carry forward of longterm capital loss of Rs.8,37,59,368/- arising on sale of listed company shares on which STT was paid with the long term capital gain arising there from is exempt tax u/s.10(38) of the Act. The Revenue has raised the following grounds:-

> *"(i) Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is justified in allowing the assessee's claim to set off Long Term Capital Gains of Rs.23,11,153/- arising from sale of unlisted equity of a company on which no STT is paid/payable against the Long Term Capital Loss of Rs. 8,37,59,368/- arising from sale of equity of a company listed on a recognized stock exchange on which STT is paid?*
>
> *(ii) Whether on the facts and circumstances of the case and in law, the Ld. CITA) is justified in allowing the assessee's claim to set off Long Term Capital Gains of Rs. 23,11,153/- which is taxable under the provision of section 48 to 55 of the Income Tax Act, 1961 against the Long Term Capital Loss of Rs. 8,37,59,368/- which do not form part of total income as envisaged in the provision of section 10(38) of the Income Tax Act, 1961?*

(iii) Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is justified in allowing the assessee's claim to carry forward the Long Term Capital Loss of Rs. 8,37,59,368/- arising on sale of shares of a company listed at a recognized stock exchange on which STT was paid which do not form part of total income as envisaged in the provision of section 10(38) of the Income Tax Act, 1961?

(iv) Whether on the fact and circumstances of the case the Ld. CIT(A) is justified in allowing assessee's claim to carry forward Long Term Capital Loss of Rs.8,37,59,368/- arising on sale of shares of company listed at stock exchange on which STT was paid, which do not form part of total income as envisaged in the provisions of section 10(38) of the Income Tax Act, 1961 without considering the decision of the Hon'ble Gujarat High Court in the case of Kishorebhai Bhikhabhai Virani Vs ACIT (2014) 367 ITR 261 (Gujarat)?

3. Brief facts relating to the above grounds of appeal are that search and seizure action u/s. 132 of the Income-tax Act (for short "Act") were initiated on ABIL Group on 21.07.2017 and various residences of the partners/directors of the group situated at Mumbai and Pune were covered by search action. The assessee Shri Avinash N. Bhosale is a promoter and founder of ABIL Group. The group companies are primarily engaged in infrastructure development, real estate development and hospitality services. As the case of the assessee is covered under search action all the cases were centralized u/s. 127(2) of the Act and accordingly, notices u/s. 153A of the Act were issued and served on the assessee calling for filing of correct return of income for the A.Y.2011-12.

3.1. In response assessee filed return of income on 14.11.2018 declaring total income of Rs.24,63,64,940/-. During assessment proceedings, the ld. AO observed that assessee has claimed long term capital loss of

Rs.8,37,59,368/-, he observed that the above capital loss was arising from sale of equity shares of listed company and this transaction is subject to Security Transaction Tax (STT). According to ld. AO, long term capital gain on listed shares which is covered u/s. 10(38) of the Act where STT has been paid being exempt from income tax, does not form part of total income chargeable to tax, and any loss on such sale of STT paid shares also cannot form part of the total income and is a dead loss. The assessee had sold equity shares of M/s. Core Projects Ltd which was listed in recognized stock exchange and had suffered STT. In this transaction of sale of equity shares, the assessee incurred long term capital loss of Rs.8,37,59,368/-. During the same F.Y.2010-11 relevant to A.Y.2011-12, the assessee had earned long term capital gains of Rs.23,11,153/- on sale of unlisted shares on which STT was not paid. The assessee sought to set off the long term capital loss on sale of listed shares with long term capital gain on sale of unlisted shares in the return of income.

3.2. Before the ld. AO, the assessee made submissions in support of the claim to carry forward of such loss by relying on the decision of this Tribunal in case of M/s. Raptakos Brett & Co. Ltd, Mumbai v. DCIT in ITA Nos. 3317/Mum/ 2009 & 1692/ Mum/ 2010 [58 taxmann.com 115]. After considering the submissions of the assessee, the ld. AO rejected the same and he did not allow the assessee to carry forward for setting off the above said losses.

3.3. Aggrieved, the assessee preferred an appeal before the Ld.CIT(A) and Ld.CIT(A) considering the detailed submissions made before him, allowed the claim of the assessee by relying on Coordinate Bench decision of Pune Tribunal in the case of ACIT v. Smt Gauri Avinash Bhosale in ITA.No. 1303/PUN/2017 and of this Tribunal in the case of M/s. Raptakos Brett & Co. Ltd, Mumbai v. DCIT (supra). Aggrieved, revenue is in appeal before us raising the above said grounds of appeal.

3.4. Before us, the Ld. DR brought to our notice the relevant facts in this appeal and she strongly objected the decision of the Ld.CIT(A) in allowing the set off of long term capital loss in the present case. The Ld. DR relied on the decision of Hon'ble Kerala High Court in the case of Apollo Tyres Ltd. v. DCIT reported in 130 taxmann.com 295 and she brought to our notice Para No. 6.1 of the above order. Further she relied on the decision of the Delhi Tribunal in the case of Nikhil sawhney v. ACIT reported in 119 taxmann.com 372.

3.5. Per Contra, the Ld. AR submitted that the issue involved in the cases relied on by the Ld. DR is not the issue raised by the department in the grounds of appeal. He relied on the findings of the Ld.CIT(A). On merits, in support of his contention, he relied on the following decisions: -

(i).M/s. Raptakos Brett & Co. Ltd, Mumbai v. DCIT [58 taxmann.com 115].
(ii)ACIT v. Smt. Gauri Avinash Bhosale in ITA.No.1303/PUN/2017.

(iii).Nomura India Investment Fund Mother fund v. Addl. DIT (IT) in ITA.No. 8140/Mum/2010 dated 24.12.2019.
(iv).Netesoft India Limited v. DCIT in ITA.No. 5359/Mum/2017 dated 20.12.2019.

3.6. We have considered the rival submissions and perused the materials placed on record. We observe from the record that the assessee has claimed carry forward of long term capital loss which assessee has incurred by making investment in M/s. Core Projects Limited and this transaction involves the STT which assessee has paid at the time of transfer of the above shares. No doubt, the profit which assessee would have earned will be exempt from tax u/s. 10(38) of the Act. However, we observe from the submissions of both the parties and in our considered view, the facts in the case relied by the Ld.CIT(A) in ACIT v. Smt Gauri Avinash Bhosale (supra) and M/s. Raptakos Brett & Co. Ltd, Mumbai v. DCIT (supra) are exactly same. For the sake of convenience, the relevant operative portion of the decision of Mumbai Tribunal in the case of M/s. Raptakos Brett & Co. Ltd, Mumbai v. DCIT (supra) is reproduced hereunder: -

> *"7. We have heard rival submissions and perused the relevant findings given in the impugned orders. The main issue before us is, whether Long term capital loss on sale of equity shares can be set off against Long term capital gain arising on sale of land or not, as the income from Long term capital gain on sale of such shares are exempt u/s. 10(38). The nature of income here in this case is from sale of Long term capital asset, which are equity shares in a company and unit of an equity oriented fund which is chargeable to STT. First of all, Long term capital gain has been defined under section 2(39A), as capital gains arising from transfer of a Long term capital asset.*

Section 2(14) defines "Capital asset" and various exceptions and exclusions have been provided which are not treated as capital asset. Section 45 is the charging section for any profits or gain arising from a transfer of a capital asset in the previous year i.e. taxability of capital gains. Section 47 enlists various exceptions and transactions which are not treated as transfer for the purpose of capital gain u/s.45. The mode of computation to arrive at capital gain or loss has been enumerated from sections 48 to 55. Further sub section (3) of section 70 and section 71 provides for set off of loss in respect of capital gain.

8.From the conjoint reading and plain understanding of all these sections it can be seen that, firstly, shares in the company are treated as capital asset and no exception has been carved out in section 2(14), for excluding the equity shares and unit of equity oriented funds that they are not treated as capital asset. Secondly, any gains arising from transfer of Long term capital asset is treated as capital gain which is chargeable u/s. 45; thirdly, section 47 does not enlist any such exception that transfer of long term equity shares/funds are not treated as transfer for the purpose of section 45 and section 48 provides for computation of capital gain, which is arrived at after deducting cost of acquisition i.e. cost of any improvement and expenditure incurred in connection with transfer of capital asset, even for arriving of gain in transfer of equity shares; lastly, section 70 & 71 elaborates the mechanism for set off of capital gain. Nowhere, any exception has been made/ carved out with regard to Long term capital gain arising on sale of equity shares. The whole genre of income under the head capital gain on transfer of shares is a source, which is taxable under the Act. If the entire source is exempt or is considered as not to be included while computing the total income then in such a case, the profit or loss resulting from such a source do not enter into the computation at all. However, if a part of the source is exempt by virtue of particular "provision" of the Act for providing benefit to the assessee, then in our considered view it cannot be held that the entire source will not enter into computation of total income. In our view, the concept of income including loss will apply only when the entire source is exempt and not in the cases where only one particular stream of income falling within a source is falling within exempt provisions. Section 10(38) provides exemption of income only from transfer of Long term equity shares and equity oriented fund and not only that, there are certain conditions stipulated for exempting such income i.e. payment of security

transaction tax and whether the transaction on sale of such equity share or unit is entered into on or after the date on which chapter VII of Finance (No.2) Act 2004 comes into force. If such conditions are not fulfilled then exemption is not given. Thus, the income contemplated in section 10(38) is only a part of the source of capital gain on shares and only a limited portion of source is treated as exempt and not the entire capital gain (on sale of shares). If an equity share is sold within the period of twelve months then it is chargeable to tax and only if it falls within the definition of Long term capital asset and, further fulfils the conditions mentioned in subsection (38) of section 10 then only such portion of income is treated as exempt. There are further instances like debt oriented securities and equity shares where STT is not paid, then gain or profit from such shares are taxable. Section 10 provides that certain income are not to be included while computing the total income of the assessee and in such a case the profit or loss resulting from such a source of income do not enter into computation at all. However, a distinction has been drawn where the entire source of income is exempt or only a part of source is exempt. Here it needs to be seen whether section 10(38) is source of income which does not enter into computation at all or is a part of the source, the income in respect of which is excluded in the computation of total income. For instance, if the assessee has income from Short term capital gain on sale of shares; Long term capital gain on debt funds; and Long term capital gain from sale of equity shares, then while computing the taxable income, the whole of income would be computed in the total income and only the portion of Long term capital gain on sale of equity shares would be removed from the taxable income as the same is exempt u/s 10(38). This precise issue had come up for consideration before the Hon'ble Calcutta High Court in Royal Turf Club, wherein the Hon'ble High Court observed that "under the Income tax Act 1961 there are certain incomes which do not enter into the computation of the total income at all. In computing the total income of a resident assessee, certain incomes are not included under s.10 of the Act. It depends on the particular case; where the Act is made inapplicable to income from a certain source under the scheme of the Act, the profit and loss resulting from such a source will not enter into the computation at all. But there are other sources which, for certain economic reasons, are not included or excluded by the will of the Legislature. In such a case, one must look to the specific exclusion that has been made."

The Hon'ble High Court was besieged with the following question

"Whether under s.10(27) read with s.70 of the I.T.Act, 1961, was the assessee entitled to set off the loss on the two heads, namely, Broodmares Account and the Pig Account, against its income of other sources under the head "Business"

"Their Lordships after analysing the provisions of section 70 and section 10(27) observed in the following manner:

"In this case it is important to bear in mind that set-off is being claimed under Section 70 of the 1961 Act which permits set off of any income falling under any head of income other than the capital gain which is a loss, the assessee shall be entitled to have the amount of such loss set off against his income from any other source under the same head. We have noticed that in the instant case the exclusion has been conceded in computing the business income or the source of income from the head of business and in computing that business income, the loss from one particular source, that is, broodmares account and the pig account, had been excluded contrary to the submission of the assessee. The assessee wanted these losses to be set off. The Revenue contends that as the sources of the income are not to be included in view of the provisions of Clause (27) of s. 10 of the 1961 Act, the loss suffered from this source could also not merit the exclusion. Under the I.T. Act, there are certain incomes which do not enter into the computation of the total income at all. In this connection we have to bear in mind the scheme of the charging section which provides that the incomes shall be charged and s. 4 of the Act provides that the Central Act enacts that the incomes shall be charged for any assessment year and in accordance with and subject to the provisions of the 1961 Act in respect of the total income of the previous year or years or whatever the case may be. The scheme of " total income " has been explained by s. 5 of the Act which provides that subject to the provisions of the Act, the total income of the previous year of a person who is a resident includes all income from whatever source it is derived. In computing the total income, certain incomes are not included under s. 10 of the Act. It depends on the particular case where certain income, in respect of which the Act is made inapplicable to the scheme of the Act, and in such a case, the profit and loss resulting from such a source do not enter into the computation at all. But there are other sources which for certain economic reasons are not included or excluded by the will of the Legislature. In such a case we must look to the specific exclusion that has been made. The question is in this case

whether s. 10(27) is a source which does not enter into the computation at all or is a source the income in respect of which is excluded in the computation of total income. How this question will have to be viewed, has been looked into by the Supreme Court in several decisions to some of which our attention was drawn."

After discussing the various decisions of the Hon'ble Supreme Court specifically the decision of in the case of Karamchand Premchand (supra), the Hon'ble High Court came to the following conclusion:

> *"cl.(27) of s.10 excludes in express terms only "any income derived from a business of live-stock breeding or poultry or dairy farming. It does not exclude the business of livestock breeding or poultry or dairy farming from the operation of the Act. Therefore, the losses suffered by the assessee in the broodmares account and in the pig account were admissible deductions in computing its total income"*

Thus, the ratio laid down by the Hon'ble Calcutta High Court is clearly applicable and accordingly we follow the same in the present case.

9.Now coming to the argument of the learned DR and learned CIT(A) that income includes loss and if income is exempt then loss will also not be taken into computation of the income, and such an argument is with reference to the decision of Hon'ble Supreme Court in the case of CIT vs. Hariprasad & Company Pvt. Ltd. (1975) 99 ITR 118. The Hon'ble Supreme Court, opined that, if loss was from the source or head of income not liable to tax or congenitally exempt from income tax, neither the assessee was required to show the same in the return nor was the Assessing Officer under any obligation to compute or assess it much less for the purpose of carry forward. Further, the Hon'ble Supreme Court observed that "From the charging provisions of the Act, it is discernible that the words ' income ' or ' profits and gains' should be understood as including losses also, so that, in one sense 'profits and gains' represent ' plus income ' whereas losses represent 'minus income'. In other words, loss is negative profit. Both positive and negative profits are of a revenue character. Both must enter into computation, wherever it becomes material, in the same mode of the taxable income of the assessee. Although Section 6 classifies income under six heads, the main charging provision is Section 3 which levies income-tax, as only one tax, on the 'total income ' of the assessee as

defined in Section 2(15). An income in order to come within the purview of that definition must satisfy two conditions. Firstly, it must comprise the ' total amount of income, profits and gains referred to in Section 4(1)'. Secondly, it must be 'computed in the manner laid down in the Act'. If either of these conditions fails, the income will not be a part of the total income that can be brought to charge." While concluding the issue their Lordships observed that "it may be remembered that the concept of carry forward of loss does not stand in vacuo. It involves the notion of set- off. Its sole purpose is to set off the loss against the profits of a subsequent year. It pre-supposes the permissibility and possibility of the carried forward loss being absorbed or set off against the profits and gains, if any, of the subsequent year. Set off implies that the tax is exigible and the assessee wants to adjust the loss against profit to reduce the tax demand. It follows that if such setoff is not permissible or possible owing to the income or profits of the subsequent year being from a non-taxable source, there would be no point in allowing the loss to be "carried forward". Conversely, if the loss arising in the previous year was under a head not chargeable to tax, it could not be allowed to be carried forward and absorbed against income in a subsequent year from a taxable source." The ratio and the principle laid down by the Hon'ble Apex Court would not apply here in this case, because the concept of income includes loss will apply only when entire source is exempt or is not liable to tax and not in the case where only one of the income falling within such source is treated as exempt. The Hon'ble Apex Court on the other hand, itself has stated that if loss from the source or head of income is not liable for tax or congenitally exempt from income tax, then it need not be computed or shown in the return and Assessing Officer also need not assess it. This distinction has to be kept in mind. Hon'ble Calcutta High Court in Royal Turf Club have discussed the aforesaid decision of the Hon'ble Supreme Court and held that the same will not apply in such cases. Thus, in our conclusion, we hold that section 10(38) excludes in expressed terms only the income arising from transfer of Long term capital asset being equity share or equity fund which is chargeable to STT and not entire source of income from capital gains arising from transfer of shares. It does not lead to exclusion of computation of capital gain of Long term capital asset or Short term capital asset being shares. Accordingly, Long term capital loss on sale of shares would be allowed to be set off against Long term capital gain on sale of land in accordance with section 70(3)."

3.7. We find that the aforesaid decision of Mumbai Tribunal in the case of Raptakos Brett & Co. Ltd. v. DCIT (supra) has attained finality as the appeal preferred by the department against the said decision has been dismissed by the Hon'ble Jurisdictional High Court, though, due to non-prosecution. Thus, we do not find any infirmity in the order of the Ld.CIT(A) in allowing the claim of carry forward of Long Term Capital Loss of Rs.8,37,59,368/- arising from sale of equity shares. With regard to case law relied by the Ld. DR in the case of Apollo Tyres Ltd., v. DCIT (supra), the issue involved in that case was whether long term capital loss incurred on which STT paid could not be set off against long term capital gain arising out of sale of land, the issue is factually distinguishable. With regard to Nikhilsawhney v. ACIT (supra), this case was pronounced on 17.08.2020 and subsequently Coordinate Bench has decided the issue in favour of the assessee. Aggrieved, when revenue preferred appeal before Hon'ble Jurisdictional High Court, the same was dismissed. Therefore, the issue under consideration reached finality. In view of the aforesaid observations and respectfully following the judicial precedents relied upon hereinabove, we do not find any infirmity in the order of the ld. CIT(A) granting relief to the assessee. Accordingly, grounds raised by the revenue are dismissed.

ITA No.852/Mum/2021 & ITA No.121/Mum/2021 (A.Y.2012-13)

4. At the outset, there is a delay in filing of appeal by the assessee before us by 22 days. The assessee has filed a letter dated 19/05/2021 through its authorised representative that since lockdown was declared in

the State of Maharashtra since 4th April 2021, the office of the assessee and its Counsel were closed and staff of the assessee and Counsel were operating only from home and that assessee had to consume more time to gather the relevant information and prepare the appeal which had contributed to the delay of 22 days in filing of appeal. We find this explanation to be reasonable and deem it fit to condone the delay and admit the appeal of the assessee for adjudication.

5. We find that the Revenue had raised only one ground before us challenging the action of the ld. CIT(A) in allowing the assessee's claim of set off of long term capital gain of Rs.2,97,37,203/- on sale of immovable property against brought forward long term capital loss arising from sale of listed company shares on which STT was paid.

5.1. The only issue raised in the original grounds of appeal by the assessee is challenging the disallowance made u/s.14A of the Act r.w.r. 8D(2) of the Rules.

5.2. We also find that assessee has raised the following additional grounds of appeal:-

> *1. The learned CIT (A) ought to have held that disallowance u/s 14A of the Act and denial of set off of brought forward long term capital loss against long term capital gain by the Assessing Officer are bad in law since no incriminating material pertaining to the same was found during the course of search from the premises of assessee and the relevant assessment year is an unabated year.*
> *2. The appellant craves leave to add to, amend or alter, the foregoing ground of appeal*

5.3. We have heard the rival submissions and perused the materials available on record. We find that assessee had filed his original return of income u/s.139(1) of the Act for A.Y.2012-13 declaring total income of Rs.10,79,70,024/-. The assessment was completed u/s.143(3) of the Act on 26/03/2015 determining total income at Rs.15,18,79,290/-. Being aggrieved with this assessment order, the assessee preferred an appeal before the ld. CIT(A)-II, Pune. The ld. CIT(A)-II, Pune vide order dated 22/04/2015 confirmed the addition made by the ld. AO u/s.14A of the Act amounting to Rs.54,50,000/- and restricted the disallowance of helicopter expenses to 1/7th of those expenses by following the decision given by the Pune Tribunal in ITA No.1425/PUN/2008 in the case of assessee for A.Y.2005-06.

5.4. We find that there was a search and seizure action u/s. 132 of the Income-tax Act (for short "Act") which was initiated on ABIL Group on 21.07.2017 , pursuant to which, various residences of the partners/directors of the group situated at Mumbai and Pune were covered by search action. The assessee Shri Avinash N. Bhosale is a promoter and founder of ABIL Group. The group companies are primarily engaged in infrastructure development, real estate development and hospitality services. As the case of the assessee is covered under search action, all the cases were centralized u/s. 127(2) of the Act and accordingly, notices u/s. 153A of the Act were issued and served on the assessee calling for filing of correct return of income for the A.Y.2012-13.

5.5. In response to the said notice, the assessee filed the return of income on 14/11/2018 declaring total income of Rs.12,07,93,160/-. Subsequently, the assessment u/s.153A r.w.s. 143(3) of the Act was completed by the ld. AO on 29/05/2019 assessing total income at Rs.15,59,80,360/- by making disallowance u/s.14A of the Act amounting to Rs.54,50,000/- and long term capital gain of Rs.2,97,37,203/-. The ld. CIT(A) granted relief on account of addition made in respect of long term capital gain by granting set off of brought forward long term capital loss from earlier years against the said long term capital gain on sale of immovable property by following the order passed by Pune Tribunal in the case of ACIT, Circle-2, Pune vs. Smt. Gauri Avinash Bhosale in ITA No.1303/PUN/2017 and also by following the decision of Mumbai Tribunal in the case of Raptakos Brett and Co. Ltd., in ITA No.3317/Mum/2009 dated 10/06/2015. The ld. CIT(A) however, dismissed the ground raised by the assessee in respect of disallowance u/s.14A of the Act. Aggrieved by this order of ld. CIT(A), the assessee is in appeal before us challenging disallowance u/s.14A of the Act and Revenue is in appeal before us challenging the action of the ld. CIT(A) in allowing the set off of brought forward long term capital loss for long term capital gain.

5.6. We find that admittedly both the additions were made by the ld. AO in the assessment framed u/s.153A r.w.s. 143(3) of the Act without any incriminating material found during the course of search. In this regard, the additional ground raised by the assessee assumes greater significance. Hence, the additional ground raised by the assessee, being a legal issue, is hereby admitted as it goes to the root of the matter and no

fresh facts are required to be examined thereon. Reliance is placed on the decision of the Hon'ble Supreme Court in the case of NTPC Limited vs. CIT reported in 229 ITR 383 (SC) and Jute Corporation of India Ltd., vs. CIT reported in 187 ITR 688 (SC).

5.7. From the perusal of the entire assessment order in respect of making disallowance u/s.14A of the Act and denial of set off of brought forward long term capital loss with long term capital gain, the ld. AO had not made any reference to any seized material found during the course of search to justify the said addition. Admittedly, the assessment for A.Y.2012-13 being unabated assessment, there cannot be any disturbance to the originally concluded assessment / appellate proceeding unless there is any incriminating material found during the course of search relatable to such assessment year. As stated earlier in the instant case, no such incriminating material has been referred by the ld. AO in his order for framing these two additions / disallowances. This issue is no longer res integra in view of the decision of the Hon'ble Jurisdictional High Court in the case of Continental Warehousing Corporation reported in 374 ITR 645 wherein it had been categorically held by the Hon'ble Jurisdictional High Court that no addition could be made in respect of assessments which have become final if no incriminating material is found during search. The relevant portion of the said order is hereby reproduced as under:-

> "***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."*

5.8. Respectfully following the aforesaid decision of the Hon'ble Jurisdictional High Court, we have no hesitation in allowing the additional ground raised by the assessee. Since, the additional ground raised by the assessee is hereby allowed, the entire additions made by the ld. AO in the order passed u/s.153A r.w.s. 143(3) of the Act dated 29/05/2019 stands automatically deleted. Accordingly, the grounds raised by the assessee are allowed and ground raised by the Revenue is dismissed.

6. In the result, appeal of the assessee is allowed and appeal of the revenue is dismissed for A.Y.2012-13.

7. TO SUM UP:-

Sr. No.	ITA No.	A.Y.	Appeal By	Result
1	634/Mum/2021	2011-12	Revenue	Dismissed
2	852/Mum/2021	2012-13	Assessee	Allowed
3	121/Mum/2021	2012-13	Revenue	Dismissed

Order Pronounced on 28/01/2022 by way of proper mentioning in the notice board.

Sd/-
(KULDIP SINGH)
JUDICIAL MEMBER

Sd/-
(M.BALAGANESH)
ACCOUNTANT MEMBER

Mumbai; Dated 28/01/2022
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

		Date	Initial	
1.	Draft dictated on	25/01/2022		Sr.PS
2.	Draft placed before author	25/01/2022		Sr.PS
3.	Draft proposed & placed before the second member			JM/AM
4.	Draft discussed/approved by Second Member.			JM/AM
5.	Approved Draft comes to the Sr.PS/PS			Sr.PS/PS
6.	Kept for pronouncement on			Sr.PS
7.	File sent to the Bench Clerk			Sr.PS
8.	Date on which file goes to the AR			
9.	Date on which file goes to the Head Clerk.			
10.	Date of dispatch of Order.			
11.	Dictation Pad is enclosed	Yes		