आयकर अपीलीय अधिकरण, 'सी' न्यायपीठ, चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL

'C' BENCH, CHENNAI

श्री महावीर सिंह, उपाध्यक्ष एवं श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष

BEFORE SHRI MAHAVIR SINGH, VICE PRESIDENTAND
SHRI MANOJ KUMAR AGGARWAL, ACCOUNTANT MEMBER

आयकर अपील सं./**ITA No.: 676/CHNY/2017**

निर्धारण वर्ष /Assessment Year: 2006-07

The ACIT, Central Circle 1(2), Chennai – 34.	v.	**M/s. Saravana Stores** **(Thanga Nagai Maligai)**, Rep by Legal Heirs, No.115, Usman Road, T.Nagar, Chennai – 600 017. **PAN: AAUFS 9173N**
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/Appellant by : Shri M. Rajan, CIT

प्रत्यर्थी की ओर से/Respondent by : Shri S. Sridhar, Advocate

सुनवाई की तारीख/Date of Hearing : 21.02.2022

घोषणा की तारीख/Date of Pronouncement : 25.02.2022

आदेश /O R D E R

PER MAHAVIR SINGH, VP:

This appeal by the Revenue is arising out of the order of Commissioner of Income Tax (Appeals)-18, Chennai in ITA No.165/14-15 order dated 30.12.2016. The assessment was framed by the ACIT, Central Circle 1(2), Chennai for the relevant

assessment year 2006-07 u/s.153 r.w.s. 143(3) of the Income Tax Act, 1961 (hereinafter the 'Act') vide order dated 28.03.2014.

2. The first issue in this appeal of Revenue is against the order of CIT(A) deleting the addition made by the AO by making disallowance of expenses for non-deduction of TDS on account of advertisement expenditure (TNM), advertisement expenditure (Textile) and annual maintenance of TNM amounting to Rs.3,35,64,400/- by invoking the provisions of section 40(a)(ia) of the Act while framing assessment u/s.153A r.w.s. 143(3) of the Act. The second issue in this appeal of Revenue is as regards to the order of CIT(A) deleting the disallowance made by AO on account of interest on borrowed capital diverted for interest free advances amounting to Rs.6,84,951/- while framing assessment u/s.153A r.w.s. 143(3) of the Act.

3. Brief facts are that the assessee is a firm part of Saravana Group. A search & seizure action u/s.132 of the Act was conducted on the Saravana Group of cases on 18.08.2011. During the course of search proceedings various business premises were covered including the assessee's firm case M/s. Saravana Stores (Thanga Nagai Maligai). During the financial year 2005-06 relevant to

assessment year 2006-07, the assessee has two units Thanga Nagai Maligai (TNM) and Textile (TEX) division. During the year under consideration the assessee firm had incurred expenditure on advertisement and annual maintenance contract but did not deduct TDS. The second issue is that the CIT(A) had deleted the disallowance of interest on borrowed capital diverted for interest free advances amounting to Rs.6,84,951/-.

4. The assessee filed return of income for the relevant assessment year 2006-07 on 23.10.2006 and along with the return of income assessee filed computation of income, profit & loss account, balance sheet and the schedules attached to the balance sheet and audit report. The assessee has given complete details in its return of income in regard to advertisement expenditure of TNM, advertisement expenditure of Textile, annual maintenance (TNM) and the claim of interest on loans obtained along with the details of interest free advances to various parties. This return was processed u/s.143(1) of the Act. Subsequently, search/s.132 of the Act was conducted on the business premises of the assessee on 18.08.2011 and consequent to that notice u/s.153A of the Act was issued. The assessee in response to 153A notice submitted a letter dated 23.08.2013 stating that the return filed originally on 23.10.2006

may be treated as return filed in response to this notice u/s.153A of the Act. The AO on the basis of information available in the return of income filed originally made disallowance of expenses incurred during the year on account of advertisement expenditure (TNM), advertisement expenditure (Textile), annual maintenance (TNM) and disallowance of interest on loans and advances. Aggrieved, assessee preferred appeal before CIT(A).

5. The CIT(A) deleted the disallowance by stating that during the course of search no incriminating material was found in regard to expenses incurred on which no TDS was deducted and disallowance of interest on loans and advances. The CIT(A) mainly relied on the Special Bench decision of ITAT,Mumbai in the case of All Cargo Global Logistics Ltd. vs. DCIT, [2012] 137 ITD 287 (Mum) (SB). The CIT(A) decided the issue vide para 7 as under:-

> 7. I have perused the assessment order, grounds of appeal, considered the written submissions and the materials on record. After going through the same, the appeal is decided as under:-
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> 7.1 After hearing the AR and on going through the assessment order, I am of the considered opinion that, the AO has not brought on record any new material / evidence to prompt him to make such addition. The AO while making this addition has not roped in any incriminating materials found during the course of search on the basis of which he has made such additions / disallowances. The AO has not justified his decision with any supportive incriminating documents seized during the course of search.

7.2 As per the decision of the Special Bench of the ITAT Mumbai in the case of All Cargo Global Logistics Ltd. v. DCIT [2012) 137 ITD 287 [Mum] (SB) wherein it is held that, where the assessments are completed and no assessment is pending at the time of assessment u/s 153A, reassessment can be made only if incriminating materials are collected in the course of search and the items included in the earlier AYs cannot be re-considered through re-assessment. The co-ordinate bench of the Tribunal in the case of A.B.S.Sanjay Vs.ACIT (supra) has followed the decision in the case of All cargo Global Logistics Ltd., Vs. DCIT (Supra), and the judgment of the Hon'ble Rajasthan High Court in the case of Jai Steel (India) Vs. ACIT reported as 88 DTR(Raj) 1 and deleted the additions made on similar grounds.

7.3 The Hon'ble High Courts and different benches of the Tribunal have been consistently taking a view that in case nothing incriminating is found on account of search of requisition, the question of re-assessment of the concluded assessment does not arise. Now, it is a well settled law that re-assessment of the concluded assessment is permitted in assessment u/s 153A only if incriminating materials are found in the course of search.

7.4 In the present case, I do not find from the discussion of the AO in the assessment order that, addition was made based on any incriminating material found during search operation. This being so, I am constraint **to direct the AO to delete** the **addition.**

Aggrieved, Revenue came in appeal before the Tribunal.

6. We have heard rival contentions and gone through facts and circumstances of the case. Admitted facts are that no incriminating material was found during the course of search on the business premises of the assessee conducted on 18.08.2011 in relation to the expenses of advertisement charges (TNM), advertisement charges (Textile), annual maintenance (TNM) and also in relation to interest

paid on various loans and advances. The assessee filed original return of income for the relevant assessment year 2006-07 on 23.10.2006 and also has filed complete details in respect to the items added by the AO in consequence to search proceedings. We are of the view that once there is no incriminating material and assessment is concluded without any incriminating material, no addition or disallowance based on assessee's documents can be made. We find the issue is covered in favour of the assessee by the Mumbai Bench of the Tribunal in ITA Nos.3575 to 3577, 2580 to 3584, 3736 & 3737/Mum/2011 & 7382 to 7385, 7387, 7388& 7390/Mum/2013, order dated 24.05.2017, wherein it was held as under:-

> 5. In view of the above given facts, the learned Counsel for the assessees' argued that the issue of assumption of jurisdiction by the AO and making addition while framing assessment u/s 153A read with section 143(3) of the Act, the assessment is without jurisdiction in respect to assessment of gifts already disclosed. Now, before us the learned CIT DR. could not support the orders of CIT(A) or on query from the Bench could not produce any seized material pertaining to this AY relatable to assessee in regards to the additions made by AO. Once this is the position, the issue is squarely covered in favour of assessee by the decision of the Hon'ble Bombay High Court in the case of CIT vs Continental Warehousing Corporation (Nhava Sheva) Ltd. (2015) 374 ITR 645 (Bom).
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> 6. We find that this issue now stands covered in favour of assessee and against the Revenue by the decision of Hon'ble Bombay High Court in the case of Continental Warehousing Corporation (Nhava Sheva) Ltd. (supra), wherein considering the judgment of the Special Bench of the Mumbai Tribunal in the case of All Cargo Global Logistics 137 ITD 287(SB) (Mum), considered this issue that, whether there is scope of assessment u/s. 153A of the Act in respect to completed assessment which is limited only to

undisclosed income and undisclosed assets found during the course of search or not? Hon'ble High Court held that on a plain reading of section 153 of the Act it becomes clear that on initiation of the proceedings u/s. 153A of the Act, it is only the assessment/reassessment proceedings that are pending on the date of conducting search u/s. 132 of the Act stand abated and not the assessments/reassessments already final for those assessment years covered u/s. 153A of the Act. Hon'ble High Court also discussed the CBDT Circular No. 8 of 2003 dated 18.09.2003 reported in 263 ITR (st.) 61 at page 107 wherein CBDT has clarified that on initiation of proceedings u/s. 153A of the Act the proceedings pending in appeal, revision or rectification proceedings against final assessment shall not abate. It is only because the final assessments do not abate the appeal, revision or rectification pending against final assessments would not abate. Therefore, Hon'ble High Court rejected the arguments of the Revenue that on initiation of proceedings u/s. 153A of the Act, the reassessment final for assessment years covered u/s. 153A of the Act stands abated. Only the pending assessments get revived u/s. 153A of the Act. Hon'ble High Court further held that once assessment has attained finality, then the AO while passing independent assessment order u/s. 153A/143(3) of the Act could not disturb the assessment order which has attained finality unless the material gathered in the course of search u/s. 132/153A of the Act established that the finality attained in the assessment were contrary to the facts unearthed during the course of search. The relevant portion of the judgment reads as under: -

"31. We, therefore, hold that the Special Bench's understanding of the legal provision is not perverse nor does it suffer from any error of law apparent on the face of the record. The Special Bench in that regard held as under:-

"The provision under section 153A is applicable where a search or requisition is initiated after 31.5.2003. In such a case the AO is obliged to issue notice u/s 153A in respect of 6 preceding years, preceding the year in which search etc. has been initiated. Thereafter he has to assess or reassess the total income of these six years. It is obligatory on the part of the AO to assess or reassess total income of the six years as provided in section 153A(1)(b) and reiterated in the 1st proviso to this section. The second proviso states that the assessment or reassessment pending on the date of initiation of the search or requisition shall abate. We find that there is no divergence of views in so far as the provision contained in section 153A till the 1st proviso. The divergence starts from the second proviso which states that pending assessment or reassessment on the date of initiation of search shall abate. This means that an assessment or reassessment pending on the date of initiation of search shall cease to exist and no further action shall be taken thereon. The assessment shall now be made u/s 153A. The case of Ld. Counsel for the assessee

is that necessary corollary to this provision is that completed assessment shall not abate. These assessments become final except in so far and to the extent as undisclosed income is found in the course of search. On the other hand, it has been argued by the Ld. Standing Counsel that abatement of pending assessment is only for the purpose of avoiding two assessments for the same year, one being regular assessment and the other being assessment u/s 153A. In other words these two assessments coalesce into one assessment. The second proviso does not contain any word or words to the effect that no reassessment shall be made in respect of a completed assessment. The language is clear in this behalf and therefore literal interpretation should be followed. Such interpretation does not produce manifestly absurd or unjust results as section 153A (i)(b) and the first proviso clearly provide for assessment or reassessment of all six years. It may cause hardship to some assesses where one or more of such assessments has or have been completed before the date of initiation of search. This is hardly of any relevance in view of clear and unambiguous words used by the legislature. This interpretation does not cause any absurd etc. results. There is no casus omissus and supplying any would be against the legislative intent and against the very rule in this behalf that it should be supplied for the purpose of achieving legislative intent. The submissions of the Ld. Counsels are manifold, the foremost being that the provision u/s 153A should be read in conjunction with the provision contained in section 132(1), the reason being that the latter deals with search and seizure and the former deals with assessment in case of search etc, thus, the two are inextricably linked with each other.

Before proceeding further, we may now examine the provision contained in sub-section (2) of section 153, which has been dealt with by Ld. Counsel. It provides that if any assessment made under subsection (1) is annulled in appeal etc., then the abated assessment revives. However, if such annulment is further nullified, the assessment again abates. The case of the Ld. Counsel is that this provision further shows that completed assessments stand on a different footing from the pending assessments because appeals etc. proceedings continue to remain in force in case of completed assessments and their fate depends upon subsequent orders in appeal. On consideration of the provision and the submissions, we find that this provision also makes it clear that the abatement of pending proceedings is not of such permanent nature that they cease to exist for all times to come. The interpretation of the Ld. Counsel, though not specifically stated, would be that on annulment of the assessment made u/s 153(1), the AO gets the jurisdiction to assess the total income which was vested in him earlier independent of the search and which came to an end due to initiation of the search.

The provision contained in section 132 (1) empowers the officer to issue a warrant of search of the premises of a person where any one or more of conditions mentioned therein is or are satisfied, i.e. - a) summons or notice has been issued to produce books of account or other documents but such books of account or documents have not been produced, b) summons or notice has been or might be issued, he will not produce the books of account or other documents mentioned therein, or c) he is in possession of any money or bullion etc. which represents wholly or partly the income or property which has not been and which would not be disclosed for the purpose of assessment, called as undisclosed income or property. We find that the provision in section 132 (1) does not use the word "incriminating document". Clauses (a) and (b) of section 132(1) employ the words "books of account or other documents". For harmonious interpretation of this provision with provision contained in section 153A, all the three conditions on satisfaction of which a warrant of search can be issued will have to be taken into account.

Having held so, an assessment or reassessment u/s 153A arises only when a search has been initiated and conducted. Therefore, such an assessment has a vital link with the initiation and conduct of the search. We have mentioned that a search can be authorised on satisfaction of one of the three conditions enumerated earlier. Therefore, while interpreting the provision contained in section 153A, all these conditions will have to be taken into account. With this, we proceed to literally interpret to provision in 153A as it exists and read it alongside the provision contained in section 132(1).

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. The assessment has now to be made u/s 153A (1)(b) and the first proviso. It also means that only one assessment will be made under the aforesaid provisions as the two proceedings i.e. assessment or reassessment proceedings and proceedings under this provision merge into one. If assessment made under sub-section (1) is annulled in appeal or other legal proceedings, then the abated assessment or reassessment shall revive. This means that the assessment or

reassessment, which had abated, shall be made, for which extension of time has been provided under section 153B.

The question now is - what is the scope of assessment or reassessment of total income u/s 153A (1) (b) and the first proviso? We are of the view that for answering this question, guidance will have to be sought from section 132(1). If any books of account or other documents relevant to the assessment had not been produced in the course of original assessment and found in the course of search in our humble opinion such books of account or other documents have to be taken into account while making assessment or reassessment of total income under the aforesaid provision. Similar position will obtain in a case where undisclosed income or undisclosed property has been found as a consequence of search. In other words, harmonious interpretation will produce the following results: -

a) In so far as pending assessments are concerned, the jurisdiction to make original assessment and assessment u/s 153A merge into one and only one assessment for each assessment year shall be made separately on the basis of the findings of the search and any other material existing or brought on the record of the AO,

(b) in respect of non-abated assessments, the assessment will be made on the basis of books of account or other documents not produced in the course of original assessment but found in the course of search, and undisclosed income or undisclosed property discovered in the course of search."

7. We have examined the details and noticed that notice u/s 143(2) of the Act became time barred on 31.08.2004 at the time when the search took place much later on 03.08.2006. Therefore, it follows that as on the date of search, there was an assessment completed or processing of return of income of the assessee under section 143(1) of the Act. Subsequently, the A.O. initiated proceedings under s. 153A and in the assessment completed under s. 143(3) r.w.s 153A, the A.O. has brought to tax a sum of Rs. 10,00,000/- being the amount of gift received from Shri Gayanchand Jain without any incriminating material found during the course of search. Once this is the position the issue is clearly covered in favour of assessee and against the Revenue by the decision of Hon'ble Bombay High Court in the case of Continental Warehousing Corporation (Nhava Sheva) Ltd. (Supra). Respectfully, following the same and in the given said of facts, we are of the view that this gift received from Shri Gayandhand Jain for an amount of Rs. 10,00,000/- disclosed in the return of income as evidence by the capital account and which has not been abated, the amount of gift cannot be added. Accordingly, we reverse the orders of CIT(A) as well as that of the AO and delete the addition in all these eleven appeals of the assessee.

6.1 In view of the above decision and the decision of Hon'ble Bombay High Court in the case of CIT vs Continental Warehousing Corporation (Nhava Sheva) Ltd. (2015) 374 ITR 645 (Bom), we find no infirmity in the order of CIT(A) and hence, we confirm the same.

7. In the result, the appeal filed by the Revenue is dismissed.

Order pronounced in the court on 25th February, 2022 at Chennai.

Sd/-	Sd/-
(मनोज कुमार अग्रवाल)	(महावीर सिंह)
(MANOJ KUMAR AGGARWAL)	**(MAHAVIR SINGH)**
लेखा सदस्य /ACCOUNTANT MEMBER	उपाध्यक्ष /VICE PRESIDENT

चेन्नई/Chennai,
दिनांक/Dated, the 25th February, 2022

RSR
आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant	2. प्रत्यर्थी/Respondent	3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त /CIT	5. विभागीय प्रतिनिधि/DR	6. गार्ड फाईल/GF.