IN THE INCOME TAX APPELLATE TRIBUNAL,

ALLAHABAD BENCH, ALLAHABAD

BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER

ITA No.141/Alld./2017
Assessment Year: 2008-09

M/s Subhash Stone Industries, Private Limited(Formerly Rajluxmi Stone Crushers Private Limited),Ambika Vihar, Haldwani, Nainital-263139, Uttarakhand	v.	Deputy Commissioner of Income Tax, Central Circle, Allahabad, U.P.
PAN:AABCR0021Q		
(Appellant)		(Respondent)

Appellant by:	None
Respondent by:	Shri Ramendra Kumar Vishwakarma, CIT-DR
Date of hearing:	11.05. 2022
Date of pronouncement:	19.05.2022

O R D E R

PER SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER:

This appeal, filed by assessee, being ITA No. 141/Alld./2017, is directed against an appellate order dated 31.03.2017 in Appeal No. 154/667/DCIT/CC/Alld./CIT(A)-III/Lko./14-15 passed by learned Commissioner of Income Tax (Appeals)-III, Lucknow (hereinafter called "the CIT(A)"), for assessment year(ay):2008-09, the appellate proceedings had arisen before learned CIT(A) from assessment order dated 30.03.2013 passed by learned Assessing Officer (hereinafter called "the AO") under Section 153A

read with Section 143(3) of the Income-tax Act,1961(hereinafter called " the Act") . This appeal was heard on 11.05.2022 by Division Bench of Allahabad-tribunal, in open Court hearings through Physical Hearing Mode.

2. The grounds of appeal raised by assessee in ITA No. 141/Alld./2017, in memo of appeal filed with Income-Tax Appellate Tribunal, Allahabad Bench , Allahabad(hereinafter called " the tribunal") , reads as under:-

> *"1.That in any view of the matter the assessment made on an income of Rs. 78,82,390/- vide order dated 30.03.2013 passed u/s 153A r.w.s. 143(3) of the IT Act as against the returned income of Rs. 30,24,550/- is bad both on the facts and in law.*
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> *2.That in any view of the matter the entire amount added vide Sec. 132 of the Act and subsequent notice u/s 153A of the Act is also illegal as during the course of search no incriminating material was found but instead the disclosed figure in Balance Sheet were added which is out of the purview of Sec 153A of the Act, therefore, the entire action is bad in law.*
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> *3. That in any view of the matter the addition of Rs. 6,26,650/- as per para 2.3 of the assessment order as made by the Assessing officer and confirmed by the Ld. CIT(A) is highly unjustified when the said income has already been added in original assessment proceedings.*
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> *4.That in any view of the matter the assessment framed u/s 153A of the Act is bad in law as there was no undisclosed income relating to a company but the amount has already been disclosed to the Department which has been added back which action is highly unjustified. Hence both the two lower authorities were wrong in not considering the facts properly.*
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> *5. That in any view of the matter the interest charged under different sections of the Act is highly unjustified.*
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> *6. That in any view of the matter the appellant reserves his right to take any fresh grounds of appeal before hearing of appeal."*

3. The appeal was fixed for hearing before the Division Bench on 11th May, 2022, and adjournment application was moved by the assessee counsel on the ground that the Director of the company Shri Ajay Kumar who is looking after tax matter is not keeping well. It is also submitted in the aforesaid adjournment application that the case record is not available with the counsel. These are old appeals, which is pending adjudication

before the tribunal for around five years. It is observed that this appeal had come for hearing earlier before the Division Bench on several occasions, but on every occasion the assessee has sought adjournment before the Division Bench on one ground or other. This appeal was earlier fixed for hearing(s) before Division Bench, on 14th October, 2020, 25th November, 2020, 5th January, 2021, 3rd February, 2021, 26th July, 2021, 8th September, 2021, 30th September, 2021, 8th November, 2021, 11th November, 2021, 9th December, 2021, 20th January, 2022 and finally on 11th May, 2021, and on all these occasions, the appeal could not be proceeded because either the counsel for the assessee did not appeared before the Bench , or otherwise sought adjournment on one reason or the other. The Bench was pleased to grant adjournment on all these occasions, except on 11th May 2022 wherein the adjournment application was rejected by the Division Bench. There was also defect in the appeal filed by the assessee, as the assessee did not deposited fee in full of Rs. 10000/- before filing this appeal with government treasury as is prescribed u/s 253(6)(c) of the 1961 Act , and rather deposited only Rs. 1500/- with government treasury, vide challan no. 35117(BSR Code 6360218) dated 06.07.2017 . The defect was pointed out to the ld. Counsel for the assessee on earlier occassions , and the assessee duly deposited short appeal fee of Rs. 8500/- with government treasury on 10.11.2021 vide challan no. 30669(BSR Code 6360218) which was deposited by assessee with Axis Bank. Both the challans , aggregating to Rs. 10000/- are placed on record in file. Coming back , on 11th May, 2022, the Division Bench rejected the adjournment application moved by the assessee's counsel , and passed the following interim order/order sheet entry, which is reproduced as hereunder;

"Dated: 11.5.2022

ITA No. 141/ALLD/2017
Assessment Year: 2008-09

None appeared on behalf of the assessee when this appeal was called for hearing. An application on behalf of the assessee is filed for seeking adjournments of the hearing on the ground that the Director of the company is out of station at Haldwani, Nainital and also not keeping well. This appeal is pending for last more than five years and the assessee has been seeking adjournments right from the beginning.

During the Covid period, the hearings of the appeals were conducted through video conference and no adjournments were denied by the Bench.

Even after the physical hearing started the assessee sought adjournments on several occasions. Thus, it transpires from the record that the assessee is not interested in prosecuting the case. Accordingly, we decline to adjourn the hearing and propose to hear and dispose of the appeal ex parte.

Sd/- ***Sd/-***

(RAMIT KOCHAR) ***(VIJAY PAL RAO)***
ACCOUNTANT MEMBER ***JUDICIAL MEMBER"***

Thus, we declined to adjourn the hearing and proceeded to adjudicate this appeal on merits in accordance with law, after hearing ld. CIT-DR and after considering the entire material on record.

4. The brief facts of the case are that in pursuance of warrants of authorization issued by Director of Income Tax (Investigation), Kanpur, under Section 132 of the Income Tax Act, 1961, a search and seizure operations were carried out by Revenue on 3rd February, 2011 , at the residential and business premises belonging to the Vaish group of cases. Along with the search and seizure action conducted by Revenue u/s 132(1) of the 1961 Act, certain business premises of the group were also surveyed under Section 133A of the 1961 Act. The assessee was also searched by Revenue under Section 132(1) , on 3rd February, 2011 , under warrant of authorization dated 18th January, 2011. The assessee is engaged in the business of stone crushing. Statutory notices were issued by the AO under Section 153A , dated 16th February, 2012 and 17th

July, 2012 , requiring the assessee to file return of income within 15 days from the date of service of the notice. The assessee filed return of income on 11.10.2012. The AO also issued notices u/s 142(1) and 143(2) of the 1961 Act. There is no dispute between rival parties as to the search conducted by Revenue or the issuance of the aforesaid notices. The AO , inter-alia, made additions to the tune of Rs. 6,26,650/- which was **reiteration** of additions as were made by the AO in original assessment proceedings conducted u/s 143(3) read with Section 143(2) , vide assessment order dated 21.12.2010 passed by AO u/s 143(3) of the 1961 Act. The Revenue conducted search and seizure operations u/s 132(1) against the assessee, on 03.02.2011 , and hence assessment originally framed by the AO u/s 143(3) , on 21st December, 2010 for assessment year 2008-09, was made prior to the date of search on 03.02.2011 u/s 132(1) of the 1961 Act, and hence is an unabated assessment. Reference is drawn to the provisions of second proviso to Section 153A(1) . The AO while making search assessment for impugned assessment year, vide assessment order dated 30.03.2013 passed u/s 153A read with Section 143(3) , reiterated the additions of Rs. 6,26,650/- made by the AO in the original assessment order dated 21.12.2010 passed u/s 143(3) of the 1961 Act. The aforesaid additions of Rs. 6,26,650/- were made mostly by disallowing the business expenses claimed by the assessee under various heads, and details are as under :

a)	Disallowance of loader running expenses	Rs. 1,50,000/-
b)	Disallowance of Plant Maintenance	Rs. 1,50,000/-
c)	Disallowance on account of donation paid	Rs. 51,000/-
d)	Disallowance u/s 40(a)(ia) for non deduction of TDS	Rs.1,19,950/-
e)	Disallowance of Proportionate Expenses	Rs.1,55,700/-

	Total	Rs. 6,26,650/-

Hence, an addition of Rs. 6,26,650/- was made by the AO to the income of the assessee on the aforestated heads vide assessment originally made by the AO , vide assessment order dated 21.12.2010 passed u/s 143(3) of the 1961 Act. These addition of Rs. 6,26,650/- was reiterated by the AO while passing the assessment order dated 30.03.2013 passed u/s 153A read with Section 143(3) of the 1961 Act . There was further addition of Rs. 42,31,186/- made by the AO to the income of the assessee on account of unexplained cash credit by invoking provisions of Section 68 of the 1961 Act , and hence income assessed by the AO was to the tune of Rs. 78,82,390/-, vide assessment order dated 31.03.2013 passed by the AO u/s 153A read with Section 143(3) of the 1961 Act, as against the returned income of Rs.30,24,550/-

5. The assessee being aggrieved by assessment order dated 30.03.2013 passed by the AO u/s 153A read with Section 143(3), filed first appeal before Ld. CIT(A) and raised as many as 13 grounds of appeal . The ground Nos. 1 to 5 were relating to the validity/legality of the assessments made by the AO, which grounds of appeal stood dismissed by Ld. CIT(A), by holding as under:

> *"7. I have examined the facts and circumstances of the case. I have considered the findings of the AO and the submission of the appellant. The appellant has raised three issues viz., that the action U/s 132 of the Act is not legal, there is malafide in completion of assessment proceeding as the AO is the same person who was also the authorized officer during the course of search and seizure operation. Regarding the first issue I find that the validity of search u/s 132 of the Act is not an appealable under Section 246A of the Act.*
> *The assessee has contended that the AO who passed the assessment order is the same person who conducted the search and therefore the principle of natural justice has been violated. On my examination, I have not expressly found anything to show that there was any mala-fides attributable to what was a question of jurisdiction and discharge of statutory duties by the AO. The appellant's contention, apart from running contrary to the scheme of the Act, would amount to a limitation on the powers conferred statutorily on the Assessing Officer. A reference in this connection may be made to the decision of Hon'ble Supreme Court of India in the case of Union of India And Others Vs. Vipan Kumar Jain And Others (2003) 260 ITR 001 (SC) wherein the Hon'ble Apex Court held that-*
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> > *Ultimately, the question of bias have to be decided on the facts of each case if the assessee is able to establish to that the Assessing Officer was in fact biased in the sense that he*

> *was involved or interest in his personal capacity in the outcome of the assessment or the procedure for assessment, no doubt, it would be a good ground for setting aside the assessment order but to hold, as the High Court has that bias is established only because the authorized officer under section 132 and the Assessing Officer are the same person is, in our view, on incorrect approach.*

8. The appellant apart from alleging motive has not been able to substantially prove that the AO who was the authorized officer in case of search in the case of assessee acted mala-fides and was personally in any way interested in the outcome of assessment. The contention of the appellant carries no force.

9. The appellant has also contended that no addition could have been made in absence of any incriminating material having been found as a result of the search. In this connection a reference may be made to the decision of Hon'ble Karnataka High Court in the case of M/s. Canara Housing Development Company Vs. DCIT Central Circle-I, Bangalore in ITA No. 38/2014 dated 25.07.2014 wherein the Hon'ble Court held that the assessing authority shall determine the total income of the assessee taking into consideration the materials which was the subject matter of earlier return and the undisclosed income unearthed during search and also any other income which comes to his notice. The relevant observations are-

> *When once the proceedings are initiated under section 153A of the Act, the legal effect is even in case where the assessment order is passed it stands reopened. In the eye of law there is no order of assessment. Re-opened means to deal with or begin with again. It means the Assessing Officer shall assess or reassess the total income of six assessment years. Once the assessment is reopened, the assessing authority can take note of the income disclosed in the earlier return, any undisclosed income found during search or and also any other income which is not disclosed in the earlier return or which is not unearthed during the search, in order to find out what is the "total income" of each year and then pass the assessment order.*

Hon'ble Allahabad High Court decided a similar matter in the case of CIT Vs. Raj Kumar Arora (2014) 52 taxmann.com 172 (Allahabad) and laid down that Assessing Officer has power to reassess returns of assessee not only for undisclosed income found during search operation but also with regard to material available at time of original assessment. The relevant observations of Hon'ble Jurisdiction High Court is at paragraphs 9 to 11 of the decision dated 11.07.2014 .

10.In view of the above discussion and as laid down by the Hon'ble Jurisdiction High Court the Assessing Officer has power to reassess returns of assessee not only for undisclosed income found during search operation but also with regard to material available at time of original assessment. Accordingly the contention of the appellant is rejected. Grounds of appeal numbers 1,2,3,4, and 5 carry no force and are dismissed."

6. The assessee vide ground number 6 , inter-alia, also challenged before ld. CIT(A) the addition made by AO aggregating to Rs. 6,26,560/- under various heads , vide assessment order dated 31.03.2013 passed u/s 153A read with Section 143(3), which

additions were infact reiteration of the additions as were originally made by the AO vide assessment order dated 21.12.2010 passed by AO u/s 143(3) of the 1961 Act. The assessee contended before ld. CIT(A), that the additions of Rs. 6,26,650/- under various heads were made by the AO to the income of the assessee while framing original assessment order dated 21.12.2010 passed by AO u/s 143(3) of the 1961 Act , and it was submitted by assessee before ld. CIT(A) that said assessment made u/s 143(3) wherein addition of Rs. 6,26,650/- was made by the AO to the income of the assesssee, was accepted by the assessee and no appeal was filed against the said assessment order, and hence the same has attained finality. The assessee submitted that the aforesaid addition of Rs. 6,26,650/- now made by the AO while framing assessment u/s 153A read with Section 143(3), is a double addition and hence is not sustainable in the eye of law. It was submitted by assessee before ld. CIT(A) that assessment framed by the AO u/s 143(3) , dated 21.12.2010 was a concluded assessment which was not pending on the date of search viz. 03rd February, 2011. It was also submitted by assessee before ld. CIT(A), that no incriminating material was found during the course of search conducted by Revenue u/s 132(1) , and hence this addition of Rs. 6,26,650/- could not have been made in the search assessment u/s 153A read with Section 143(3) of the 1961 Act. The Ld. CIT(A) was pleased to dismiss the ground no. 6 raised by the assessee in memo of appeal, by holding as under:

> *"14. I have examined the facts and circumstance of the case, have considered the findings of the AO in the assessment order and the submission of the appellant and the case law cited by the appellant. It is noted that the Assessing Officer made disallowance under various heads to the tune of Rs. 6,26,650/- and completed the assessment u/s 143(3), vide order dated 21-12-2010. The Assessing Officer while framing the assessment u/s 153A of the Act has added an amount of Rs. 6,26,650/- which was earlier added U/s 143(3) of the Act. It is relevant to consider the provision contained in Section 153A which reads as under:*
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> > *(1). Notwithstanding anything contained in Section, 139, Section 147, Section 148, Section 149, Section 151 and Section 153 in the case of a person where a search is initiated under Section 132 or books of account, other documents or any assets are*

requisitioned under Section 132A after 31st day of May, 2003, the Assessing Officer shall-

(a) Issue notice to such person requiring him to furnish within such period, as may be specified in the notice, the return of income in respect of each assessment year falling within six assessment years referred to in clause (b), in the prescribed from and verified in the prescribed manner and setting forth such other particulars as may be prescribed and the provisions of this Act shall so far as may be, apply accordingly as if such return were a return required to be furnished under Section 139.

(b) Assess or reassess the total income of six assessment years immediately preceding the assessment year relevant to the previous year in which such search in conducted or requisition is made.

Provided that the Assessing Officer shall assess or reassess the total income in respect of each assessment year falling within six assessment year.

Provided further that assessment or reassessment, if any, relating to any assessment year falling within the period of six assessment years referred to in this pending on the date of initiation of the search under Section 132 or making of requisition under Section 132A, as the case may be, shall abate.

Provided also that the Central Government may be rule made by it and published in the official Gazette, specify the class or classes of case in which the Assessing Officer shall not be required to issue notice for assessing or reassessing the total income for six assessment years immediately preceding the assessment year relevant to the previous year in which search is conducted or requisition is made.

(2) if any proceeding initiated or any order of assessment or reassessment made under Sub-Section (1) has been annulled in appeal or any other legal proceeding, then, notwithstanding anything contained in subsection (1) of Section 153A, the assessment or reassessment relating to any assessment year which has abated under the second proviso to sub-section (1), shall stand revived with effect from the date of receipt of the order of such annulment by the commissioner.

15. On examining the 1st Proviso to section 153A it is clearly evident that the AO has to assess or reassess the total income in respect of each assessment year falling within such six assessment year and the assessment is to be made as per the provisions of section 153A(1)(b).

A reference is also made to Board's circular N. 7 of 2003 dated 5 Sept. 2003 in which it has been stated……

(d) In Board Circular No. 7 of 2003, dated 5 Sept., 2003 the AOs have been informed that they shall make assessment or reassessment of the total income of 6 years and the pending assessments on the date of initiation of search shall abate, in this

> *connection, it is clarified that the appeals, review or rectification proceedings pending on the date of initiation of search or requisition shall not abate. This only means that the issued which stand concluded in assessments made earlier shall continue to remain intact subject to aforesaid jurisdictions. The other conclusion may be that in respect of matters abated and discussed in the assessments already made no further action is required in reassessments under S. 153A.*
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> *17. In view of the above legal position it is clear that there will be only one assessment order in respect of each of the six assessment year in which both the disclosed income and the undisclosed income would be brought to tax. In other words addition made in the original assessment u/s 143(3) vide order dated 2.12.2010, in the case of assessee for A.Y. 2008-09 shall be merged with the assessment u/s 153A there will be only one assessment order passed by the AO U/s 153A of the Act for A.Y. 2008-09.*
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> *In view of the aforesaid discussion the action of the AO in adding an amount of Rs. 6,26,650/- which was earlier added U/s 143(3) of the Act is hereby upheld. Ground No. 6 of the appeal is dismissed."*

In so far as other addition to the tune of Rs. 42,31,186/- on account of unexplained cash credit made by the AO in the hands of the assesssee vide search assessment u/s 153A read with Section 143(3) is concerned, the Ld. CIT(A) was pleased to delete the additions and gave the relief to the assessee . Similarly, challenge made by the assessee before ld. CIT(A) as to the action of the AO in rejecting books of accounts by invoking provisions of Section 145(3), was also favourably decided by ld. CIT(A) in favour of the assessee. The Revenue is not in appeal before the tribunal against the aforesaid relief granted by ld. CIT(A) to the assessee , and hence these issue's have attained finality.

7. Now, the assessee being aggrieved by the appellate order passed by ld. CIT(A) has come in appeal before the tribunal . None appeared on behalf of the assessee when this appeal was called for hearing before the DB. This appeal is pending adjudication before tribunal for almost five years. The Division Bench dismissed the adjournment application on 11.05.2022 moved by ld. Counsel for the assessee, which is recorded in para 3 of this order. Thus, we proceed to decide this appeal after hearing ld. CIT-DR and perusing the material on record.

8. Ld. CIT-DR submitted that ground Nos. 1 and 2 raised by the assessee is with respect to challenge on legal ground as to the additions made by the AO without incriminating material, which was dismissed by ld. CIT(A) . It was submitted by ld. CIT-DR that the addition of Rs. 6,26,650/- was made by the AO while passing assessment order u/s 153A read with Section 143(3) , wherein it is the reiteration of the additions made by the AO in the assessment order originally framed u/s 143(3) of the 1961 Act. Our attention was drawn by ld. CIT(A) to the provision of Section 153A of the 1961 Act.

9. We have heard ld. CIT-DR in open court proceedings and perused the material on record. We have observed that in pursuance to warrants of authorization issued by Director of Income Tax (Investigation), Kanpur, under Section 132 of the Income Tax Act, 1961, a search and seizure operations were carried out by Revenue on 3rd February, 2011, at the residential and business premises belonging to the Vaish group of cases. Along with the search and seizure action conducted by Revenue u/s 132(1) of the 1961 Act, certain business premises of the group were also surveyed under Section 133A of the 1961 Act. The assessee was also searched by Revenue under Section 132(1) , on 3rd February, 2011 , under warrant of authorization dated 18th January, 2011. The assessee is engaged in the business of stone crushing. Statutory notices were issued by the AO, pursuant to search and seizure operations conducted by Revenue u/s 132(1) of the 1961 Act, on 03.02.2011. The assessee filed return of income u/s 153A , consequent to Search , on 11.10.2012 , declaring total income of Rs. 30,24,550/-. The AO framed assessment u/s 153A read with Section 143(3) of the 1961 Act, vide assessment order dated 30.03.2013, assessing total income of the assessee to the tune of Rs. 78,82,390/- .

9.2 The assessee had originally filed return of income with Revenue u/s 139(1) of the 1961 Act, on 30.09.2008 , declaring total income of Rs. 43,03,860/-. The said return of income was selected for framing scrutiny assessment by Revenue u/s 143(3) read with Section 143(2) of the 1961 Act, and the AO framed scrutiny assessment u/s 143(3) of the

1961 Act , vide assessment order dated 21.12.2010, assessing total income of the assessee to the tune of Rs. 49,30,510/- , as against returned income of Rs. 43,03,860/-.

9.3 The ground number 1 and 6 raised by the assessee in memo of appeal filed with the tribunal are general in nature and does not require separate adjudication, and are thus dismissed. We order accordingly.

9.4 The assessee has also challenged the assessment made u/s 153A read with Section 143(3), on legal ground vide ground number 2, averring that in case no incriminating material is found during the search operations conducted by Revenue u/s 132 of the 1961 Act, no additions could be made while framing assessment u/s 153A read with Section 143(3) of the 1961 Act. On this similar issue, dissent took place between both the members, who are part of this Division Bench, in the case of ACIT v. Sunshine Infraestate Private Limited (ITA No. 103/Alld/2017 & C.O. 22/Alld/2017) and matter was referred to Third Member, who was pleased to decide this issue in favour of Revenue and against the tax-payer, by holding as under :

> *"7.1. Now, I take up the second question as to whether the learned CIT(A) was justified in holding that no addition, based otherwise than on an incriminating document or material etc. found during the course of search, can be made in the assessment relating to any assessment year falling within the period of six assessment years as prescribed u/s 153A of the Act which is not pending on the date of initiation of the search.*
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> *7.2. Tersely stated, the return for the assessment year 2011-12 was originally filed by the assessee on 30.09.2011. Though no scrutiny assessment was made u/s 143(3), but the return was processed u/s 143(1) and the time for issuing notice u/s 143(2) expired on 30.09.2012. As against that, the search and seizure action was taken up on 05.12.2013 i.e. after the lapse of period for issuing notice u/s 143(2). No incriminating material connected with the addition of Rs.2.50 crore was found during the course of search. The assessee contended before the ld. CIT(A) that the AO was debarred from making the addition in such circumstances. The ld. CIT(A) accepted the assessee's contention. When the matter travelled to the Tribunal, the ld. AM relied on certain decisions of the Hon'ble jurisdictional High Court to jettison the assessee's contention urging to limit the scope of assessment proceedings u/s 153A only to the incriminating material found during the course of search because the assessment for the year under consideration was not pending on the date of search and had abated. Au contraire, the ld. JM also relied on certain other judgments to fortify the assessee's contention on this count.*

7.3. I have heard the both sides in extenso on this issue. Patently, there are two sets of view of the Hon'ble High Courts on the scope of assessment u/s 153A of an assessment year which was not pending on the date of search either because of its prior completion or because of no time left for taking it up. The Hon'ble Delhi High Court in the case of CIT vs. Kabul Chawla (2016) 380 ITR 573 (Del) has held that : `Completed assessments can be interfered with by the AO while making the assessment under Section 153A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment.' Similar view has been reiterated by some other High Courts, including, the Hon'ble Bombay High Court in CIT vs. Continental Warehousing Corporation (2015) 374 ITR 645 (Bom) and the Hon'ble Delhi High Court in Pr.CIT & Ors. vs. Meeta Gutgutia (2017) 395 ITR 526 (Del).

7.4. As opposed to that, there are certain High Courts, including the Hon'ble jurisdictional High Court, canvassing a view in favour of the Revenue holding that the scope of assessments u/s 153A, for the years whose assessments already stood completed on the date of search, is not restricted only to the incriminating material found during the course of search but also to the material available at the time of original filing of the return. The Hon'ble Allahabad High Court in CIT vs. Rajesh Kumar Arora (2014) 367 ITR 517 (All) 15 contrasted the position of assessment u/s 158BC covered Chapter XIV-B of the Act with that of the assessment u/s 153A. It observed that whereas only the undisclosed income found during the course of search was required to be assessed under the block assessment proceedings and the regular assessment proceedings were preserved, there is only one assessment of total disclosed or undisclosed income in respect of each of the six assessment years under section 153A. Once again, this issue came to be decided similarly by the Hon'ble Allahabad jurisdictional High Court in CIT & Ors. vs. Kesarwani Zarda Bhandar Sahson & Ors. (2016) 97 CCH 0377 (All HC). The Hon'ble Kerala High Court in E.N. Gopakumar vs. CIT (2016) 390 ITR 131 (Ker) was confronted with the similar issue in which the assessee relied on the judgments favouring it including Kabul Chawla (supra) and Continental Warehousing Corporation (supra). The Hon'ble High Court preferred to go with the view against the assessee.

7.5. On going through the above position, it is lucid that there are two schools of thought on this issue. Por una parte, the view of the Hon'ble jurisdictional High Court and some other Hon'ble High Courts in favaour of the Revenue is that the scope of the unabated (already completed) assessments u/s 153A of the Act is not confined only to the incriminating material found during the course of search but also to the already declared particulars; por otra parte some other High Courts including the Hon'ble Delhi High Court have canvassed a view in favour of the assessee by holding that the completed assessments can be interfered with by the AO while making the assessment under Section 153A only on the basis of some incriminating material unearthed during the course of search. It is axiomatic as is fortified by Article 227 of the Constitution of India that the law declared by a jurisdictional High Court is binding on all the subordinate Courts and authorities or Tribunal functioning under its superintendence throughout the territories in relation to which it exercises jurisdiction. It is simple and plain that when discordant views are rendered by different High Courts, an inferior authority under one of such High Courts is bound to follow its jurisdictional High Court. Howsoever appealing or convincing the other view may appear, but in the judicial hierarchy, such a view has to make a place for the view of the jurisdictional High Court. It is only for the Hon'ble Supreme Court to take a final call on the view of the jurisdictional High Court. Until that is done, the same remains binding on all the authorities under the

jurisdiction of the High Court. Any contrary course of action of suo motu disregarding the view of the jurisdictional High Court destroys the fabric of judicial discipline leading to chaos.

7.6. At this occasion, it is pertinent to mention that the undersigned authored the Delhi Tribunal order in Kabul Chawla [since reported at (2014) 151 ITD 0055 (Delhi)], which got approval of the Hon'ble Delhi High Court supra. Later on, similar issue came up for consideration before the undersigned in a Third member case in HBN Dairies & Allied Ltd. vs. ACIT (2018) 195 TTJ 0969 (Del) (TM). The issue was again decided in favour of the assessee. But, in view of the fact that the Hon'ble jurisdictional Allahabad High Court has decided this issue in favour of the Revenue, there is no question of proceeding with any contrary view, which has to bow before that of the Hon'ble jurisdictional High Court.

7.7. The principle of following a view in favour of the assessee when contrary views are available, applies to the authorities acting under a neutral High Court, namely, which has not expressed any opinion – for or against - on that point. Once the jurisdictional High Court decides a particular issue in a particular manner, that manner has to be mandatorily followed by all the authorities acting under its jurisdiction. In that view of the matter, I am bound to go with the view taken by the Hon'ble jurisdictional High Court.

7.8. The ld. AR contended that the judgment in Rajesh Kumar Arora (supra) need not be followed for two reasons viz., first, the ratio of the decision is not applicable to the facts of the case and second, the Hon'ble Supreme Court has overruled it by upholding the contrary view of the Hon'ble Delhi High Court in the case of Meeta Gutgutia (supra).

7.9. The first raison d'etre was elaborated by stating that the proposition laid down in Rajesh Kumar Arora (supra) is that the AO has power to reassess the return of income of assessee not only for the undisclosed income which was found during the course of search but also the income with regard to the material that was already available on record. Relying on the judgment of Hon'ble Bombay High Court in the case of CIT vs. Jet Airways (I) Ltd. (2011) 331 ITR 236 (Bom), the ld. AR contended that the existence of some undisclosed income emanating from the incriminating material is a pre-requisite for assessing further income w.r.t. the material already available on record. If no addition on account of any undisclosed income is made, the AO would be debarred from making any addition on the basis of material already on record. It was submitted that since the assessee had already declared the creditor of Rs.2.50 crore in its Balance Sheet and no addition on the basis of any incriminating material was made by the AO, there was no scope left for making the addition even if the ratio in Rajesh Kumar Arora (supra) was followed.

7.10. The argument of ld. AR is primarily based on the judgment in Jet Airways (supra), in which the Hon'ble Bombay High Court held that the AO may assess or re-assess the income u/s 147 of the Act in respect of any issue which comes to his notice subsequently in the course of proceedings though the reasons for such issue were not included in the notice but where the alleged escaped income that formed the basis of reasons for re-assessment ceased to exist, it was not open to independently assess some other income. The Hon'ble High Court in that case was interpreting section 147, which provides that: "If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of section 148 to 153, assess or

re-assess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of proceedings". It is, therefore, overt that the use of the words `and also' in the language of section 147 categorically makes the existence of an income arising out of reasons for re-assessment as a sine qua non for including any other income which comes to the notice of the AO during the course of reassessment proceedings. The important point to accentuate is that a judgment is not interpreted like a legal provision. Each and every word used in a provision carries meaning and has to be brought to its logical conclusion. On the other hand, what is important or has a binding force in a judgment is its ratio decidendi and not any orbiter dicta. The ratio decidendi of a judgment is an expression of opinion by the Court on the question raised before it for consideration and decision. On the other hand, certain passing remarks made by a Court while answering such question are orbiter dicta, which carry only persuasive value rather than the binding force.

7.11. Now I turn to the judgment in Rajesh Kumar Arora (supra) for finding out its ratio. During the course of assessment proceedings u/s 153A in that case, the AO found that a gift was received by the minor children from various persons which was a sham transaction and the assessee failed to prove the genuineness of this gift. That was the only reason with the AO to make the addition while completing assessment u/s 153A. The assessee contended before the higher authorities that the transaction of gift was duly recorded. The Tribunal deleted the addition on the ground that the subject matter of the addition was a gift received by the assessee and no incriminating material in relation to such gift was found during the course of search. The Revenue raised the following substantial questions of law as arising from the Tribunal order:

> *"1. Whether ITAT has erred in law in dismissing the appeal of the department and holding that no addition can be made for gift in assessment completed under section 153A unless some incriminating material was found during the course of search, thus ignoring the provisions of law as contained in section 153A which required the Assessing Officer to assess or reassess the total income as defined in section 2(45) of the Income Tax Act, 1961.*
>
> *2. Whether the order of the ITAT is perverse in as much as it has ignored the provisions of law as contained in proviso (b) of sub-sec.(1) of section 153A which required the Assessing Officer to assess or reassess the total income."*

7.12. It is thus, clear that the only subject matter of addition by the AO u/s 153A of the Act in that case was the transaction of gift, which had originally been declared but the assessee could not prove its genuineness in the proceedings u/s 153A and further no incriminating material was found during the course of search. It was in that backdrop that the Hon'ble High Court, deciding the issue in favour of the Revenue, answered the question by holding that the ITAT erred in holding that no addition could be made for gift in the assessment completed u/s 153A because no incriminating material was found during the course of search. It held that `we are of the opinion that in cases where the assessment or reassessment proceedings have already been completed and assessment orders have been passed, which were subsisting when the search was made, the Assessing Officer would be competent to reopen the assessment proceeding already made and determine the total income of the assessee. The Assessing Officer, while exercising the power under Section 153A of the Act, would make assessment and compute the total income of the assessee including the undisclosed income, notwithstanding the

assessee had filed the return before the date of search which stood processed under Section 143(1)(a) of the Act.' In view of the fact that the only issue for consideration by the Hon'ble High Court was the sustainability or otherwise of an addition in the absence of any incriminating material found during the course of search, its ratio decidendi is that `in cases where the assessment … have already been completed…, which were subsisting when the search was made, the Assessing Officer would be competent to reopen the assessment proceeding already made and determine the total income of the assessee'. The reference in the last line to make assessment and compute the total income of the assessee including the undisclosed income, is obiter dictum. It is more so when the setting of this observation is seen after discussion in the earlier para about the block assessment under Chapter XIV-B which talks of assessing the undisclosed income only vis-à-vis the assessment u/s 153A providing for making assessment for both the disclosed as well as undisclosed income. I, therefore, hold the argument advanced by ld. AR on this score as sans merit.

7.13. The second contention put forth by the ld. AR was that the decision of the Hon'ble jurisdictional High Court on the point stands overruled by the judgment of Hon'ble Supreme Court in Pr.CIT vs. Meeta Gutgutia (2018) 257 Taxman 441 (SC). I find it relevant to mention that the Hon'ble Delhi High Court in Meeta Gutgutia (supra) followed the view taken in Kabul Chawla (supra). The Revenue preferred Special Leave Petition before the Hon'ble Supreme Court, which came to be dismissed.

7.14. Article 136 of the Constitution of India with the marginal note "Special leave to appeal by the Hon'ble Supreme Court" provides that: `(1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.' This Article deals with the discretion of the Hon'ble Supreme Court in granting special leave to appeal from any judgment. Once a SLP is filed, the Hon'ble Supreme Court may either grant the special leave to appeal or dismiss it. In case, the special leave to file an appeal is granted, then the SLP gets converted into an appeal. On the other hand, the dismissal of a SLP can be either without assigning any reasons or with reasons. If no reasons are adduced by the Hon'ble Supreme Court and the SLP is dismissed, it does not amount to any declaration of law by the Hon'ble Supreme Court in terms of Article 141 of the Constitution having binding force on all Courts within territory of India nor does the judgment impugned before it gets merged with the order dismissing the SLP. This is not a dismissal of the appeal, but of the leave to file appeal. If the SLP is dismissed by means of reasoned order, then it is a declaration of law by the Hon'ble Supreme Court having binding force under Article 141 of Constitution but will still not attract the doctrine of merger. In Kunhayammed & Ors. vs. State of Kerala & Anr. (2000) 245 ITR 360 (SC), the Forest Tribunal considering the provisions of Kerala Private Forests (Vesting and Assignment) Act, 1971 held that the land of the appellants therein did not vest in the Government. The State of Kerala approached the Hon'ble High Court through an appeal which was dismissed. The State of Kerala filed a petition for special leave under Article 136 of the Constitution which was dismissed by an order reading "Special Leave Petition is dismissed on merits". The State of Kerala filed an application for Review before the Hon'ble Kerala High Court seeking Review of its earlier order. A preliminary objection was raised before the Hon'ble High Court as to the maintainability of the Review petition because of the dismissal of the SLP against it. The Hon'ble High Court overruled the preliminary objection. When the matter came up for hearing before the Hon'ble Supreme Court, it held that mere rejection of SLP by a non-speaking order does not take away the jurisdiction of the High Court or the Tribunal to review its own order. Almost identical issue was raised before the Hon'ble

Supreme Court in Bakshi Dev Raj & Anr. vs. Sudheer Kumar (Civil Appeal Nos.4641-4642 of 2009). Vide judgment dated 04.08.2011, the Hon'ble Supreme Court has taken a similar view as in Kunhayanned & Ors. (supra) by specifically holding that the expression `Dismissed on merits' used while dismissing the SLP is equivalent of dismissal of SLP by a non-speaking order. More recently, a Larger Bench of the Hon'ble Supreme Court in Khoday Distilleries Ltd. and Ors. Vs. Sri Mahadeshwara SSK Ltd. (Civil Appeal No.2432/2019 arising out of SLP No.490/2012) has reiterated similar view vide its judgment dated 01.03.2019. On an overview of the legal position emanating from the above judgments, it becomes sparklingly clear that the dismissal of a SLP with remarks, such as, "Special Leave Petition is dismissed on merits" or "Dismissed on merits" does neither amount of any declaration of law by the Hon'ble Supreme Court magnetizing Article 141 of the Constitution nor lead to the merger of the judgment impugned in the special leave petition.

7.15. I advert to the decision in Meeta Gutgutia (supra), which is the trump card of the ld. AR for bolstering the proposition that the view of the Hon'ble jurisdictional High Court in Rajesh Kumar Arora (supra) has been overruled by the Hon'ble Summit Court. The same has been reported as Pr.CIT vs. Meeta Gutgutia (2018) 257 Taxman 441 (SC) with its full text reading as under:

"1. Delay condoned.
2. We do not find any merit in this petition. The special leave petition is, accordingly, dismissed.
3. Pending application stands disposed of."

7.16. It can be easily seen that the Hon'ble Supreme Court has simply dismissed the SLP filed by the Revenue finding no merit in the same. It is not a case of the Hon'ble Supreme Court either considering and deciding the issue on merits in an appeal or giving reasons at the stage of dismissal of SLP. Applying the principles laid down by the Hon'ble Supreme Court in the three cases discussed above, there remains no doubt whatsoever that the dismissal of SLP in Meeta Gutgutia (supra) with the remarks - `We do not find any merit in this petition. The special leave petition is, accordingly, dismissed' - are no different from the remarks "Special Leave Petition is dismissed on merits" or "Dismissed on merits", which have been held by the Hon'ble Apex Court as dismissal of SLP without reasons, not leading to any declaration of law by the Hon'ble Supreme Court. In the hue of the above discussion, the judgment of the Hon'ble Delhi High Court in Meeta Gutgutia (supra) cannot be construed to have either been affirmed by the Hon'ble Supreme Court or merged in the order dismissing the SLP against it. This judgment, ergo, ranks pari passu with Kabul Chawla (supra) and other judgments of Hon'ble High Courts deciding the issue in favour of assessee, without getting elevated to the status of that of the Hon'ble Supreme Court. The sequitur is that the ratio decidendi laid down by the Hon'ble jurisdictional High Court in Rajesh Kumar Arora (supra) still holds the field and is binding on all the authorities under the jurisdiction of the Hon'ble Allahabad High Court. In view of the foregoing discussion and respectfully following the binding precedent, I agree with the learned AM that there is no legal impediment in making an addition, otherwise than on the basis of any incriminating material found during search, in an assessment u/s 153A for a year whose assessment was not pending on the date of search."

Respectfully, following the aforesaid decision, we decide effective ground number 2 against the assessee and in favour of Revenue. We order accordingly.

9.5 Vide ground number 3 and 4 , the assessee has challenged on merits, the addition of Rs. 6,26,650/- made by the AO vide assessment order dated 30.03.2013 passed u/s 153A read with Section 143(3) of the 1961 Act, on the grounds that similar addition was made by the AO while passing original assessment order dated 21.12.2010 u/s 143(3) of the 1961 Act, which addition has been accepted by the assessee and had attained finality. It is claimed that this is the double addition. It is also claimed that assessment framed by the AO u/s 143(3), dated 21.12.2010 was an unabated assessment, as it was framed by the AO prior to initiation of search and seizure operations conducted by Revenue against the assessee u/s 132(1), on 03.02.2011. We have observed that Section 153A mandates to assess or reassess the total income of the assessee of six assessment year immediately preceding the assessment year relevant to the previous year in which search is conducted. Thus, pursuant to searc , it is incumbent on the AO to frame assessment for all the six assessment year immediately preceding the assessment year relevant to the previous year in which search was conducted, and assess or reassess the total income of the assessee which shall include both the disclosed income and undisclosed income detected due to search u/s 132(1). In case of abated assessment, the total income is to be assessed , while in case of unabated income , the total income is to be reassessed. The Section 153A starts with non obstante clause and states that notwithstanding anything contained in Section 139, Section 147, Section 151 and Section 153 , the AO has to assess or reassess the income of the assessee for all the six assessment year immediately preceding the assessment year relevant to the previous year in which search is conducted. In the instant case, the AO has only reiterated the additions of Rs. 6,26,650/- in assessment order dated 30.03.2013 passed by the AO u/s 153A read with Section 143(3) of the 1961 Act , as this addition of Rs. 6,26,650/ -was made by the AO while framing original assessment passed by the AO vide assessment order dated 21.12.2010 u/s 143(3) of the 1961 Act. The assessee has claimed that it has accepted the addition of

Rs. 6,26,650/- made by the AO while framing original assessment order dated 21.12.2010 u/s 143(3) , as no appeal was filed by the assessee before ld. CIT(A) against the assessment order dated 21.12.2010 passed by the AO u/s 143(3). The search was conducted by Revenue u/s 132(1) , on 03.02.2011, which is post assessment order dated 21.12.2010 passed u/s 143(3) by the AO. The assessee has filed return of income on 11.10.2012, consequent to search u/s 132(1) . The assessee was required to disclose the total income for the impugned assessment, in the said return of income filed on 11.10.2012 which shall include both the disclosed income as well income detected due to search conducted by Revenue u/s 132(1), but the assessee failed to include this income of Rs. 6,26,650/- in the said return of income filed on 11.10.2012 in pursuant to search, more so the aforesaid additions as was made in original assessment order passed by AO u/s 143(3), dated 21.12.2010 were accepted by the assessee as no appeal was filed by the assessee before ld. CIT(A) against the said additions made by AO vide assessment order originally framed u/s 143(3), dated 21.10.2010, and hence the assessment order dated 21.12.2010 attained finality. Thus, the assessee erred in not including the aforesaid income of Rs. 6,26,650/- in the return of income filed on 11.10.2012 in pursuant to search conducted by Revenue u/s 132(1). The AO has now included the said income of Rs. 6,26,650/- in the assessed income vide assessment order dated 30.03.2013 passed u/s 153A read with Section 143(3) of the 1961 Act. There is no duplication or double addition perse made by the AO, as the fault lies with the assessee in not including the said accepted income of Rs. 6,26,650/- in the return of income filed on 11.10.2012. Of course, the assessee will be entitled for credit of all taxes paid on regular assessment , if any , pursuant to these accepted additions of Rs. 6,26,650/- made by the AO vide assessment order dated 21.12.2010 passed u/s 143(3), and hence no double jeopardy is been done to the assessee,as is alleged by the assessee. Thus, we hold that contentions of the

assessee lacks merit and are hereby dismissed. We decide ground number 3 and 4 against the assessee and in favour of Revenue. We order accordingly.

9.6 The Ground number 5 is consequential in nature and does not require separate adjudication, and hence stood dismissed. We order accordingly.

10. In the result, appeal filed by the assessee in ITA no. 141/Alld/2017 for ay: 2008-09 stood dismissed

Order pronounced on 19/05/2022 at Allahabad in open Court.

Sd/-	***Sd/-***
[VIJAY PAL RAO]	[RAMIT KOCHAR]
JUDICIAL MEMBER	ACCOUNTANT MEMBER

DATED: 19/05/2022

Kdazmi
Copy forwarded to:

1. Appellant –Subhash Stone Industries Private Limited(Formerly known as Rajluxmi Stone Crushers Private Limited), Ambika Vihar, Haldwani, Nainital-263139, Uttarakhand

2. Respondent –The Deputy Commissioner of Income Tax, Central Circle, Allahabad, U.P.

3. The ld. CIT(A) –III, Lucknow, U.P./ The ld. CIT(A), Aayakar Bhawan, Civil Lines, Allahabad, U.P.

4. The ld. CIT, Allahabad, U.P.

5. The ld. CIT-DR, ITAT, Allahabad, U.P.

By Order