

THE INCOME TAX APPELLATE TRIBUNAL
“B” Bench, Mumbai
Shri B.R. Baskaran (AM) & Smt. Kavitha Rajagopal (JM)

I.T.A. No. 1039/Mum/2021 (A.Y. 2012-13)
I.T.A. No. 1195/Mum/2021 (A.Y. 2013-14)
I.T.A. No. 1196/Mum/2021 (A.Y. 2014-15)

M/s. Bazigar Trading Pvt. Ltd. Office No. 20, 8 th Floor 3 Navjivan Commercial Premises Co-operative Society Ltd., lamington Road Mumbai-400 008. PAN : AABCB3052B (Appellant)	Vs.	DCIT, Central Circle-3(1) 19 th Floor Air India Building Nariman Point Mumbai-400 021. (Respondent)
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I.T.A. No. 1266/Mum/2021 (A.Y. 2012-13)
I.T.A. No. 1294/Mum/2021 (A.Y. 2013-14)
I.T.A. No. 1267/Mum/2021 (A.Y. 2014-15)
I.T.A. No. 1268/Mum/2021 (A.Y. 2015-16)

M/s. Burlington Finance Ltd. 16, Netaji Subhas Road 4 th Floor, B.B.D Bag Kolkata-700 001. PAN : AABCB2575P	Vs.	DCIT, Central Circle-3(1) 19 th Floor Air India Building Nariman Point Mumbai-400 021.
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I.T.A. No. 1309/Mum/2021 (A.Y. 2012-13)
I.T.A. No. 1451/Mum/2021 (A.Y. 2013-14)
I.T.A. No. 1344/Mum/2021 (A.Y. 2014-15)
I.T.A. No. 1327/Mum/2021 (A.Y. 2015-16)

M/s. Symphony Merchants Pvt. Ltd. Office No. 21, 8 th Floor 3 Navjivan Commercial Co-operative Society Ltd. Lamington Road Mumbai-400 008. PAN : AADCS5411K	Vs.	DCIT, Central Circle-3(1) 19 th Floor Air India Building Nariman Point Mumbai-400 021.
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I.T.A. No. 1434/Mum/2021 (A.Y. 2012-13)
 I.T.A. No. 1435/Mum/2021 (A.Y. 2013-14)
 I.T.A. No. 1436/Mum/2021 (A.Y. 2014-15)
 I.T.A. No. 1437/Mum/2021 (A.Y. 2015-16)

M/s. Yashodham Merchants Pvt. Ltd. Office No. 20, 8 th Floor 3 Navjivan Commercial Co-operative Society Ltd. Lamington Road Mumbai-400 008. PAN : AAACY1075E	Vs.	DCIT, Central Circle-3(1) 19 th Floor Air India Building Nariman Point Mumbai-400 021.
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I.T.A. No. 1579/Mum/2021 (A.Y. 2013-14)

M/s. Kalyan Vyapaar Pvt. Ltd. Office No. 21, 8 th Floor 3 Navjivan Commercial Co-operative Society Ltd. Lamington Road Mumbai-400 008. PAN : AABCK1377N	Vs.	DCIT, Central Circle-3(1) 19 th Floor Air India Building Nariman Point Mumbai-400 021.
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I.T.A. No. 2084/Mum/2021 (A.Y. 2012-13)
 I.T.A. No. 1649/Mum/2021 (A.Y. 2013-14)
 I.T.A. No. 1729/Mum/2021 (A.Y. 2015-16)

M/s. Manimudra Vincom Pvt. Ltd. 16, Nitaji Subhas Road 4 th Floor, Kolkata West Bengal - 700 001. PAN : AADCM4316K	Vs.	DCIT, Central Circle-3(1) 19 th Floor Air India Building Nariman Point Mumbai-400 021.
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I.T.A. No. 2015/Mum/2021 (A.Y. 2014-15)
 I.T.A. No. 2016/Mum/2021 (A.Y. 2015-16)

M/s. August Trading Pvt. Ltd. Office No. 22, 8 th Floor Building No. 3, Navjivan Commercial Premises Co-operative Society Ltd. Lamington Road	Vs.	DCIT, Central Circle-3(1) 19 th Floor Air India Building Nariman Point Mumbai-400 021.
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Mumbai-400 008.		
PAN : AACCA1901B		

I.T.A. No. 1728/Mum/2021 (A.Y. 2012-13)
I.T.A. No. 1769/Mum/2021 (A.Y. 2013-14)

M/s. Amrit Sales Promotion Pvt. Ltd. Office No. 21, 8 th Floor Building No. 3, Navjivan Commercial Premises Co-operative Society Ltd. Lamington Road Mumbai-400 008. PAN : AACCA3220D	Vs.	DCIT, Central Circle-3(1) 19 th Floor Air India Building Nariman Point Mumbai-400 021.
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Assessee by	Shri Dixit Jain, CA
Department by	Dr. Mahesh Akhade
Date of Hearing	05.07.2022
Date of Pronouncement	26.08.2022

ORDER

Per Bench :-

All these appeals were heard together, since common issues are involved in all these appeals and they relate to the assessment years mentioned in the cause title. All these appeals are directed against the orders passed by Ld CIT(A) in the respective hands of the assessee herein for the relevant years.

2. Besides the grounds urged on merits, all these assessee have raised a legal ground, which is common in all these appeals. For the sake of convenience, we extract below the legal issue urged by these assessee:-

“On the facts and in the circumstances of the case and in law the Hon’ble CIT(A) erred in not accepting the claim of the assessee that assessment order passed u/s 153A r.w.s. 143(3) of the IT Act is bad in law when there was no pending assessment proceedings as on the date of search action u/s 132 of the Act and also for the reason that there are no incriminating

material being found or seized pursuant to search action, no addition can be made in respect of unabated year.”

Since the above said legal issue goes to the root of the matters, we heard the parties on the legal issue urged by all these assessees in the years under consideration.

3. The facts relating to all the legal issue are stated in brief. All the assessees herein belong to same group. A search and seizure action u/s 132 of the Act was conducted in the hands of all these assessees on 21.08.2017. As a consequence thereto, the present assessments have been completed by the assessing officer u/s 143(3) r.w.s 153A of the Act. All these assessees had declared capital gains/capital losses from purchase and sale of shares of certain companies in all the years under consideration, in the returns of income filed by them respectively for the years under consideration. It is pertinent to note that all the returns have been filed much prior to the date of search. The said returns of income were either processed u/s 143(1) of the Act or the assessment orders have been passed u/s 143(3) of the Act prior to the date of search. In some cases, the time limit for issuing notice u/s 143(2) of the Act has expired. These details have been tabulated infra. Accordingly, all the assessment years under consideration in the hands of all the assessees herein fall under the category of “unabated assessment”.

4. Consequent to the search operations, the AO initiated assessment proceedings u/s 153A of the Act. The AO noticed that all the shares purchased and sold by these assessees have been identified as “penny stocks” by the investigation wing of the Income tax department. It is the allegation of the revenue that some people have manipulated the prices of penny stocks to take it to unrealistic levels of high/low prices, so that the capital gains/capital losses are generated by certain investors to suit their requirement. Hence, the AO took the view that the capital gains/capital losses declared by the assessee from sale of penny stocks are bogus in

nature. Accordingly, the AO assessed the capital gains/losses as income of the assesseees in the respective years. Since these assesseees have made investments in shares, the AO also made disallowance u/s 14A of the Act in all these years in the hands of these assesseees herein. It is pertinent to note that the search officials did not unearth any incriminating material warranting addition of capital gains/capital losses or disallowance u/s 14A of the Act.

5. Before Ld CIT(A), these assesseees contended the search officials did not unearth any incriminating material during the course of search relating to the capital loss/capital gains declared by them nor did not they unearth any material warranting disallowance u/s 14A of the Act. It was submitted that the capital loss/capital gains have been declared by these assesseees in the original returns of income filed much prior to the date of search. It was submitted that these assessments do not abate on account of search action as per the provisions of sec.153A of the Act, i.e., these assessments fall under the category of “unabated/finalized/completed” assessments. Accordingly, it was contended that the AO could not have made the impugned additions without there being any incriminating material found during the course of search in the case of “unabated assessment years”. However, the Ld CIT(A) rejected these contentions with the following observations:-

5.6 The findings of a search may lead to detection of money, bullion, jewellery or other valuable article or thing which has not been disclosed prior to search action. If these assets belong to the searched person, he is to be assessed under section 153A. If these belong to a person who has not been searched, he is to be assessed under section 153C of the Act. The findings of search may also lead to gathering off information or detection of such books of account or documents, seized on requisitioned which impact the determination of total income of an assessee, meaning thereby that these evidences discovered during the search action indicate suppressions of income, suppression of information about the character of a receipt/suppression of tax by a person, whether searched or not. Loosely, these items are known as “Incriminating material/evidence” being information which was earlier not known prior to the search action and having come to light during the search action, has the potential of

affecting determination of income/tax of the persons affected by such information. If the information pertains to searched person, he is assessee under section 153A and if the information is in respect of a party not covered by search, his case is covered under section 153C.

5.7 While the term "Incriminating material/evidence" has neither been used in section 153 nor has been defined in the section, the Act as well as various judicial decisions provide a hint. Such incriminating material/evidence' could be any books of account or documents or any information unearthed during the course of search action having a bearing on the determination of the total income of a person. Clearly, such incriminating material has to be either the books of account or document (seized or requisitioned) itself or any information gathered during search or a statement recorded during the search action which has the potential of affecting the determination of total income of the party to which such information relates. This would also include information which evidences falsity in the books of account of an assessee. Hence, if a search is conducted to investigate certain allegations relating to falsity in the books of an assessee and these allegations are found to be correct during search and based on the various documents/evidences/statements collected during the search action, specific information or finding is generated on account of inquiries conducted during search process which has a bearing on the determination of total income of an assessee, the AO would be within his power to proceed under section 153A of the Act against such person on the basis of such finding which would also constitute incriminating material.

5.8 Hence, if during the course of search action, elaborate and thorough investigations are carried out to verify/examine modus operandi of an illegal scheme orchestrated by an assessee to inflate expenses, based on ascertainment of various facts, examination of seized books, recording of statements and analysis of documents of a number of entities in coordination with each other, certain information is generated that (1) the scheme violates the provisions of Income Tax Act and that (ii) such scheme has assisted various parties in inflating the expenses thus affecting determination of their total income, then, this information is clearly covered by section 153A of the Act. If a search is mounted to examine existence of an entity, the very fact that no evidence whatsoever is found of its existence during the search action would be an incriminating material against the person.

The Ld CIT(A) also took support of following judicial rulings in support of his views:-

- (a) N.K. Industries Ltd (2016)(72 taxmann.com 289)(Guj)
- (b) N.K. Proteins (2017)(84 taxmann.com 195)(SC)
- (c) P.R. Metrani vs. CIT (2006)(287 ITR 209)
- (d) Nau Nidh Overseas (P) Ltd (2017)(88 taxmann.com 665)(Delhi)

- (e) Rameshbhai Jivraj Desai (2020)(120 taxmann.com 82)(Guj)
- (f) Gurinder Singh Bawa (2017)(79 taxmann.com 398)(Bom)

6. The Ld CIT(A) finally concluded as under on this legal issue:-

“5.14 In the case of the assessee, there is no doubt that the appellant has sufficient transactions with various entities which have been found to be predominantly engages in providing accommodation entries. The AO/Investigation Unit have conducted sufficient inquiries and there is substantial material available to demonstrate the above findings to demonstrate the falsity in appellant's accounts. These documents statements and the overall findings of the search action are sufficient incriminating material to proceed u/s 153A of the Act in case of the assessee. The assessee in incorrect in trying to claim that there are no incriminating materials against the assessee for the assessment year under reference. Hence, the additional ground or appeal taken by the assessee is ruled against the assessee and is dismissed.”

Accordingly, the Ld CIT(A) dismissed the above said legal ground urged by these assesseees in all the years under consideration. On merits also, the Ld CIT(A) confirmed the orders so passed by the AO in the years under consideration in the hands of all these assesseees. Hence, these assesseees are aggrieved by the above said decision of Ld CIT(A).

7. The Ld A.R submitted that the Ld CIT(A) was not justified in not following the binding decision rendered by Hon'ble jurisdictional Bombay High Court in the case of Continental Corporation (Nhava Sheva) Ltd (2015)(58 taxmann.com 78)(Bom) and Gurinder Singh Bawa (2017)(79 taxmann.com 398)(Bom), wherein the Hon'ble Bombay High Court held that the unabated assessments (finalized assessments) cannot be touched by resorting to the provisions of sec.153A of the Act unless some incriminating materials relating to the said assessments, which are contrary to and/or not disclosed during regular assessment proceedings, are found. The Ld A.R submitted that the capital gains/capital losses have been duly declared in the returns of income filed by the assesseees herein much prior to the initiation of search action and the said returns of income have been either processed u/s 143(1) of the Act or accepted in the assessment orders passed

u/s 143(3) of the Act. In respect of the returns of income processed u/s. 143(1) of the Act, the time limit for issuing notice u/s 143(2) of the Act has also expired. Hence all the assessment years under consideration in the hands of all the assessee herein fall under the category of “unabated assessment/ finalized assessment/completed assessment” within the meaning of sec.153A of the Act. He submitted that the search officials did not find any incriminating documents against the capital gains/capital losses declared by the assessee or warranting any disallowance u/s 14A of the Act, during the course of search action. Accordingly, by placing reliance on the above said decisions rendered by Hon’ble Bombay High Court, the Ld A.R contended that the AO could not have examined the capital gains/losses declared by the assessee nor he could have made any disallowance u/s. 14A of the Act.

8. The Ld D.R, on the contrary, submitted that the investigation wing of the Income tax department has identified large scale of rigging in the prices of penny stocks. The prices of all these penny stocks were manipulated and the rise/fall of prices was not in tune with normal market trend of movement of prices. Further, the prices of these shares are not commensurate with the size of its operations or net worth. It was noticed that certain persons have purchased and sold these penny stocks in order to generate capital gains/capital losses to suit their requirement. In this process, the unaccounted money was brought into the books of accounts. It was identified that the assessee herein have dealt in the penny stocks and have generated capital losses/capital gains. Hence the search operations were carried out in the hands of the assessee and it was found out that these assessee have declared capital losses/capital gains on sale of penny stocks. He submitted that the Ld CIT(A) has rightly observed that the entries made in the books of account itself should be considered as incriminating in nature. Since the search has been conducted in the hands of these assessee in order to examine their dealing in penny stocks, the said state of affairs found during

the course of search shall by itself constitute incriminating material. Accordingly, the Ld D.R submitted that the AO has rightly disallowed the claim of capital loss/capital gains in the hands of the assessee. Since these assesseees have not made disallowance u/s 14A of the Act, the AO has rightly computed disallowance u/s 14A of the Act also. Accordingly, the Ld D.R submitted that the Ld CIT(A) was justified in rejecting the above said legal ground of the assessee.

9. In the rejoinder, the Ld A.R submitted that the additions cannot be made on the basis of suspicions. He submitted that the assessee is placing reliance on the binding decision rendered by Hon'ble Bombay High Court with regard to the scope of assessment u/s 153A of the Act in respect of unabated assessments. He submitted that a particular state of affairs cannot lead to any incriminating material, since the said state of affairs is a presumption entertained by the AO rather than on certain materials. He submitted that the capital gains/capital losses declared by these assesseees are based on actual transactions of purchase and sale of shares through stock exchanges and further these transactions are duly supported by the evidences, which were not found to be bogus. Accordingly, he submitted that the suspicion, surmises and conjectures cannot replace actual facts. The Ld A.R further submitted that the Ld CIT(A) has not followed the above said binding decisions rendered by Hon'ble Bombay High Court and proceeded to uphold the validity of the additions made by the AO by placing his reliance on certain case laws. He submitted that those decisions have been rendered on different contexts/different set of facts and hence those decisions are not applicable to the facts of the present case. He submitted that the co-ordinate bench of Tribunal, on identical set of facts, have decided an identical legal issue in favour of the assessee in the case of Smt Anjali Pandit vs. ACIT (ITA No.3028 to 3032/Mum/2011 & others), by its order dated 17.11.2016. He further submitted that the Ld CIT(A) has not followed the binding decisions rendered by Hon'ble jurisdictional Bombay High Court.

10. We have heard rival contentions and perused the record. We noticed earlier that the revenue has carried out search and seizure operations in the hands of these assesseees on 21-08-2017. These assesseees have furnished the details relating to dates of filing of returns of income and the details of assessments in order to substantiate their claim that all the assessment years under consideration fall under the category of “unabated assessments”. They have been tabulated below:-

(A) YASHODHAM MERCHANTS PVT LTD:-

Assessment year	Date of filing return of income	Time limit for issuing notice u/s 143(2) expired on	Date of intimation u/s 143(1) of the Act	Date of assessment order u/s 143(3)
2012-13	27-09-2012	30-09-2013		09-03-2015
2013-14	18-09-2013	30-09-2014		30-03-2016
2014-15	25-11-2014	30-09-2015		28-12-2016
2015-16	26-09-2015	30-09-2016	28-07-2016	

(B) SYMPHONY MERCHANTS PVT LTD:-

Assessment year	Date of filing return of income	Time limit for issuing notice u/s 143(2) expired on	Date of intimation u/s 143(1) of the Act	Date of assessment order u/s 143(3)
2012-13	25-09-2012	30-09-2013	10-01-2014	
2013-14	20-09-2013	30-09-2014	26-09-2014	
2014-15	26-09-2014	30-09-2015		22-12-2016
2015-16	29-09-2015	30-09-2016		08-12-2017

(C) MANIMUDRA VINCOM PVT LTD:-

Assessment year	Date of filing return of income	Time limit for issuing notice u/s 143(2) expired on	Date of intimation u/s 143(1) of the Act	Date of assessment order u/s 143(3)

2012-13	28-09-2012	30-09-2013		27-02-2015
2013-14	25-09-2013	30-09-2014		30-03-2016
2015-16	24-09-2015	30-09-2016	29-04-2016	

(D) KALYAN VYAPAAR PVT LTD:-

Assessment year	Date of filing return of income	Time limit for issuing notice u/s 143(2) expired on	Date of intimation u/s 143(1) of the Act	Date of assessment order u/s 143(3)
2013-14	14-09-2013	30-09-2014		10-02-2016

(E) BURLINGTON FINANCE LTD:-

Assessment year	Date of filing return of income	Time limit for issuing notice u/s 143(2) expired on	Date of intimation u/s 143(1) of the Act	Date of assessment order u/s 143(3)
2012-13	23-09-2012	30-09-2013		03-03-2015
2013-14	17-09-2013	30-09-2014		22-03-2016
2014-15	15-11-2014	30-09-2015		28-12-2016
2015-16	24-09-2015	30-09-2016	23-05-2016	

(F) BAZIGAR TRADING PVT LTD:-

Assessment year	Date of filing return of income	Time limit for issuing notice u/s 143(2) expired on	Date of intimation u/s 143(1) of the Act	Date of assessment order u/s 143(3)
2012-13	29-09-2012	30-09-2013		09-03-2015
2013-14	30-09-2013	30-09-2014		30-03-2016
2014-15	25-11-2014	30-09-2015		28-12-2016

(G) AUGUST TRADING PVT LTD:-

Assessment year	Date of filing return of	Time limit for issuing notice	Date of intimation	Date of assessment
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	income	u/s 143(2) expired on	u/s 143(1) of the Act	order u/s 143(3)
2014-15	30-09-2014	30-09-2015		26-12-2016
2015-16	25-09-2015	30-09-2016		21-12-2017

(H) AMRIT SALES PROMOTION PVT LTD:-

Assessment year	Date of filing return of income	Time limit for issuing notice u/s 143(2) expired on	Date of intimation u/s 143(1) of the Act	Date of assessment order u/s 143(3)
2012-13	24-09-2012	30-09-2013		13-03-2015
2013-14	12-09-2013	30-09-2014		02-03-2016

11. A close scrutiny of the above table would reveal that the returns of income filed by the assessee herein for the years under consideration have either been processed u/s 143(1) of the Act or assessed u/s 143(3) of the Act prior to the date of search, i.e., prior to 21.08.2017. In the cases where returns of income have been processed u/s 143(1), we notice that time limit for issuing notice u/s 143(2) has expired prior to the date of search. Hence, all these assessments would fall under the category of “unabated/finalized/completed” assessments, as contended by Ld A.R.

12. In two instances, viz., Symphony Merchants P Ltd for AY 2015-16 and August Trading Pvt Ltd for AY 2015-16, the assessment u/s 143(3) of the Act has been completed after the date of search, viz., on 08.12.2017 and 21.12.2017 respectively. Under the provisions of sec.153A of the Act, all the assessments pending as on the date of search shall abate and thereafter, those assessments have to necessarily be completed u/s 153A r.w.s 143(3) of the Act. Hence the AO could not have passed these two assessment orders and hence assessment orders so passed in respect of these two cases on 08.12.2017 and 21.12.2017 u/s 143(3) of the Act are illegal and should be considered as non-est in the eyes of law.

13. The contention of the assessee is that all these assessments under consideration shall not abate, since no assessment was pending on the date of search. It was further contended that in the cases of unabated/finalized/completed assessments, the AO could have interfered with the issues already concluded only if the search team has found any incriminating material during the course of warranting such interference. It is the submission of Ld A.R that the search officials did not unearth any incriminating material warranting interference with the capital gains/capital loss declared by these assesseees in all the years under consideration. In support of these legal contentions, the Ld A.R placed his reliance on the decision rendered by the jurisdictional Hon'ble Bombay High Court in the cases of Continental Corporation (Nhava Sheva) Ltd (supra) and Gurinder Singh Bawa (supra). He also submitted that the legal proposition interpreted by the jurisdictional High Court has been followed by the Mumbai bench of Tribunal in the case of Smt Anjali Pandit vs. ACIT (supra).

14. The provisions of sec.153A of the Act provide for issuing of notice u/s 153A of the Act for six assessment years immediately preceding the year of search and thereafter, the AO shall assess or reassess the total income for the above said six years. This section further provides that all pending assessment or re-assessment pending as on the date of search shall abate. Hence the assessments of the assessment years falling within the period of above said six years which are not pending, i.e., which have attained finality shall not abate. Assessments of such assessment years are called "unabated/completed/finalized" assessments. The question as to whether the AO is entitled to interfere with such kinds of unabated/completed/finalized assessments or not without there being any incriminating material found during the course of search, was examined by the Special bench of Tribunal in the case of All Cargo Logistics Ltd vs. DCIT (2012)(137 ITD 287)(Mum), wherein it was held that the AO could interfere with the unabated/completed/finalized assessments only if the incriminating

materials found during the course of search warrant such interference, meaning thereby, if the search action did not bring out any incriminating material, then the AO cannot disturb the completed assessments and he has to simply reiterate the earlier total income in the present assessment order.

15. The above said view expressed by the Special bench has since been upheld by Hon'ble Bombay High Court in the case of Continental Warehousing Corporation (Nhava Sheva) Ltd (supra). The relevant observations made by Hon'ble Bombay High Court in the above said case are extracted below:-

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 :

"48. 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.

49. 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 sub-section (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.

50. 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.

51. 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\(1\)](#).

52. 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](#).

53. 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.

54. It may be mentioned here that Ld. Counsel for All Cargo Global Logistics Ltd. was questioned about the scope of pending assessments as it was his contention that all six assessments are to be made, if necessary, on the basis of undisclosed income discovered in the course of search. He was specifically questioned about the jurisdiction of the AO to make original assessment along with assessment u/s 153A, merging into one. However he took an evasive view submitting that this question need not be decided in his case although the question of jurisdiction u/s 153A was vehemently pressed on account of which ground No.1 in the appeal for assessment year 2004-05 was admitted as additional ground. He also wanted the additional ground to be retained in case of any future contingency."

16. The view expressed by Hon'ble jurisdictional Bombay High Court in the case of Continental Warehousing Corporation (Nhava Sheva) Ltd (supra) was reiterated by the Hon'ble Bombay High Court in yet another case of Gurinder Singh Bawa (2017)(70 taxmann.com 398) as under:-

“5. On further appeal before the Tribunal, the assessee inter alia challenged the validity of the assessment made under Section 153A of the Act. This on account of the fact that no assessment in respect of the six assessment years were pending so as to have abated. The impugned order accepted the aforesaid submission of the respondent-assessee by inter alia placing reliance upon the decision of the Special Bench of the Tribunal in Al-Cargo Global Logistics Ltd. rendered on 6 July 2012. The Tribunal in the impugned order further held that no incriminating material was found during the course of the search. Thus the entire proceedings under Section 153A of the Act were without jurisdiction and therefore the addition made had to be deleted on the aforesaid ground. The impugned order also thereafter considered the issues on merits and on it also held in favour of the respondent-assessee.

6. Mr. Kotangale, the learned Counsel for the revenue very fairly states that the decision of the Special Bench of the Tribunal in Al-Cargo Global Logistics Ltd. was a subject matter of challenge before this Court as a part of the group of appeals disposed of as *CIT v. Continental Warehousing Corporation (Nhava Sheva) Ltd.* [\[2015\] 374 ITR 645/58 taxmann.com 78/232 Taxman 270 \(Bom.\)](#) upholding the view of the Special Bench of the Tribunal in Al- Cargo Global Logistics Ltd. Consequently, once an assessment has attained finality for a particular year *i.e.* it is not pending then the same cannot be subject to tax in proceedings under Section 153A of the Act. This of course would not apply if incriminating materials are

gathered in the course of search or during proceedings under Section 153A of the Act which are contrary to and/or not disclosed during regular assessment proceedings.

7. In view of the above, on issue of jurisdiction itself the issue stands concluded against the revenue by the decision of this Court in *Continental Warehousing Corpn. (Nhava Sheva) Ltd. (supra)*. In the appeal before us, the revenue has made no grievance with regard to the impugned order of the Tribunal holding that in law the proceedings under Section 153A of the Act are without jurisdiction. This in view of the fact that no assessments were pending, so as to abate nor any incriminating evidence was found. The grievance of the revenue is only with regard to finding in the impugned order on the merits of the individual claim regarding gifts and deemed dividend. However once it is not disputed by the revenue that the decision of this Court in *Continental Warehousing Corporation (Nhava Sheva) Ltd. (supra)* would apply to the present facts and also that there are no assessments pending on the time of the initiation of proceedings under Section 153A of the Act. The occasion to consider the issues raised on merits in the proposed questions becomes academic.

8. In the above view, the questions as framed in the present facts being academic in nature, do not give rise to any substantial question of law. Thus not be entertained.”

17. The co-ordinate bench has followed the above said binding decisions of jurisdictional High Court in the cases of Smt Anjali Pandit vs. ACIT (supra) and held as under:-

“8. From the propositions in the above mentioned decisions, we find that the case of the assessee is squarely covered by the ratio laid down in the decisions cited supra. We therefore respectfully following the same hold that the AO has not jurisdictional to assess the long term capital gain as income from other sources as the same is not based upon the seized or incriminating materials found during the search proceedings qua the long term capital gain. Similarly the CIT(A) enhancing the assessment is also not based upon any seized or incriminating materials found during the search and therefore the enhancement is also without jurisdiction u/s 153A. Accordingly, the additional grounds no. 1A and 1B raised by the assessee stand allowed in favour of the assessee and AO is directed accordingly.”

18. We may also gainfully refer to the decision rendered by Hon'ble Delhi High Court in the case of Kabul Chawla, wherein identical view was expressed. The Hon'ble Delhi High Court has summarized the legal position with regard to the provisions of sec.153A as under:-

“Summary of the legal position

37. On a conspectus of [Section 153A\(1\)](#) of the Act, read with the provisos thereto, and in the light of the law explained in the aforementioned decisions, the legal position that emerges is as under:

i. Once a search takes place under [Section 132](#) of the Act, notice under [Section 153 A \(1\)](#) will have to be mandatorily issued to the person searched requiring him to file returns for six AYs immediately preceding the previous year relevant to the AY in which the search takes place.

ii. Assessments and reassessments pending on the date of the search shall abate. The total income for such AYs will have to be computed by the AOs as a fresh exercise.

iii. The AO will exercise normal assessment powers in respect of the six years previous to the relevant AY in which the search takes place. The AO has the power to assess and reassess the 'total income' of the aforementioned six years in separate assessment orders for each of the six years. In other words there will be only one assessment order in respect of each of the six AYs "in which both the disclosed and the undisclosed income would be brought to tax".

iv. Although [Section 153 A](#) does not say that additions should be strictly made on the basis of evidence found in the course of the search, or other post-search material or information available with the AO which can be related to the evidence found, it does not mean that the assessment "can be arbitrary or made without any relevance or nexus with the seized material. Obviously an assessment has to be made under this Section only on the basis of seized material."

v. In absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made. The word 'assess' in [Section 153 A](#) is relatable to abated proceedings (i.e. those pending on the date of search) and the word 'reassess' to completed assessment proceedings.

vi. Insofar as pending assessments are concerned, the jurisdiction to make the original assessment and the assessment under [Section 153A](#) merges into one. Only one assessment shall be made separately for each AY on the basis of the findings of the search and any other material existing or brought on the record of the AO.

vii. Completed assessments can be interfered with by the AO while making the assessment under [Section 153 A](#) 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.”

19. We noticed that the Ld CIT(A) had placed reliance on certain case laws in support of his decision that the impugned assessments are valid. In our view, those case laws are not applicable to the facts of the present case. We shall discuss below the facts available in each of those cases.

(a) In the case of N K Industries (supra), the assessment related to block assessment made u/s 158BC of the Act. It is a case where incriminating materials was found during the course of search and accordingly, the Hon'ble Gujarat High Court held that If material found during course of search exposes falsity of entries made in regular books of account, consequent concealed income can be assessed as undisclosed income in block assessment. Hence this decision is not applicable to the facts of the present case.

(b) The case of M/s N K Proteins (supra) was related to bogus purchases and estimation of profit on the said bogus purchases. Hence this decision is also not applicable to the facts of the present case.

(c) In the case of P R Metrani (supra), the Hon'ble Supreme Court has interpreted the provisions of sec.132(4A) vis-à-vis then existing sec. 132(5), which provided passing of an order for the purpose of retaining the assets seized during the course of search. This is general interpretation of sec. 132(4A) vis-a-vis then existing sec. 132(5) of the Act and it does not change the interpretation given by Hon'ble Bombay High Court in respect of sec. 153A of the Act.

(d) In the case of Nau Nidh Overseas (P) Ltd (supra), the question was whether the Statement given by a searched person that certain cash found during the course of search belonged to some other person would be sufficient to initiate proceedings u/s 153C of the Act in the hands of such other person. It was held that the statement so given constitute sufficient material to initiate proceedings u/s 153C of the Act in the hands of such other person. In this case, there was incriminating material in the form of

statement given by the searched person. Hence this decision is also not applicable to the facts of the present case.

(e) In the case of Rameshbhai Jivraj Desai (supra), the Hon'ble Gujarat High Court held that the assessment should be connected with something found during the search or requisition, viz., incriminating material which reveals undisclosed income. We notice that the Hon'ble Gujarat High Court has also expressed the same view as expressed by Hon'ble Bombay High Court. However, the Ld CIT(A) has expanded its meaning by observing as under:-

“The key work used in the above decision is ‘material collected during the search or requisition’, meaning that the “results or findings of search are material documents which lead to initiation of proceedings against persons against whom search proceedings have been conducted. A material need not be merely in the form of written documents or assets.”

In support of the above said interpretation, the Ld CIT(A) has also referred to the decision rendered by Hon'ble Bombay High Court in the case of Gurinder Singh Bawa (surpa). In our opinion, the interpretation so given by Ld CIT(A) goes against the ratio laid down by Hon'ble Gujarat High Court; Hon'ble Bombay High Court and Hon'ble Delhi High Court.

20. In the instant cases, there is no dispute with regard to the fact that all these assessments were not pending as on the date of search and hence they would fall under the category of “unabated/finalized/completed assessments”. There is also no dispute with regard to the fact that the search officials did not unearth any incriminating material during the course of search warranting interference of the issues already stood concluded in unabated assessments. The conclusion reached by the AO that these assesseees have obtained accommodation entries towards capital gains/capital losses is on the basis of some generalized external information supplied by the investigation wing of income tax department and no material was found during the course of search validating the said information. In our view, the generalised external information cannot be considered as

“incriminating material found during the course of search”. It is an admitted fact that no evidence/material was found during the course of search to come to the conclusion that these assesseees have availed accommodation entries only. Hence the decisions rendered by the Hon’ble Jurisdictional Bombay High Court in the case of Continental warehousing Corporation (Nhava Sheva) Ltd (supra) and Gurinder Singh Bawa (supra), in our view, shall squarely apply to the facts of the present case. Accordingly we hold that the AO, in the absence of any incriminating material found during the course of search relating to the impugned additions, was not justified in assessing capital losses/capital gains and also he was not justified in making additions u/s 14A of the Act in all the years under consideration in the hands of these assesseees.

21. In view of the foregoing discussions, we set aside the orders passed by Ld CIT(A) in the hands of these assesseees in all the years under consideration and direct the AO to delete the additions made in respect of capital loss/capital loss and sec. 14A of the Act.

22. Since we have decided the above said legal issue in favour of the assessee, which results in deletion of all additions made by the AO, we do not find it necessary to deal with the issues urged on merits of addition, as the same would render academic in nature.

23. In the result, all the appeals of the assessee are allowed.

Order pronounced in the open court on 26.08.2022.

Sd/-
(KAVITHA RAJAGOPAL)
JUDICIAL MEMBER

Sd/-
(B.R. BASKARAN)
ACCOUNTANT MEMBER

Mumbai; Dated : 26/08/2022

Copy of the Order forwarded to :

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

//True Copy//

PS

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai