

**IN THE INCOME TAX APPELLATE TRIBUNAL "H" BENCH, MUMBAI**

**BEFORE SHRI ABY T. VARKEY, JM AND SHRI GAGAN GOYAL, AM**

आयकरअपीलसं/ I.T.A. Nos.1072, 1071, 1070, 4469, 4471 & 1073/Mum/2020  
(निर्धारणवर्ष / Assessment Years:2008-09 to 2010-11 & 2012-13 to 2014-15)

Kamla Landmarc Properties Ground Floor, Shanti Vimal, P. M. Road, Vile Parle East, Mumbai-400057.	<b>बनाम/</b> Vs.	DCIT, Central Circle-3(4) 19 <sup>th</sup> Floor, Air India Building, Nariman Point, Mumbai-400021.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. :AAHFK1108L		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)
Assessee by:	Shri Rashmikant Modi Ms. Ketki Rajeshirke	
Revenue by:	Shri Vinay Sinha (DR)	

सुनवाईकीतारीख / Date of Hearing: 15/07/2022  
घोषणाकीतारीख /Date of Pronouncement: 30/08/2022

**आदेश / ORDER**

**PER BENCH**

These appeals preferred by the assessee are against the common order of the Ld. Commissioner of Income Tax (Appeals)-51, Mumbai [hereinafter in short "Ld. CIT(A)"] dated 23.04.2019 for A.Y. 2008-09 to A.Y. 2010-11 and A.Y. 2012-13 to A.Y. 2014-15. Since issues involved are common, all the appeals for all the assessment year/years (hereinafter referred to as "AY") were heard together. Both the parties also argued them together raising similar arguments on these issues. Accordingly, for the sake of convenience and brevity, we dispose all the appeals by this consolidated order.



2. Before we advert to the grounds taken in the cross appeals, it would first be relevant to cull out the basic facts of the case and effect of law in brief in respect of certain AY's. The assessee is primarily engaged in the business of construction of residential/commercial projects in Mumbai and belongs to the Kamla Landmark Group whose main promoters / key persons are Shri Ramesh Jain, Shri Jitendra Jain, Shri Ketan Shah and Shri Sushi Mantri. Search under section (hereinafter referred to as "u/s.") 132 of the Income Tax Act, 1961 (hereinafter referred to as "the Act") was conducted against the Kamla Landmarc Group, on 10-12-2013 which triggered assessment/re-assessment under section 153A of the Act. Prior to the date of search, the income-tax assessment u/s 143(3) of the Act (scrutiny assessment) for AY 2008-09 was already completed. And no assessment was pending before the AO on the date of search, so the assessment for AY 2008-09 did not abate consequent to the search on 10-12-2013. And also, since the returns of income for these assessment years i.e AYs 2009-10, 2010-11 & 2012-13 were filed on 27-09-2009, 11-10-2010 & 29-09-2012 respectively, and undisputedly the time limit for issuance of notices u/s 143(2) of the Act for all these years had expired as on the date of search on 10-12-2013 and so was not pending before the AO on the date of search (i.e.



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on 10.12.2013) consequently, these AYs i.e. 2009-10, 2010-11 & 2012-13 were also unabated. However with regard to AY 2013-14, it was pointed out that, the return of income was filed on 29-10-2013 and therefore, the time limit for issuance of notice u/s 143(2) of the Act had not expired on the date of search i.e. 10-12-2013. Further, AY 2014-15 was the year of search. Hence, AYs 2013-14 & 2014-15 were pending before the AO on the date of search and consequently, AYs 2013-14 & 2014-15 were abated assessment years as per second proviso to section 153A of the Act. Therefore, we hold that except AYs 2013-14 & 2014-15, all the other AYs 2008-09, 2009-10, 2010-11 & 2012-13 were unabated assessments.

**3.** Since the issues raised and the additions involved in all the appeals are similar, we first take up the appeal filed by the assessee for AY 2008-09 in ITA No. 1072/Mum/2020 as the lead case. It is noted that, the AO in the assessment completed u/s 153A/143(3) of the Act, had made several disallowances/ additions viz., disallowance of remuneration paid to partners u/s 40(b) of the Act, estimated disallowance of expenses such as professional fees, brokerage, labour charges etc., disallowance of other expenses for non-deduction of TDS u/s 40(a)(ia) of the Act and partial disallowance of interest on partner's capital u/s 36(1)(iii) of the Act. It is noted that similar



additions/disallowances were made in the other unabated AYs 2009-10, 2010-11 & 2012-13 as well.

**4.** Aggrieved by the order of the AO, the assessee preferred appeal before the Ld. CIT(A). Before the Ld. CIT(A), the assessee had challenged these additions on the preliminary ground that, no incriminating material whatsoever was found in the course of search to justify the additions/disallowances made in the unabated AY 2008-09. According to assessee therefore, the impugned additions made in the absence of any incriminating material found in the course of search was unsustainable and therefore deserves to be deleted. Further, the assessee also objected to the merits of the additions made by the AO. The Ld. CIT(A) however rejected the legal ground raised by the assessee by holding that, in the statement given by the Director of the Kamla Group, Shri Jitendra Jain had explained the modus operandi by which the entities belonging to the Group had obtained accommodation entries in the form of unsecured loans from entry providers, which constituted incriminating evidence to justify the addition/s made by the AO in the relevant AY 2008-09. On the merits, the Ld. CIT(A) after examining the details/information available on record, partially allowed the grounds raised by the assessee. Aggrieved by the order of the Ld. CIT(A), the assessee is in appeal before us.



5. Assailing the action of Ld. CIT(A), the Ld. AR of the assessee submitted that the Ld. CIT(A)'s reliance on the statement given u/s 132(4) of the Act by the Director, Shri Jitendra Jain, to justify the additions/disallowances made in the unabated assessment was misplaced and erroneous. The Ld. AR showed us that, in none of the AYs, the AO had made any addition on account of unsecured loans u/s 68 of the Act nor had the AO disallowed interest paid on such loans u/s 37 of the Act. The Ld. AR thus submitted that, the statement u/s 132(4) of the Act referred to by the Ld. CIT(A) as incriminating evidence to justify the adhoc disallowance out of brokerage expenses, professional charges, labour charges, other expenses etc. in the unabated AY was factually perverse. He pointed out that the additions made by the AO comprised of disallowance of professional fees, labour charges, brokerage etc., partner's remuneration and, the interest paid on partner's capital were on the ground that there was no justification given by partners for excess withdrawal from their capital accounts. The Ld. AR pointed out that, none of these additions/disallowances were based on any incriminating material found in the course of search. Taking us through the statement of Shri Jitendra Jain recorded u/s 132(4) of the Act, he showed us that none of the questions posed before him pertained to these items of additions /



disallowances made in these cases (Un-abated assessments). Relying on the decision rendered by the jurisdictional Hon'ble Bombay High Court in the case of CIT vs Continental Warehousing Corporation (Nhava Sheva) Ltd reported in (374 ITR 645), the Ld. AR therefore urged that the additions made in this unabated AY was unsustainable and therefore deserves to be deleted.

6. Per contra, the Ld. CIT, DR supported the order of the lower authorities. According to him, the contention of the assessee that unabated assessments can be interfered with only if incriminating material was found in the course of search was untenable and deserves to be rejected. He thus urged that the orders of the lower authorities did not require any interference by us.

7. We have heard both the parties, perused the details, documents and submissions along with the judicial precedents relied upon by both sides. The first ground raised in the appeal is whether in absence of any incriminating material found in the course of search at the premises of the assessee, the additions/disallowances made in the assessment of the assessee which were unabated on the date of search, could be held to be sustainable on facts and in law. As noted earlier, on the date of search i.e. 10-12-2013, income tax assessment for AY 2008-09 (and AY. 2009-10, 2010-11 and 2012-13) were unabated. We



note that the provisions of Section 153A of the Act, forms part of Chapter XIV of the Act contain special provisions for completing assessments in case of search conducted u/s 132 of the Act or requisition made u/s 132A of the Act. These provisions can be invoked only in cases where the Income-tax Department has exercised its extra ordinary power of conducting search and seizure operations after complying with stringent pre-conditions prescribed in Section 132 of the Act. We do not deny the Ld. CIT, DR's contention that, once a search u/s 132 is conducted against a person, then irrespective whether any incriminating material is found, the AO is required to proceed against such person for completing the assessments u/s 153A of the Act for the specified six assessment years. To this extent, there is no quarrel. However we find that Section 153A itself creates the fine distinction/differentiation amongst specified six assessment years depending whether prior to the date of search, the assessment proceedings are pending or not before the AO. We note that the relevant section itself (second proviso to section 153A of the Act) clarifies that where an assessment was already completed against an assessee and any appeals or further proceedings are pending, then such appeals or other proceedings do not abate. We should keep in mind that merely because an assessee is subjected to search u/s 132 of the Act, such action by itself does not give carte blanche to the



Department to subject such an assessee to the rigors of the assessment afresh for all the six years. It is for this reason that the Parliament in its wisdom has categorically created two classes among the six years, (a) un-abated assessment and (b) abated assessments. Consequent to a search conducted u/s 132 of the Act, the AO is required to issue notices u/s 153A of the Act to assess the income of the assessee for six assessment years preceding the date of search. These six assessment years comprise of assessments which are not abated (non-pending assessment before AO on the date of search); and assessments which are pending before the AO on the date of search, which would be treated as abated. In the case of abated assessments, the AO is free to frame the assessment in regular manner and determine the correct taxable income for the relevant year inter alia including the undisclosed income un-earthed during search, having regard to the provisions of the Act. However, in relation to unabated assessments (AYs), which were not pending on the date of search, there is a restriction on the powers of the AO. In case of unabated assessments, the AO can re-assess the income only to the extent and with reference to any incriminating material which the Revenue has unearthed in the course of search. Merely because an assessee is subjected to search, he cannot be placed on a different pedestal or put in a more disadvantageous position than an assessee who is not



subjected to search unless in the course of search some incriminating documents or evidence or information or material is gathered by the Investigating authorities so as to vest the AO with the necessary powers to make additions to the total income in relation to assessments which did not abate on account of search. Considering these aspects the Hon'ble Delhi High Court in the case of **CIT vs Kabul Chawla reported in (2016) 380 ITR 573 (Del)** held as under:-

"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:

Once a search takes place under section 132 of the Act, notice under section 153A(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. 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 Ld AOs as a fresh exercise.

The Ld AO will exercise normal assessment powers in respect of the six years previous to the relevant AY in which the search takes place. The Ld 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".

Although Section 153A does not say that additions should be strictly made on the basis of evidence found in the course of the search, or



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other post-search material or information available with the Ld 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."

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 complete assessment proceedings.

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 Ld AO.

Completed assessments can be interfered with by the Ld 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."

38. The present appeals concern AYs 2002-03, 2005-06 and 2006-07, on the date of the search the said assessments already stood completed. Since no incriminating material was unearthed during the search, no additions could have been made to the income already assessed."

**8.** We find that the Hon'ble Delhi High Court while adjudicating the appeal in the case of CIT vs Kabul Chawla (2016) 380 ITR 573



had taken judicial note of host of the earlier decisions in the cases of CIT vs Anil Kumar Bhatia reported in (2013) 352 ITR 493 (Del) ; CIT vs Chetan Das Lachman Das reported in (2012) 211 Taxman 61 (Del HC) ; Madugula Venu vs DIT reported in (2013) 215 Taxman 298 (Del HC) ; Canara Housing Development Co. vs DCIT reported in (2014) 49 taxmann.com 98 (Kar HC) ; Filatex India Ltd vs CIT reported in (2014) 229 Taxman 555 (Del HC) ; Jai Steel (India) vs ACIT reported in (2013) 219 Taxman 223 (Del HC) ; CIT vs Murli Agro Products Ltd reported in (2014) 49 taxmann.com 172 (Bom HC) ; CIT vs Continental Warehousing Corporation (Nhava Sheva) Ltd reported in (2015) 374 ITR 645 (Bom HC) and All Cargo Global Logistics Ltd vs DCIT reported in (2012) 137 ITD 287 (Mum ITAT) (SB). We also find that Revenue's SLP against the decision of the Hon'ble Delhi High Court in the case of Kabul Chawla (Supra) was dismissed by the Hon'ble Apex Court which is reported in 380 ITR (St.) 4 (SC).

9. We also find that the Hon'ble Jurisdictional High Court in the case of **CIT Vs Gurinder Singh Bawa (386 ITR 483)** has endorsed the aforesaid view, and held as follows:

"3. For the Assessment Year 2005-06, the respondent-assessee had filed his return of income declaring an income of Rs.9.61 lakhs. The return of income as filed by the respondent- assessee was processed under Section 143(1) of the Act. Admittedly, no notice under Section



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143(2) of the Act has been issued. Thereafter on 5 January 2007, a search was conducted on the respondent-assessee under Section 132 of the Act. Consequent thereto, proceedings under Section 153A of the Act were initiated. During the assessment proceedings for A.Y. 2005-06, the Assessing Officer added an amount of Rs.93.72 lakhs (declared as gifts) as being covered by Section 68 of the Act and an amount of Rs.43.67 lakhs (accumulated profits of the lender) out of Rs.1.5 crores received as loan from one K.P. Developers Pvt. Ltd. as deemed dividend under Section 2(22)(e) of the Act. Undisputedly, respondent-assessee was a shareholder in M/s K.P. Developers (P) Ltd. The aforesaid additions are reflected in an assessment order dated 31 December 2008 passed under Section 143(3) r/w 153A of the Act determining the respondent-assessee's total income at Rs.1.47 crores.

4. In appeal, the CIT(A) held that the addition of an amount of Rs.43.67 lakhs as deemed dividend has to be deleted. This on the ground that there were no accumulated profits available with M/s K.P. Developers (P) Ltd. to distribute amongst its shareholders. However, so far as the addition in respect of the unexplained gifts aggregating to Rs. 93.70 lakhs is concerned, the CIT(A) did not disturb the finding of the Assessing Officer.

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



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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 assessment 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.

**10.** Identical view was expressed by the Hon'ble jurisdictional Bombay High Court in the case of **CIT Vs SKS Ispat & Power Ltd (398 ITR 584)** wherein it was held as follows:

"5. We have considered the arguments canvassed by the learned counsel for the respective parties. On perusal of section 153A of the Act, it is manifest that it does not make any distinction between assessment conducted under section 143(1) and 143(3). This court had occasion to consider the scope of section 153A of the Act in the case of *Gurinder Singh Bawa* and in the case of *Continental Warehousing Corpn. (Nhava Sheva) Ltd.* (referred to *supra*). It has been observed that section 153A cannot be a tool to have a second inning of assessment either to the Revenue or the assessee. Even in the case of *Gurinder Singh Bawa* (referred to *supra*) the assessment was under section 143(1) of the Act and the court held that the scope of assessment after search under section 153A would be limited to the incriminating evidence found during the search and no further. In the said judgment, the judgment of this court in *Continental Warehousing Corpn. (Nhava Sheva) Ltd.* (referred to *supra*) has been followed.

6. Considering the authoritative pronouncements of this court in the above referred cases one of which is also with regard to assessment under section 143(1), the issue is no longer *res integra* and stands concluded in the above referred judgments."

**11.** In light of the above judicial precedents, and particularly the judgment of the Hon'ble Bombay High Court (*supra*) which is binding upon this Tribunal, we hold that in the case of unabated assessments



of an assessee, no addition is permissible in the assessment order u/s 153A of the Act unless it is based on any relevant incriminating material found during the course of search qua the assessee and qua the AY.

**12.** In view of the above legal position, let us now proceed to examine whether the additions/disallowances which the AO made in the order impugned in this appeal [AY 2008-09] was based on or made with reference to any incriminating material/document found in the course of search. Perusal of the assessment order reveals that, the AO had made disallowances out of several expenses viz., labour charges, professional fees, brokerage, interest etc. only on the premise that the details were not submitted before him or they were insufficient. The AO had disallowed portion of the interest paid on partner's capital on the ground that the purpose of excess withdrawal from the capital account had not been justified by the partners. It is therefore found that, none of these additions/disallowances were made in the unabated AY 2008-09 (AY. 2009-10, 2010-11 & 2012-13) based on any incriminating material or evidence found in the course of search. The Ld. CIT, DR was also not able to point out the relevant incriminating material or evidence based on which the impugned additions were made by the AO, in the written submissions



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filed by him. Having regard to these facts, in our considered opinion therefore, the additions impugned before us in the assessment order passed u/s 153A/143(3) of the Act by the AO were not supported or backed by any incriminating material found or seized in the course of search and therefore these additions made in the unabated AY's were legally impermissible. Hence, we set aside the order of the lower authorities below and allow this ground of the assessee and direct the AO to delete the additions made in the assessment order.

**13.** Since we have deleted the additions impugned before us on the ground that it was not based any incriminating material found in the course of search, all other grounds raised in the appeal on the merits of these additions have become academic in nature and is therefore dismissed as infructuous.

**14.** Since the facts and circumstances in the lead case under consideration, being ITA No. 1072/Mum/2019, for A.Y. 2008-09 are identical to the other unabated AYs 2009-10, 2010-11 & 2012-13 in ITA Nos. 1071/Mum/2019, 1070/Mum/2019 & 4469/Mum/2019, our decision in the case of ITA No. 1072/Mum/2019, for A.Y. 2008-09 of the assessee's appeal shall apply mutatis mutandis to the assessee's appeals in ITA Nos. 1071/Mum/2019, 1070/Mum/2019 &



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4469/Mum/2019. Hence, the appeal for the AYs 2009-10, 2010-11 & 2012-13 also stands allowed.

**15.** Now we take up the appeals of the assessee for the abated assessments for AYs 2013-14 & 2014-15. It is observed that in these years, the AO had made disallowance out of interest paid on partner's capital u/s 36(1)(iii) of the Act holding that, it was not for business purposes. Further, the AO had made estimated disallowances out of certain expenses viz., labour charges, professional fees etc. Aggrieved the assessee preferred appeal before the Ld. CIT(A), who had partly allowed the appeal on merits. Aggrieved, the assessee is now in appeal before us.

**16.** We have heard both the parties. On examination of the records, it is noted that the assessee had not properly complied with the requisitions issued by the AO u/s 142(1) of the Act, and even the AO did issue any specific show cause before making the impugned disallowances. Therefore, in the fitness of matters, we set aside these additions back to the file of the AO for fresh examination. The assessee is directed to file the relevant details / explanation before the AO in this regard. The AO shall also allow sufficient opportunity of hearing to the assessee and shall pass fresh order, after giving due consideration/opportunity to the submissions put forth by the assessee



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in accordance to law. These appeals in ITA Nos.4471/Mum/2019 & 1073/Mum/2019 for AY 2013-14 & 2014-15 are therefore allowed for statistical purposes.

**17.** In the result, the appeals of the assessee for AYs 2008-09, 2009-10, 2010-11, 2012-13 are allowed and the appeals of the assessee for AYs 2013-14 and 2014-15 are allowed for statistical purposes.

Order pronounced in the open court on 30/08/2022.

Sd/-

**(GAGAN GOYAL)**

लेखासदस्य / ACCOUNTANT MEMBER  
मुंबई Mumbai; दिनांक Dated : 30/08/2022.  
*Vijay Pal Singh/Sr. P.S.*

Sd/-

**(ABY T. VARKEY)**

न्यायिकसदस्य/JUDICIAL MEMBER

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकरआयुक्त(अपील) / The CIT(A)-
4. आयकरआयुक्त / CIT
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्डफाईल / Guard file.

सत्यापितप्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायकपंजीकार / (Dy./Asstt. Registrar)  
आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai