आयकर अपीलीय अधिकरण 'ए' न्यायपीठ चेन्नई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH, CHENNAI

माननीय श्री महावीर सिंह, उपाध्यक्ष एवं
माननीय श्री मनोज कुमार अग्रवाल ,लेखा सदस्य के समक्ष।
BEFORE HON'BLE SHRI MAHAVIR SINGH, VICE PRESIDENT AND
HON'BLE SHRI MANOJ KUMAR AGGARWAL, AM

आयकर अपील सं./ **ITA No.348/Chny/2020**
(निर्धारण वर्ष / Assessment Year: 2012-13)

Shri S. Victor Arockiam No.110/C-7, Velayutha Nagar, Udayarpalayam Taluk, Ariyalur District – 621 802.	**बनाम**/ Vs.	**DCIT** Central Circle-1, Trichy.
स्थायी लेखा सं./जीआइ आर सं./**PAN/GIR No. AKQPV-2871-G**		
(अपीलार्थी**/Appellant**)	:	(प्रत्यर्थी / **Respondent**)

अपीलार्थी की ओरसे/ **Appellant by**	:	Shri R. Viswanathan (CA) – Ld. AR
प्रत्यर्थी की ओरसे/**Respondent by**	:	Shri Guru Bashyam (CIT) –Ld. DR
सुनवाई की तारीख**/Date of Hearing**	:	12-10-2022
घोषणा की तारीख /**Date of Pronouncement**	:	12-10-2022

आदेश / O R D E R

Manoj Kumar Aggarwal (Accountant Member)

1. Aforesaid appeal by assessee for Assessment Year (AY) 2012-13 arises out of the order of learned Commissioner of Income Tax (Appeals)-19, Chennai [CIT(A)] dated 25-11-2019 in the matter of an assessment framed by Ld. Assessing Officer [AO] u/s. 143(3) r.w.s. 153A of the Act on 31-12-2018. The revised grounds filed by the assessee read as under:

1. The order dated 25.11.2019 of the Learned CIT(A)- 19, Chennai in ITA No.200/18-19 for the Assessment year is contrary to facts, opposed to law and untenable.

On Jurisdiction

2. The Learned AO erred in making an assessment u/s 153A in the absence of incriminating Evidence seized at the time of Search and exercised unfettered Jurisdiction u/s 153A.

2.1 The Ld AO ought not to have exercised Notice u/s 153A when there is no evidence seized at the time of Search

2.2 The Ld AO further grossly erred in considering the additions which can be made under Regular Assessment.

On Invoking Section 40A(3)

3. Ld AO erred in invoking Section 40A(3) for genuine & bonafide cash transactions as held ITO vs M/s Pranay Towers ITAT New Delhi, ITA No.4087/Del/2013.

3.1 Ld CIT(A) erred in considering the AO report without linking with the party ledger

3.2 Ld AO came to a conclusion that payment made to the creditor cannot be considered for Section 40A(3)

2. The Ld. AR advanced arguments and submitted that this is non-abated year and therefore, in the absence of any incriminating material unearthed by the revenue in search action, no such addition as made by revenue u/s 40A(3) could have been made. The Ld. CIT-DR controverted the arguments of Ld. AR and relied on various judicial decisions, the copies of which have been placed on record. Having heard rival submissions, the appeal is disposed-off as under.

Assessment Proceedings

3.1 The assessee being resident individual is stated to be engaged in trading of oil, sugar and groceries under proprietary ship concern namely M/s Vijay Trader. Post demonetization, field enquiries were conducted and it was found that the assessee was in possession of unaccounted cash of Rs.39 Lacs which was stated to be sourced out of retail sales. However, the assessee could not produce documentary evidences which resulted into search action

on the assessee on 22.12.2016. The unaccounted cash of Rs.37 Lacs was seized which include new currency of Rs.32.79 Lacs. It transpired that the assessee was not maintaining proper books of accounts. Two other proprietary concerns were also running from the same premises which were stated to be controlled by the assessee. The assessee made admission of unaccounted income.

3.2 Subsequently, notices u/s 153A were issued for AYs 2011-12 to 2016-17, For AY 2012-13, the assessee offered original return of income as filed on 20.09.2012 admitting income of Rs.2.39 Lacs.

3.3 For AY 2012-13, it was seen from purchase ledger that the assessee made cash purchases exceeding Rs.20,000/- per day which would call for disallowance u/s 40A(3). Accordingly, Ld. AO added the amount of Rs.4.76 Lacs to the income of the assessee and framed the assessment.

Appellate Proceedings

4.1 During appellate proceedings, the assessee, inter-alia, submitted that in the absence of any incriminating material, no such additions could have been made. The impugned addition could be considered only in the regular assessment and not in an assessment framed u/s 153A.

4.2 However, rejecting the arguments of assessee and relying on various case laws, Ld. CIT(A) upheld the action of Ld. AO. Aggrieved, the assessee is in further appeal before us.

Our findings and Adjudication

5. Upon perusal of material facts, it could be gathered that the assessee was subjected to search action on 22.12.2016. On that date, no assessment proceedings were pending against the

assessee for AY 2012-13. The assessment had attained finality and this was a non-abated year. The only addition made by Ld. AO is disallowance of cash expenditure exceeding Rs.20,000/- per day u/s 40A(3) which apply to regular expenditure reflected by the assessee in the books of accounts. Clearly, the impugned addition is not made on the basis of any incriminating material unearthed by revenue during the course of search action and the same emanates from the regular books of accounts maintained by the assessee. This being so, the impugned edition is not sustainable in law in terms of various judicial pronouncements as enumerated below.

6. The Hon'ble Bombay High Court in the case of **CIT V/s Continental Warehousing Corporation [2015; 374 ITR 645]** held that in case of non-abated year, the additions which could be made, has to be on the basis of incriminating material found by the department during the course of search operations. In other words, unless any incriminating material was unearthed, no additions could be sustained in the hands of the assessee. This decision was followed in **CIT V/s Gurinder Singh Bawa (79 taxmann.com 398 05/10/2015)** which deal with a situation wherein the original return of income was processed u/s 143(1). Subsequently, Hon'ble Bombay High Court in **CIT V/s Deepak Kumar Agarwal (398 ITR 586 11/09/2017)** held as under:-

> **20.** At the outset, and since heavy reliance is placed by the Revenue on the Supreme Court judgment in *Rajesh Jhaveri Stock Brokers (P.) Ltd.* (*supra*), it would be proper to note the facts in the same.
>
> **21.** There, the Assistant Commissioner of Income Tax challenged the correctness of the decision rendered by a Division Bench of the Gujarat High Court. That Division Bench judgment allowed the Writ Petition/Special Civil Application of the assessee.

22. The respondent-assessee, a private limited company, filed its return of income for the assessment year 2001-2002 on October 30, 2001, declaring total loss of Rs.2,70,85,105/-. That return was proposed under Section 143(1) of the IT Act accepting the loss returned by the respondent. A notice was issued under Section 148 of the IT Act on the ground that the claim of bad debts as expenditure was not acceptable. On 12th May, 2004, a return of income declaring the loss at the same figure as declared in the original return was filed by the respondent-assessee under protest. A copy of the reasons recorded was furnished by the Revenue on the request of the assessee sometime in November, 2004. The assessee raised various objections, both on jurisdiction and the merits of the subject matter recorded in the reasons. The Revenue disposed of these objections on 4th February, 2005 holding that the initiation of reassessment proceedings was valid and it had jurisdiction to undertake such an exercise. The notice under Section 148 of the IT Act dated 12th May, 2004 was challenged by the respondent-assessee.

23. That Writ Petition was allowed and hence, the Revenue was in Appeal.

24. Mr. Ahuja's argument overlooks this factual aspect and when he relies upon the observations of the Hon'ble Supreme Court, and particularly in paragraph 13, he forgets that they were made in the context of a challenge to the notice under Section 148 of the IT Act. The Supreme Court, in paragraph 13 of this judgment, noted that intimation under Section 143(1)(a) was given without prejudice to the provisions of Section 143(2). Though technically this intimation issued was deemed to be a demand notice issued under Section 156, that did not *per se* preclude the Assessing Officer to proceed under Section 143(2). The right preserved was not taken away. The Hon'ble Supreme Court referred to the period between April 1, 1989 and March 31, 1998, and the second proviso to Sub-section (1) Clause (a) of Section 143 and its substitution with effect from 1st April, 1998. The sending of intimation between 1st April, 1998 and 31st May, 1999 under Section 143(1)(a) was mandatory. That requirement continued until the second proviso was substituted by the Finance Act, 1997, which was operative till 1st June, 1999.

25. The Hon'ble Supreme Court therefore, relied upon these amendments and, tracing their history, held that the intimation under Section 143(1)(a) cannot be treated to be an order of assessment. That is how it referred to the Division Bench Judgment of the High Court at Delhi and explained the legal position. There was thus no assessment under Section 143(1)(a) and therefore, the question of change of opinion did not arise. A reference to Section 147 therefore, was made in the context of the Assessing Officer being authorized and permitted to assess or re-assess income chargeable to tax if he has reason to believe that income for any assessment year has escaped assessment. Before us, such is not the position, and even if this judgment of the High Court had been brought to the notice of the Division Bench deciding the *Continental Warehousing Corpn.* and *All Cargo Global Logistics* (*supra*), there would not have been any difference.

It was finally held by Hon’ble Court as under: -

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

"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 regularassessment 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 subsection (2) of section 153, which has been dealt with by Ld. Counsel. It provides that if any assessment made under subsection (1) is annulled in appeal etc., then the abated assessment revives. However, if such annulment is further nullified, the assessment again abates. The case of the Ld. Counsel is that this provision further shows that completed assessments stand on a different footing from the pending assessments because appeals etc. proceedings continue to remain in force in case of completed assessments and their fate depends upon subsequent orders in

appeal. On consideration of the provision and the submissions, we find that this provision also makes it clear that the abatement of pending proceedings is not of such permanent nature that they cease to exist for all times to come. The interpretation of the Ld. Counsel, though not specifically stated, would be that on annulment of the assessment made u/s 153(1), the AO gets the jurisdiction to assess the total income which was vested in him earlier independent of the search and which came to an end due to initiation of the search.

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 subsection (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."

It was thus held by Hon'ble Court that in respect of non-abated assessment, the additions are to be strictly based 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 during search.

7. We find that similar view has been expressed by Hon'ble Delhi High Court in **CIT Vs. Kabul Chawla (380 ITR 573)** which has summarized the legal position 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:
> i. 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.

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 153A 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.

It was thus held that completed assessments could 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. Nothing has been shown to us that the aforesaid decisions have subsequently been reversed or stayed in any manner by any higher judicial forum.

8. We find that similar is the view of Hon'ble Delhi High Court in **Pr. CIT V/s Meeta Gutgutia (82 Taxmann.com 287)** which has primarily

followed the decision of **Kabul Chawla (supra).** We also find that Special Leave Petition (SLP) filed by the revenue against this decision has already been dismissed by Hon'ble Supreme Court on 02.07.2018 which is reported at 96 Taxmann.com 468. The decision of Hon'ble Court was 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.

9. During the course of hearing before us, the Ld. CIT-DR has relied on the decision of Hon'ble Kerala High Court in the case of **E.N.Gopakumar V/s CIT (75 Taxmann.com 215; 03.10.2016)** which has taken a contrary view by relying upon its earlier decision in **CIT V/s St. Francis Clay Décor Tiles (70 Taxmann.com 234; 22.03.2016).** However, upon perusal of decision of Hon'ble Court in **CIT V/s St. Francis Clay Décor Tiles (supra)**, we find that the said case is factually distinguishable. In that case, the admitted facts were that the Managing Partner of the assessee had given voluntary statement to the Assessing Officer that there was undisclosed income of Rs.2.75 Crores. The admission was retracted by the Managing Partner subsequently. On the basis of these facts, it was concluded by Hon'ble Court that since there was a disclosure made by giving a statement during the course of search and therefore, the Assessing Officer, by virtue of the power conferred on him under section 153A, was competent to issue notice under the said provision and require the assessee firm to furnish the returns as provided there-under. It was further held that neither under section 132 nor under section 153A, the

phraseology "incriminating" is used by the Parliament. Therefore, any material which was unearthed during search operations or any statement made during the course of search by the assessee is a valuable piece of evidence in order to invoke the provisions of Section 153A of the Income Tax Act, 1961. In the present case, the additions are not based on any admission made by the assessee.

10. The case law of Hon'ble Karnataka High Court in **Canara Housing Development Co. vs DCIT (49 Taxmann.com 98)** is on different footing. It has been held in this decision that once proceedings under section 153A is initiated pursuant to search, order of assessment in respect of six years stands reopened and, therefore, in absence of any valid assessment order in existence, revisional proceedings under section 263 cannot be initiated in such a case. Further, the condition precedent for application of section 153A is that there should be a search under section 132, however, initiation of proceedings is not dependent on any undisclosed income being unearthed during such search operations. This case law deal with a situation wherein revision has been proposed u/s 263 against an assessment framed u/s 143(3) during pendency of assessment pursuant to search action.

11. The case law of Hon'ble Gujarat High Court in **Kamleshbhai Dharmashibhai Patel vs. CIT (31 Taxmann.com 50)** deal with validity of proceedings u/s 153C wherein the incriminating documents have been found from the premises of another party. This case law has no application in the facts of the present case.

12. The case law of Hon'ble Delhi High Court in **CIT V/s Anil Kumar Bhatia (24 Taxmann.com 98)** do not address the situation before us since it has been held in para-23 as under: -

> **23**. We are not concerned with a case where no incriminating material was found during the search conducted under Section 132 of the Act. We, therefore, express no opinion as to whether Section 153A can be invoked even in such a situation. That question is therefore left open.

Accordingly, all these decisions cited before us do not render any assistance to the case of the revenue. These case laws are distinguishable on facts.

13. The revenue has also referred to the Special Leave Petition (SLP) filed by the revenue and accepted by Hon'ble Supreme Court in the case of **Pr. CIT V/s Gahoi Foods Pvt. Ltd. (117 Taxmann.com 118).** We find that SLP has been filed by the revenue against the decision of Hon'ble High Court of Madhya Pradesh as reported at 117 Taxmann.com 117. In this case, Hon'ble Court chose to follow the decision of Hon'ble Delhi High Court in **CIT V/s Kabul Chawla (380 ITR 573)** and concurred with the views expressed therein. The revenue preferred SLP against the same which has been admitted and tagged with other appeals. However, there is no stay by Hon'ble Supreme Court on the operation of the order of Hon'ble High Court.

14. Finally, considering the facts and circumstances of the case, the impugned addition as made by Ld. AO u/s 40A(3) could not be sustained in law. We order so. No other ground has been urged before us.

15. The appeal stand allowed in terms of our above order.

Order pronounced on 12th October. 2022.

Sd/-	**Sd/-**
(MAHAVIR SINGH)	**(MANOJ KUMAR AGGARWAL)**
उपाध्यक्ष /VICE PRESIDENT	**लेखा सदस्य / ACCOUNTANT MEMBER**

चेन्नई / Chennai; दिनांक / Dated : 12.10.2022
EDN/-

आदेश की प्रतिलिपि ग्रेषित/Copy of the Order forwarded to :

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