INCOME TAX APPELLATE TRIBUNAL
MUMBAI 'A' BENCH, MUMBAI

[Coram: Pramod Kumar, Vice President
and, Pavan Kumar Gadale, Judicial Member]

ITA No.: 1292/Mum/2019
Assessment year: 2009-10

Luxora Infrastructure Pvt Ltd **…………………….. Appellant**
1207, 12th floor, A Wing , 02 Commercial Building
23-24, Minerva Industrial Estate, Off LBS Road
Mulund (W), Mumbai 400 080 [PAN: AABCL2854K]

Vs.

Deputy Commissioner of Income Tax
Central Circle 2(1), Mumbai **………………….Respondent**

Appearances:
K P Dewani, *for the appellant*
Shailja Rai, *for the respondent*

Date of concluding the hearing	:	28/07/2022
Written submissions filed on	:	01/08/2022
Date of pronouncing the order	:	21 /10/2022

O R D E R

Per Pramod Kumar, VP:

1. By way of this appeal, the assessee appellant has challenged the correctness of the order dated 31st December 2018, in the matter of assessment under section 143(3) r.w.s. 153A of the Income Tax Act, 1961, for the assessment year 2009-10.

2. The short point, in our humble understanding, that we need to adjudicate in this case is whether, in the absence of any incriminating material found during the course of the search operations, any addition can be made in an assessment under section 143(3) read with Section 153A. Ground number 3 specifically raises this issue.

3. The issue in appeal lies in a narrow compass of material facts. The assessee before us is a company engaged in the business of, inter alia, the construction and development of integrated townships. The assessment under section 143(3) was completed on 12th December 2011 at a total income of Rs 42,18,260. However, as a result of search operations having been carried out by the income tax department on the assessee and its associated persons and group enterprises, the assessee was called upon to file a fresh return under section 153A, which was

filed by the assessee on 3rd February 2017. During the course of ensuing assessment proceedings, the Assessing Officer noticed that the assessee had issued 4,75,000 equity shares and 9,04,762 preferences shares to one Mauritius-based company by the name of Access Investment India, and 1,45,712 and 50,000 preference shares, in two different lots, to another Mauritius based entity by the name of Aanya Properties (2) Limited. Some of these shares were issued at par, and others at different rates of premium. It was in this backdrop that the Assessing Officer required the assessee to furnish the details in support of the "credibility of the said subscribers of the shares, and genuineness of the transaction". The necessary details were furnished by the assessee, though, for the reasons we will set out in a short while, it is not really necessary to go into fine details about the same. Suffice to say that the details regarding "identity, capacity, genuineness, and creditworthiness" of these two shareholders of the assessee were duly furnished by the assessee, and even though the Assessing Officer did not point out any specific defects in the same, he noted that in the case of Luxora Realtors Pvt Ltd, a sister concern of the assessee- which was also subjected to search operations and resultant assessment under section 153A r.w.s. 143(3), "the share capital money received by the group company of the assessee, Luxora Realtors Pvt Ltd, was added to the total income" and extensively reproduced from the assessment order of the said sister concern. The Assessing Officer also noted that "further, during the course of the assessment proceedings, the assessee has argued that the learned CIT(A) has granted relief on the addition on the same ground for the assessment year 2012-13" but rejected this plea by observing that "however, the issue is still alive, as the revenue has preferred an appeal before the Hon'ble ITAT, and it has not reached the finality". He thus concluded that "in view of the discussions made above, the creditworthiness of M/s Ananya Properties (2) Ltd and Access Investments India are not proved by the asssessee" and proceeded to add receipts amounting to Rs 110,02,46,593, as received from these two entities, as unexplained credit in the hands of the assessee under section 68. Aggrieved, assessee carried the matter in appeal before the CIT(A) but without success. The assessee is not satisfied and is in further appeal before us.

4. When this appeal was taken up for hearing, the learned counsel of the assessee submitted that the issue in the appeal is a fully covered matter by a coordinate bench decision in the case of a sister concern, i.e. Luxora Realtors Pvt Ltd, and that this sister concern is duly referred to in the assessment order itself. It was also pointed out that admittedly material facts of the case are similar, as noted by the Assessing Officer himself on page 15 of the assessment order, but the Assessing Officer had declined to follow the CIT(A)'s decision on the same as "the issue is still alive, as the revenue has preferred an appeal before the Hon'ble ITAT, and it has not reached the finality". It is submitted that a coordinate bench, vide order dated 8th February 2022 and in ITA No 1096/Mum/2020, has observed as follows:

> **5. After considering the detailed submissions of the assessee Ld.CIT(A) disposed off the appeal filed by the assessee by adjudicating only Ground No. 2 raised by the assessee on the issue of incriminating material and other grounds raised by the assessee were dismissed as it becomes academic in nature. For the sake of clarity, the finding of the Ld.CIT(A) with regard to Ground No. 2 are reproduced below: -**

"5.2 Ground No.2: This ground of appeal relates to addition of Rs. 3,09,16,129/-, which is reduced from Work-in-progress. This issue is discussed in para 6, 61.1 and 6.2 of the assessment order. In this regard, assessee, in the written submission (para 4 above), has — stated that the assessment u/s. 143(3) of the year under consideration was already passed prior to search and the AO did not make any addition on account of brokerage, sales & marketing, finance cost and legal & professional fees. Therefore, the AO cannot revisit the order without any incriminating material. AO has not brought out anything in the assessment order to establish, that certain new facts or new insights/revelations or any incriminating document or any admission in statements recorded in search proceedings were discovered or unearthed, due to which issued closed in earlier 143(3) order is being reassessed/revisited in the 153A assessment. In view of this, the ground no. 2 of assesssee's appeal is allowed."

6. Aggrieved revenue is in appeal before us raising following grounds in its appeal: -

> **"1. Whether on the facts and in the circumstances of the case and in Law, the Ld. CIT(A) was justified in deleting the addition of Rs. 3,09,16,296/- and further holding that the AO could not make addition without incriminating material without considering the fact that once the assessment is initiated u/s 153A or 153C of the Act, it is open for the AO to make addition on any issue whether any incriminating material related that is found in the course of search or not''**
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> **2. Whether on the facts and in the circumstances of the case and in Law, the Ld. CIT(A) was justified in deleting the addition of Rs. 3,09,16,296/and further holding that he AO could not make addition without incriminating material without considering the fact that on this issue, he decision in the case of Commissioner of Income Tax s. Continental Warehousing & All Cargo Global logistics has not been accepted by the Revenue & SLP been filed in the Apex Court which is pending for adjudication."**

7. Before us, revenue raised the grounds of appeal contesting that Ld.CIT(A) was not justified in deleting the addition and holding that the Assessing Officer could not make addition without incriminating material and he failed to consider the fact that once the assessment is initiated u/s.153A or 153C of the Act, it is open for the Assessing Officer to make addition on any issue whether any incriminating material related is found in the course of search or not and further the Hon'ble Jurisdictional High Court decision in the case of CIT v. Continental Warehousing & All Cargo Global logistics [374 ITR 0645] which has not been accepted by the revenue and it is in appeal before on Hon'ble Apex court.

8. At the time of hearing, Ld. DR heavily relied on the order passed by the Assessing Officer and he relied on the case law submitted by him which are as below: -

S. No. [A] On the issue of addition being made in Search Assessments even in the absence of incriminating Material

1 CIT v. Raj Kumar Arora [2014] 52 taxmann.com 172 (Allahabad)
2 E.N. Gopakumar v. CIT[2016] 75 taxmann.com 215 (Kerala)

3. M/s. Canara Housing Development .v. Dy.CIT (Karnataka High Court) on 25 July, 2014 ITA No. 38/2014

[B] List of few cases wherein the SLP filed by the Revenue, against the orders of High Courts given in favour of the assessee on the issue of addition being made in Search Assessments even in the absence of Incriminating Material, are admitted

1 Pr.CIT v. Gahoi Foods (P.) Ltd [2020] 117 taxmann.com 118 (SC)
2 Pr.CIT v. Param Dairy Ltd. [2021] 133 taxmann.com 148 (SC)
3 Pr.CIT v. Gaurav Arora [2021] 133 taxmann.com 293 (SC)
4 CIT v. Continental Warehousing Corporation (Nhava Sheva) Ltd. [2015] 64 taxmann.com 34 (SC)

In addition to the case laws relied Ld. DR further relied on the decision rendered by the Hon'ble Kerala High Court in the case of CIT vs K.P. Ummer dated 19/02/2019, ITA No. 174 of 2013 for the contention that there is no bar on making any addition to the income of the assessee even in case of completed assessments irrespective of the fact that no incriminating material was found during the course of search proceedings."

9. On the other hand, Ld. AR of the assessee submitted written submissions and it is reproduced below: -

"Ground No.1 & 2: Hon'ble CIT(A) deleted addition made in assessment framed u/s 153C in absence of incriminating material.

A.O. Para 6 Page 3

CIT(A) Para 5.2 Page 13 & 14

A) Regular assessment u/s 143(3) completed on 09/03/2017 by ACIT—15(2)(1) allowing expenses at Rs.3,09,16,296/- in the assessment framed and determining business loss at Rs.2,27,16,946/- as shown. (P37 to 49)

B) Notice u/s 153C issued on 16/11/2017 by DCIT, Central Circle- (2)(1), Mumbai pursuance to action u/s 132(1) on associate concern.

C) No incriminating evidence found for the year under consideration. A.O. has not based addition made at Rs.3,09,16,296/- on any incriminating material found in the course of search.

D) The issue covered in favour of assessee by decision of Hon'ble Apex Court in the case of CIT vs. Sinhgad Technical Education Society reported at 397 ITR 0344 (SC).

E) No incriminating evidence/material has been found in the course of search at the premises of M/s. Luxora Infrastructure Pvt. Ltd. and Group Companies on the basis of which jurisdiction is assumed in the case of assessee u/s 153C.

F) In absence of incriminating material no jurisdiction with A.O. to make any addition in respect to assessment year which has achieved finality u/s 143(3) of I.T. Act 1961. In the case of assessee for Asstt. Year 2013-14 regular assessment has been completed u/s 143(3) on 09/03/2017 i.e before initiation of proceedings u/s 153C on 16/11/2017. Thus addition made in absence of incriminating material in the assessment framed u/s 153C for Asstt. Year 2013-14 is bad in law. Hon'ble CIT(A) has rightly deleted addition made by A.O.

Reliance on:

i) (2017) 397 ITR 0344 (SC) CIT vs. Sinhgad Technical Education Society (P-2).

ii) Hon'ble Bombay High Court, Bench at Nagpur in ITA No.50/2017 in the case of M/s. Marytime Suppliers Pvt. Ltd., Nagpur. (P-11 & 12)

iii) Hon'ble Bombay High Court, Bench at Nagpur in ITA No.54/2017 in the case of Dnarampal Agrawal, Nagpur. (P-15)

iv) (2015) 374 ITR 0645 (Bom.) CIT vs. Continental Warehousing Corporation (P-26)"

10. Considering the rival submissions and material placed on record, we observe that the original assessment u/s. 143(3) of the Act was completed on 09.03.2017 and the assessment was framed and business loss was determined at ₹.2,27,16,947/-, subsequent to search notice u/s. 153C of the Act was issued and served on the assessee. We observed from the notice u/s.153C of the Act that the issues raised in the notice and the additions made by the Assessing Officer in assessment order are not the same, in the Assessment Order Assessing Officer analysed the financial statements and disallowed certain expenditures which according to the Assessing Officer should have been charged to work-in-progress accordingly, he made addition. After careful consideration of the order passed by the Ld.CIT(A) and Ld.CIT(A) gave a finding that the addition made by the Assessing Officer in the Assessment Order are not based on any incriminating material found during the search it is in line with the decision of the Hon'ble Jurisdictional High Court in the case of CIT v. Continental Warehousing &

> **All Cargo Global logistics (supra). Further we observe that revenue has raised Ground No. 2 with the submission that revenue has not accepted the decision of the Hon'ble Jurisdictional High Court in the case of CIT v. Continental Warehousing & All Cargo Global logistics (supra). However, the above decision is binding**
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> **on this jurisdiction and we do not find any reason to interfere with the finding of the Ld.CIT(A) as per which Assessing Officer has not made the addition based on any incriminating material found during search. Therefore, ground raised by the revenue is dismissed.**

5. It was thus submitted that the appeal deserves to be allowed on the short ground that admittedly there was no incriminating material found during the search operations, and yet the impugned additions have been made. Learned counsel, thereafter, took us through the voluminous paper books in support of the genuineness of the transaction and also referred to the reports obtained from the Mauritius tax authorities through the official channels. For the reasons we will state in a short while, however, we are not inclined to deal with those aspects of the matter. Coming back to the question of additions being made in the absence of the incriminating material, the learned Commissioner (DR) addressed us at length on the merits on this aspect of the matter and submitted that such an approach is plainly contrary to the scheme of the Act. She also pointed out our attention to several decisions of the Hon'ble non-jurisdictional High Court, which follow a different path vis-à-vis the path traversed by the Hon'ble jurisdictional High Court in the case of Continental Warehousing *(supra)* and All Cargo Global Logistics *(supra)* and justifies the same. In response to our request, she has filed a very comprehensive and detailed note on this aspect, which, inter alia, states as follows:

> 2. This is with reference to the assessee's appeal which was heard on 28.07.2022 . One of the grounds raised by the assessee before the Hon'ble Bench is that " *(3) The addition made by A.O. u/s 68 in assessment framed u/s 143(3) r.w.s. 153A in absence of any incriminating material found during the course of search and upheld by Hon'ble CIT(A) is unjustified, unwarranted and bad in law*."
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> 3. It is argued by the assessee that the powers of an AO to make assessment under section 153A are restricted to those issues which emanate from the evidences found in search only. It is being argued that the AO cannot embark upon assessment on any other issue which either has no relevance or nexus to evidence found during search or is based merely on the re-appreciation / examination of an entry already recorded in books or documents already made available to AO or any claim/relief already claimed and allowed by AO prior to search, whether under section 143(1)or 143(3).
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> 4. There are contradictory decisions of the courts on this issue, with the Jurisdictional Bombay High Court deciding the issue in favour of the assessee in its oft quoted judgement rendered in the case of Continental Warehousing. However, there are a few High Courts which having taken cognizance of the Bombay High Court , referred above , have held that there is no requirement of existence of incriminating material either for invoking provision of section 153A or for revisiting the assessments which stood completed as on the date of search

either u/s 143(1) or 143(3). As directed by the Hon'ble Bench , kindly find below a summary of the decisions relied upon by the undersigned to counter the assessee's contention

A) ***Commissioner of Income-tax, Central, Kanpur v. Raj Kumar Arora [2014] 52 taxmann.com 172 (Allahabad)***, ***dated 11 July, 2014*** wherein after analysing the provisions of section 153A and the CBDT Circular dated 05.09.2003 explaining these provisions , the Hon'ble Court held as under :

> *" 9. Under Section 153A of the Act, the Assessing Officer is bound to issue notice to the assessee to furnish return for each assessment year falling within six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made. The Assessing Officer is required to assess or reassess the total income of the aforesaid years.*
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> *10. Under the block assessment proceeding under Chapter XIV-B only the undisclosed income found during the search and seizure operation were required to be assessed and the regular assessment proceedings were preserved. The introduction of Section 153A of the Act provides a departure from this proceeding. Under Section 153A of the Act, the Assessing Officer has been given the power to assess or reassess the total income of the assessment years in question in separate assessment orders. Consequently, there would be only one assessment order in respect of six assessment years in which total disclosed or undisclosed income would be brought to tax. Consequently, even though an assessment order has been passed under Section 143(1) (a) or under Section 143(3) of the Act, the Assessing Officer would be required to reopen these proceedings and reassess the total income taking notice of undisclosed income even found during the search and seizure operation. The fetter imposed upon the Assessing Officer under Sections 147 and 148 of the Act have been removed by the non obstante clause under Section 153A of the Act. Consequently, we are of the opinion that in cases where the assessment or reassessment proceedings have already been completed and assessment orders have been passed, which were subsisting when the search was made, the Assessing Officer would be competent to reopen the assessment proceeding already made and determine the total income of the assessee. The Assessing Officer, while exercising the power under Section 153A of the Act, would make assessment and compute the total income of the assessee including the undisclosed income, notwithstanding the assessee had filed the return before the date of search which stood processed under Section 143(1)(a) of the Act.*
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> *11. In the light of the aforesaid, the reasons given by the Tribunal that no material was found during the search cannot be sustained, since we have held that the Assessing Officer has the power to reassess the*

> *returns of the assessee not only for the undisclosed income, which was found during the search operation but also with regard to the material that was available at the time of the original assessment."*

B) *M/s Canara Housing Development Company vs The Deputy Commissioner Of Income (Karnataka High Court) dated 25 July, 2014 ITA No. 38/2014*

Though the substantial question of law that arose for consideration in this case was with reference to the powers of the CIT to invoke the provisions of section 263, viz, *"When once the proceedings under Section 153A of the Act is initiated, whether the Commissioner of Income Tax can invoke the power under Section 263 of the Act to review the order of assessment passed by the Assessing Authority?",* the Karnataka High Court also provided indepth analysis of the provisions of section 153A of the Act and held as under:

> *When once the proceedings are initiated under Section 153A of the Act, the legal effect is even in case where the assessment order is passed it stands reopened. In the eye of law there is no order of assessment. Re-opened means to deal with or begin with again. It means the Assessing Officer shall assess or reassess the total income of six assessment years. Once the assessment is reopened, the assessing authority can take note of the income disclosed in the earlier return, any undisclosed income found during search or and also any other income which is not disclosed in the earlier return or which is not unearthed during the search, in order to find out what is the "total income" of each year and then pass the assessment order.(para 10)*

Since the impugned order of the ITAT was passed by placing reliance on the judgment of the Special Bench of ITAT, Mumbai in the case of ***ALL CARGO GLOBAL LOGISTICS LIMITED - (2012) 16 ITR (TRIBUNAL) 380 (MUM)(SB),*** the Hon'ble High Court held that

> *11.The Tribunal has proceeded on the assumption by virtue of the judgment of the special bench of the Mumbai, the scope of enquiry under Section 153A is to be confined only to the undisclosed income unearthed during search and if there is any other income which is not the subject matter of search, the same cannot be taken into consideration. Therefore, the revisional authority can exercise the power under Section 263.* ***In the entire scheme of 153A of the Act, there is no prohibition for the assessing authority to take note of such income. On the contrary, it is expressly provided under Section 153A of the Act the Assessing Officer shall assess or reassess the "total income" of six assessment years which means the said total income includes income which was returned in the earlier return, the income which was unearthed during search and income which is not the subject matter of aforesaid two income.*** *If the commissioner has come across any income that the assessing authority has not taken note of while passing the earlier order, the said*

material can be furnished to the assessing authority and the assessing authority shall take note of the said income also in determining the total income of the assessee when the earlier proceedings are reopened and that income also shall become the subject matter of said proceedings. "(emphasis supplied)

C) E.N. Gopakumar v. Commissioner of Income-tax (Central) [2016] 75 taxmann.com 215 (Kerala) dated 3 October , 2016

The various questions of law raised by the assessee were recasted by the Hon'ble Court and following two questions of laws were treated to be arising for decision:

(i) For the purpose of issuing a notice under Section 153A(1)(a) of the Act calling upon an assessee to file return, is it an imperative that the search under Section 132 of the Act, on the basis of which the notice is sought to be issued, should have resulted in unearthing incriminating material against the assessee?

(ii) While concluding the assessment following the notice issued under Section 153A(1)(a) of the Act, is it necessary that incriminating materials were unearthed as against the assessee in the search under Section 132 of the Act? Is it legally sustainable to conclude an assessment of such a nature in the absence of any incriminating material having been unearthed in the search? Is it necessary that any incriminating material ought to have been unearthed in the search under Section 132 of the Act to make any additions to the returns filed by the assessee following notice under Section 153A(1)(a)?

Answering the above two questions, the Court held as under:

7. In so far as the issue as to whether it is necessary that incriminating materials should be unearthed in a search under Section 132 of the Act to sustain a notice issued under Section 153A(1)(a) is concerned, the issue stands covered in favour of the Department as per the judgment of this Court in St. Francis Clay Becor Tiles's case (supra) and Promy Kuriakose's case (supra) though the second among them relates to a third person to the search as well; which cases would fall under Section 153C of the Act. We, therefore, answer the said question stating that for the issuance of a notice under Section 153A(1)(a), it is not necessary that the search on which it was founded should have necessarily yielded any incriminating material against the assessee or the person to whom such notice is issued.

Question No.(ii):

8. Section 153A is a provision which deals with assessment in case of search or requisition. The activation of a search is not something which is regulated by any limit as to period of time. Even if returns are filed and regular assessments are concluded, search on premises could always be made, if the authority concerned is satisfied that action ought to proceed in that line. Once that is done, Section 153A(1)(a) authorises the issuance of notice calling for filing of returns. This has been noted even under the point decided above.

Once a return is filed in answer to such a notice, the Explanation to Section 153A provides, among other things, that all provisions of the Income Tax Act will apply to the assessment made under Section 153A of the Act. This is the manner in which the provisions in Sections 153A, 153B and 153C of the Act would regulate. Once that is done, it is well within the jurisdiction of the assessing authority to proceed with any lawful modes of assessment as prescribed in the Act. ***The Statute nowhere makes it conditional that the department has to unearth some incriminating material to conclude some method against the assessee in events where the assessment is triggered by a notice under Section 153A(1)(a) of the Act. This means that even when such notice is triggered following a search, the assessment proceedings can be concluded in any manner known to law, including under Section 143(3) or even Section 144 of the Act, if need be. Therefore, the assessment proceedings generated by the issuance of a notice under Section 153A (1)(a) of the Act can be concluded against the interest of the assessee including making additions even without any incriminating material being available against the assessee in the search under Section 132 of the Act on the basis of which the notice was issued under Section 153A(1)(a) of the Act.*** *We answer this issue accordingly.(emphasis supplied)*

It is pertinent to mention that the judgment of the Bombay High Court in ***CIT v. Continental Warehousing Corporation (Nhava Sheva) Ltd. [2015] 374 ITR 645*** was also brought to the notice of the Kerala High Court by the appellant.

D) CIT vs Shri K P Ummer, Kerala High Court's order dated 19 February, 2019 in ITA No. 174 of 2013

One of the Questions of Law framed by the Court, as mentioned in para 8 of its order is as under:

"Whether the Tribunal was correct in having found that in those years prior to 2005-06, where the due date for issue of notice under Section 143(2) had expired, as on the date of search, there could be no re-assessment made by virtue of the provisions under Section 153A; of such matters as available in the returns filed, which stands concluded by sheer efflux of time?"

The court relying upon two of its earlier decisions reported in ***CIT v. St. Francis Clay Decor Tiles [2016]385 ITR 624(Ker)]*** and *CIT v. Dr P Sasikumar*[2016(387)ITR 8(Ker)]held that the question is no longer *res integra.* After reproducing the relevant extract from St. Francis Clay Décor, the Kerala High Court held that

"10. Hence, when a notice under Section 153A is issued, it enables the department to carry out re-assessment or assessment with respect to the six immediate prior years and the year in which the search is carried out. This does not require any incriminating material recovered on search relating to those prior years; in which there is no time left, on the date of search, for an assessment under Section 143. The provision under Section 153A is a ***non obstante*** *clause having overriding effect over Sections 139, 147, 158, 149, 151 and 153. The intention of the legislature is to enable assessment, if it has*

> *not been regularly done in any of the previous years, or to re-initiate assessment in case there is already proceedings pending or to re-assess in the case of completed assessments; if the search under Section 132 reveals material pointing to a practice of suppression of income from taxation. These materials need not necessarily be that relevant to the previous six years since a practice of suppression detected in the subject year permits a like presumption to be drawn in the earlier six years too; on best judgment with reference to the business or profession carried on by the assessee. We have also held in* ***Commissioner of Income Tax v. Orma Marble Palace P(Ltd)*** *[ITA 19 of 2011] that a dishonest assessee would not keep evidence of his dishonesty to be discovered after a long time or even a short time. Hence there is no assumption possible that in any of the prior years in which assessments were not regularly completed and the time for the same has expired, there could be additions only on the basis of materials recovered relevant to those years.* ***The returns filed in pursuance to a notice under Section 153A is also to be treated as a return filed under Section 139. Hence, we cannot agree with the Tribunal that the assessments carried out under Section 153A for the prior years in which the due date for notice under Section 143(2) has expired, can only be with reference to incriminating materials recovered on search. (Emphasis supplied)"***

In para 12 of the order, the Hon'ble High Court also provided its observations on the distinction made by the Tribunal in so far as the assessment years based on the limitation for assessment. The Tribunal categorised them as 'concluded assessments' and 'abated assessments'. The Court held that

> *12. We do not think that the intention in providing for abatement of pending proceedings and the revival of the same, if the proceedings under 153A(1) are eventually set aside; was to provide for a separate procedure for the years in which the notice period under Section 143(2) has expired. In fact, the second proviso is intended at keeping in abeyance any pending proceeding for assessment in a particular year; in which there is a proceeding initiated under Section 153A, pursuant to a search under Section 132. Otherwise, there would be parallel proceedings continued for the same assessment year. Hence, when a notice is issued pursuant to a search under Section 132, for assessment under Section 153A, all pending proceedings with respect to a regularly initiated assessment or re-assessment would stand abated. For the said years, the proceedings under Section 153A would be continued and the assessments concluded on that basis. However, when and if the said assessment proceeded with and concluded under Section 153A, is said aside by the statutory authorities or by this Court, then necessarily the original proceedings which stood abated would revive, which is the enabling provision under sub-section (2) of Section 153A.* ***There can be no corollary inferred from the above provisions to find certain years to be of 'concluded assessment'; being possible of re-assessment only on incriminating material recovered in search relatable to that year. Hence, we, on the above***

> ***reasoning and respectfully following the cited decisions of another Division Bench of this Court, answer the question of law against the assessee and in favour of the revenue.***
> ***(Emphasis supplied)***

5. Apart from placing reliance on the above decisions ,which have validated the action of the AOs in making assessments on issues not emanating exclusively from the seized documents, even in AYs where in the assessments stood completed either u/s 143(3) or where the time to issue notice u/s 142(1) had expired, the undersigned would also like to take strength from the fact that SLPs filed by the Department against the Bombay High Court's decision in the case of ***CIT v. Continental Warehousing Corporation (Nhava Sheva) Ltd. [2015] 374 ITR 645*** as well as other decisions rendered by various High Court's confirming the contentions raised by the assessee are admitted by the Hon'ble Supreme Court.

6. In response to the above, the learned counsel for the assessee has also filed a written submission which is reproduced below:

> *1.The assessee is in receipt of mail from CIT(DR) dt. 01/08/2022 wherein certain judgments of Hon'ble Allahabad High Court, Hon'ble Karnataka High Court and Hon'ble Kerala High Court have been referred to submit that even without incriminating material addition can be made in the assessment framed u/s 153A r.w.s. 143 of I.T. Act 1961. It has been accepted at para 4 of the mail that Hon'ble Jurisdictional Bombay High Court has decided the aforesaid issue in favour of assessee.*
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> *2. It is settled position of law that decision of Hon'ble Jurisdictional High Court is binding precedent even though a contrary view has been held by other High Courts on the issue. Assessee for this proposition places reliance on the decision of Hon'ble Jurisdictional High Court in the case of Thana Electricity Supply Ltd. reported at 206 ITR 0727. In view of above addition made by A.O. being contrary to law laid down by the Hon'ble Jurisdictional High Court deserve to be deleted.*
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> *3. It is respectfully submitted that the judgments relied upon by the Hon'ble CIT(DR) in the mail were also relied upon in the case of associate concern of assessee M/s. Luxora Realtors Pvt. Ltd. in assessment year 2013-14 in appeal of revenue ITA No.1096/Mum/2020 before Hon'ble ITAT Mumbai, A-Bench. The appeal of Revenue came to be dismissed by Hon'ble ITAT Mumbai, A-Bench in the case of associate concern of assessee M/s. Luxora Realtors Pvt. Ltd. vide order dated 08/02/2022 copy of which is enclosed. The Hon'ble ITAT has considered the judgment relied upon by CIT(DR) and after considering the same has followed the judgment of Hon'ble Jurisdictional High Court relied upon by the assessee and held that no addition can be made in the completed assessment in the absence of incriminating material found in the course of search. The decision of co-ordinate bench in the case of associate concern of*

assessee M/s. Luxora Realtors Pvt. Ltd. is binding precedent. Relying upon the same it is humbly prayed that addition made in respect to share capital contribution in the absence of any incriminating material is unjustified and unsustainable.

4. It is worthwhile to note that Hon'ble Delhi High Court in recent decision in the case of Mamta Agarwal in ITA No.191/2022 vide judgment dated 14/07/2022 has held that no addition could be made in the absence of incriminating material found in the course of search. Ratio laid down fully supports the submission made.

5. It is settled proposition of law that on a legal position if two views are available, the view which is favourable to assessee needs to be adopted. The proposition submitted by assessee is in terms of law laid down by the Hon'ble Apex Court in the case of Mysore Minerals Ltd. reported at 239 ITR 0775 (SC). In the case of assessee the judgments laying down law in favour of assessee is that of Hon'ble Jurisdictional High Court and is binding precedent by itself. In view of above contrary view adopted by other High Court deserves no consideration in terms of law laid down by the Hon'ble Apex Court as referred to hereinabove.

6. Considering the submission made hereinabove it is humbly submitted that addition made in the case of assessee on account of share capital contribution without any incriminating material found in the course of search is unjustified and unsustainable. In view of above it is humbly prayed that the addition made by A.O. be directed to be deleted and grounds of appeal of the appellant be allowed.

7. We have heard the rival contentions, perused the material on record, and duly considered facts of the case in the light of the applicable legal position.

8. We have noticed that there is no dispute that the issue in the appeal is squarely covered by the judgements of the Hon'ble jurisdictional High Court, in favour of the assessee, and, to that extent, the legal position is that in the absence of any incriminating material, no addition can be made in the assessment proceedings under section 153A read with section 143(3). Whatever may be learned Departmental Representative's vehement submission against the merits of this legal position and the support that her arguments canvass from the scheme of the Income Tax Act, 1961, she has been gracious enough to accept that while there are conflicting decisions of Hon'ble non-jurisdictional High Courts on the above legal proposition, but with "the Jurisdictional Bombay High Court deciding the issue in favour of the assessee in its oft-quoted judgement rendered in the case of Continental Warehousing". The question then arises as to what is the binding nature of judicial precedent from the non-jurisdictional High Court, and whether the fact of an SLP being admitted, against a binding judicial precedent, can dilute, curtail or otherwise narrow down the binding nature of such judicial precedent. As for the first question, i.e. binding nature of decisions from the Hon'ble jurisdictional High Court and decisions from the Hon'ble non-jurisdictional High Court, the legal position is clear and unambiguous. As observed by the Hon'ble Supreme Court in the case of **Mumbai Kamgar Sabha v. Abdulbahi Faizullbhai**

AIR 1976 SC 1455, "**It is trite, going by anglophonic principles that a ruling of a superior Court is binding law**". While dealing with judicial precedents from non-jurisdictional High Courts, we may usefully take of observations of Hon'ble jurisdictional High Court in the case of **CIT vs. Thana Electricity Supply Ltd. [(1994) 206 ITR 727 (Bom)]**, to the effect "**The decision of one High Court is neither binding precedent for another High Court nor for the Courts or the Tribunals outside its own territorial jurisdiction. It is well-settled that the decision of a High Court will have the force of binding precedent only in the State or territories on which the Court has jurisdiction. In other States or outside the territorial jurisdiction of that High Court it may, at best, have only persuasive effect**". Unlike the decisions of the Hon'ble jurisdictional High Court, which bind us in letter and in spirit on account of the binding force of law, the decisions of the Hon'ble non-jurisdictional High Court are followed by the lower authorities, only in the absence of benefit of guidance by the Hon'ble jurisdictional High Court on that issue, on account of the persuasive effect of these decisions and on account of the concept of judicial propriety-factors which are inherently subjective in nature. Quite clearly, therefore, the applicability of the non-jurisdictional High Court is never absolute, without exceptions and as a matter of course, and that too is limited only on the issues on which there is no guidance of the Hon'ble jurisdictional High Court. In the present case, we have the benefit of guidance on the subject by the Hon'ble jurisdictional High Court. There is thus no occasion for us to consider the judgments of the Hon'ble non-jurisdictional High Courts. In view of these discussions, the decisions of the Hon'ble non-jurisdictional High Court have no relevance in the present context. It is also elementary in law that the mere pendency of the appeal, against a binding judicial precedent, in a higher judicial forum does not dilute, curtail or otherwise narrow down its binding nature. As long as the binding judicial precedent holds good in law, as it does unless it is upturned or reversed by a higher judicial forum, it binds the lower judicial forums.

9. In view of these discussions, as also bearing in mind the entirety of the case, we uphold the plea of the assessee, and respectfully following the coordinate bench in the case of Luxoria Realtors (supra), as also Hon'ble jurisdictional High Court's judgments in the cases of Continental Warehousing (supra) and All Cargo Global Logistics (supra), hold that the impugned additions, in respect of share capital subscriptions from the two Mauritius based entities, namely Access Investment India and Aanya Properties (2) Limited, amounting to Rs 110,02,46,593, must be deleted for this short reason alone. We, therefore, delete the impugned additions. The assessee gets the relief accordingly.

10. As this appeal has been decided on the short ground of jurisdiction in the assessment under section 153A r.w.s. 143(3), we see no need to deal with the merits of the additions. That aspect of the matter is academic as of now.

11. In the result, the appeal is allowed in the terms indicated above. Pronounced in the open court today on the 21st day of October, 2022.

Sd/-	**Sd/-**
Pavan Kumar Gadale	**Pramod Kumar**
(Judicial Member)	(Vice President)

Mumbai, dated the 21st day of October, 2022

Copies to: (1) *The appellant* (2) *The respondent*
(3) *CIT* (4) *CIT(A)*
(5) *DR* (6) *Guard File*

By order

Senior Private Secretary
Income Tax Appellate Tribunal
Mumbai benches, Mumbai