

IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI 'D' BENCH, MUMBAI.

Before Shri B.R. Baskaran (AM) & Smt. Kavitha Rajagopal (JM)

I.T.A. No. 904/Mum/2022 (A.Y. 2013-14)

I.T.A. No. 907/Mum/2022 (A.Y. 2014-15)

DCIT, CC-6(3) Room No. 1903 19 <sup>th</sup> Floor Air India Building Nariman Point Mumbai-400021. (Appellant)	Vs.	Late Hiraben Khantilal Shah (through legal hire Pankaj Shah) G-5, 1 <sup>st</sup> Floor Mangal Kunj, Jambli Gulli Borivali West Mumbai-400 092. (Respondent)
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I.T.A. No. 573/Mum/2022 (A.Y. 2012-13)

Hiraben Khantilal Shah G-5, 1 <sup>st</sup> Floor Mangal Kunj, Jambli Gulli Borivali West Mumbai-400 092. (Appellant)	Vs.	DCIT, CC-6(3) Room No. 1903 19 <sup>th</sup> Floor Air India Building Nariman Point Mumbai-400021. (Respondent)
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C.O. No. 107/Mum/2022 (A.Y. 2013-14)

C.O. No. 108/Mum/2022 (A.Y. 2014-15)

Late Hiraben Khantilal Shah (through legal hire Pankaj Shah) G-5, 1 <sup>st</sup> Floor Mangal Kunj, Jambli Gulli Borivali West Mumbai-400 092. (Appellant)	Vs.	DCIT, CC-6(3) Room No. 1903 19 <sup>th</sup> Floor Air India Building Nariman Point Mumbai-400021. (Respondent)
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PAN : AAHPS6934N

Assessee by	Shri Mani Jain & Shri Patreek Jain
Department by	Ms. Riddhi Mishra
Date of Hearing	21.03.2023
Date of Pronouncement	16.05.2023

ORDER

Per Bench:-

The assessee has filed appeal for AY 2012-13. The Revenue has filed appeals for A.Y. 2013-14 and 2014-15. The assessee has filed Cross Objections for AY 2013-14 and 2014-15. In the appeal of the assessee for AY 2012-13 and in the Cross objections filed for AY 2013-14 and 2014-15, the assessee is challenging the validity of additions made in the assessment completed under section 153A of the I.T. Act in the absence of any incriminating material on the ground that assessments of these years do not abate u/s 153A of the Act. Accordingly, the parties were heard on the above said legal ground.

2. Facts relating to the case are stated in brief. The assessee herein belongs to Pankaj Shah family. The assessee alongwith other family members and group companies were subjected to search operations under section 132 of the Act on 04.2.2016. Consequently thereto, the assessment for AY 2014-15 was completed in the hands of the assessee under section 143(3) read with section 153A of the Act, wherein long term capital gains declared by the assessee were disallowed holding them to be bogus in nature. The Assessing Officer, however, assessed sale proceeds of shares sold by the assessee under section 68 of the Act. He also made addition towards estimated commission expenses incurred in procuring bogus capital gains.

3. Before Id CIT(A), the assessee contended that the impugned additions could not have been made in the absence of incriminating materials. However, the Ld CIT(A) held that the books of accounts of the assessee itself shall constitute incriminating material. Accordingly, he dismissed the above said legal ground of the assessee in all the three years. The Ld CIT(A) confirmed the additions in AY 2012-13. Hence the assessee has filed appeal for AY 2012-13 raising grounds relating to above said legal contention and also on merits of addition. However, the learned CIT(A) deleted both the additions made by the AO in AY 2013-14 and 2014-15. Hence, the Revenue

has filed appeals challenging the relief granted by Ld CIT(A) in AY 2013-14 and 2014-15. The assessee, on the contrary, has filed cross objections in both the above said years raising the legal contention that the impugned additions could not have been made in the absence of any incriminating material.

4. The Learned AR submitted that all these years fall under the category of “unabated assessment years” and hence the assessments already completed prior to the date of search do not abate. He submitted that, in the case of unabated assessments, the Assessing Officer can make any addition only on the basis of any incriminating material found during the course of search. He submitted that the additions made by the AO in these years are not based on any incriminating material found during the course of search. Accordingly, he contended that all the additions made by the AO in these years are liable to be deleted. In support of this legal contention, the Ld A.R placed his reliance on the decision rendered by jurisdictional Hon’ble Bombay High Court in the cases of Continental Corporation (Nhava Sheva) Ltd (2015)(58 taxmann.com 78)(Bom) and Gurinder Singh Bawa (2017)(79 taxmann.com 398)(Bom). The Learned AR also furnished following details in support of his contentions that these years fall under the category of unabated assessment years.

Assessment year	Date of filing Return of income	Last date for issue of notice u/s. 143(2)	Date of search
2012-13	14.11.2021	30.09.2013	04.02.2016
2013-14	05.08.2013	30.09.2014	04.02.2016
2014-15	30.07.2014	30.09.2015	04.02.2016

5. We heard learned DR and perused the record. From the table extracted above, we noticed that all these years fall under the category of unabated assessment years. We notice that the additions made by the AO in these

years are related to the sale of shares and estimated commission. We are unable to agree with Ld CIT(A) that these additions have been made on the basis of any incriminating material found during the course of search. We notice that the addition relates to sale of shares already recorded in the books and the commission expenses have been made on estimated basis. Hence it cannot be said that the additions have been made on the basis of incriminating materials.

5.1 We notice that the above said legal contentions of the assessee finds support from the decision rendered by Hon'ble Bombay High Court in the case of Continental Warehousing Corporation (Nhava Sheva) Ltd (supra), wherein the High Court has upheld the view given by the Special bench of Tribunal in the case of All Cargo Logistics. The relevant observations made by Hon'ble Bombay High Court in the above said case are extracted below:-

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

"48. The provision under section 153A is applicable where a search or requisition is initiated after 31.5.2003. In such a case the AO is obliged to issue notice u/s 153A in respect of 6 preceding years, preceding the year in which search etc. has been initiated. Thereafter he has to assess or reassess the total income of these six years. It is obligatory on the part of the AO to assess or reassess total income of the six years as provided in section 153A(1)(b) and reiterated in the 1st proviso to this section. The second proviso states that the assessment or reassessment pending on the date of initiation of the search or requisition shall abate. We find that there is no divergence of views in so far as the provision contained in section 153A till the 1st proviso. The divergence starts from the second proviso which states that pending assessment or reassessment on the date of initiation of search shall abate. This means that an assessment or reassessment pending on the date of initiation of search shall cease to exist and no further action shall be taken thereon. The assessment shall now be made u/s 153A.

The case of Ld. Counsel for the assessee is that necessary corollary to this provision is that completed assessment shall not abate. **These assessments become final except in so far and to the extent as undisclosed income is found in the course of search.** On the other hand, it has been argued by the Ld. Standing Counsel that abatement of pending assessment is only for the purpose of avoiding two assessments

for the same year, one being regular assessment and the other being assessment u/s 153A. In other words these two assessments coalesce into one assessment. The second proviso does not contain any word or words to the effect that no reassessment shall be made in respect of a completed assessment. The language is clear in this behalf and therefore literal interpretation should be followed. Such interpretation does not produce manifestly absurd or unjust results as section 153A (i)(b) and the first proviso clearly provide for assessment or reassessment of all six years. It may cause hardship to some assesses where one or more of such assessments has or have been completed before the date of initiation of search. This is hardly of any relevance in view of clear and unambiguous words used by the legislature.

This interpretation does not cause any absurd etc. results. There is no casus omissus and supplying any would be against the legislative intent and against the very rule in this behalf that it should be supplied for the purpose of achieving legislative intent. The submissions of the Ld. Counsels are manifold, the foremost being that the provision u/s 153A should be read in conjunction with the provision contained in section 132(1), the reason being that the latter deals with search and seizure and the former deals with assessment in case of search etc, thus, the two are inextricably linked with each other.

49. Before proceeding further, we may now examine the provision contained in sub-section (2) of section 153, which has been dealt with by Ld. Counsel. It provides that if any assessment made under sub-section (1) is annulled in appeal etc., then the abated assessment revives. However, if such annulment is further nullified, the assessment again abates. The case of the Ld. Counsel is that this provision further shows that completed assessments stand on a different footing from the pending assessments because appeals etc. proceedings continue to remain in force in case of completed assessments and their fate depends upon subsequent orders in appeal. On consideration of the provision and the submissions, we find that this provision also makes it clear that the abatement of pending proceedings is not of such permanent nature that they cease to exist for all times to come. The interpretation of the Ld. Counsel, though not specifically stated, would be that on annulment of the assessment made u/s 153(1), the AO gets the jurisdiction to assess the total income which was vested in him earlier independent of the search and which came to an end due to initiation of the search.

50. The provision contained in section 132 (1) empowers the officer to issue a warrant of search of the premises of a person where any one or more of conditions mentioned therein is or are satisfied, i.e. - a) summons or notice has been issued to produce books of account or other documents but such books of account or documents have not been produced, b) summons or notice has been or might be issued, he will not produce the books of account or other documents mentioned therein, or c) he is in possession of any money or bullion etc. which represents wholly or partly the income or property which has not been and which would not be disclosed for the purpose of assessment, called as undisclosed income or

property. We find that the provision in section 132 (1) does not use the word "incriminating document". Clauses (a) and (b) of section 132(1) employ the words "books of account or other documents". For harmonious interpretation of this provision with provision contained in section 153A, all the three conditions on satisfaction of which a warrant of search can be issued will have to be taken into account.

51. Having held so, an assessment or reassessment u/s 153A arises only when a search has been initiated and conducted. Therefore, such an assessment has a vital link with the initiation and conduct of the search. We have mentioned that a search can be authorised on satisfaction of one of the three conditions enumerated earlier. Therefore, while interpreting the provision contained in section 153A, all these conditions will have to be taken into account. With this, we proceed to literally interpret to provision in 153A as it exists and read it alongside the provision contained in section 132(1).

52. The provision comes into operation if a search or requisition is initiated after 31.5.2003. On satisfaction of this condition, the AO is under obligation to issue notice to the person requiring him to furnish the return of income of six years immediately preceding the year of search. The word used is "shall" and, thus, there is no option but to issue such a notice. Thereafter he has to assess or reassess total income of these six years. In this respect also, the word used is "shall" and, therefore, the AO has no option but to assess or reassess the total income of these six years. The pending proceedings shall abate. This means that out of six years, if any assessment or reassessment is pending on the date of initiation of the search, it shall abate. In other words pending proceedings will not be proceeded with thereafter. The assessment has now to be made u/s 153A (1)(b) and the first proviso. It also means that only one assessment will be made under the aforesaid provisions as the two proceedings i.e. assessment or reassessment proceedings and proceedings under this provision merge into one. If assessment made under sub-section (1) is annulled in appeal or other legal proceedings, then the abated assessment or reassessment shall revive. This means that the assessment or reassessment, which had abated, shall be made, for which extension of time has been provided under section 153B.

**53. The question now is - what is the scope of assessment or reassessment of total income u/s 153A (1)(b) and the first proviso ? We are of the view that for answering this question, guidance will have to be sought from section 132(1). If any books of account or other documents relevant to the assessment had not been produced in the course of original assessment and found in the course of search in our humble opinion such books of account or other documents have to be taken into account while making assessment or reassessment of total income under the aforesaid provision. Similar position will obtain in a case where undisclosed income or undisclosed property has been found as a consequence of search. In other words, harmonious interpretation will produce the following results :-**

a) In so far as pending assessments are concerned, the jurisdiction to make original assessment and assessment u/s 153A merge into one and only one assessment for each assessment year shall be made separately on the basis of the findings of the search and any other material existing or brought on the record of the AO,

(b) in respect of non-abated assessments, the assessment will be made on the basis of books of account or other documents not produced in the course of original assessment but found in the course of search, and undisclosed income or undisclosed property discovered in the course of search.

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

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

**“5.** On further appeal before the Tribunal, the assessee interalia 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 interalia placing reliance upon the decision of the Special Bench of the Tribunal in Al-Cargo Global Logistics Ltd. rendered on 6 July 2012. The Tribunal in the impugned order further held that no incriminating material was found during the course of the search. Thus the entire proceedings under Section 153A of the Act were without jurisdiction and therefore the addition made had to be deleted on the aforesaid ground. The impugned order also thereafter considered the issues on merits and on it also held in favour of the respondent-assessee.

**6.** Mr. Kotangale, the learned Counsel for the revenue very fairly states that the decision of the Special Bench of the Tribunal in Al-Cargo Global Logistics Ltd. was a subject matter of challenge before this Court as a part of the group of appeals disposed of as *CIT v. Continental Warehousing*

*Corporation (Nhava Sheva) Ltd.* [[2015\] 374 ITR 645/58 taxmann.com 78/232 Taxman 270 \(Bom.\)](#) upholding the view of the Special Bench of the Tribunal in *Al- Cargo Global Logistics Ltd.* Consequently, once an assessment has attained finality for a particular year *i.e.* it is not pending then the same cannot be subject to tax in proceedings under Section 153A of the Act. This of course would not apply if incriminating materials are gathered in the course of search or during proceedings under Section 153A of the Act which are contrary to and/or not disclosed during regular assessment proceedings.

**7.** In view of the above, on issue of jurisdiction itself the issue stands concluded against the revenue by the decision of this Court in *Continental Warehousing Corpn. (Nhava Sheva) Ltd. (supra)*. In the appeal before us, the revenue has made no grievance with regard to the impugned order of the Tribunal holding that in law the proceedings under Section 153A of the Act are without jurisdiction. This in view of the fact that no 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.

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

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

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

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

“Summary of the legal position

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

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

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

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

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

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

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

vii. Completed assessments can be interfered with by the AO while making the assessment under Section 153 A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment.”

5.5 The decision rendered in the above said cases by Hon’ble Bombay High Court and Hon’ble Delhi High Court has been upheld by Hon’ble Supreme Court in the recent decision rendered in the case of PCIT vs. Abhisar Buildwell P Ltd (Civil Appeal No.6580 of 2021 dated 24<sup>th</sup> April, 2023). The relevant observations made by Hon’ble Supreme Court are extracted below:-

“13. For the reasons stated hereinabove, we are in complete agreement with the view taken by the Delhi High Court in the case of Kabul Chawla (supra) and the Gujarat High Court in the case of Saumya Construction (supra) and the decisions of the other High Courts taking the view that no addition can be made in respect of completed assessments in absence of any incriminating material.

14. In view of the above and for the reasons stated above, it is concluded as under:-

i) to iii).....

iv) in case no incriminating material is unearthed during the search, the AO cannot assess or reassess taking into consideration the other material in respect of completed assessments/unabated assessments. Meaning thereby, in respect of completed/unabated assessments, no addition can be made by the AO in absence of any incriminating material found during the course of search under Section 132 or requisition under Section 132A of the Act, 1961. However, the completed/unabated assessments can be re-opened by the AO in exercise of powers under Section 147/148 of the Act, subject to fulfillment of the conditions as envisaged/mentioned under section 147/148 of the Act and those powers are saved.”

6. In view of the foregoing discussions, following binding decision rendered by Hon'ble Supreme Court in the case of Abhisar Buildwell P Ltd (supra), which in turn has approved the decision rendered by Hon'ble Jurisdictional Bombay High Court in the case of Continental Warehousing Corporation (Nhava Sheva) Ltd (supra) and the decision of Hon’ble Delhi High Court rendered in the case of Kabul Chawla (supra), we hold that the

additions made by the Assessing Officer under section 68 of the Act towards sale of shares and also estimated commission expenditure are liable to be deleted, since they are not based on any incriminating material found during the course of search. Accordingly, we set aside the order passed by Ld CIT(A) on the above said legal issue. Since we have held that the additions could not have been made in the absence of any incriminating material, the grounds urged by the assessee/revenue on merits do not require adjudication.

7. In the result, the appeal filed by the revenue is dismissed and the cross objection of the assessee is allowed.

Pronounced in the open court on 16.5.2023.

Sd/-  
(KAVITHA RAJAGOPAL)  
Judicial Member

Sd/-  
(B.R. BASKARAN)  
Accountant Member

Mumbai; Dated : 16/05/2023

Copy of the Order forwarded to :

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

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PS

BY ORDER,  
(Assistant Registrar)  
ITAT, Mumbai