**IN THE INCOME TAX APPELLATE TRIBUNAL,
KOLKATA-GUWAHATI 'e-COURT', KOLKATA
[Virtual Court Hearing]**

**Before Shri Rajpal Yadav, Vice-President (KZ)
&
Dr. Manish Borad, Accountant Member**

**I.T.A. No. 220/GAU/2019
Assessment Year: 2013-2014**

Agrim Infraproject Private Limited,.....Appellant
C/o. Rahul Raj Jain & Co.,
H No. 15, 1st Floor, Bye Lane-2,
Shaktigarh Path, Bhangagarh,
G.S. Road, Assam-781005
[PAN:AAHCA2413P]

-Vs.-
Deputy Commissioner of Income Tax,.....Respondent
Circle-3, Guwahati,
Office of Deputy Commissioner of Income Tax,
6th Floor, Aayakar Bhawan,
Christian Basti, G.S. Road,
Assam-781005

Appearances by:
Shri Miraj D. Shah, Advocate, appeared on behalf of the assessee

Shri N.T. Sherpa, JCIT, appeared on behalf of the Revenue

Date of concluding the hearing : May 17, 2023
Date of pronouncing the order : June 21, 2023

O R D E R

Per Rajpal Yadav, Vice-President (KZ):-

The assessee is in appeal before the Tribunal against the order of ld. Commissioner of Income Tax

(Appeals), Guwahati-2, Guwahati dated 15.02.2019 passed for Assessment Year 2013-14.

2. The assessee has originally taken three grounds of appeal. However, during the course of hearing, it has filed revised grounds of appeal, wherein it has raised twelve grounds of appeal. A perusal of all the grounds, i.e. original as well as revised, would reveal that basically grievance of the assessee revolves around a single issue, namely whether an addition of Rs.2,05,00,000/-can be made in an assessment order passed under section 153A without unearthing any incriminating material during the course of search.

3. Brief facts of the case are that the assessee-company is a Real Estate Developer and is a well-known name in Infrastructure and Real Estate Projects in North-East. A search under section 132 of the Income Tax Act was carried out upon the group including the premises of the assessee on 17.09.2015. A notice under section 153A was issued on 12.06.2017. In response to this notice, assessee filed its return of income on 28.11.2017 declaring total income at Rs.19,82,260/-. The ld. Assessing Officer thereafter issued notice under section 143(2) of the Income Tax Act. The ld. Assessing Officer has observed that during the financial year 2012-13,

assessee-company has taken unsecured loan from Kolkata based three companies as under:-

Sl. No.	Name of Company	Amount of unsecured loans
1.	M/s. KLS Commodities Pvt. Limited	Rs.1,65,00,000/-
2.	M/s. Shree Ramkrupa Finance Pvt. Limited	Rs. 95,00,000/-
3.	M/s. Burlington Barter Pvt. Limited	Rs. 40,00,000/-

The ld. Assessing Officer thereafter observed that these companies are shell companies, who were engaged in providing accommodation entries and, therefore, these loans are not genuine because assessee could not prove the identity, creditworthiness and genuineness of the transaction. The ld. Assessing Officer has made the addition of these loans with the aid of section 68.

4. Appeal to the ld. CIT(Appeals) did not bring any relief to the assessee.

5. The ld. Counsel for the assessee while impugning the order of ld. CIT(Appeals) submitted that the assessee has filed its original return of income under section 139(1) on 30.09.2013 declaring total income of Rs.19,82,260/-. This return was processed under section 143(1) of the Income Tax Act. The search was carried out upon the assessee on 17.09.2015. Before this date of

search, the time limit to issue notice under section 143(2) was expired. The Department was unable to seize any incriminating material. The loans from these three companies were already declared in the accounts and are available in the books. The ld. Assessing Officer in order to bring this aspect within the ambit of section 153A has observed that during the course of search and seizure action, Inspector of Income Tax was deputed to verify the existence of the abovementioned companies. This one observation cannot be construed that Department was able to lay its hand on incriminating material, which can justify the addition on these loans as unexplained one in an assessment under section 153A. During the course of search, Department was not sitting in a regular assessment proceeding to examine each and every claim if ever made by the assessee and then held it is incorrect claim because some Inspectors have given a report. There should be something more to be recovered from the assessee exhibiting that loans, which are shown by the assessee in its books of account, were non-genuine. Therefore, with the help of recent decision rendered by the Hon'ble Delhi High Court in the case of CIT –vs.- Kabul Chawla reported in 380 ITR 573 (Del.). He emphasized that addition in the total income of the assessee cannot be made.

6. On the other hand, ld. JCIT submitted that during the course of search, an inquiry was made about the status of the creditor and it was collected by the Revenue that these are paper companies. In other words, they fall within the list of Jamakharchi companies compiled by the Director of Investigation, Kolkata in some investigations. Therefore, ld. Assessing Officer has rightly exercised the power under section 153A and enquired the genuineness of these loans in the assessment proceedings under section 153A of the Income Tax Act.

7. We have duly considered the rival contentions and gone through the record carefully. Before adverting to the facts and alleged seized material considered by the ld. Assessing Officer for making the addition in the hands of the present assessees, we deem it appropriate to bear in mind the position of law propounded in various authoritative judgments expounding scope of section 153A of the Act. We are of the view that in this regard, there were large numbers of decisions. First we refer to the decision of Hon'ble Delhi High Court in the case of CIT v-vs.- Kabul Chawla, 380 ITR 573 (Del.). Hon'ble Delhi High Court after detailed analysis has summarized the following 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(l) 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 A.Y.s will have to be computed by the AOs as afresh 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.

(vi) 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."

8. Hon'ble Gujrat High Court has also considered the decision of Hon'ble Delhi High Court in the case of CIT Vs. Kabul Chawla (supra). Hon'ble Gujarat High Court framed the following question of law in the case of Pr.CIT Vs. Saumya Construction (supra):

"(a) Whether the order of Tribunal is right in law and on facts in deleting the addition made in assessment made u/s 153A of the Act?

(b) Whether the Tribunal is right in law in holding that the addition should be based on the incriminating material found during the course of search under new procedure of assessment u/s 153A which is different from earlier procedure u/s 158BC r.w.s. 158BB of the Act and by reading into the section, the words 'the incriminating material

found during the course of search' which are not there in section 153A?

(c) Whether the Tribunal erred in relying on the ITAT order in Sanjay Aggarwal v. DCIT (2014) 47 Taxmann.Com 210 (Del) which has interpreted undisclosed income unearthed during the search to imply incriminating material, as against the finding of the Delhi High Court in Filatex India Ltd. v. *CIT-IV (2015) 229 Taxman 555 wherein it is held that during the assessment u/s 153A additions need not be restricted or limited to incriminating material found during the course of search?"*

9. Hon'ble Court concurred with the decision of Hon'ble Delhi High Court. We deem it appropriate to take note of relevant part of the decision, which reads as under:

"16. Section 153A bears the heading "Assessment in case of search or requisition". It is well settled as held by the Supreme Court in a catena of decisions that the heading of the section can be regarded as a key to the interpretation of the operative portion of the section and if there is no ambiguity in the language or if it is plain and clear, then the heading used in the section strengthens that meaning. From the heading of section 153, the intention of the legislature is clear viz., to provide for assessment in case of search and requisition. When the very purpose of the provision is to make assessment in case of search or requisition, it goes without saying that the assessment has to have relation to the search or requisition. In other words, the assessment should be connected with something found during the search or requisition, viz., incriminating material which reveals undisclosed income. Thus, while in view of the mandate of sub-section (1) of section 153 A of the Act, in every case where there is a search or requisition, the Assessing Officer is obliged to issue

notice to such person to furnish returns of income for the six years preceding the assessment year relevant to the previous year in which the search is conducted or requisition is made, any addition or disallowance can be made only on the basis of material collected during the search or requisition. In case no incriminating material is found, as held by the Rajasthan High Court in the case of Jai Steel (India) (supra), the earlier assessment would have to be reiterated. In case where pending assessments have abated, the Assessing Officer can pass assessment orders for each of the six years determining the total income of the assessee which would include income declared in the returns, if any, furnished by the assessee as well as undisclosed income, if any, unearthed during the search or requisition. In case where a pending reassessment under section 147 of the Act has abated, needless to state that the scope and ambit of the assessment would include any order which the Assessing Officer could have passed under section 147 of the Act as well as under section 153A of the Act.

17. In the facts of the present case, a search came to be conducted on 07.10.2009 and the notice was issued to the assessee under section 153A of the Act for assessment year 2006-07 on 04.08.2010. In response to the notice, the assessee filed return of income on 18.11.2010. In terms of section 153B, the assessment was required to be completed within a period of two years from the end of the financial year in which the search came to be carried out, namely, on or before 31st March, 2012. Here, insofar as the impugned addition is concerned, the notice in respect thereof came to be issued on 19.12.2011 seeking an explanation from the assessee. The assessee gave its response by reply dated 21.12.2011 calling upon the Assessing Officer to provide copies of statements recorded on

oath of Shri Rohit P. Modi and Smt. Pareshaben K. Modi during the search as well as the copies of the documents upon which the department placed reliance for the purpose of making the proposed addition as well as the copy of the explanation given by Shri Rohit P. Modi and Smt. Pareshaben K. Modi regarding the on-money received, copies of the assessment orders in case of said persons and also requested the Assessing Officer to permit him to cross-examine the said persons. The Assessing Officer issued summons to the said persons, however, they were out of station and it was not known as to when they would return. In this backdrop, without affording any opportunity to the assessee to cross-examine the said persons, the Assessing Officer made the addition in question.

18. In this case, it is not the case of the appellant that any incriminating material in respect of the assessment year under consideration was found during the course of search. At the relevant time when the notice came to be issued under section 153A of the Act, the assessee filed its return of income. Much later, at the fag end of the period within which the order under section 153A of the Act was to be made, in other words, when the limit for framing the assessment as provided under section 153 was about to expire, the notice has been issued in the present case seeking to make the proposed addition of Rs.l 1,05,51,000/- on the basis of the material which was not found during the course of search, but on the basis of a statement of another person. In the opinion of this court, in a case like the present one, where an assessment has been framed earlier and no assessment or reassessment was pending on the date of initiation of search under section 132 or making of requisition under section 132A, while computing the total income of the assessee under section 153A of the Act, additions or disallowances can be made only on the basis of the incriminating

material found during the search or requisition. In the present case, it is an admitted position that no incriminating material was found during the course of search, however, it is on the basis of some material collected by the Assessing Officer much subsequent to the search, that the impugned additions came to be made.

19. On behalf of the appellant, it has been contended that if any incriminating material is found, notwithstanding that in relation to the year under consideration, no incriminating material is found, it would be permissible to make additions and disallowance in respect of all the six assessment years. In the opinion of this court, the said contention does not merit acceptance, inasmuch as, the assessment in respect of each of the six assessment years is a separate and distinct assessment. Under section 153A of the Act, an assessment has to be made in relation to the search or requisition, namely, in relation to material disclosed during the search or requisition. If in relation to any assessment year, no incriminating material is found, no addition or disallowance can be made in relation to that assessment year in exercise of powers under section 153A of the Act and the earlier assessment shall have to be reiterated. In this regard, this court is in complete agreement with the view adopted by the Rajasthan High Court in the case of Jai Steel (India), Jodhpur (supra). Besides, as rightly pointed out by the learned counsel for the respondent, the controversy involved in the present case stands concluded by the decision of this court in the case of Jayaben Ratilal Sorathia (supra) wherein it has been held that while it cannot be disputed that considering section 153A of the Act, the Assessing Officer can reopen and/or assess the return with respect to six preceding years; however, there must be some incriminating material available with the

Assessing Officer with respect to the sale transactions in the particular assessment year.

20. For the foregoing reasons, it is not possible to state that the impugned order passed by the Tribunal suffers from any legal infirmity so as to give rise to a question of law, much less, a substantial question of law, warranting interference. The appeal, therefore, fails and is, accordingly, dismissed."

10. It is also pertinent to note that, in the case of Kabul Chawla (supra), the Hon'ble Delhi High Court in its concluding paragraph has observed that, on the date of the search, the assessments for assessment years 2002-03, 2005-06 and 2006-07 already stood completed and the returns in these years were accepted under Section 143(1) of the Act and these acceptance of returns processed under Section 143(1) of the Act was construed by the Hon'ble Delhi Court as completion of assessments and as acceptance of return, according to the Hon'ble Delhi High Court, could be tinkered with if some incriminating material was found at the premises of the assessee.

11. The position of law in other decisions referred by the Id. Counsel for the assessee is identical; particularly we have considered the judgment of Hon'ble Calcutta High Court in the case of PCIT vs. Salasar Stock Broking Pvt. Ltd.

12. It is also pertinent to observe that the Hon'ble Supreme Court had recently considered this issue and silenced all controversies on the scope of section 153A in

the judgment rendered in the case of PCIT –vs.- Abhisar Buildwell Pvt. Limited reported in 149 taxmann.com399 (SC). The Hon'ble Supreme Court has concurred with the decisions of the Hon'ble Delhi High Court in the case of Kabul Chawla as well as Hon'ble Gujarat High Court in the case of Saumya Construction. The relevant part of the judgment of the Hon'ble Supreme Court reads as under:-

> *"As per the provisions of Section 153A, in case of a search under Section 132 or requisition under Section 132A, the AO gets the jurisdiction to assess or reassess the 'total income' in respect of each assessment year falling within six assessment years. However, it is required to be noted that as per the second proviso to Section 153A, the assessment or re-assessment, if any, relating to any assessment year falling within the period of six assessment years pending on the date of initiation of the search under Section 132 or making of requisition under Section 132A, as the case may be, shall abate. As per sub-section (2) of Section 153A, if any proceeding initiated or any order of assessment or reassessment made under sub-section (1) has been annulled in appeal or any other legal proceeding, then, notwithstanding anything contained in sub-section (1) or section 153, the assessment or reassessment relating to any assessment year which has abated under the second proviso to subsection (1), shall stand revived with effect from the date of receipt of the order of such annulment by the Commissioner. Therefore, the intention of the legislation seems to be that in case of search only the pending assessment/reassessment proceedings shall abate and the AO would assume the jurisdiction to assess or reassess the 'total income' for the entire six years period/block assessment period. The*

intention does not seem to be to re-open the completed/unabated assessments, unless any incriminating material is found with respect to concerned assessment year falling within last six years preceding the search. Therefore, on true interpretation of Section 153A of the Act, 1961, in case of a search under Section 132 or requisition under Section 132A and during the search any incriminating material is found, even in case of unabated/completed assessment, the AO would have the jurisdiction to assess or reassess the 'total income' taking into consideration the incriminating material collected during the search and other material which would include income declared in the returns, if any, furnished by the assessee as well as the undisclosed income. However, in case during the search no incriminating material is found, in case of completed/unabated assessment, the only remedy available to the Revenue would be to initiate the reassessment proceedings under sections 147/48 of the Act, subject to fulfillment of the conditions mentioned in sections 147/148, as in such a situation, the Revenue cannot be left with no remedy. Therefore, even in case of block assessment under section 153A and in case of unabated/completed assessment and in case no incriminating material is found during the search, the power of the Revenue to have the reassessment under sections 147/148 of the Act has to be saved, otherwise the Revenue would be left without remedy.

If the submission on behalf of the Revenue that in case of search even where no incriminating material is found during the course of search, even in case of unabated/completed assessment, the AO can assess or reassess the income/total income taking into consideration the other material is accepted, in that case, there will be two assessment orders, which shall not be permissible

under the law. At the cost of repetition, it is observed that the assessment under Section 153A of the Act is linked with the search and requisition under Sections 132 and 132A of the Act. The object of Section 153A is to bring under tax the undisclosed income which is found during the course of search or pursuant to search or requisition. Therefore, only in a case where the undisclosed income is found on the basis of incriminating material, the AO would assume the jurisdiction to assess or reassess the total income for the entire six years block assessment period even in case of completed/unabated assessment. As per the second proviso to Section 153A, only pending assessment/reassessment shall stand abated and the AO would assume the jurisdiction with respect to such abated assessments. It does not provide that all completed/unabated assessments shall abate. If the submission on behalf of the Revenue is accepted, in that case, second proviso to section 153A and subsection (2) of Section 153A would be redundant and/or re-writing the said provisions, which is not permissible under the law.

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 the completed assessments in absence of any incriminating material.

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

(i) that in case of search under Section 132 or requisition under Section 132A, the AO assumes the jurisdiction for block assessment under section 153A;

(ii) all pending assessments/reassessments shall stand abated;

(iii) In case any incriminating material is found/unearthed, even, in case of unabated/completed assessments, the AO would assume the jurisdiction to assess or reassess the 'total income' taking into consideration the incriminating material unearthed during the search and the other material available with the AO including the income declared in the returns; and

(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 Sections 147/148 of the Act, subject to fulfillment of the conditions as envisaged/mentioned under sections 147/148 of the Act and those powers are saved.

The question involved in the present set of appeals and review petition is answered accordingly in

terms of the above and the appeals and review petition preferred by the Revenue are hereby dismissed. No Costs".

13. In the light of above, if we examine the facts of the present case, then it would reveal that original return was filed by the assessee on 30.09.2013. The time limit to scrutinize this return was expired much before the search, i.e. 17.09.2015. The Department was unable to lay its hand on any incriminating material. The ld. Assessing Officer is examining the loans shown by the assessee in the books of account. The ld. Assessing Officer has observed that during the accounting year, assessee has taken unsecured loans from three companies. This part is already available in the regular books and must have been reflected in the return. If Department wish to undertake an exercise for examining, then, it ought to have scrutinised the return. The ld. Assessing Officer has not made reference of any document seized during the course of search. He has examined the Bank accounts and already available amounts in the accounts. The only reference to the seized material made by the ld. Assessing Officer is that during the course of search and seizure action, Inspector of the Department was deputed to verify the existence of the above. This is only a passing reference in the assessment order the weightage to this observation could be made if ld. Assessing Officer has power to tinker with

the completed assessment. An inquiry, which could be made in the regular assessment, cannot be construed as seized material for just bringing an item in the scope of section 153A of the Income Tax Act. Therefore, respectfully following the judgment of the Hon'ble Supreme Court, we allow this appeal of the assesese and delete the addition.

14. In the result, the appeal of the assessee is allowed.

Order pronounced in the open Court on 21.06.2023.

Sd/-	**Sd/-**
(Manish Borad)	**(Rajpal Yadav)**
Accountant Member	**Vice-President**

Kolkata, the 21st day of June, 2023

Copies to :(1) Agrim Infraproject Private Limited,
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(3) Commissioner of Income Tax (Appeals),
Guwahati-2, Guwahati;

(4) Commissioner of Income Tax- ,

(5) The Departmental Representative
(6) Guard File

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By order

Assistant Registrar,
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata

Laha/Sr. P.S.