

IN THE INCOME TAX APPELLATE TRIBUNAL
“G” BENCH, MUMBAI
BEFORE SHRI BASKARAN BR, ACCOUNTANT MEMBER &
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA No. 2704/Mum/2022 (A.Y: 2015-16)

The DCIT, Central Circle 5(1), Room No. 1928, 19 th Floor, Air India Bldg, Nariman Point, Mumbai – 400021.	Vs.	M/s Shah & Parikh 2, Vallabh Niwas, Malviya Road, Vile Parle(E), Mumbai-400057
PAN/GIR No. : AAJFS4684D		
Appellant	..	Respondent

Appellant by :	Shri.Dr. Kishor Dhule CIT-DR & Smt. Neeraja Sharma.DR
Respondent by :	Shri. JP Bairagra, Shri Ashiskumar Bairagra & Shri Akhilesh Pevekar. AR

Date of Hearing	06.02.2023
Date of Pronouncement	03.04.2023

आदेश / O R D E R

PER BENCH:

This appeal is filed by the revenue against the order of the Commissioner of Income Tax (Appeals)-53, Mumbai passed u/s 153A r.w.s 143(3) and 250 of the Act. The revenue has raised the following grounds of appeal:

Grounds of appeal

1 *"Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in quashing the assessment order passed under section 143(3) read with section 153A of the I.T. Act on the grounds that no incriminating material was found during the course of search proceedings?"*

2 *"Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in relying on the judgment of the Hon'ble Bombay High Court in the case of Continental Warehousing Corporation (Nhaseva) Ltd ignoring that the SLP filed against the said decision before the Hon'ble Supreme Court on the questions as to whether addition can be made in absence of incriminating material under the provision was not adjudicated on this issue but adjudicated on the issue of deduction u/s 801A, hence the issue as to whether addition can be made in absence of incriminating material under the provision has not been decided conclusively by Hon'ble Supreme Court."*

3. *"Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs. 2,91,194/- on account of bogus purchase ignoring the facts that the assessee failed to prove the genuineness of purchases, and any expenditure in respect of which payments by account payee cheques is not enough evidence to prove the genuineness of the transaction?"*

4 *"Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is justified in deleting the addition of Rs. 14,38,923/- as alleged labour and jobwork expenses ignoring the facts that the assessee failed to prove the genuineness of these expenses?"*

5 *"Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs. 2,35,55,000/- u/s 68 of the Act in respect of unsecured loans ignoring the facts that the assessee has not proved the genuineness of the transaction, the identity of most of the creditors, and credit-worthiness of the parties to the satisfaction of the AO, so as to discharge the primary onus?"*

6 *"Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance of interest expenses on unsecured loans when the said unsecured loans were found to be non-genuine as the assessee has not proved the genuineness of the transaction, the identity of most of the creditors, and credit-worthiness of the parties?"*

7 *"The appellant craves to leave, to add, to amend and/ or to alter any of the ground of appeal if need be."*

2. The brief facts of the case are that the assessee firm is engaged in the business of civil contract works and undertakes BMC and Government contract works. The assessee has filed the return of income for the A.Y 2015-16 on 29-11-2015 disclosing a total income of Rs. 1,82,45,122/-. There was a search and seizure operations u/s 132 of the Act on RPS group companies who are also civil contractors and undertake the Government contract works and the flagships companies are RPS Infra Projects Pvt Ltd, M/s Saketh Infra Project Pvt Ltd and M/s Santhi Infra

Engineering Pvt Ltd. Since the search has taken place on 06.11.2019 in the F.Y 2019-20, therefore assessments relating to A.Y. 2015-16 to 2017-18 and subsequent years were covered and completed u/s 143(3) r.w.s 153A of the Act. The Assessing officer has made disallowance of bogus purchases, bogus job works & labour charges, unexplained cash credits of loans and disallowance of interest on loans and assessed the total income of Rs 4,89,96,840/- and passed the order u/s 143(3) r.w.s 153A of the Act dated 30-09-2021.

3. Aggrieved by the order, the assessee has filed an appeal before the CIT(A). The assessee has challenged the validity of additions made by the AO since these assessments fall under the category of “unabated assessments” and no incriminating material relating to these years was found in the course of search. In support of this proposition assessee relied on the jurisdictional Honble Bombay High Court decision of M/s. Allcargo Global Logistic Ltd and CIT Vs Continental ware housing corporation (Nhavaseva) Ltd and the Hon’ble Tribunal decisions. Whereas, the CIT(A) has considered the grounds of appeal,

submissions of the assessee, findings of the scrutiny assessment, remand report, and provisions of law and judicial decisions and decided on merits and cancelled the assessment order as no incriminating material was found during the course of search proceedings and allowed the grounds of appeal observing at page 24 Para 4.3.3 to 4.3.5 of the order read as under:

4.3.3 During the course of appellate proceedings, the appellant company has provided the copies of panchnama dated 07.11.2019 alongwith inventory of the books of accounts found and seized, cash and jewellery found/seized. The appellant has also provided a copies of statements of Shri Mahabir Thanvi, Accountant and Shri Jayantilal Shah, Director, Shri Anuj Parikh, Smita Parikh, Partners, whose statements were recorded u/s 132(4) on 09.11.2019 during the search proceedings. On perusal of these statements, it is seen that there is no reference to any incriminating documents at the time of recording of statement u/s. 132(4) of the Act. There is no reference in the assessment order about any incriminating document found/seized during the course of search proceedings relevant to the bogus purchases, bogus job work & sub-contract expenses and unsecured loans. Even in the statement of Shri Jayantilal Shah recorded u/s. 132(4), there is no mention about any incriminating evidences/material found or seized related to purchases made from the alleged parties, payment of sub-contract & job work expenses and unsecured loans. Thus, it can be safely inferred that during the course of search proceedings, no incriminating material/evidences in

relation to the purchases from alleged parties, payment of sub-contract & job work expenses and unsecured loans was found/seized.

4.3.4 It is a well settled law that in the unabated assessment order, no addition u/s 153A can be made unless there is some incriminating material with respect to the addition made by the AO.

The Hon'ble ITAT, Special Bench, Mumbai has in the case of All Cargo Global Logistics Ltd. v. DCIT 137 ITD 287 (Mum) (SB) held that in respect of non-abated assessments, the assessment will be made on the basis of books of account or other documents not produced in the course of original assessment but found in the course of search and undisclosed income or undisclosed property discovered in the course of search. It has thus been held that in case of completed assessments, the assessment u/s. 153A has to be made on the basis of incriminating material only, i.e., undisclosed income/property/books of accounts/documents. In other words, where nothing incriminating is found in the course of search relating to any of the assessment years covered u/s.153A of the Act, the assessment for such A.Ys. cannot be disturbed. It has also been held that in the absence of any incriminating materials, the completed assessment has only to be reiterated.

Similar view has been taken in the case of Murli Agro Products Ltd.[2014] 49 taxmann.com 172 (Bom).

The Hon'ble jurisdictional High Court in the case of Commissioner of Income-tax-II, Thane v.Continental Warehousing Corporation (Nhava Sheva) Ltd. [2015] 58 taxmann.com 78 (Bombay) has held that no addition can be made in respect of assessments which have become final, if no incriminating material is found during the

search. It has been held that once the original assessment has attained finality, then the Assessing Officer while passing the independent assessment order u/s.153A r.w.s.143(3) cannot disturb the assessment/reassessment order which has attained finality, unless the materials gathered in the course of the proceedings u/s.153A establish that the reliefs granted under the finalized assessment/reassessment were contrary to the facts unearthed during the course of 153A proceedings.

The Hon'ble jurisdictional High Court in the case of Continental Warehousing Corporation (Nhava Sheva) Ltd. Has held as under:

A bare perusal of section 153A would indicate as to how a non-obstante clause has been inserted and with a defined intent. Where search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A after 31-5- 2003, that the Assessing Officer is in a position to and mandated to issue notice within the meaning of sub-section (1) of section 153A. That is because, Chapter XIII within which the powers of search and seizure and powers to requisition books of account are spelt out enable the revenue to take care of cases where it effects a search and seizure. That search and seizure is effected and after the same at search and is effected, books of account, other documents, money, bullion, jewellery or other valuable article or thing is found as a result thereof that notwithstanding anything and within the meaning of the above provisions having been concluded, it is open for the revenue to make an assessment. It is also open to the revenue to make a reassessment in cases where it exercises the powers to requisition books of account etc. This is because it is of the view that the books of account are required to be summoned or taken into custody. It,

therefore, issues a summons in that regard. It may also requisition the books of account or other documents for that might be useful and or any assets representing withholding or part income or property which has not been or would not have been disclosed for the purpose of the Indian Income-tax Act, 1922 or the Income-tax Act of 1961 by any person from whose possession or control they have been taken into custody. This is when the authorities have reason to believe that such powers need to be exercised. Therefore, the fetters and which are to be found in other provisions are removed and a notice of assessment in such cases is then issued. That is mandated by sub-section (1) of section 153A. It is not only the issuance of the notice but assessment or reassessment of total income of six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition has to be made. [Para 22]

There is much substance in the contentions of the assessee that the provisions such as section 153A enabling assessment in case of search or requisition making specific reference to the provisions which enable carrying out of search or exercise of power of requisition that the assessment in furtherance thereof is contemplated.[Para 23]

Assessee's reliance upon the Division Bench judgment of this Court rendered in CIT v. Murli Agro Products Ltd. [2014] 49 taxmann.com 172 in that context is, therefore, well placed.[Para 24]

The Division Bench outlined the ambit and scope of the powers conferred by section 153A and observed that on a plain reading of section 153A, it becomes clear that on initiation of the proceedings under section 153A, it is only the assessment/reassessment proceedings that are

pending on the date of conducting search under section 132 or making requisition under section 132A stand abated and not the assessments/reassessments already finalised for those assessment years covered under section 153A. By a Circular No. 8 of 2003, dated 18-9-2003 (See 263 ITR (St) 61 at 107) the CBDT has clarified that on initiation of proceedings under section 153A, the proceedings pending in appeal, revision or rectification proceedings against finalised assessment/reassessment shall not abate. It is only because, the finalised assessments/reassessments do not abate, the appeal revision or rectification pending against finalised assessment/reassessments would not abate. Therefore, the argument of the revenue, that on initiation of proceedings under section 153A, the assessments/reassessments finalised for the assessment years covered under section 153A stand abated cannot be accepted. Similarly on a case under section annulment of assessment made under section 153A (1) what stands revived is the pending assessment/reassessment proceedings which stood abated as per section 153A(1).

Once it is held that the assessment has attained finality, then the Assessing Officer while passing the independent assessment order under section 153A read with section 143 (3) could not have disturbed the assessment/reassessment order which has attained finality, unless the materials gathered in the course of the proceedings under section 153A establish that the reliefs granted under the finalised assessment/reassessment were contrary to the facts unearthed during the course of 153A proceedings. If there is nothing on record to suggest that any material was unearthed during the search or during the 153A proceedings, the Assessing Officer while passing order under section 153A read with section 143(3) cannot disturb the assessment order [Para 28]

The stand of revenue that these observations are made in passing or that they are not binding on instant Court is not agreeable because the essential controversy before the Bench was somewhat different. Revenue urged that was only in relation to the legality and validity of the order of the Commissioner under section 263. Had that been the case, the Division Bench was not required to trace out the history of section 153A and the power that is conferred thereunder. When the revenue argued before the Division Bench that the power under section 153A can be invoked and exercised even in cases where the second proviso to sub-section (1) is not applicable that the Division Bench was required to express a specific opinion. The provision deals with those cases where assessment or reassessment, if any, relating to the assessment years falling within the period of six assessment years referred to in sub-section (1) of section 153A were pending. If they were pending on the date of the initiation of the search under section 132 or making of requisition under section 132A, as the case may be, they abate. It is only pending proceedings that would abate and not where there are orders made of assessment or reassessment and which are in force on the date of initiation of the search or making of the requisition. As that specific argument was canvassed and dealt with by the Division Bench and that is how it was called upon to interpret section 153A, then, each of the above conclusions rendered by the Division Bench would bind the instant Court.[Para 29]

Even otherwise, Court is in agreement with the Division Bench when it observes as above with regard to the ambit and scope of the powers conferred under section 153A. Even if the exercise of power under section 153A is permissible still the provision cannot be read in the manner suggested by the revenue. Not only the finalised assessment cannot be touched by resorting to those

provisions, but even while exercising the power can be exercised where a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under after 3 section 132A after 31-3- 2003. There is a mandate to issue notices under section 31-3-153(1)(a) and assess or reassess the total immediately preceding the assessment year come of such search is conducted or requisition is made Six assessment years relevant to previous year in which Thus, crucial words 'search' and 'requisition' appear in the substantive provision and the provisos. That would throw light on the issue of applicability of the provision. It being enacted to a search or requisition that its construction would have to be accordingly. That is the conclusion reached by the Division Bench in Murli Agro (supra). These are the conclusions which can be reached and upon reading of the legal provisions in question.[Para 30]

Therefore, 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. [Para 31]

Further, revenue would submit that the above observations and conclusions of the Special Bench are specifically disapproved in CIT v. Anil Kumar Bhatia [2012] 24 taxmann.com 98/211 Taxman 453 (Delhi). However, this argument is not found to be accurate. Upon reading of the observations of the Delhi High Court as a whole and in entirety, it is not possible to agree with revenue that the High Court of Delhi reached a conclusion different than the view taken by the Division Bench.[Para 35]

4.3.5 In view of the above legal position, it is held that the disallowance of bogus purchase, job work/& sub-contract expenses, labour expenses and addition of unsecured loans made by the A.O. vide impugned order

u/s.153A r.w.s.143(3) was without any incriminating material related to such expenses and unsecured loans being found during search action. Thus, the assessment order u/s. 153A is not in accordance with law and the same is, therefore, quashed.

Accordingly, grounds no. 1 & 2 of the appeal are allowed.

4. The CIT(A) has considered the submissions, details and relied on the various judicial decisions and finally concluded that the assessment u/s 143(3) r.w.s 153A of the Act and the additions made in respect of bogus purchases, job works and labour expenses, addition of unsecured loans and interest disallowance are without any incriminating material or any related expenses therefore the provisions of sec 153A of the Act does not attract and the order passed by the AO is devoid of merits and quash the assessment and allowed these grounds of appeal and partly allowed the assessee appeal. Aggrieved by the order of the CIT(A), the revenue has filed the appeals before the Honble Tribunal.

5. At the time of hearing, the Ld. DR submitted that the CIT(A) has erred in quashing the assessment order and deleting the additions on the ground that no incriminating material was found in the course of

search relying on the judicial decisions and the revenue has filed the SLP in the case of Honble Bombay High court decision and the same is pending and prayed for allowing the revenue appeal.

6. Per Contra, the contentions of the Ld. AR that the CIT(A) was correct in deciding the appeal on legal ground as the AO could not have made addition in these years in the absence of incriminating material and the assessment year falls under the category of unabated assessment years. The Ld. AR emphasized that the CIT(A) has considered the fact that the search has taken place on 06.11.2019 and the return of income for A.Y.2015-16 was filed on 29.11.2015 and the assessment order u/s 143(3) was passed on 30.09.2016, the time limit for issue of notice u/s 143(2) of the Act is 30-09-2016 and was considered. The contentions of the Ld.AR are that in respect of A.Y.2015-16 the time limit for issue notice u/s 143(2) of the Act has expired much prior to date of search i.e. 6-11-2019 and all the Assessment year will come under the category of unabated assessments and further the revenue could not unearth any incriminating material warranting

disturbance of already completed assessments and the Ld. AR has submitted that the additions are deleted by the CIT(A) relying the on decisions of Hon'ble Bombay High Court. The Ld. AR substantiated the submissions with the factual paper book, chart and judicial decisions and emphasized that the assessments are unabated and supported the order of the CIT(A).

7. We heard the rival submissions and perused the material on record. The Ld. DR submitted that the CIT(A) has erred in quashing the assessment order overlooking the findings of the assessing officer and the judicial decision relied by the CIT(A), the revenue has not accepted the decision and filed the SLP before the Honble Supreme court and is pending. Whereas, the contentions of the Ld. AR are that the AO has erred in issuing notice u/s 153A of the Act and further passing the order u/s 143(3) r.w.s 153A of the Act is bad in law though no incriminating material was found in the course of search and relied on the jurisdictional Honble Bombay High Court decision of M/s. Allcargo Global Logistic Ltd and CIT Vs Continental ware housing corporation (Nhavaseva) Ltd

and the Hon'ble Tribunal decisions and emphasized the assessment year falls under category of unabated assessments. We find that the search took place on 06.11.2019 and the assessee has submitted the return of income and time limit for issue of notice U/sec143(2) is as under:

<i>Assessment Year</i>	<i>ROI Filed on</i>	<i>Assessment order u/s 143(3)</i>	<i>Time limit to issue notice u/s 143(2)</i>
2015-16	29.11.2015	30.06.2017	30.09.2016

8. We find that there is no dispute with regard to the facts that the Assessment relating to AY 2015-16, fall under the category of "unabated assessments". There is also no dispute that the department did not unearth any incriminating material relating to the additions of bogus purchases, bogus job works & labour charges, unexplained cash credits of loans and interest on loans and hence the AO, in the absence of any incriminating material relating to the above said additions, could not have made any addition in unabated assessment years. In support of the above said proposition, we rely upon the decision rendered by Hon'ble Bombay High Court in the case of Continental Corporation (Nhava Sheva) Ltd (2015)(58

taxmann.com 78)(Bom) and Gurinder Singh Bawa (2017)(79 taxmann.com 398)(Bom), wherein the Hon'ble Bombay High Court held that the unabated assessments (finalized assessments) cannot be touched by resorting to the provisions of sec.153A of the Act unless some incriminating materials relating to the said assessments, which are contrary to and/or not disclosed during regular assessment proceedings, are found.

9. Whereas the provisions of sec.153A of the Act provide for issuing of notice u/s 153A of the Act for six assessment years immediately preceding the year of search and thereafter, the AO shall assess or reassess the total income for the above said six years. This section further provides that all pending assessment or re-assessment pending as on the date of search shall abate. Hence the assessments of the assessment years falling within the period of above said six years which are not pending, i.e., which have attained finality shall not abate. Assessments of such assessment years are called "unabated / completed / finalized" assessments. The question as to whether the AO is entitled to interfere with such kinds of unabated/completed/ finalized assessments or not

without there being any incriminating material found during the course of search, was examined by the Special bench of Tribunal in the case of All Cargo Logistics Ltd vs. DCIT (2012)(137 ITD 287)(Mum), wherein it was held that the AO could interfere with the unabated/completed/finalized assessments only if the incriminating materials found during the course of search warrant such interference, meaning thereby, if the search action did not bring out any incriminating material, then the AO cannot disturb the completed assessments and he has to simply reiterate the earlier total income in the present assessment order.

10. Further the views expressed by the Special bench has since been upheld by Hon'ble Bombay High Court in the case of Continental Warehousing Corporation (Nhava Sheva) Ltd (supra). 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."

11. Similarly the findings and views 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 assessments 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.”

12. The Coordinate bench of the Tribunal has followed the above said binding decisions of jurisdictional High Court in the cases of Smt Anjali Pandit vs. ACIT (ITA No.3028 to 3032/Mum/2011 & others - order dated 17.11.2016) 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.”

13. We also rely on the decision rendered by Hon’ble Delhi High Court in the case of CIT Vs Kabul Chawla 380 ITR 573(Delhi) wherein identical view was expressed. The Hon’ble Delhi High Court has summarized the legal position with regard to the provisions of sec.153A of the Act 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.”

14. We considering facts, circumstances submissions and the ratio of judicial decisions discussed find the that CIT(A) has dealt on the provisions of law, remand report, and judicial decisions and quashed the assessment orders. On merits the CIT(A) has also relied on the remand report of the AO and granted the relief. We considering the facts and judicial decisions as discussed above are of the view that the CIT(A) has passed a reasoned and conclusive order. Accordingly, we do not find any infirmity in the order of the CIT(A)

in quashing the assessment order and uphold the same and dismiss the grounds of appeal of the revenue.

15. In the result, the appeal filed by the revenue is dismissed.

Order pronounced in the open court on 03.04.2023.

Sd/-

(BASKARAN BR)
ACCOUNTANT MEMBER

Sd/-

(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

Mumbai, Dated 03.04.2023

KRK, PS

Copy of the Order forwarded to :

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

सत्यापित प्रति //True Copy//()

1.

आदेशानुसार/ BY ORDER,

(Asst. Registrar)
ITAT, Mumbai