

| आयकर अपीलिय अधिकरण न्यायपीठ, गुवाहाटी।
IN THE INCOME TAX APPELLATE TRIBUNAL
"GUWAHATI" BENCH, GUWAHATI

BEFORE DR. MANISH BORAD, HON'BLE ACCOUNTANT MEMBER
&
SHRI SONJOY SARMA, HON'BLE JUDICIAL MEMBER

I.T.A. No. 104/GTY/2023
Assessment Year: 2012-13

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| Assistant Commissioner of Income Tax, Circle-1, Dibrugarh | Vs | Smt. Santosh Bamalwa Ground Floor Mahalaya Road C/o A.K. Varma Dibrugarh - 786001 [PAN: AEDPB9900P] |
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| अपीलार्थी/ (Appellant) | | प्रत्यर्थी/ (Respondent) |
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C.O. No. 34/GTY/2023
Assessment Year: 2012-13

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| Smt. Santosh Bamalwa Ground Floor Mahalaya Road C/o A.K. Varma Dibrugarh - 786001 [PAN: AEDPB9900P] | Vs | Assistant Commissioner of Income Tax, Circle-1, Dibrugarh |
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| अपीलार्थी/ (Appellant) | | प्रत्यर्थी/ (Respondent) |
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| Assessee by : | Shri S.K. Tulsian, Advocate |
| Revenue by : | Shri Arun Bhowmick, JCIT, D/R |

सुनवाई की तारीख/Date of Hearing : 01/11/2023
घोषणा की तारीख /Date of Pronouncement: 13/12/2023

आदेश/ORDER

PER DR. MANISH BORAD, ACCOUNTANT MEMBER :

The present appeal filed by the revenue and the cross-objection filed by the assessee are directed against the order of the Learned Commissioner of Income Tax (Appeals), Central, North-East Region, Guwahati (hereinafter the "ld. CIT(A)") dt. 14/07/2023, passed u/s

250 of the Income Tax Act, 1961 ("the Act'), for Assessment Year 2012-13.

2. The assessee has raised the following grounds of appeal:-

"1. Whether on the facts and the circumstances of the case, the Ld. CIT(A) has erred in deleting the addition to the tune of Rs.4,76,18,448/- on the ground that no incriminating documents related to the disallowance of bogus Long Term Capital Gain is available with department, when the entry operator and the directors of shell companies themselves have accepted under Oath that they are involved in providing accommodation entries during various departmental investigations which is incriminating in itself.

2. Whether on the facts and the circumstances of the case, the Ld. CIT(A) has erred in deleting the addition to the tune of Rs.4,76,18,448/- under section 68 of the Income Tax Act on account of unexplained cash credits received.

3. Whether a fact emanating from the statement recorded during search operation could be sufficient to initiate and complete the proceedings u/s 153A/153D of the Income Tax Act.

4. The appellant craves the leave to add/modify/alter any or all the grounds during the course of hearing/pendency of appeal."

3. The Id. Counsel for the assessee, at the outset submitted that the issues raised in the instant appeal as well as the cross-objection are squarely covered by the decision of the Hon'ble Tribunal in the assessee's own group of cases for Assessment Year 2012-13 in the case of *DCIT vs. Bajrang Lal Bamalwa in ITA NO. 51 & 52/GAU/2023 & ors., order dt. 01/09/2023.*

The Id. D/R could not controvert this contentions and accepted that the issue raised in the instant appeal stands adjudicated in the other group cases of the assessee.

4. We have heard rival contentions and perused the material placed before us. We observe that a search was carried out u/s 132 of the Act on 20/11/2017 in the case of M/s. Nemichand Bamalwa & Sons Group, which is engaged in the jewellery business. Assessee along with other persons, namely, Shri Madanlal Bamalwa, Shri Hansraj Bamalwa, Shri Bachh Raj Bamalwa and Shri Bajranglal Bamalwa were also subjected to the search and seizure operations. In the assessment proceedings carried out u/s 153A r.w.s. 143(3) of the Act after validly serving notice u/s 143(2) and 142(1) of the Act. The ld. Assessing Officer during the course of assessment proceedings, noticed that the assessee has earned long term capital gain from sale of equity shares of Twenty First Century India Ltd.. The ld. Assessing Officer after making a detailed discussion came to a conclusion that the alleged long term capital gain is bogus and the sale consideration received during the year deserves to be added u/s 68 of the Act as unexplained cash credit. In appeal before the ld. CIT(A), assessee got relief on the ground that no incriminating material were found during the course of search pertaining to the alleged transaction giving rise to alleged long term capital gain and since the year under consideration is Assessment Year 2012-13 and the time limit to select the case for scrutiny expired on 30/09/2013, which was before the date of search, the year under consideration come under the category of completed and non-abated year and the additions for such year cannot be made u/s 153A of the Act, unless and until incriminating material is found and seized and reference to the same is made by the Assessing Officer.

5. Against the impugned order, revenue is in appeal whereas the assessee has raised cross-objection stating that the issue on merits ought to have been adjudicated. So far as the grounds raised by the revenue are concerned, we find that similar grounds have been raised by another assessee of the same group, namely, Bajrang Lal Bamalwa and except the change of figure of long term capital gain, the grounds are almost identical. This Tribunal vide its order dt. 01/09/2023 in ITA NO. 51 & 52/GAU/2023 & ors., has adjudicated the similar issues and dismissed the revenue's appeal observing as follows:-

"27. We have duly considered the rival contentions and gone through the record carefully. Section 153A including the amendment effected by Finance Act, 2017 whereby 4th proviso has been included in the Statute Book has a direct bearing on the controversies. Therefore, we take note of this section, which reads as under:-

"153A. (1) Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, in the case of a person where a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A after the 31st day of May, 2003, the Assessing Officer shall-

(a) issue notice to such person requiring him to furnish within such period, as may be specified in the notice, the return of income in respect of each assessment year falling within six assessment years and for the relevant assessment year or years referred to in clause (b), in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139;

(b) assess or reassess the total income of six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or

requisition is made and for the relevant assessment year or years;

PROVIDED THAT the Assessing Officer shall assess or reassess the total income in respect of each assessment year falling within such six assessment years and for the relevant assessment year or years :

PROVIDED FURTHER THAT assessment or reassessment, if any, relating to any assessment year falling within the period of six assessment years and for the relevant assessment year or years referred to in this sub-section 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 :

PROVIDED ALSO THAT the Central Government may by rules made by it and published in the Official Gazette (except in cases where any assessment or reassessment has abated under the second proviso), specify the class or classes of cases in which the Assessing Officer shall not be required to issue notice for assessing or reassessing the total income for six assessment years immediately preceding the assessment year relevant to the previous year in which search is conducted or requisition is made and for the relevant assessment year or years:

PROVIDED ALSO THAT no notice for assessment or reassessment shall be issued by the Assessing Officer for the relevant assessment year or years unless-

(a) the Assessing Officer has in his possession books of account or other documents or evidence which reveal that the income, represented in the form of asset, which has escaped assessment amounts to or is likely to amount to fifty lakh rupees or more in the relevant assessment year or in aggregate in the relevant assessment years;

(b) the income referred to in clause (a) or part thereof has escaped assessment for such year or years; and

(c) the search under section 132 is initiated or requisition under section 132A is made on or after the 1st day of April, 2017.

EXPLANATION 1.-For the purposes of this sub-section, the expression "relevant assessment year" shall mean an assessment year preceding the assessment year relevant to the previous year in which search is conducted or requisition is made which falls beyond six assessment years but not later than ten assessment years from the end of the assessment year relevant to the previous year in which search is conducted or requisition is made.

EXPLANATION 2.-For the purposes of the fourth proviso, "asset" shall include immovable property being land or building or both, shares and securities, loans and advances, deposits in bank account.

(2) 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 sub-section (1), shall stand revived with effect from the date of receipt of the order of such annulment by the Principal Commissioner or Commissioner:

PROVIDED THAT such revival shall cease to have effect, if such order of annulment is set aside.

Explanation.-For the removal of doubts, it is hereby declared that,-

(i) save as otherwise provided in this section, section 153B and section 153C, all other provisions of this Act shall apply to the assessment made under this section;

(ii) in an assessment or reassessment made in respect of an assessment year under this section, the tax shall be chargeable at the rate or rates as applicable to such assessment year".

28. The ld. Counsel for the assessee while taking us through this section apprised us its scope as propounded by the Hon'ble Supreme Court in the case of PCIT -vs.- Abhisar Buildwell Pvt. Limited reported in 149 taxmann.com 399 (SC) (copy placed on record). He also made reference to the decision of the Hon'ble Delhi High Court in the case of CIT -vs.- Kabul Chawla

reported in 380 ITR 573 (Delhi) as well as the decision of the Hon'ble Punjab & Haryana High Court in the case of Vipin Khanna -vs.- CIT reported in 255 ITR 220 (PH). According to the ld. Counsel for the assessee, this section has two compartments. The first compartment deals with the situation upto 2nd proviso of the section. This compartment provides that section 153A applies to a person in respect of whom search is initiated under section 132 of the Act, or whose books of account, other documents or any asset are requisitioned under section 132A after May 31, 2003. The second proviso attached with this section further contemplates that the assessments/reassessments, relating to any assessment year falling within the period of six assessment years, which are pending on the date of initiation of the search under section 132 or requisitioned under section 132A shall stand abate. It was further submitted that the second proviso also provides that if on the date of initiation of search or requisition under section 132 or under section 132A of the Act, any assessment/reassessment proceedings relating any assessment year falling within the period of six assessment years is pending, then the pending proceeding shall stand abated and fresh assessment of the same can be done under section 153A of the Act. It is also emphasized that if no proceeding was pending on the date of the search, then, the proceeding for that year stand concluded and such search shall have no impact on the concluded proceeding. Thus this proviso was enacted specifically to avoid two parallel proceeding of assessment of a particular year of the same person, i.e. one regular assessment proceeding under section 143(3) /147 of the Income Tax Act, vis-a-vis another assessment proceeding under section 153A of the Act. The ld. Counsel for the assessee further explained the meaning of expression "abatement". This expression would mean that something is to be eliminated or suspended, defeat, nullify of pending action. Thus a plain reading of second proviso would suggest that if the assessment or reassessment, which is pending on the date of initiation of search, shall only abate. Therefore, what will abate are only the pending assessment or reassessment and not the completed assessment. This proviso i.e. second, would not lead to any abatement of those assessments, which have already been concluded and are not pending on the date of search. The next question, which would pose before us is, what to be construed as pending. The expression "pending" would mean that where some

proceeding has been initiated by the ld. Assessing Officer. We will amplify this proposition while taking note of the judgment of the Hon'ble Delhi High Court as well as of the Hon'ble Supreme Court on this aspect. In other words, if no proceedings are pending, namely in a regular assessment year, the time limit to issue notice under section 143(2) expired and no reassessment proceeding is pending, then it is to be construed that assessment in that year is completed. In such situation, it has been laid down that those assessments would not be tinkered with unless incriminating material exhibiting the escapement of income unearthed found during the course of search. Thus the power given by the 1st proviso to assess income for six assessment years has to be confined to the undisclosed income unearthed during the course of search by way of a seized material or documents etc.

29. There was lot of controversy on the scope and interpretation of the first compartment of the section 153A, but now this controversy has been finally silenced by the Hon'ble Supreme Court in the case of PCIT -vs.- Abhisar Buildwell Pvt. Limited. Before advertng to the judgment of the Hon'ble Supreme Court, we deem it appropriate to make reference to the two decisions of the Hon'ble High Courts namely CIT -vs. Kabul Chawla of Hon'ble Delhi High Court and Saumya Construction of Hon'ble Gujarat High Court.

30. 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:

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."

31. Now we take note of the relevant part of the Hon'ble High Court's decision in the case of Saumya Construction. 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?"

32. 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.1 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."*

33. *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.*

34. *The Hon'ble Supreme Court in the case of PCIT -vs.- Abhisar Buildwell Pvt. Limited has concurred with both these decisions of the Hon'ble High Courts. The relevant part of the Hon'ble Supreme Court's decision 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 sub-

section (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 rewriting 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".

35. *In the light of above, let's examine the facts available on the record. A perusal of the assessment order would reveal that the ld. Assessing Officer himself has not referred to any specific material, which was discovered during the course of search. His reference was with regard to the general philosophy enumerated in the discussion of the Revenue Department at*

National Level and how on execution of that philosophy by the DIT, Kolkata has carried out the searches and compiled the report to us. It appears that instead of examining analytically, he pasted that report as it is in the assessment order. The ld. Assessing Officer was also aware. He has not possessed any material. Therefore, he tried to collect the material by issuing a commission to the Investigation Wing, Kolkata and apprising them that basically during the course of search, nothing has unearthed. Therefore, DIT Investigation should again call the persons, who are alleged as an entry operator and record their statements afresh confronting the present assessees. He also requested them to provide an opportunity to these assessees for cross examination. The copy of the commission letter has been reproduced by the ld. CIT(Appeals) on pages no. 115 to 118 of the impugned order. We take note of the relevant part in the concluding paragraph of this letter:-

“Further, the assessee has stated that no incriminating document relating to such share transaction was found/seized indicating such transactions to be bogus. The undersigned has examined the seized document and Harddisk but could not identify or draw any inference in contrary to the contention of the assessee”.

In the light of above, I do hereby issue the commission under section 131(1)(d) read with Code of Civil Procedure 1908 to re-examine and cross examine all the family members of Nemichand Bamalwa & Sons, who have claimed such bogus long-term capital gains and the concerned Directors, the entry operators, the brokers.

ACIT, Circle-1, Dibrugarh”.

This letter was replied by the Office of the Deputy Director (Investigation), Kolkata vide letter dated 11.11.2019 and he expressed his apprehension about going through examination, re-examination. All these exercises were left upon to the ld. Assessing Officer, who did not carry out any such exercise. Thus there was no documentary evidence found during the course of search, which can demonstrate that these transactions were bogus.

36. During the course of hearing, it was submitted by the ld. Counsel for the assessees that these respondents have basically made investments in Highland Dealcom Pvt. Limited. This Company alongwith Dignity Suppliers Pvt. Limited, Astha Tradelink Pvt. Limited, Sarathi Dealers Pvt. Limited were

amalgamated with TFCIL and the respondents become shareholder of this company. Now the genuineness of all these companies cannot be doubted because their amalgamation was upheld by the Hon'ble High Court subject to the notice of all concerns including Income Tax Department, which is one of the mandatory requirements for amalgamation. No objection was raised by the Revenue Department.

37. *A cumulative setting of all these factors demonstrated before us would goad that the ld. Assessing Officer was not possessing any incriminating material against these assesseees and, therefore, ld. CIT(Appeals) has rightly deleted the additions in a well reasoned order.*

38. *Shri Bachh Raj Bamalwa has made investment in the shares of Jacson Investment Limited and he sold those shares. We find that there is no difference qua this entity also. As far as the discovery of any material during the course of search is concerned, therefore, ld. CIT(Appeals) has rightly deleted this addition.*

39. *As far as the case of Shri Vishal Bamalwa is concerned, it has been submitted by the ld. Counsel for the assessee that under Ground No. 11, the assessee has submitted that no search was carried out under section 132(1). The Panchnama of the Bamalwa Group are available at pages no. 1 to 39 of the paper book No. 17 filed in the case of Vishal Bamalwa and, therefore, no order under section 153A ought to have been passed. The cognizance under section 153A could only be taken if a valid search has been carried out upon the assessee. The judgment of ITAT, Ahmedabad Bench in the case of Dr. Mansukh Kanjibhai Vs. ACIT, CC-2, Baroda in ITA No. 2878 to 2880/Ahd/2007 has been relied upon. Similarly he placed on record the judgment of the Hon'ble Orissa High Court in the case of CIT Vs. Sikhya 'O' Anusandhan in ITA Nos. 117 to 123 of 2011. He placed on record copies of both these orders in paper book no. 18 at pages 105-109. On the strength of these details, it was contended that the assessment order in the case of this assessee ought to have been quashed by the ld. CIT(Appeals).*

40. *With the assistance of ld. Representatives, we have gone through the record carefully. Name of this assessee is not available in the Panchnama and, therefore, it is construed that*

no search was carried out upon him and if no search was carried out upon him, then, no 153A could be passed. The opening line of section 153A as reproduced by us would indicate that notwithstanding anything contained in section 139, 147, 148, 149 and 151 and in section 153, in case of a person where search is initiated under section 132. The initiation of the search is to be construed as if actual search was conducted. Even availability of the name of an assessee in authorisation of the warrant is there that would not be suffice to say that search was conducted. The assessment machinery under section 153A could be set in motion only the search was conducted upon an assessee. Therefore, respectfully following the decision of the Hon'ble Orissa High Court as well as concurring with the view taken by ITAT, Ahmedabad Bench, we are of the view that this assessment order is not sustainable and accordingly quashed."

6. After perusal of the above, we find that the same is squarely applicable to the issues raised by the revenue in its appeal and the since Id. D/R has been unable to bring any discrepancy in the facts, we are inclined to decide the issues against the revenue and confirm the finding of the Id. CIT(A) to the extent that the assessment order in question is not sustainable and deserves to be quashed.

7. As far as the cross-objections are concerned, emphasizing that the issues on merits ought to have been adjudicated on merits, we find that this Tribunal has dealt with the cross-objection and allowed the same in favour of the assessee observing as follows:-

"45. A perusal of these assessment orders would indicate that in five scrutiny cases of the sale of shares, i.e. TFCIL, gain earned by the assessee was accepted as a genuine by the Department itself. Out of these five cases, two are in the re-assessment under section 147 and these assessment orders have been framed after more than one year of the search. Therefore, Department was not doubting the genuineness of the transactions. It is also observed that apart from Hon'ble Calcutta High Court in the case of Swati Bajaj, the other Hon'ble High Courts

have accepted the claim of these alleged bogus long-term capital gains and ld. Counsel for the assessee drew our attention towards the decision of the Hon'ble Rajasthan High Court in the case of CIT Vs. Smt. PushpaMalpani (2012) 20 taxmann.com 597 (Raj HC) , Hon'ble Delhi High Court in the case of PCIT -vs.- Krishna Devi (supra). In that case, the jump in share price of investment made by the assessee in Goldline was 4849.2%. The ld. Counsel for the assessee has also drew our attention on the tabulated details submitted in his submission and pointed out how certain companies have performed so well and the change was 449% to 312%, whereas certain companies has performed very badly. Therefore, we have made analysis of these break-up in the light of the large number of decisions, namely 21 in number compiled in the written submission. We are of the view that the Department was not possessing any details, which authorize it to doubt the claim made by the assessee. Therefore, even otherwise on merit also, no addition is sustainable."

8. Respectfully following the same, we allow the grounds raised by the assessee in the cross-objection.

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

Order pronounced in the Court on 13th December, 2023.

Sd/-

**(SONJOY SARMA)
JUDICIAL MEMBER**

Sd/-

**(DR. MANISH BORAD)
ACCOUNTANT MEMBER**

Kolkata, Dated 13/12/2023

S/S

I.T.A. No. 104/GTY/2023
Assessment Year: 2012-13
C.O. No. 34/GTY/2023
Assessment Year: 2012-13
Smt. Santosh Bamalwa

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. संबंधित आयकर आयुक्त / Concerned Pr. CIT
4. आयकर आयुक्त (अपील) / The CIT(A)-
5. विभागीय प्रतिनिधि , आयकर अपीलीय अधिकरण, गुवाहाटी /DR,ITAT, Guwahati,
6. गार्ड फाईल /Guard file.

आदेशानुसार/ BY ORDER,
TRUE COPY

Assistant Registrar
आयकर अपीलीय अधिकरण
ITAT, Guwahati