

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'SMC': NEW DELHI**

**BEFORE,
SHRI S.RIFAUR RAHMAN, ACCOUNTANT MEMBER**

**ITA No.3325/Del/2019
(ASSESSMENT YEAR 2014-15)**

Prakhar Dalmia Kumar Piyush & Co. Chartered Accountants C-5, LGF Lajpat Nagar-III New Delhi PAN-ARJPD 0928N	Vs.	Asst.CIT Circle-34(1) New Delhi
(Appellant)		(Respondent)

Assessee by	Shri Ashish Jaiswal, Adv.
Respondent by	Shri Om Prakash, Sr. DR
Date of Hearing	07/05/2024
Date of Pronouncement	10/05/2024

ORDER

PER S.RIFAUR RAHMAN, AM:

1. This appeal has been filed by the Assessee against the order of Learned Commissioner of Income Tax (Appeals)-12, New Delhi ["Ld. CIT(A)", for short], dated 21/03/2019 for Assessment Year 2014-15.

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

"1. That in the facts and the circumstances of the case, the Ld. CIT(A) has erred in confirming the addition to income for Rs.14,94,377/- made by the Ld. Assessing Officer (AO) under section 68 of the Income Tax Act, 1961,

while denying the claim of Long Term Capital Gain on account of sale of shares to the appellant, which income is exempt under section 10(38) of the said Act.

2. That the Ld. CIT(A) has erred in law and in facts in denying the claim of exemption of income under section 10(38) of the Income Tax Act, 1961 to the appellant, based on conjecture and surmises and without any evidence to substantiate that the claim of Long Term Capital Gain is not admissible to the appellant.

3. That the Ld. CIT(A) has in the facts and circumstances of the case erred in confirming the order of the Ld. AO in making addition of Rs.14,944/- as unexplained expenditure under section 69C of the Act, based on conjecture and surmises and without any evidence on record to substantiate the same.”

3. Further, assessee has filed a petition for admission of additional grounds of appeal before us and prayed that additional grounds may be admitted for adjudication and reliance was placed on the decision of Hon’ble Supreme Court in the case of *National Thermal Power Co. Ltd. Vs. CIT, 229 [1998] 229 ITR 383 (SC)*. The assessee has raised following additional grounds of appeal:

“1. That the assessment proceeding initiated u/s 143(2) of the IT Act, 1961 on 30.08.2016 and completed u/s 143(3) of the IT Act, 1961 on 30.12.2016 is without lawful jurisdiction as the assessment pending on the date of initiation of search (13.07.2016) u/s 132 shall abate. The assessee already stood abated on the date of search in the case of appellant on 13.07.2016 on the basis of second proviso to section 153A of the IT Act, 1961.

2. That the assessment completed u/s 143(3) of the IT Act, 1961 is without jurisdiction as the notice u/s 143(2) of the Act has been issued by ITO, 35(3), Delhi and the assessment has been completed u/s 143(3) of the Act by ACIT, Circle, 34(1), Delhi without transfer of jurisdiction u/s 127 of the Act.

3. That the notice issued u/s 143(2) of the IT Act, 1961 dated 30.08.2016 is barred by limitation on 30.09.2015 making the assessment proceeding without jurisdiction.

4. That the Ld. AO has erred in initiating and completing assessment without jurisdiction making the assessment invalid and void ab initio.

It is prayed that the above grounds of appeal are purely legal in nature and go to the root of the matter may kindly be admitted in the interest of justice. Reliance is placed upon the Apex Court in the case of National Thermal Power Co. Limited, Vs. Commissioner of Income Tax Reported in 229 ITR 383 (SC)."

4. On the other hand, the Ld. DR objected to the aforesaid additional grounds raised at this stage.

5. After considering the submissions of both the parties, the additional grounds are admitted for adjudication being legal issues raised by the assessee.

6. At the time of hearing, Ld. AR pressed the additional ground No.1 and submitted that the assessment order is not maintainable. Based on the following facts on record, he submitted that the search was initiated on 13/07/2016 and on the date of search the assessment u/s 143(3) was pending and, further, submitted that the Assessing Officer has initiated the regular assessment proceedings by issue of notice u/s 143(2) of the Income Tax Act, 1963 ('the Act' for short) on 30/08/2016,

therefore, the regular assessment was initiated and it is abated based on the fact that the search was initiated on 30/07/2016. Subsequently, abated assessment was completed u/s 143(3) r.w. section 153A of the Act. The present impugned assessment order u/s 143(3) of the Act is already abated and the same was completed by the Assessing Officer in assessment order 30/12/2016 is bad in law. In this regard, he relied on the decision of *Smt. Meha Jain vs. DCIT, ITA No.996/Ind/2019* wherein the similar facts on record was adjudicated in favour of the assessee and he prayed that the issue under consideration may be decided in favour of the assessee by relying on the above decision. No other submissions are made on any other grounds raised by the assessee.

7. On the other hand, Ld. DR relied on the factual submissions made in letter dated 20/07/2023 which are as under:

“With reference to the email dated 21.06.2023 received from Hon'ble Addl. CIT, ITAT, Delhi in the case of Shri Prakhar Dalmia for A.Y. 2014-15, a factual report in this matter is submitted as under for kind consideration:-

A search and seizure action u/s 132 of IT Act was carried out in the case of the assessee on 10.10.2019 by Investigation Unit, Goa. The PAN of the assessee was then lying with Central Circle, Kanpur. Accordingly, the

case was centralized to this office vide Pr. CIT (Central), Kanpur order u/s 127(2) dated 19.02.2021 (enclosed herewith). Hence, notice u/s 153A dated 03.02.2021 was issued and duly served on the assessee & called for ROI for various assessment years.

Consequent to the order u/s 127 dated 19.02.2021, this office received the assessment records in 7 volumes for A.Ys. 2011-12 to 2017-18 along with the Transfer Memo dated 19.02.2021 (enclosed herewith). Upon perusal of the records received from DCIT/ACIT, Central Circle, Kanpur, it is noticed that earlier also a search action u/s 132 of IT Act was conducted on 13.07.2016 by Investigation Unit, Kanpur in the case of assessee. Accordingly, a notice u/s 153A of the IT Act was issued on 06.10.2017 by the then DCIT/ACIT, Central Circle, Kanpur for A.Ys. 2011-12 to 2017-18 and the assessment order for A.Y. 2014-15 was passed on 30.12.2018 with addition of Rs. 14,94,377/- as undisclosed investment u/s 69 of the Act.

Further, the then DCIT, Central Circle, Panaji completed the assessment proceedings for A.Y. 2014-15 on 21.09.2021 by considering the fact that the assessment for A.Y. 2014-15 had already been completed u/s 153A by the then DCIT/ACIT, Central Circle, Kanpur.

In view of the above, it is apparent from the records available with the undersigned that no records pertaining to the assessment proceedings u/s 143(3) for A.Y. 2014-15 completed in Circle, Delhi has been received in this office from DCIT/ACIT, Central Circle, Kanpur. Further, it is also verified from the ITBA/AST that no document is available for the above said assessment proceedings as per records.

The above findings have also been sent on mail to our Delhi and Kanpur counterpart for kind necessary action.

Submitted for kind perusal and further necessary directions, if any.”

8. Considered the rival submissions and material placed on record. It is fact on record that the notice u/s 143(2) was issued by the Assessing Officer in this case on 30/08/2016 and, after

issuing of notice, the search was initiated in the case of the assessee on 13/07/2016, therefore, the assessment initiated u/s 143(2) is abated since on the date of search, the assessment was pending and it is brought to our notice that the assessment u/s 153A was completed on 30/12/2018, therefore, the regular assessment initiated by issuing of notice u/s 143(2) is abated assessment, therefore, the assessment completed u/s 143(3) is bad in law. Considering the fact that revision proceedings u/s 153A was initiated and completed the assessment on 30/12/2018. In this regard, we observed that Co-ordinate Bench of Indore has decided the similar issue on record and for the sake of clarity the operative part of the order is reproduced below:

“5. Ground No.1 is regarding validity of the assessment order passed u/s 147 r.w.s. 143(3) as the assessment proceeding pending on the date of search and seizure action on 16.05.2013 stood abated in view of 2nd Proviso to section 153A(1) of the Act and consequently the assessment order passed u/s 143(3) r.w.s. 147 on 19.02.2014 is invalid and liable to be quashed. He has referred to the notice issued u/s 148 on 22.03.2013 and submitted that thereafter a search and seizure action u/s 132(1) was carried on 16.05.2013 when the reassessment proceedings were pending and consequently the same stood abated and merged with the assessment proceedings u/s 153A of the Act. The assessee raised this ground before the Ld. CIT(A) and contended that the AO did not have power and jurisdiction to pass an order u/s 143(3) r.w.s. 147 when the notice u/s 153A for the same assessment year was already issued. However, the Ld. CIT(A) did not adjudicate this ground while passing the impugned order.

6. On the other hand, Id. DR has not disputed the relevant facts including the fact that the reassessment proceedings u/s 147 of the Act were pending on the date of search i.e. 16.05.2013, however, he has relied upon the orders of the authorities below.

7. We have considered the rival submissions as well as relevant material on record. The relevant facts emerging from records are that the original assessment in case of assessee for the assessment year 2008-09 was completed on 29.1.2010. Thereafter the assessment was reopened by the AO by issuing notice u/s 148 on 22.03.2013. Further, there was a search and seizure action u/s 132(1) of the Act in the case of the assessee on 16.05.2013. Thus, it is clear that on the date of search i.e. 16.05.2013 the reassessment proceedings initiated vide notice u/s 148 dated 22.03.2013 were pending. The reassessment proceedings were completed u/s 147 r.w.s. 143(3) on 19.02.2014 against which the assessee filed an appeal before the Ld. CIT(A). The notice u/s 153A was issued by the AO on 01.10.2015. In response to said notice the assessee filed return of income on 07.01.2016. The assessment order u/s 153A r.w.s. 143(3) was passed on 15.03.2016. Since appeal against the order passed u/s 147 r.w.s. 143(3) was pending before the Ld. CIT(A) which was decided by the Ld. CIT(A) vide impugned order dated 29th July 2019. The above stated facts are not in dispute and therefore it is clear that reassessment proceedings initiated vide notice u/s 148 dated 22.03.2013 were pending on the date of search i.e. 16.05.2013. Accordingly, reassessment proceedings pending on the date of search stood abated by virtue of 2nd proviso to section 153A(1). For the sake of completeness section 153A(1) with proviso is quoted as under:

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 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:

Provided that the Assessing Officer shall assess or reassess the total income in respect of each assessment year falling within such six assessment years:

Provided further that assessment or reassessment, if any, relating to any assessment year falling within the period of six assessment years referred to in this 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 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 de documents or evidence which reveal that the income, represents the form of asset, which has escaped assessment amounts to or 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 e 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 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 and advances, deposits in bank account.]

8. There is no quarrel on the point that the pending assessment as on the date of search got abated and the jurisdiction of the AO to make original assessment and assessment u/s 153A merges into one. As per the new/amended regime of block assessment u/s 153A only one assessment shall be made separately for each of the six assessment years on the basis of the findings of search and any other material existing or brought on record of the AO. The assessments or reassessments which stand abated in terms of 2nd proviso of section 153A(1) of the Act are required to be made by the AO as his original jurisdiction to frame the assessment. In the provision of section 153A(1) the term 'assess' has been used in the context of an abated assessment proceedings and 'reassess' has been used for completed assessment proceedings which would not abate by virtue of search as they are not pending on the date of initiation of the search. The assessment or reassessment pending on the date of search shall abate and total income for such assessment year shall have to be computed by the AO as a fresh exercise. In another words there will be only one assessment order in respect of each of the six assessment years "in which both disclosed and undisclosed income would be brought to tax". Insofar as pending assessments are concerned, the jurisdiction to make the original assessment and the assessment u/s 153A merges into one and consequently only one assessment shall be made. Therefore, a mandate is cast upon the assessing officer as per the first proviso to section 153A(1) that the assessing officer shall assess or reassess the total income in respect of each assessment years falling within such six assessment years and the

assessment or reassessment as the case may be relating to the assessment years pending on the date of search u/s 132 or requisition u/s 132A shall abate and consequently those pending assessment proceedings gets merged with the proceedings u/s 153A of the Act. Sub-section (2) of section 153A of the Act provides that if any proceedings or any order of assessment or reassessment made under sub-section (1) is annulled in appeal or any other legal proceedings then the assessment or reassessment relating to the assessment years which is abated under 2nd proviso would stand revived.

9. Therefore, in the case on hand the pending reassessment proceedings u/s 147 of the Act got abated by virtue of 2nd proviso to section 153A(1) and scope and ambit of assessment proceedings u/s 153A would cover the assessment as could have been passed u/s 147 of the Act because the proceedings u/s 147 will merge with the scope and ambit of the assessment u/s 153A of the Act. Thus, the jurisdiction of the AO to make the original assessment and assessment u/s 153A of the Act, so far as pending assessment are concerned, merges into one and consequently only one assessment shall be made on the basis of the finding of the search and any other material existing or brought on record of the AO. This proposition has been confirmed by the Hon'ble Supreme Court in case of Pr. CIT vs. Abhisar Buildwell Pvt. Ltd. 149 taxman.com 399 in para 11 to 14 as under:

11. 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 fulfilment 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.

12. 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 sub section (2) of Section 153A would be redundant and/or re-writing the said provisions, which is not permissible under the law.

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

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

i) 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 fulfilment 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.

10. Thus, once the reassessment proceedings initiated vide notice u/s 148 dated 22.03.2013 stood abated by virtue of search and seizure action u/s 132(1) carried out on 16.05.2013 then the reassessment order dated 19.02.2014 passed by the AO u/s 147 r.w.s. 143(3) is illegal and void-ab- initio and liable to be quashed. We order accordingly.

11. Since we have quashed the assessment order being illegal and void ab-initio therefore, we do not propose to go to the other grounds of appeal which become infructuous.”

9. Respectfully following the above decision, the issue involved under consideration is exactly similar. Accordingly, the additional grounds raised by the assessee is allowed and all other grounds raised by the assessee are not adjudicated at this stage. Accordingly, appeal filed by the assessee is partly allowed.

10. In the result, appeal filed by the assessee is partly allowed.

Order pronounced in the open court on 10th May, 2024.

Sd/-

(S.RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Dated: 10/05/2024

Pk/sps

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI