

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI "F" BENCH : MUMBAI

BEFORE SHRI VIKRAM SINGH YADAV, ACCOUNTANT MEMBER
AND
MS. KAVITHA RAJAGOPAL, JUDICIAL MEMBER

ITA No. 3721/Mum/2025
Assessment Year : 2017-18

Vinay Arun Joshi, 101, A Devidarshan Complex, Tembhi Naka, Thane West, Thane, Maharashtra-400601. PAN : AJCPJ6383Q	vs.	PCIT, Central, Mumbai-1, Room No. 1001, 10 th Floor, Pratishtha Bhavan, Old CGO Annex, Maharshi Karve Road, Mumbai-400020.
(Appellant)		(Respondent)

For Assessee :	Shri Satish R. Mody
For Revenue :	Shri Vivek Perampurna, CIT-DR

Date of Hearing :	23-07-2025
Date of Pronouncement :	30-07-2025

ORDER

PER VIKRAM SINGH YADAV, A.M :

This is an appeal filed by the assessee against the order of the Learned Pr. Commissioner of Income Tax (Central), Mumbai-1 [‘Ld.PCIT’], dated 21-03-2025, pertaining to Assessment Year (AY) 2017-18, wherein the assessee has taken the following grounds of appeal:

1. *“On the facts & in the circumstances of case the learned Pr. Commissioner of Income Tax, Central Mumbai-1 has erred legally & factually by passing order u/sec 263 for fresh assessment where the order passed u/sec 153A r.w.s. 143(3) was not at all prejudicial for revenue.*

2. On the facts and in the circumstances of case the learned Pr. Commissioner of Income Tax, Central Mumbai-1 has further erred in passing order u/sec 263 when the order passed u/sec 153A r.w.s. 143(3) was made after search on assessee & there was no incriminating evidence for any concealed income or any corroborating evidence were found during search operation.”

2. Briefly the facts of the case are that the assessee filed his original return of income u/s. 139(1) of the Income Tax Act, 1961 (‘the Act’) on 04-03-2018, declaring total income of Rs. 25,72,564/-. Subsequently, a search and seizure operation u/s. 132(1) of the Act was carried out on 08-02-2021 in the case of JMJ Group and others and consequent to the same, the case of the assessee was centralized with the office of the DCIT, CC-2(2), Mumbai and a notice u/s. 153A of the Act dt. 06-10-2021 was issued and served on the assessee. In response to the notice, the assessee filed his return of income on 22-11-2021, declaring total income of Rs. 25,72,564/- as declared in the return filed u/s. 139(1) of the Act. Subsequently, notices u/s. 143(2) and 142(1) of the Act were issued. After taking into consideration the submissions/documentation filed by the assessee, the returned income was accepted and assessed income was determined at Rs. 25,72,560/-.

3. Subsequently, the assessment records were called for and examined by the Ld.PCIT, Central Circle, Mumbai-1 and a show cause dt. 25-02-2025 was issued to the assessee and the contents thereof read as under:

“2. Ongoing through the assessment records for the impugned A.Y 2017-18, it is noticed that during the year under consideration you have claimed long term capital loss of Rs 2,17,79,049/- against the sale of immovable property named "Lalit Kunj Building" at Jodhpur (50% share). While computing the said long term capital loss, you have claimed that the same was purchased in 2013 for a consideration of Rs 6,87,50,000/- (50% share) and employed the indexation multiplier in the manner shown as under.-

<i>Particular</i>	<i>Amount</i>
<i>50% share of sale consideration</i>	<i>Rs. 6,00,00,000/-</i>
<i>50% share of cost of Acquisition (Dated 21/01/2013)</i>	<i>Rs. 6,90,00,000/-</i>
<i>Indexed cost (1125/852) Rs. 6,87,50,000/-</i>	<i>Rs. 9,07,79,049/-</i>
<i>Long term Capital Loss</i>	<i>Rs. 2,17,79,049/-</i>

3. It is further seen from records that you had filed your Return of Income in ITR-3 with a total taxable income exceeding Rs 50 Lakhs for the preceding AY 2016-17 and shown Assets and liabilities under Schedule AL of ITR as under:-

<i>Particular</i>	<i>Amount</i>
<i>Immovable Asset</i>	<i>Nil</i>
<i>Movable Asset</i>	<i>1,72,13,894/-</i>
<i>Liability in relation to Assets (Immovable Asset)</i>	<i>Nil</i>

4. Therefore the records show that you had neither disclosed any immovable assets during the preceding AY 2016-17 (i.e in the previous year's ITR) nor submitted any supporting documents (i.e. sale deed, purchase deed, Balance Sheet and Capital Account) etc. in support of your purported ownership of the said assets. During the assessment for this successor AY 2017-18, the claim of deduction of cost of acquisition u/s 48 of the IT Act could therefore not be ascertained. In the absence of the resultant documentary evidence, the cost of acquisition and indexation of Rs 9,07,79,049/ claimed by you in your Return of Income requires to be disallowed and the entire sale consideration shown by you is required to be brought to tax in assessment.

5. The omission to do so by the Assessing Officer in the earlier order of assessment dated 05.04.2022 has resulted in under assessment of Income of Rs 6,90,00,000/-. As you had neither shown these assets in your Return of Income nor furnished any documents in support of the claim of LTCL, the said Loss of Rs 2,17,79,049/- claimed by you should have been disallowed in the Assessment.

6. From the above discussion, it is clear that the AO has failed to decide on the above matters in consonance with the applicable and binding statutory provisions and legal positions and/or accounting standards and reporting requirements and/or logical and arithmetical inconsistencies. Hence, this issue has been and remains unverified and unexamined by Assessing Officer (AO) as well as has been and remained unexplained on your part during the course of the above stated assessment proceedings for AY 2017-18. Thus, the order passed by the A.O. has rendered the assessment erroneous in so far as it is prejudicial to the interest of revenue, for the reasons as mentioned above.

Therefore, prima facie, action under Section 263 of the Income Tax Act, 1961 is considered necessary.

7. In this regard, please refer to Explanation 2 to Section 263 which is reproduced verbatim hereunder:-

"For the purpose of this section, it is hereby declared that an order passed by the A.O. shall be deemed to be erroneous in so far as it is prejudicial to the interest of the revenue, if in the opinion of Principal Commissioner or Commissioner:-

(a) the order is passed without making inquiries or verification which should have been made;

(b) the order is passed allowing any relief without inquiring into the claim;"

8. It is clear from the factual narrative, reasoning and arguments in the above paragraphs that the impugned (earlier) order of assessment passed by the AO dated 05/04/2022 meets both conditions stipulated by Explanation 2 to Section 263 as above. The order indeed has been passed by the AO without making the required inquiries and verifications.

However before processing and proceeding further u/s 263 of the Act, an opportunity of being heard is given to the you the assessee firm to explain, along with the evidence, as and if any, as to why the action as proposed above should not be taken in the your case u/s 263 of the Act, 1961, enhancing or modifying the assessment or cancelling the order of assessment in your case and why the amount(s) as identified above alongside other associated amounts cannot be brought to tax in your hands under the Act.

9. You the assessee, may appear on the stipulated date and time stated at the beginning of this notice either in person or through your authorized representative. If you do not wish to avail the opportunity of being heard, you may send/submit your written submissions, which will be duly considered before passing order u/s 263 of the Act."

4. In response to the show cause, the assessee filed his submissions which were considered, but not found acceptable to the Ld. PCIT and the assessment order was set aside to the file of the AO for carrying out fresh assessment in light of the directions given in the impugned order and the relevant findings of ld. PCIT read as under:

"8. I have perused the records available and after considering the facts and circumstances of the case and law, hold that the assessee's factual depositions, explanations and arguments merit consideration. The

assessment order u/s 143(3) r.w.s. 153A of the Act on 05.04.2022 will in this case be erroneous and prejudicial to the interest of revenue u/s 263 of the Act only if it is determined that the income has been under-assessed for the impugned AY 2017-18.

On the arguments made by the assessee in his submissions on the non-applicability of the revisionary proceedings u/s 263 of the Act, the analysis and findings that follow are presented in rebuttal. The text, substance and spirit of the relevant provisions of Section 263 of the Act are detailed below.

Explanation-2 below sub-section (1) of section 263 (inserted by the Finance Act 2015 w.e.f. 01.06.2015) is clear on the matter of revisions and the relevant part of the provisions is reproduced hereunder:

"Explanation-2 - For the purposes of this section, it is hereby declared that an order passed by the Assessing Officer shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if, in the opinion of the Principal Commissioner or Commissioner;

(a) the order is passed without making inquiries or verification which should have been made;

(b) the order is passed allowing any relief without inquiring into the claim;

(c) the order has not been made in accordance with any order/direction or instruction issued by the Board under section 119; or

(d) the order has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdictional High Court or Supreme Court in the case of the assessee or any other person."

8.1 The above clauses of Explanation 2 to section 263 are quite lucid and clear and the present case of the assessee prima facie appears covered by clause(a) above, since the material particulars regarding the possession of the immovable property in reference in the preceding AY 2016-17 were omitted to be reported in the Return of Income filed for such Assessment Year. The provisions of Section 263 read with Explanation 2(a) show the assessment order passed by the AO 143(3) r.w.s.153A of the Act on 05.04.2022 falls within this clause as he has omitted to examine and include the aforesaid material facts and particulars. Thus, in the instant case, the order passed by the A.O. has rendered the assessment erroneous in so far as it is prejudicial to the interest of revenue for the reasons mentioned above. Therefore, action u/s 263 of the Act, is considered necessary and the assumption of jurisdiction is valid.

10. As already stated earlier, considering the facts available on record and/or provided by the assessee, the applicable positions of law and the various judicial pronouncements, I hold that it appears from the assessee's

replies and the agreement and the other evidences on record that there has been a lapse on the part of the assessee in not mentioning/reporting the entries relating to the continued possession of the immovable property in the Return of Income for the preceding AY 2016-17. This omission is what has caused the instant allegation and examination into the costs of acquisition and the indexation involving the said property. Further, despite this error/omission, the Assessing Officer has not carried out the necessary inquiries into the matter in the manner in which these ought to have been carried out, placing this consequently within the ambit of Explanation 2 of Section 263 of the Act. These are easily verified and corrected/rectified through an examination of the materials available and/or provided by the assessee. This exercise of examination, factual verification and reconciliation of the material particulars involving the said immovable property is now to be carried out by the Assessing Officer in the order of assessment to be passed in consequence to the directions issued in this order. Any assessment of concealed incomes including those involving the disallowance of the costs of acquisition and the indexation would be required only if the assessee's submissions are found to be incorrect by the Assessing Officer. The impugned matter is set aside to the Assessing Officer to redo and complete the assessment in the case of the assessee for the A.Y. 2017-18. The fresh order of assessment may be passed thereafter by the Assessing Officer after carrying out the necessary enquiries and investigations in line with the directions as above.”

5. Against the said findings and directions of the Ld.PCIT, the assessee is in appeal before us.

6. During the course of hearing, the Ld.AR challenged the assumption of jurisdiction by the Ld.PCIT u/s. 263 of the Act. In this regard, it was submitted that the AO has passed the order u/s. 143(3) r.w.s. 153A of the Act, consequent upon the search and seizure proceedings conducted in the group cases. During the course of search/survey proceedings, the residential and business premises of the assessee were covered and physical verification of the entire premises was carried out by the search party and no documentary evidences or any other incriminating material whatsoever were found or seized by the search team which indicated that the assessee has made any wrongful claim of the indexed cost of acquisition in respect of sale of immovable property while filing his return

of income for the impugned assessment year i.e., AY. 2017-18. It was submitted that in spite of physical verification, there was no iota of evidence which was collected by the search party, which proves that a wrongful claim of cost of acquisition was made by the assessee.

7. It was submitted that it is a well settled legal position that in case of search u/s. 132 of the Act or requisition u/s. 132A of the Act, the AO assumes the jurisdiction for block assessment u/s. 153A of the Act and all pending assessments stand abated. It was submitted that in case any incriminating material is found/unearthed, in case of unabated/completed assessment, the AO can assume jurisdiction to assess or re-assess the total income taking into consideration the incriminating material unearthed during the search and other material available with the AO, including the income declared in the return of income. In case no incriminating material is unearthed during the search, the AO cannot assess or re-assess the income taking into consideration the other material in respect of the completed assessment/unabated assessment. It was submitted that in respect of completed/unabated assessment, no addition can be made by the AO in absence of any incriminating material found during the course of search and matter has since attained finality in light of the decision of the Hon'ble Supreme Court in the case of Pr.CIT vs. Abhisar Buildwell P. Ltd., [2023] SCC Online SC 481.

8. It was accordingly submitted that in light of the aforesaid legal position and facts of the present case, given that it is the case of unabated assessment wherein the original return of income was filed on 04-03-2018 and which was processed u/s. 143(1) of the Act and on the date of search i.e., 08-02-2021, the time limit for issuance of notice u/s. 143(2) of the Act has expired and, therefore, being a case of a completed/unabated

assessment and the fact that no incriminating material what-so-ever was found during the course of search action, which indicate that the assessee has wrongfully claimed the indexed cost of acquisition while computing Long Term Capital Gain, the AO could not have acquire any jurisdiction to disallow such indexed cost of acquisition and having not done that the AO has not made mistake in the instant case and the order so passed cannot be held as erroneous as well as prejudicial to the interest of the Revenue. It was further submitted that where the AO does not have the jurisdiction to disturb the completed assessment in absence of any incriminating material, the Ld.PCIT equally does not have the jurisdiction to invoke the provisions of section 263 of the Act as what cannot do directly by the AO, the same cannot be done indirectly by the ld PCIT by enlarging the scope of assessment by acquiring jurisdiction u/s 263 and holding the order so passed by the AO u/s. 143(3) r.w.s. 153A of the Act as erroneous as well as prejudicial to the interest of the Revenue. It was submitted that the assessee has raised this jurisdictional matter before the ld PCIT as well as can be seen from his written submissions made during the revisionary proceedings, however, the ld PCIT has failed to appreciate the same and more so, no finding has been recorded by him disputing the said factual and legal position.

9. In support, reliance was placed on the decision of the Hon'ble Bombay High Court in the case of CIT (Central) vs. Murli Agro Products Ltd., [2014] 49 taxmann.com 172 (Bombay) and the relevant findings therein read as under:

“9. What Section 153A contemplates is that, notwithstanding the regular provisions for assessment/reassessment contained in the IT Act, where search is conducted under Section 132 or requisition is made under Section 132A on or after 31/5/2003 in the case of any person, the Assessing Officer shall issue notice to such person requiring him to furnish return of

income within the time stipulated therein, in respect of six assessment years immediately preceding the assessment year relevant to the previous year in which the search is conducted or requisition is made and thereafter assess or reassess the total income for those assessment years. The second proviso to Section 153A provides for abatement of assessment/reassessment proceedings which are pending on the date of search/requisition. Section 153A(2) provides that when the assessment made under Section 153A(1) is annulled, the assessment or reassessment that stood abated shall stand revived.

10. Thus on a plain reading of Section 153A of the Income-tax Act, it becomes clear that on initiation of 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 of the Act stand abated and not the assessments/reassessments already finalised for those assessment years covered under Section 153A of the Act. 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 assessments/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 of the Income-tax Act stand abated cannot be accepted. Similarly on 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).

11. In the present case, as contended by Shri Mani, learned counsel for the assessee, the assessment for the assessment year 1998-99 was finalised on 29-12-2000 and search was conducted thereafter on 3-12-2003. Therefore, in the facts of the present case, initiation of proceedings under Section 153A would not affect the assessment finalised on 29-12-2000.

12. Once it is held that the assessment finalized on 29.12.2000 has attained finality, then the deduction allowed under section 80 HHC of the Income-tax Act as well as the loss computed under the assessment dated 29-12-2000 would attain finality. In such a case, the A.O. while passing the independent assessment order under Section 153A read with Section 143(3) of the IT. Act 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 of the Income-tax Act establish that the reliefs granted under the finalised assessment/reassessment were contrary to the facts unearthed during the course of 153A proceedings.

13. In the present case, there is nothing on record to suggest that any material was unearthed during the search or during the 153A proceedings which would show that the relief under Section 80HHC was erroneous. In such a case, the A.O. while passing the assessment order under Section 153A read with Section 143(3) could not have disturbed the assessment order finalised on 29.12.2000 relating to Section 80HHC deduction and consequently the C.I.T. could not have invoked jurisdiction under Section 263 of the Act.”

10. Further, reliance was placed on the decision of the Co-ordinate Nagpur Benches of the Tribunal in the case of *Vikas Gupta vs. PCIT (in ITA No. 186/Nag/2024, dt. 21-03-2025)*, wherein the relevant findings read as under:

*“8. Without adverting to the merits of the case, it is apparent that the assessment year 2016-17 was clearly an unabated assessment year, because no proceedings were pending as on date of search. There was no incriminating documents which were unearthed on the basis of which addition could have been perpetuated. Hence, provisions of section 263 of the Act has got no application, as addition on account of section 68 do not emanate from any seized documents which are incriminating in nature. In this regard, we refer and rely upon the decision of the Co-ordinate Bench of the Tribunal Kolkata Bench, in *Arati Ray v/s DCIT, ITA no.778/Kol./2024*, for the assessment year 2014-15, order dated 11/07/2024, wherein the Bench, on identical issue, held as under:-*

“14. We have duly considered the rival contentions and gone through the record carefully. Before we embark upon an enquiry on the facts and issues agitated before us to find out whether the action u/s 263 of the Act, deserves to be taken against the assessee or not, it is pertinent to take note of this section. It reads as under:-

“263(1) The Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer is erroneous in so far as it is prejudicial to the interest of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.

[Explanation. For the removal of doubts, it is hereby declared that, for the purposes of this sub-section,-

(a) an order passed on or before or after the 1st day of June, 1988 by the Assessing Officer shall include-

(i) an order of assessment made by the Assistant Commissioner or Deputy Commissioner or the Income Tax Officer on the basis of the directions issued by the Joint Commissioner under section 144A;

(II) an order made by the Joint Commissioner in exercise of the powers or in the performance of the functions of an Assessing Officer conferred on, or assigned to, him under the orders or directions issued by the Board or by the Chief Commissioner or Director General or Commissioner authorized by the Board in this behalf under section 120;

(b) "record shall include and shall be deemed always to have included all records relating to any proceeding under this Act available at the time of examination by the Commissioner;

(c) where any order referred to in this sub-section and passed by the Assessing Officer had been the subject matter of any appeal filed on or before or after the 1st day of June, 1988, the powers of the Commissioner under this sub-section shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in such appeal.

(2) No order shall be made under sub-section (1) after the expiry of two years from the end of the financial year in which the order sought to be revised was passed.

(3) Notwithstanding anything contained in sub-section (2), an order in revisior under this section may be passed at any time in the case of an order which has been passed in consequence of, or to give effect to, any finding or direction contained in an order of the Appellate Tribunal, National Tax Tribunal, the High Court or the Supreme Court.

Explanation. In computing the period of limitation for the purposes of sub-section (2), the time taken in giving an opportunity to the assessee to be reheard under the proviso to section 129 and any period during which any proceeding under this section is stayed by an order or injunction of any court shall be excluded."

15. A bare perusal of the sub section-1 would reveal that powers of revision granted by section 263 to the learned Commissioner have four compartments. In the first place, the learned Commissioner may call for and examine the records of any proceedings under this Act. For calling of the record and examination, the learned Commissioner was not required to show any reason. It is a part of his administrative control to call for the records and examine them. The second feature would come when he will judge an order passed by an Assessing Officer on culmination of any proceedings or during the pendency of those proceedings. On an analysis of the record and of the order

passed by the Assessing Officer, he formed an opinion that such an order is erroneous in so far as it is prejudicial to the interests of the Revenue. By this stage the learned Commissioner was not required the assistance of the assessee. Thereafter the third stage would come. The learned Commissioner would issue a show-cause notice pointing out the reasons for the formation of his belief that action u/s 263 is required on a particular order of the Assessing Officer. At this stage the opportunity to the assessee would be given. The learned Commissioner has to conduct an inquiry as he may deem fit. After hearing the assessee, he will pass the order. This is the 4th compartment of this section. The learned Commissioner may annul the order of the Assessing Officer. He may enhance the assessed income by modifying the order. He may set aside the order and direct the Assessing Officer to pass a fresh order.

16. A perusal of sub-clause (c) of the above would contemplate that if any order, which is subject matter for revision under section 263 is challenged in appeal, then, on the items which are subject matter of appeal, no power under section 263 could be exercised by the Id. Commissioner. We may elaborate further, for example- an assessment order was passed, it contains five issues, which were challenged before the Id. CIT(A), but Id. Assessing Officer failed to look into few Issues, which may arise from the record, then In spite of the assessment order being challenged before the Id. CIT(A), the Id. Commissioner would have jurisdiction on such items, which are not subject matter of appeal in that assessment order.

17. At this stage, before considering the multi-fold contentions of the Id. Representatives, we deem it pertinent to take note of the fundamental tests propounded in various judgments relevant for judging the action of the CIT taken u/s 263. The ITAT in the case of Mrs. Khatiza S. Omerbhoy Vs. ITO, Mumbai, 101 TTJ 1095, analyzed in detail various authoritative pronouncements including the decision of Hon'ble Supreme Court in the case of Malabar Industries 243 ITR 83 and has propounded the following broader principle to judge the action of CIT taken under section 263.

(i) The CIT must record satisfaction that the order of the AO is erroneous and prejudicial to the interest of the Revenue. Both the conditions must be fulfilled.

(ii) Sec. 263 cannot be invoked to correct each and every type of mistake or error committed by the AO and it was only when an order is erroneous that the section will be attracted.

(iii) An incorrect assumption of facts or an incorrect application of law will suffice the requirement of order being erroneous.

(iv) If the order is passed without application of mind, such order will fall under the category of erroneous order.

(v) Every loss of revenue cannot be treated as prejudicial to the interests of the Revenue and if the AO has adopted one of the courses permissible under law or where two views are possible and the AO has taken one view with which the CIT does not agree. It cannot be treated as an erroneous order, unless the view taken by the AO is unsustainable under law.

(vi) If while making the assessment, the AO examines the accounts, makes enquiries, applies his mind to the facts and circumstances of the case and determine the income, the CIT, while exercising his power under s 263 is not permitted to substitute his estimate of income in place of the income estimated by the AO.

(vii) The AO exercises quasi-judicial power vested in him and if he exercises such power in accordance with law and arrive at a conclusion, such conclusion cannot be termed to be erroneous simply because the CIT does not see stratified with the conclusion.

(viii) The CIT, before exercising his jurisdiction under s. 263 must have material on record to arrive at a satisfaction.

(ix) If the AO has made enquiries during the course of assessment proceedings on the relevant issues and the assessee has given detailed explanation by a letter in writing and the AO allows the claim on being satisfied with the explanation of the assessee, the decision of the AO cannot be held to be erroneous simply because in his order he does not make an elaborate discussion in that regard.

18. In the light of above, let us examine the facts and circumstances of the appeals before us. There is no dispute to the fact that all these assesseees have filed their returns within due date provided under section 139(1) of the Income Tax Act. They have disclosed the long-term capital gain assessable in their hands. Those returns have been accepted under section 143(1) of the Income Tax Act. The assessments have attained finality. No notice under section 143(2) for scrutinizing the returns have been issued upon the assessee before the search carried out. Even the time limit for issuance of such notice have already been expired before the search. During the course of search, no incriminating material was found which can authorize the Id. Assessing Officer to assess the income under section 153A of the Income Tax Act. To buttress this observation, we have taken note of the relevant part of the assessment orders in the case of each assessee in the earlier part of this order. The Hon'ble Delhi High Court has considered the scope of section 153A in the case of CIT-vs. Kabul Chawala (supra). The assessment years involved therein were A.Ys. 2001-02, 2005-06 and 2006-07. In all these assessment orders, return was processed under section 143(1) and there was no scrutiny assessment. Thereafter search was carried out under section 132 of the Income Tax Act on 15.11.2007. The revenue sought to make addition on account of deemed dividend under section 2(22)(e) of the Income Tax Act.

19. The Hon'ble Delhi High Court after considering host of decisions propounded following propositions in the concluding paragraph of the judgment, which read 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:

1. 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.

Conclusion

38. The present appeals concern AYs, 2002-03, 2005-06 and 2006-07. On the date of the search the said assessments already stood completed. Since no incriminating material was unearthed during the search, no additions could have been made to the income already assessed.

39. The question framed by the Court is answered in favour of the Assessee and against the Revenue.

40. The appeals are accordingly dismissed but in the circumstances no orders as to costs".

20. This judgment and other judgments on this school of thought have fallen for consideration of the Hon'ble Supreme Court, who concurred with the Hon'ble Delhi High Court as well as Hon'ble Gujrat High Court. The relevant part of the finding of the Hon'ble Supreme Court in this aspect reads 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 reassessment, 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"

21. In view of the above position of law, a short question before us is, whether scope of assessment under section 153A could be enhanced to include re-computation of long-term capital gain qua those assessments, which are unabated. The assessments in each appellant's case have attained finality. It is pertinent to note that in paragraph no. 4.1 of the impugned order in the case of each assessee, Id. PCIT has observed that assessment orders under section 153A were passed without making necessary Inquiry, verification, Investigation on the issue. The Id. PCIT further observed that reliance placed by the assessees on the judgment of the Hon'ble Supreme Court in the case of PCIT-vs.- Abhisar Buildwell (P) Ltd. (supra) is misplaced. According to the Id.PCIT, the factum of the difference in sale consideration, vis-à-vis valuation of the property for the purpose of stamp duty valuation ought to be considered as an incriminating aspect, which would not come to the light if search or consequential search assessment had not taken place. The Id.PCIT thereafter made reference to section 50C of the Income Tax Act. We have considered this finding of the Id.PCIT, but these findings are not in consonance with the proposition of law laid down by the Hon'ble Supreme Court in the case of Abhisar Buildwell (P) Ltd. Had the assessees have not disclosed long-term capital gain in their regular returns of income and then a discovery of this factum was unearthed during the course of search. The situation would be different. The Id. PCIT has not made reference to any seized material found during the course of search. He is of the view that the subject matter of a regular assessment, which would have taken under section 143(3) after issuance of a notice u/s 143(2) ought to have been considered in this search assessment under section 153A, but this proposition harbored by the Id. PCIT is contrary to the position of law laid down by the Hon'ble Supreme Court. It is pertinent to note that section 48 of the Income Tax Act contemplates mode of computation of long-term capital gain. It provides that from the full value of the consideration received or accrued to an assessee on transfer of capital assets, the cost of acquisition, cost of any improvement and any expenditure Incurred in connection with the transfer are to be debited. This expression "full value of the consideration" is to be deemed equivalent to the amount on which stamp duty was paid. This deeming fiction is provided under section 50C of the Income Tax Act. Sub-clause (2) of section 50C further authorizes the Id. Assessing Officer that in case, an assessee disputes about deeming of the full sale consideration equivalent to the amount on which stamp duty was paid, then, he would make a reference to the DVO for determining the fair market value. Now this exercise was required to be conducted in a regular assessment under section 143(3), but that assessment attained finality. The factum of transfer of capital asset was brought to the notice of the revenue by all these assessees, therefore, it is not a new discovery of fact during the course of search, which can authorize the Id. Assessing Officer to carry out the exercise contemplated in section 50C of the Income Tax Act. The Id. PCIT has misread and misconstrued the position of law laid down by the judgment of the Hon'ble Supreme Court. This issue does not fall within the ambit of assessment under section 153A of the Income Tax Act. For buttressing our finding, we have made reference to the assessment orders. The Id. Assessing

Officer has duly observed that neither there was any incriminating material nor there is any adverse mentioned in the appraisal report for taking this action. The ld. Assessing Officer has recorded a categorical finding that no incriminating material was found during the course of search. Therefore, no addition could be made and if no addition could be made, how ld. Pr.CIT could enlarge the scope of assessment by exercising the powers under section 263 of the Income Tax Act. The issue in dispute is squarely covered by the decision of the Hon'ble Supreme Court in the case of PCIT vs. Abhisar Buildwell (P) Ltd. (supra) as well as PCIT vs. Jay Ambey Aromatics (Supra). Therefore, in view of the above discussion, the orders of Id. Pr. CIT in each case of the appellant are not sustainable. They are quashed.

9. Respectfully following the above decision of the Co-ordinate Bench of the Tribunal, nothing warrants us to deviate from the view taken as above. Accordingly, we set aside the impugned order passed by the learned PCIT under section 263 of the Act by allowing the grounds raised by the assessee.”

11. Per contra, the Ld.CIT-DR has vehemently argued the matter and has relied upon the findings of the Ld.PCIT, which we have already been taken note and the same are not been repeated for the sake of brevity.

12. We have heard the rival contentions and perused the material available on record. In this case, the assessee has filed original return of income on 04-03-2018 and which was processed u/s. 143(1) of the Act and on the date of search i.e., 08-02-2021, the time limit for issuance of notice u/s. 143(2) of the Act has expired and, it is therefore a case of completed/unabated assessment as on the date of search. As per settled position so laid down by the Hon'ble Supreme Court in case of Abhisar Buildwell, where 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 completed assessment will be reiterated and 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 of the Act.

13. In the instant case, on perusal of assessment order so passed u/s 153A of the Act, we find that there is no mention of any incriminating material found during the course of search which has been referred to by the AO while completing the reassessment. The notices so issued u/s. 153A, 143(2) as well as 142(1) were also pursued where again there is no mention of any incriminating material found during the course of search. Further, even the Ld.PCIT has not referred to any incriminating material more so in the context of cost of acquisition which has been claimed by the assessee which the AO has failed to take cognizance of and subject matter of revisionary proceedings u/s 263 of the Act. We therefore agree with the contention advanced by the Ld.AR that in absence of any incriminating material found during the course of search which indicate that the assessee has wrongfully claimed the indexed cost of acquisition while computing Long Term Capital Gain, the AO could not have acquired any jurisdiction to disallow such indexed cost of acquisition and having not done so, the order so passed by the AO cannot be held as erroneous as well as prejudicial to the interest of the Revenue. As a natural corollary thereof, we agree with the contention of the Ld.AR that where the AO does not have the jurisdiction to disturb the completed/unabated assessment in absence of any incriminating material, the Ld.PCIT does not have the jurisdiction to enlarge the scope of reassessment by invoking his jurisdiction u/s Section 263 of the Act unless and until he draws reference to any incriminating material found during the course of search and which

the AO has failed to take cognizance while framing the reassessment. The decision of the Co-ordinate Bench in case of Vikas Gupta (Supra) lays down a similar proposition and supports the case of the assessee.

14. In light of aforesaid discussion and in the entirety of facts and circumstances of the case, we find that there is no legal and justifiable basis for the Ld.PCIT to invoke his jurisdiction u/s 263 of the Act and in view of the same, the order so passed by the him is hereby set-aside and that of the AO is sustained.

15. In light of aforesaid, the grounds raised on merits of the case have become academic and the same is thus dismissed as infructuous.

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

Order pronounced in the open court on 30-07-2025

Sd/-
[MS. KAVITHA RAJAGOPAL]
JUDICIAL MEMBER

Sd/-
[VIKRAM SINGH YADAV]
ACCOUNTANT MEMBER

Mumbai,
Dated: 30-07-2025

TNMM

Copy to :

- 1) The Appellant
- 2) The Respondent
- 3) The CIT concerned
- 4) The D.R, ITAT, Mumbai
- 5) Guard file

By Order

Dy./Asst. Registrar
I.T.A.T, Mumbai