

IN THE INCOME TAX APPELLATE TRIBUNAL "G", BENCH MUMBAI

BEFORE: SHRI R.C.SHARMA, AM

&

SHRI PAWAN SINGH, JM

ITA No.4910/Mum/2015

(Assessment Year : 2007-2008)

Shri Abhishek Lodha 412, 4 th Floor, 17G, Vardhaman Chamber, Cawasji Patel Road, Horniman Circle, Fort, Mumbai-400001	Vs.	DCIT,CC7(3), 400020	Mumbai-
PAN/GIR No.		:	ABWPL7723N
(Appellant)	..		(Respondent)

Assessee by : Shri Vijay Mehta
Revenue by : Shri Jeevanlal Lavedia

Date of Hearing : 06/10/2016

Date of Pronouncement 07/10/2016

आदेश / O R D E R

PER R.C.SHARMA (A.M):

This is an appeal filed by the assessee against the order of CIT(A) for the Assessment Year 2007-2008 in the matter of the order passed under Section 153A read with Section 143(3) of the I.T. Act.

2. In this appeal, assessee is aggrieved for addition of Rs.1,00,000/- on account of gift received during the year under consideration.

3. It was contended by learned AR that original return of income was filed u/s 139 on 30/10/2007 and the time limit for issue of notice under Section 143(2) of the Act was expired on 31/10/2008. However, there was a search under seizure action u/s. 132 on 10/01/2011, wherein no incriminating material was found.

Addition was made in respect of the gift received by assessee which was already recorded in the regular books of accounts.

4. Learned AR placed on record the order of the co-ordinate Bench in case of other family members, wherein similar issue was dealt by Tribunal and the addition so made was deleted on the plea that no incriminating material was found during course of search in respect of the additions so made and that time limit for issue of notice u/s 143(2) have already been expired.

5. The precise observation of the Tribunal in case of Mangal Prabhat Lodha in I.T.A.No.3456,3457 & 3458/M/2015 order dated 24/08/2016 was as under:-

ITA No.3456,3457 & 3458/Mum/2015

2. *In ITA No.3456 assessee is aggrieved for addition made u/s 153A r.w.s. 143(3) when there was no incriminating material found during the course of search and the assessment order has already been passed u/s 143(3) of the Act. In respect of AY 2008-09 we found that original return of income was filed u/s 139(1) of the Act on 26.12.08. Scrutiny assessment order u/s 143(3) was passed on 29.12.10. Search was conducted on 10.01.2011. It was contention of ld. AR that assessment for the year was not abated and no incriminating material was found during course of search so as to make addition while framing assessment u/s 153A r.w.s. 143(3) of the Act.*

3. *Thus for both assessments years the assessments were not pending and no incriminating material was found with reference to the addition made by AO on account of notional rent of property and difference in 26AS, when actually there were mistake in TDS certificate so filed by company. It was contended by ld. AR in the following decisions for non-abated year wherein assessment was completed u/s.143(1) of the Act no addition to the income can be made in an assessment made u/s.153A/1153C of the Act unless some incriminating material found during the course of the search.*

1. *All Cargo Global Logistics [374 ITR 645 (Bom)]*
2. *CIT v. Kabul Chawla [380 ITR 573 (Del)]*

3. *Suncity Alloys (P) Ltd. v. ACIT [124 TTJ 674 (Jod)].*
4. *Atithi N. Patel [ITA NO: 43/Mum/2010 Order dated 22.08.2012]*
5. *Saf Yeast Co. Pvt. Ltd. v ACIT [ITA nO.1074/PN/2007 Order dated 03.10.2012]*
6. *B.R. Machine Tools P. Ltd. v ACIT [ITA no.4174 to 4177/Mum/2013 Order dated 06.12.2013]*
7. *Gurinder Singh Bawa [ITA No. 2075/Mum/2010 Order dated 16.11.2012]*
8. *Raksha Chhadwa v ACIT [ITA no. 8576 & 8577/Mum/2010 for A.Y. 2003-04 & 2005-06 order dated 17.10.2014]. (copy enclosed)*
9. *Order of the Hon'ble Tribunal in the case of Monoplan Securities Pvt. Ltd. v DCIT (ITA No: 5174/Mum/2007) dated 23.09.2014(copy enclosed).*

4. *From the record we found that addition was made on account of notional rent of Rs.75,600/- this addition has already been considered by AO while framing assessment u/s 143(3). No incrementing material was found during search so as to empower the AO to make addition in respect of completed assessments. We also found that no incriminating materials were found during course of search with respect to salary received by assessee. Since assessment was already completed and not pending as on the date of search, no addition was warranted u/s.153A r.w.s.143(3) of I.T.Act.*

5. *The issue under consideration is squarely covered by order of tribunal in assessee's own case in ITA No.3454/Mum/2015 order dated 30.10.2015, wherein tribunal observed as under:*

"5. As the aforesaid discussion shows that the pertinent point raised by the assessee before me is that the impugned addition has been made in the absence of requisite jurisdiction. In order to appreciate the controversy, it is pertinent to observe that Section 153A of the Act postulates the assessment in cases of search or requisition under section 132 or under section 132A of the Act respectively. The said section envisages that the Assessing Officer shall assess or reassess the total income for six assessment years immediately preceding the assessment year relevant to the previous year in which search was conducted. The second proviso to section 153A{1} of the Act also prescribes that assessment or re-assessment, if any, relating to any assessment year falling within the period of six years referred to in sub- section(1) of section 153A

of the Act, which is pending on the date of initiation of search or making of requisition as the case may be, shall abate. In other words, in so far as the pending assessments are concerned, the competence of the Assessing Officer to make the original assessment converges with the assessment to be made u/s.153A of the Act, i.e. only one assessment shall be made for such assessment years based on the findings of the search as well as any other material existing or brought on record by the Assessing Officer. Notably, there would be assessments in the period of the six assessment years identified in section 153A(1) of the Act, which would have become final (i.e. which are not pending on the date of search); such assessments do not abate in terms of the second proviso to sec.153A(1) of the Act. The scope and ambit of such an assessment is the controversy before me. In this context, it would be pertinent to refer to the judgment of the Hon'ble Bombay High Court in the case of CIT vs. Continental Warehousing Corporation (Nhava-Sheva) 58 Taxmann.Com 78 (Bom) wherein the scope of an assessment under section 153A of the Act has been considered. One of the points addressed by the Hon'ble High Court was whether the scope of assessment under section 153A of the Act envisages additions, which are otherwise not based on any incriminating material found during the course of search. As per Hon'ble High Court, no addition could be made in respect of the assessment that had become final in the event no incriminating material was found during the course of search. The Hon'ble High Court also noticed its earlier judgment in the case of Murali Agro-products Ltd. (supra) and elaborately culled out the scope and ambit of the assessment and reassessment of total income under section 153A(1) of the Act read with the proviso thereof. The Hon'ble Bombay High Court in Continental Warehousing Corporation (supra) has ruled that an unabated assessment under section 153A(1) would not encompass an addition, if no incriminating material is found during the course of search because in such a case, the original assessment had become final. This proposition has been canvassed by the ld. Representative for the assessee before me in order to assail the addition of Rs.75,600/- made by the Assessing Officer.

5.1 Moreover, the Hon'ble Delhi High Court in the case of CIT(Central)-III vs. Kabul Chawla in ITA 707/2014 dated 28/08/2015 has extensively considered the legal position and summarized it in the following words:-

"Summary of the legal position

37. On a conspectus of Section 153A(1) of the Act, read with the proviso 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 153A{1} will have to be mandatorily issued to the person searched requiring him to file returns for six A Ys immediately preceding the previous year relevant to the A Y in which the search takes places.

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.

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 153A is relatable to abated proceedings (i.e. those pending on the date of search) and the word 'reassess' to completed assessment proceedings.

iii. The AO will exercise normal assessment powers in respect of the six years previous to the relevant AY in which the search take 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 153A 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."

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 A Y on the basis of the findings of the search and any other material existing or brought on the record of the Assessing Officer.

vii. Completed assessments can be interfered with by the AO while making the assessment under Section 153A 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.”

5.2 Factually speaking, in the present case the assessment for the year under consideration stood completed on the date of search. I have perused the assessment order and find that there is nothing brought on record to suggest that any material was found during course of search in relation to the impugned addition. The entire discussion on this point in para-3 of the assessment order does not refer to any material found during the course of search leave alone any incriminating material. Therefore, in this factual background, I do not find any justification for the Assessing Officer to make the impugned addition in an assessment finalized under section 153A of the Act in the absence of incriminating material having not been found during the course of search, qua the impugned addition.

5.3 In conclusion, I, therefore, hold that following the ratio of the judgment of the Hon'ble Bombay High Court in the case of Continental Warehousing Corporation (Nhava-Sheva) (supra) as also the-judgment of the Hon'ble Delhi High Court in the case of Kabul Chawla (supra), the impugned addition could not have been made in respect of an unabatable assessment which had otherwise become final, in the absence of any incriminating material having been found in the course of search, qua the impugned addition. Accordingly, I set aside the order of the CIT(A) and direct the Assessing Officer to delete the addition of Rs.75,600/- as the same IS purported to be beyond the scope and ambit of assessment envisaged under section 153A of the Act. Thus, on this aspect, the assessee succeeds.

6. In the result, the appeal of the assessee is allowed as above.”

6. *The jurisdictional High Court in the case of Continental Warehousing Corporation (Nhava Sheva) 374 ITR 645, vide order dated 21-4-2015 have considered the decision of Special Bench in the case of All Cargo and also the decision of Delhi High Court in the case of Anil Bhatia (supra), on which CIT(A) has relied for dismissing legal ground raised by assessee. After elaborate discussion the Hon'ble High Court held, Head Note, reads as under :-*

A bare perusal of section 153A would indicate as to how a non-obstante clause has been inserted and with a defined intent. Where search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A after 31-5-2003, that the Assessing Officer is in a position to and mandated to issue notice within the meaning of sub-section (1) of section 153A. That is because, Chapter XIII within which the powers of search and seizure and powers to requisition books of account are spelt out enable the revenue to take care of cases where it effects a search and seizure. That search and seizure is effected and after the same is effected, books of account, other documents, money, bullion, jewellery or other valuable article or thing is found as a result thereof that notwithstanding anything and within the meaning of the above provisions having been concluded, it is open for the revenue to make an assessment. It is also open to the revenue to make a reassessment in cases where it exercises the powers to requisition books of account etc. This is because it is of the view that the books of account are required to be summoned or taken into custody. It, therefore, issues a summons in that regard. It may also requisition the books of account or other documents for that might be useful and or any assets representing withholding or part income or property which has not been or would not have been disclosed for the purpose of the Indian Income-tax Act, 1922 or the Income-tax Act of 1961 by any person from whose possession or control they have been taken into custody. This is when the authorities have reason to believe that such powers need to be exercised. Therefore, the fetters and which are to be found in other provisions are removed and a notice of assessment in such cases is then issued. That is mandated by sub-section (1) of section 153A. It is not only the issuance of the notice but

assessment or reassessment of total income of six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition has to be made.

- *There is much substance in the contentions of the assessee that the provisions such as section 153A enabling assessment in case of search or requisition making specific reference to the provisions which enable carrying out of search or exercise of power of requisition that the assessment in furtherance thereof is contemplated.*
- *Assessee's reliance upon the Division Bench judgment of this Court rendered in CIT v. Murli Agro Products Ltd. [2014] 49 taxmann.com 172 in that context is, therefore, well placed.*
- *The Division Bench outlined the ambit and scope of the powers conferred by section 153A and observed that on a plain reading of section 153A, it becomes clear that on initiation of the proceedings under section 153A, it is only the assessment/reassessment proceedings that are pending on the date of conducting search under section 132 or making requisition under section 132A stand abated and not the assessments/reassessments already finalised for those assessment years covered under section 153A. By a Circular No. 8 of 2003, dated 18-9-2003 (See 263 ITR(St) 61 at 107) the CBDT has clarified that on initiation of proceedings under section 153A, the proceedings pending in appeal, revision or rectification proceedings against finalised assessment/reassessment shall not abate. It is only because, the finalised assessments/reassessments do not abate, the appeal revision or rectification pending against finalised assessment/reassessments would not abate. Therefore, the argument of the revenue, that on initiation of proceedings under section 153A, the assessments/reassessments finalised for the assessment years covered under section 153A stand abated cannot be accepted. Similarly on annulment of assessment made under section 153A (1) what stands revived is the pending assessment/reassessment proceedings which stood abated as per section*

153A(1).

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

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

153A , then, each of the above conclusions rendered by the Division Bench would bind the instant Court.

- *Even otherwise, Court is in agreement with the Division Bench when it observes as above with regard to the ambit and scope of the powers conferred under section 153A . Even if the exercise of power under section 153A is permissible still the provision cannot be read in the manner suggested by the revenue. Not only the finalised assessment cannot be touched by resorting to those provisions, but even while exercising the power can be exercised where a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A after 31-3- 2003. There is a mandate to issue notices under section 153(1)(a) and 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. Thus, the crucial words 'search' and 'requisition' appear in the substantive provision and the provisos. That would throw light on the issue of applicability of the provision. It being enacted to a search or requisition that its construction would have to be accordingly. That is the conclusion reached by the Division Bench in Murli Agro (supra). These are the conclusions which can be reached and upon reading of the legal provisions in question.*
- *Therefore, the Special Bench's understanding of the legal provision is not perverse nor does it suffer from any error of law apparent on the face of the record.*
- *Further, revenue would submit that the above observations and conclusions of the Special Bench are specifically disapproved in CIT v. Anil Kumar Bhatia [2012] 24 taxmann.com 98/211 Taxman 453 (Delhi). However, this argument is not found to be accurate. Upon reading of the observations of the Delhi High Court as a whole and in entirety, it is not possible to agree with revenue that the High Court of Delhi reached a conclusion different than the view taken by the Division Bench.*

7. *ITAT Delhi Bench in the case of Jakson Enterprises, ITA No.383/Del/2013, order dated 27-5-2015, held as under :-*

9. Having gone through the orders of the authorities below, we find that the Learned CIT(Appeals) has rejected the contentions of the assessee on the issue of validity of assessment framed under sec. 153A read with sec. 143(3) of the Income-tax Act, 1961 in absence of incriminating material found during the course of search and in the absence of the pendency of the assessment as on the date of search on the basis that for framing assessment under sec. 153A, no such requirement is there and the only requirement is that search has been conducted under sec. 132 of the Act.

10. Having gone through the decisions cited by the learned AR including the decision of Special Bench of the ITAT in the case of AL Cargo Global Logistic Ltd. vs. CIT (supra), we find that the ratio laid down therein, supports the contentions of the assessee on the issue. It reads as under:

“58. Thus, question No. 1 before us is answered as under :-

(a) In assessments that are abated, the AO retains the original jurisdiction as well as jurisdiction conferred on him u/s 153A for which assessments shall be made for each of the six assessment year separately :

(b) In other cases, in addition to the income that has already been assessed, the assessment u/s 153A will be made on the basis of incriminating material, which in the context of relevant provisions means (i) books of account, other documents, found in the course of search but not produced in the course of original 8 assessment, and

(ii) undisclosed income or property discovered in the course of search.”

11. The issue raised before the Special Bench was as to whether scope of assessment u/s 153A encompasses additions not based on any incriminating material found during the course of search?

12. In the case of Kusum Gupta (supra) also the return was processed u/s 143(1) of the Act and time limit for issuance of notice u/s 143(2) had expired on the date of search and it was held that no assessment was pending in that case and thus there was no question of abatement of assessment. Therefore, the addition in the assessment u/s 153A would be made only on the basis of incriminating material found during the search. The Delhi Bench of the Tribunal in its recent decision on the issue in the case of Shri Kabul Chawla (supra) and others vide order dated 23.5.2014 has expressed the similar view. It has also discussed the decision of Hon'ble Jurisdictional Delhi High Court in the case of CIT vs. Anil Kumar Bhatia (2012) 211 Taxmann 453 (Del.), while deciding

the issue. The relevant para No. 8 & 9 in this regard is being reproduced as under :-

“8. We are unable to accept the contention advanced on behalf of the Revenue for the reason that if both the pending and completed assessment were to be taken on same pedestal, then there was no need to enshrine second proviso to sec. 153A(1) providing that the pending assessments within the period of six assessment years shall abate. The Hon'ble Delhi High Court in the case of Anil Kumar Bhatia (supra) dealt with a situation in which some incriminating material was found in respect of a non-pending assessment. It was in that background that the Hon'ble High Court held that sec. 153A applies if incriminating material is found even if assessments are completed. The question as to whether any addition can be made in respect of completed assessments when no incriminating material was found, was apparently left open. However, we find that there are sufficient indirect hints given by the Hon 'ble Delhi High Court in the case of Anil Kumar Bhatia (supra) about not making of any addition in respect of an assessment year for which the assessment is already completed unless some incriminating material is found during the course of search. This can be seen from the following observations of the Hon'ble High Court :-

"20. A question may arise as to how this is sought to be achieved where an assessment order had already been passed in respect of all or any of those six assessment years, either under Section 143(1)(a) or Section 143(3) of the Act. If such an order is already in existence, having obviously been passed prior to the initiation of the search/requisition, the Assessing Officer is empowered to reopen those proceedings and reassess the total income, taking note of the undisclosed income, if any, unearthed during the search.”

9. The above extracted observations of the Hon'ble High Court, which are though obiter dicta, make the point clear that where an assessment order has already been passed for a year(s) within the relevant six assessment years, then also the A.O is duty bound to reopen those proceedings and reassess the total income but by 'taking note of the undisclosed income if any, unearthed during the search'. The expression 'unearthed during the search' is quite significant to denote that in respect of completed or non-pending assessments, the Assessing Officer is albeit duty bound to assess or reassess the total income but there is a cap on the scope of additions in such assessment, being the items of income 'unearthed during the search'. In other words, the determination

of 'total income' in respect of the assessment years for which the assessments are already completed on the date of search, shall not be influenced by the items of income other than those based on the material unearthed during the course of search. There is not and cannot be any quarrel over the proposition that the Assessing Officer has no option but to determine the total income of the assessee in respect of the relevant six assessment years. However, the scope of such determination of total income is different in respect of the years for which the assessments are pending vis-a-vis the years for which assessments are non-pending. In respect to the assessment years for which the original assessments have already been completed on the date of search, the total income shall be determined by restricting additions only to those which flow from incriminating material found during the course of search. If no incriminating material is found in respect of such completed assessment, then the total income in the proceedings u/s 153A shall be computed by considering the originally determined income. If some incriminating material is found in respect of 11 such assessment years for which the assessment is not pending, then the 'total income' would be determined by considering the originally determined income plus income emanating from the incriminating material found during the course of search. In the other scenario of the assessments pending on the date of search which would abate in terms of second proviso to sec. 153A(1), the total income shall be computed afresh uninfluenced by the fact whether or not there is any incriminating material. In fact, this is the position which follows when we read the judgment of the Hon'ble Delhi High Court in Anil Kumar Bhatia (supra) in juxtaposition to the special bench order in the case of All Cargo Global Logistics Ltd. (supra). The other judgment relied by the Ld. DR in the case of Madugulu Venu (supra) also talks about the need for making fresh assessment in respect of the assessment years for which the assessments are not pending on the date of search but does not set out the scope of such assessment, which is the issue before us."

13. We, thus, find that the decision of the Hon'ble Jurisdictional Delhi High Court in the case of Anil Kr. Bhatia (supra) supports the case of the assessee that in absence of incriminating material found during the course of search an addition u/s 153A of the Act cannot be made in the assessment framed thereunder. The decisions relied upon by the ld. CIT, DR in the cases of Canara Housing Development Company vs. DCIT (supra) of Hon'ble Karnataka High Court and Filatex India P. Ltd. vs. CIT (supra) of Hon'ble Delhi High Court having distinguishable facts are not applicable in the present case. In the case of Filatex India Pvt. 12

Ltd. (supra), the question raised on the applicability of provisions u/s 153A was that “whether the Tribunal erred on facts and in law in not holding that re-computation of book profit, de-hors any material found during the course of search in the order passed u/s 153A of the Act was without jurisdiction, being outside the scope of proceedings under that section?” The other question was, “whether on the facts and circumstances of the case, the Tribunal erred in law in upholding the action of the AO in denying set off, of book loss unabsorbed depreciation relatable to earlier assessment year in terms of clause (III) of Explanation 1 to section 115JB of the Act?” The relevant facts of that case noted in para no. 2 of the decision are that the AO in the proceedings u/s 153A of the Act, had made several additions, relying upon the incriminating material found in the course of search, which was conducted on 18.1.2006 and subsequent dates. In this paragraph of the decision it has been perused from the impugned order of the Tribunal that incriminating material including statement of Sanjay Agarwal, GM (Marketing) have resulted in additions, which have been upheld. The Hon’ble High Court has been pleased to note in this paragraph as “it is not the case of the appellant – assessee that initiation of proceedings u/s 153A was bad or unwarranted in law as no incriminating material was found during the search. The contention raised by the appellant – assessee is that the addition, which is the subject matter of questions no. (II) and (III), was/is not justified in the assessment order u/s 153, as no incriminating material was found concerning the addition u/s 115JB of the Act.” The Hon’ble High Court has rejected this contention of the assessee with this finding that u/s 153A of the Act, the additions need not to be restricted or limited to the incriminating material, which was found during the course of search. Thus, it is clear from the facts of this case before the Hon’ble High Court that several additions relying upon the incriminating material found in the course of search were made by the AO in the assessment proceedings u/s 153A of the Act and addition u/s 115JB was made by the AO in absence of incriminating material concerning this addition. This addition was questioned by the assessee on the basis that there was no incriminating material found concerning the addition made in the assessment u/s 153A of the Act, which has been rejected by the Hon’ble High Court with the above finding. It was held by the Hon’ble High Court that there cannot be multiple assessments, once sec. 153A of the Act is applicable. Section 153A(1) postulates one assessment; putting the total income of six assessment years immediately preceding the assessment year relevant to the previous year in which search was conducted or requisition was made.

14. In para no. 3 of the judgment the Hon’ble Delhi High Court while discussing the cited decisions in the cases CIT vs. Chetan Das (2012), 254 CTR (Del) 292 and CIT vs. Anil Kr. Bhatia (2012), 2010-11 Taxman 453 (Del) cited by the ld. AR of the assessee appellant, has noted certain

observations made and findings given by the Hon'ble Court therein. Thereafter in para no. 4 of the judgment, the Hon'ble High Court has held as under: "The first question, we notice was not raised by the appellant before the AO, CIT(A) and before the Tribunal. The appellant claims that the contention being legal can be raised at any stage. We have examined sec. 153A of the Act and find that the submission/contention has no merit".

15. When we peruse the facts of the case in the case of Filatax India Ltd. and the question raised therein it comes out that in that case admittedly during the course of search incriminating material including statements were found and resulted in additions and the addition made u/s 115JB of the Act was not based upon any incriminating material. Thus, the question raised before the Hon'ble High Court was as to whether the Tribunal has erred in law in not upholding that recomputation of book profit, de-hors any material found during the course of search in the order based u/s 153A of the Act was without jurisdiction, being outside the scope of proceedings under that section. The Hon'ble High Court after discussing the issue in detail has been pleased to decide the question against the assessee and has upheld the addition made u/s 115JB of the Act. Thus, having distinguishable facts this cited the decision in the case of Filatax India Ltd. (supra) is not helpful to the revenue.

16. So far as, the decision of Hon'ble Karnataka High Court in the case of Canara Housing Development Company (supra) relied upon by the ld. CIT DR is concerned, the issue raised before the Hon'ble High Court was regarding validity of revisional order passed u/s 263 of the Act by the ld. CIT partly upheld by the Tribunal and during that course the Hon'ble High Court has also been pleased to discuss the decision in the cases of Anil Kumar Bhatia (supra) and the decision of Special Bench of the Tribunal in the case of All Cargo Global Logistic Ltd. (supra). It has been observed by the Hon'ble High Court that the condition precedent for application of sec. 153A is that there should be a search u/s 132 and initiation of proceedings u/s 153A is not dependent on any undisclosed income being unearth during the such search. The Hon'ble Rajasthan High Court in the case of Jai Steel (supra) has been pleased to hold that if any books of accounts or other documents relevant to the assessment had not been produced in the course of original assessment and found in the course of search, such books of accounts or other documents have to be taken into consideration while assessing or re-assessing the total income under the provisions of sec. 153A of the Act. Even any undisclosed income or undisclosed property has been found after the conclusions of the search, same would also be taken into consideration. The requirement of assessment or re-assessment under the said section has to be read in the context of sections 132 or 132A of the Act, in much

as, in case nothing incriminating is found on account of such search or requisition, then the question of re-assessment of the concluded assessment does not arise, which would require more reiteration and it is only in the context of the abated assessment under second proviso which is required to be assessed.

17. In the case of SSP Aviation Ltd. vs. DCIT (supra) where the validity of assessment framed u/s 153C was challenged it was held that if the AO is satisfied that any money, bullion, Jewellery or other valuable article or thing or books of account or documents seized in the course of the search belongs to a person other than the person who was searched, then such assets or books of accounts or documents shall be handed over by him to the AO having jurisdiction over such other person. Once, that is done, the AO having jurisdiction over such other person shall proceed against him for making an assessment or reassessment of his income in accordance with the provisions of sec. 153A. The petitioner therein was not searched u/s 132 of the Act, however, some documents belonging to it were found during the search carried out in the premises of Puri Group of Companies.

18. We, thus, find that the ratio laid down by the Hon'ble Delhi High Court and Hon'ble Rajasthan High Court in the above cited and discussed decisions supports the case of the assessee that in absence of incriminating material found during the course of search no addition can be made u/s 153A of the Act where the original assessment was already framed on the date of search. The Hon'ble Karnataka High Court in the case of Canara Housing Development Company (supra) has, however, been pleased to express different view, however, as per the established proposition of law, we are bound to follow the decision of Hon'ble Jurisdictional Delhi High Court and since, the Hon'ble Karnataka High Court and the Hon'ble Rajasthan High Court have expressed different views on the issue, the view favourable to the assessee is to be followed. We, thus, reiterate that in absence of incriminating material found during the course of search no addition can be made in a case where original assessment was already framed on the date when search took place.

19. In absence of rebuttal of this material fact by the Revenue in the present case before us that no incriminating material was found during the course of search relating to the assessee for the assessment year under consideration to justify the additions made in the year by the Assessing Officer and assessment based on the original return of income filed under sec. 139 of the Act was not pending as on the date of search, we following the above cited decisions by the learned AR, discussed above, hold that the assessment framed under sec. 153A read with sec. 143(3) of the Income-tax Act, 1961 for the assessment year under

consideration is not valid and the same is accordingly held as null and void. The related ground nos. 2 to 6 on the issue is thus allowed.

20. In view of the above findings, whereby the assessment itself has been held null and void, the other issues raised in other ground nos. 7 and 8 questioning the validity of the disallowance of deduction u/s 80IB on scrap sales (ground no.7) and disallowance made u/s 14A (ground no.8) have become infructuous and academic only. These grounds thus do not require any adjudication. The same are being disposed off as such.

8. Similar view has been taken by ITAT Jodhpur in the case of Vishal Dembla, 40 taxmann.com 134, wherein it was held that where the assessee has already submitted his return prior to search which has attained finality and no incriminating document was found during the search, gifts already disclosed by the assessee in the return of income which has attained finality, could not be disturbed u/s.153A.

9. The Hon'ble jurisdictional High Court in the case of Murli Agro Products Ltd., 49 taxmann.com 172, held as under :-

Held :

The object of inserting sections 153A, 153B and 153C by Finance Act, 2003 by discarding the existing provisions relating to search cases contained in Chapter XIV B of the Act, as stated in the Memorandum explaining the provisions in the Finance Bill 2003 was that under the existing provisions relating to search cases, often disputes were raised on the question, as to whether a particular income could be treated as 'undisclosed income' or whether a particular income could be said to be relatable to the material found during the course of search, etc. which led to prolonged litigation. To overcome that difficulty, the legislature by Finance Act, 2003, decided to discard Chapter XIV B provisions and introduce sections 153A, 153B and 153C in the Act.

What section 153A contemplates is that, notwithstanding the regular provisions for assessment/reassessment contained in the 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 153(A)(1) is annulled, the assessment or reassessment that stood abated shall stand revived.

Thus, on a plain reading of section 153A, 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 stand abated and not the assessment/reassessments already finalised for those assessment years covered under section 153A.

By a circular No. 8, dated 18-9-2003 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 assessments years covered under section 153A 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). [Para 10]

In the instant case, the Assessing Officer while passing the independent assessment order under section 153A read with section 143(3) could not have disturbed the assessment/reassessment order which has attained finality, unless the materials gathered in the course of the proceedings under section 153A establish that the reliefs granted under the finalised assessment/reassessment were contrary to the facts unearthed during the course of 153A proceedings.

In the present case there was nothing on record to suggest that any material was unearthed during the search or during the 153A proceedings which would show that relief under section 80HHC was erroneous. In such a case, the Assessing Officer while passing the assessment order under section 153A read with section 143(3) could not have disturbed original assessment order relating to section 80HHC deduction and consequently the Commissioner could not have invoked jurisdiction under section 263 of the Act.

10. *The ITAT Mumbai bench in the case of Jayendra P. Jhaveri, 46 taxmann.com 457 observed as under :-*

Head Note :

So far as the question as to the processing of return under section 143(1) vis-à-vis assessment made under section 143(3) is concerned, it may further be observed that after processing of return under section 143(1) the same can be assessed under section 143(3) by issue of notice under section 143(2) subject to its issuance within the limitation period of 12 months from the end of the month in which return is furnished as per the proviso to clause (ii) of section 143(2) [as was existing at the time of relevant assessment year]. Once the limitation period as prescribed vide proviso to clause (ii) of sub-section (2) of section 143 is expired, it is not open to the Assessing Officer to assess the income under section 143(3) and the return filed by the assessee under section 139 is deemed to be accepted, which however, can be re-opened under section 147 subject to the fulfilment of ingredients of section 147 and within the time period as prescribed under section 149. So under such circumstances if the return is processed under section 143(1) and not under section 143(3) after the prescribed period of limitation, the same cannot be assessed under section 143(3) though it may be interpreted as mere intimation assessment or otherwise, but the same shall be deemed to be accepted by the Assessing Officer and it will not have any different colour other than the return which is processed under section 143(3).

Admittedly, in the case in hand, the return was processed under section 143(1) but the same has attained finality due to the expiry of limitation period of twelve months from the end of the month in which the return was filed. Hence, the assessment is deemed to be completed and not pending on the date of search on 14-8-2008. Admittedly, no incriminating material was found from the premises of the assessee during the search under section 132.

Once assessment under section 143(3) had been annulled by higher authorities on the ground of legality of notice under section 143(2), re-opening under section 147 on that very ground would mean nothing else but abuse of process of law. Hence, the contention of the revenue that as the return was processed under section 143(1), it was a mere intimation and the Assessing Officer had reason to believe that income had escaped assessment and it was open to the Assessing Officer to re-assess the income under section 153A, even without any incriminating material found during the search action, is not tenable.

The next argument of the revenue has been that since in the case in hand, no books of account were found during the search action that itself is the incriminating material against the assessee, has no force of law. Though the revenue may not be satisfied with the explanation of the assessee that the books of account were lost in flood, still the assessment or addition cannot be made on this ground. Such an inference of concealment of

income cannot be made just on mere assumptions, presumptions or suspicion.

The next limb of argument of the revenue, while relying upon the authority of Supreme Court has been that the Court should not place reliance on the decisions without discussing as to how the factual situation fits to the factual situation of the decision on which reliance is placed. His contention is that one additional or different fact may make a world of difference between conclusions in two cases. There is no doubt about the above said proposition of law laid down by the Supreme Court. The Court must observe the facts and circumstances of the case under which a certain proposition of law is laid down by the Supreme Court and then to compare the same with the facts and circumstances of the case under adjudication before it. However, this proposition of law, put by the revenue, is of no help to the revenue but to the assessee only.

In view of above, it is accordingly held that the reassessments made by Assessing Officer under section 153A, without any incriminating material being found during the search action are not in accordance with law and consequential result is that the return/original assessments which have acquired finality are to be reiterated.

11. Similar view has been taken by ITAT Jodhpur Bench in the case of IOC Builders and Developers, 50 taxmann.com 396, Pune Tribunal in the case of SRJ Peety Steels (P) Ltd., 20 taxmann.com 101, Mumbai Tribunal in the case of Nikki Agarwal, ITA No.879/Mum/2011, order dated 22-1-2014, Mumbai Tribunal in the case of Shri Parag M. Sanghvi, ITA No.8027/Mum/2010, order dated 30-9-2015, Jaipur Tribunal in the case of M/s Jadau Jewellers & Manufacturers Pvt. Ltd., ITA No.686/JP/2014, order dated 14-12-2015, ITAT Delhi Bench in the case of M/s Rakam Money Matters Pvt. Ltd., ITA No.2821/Del/2011, order dated 10-16-2014. Our view is also supported by following decisions :-

- i) ITAT Mumbai Bench in the case of Shri Gurinder Singh Bawa vs. DCIT - 28 taxmann.com 328*
- ii) ITAT Mumbai Bench in the case of Anil P. Khimani vs. DCIT - No. 2855 to 2860/Mum/2008 dated 23-02-2010*
- ii) ITAT Jodhpur Bench in the case of Vishal Dembla vs. DCIT - 157 TTJ 189*
- iv) High Court of Bombay on the case of CIT v. Murli Agro Products Ltd. [2014] 49 Taxmann.com 172*

- v) *ITAT Mumbai Bench in case of ACIT v. Jayendra P. Jhaveri [2014] 65 SOT 118*
- vi) *Jodhpur ITAT in the case of Ayushi Builders & Developers vs. DCIT [2014] 166 TTJ 25*
- vii) *ITAT Pune Bench in case of ACIT vs. SRJ Peety Steels P. Ltd. [2011] 137 TTJ 627*
- viii) *Mumbai Tribunal in the case of Nikki Agarwal vs. ACIT dated 22-01-2014 being ITA No. 879jMj2011 [20 14-TIOL-75-ITAT-MUM]*
- ix) *Mumbai Tribunal in the case of Parag M. Sanghvi vs. ACIT in ITA No. 8027/Mum/2010 dated 30-09-2015*
- x) *Mumbai Tribunal in the case of Zeenat P. Sanghvi vs. DCIT in ITA No. 8026/Mum/2010 dated 19-12-2014*
- xi) *Jaipur Tribunal in the case of Jadau Jewellers & Manufacturers (P) Ltd. vs. ACIT in ITA No. 686/JP/2014-[2016] 175 TTJ 344*

12. *The ITAT Delhi Bench in the case of M/s Suncity Projects Pvt. Ltd., 2016-TIOL-643-ITAT-Del, held as under:-*

13. *We have carefully considered the arguments of both the sides and have perused the material placed before us. In the case of Kabul Chawla (supra), Hon'ble Jurisdictional High Court has considered all earlier decisions of Hon'ble Delhi High Court and has also considered the decisions of other High Courts and Tribunals and summarized the legal position in paragraph 37 and at the conclusion of the case in paragraph 38, which are reproduced below:-*

“Summary of the legal position.

37. *On a conspectus of Section 153A(1) of the Act, read with the provisos thereto, and in the light of the law explained in the aforementioned decisions, the legal position that emerges is as under:-*

- i. *Once a search takes place under Section 132 of the Act, notice under Section 153A(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 153A 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 153A 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 153A 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."

14. In clause (iv) above, their Lordships held "Obviously an assessment has to be made under this Section only on the basis of seized material". In

clause (v), the same is reiterated by holding "In absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made". In clause (vii), it is stated "Completed assessments can be interfered with by the AO while making the assessment under Section 153A only on the basis of some incriminating material unearthed during the course of search".

13. *Hon'ble Delhi High Court in the case of RRJ Securities Ltd., 2015-TIOL-2539-HC-DEL-IT, held as under :-*

"In respect of such assessments which have abated, the AO would have the jurisdiction to proceed and make an assessment. However, in respect of concluded assessments, the AO would assume jurisdiction to reassess provided that the assets/documents received by the AO represent or indicate any undisclosed income or possibility of any income that may be remained undisclosed in the relevant assessment years. This Court in Commissioner of Income Tax (Central)-III v. Kabul Chawla : ITA 707/2014, decided on 28 th August, 2015 = 2015-TIOL-2006-HC-DEL-IT has held that completed assessments could only be interfered with by the AO on the basis of any incriminating material unearthed during the course of the search or requisition of the documents. In absence of any incriminating material, the AO does not have any jurisdiction to interfere in concluded assessments."

14. *Respectfully following the proposition of law discussed in the above judicial pronouncements, we do not find any merit for the addition made by the AO*

15. *Similarly in AY 2009-10 original return u/s 139(1) was filed on 30.09.2009 time limit for issue of notice u/s.143(2) was expired 30.09.2010. Search took place on 10.01.2011. It is clear from the above dates that assessment for AY 2009-10 was not pending as on the date of search. Furthermore no incriminating material was found during the course of search warranting the addition of Rs.75,600/- made on account of notional interest. Following the propositions discussed herein above we do not find any merit in the action of AO for making addition in respect of completed assessments, without any incriminating material found during course of search.*

16. *In the net result, the appeal filed by the assessee for A.Y.2008-09 & 2009-2010 are allowed.*

ITA No. 3458/Mum/2015(AY: 2010-2011)

17. *In this year the assessment was pending as on the date of search, therefore, proposition with regard to no addition in the absence of incriminating material is not sustainable in this year. In*

this appeal assessee is aggrieved for addition of Rs.1,17,600/- on account of notional rent.

18. *We found that in the A.Y. 2009-10 AO has made addition of notional rent by taking estimated rental value of shop at Nalasopara at Rs.3,000/- per month. As the value has been taken by AO in the AY 2009-10 at Rs.3,000 per month, it would be reasonable to take value at 10% higher in the A.Y.2010-2011. Accordingly we direct the AO to make addition on account of estimated value of shop at Nalashopara by taking the value at Rs.3,300/- per month. We direct accordingly.*

19. *In the result appeal is allowed in part.*

ITA No.3465 & 3466/Mum/15 (aY : 2008-09 & 2009-10)

20. *In both these appeals assessee is aggrieved for addition made u/s 153A r.w.s. 143(3) without finding any incrementing material during search mere particularly when assignments were not pending.*

21. *We have considered rival contentions and found that return for AY 2008-09 was filed on 09.12.2008. The time limit for issue of notice was expired on 30.09.2008. Search took place on 10.01.2011. Similarly for AY 2009-10 return was filed on 31.09.09, time limit for issuing notice u/s 143(3) expired on 30.09.2010 and search took place on 10.01.2011. Thus, assessment for the both the years were not pending as on the date of search.*

24. *We have considered rival contentions in view of the reasoning given hereinabove we do not find any merit in the additions made without finding any incrementing material during the course of search, when assessments were not pending. Accordingly we direct the AO to delete the addition so made.*

25. *In the result both the appeals are allowed.”*

6. We had carefully gone through the order of the Tribunal and also considered the judicial pronouncements referred by learned AR during the course of hearing before us which have already been dealt by Tribunal in the above mentioned order. As the facts and circumstances in the instant case are parametric, respectfully following the order of the Tribunal having similar facts in case of

other family members of the assessee, we do not find any merit in the order of lower authorities for making addition without finding and indicating any incriminating material and where time limit for issue of notice under Section 143(2) had already been expired much before the date of search.

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

Order pronounced in the open court on this 07/10/2016.

Sd/-
(PAWAN SINGH)
न्यायिक सदस्य / JUDICIAL MEMBER
मुंबई Mumbai; दिनांक Dated
Karuna, Sr. PS

Sd/-
(R.C.SHARMA)
लेखा सदस्य / ACCOUNTANT MEMBER
07/10/2016

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A), Mumbai.
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार
(Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai