Application of section 153A of the Income-Tax Act

[The AO does not have jurisdiction to apply section 153A of the Income-Tax Act, 1961, unless there is incriminating material found during the search]

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Sections 153A, 153B and 153C were inserted in the Income-Tax Act, 1961 (the Act) by the Finance Act, 2003, with effect from 1.6.2003. These sections have replaced the post-search block assessment scheme, in respect of any search or requisition made after 31.5.2003.

In this context, it has to be emphatically stated that for assumption of jurisdiction under section 153A, requirement of undisclosed income is necessary. As per section 153A, jurisdiction can be assumed by the Assessing Officer (AO) to initiate assessment proceedings. Once search is initiated under section 132 or requisition is made under section 132A, the AO gets actual jurisdiction only on the issuance of notice, which could be issued under section 153A of the Act, with no necessity for inference of escapement of income or under-assessment as is the case under section 147 of the Act. Could it mean that a mere search will enable reassessment proceedings by-passing the requirements of section 147, which was meant to ensure that finality of assessments is not lightly undone ? **It is not reasonable to infer that assumption of jurisdiction is possible where no incriminating materials are found during and after search of the premises in the circumstances where normal jurisdiction under section 147 does not lie.** The provisions of section 153A, therefore, are required to be read down to justify issuance of notice where search or other materials lead to *prima facie* inference of escapement of income. It follows that there should be *prima facie* inference of liability for invoking jurisdiction under section 153A for each year.

In this context, it will also be relevant to state that most of the Departmental officers are under an erroneous impression that the very fact that a search has been conducted, in a case, would justify initiation of proceedings under section 153A of the Act. The aforesaid erroneous impression now stands completely demolished by a number of judgements of various High Courts, particularly Bombay, Delhi and Gujarat High Courts. Besides, a number of judgements by the various Benches of the Tribunal also support the aforesaid view.

On the basis of the aforesaid legal precedents, the correct legal position in respect of assessment under section 153A of the Act, may be broadly summarized as follows :

(i) The scope of assessment under section 153A of the Act, is limited to the incriminating evidence found during the search.

(ii) Unless there is incriminating material *qua* each of the assessment years in which additions are sought to be made, the assumption of jurisdiction under section 153A would be vitiated in law.

(iii) Additions can be made in the assessment under section 153A, only on the basis of material found during search.

(iv) If no notice under section 143(2) is issued by the AO and the time period for issuing such notice has expired on or before the date of search, then the assessment(s) completed under section 143(1) of the Act shall not abate. Such assessments could not be subject to proceedings under section 153A of the Act, unless incriminating material is found in the course of search.

(v) The statements recorded under section 132(4) of the Act, do not constitute incriminating material.

In support of the aforesaid legal position, reliance may be placed on the following legal precedents :

1. *Pr. CIT Vs Meeta Gutgutia Prop.M/s Ferns "N" Petals [2017] 395 ITR 526 (Del) : 152 DTR 153 (Del)*

In this case a search and seizure operation under section 132 was conducted in the premises of the FNP group, which comprised various companies, partnerships and proprietorship concerns. The statement of one employee PG was recorded on oath under section 133A. The assessee was a director / partner / shareholder in the group of companies / concerns. She was the proprietrix of the concern FNP. On the basis of documents recovered under search operation, a notice under section 153A was issued to the assessee. Thereafter, a notice and a questionnaire under sections 143(2) and 143(1) were also issued. The Assessing Officer (AO) passed separate orders in respect of the AYs 2000-01 to 2003-04. For the AY 2004-05, as in the preceding years, the assessee had claimed deduction on account of franchisee commissions paid to various parties. The AO held that the addresses of the franchisees were not revealed and that there were discrepancies in the accounts of the franchisees filed by the assessee. Consequently, the franchisee commission payments claimed by the assessee were added back to her income. For the AY 2004-05, the AO also made an addition on account of stock. The AO estimated the undisclosed income on account of franchisee fee, at a certain percentage for the AYs 2001-02 to 2006-07. No addition was made for the AY 2006-07, although a disclosure was made. Before the CIT(A), the assessee produced additional evidence, which included copies of franchisee agreements. On analysis of the

additional evidence, the CIT(A) held that the accounts of the assessee had been tax-audited and no adverse remarks had been made by the tax-auditors. He further held that the AO had not rejected the books of account of the assessee. Accordingly, he held that the disallowances of the franchisee commission paid were unsustainable and deleted the additions so made. He also deleted the additions made on account of payment of rent, non-refundable security, income from self-controlled outlets and reduced the addition made on account of closing stock. He further deleted the additions of undisclosed income made on account of franchisee fee, accepting the contention of the assessee that there was no disclosure made for earlier years or any evidence unearthed during the search by the Department that such franchisee fee income was not disclosed by her. Both the Department and assessee filed appeals before the Appellate Tribunal. **Accepting the contention of the assessee that for AYs 2000-01 to 2003-04, there was no incriminating material seized during the course of search and therefore, the assessment orders in respect of those years ought to be quashed.** The Appellate Tribunal held that the assumption of jurisdiction under section 153A for those assessment years was illegal. In respect of AY 2004-05, the Tribunal held that the additions were based on seized documents and therefore, the assessment under section 153A was valid. It dismissed the appeals filed by the Department, in respect of deletions made by the CIT(A) and dismissed the assessee's appeals for non-prosecution.

On further appeal to the High court, dismissing the appeals of the IT Department, it was held –

(i) That it was only if during the course of search under section 132, incriminating material justifying the reopening of the assessments for six previous years was found that the invocation of section 153A *qua* each assessment year would be justified.

(ii) That nothing was brought on record by the AO to show that there was failure on the part of the assessee, to make a disclosure as regards the franchisee fee income in any of the earlier AYs 2001-02 to 2003-04. There was no incriminating material relating to non-disclosure of any franchisee fee income by the assessee in earlier years' returns. The disclosure by the assessee on account of "*undisclosed franchisee commission*" was relevant only for the year of search 2004-05 and not for the earlier years. All additions on such account were, therefore, unsustainable, as they were based on a misconception as to the factual position with regard to the number of outlets in existence during the relevant previous year, as well as on the suspicion that the assessee must have earned undisclosed income during the year in question. **There was no justification for the AO to proceed on surmises and estimates, without**

there being any incriminating material *qua* the AYs, for which he had sought to make additions of franchisee fees / commission.

Thus, it was clearly held that in the absence of any incriminating material found during the search in respect of an AY, assumption of jurisdiction by the AO under section 153A of the Act, is illegal.

The most vital aspect of the present judgment is that section 153A is titled "*Assessment in case of search or requisition*". It is connected to section 132, which deals with "*search and seizure*". Both these provisions, therefore, have to be read together. Section 153A is indeed an extremely potent power, which enables the Revenue to open at least six years of assessments earlier to the year of search. It is not to be exercised lightly. It is only if during the course of search under section 132, incriminating material justifying the reopening of the assessments for six previous years is found, that the invocation of section 153A *qua*, each of the assessment years would be justified. If no incriminating material is found during the course of search in respect of an issue, then no additions in respect of any issue can be made to the assessment under sections 153A and 153C.

2. *CIT Vs Gurinder Singh Bawa [2016] 386 ITR 483 (Bom)*

In this case, assessee's return for the AY 2005-06, was processed under section 143(1) of the Income-Tax Act, 1961. A notice under section 143(2) was not issued. A search was conducted under section 132 and in proceedings under section 153A, the AO made additions for the assessment year in question of the sums declared as gifts by the assessee, treating them as cash credits covered under section 68 and a part of the loan received from a company in which the assessee was a shareholder, as deemed dividend. The CIT(A) deleted the sum added as deemed dividend, but upheld the addition in respect of the sum declared as gifts by the assessee. The assessee challenged the validity of the assessment made under section 153A, on the ground that no assessment in respect of the six assessment years was pending so as to have abated. The Tribunal accepted the assessee's submission and held that no incriminating material having been found during the course of the search, the entire proceedings under section 153A were without jurisdiction and therefore, the addition made had to be deleted.

On appeal before the Bombay High Court, dismissing the appeal of the I.T. Department, it was held that once an assessment was not pending but had attained finality for a particular year, it could not be subject to the proceedings under section 153A of the Act, if no incriminating materials were found in the course of the search or during the proceedings under section 153A, which were contrary to and were not disclosed during the regular assessment proceedings.

It was, thus, held in this case by the Bombay High Court that as no incriminating material was found during the course of search, the entire proceedings under section 153A were without jurisdiction and therefore, the addition made had to be deleted.

As per the aforesaid judgement it is also clearly established that even if an assessment has been completed under section 143(1) of the Act and no notice has been issued under section 143(2) of the Act, such assessment could not be subject to the proceedings under section 153A of the Act, unless incriminating materials are found in the course of the search.

3. *CIT Vs Continental Warehousing Corporation (NHAVA SHEVA) Ltd. [2015] 374 ITR 645 (Bom) : 120 DTR 89 (Bom)*

It was, *inter-alia*, held in this case that on initiation of the proceedings under section 153A of the Income-Tax Act, 1961 (the Act), it is only the assessment / reassessment proceedings pending on the date of conducting search under section 132 or making requisition under section 132A, that stand abated and not the assessments / reassessments already finalized for those assessment years covered under section 153A. In so far as pending assessments are concerned, the jurisdiction to make original assessment and assessment under section 153A merges into one and only one assessment for each assessment year shall be made separately on the basis of the findings of the search and any other material existing or brought on record by the AO. **In respect of non-abated assessments, the assessment will be made on the basis of books of account or other documents not produced in the course of original assessment but found in the course of search and undisclosed income or undisclosed property discovered in the course of search.**

The Tribunal was, therefore, correct in holding that only undisclosed income and undisclosed assets discovered during search could be brought to tax.

It was also held that the notice under section 153A was founded on search. If there was no incriminating material found during the search, then the Tribunal was right in holding that the power under section 153A being not expected to be exercised routinely, should be exercised if the search revealed any incriminating material. If that was not found then in relation to the second phase of three years, there was no warrant for making an order within the meaning of this provision.

It was, thus, clearly held that if there was no incriminating material found during the search, the power under section 153A could not be exercised.

In this case, the Bombay High Court has affirmed the order of Special Bench of the Tribunal in *All Cargo Global logistics Ltd. Vs Dy.CIT [2012] 18 ITR (Trib) 106 (Mum)(SB) : 74 DTR 89 (Mum)(SB)*

4. *CIT Vs Kabul Chawla [2016] 380 ITR 573 (Del): [2015] 126 DTR 130 (Del)*

It was held in this case that in so far 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 assessment year on the basis of the findings of the search and any other material existing or brought on the record of the AO. **However, the completed assessment, can be interfered with by the AO in proceedings 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 during the course of search.**

It was further held that on the date of search, the concerned assessments for AYs 2002-03, 2005-06 and 2006-07, already stood completed and as no incriminating material was found during the search, no additions could have been made to the income already assessed.

It was also held in this case that although section 153A does not say that addition should be strictly made on the basis of evidence found in the course of 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.

5. *Pr. CIT Vs Saumya Construction P. Ltd. [2016] 387 ITR 529 (Guj) : 144 DTR 41 (Guj)*

It was held in this case that section 153A of the Income-Tax Act, 1961, bears the heading "*Assessment in case of search or requisition*". It is well settled that the heading of the section can be regarded as a key to the interpretation of the operative portion of the section and if there is no ambiguity in the language or if it is plain and clear, then the heading used in the section strengthens that meaning. The trigger point for exercise of powers under section 153A is a search under section 132 or a requisition under section 132A of the Act. **The assessment should be connected with something found during the search or requisition, i.e., incriminating material which reveals undisclosed income. Where an assessment has been framed earlier and no assessment**

or reassessment was pending on the date of initiation of search under section 132 or making of requisition under section 132A, while computing the total income of the assessee under section 153A of the Act, additions or disallowances can be made only on the basis of the incriminating material found during the search or requisition.

It was further held that it was not the case of the Revenue that any incriminating material in respect of the assessment year under consideration was found during the course of search. When the notice came to be issued under section 153A of the Act, the assessee filed its return of income. **Much later, when the time limit for framing the assessment as provided under section 153 was about to expire, the notice had been issued seeking to make the proposed addition of Rs.11,05,51,000, not on the basis of material which was found during the course of search, but on the basis of a statement of another person. The Tribunal was correct in deleting the addition.**

It was, thus, held that where an assessment has been framed earlier and no assessment or reassessment was pending on the date of initiation of search under section 132 or making of requisition under section 132A, while computing the total income of the assessee under section 153A, additions or disallowances can be made only on the basis of the incriminating material found during the search or as a result of requisition.

It was also held that the contention of the Revenue that if any incriminating materials is found, notwithstanding that in relation to the year under consideration, no incriminating material is found, it would be permissible to make additions and disallowances in respect of all the six AYs, does not merit acceptance in as much as, the assessment in respect of each of the six AYs is a separate and distinct assessment.

6. *Pr.CIT Vs Devangi alias Rupa [2017] 394 ITR 184 (Guj)*

In this case a search was conducted at the premises of the assessee on February 10, 2006 and the AO initiated the proceedings under section 153A of the Act, by issuing notice under section 153A(a) of the Act. The AO made additions for the assessment year 2000-01 to 2004-05 and for the assessment year 2004-05, denied the capital gains claimed by the assessee and treated the income as business income. The CIT(A) confirmed this. The Tribunal deleted the addition.

On appeal before the High Court, by the I.T. Department, dismissing the appeal, **it was held that at the time of search, no incriminating material was found with respect to the assessment year 2001-02 to 2003-04. Only undisclosed income and undisclosed assets detected during the**

search could be brought to tax. Therefore, the AO was not justified in making addition. With regard to the assessment year 2004-05, the assessment for that year was framed on the basis of the material already on record much prior to the search conducted on February 10, 2006. It was a scrutiny assessment and the assessment was framed for the assessment year 2004-05 on the basis of the material on record. In the absence of any specific incriminating material detected for the assessment year 2004-05, the AO was not justified in making any addition.

It was, thus, clearly held in this case that if no incriminating material is found with respect to an AY during the course of search, no addition could be made to the total income for such AY. In other words, it was held that only undisclosed income and undisclosed assets detected during search, can be brought to tax.

7. *CIT Vs SKS Ispat and Power Ltd. [2017] 398 ITR 584 (Bom)*

In this case the learned Counsel for the Department contended that the Tribunal was not justified in deleting the addition made on the basis of unaccounted sundry creditors (purchases) and unexplained share of the money, thereby limiting the scope of assessment under section 153A of the Act, only on the basis of incriminating material discovered in the search and thus, denying the Revenue to assess the undisclosed income on the basis of other evidence or post-search enquiries or investigations made during subsequent assessment proceedings.

Dismissing the appeals of the Department, it was held in this case that –

(i) Scope of assessment under section 153A of the Act, is limited to the incriminating evidence found during the search and no further, and

(ii) Section 153A of the Act, does not make any distinction between the assessment conducted under section 143(1) and section 143(3) of the Act.

8. *Pr.CIT Vs Best Infrastructure (India) Pvt. Ltd. [2017] 397 ITR 82 (Del)*

In this case search and seizure operations under section 132 of the Act, were conducted in the premises of the Best group of companies, doing construction business and Shri Tarun Goel who had accommodation transactions with the group companies. During the search, various loose papers and documents were seized, which according to the IT authorities, were with regard to the unaccounted receipts from sale of certain properties and un-recorded business expenditure. Statements of Shri Harjeet Singh and Shri Anu Agarwal, directors of the group companies and Shri Tarun Goel, were recorded under section 132(4). **The provisions of section 153A were**

invoked in the case of each of the assessees on the ground that the statements by themselves, constituted incriminating material. On the basis of the statements made by Shri Tarun Goel and Shri Anu Agarwal, the AO held that the share premium and application money of Rs.3.60 crores was unexplained credit under section 68 of the Act, Accordingly, he brought it to tax as the income of the assessee company on the ground that the directors failed to give any explanation or furnish any documentary evidence to prove the identity of the investors, their creditworthiness or the genuineness of the transactions. The AO also held that the assessee failed to produce the persons who purportedly advanced the share application money or their bank account. He added a further sum of Rs.8.10 lakhs on account of commission paid at the rate of 2.25%, as he was of the view that since the assessee had taken accommodation entries for Rs.3.60 crores, it must have paid the sum out of its undisclosed income. The CIT(A) held that Shri Anu Agarwal, a director of the group companies, was confronted with the seized documents, he had admitted the undisclosed income of Rs.8 crores for the entire group under section 132(4), which included bogus share application money. He further held that Shri Tarun Goel had stated in his statement made under section 132(4) that he had received cash from the Best group and in return had given them share capital in the form of a cheque. He also held that evidence did not mean only documentary evidence and that judicially it had been held that the statement made under section 132(4) was an important evidence collected as a result of search and seizure operation and therefore, the addition of the share capital was based on evidence gathered during the search. He negatived the challenge to the assessment orders on the ground of erroneous assumption of jurisdiction under section 153A. Additional evidence was adduced by the assessee before the CIT(A) and a remand report was submitted by the AO. It was submitted by the assessee that Shri Tarun Goel had later retracted his statement stating that it had been taken under coercion. The CIT(A) relied on the disclosure of Shri Anu Agarwal offering Rs.8 crores to tax during the search proceedings and sustained the additions made by the AO. On further appeals filed by the assessee before the Appellate Tribunal against the orders of the CIT(A) for the AYs 2005-06 to 2009-10, the same were consolidated and heard together. On the issue raised in respect of the addition made under section 68, the Appellate Tribunal held that the additions made were unjustified. On the other issue of assumption of jurisdiction under section 153A *qua* each of the assessees, it held that there was no incriminating material for each of the AYs other than AY 2008-09, to justify the assumption of jurisdiction under section 153A.

On further appeals filed by the IT Department before the High Court, dismissing the appeals, it was held –

(i) That the additions made to the income of the assessee by the AO under section 68, based on the statements made under section 1432(4) by the assessee directors in the course of search operation under section 132, were rightly deleted by the Appellate Tribunal and its order did not suffer from any legal infirmity which warranted interference. The directors had discharged the burden placed on them to explain the credits which appeared in their books of account. It was evident from the statement of Shri Anu Agarwal that the surrender of sum of Rs.8 crores was only for the AY 2008-09 and not for each of the six AYs preceding the year of search. When Shri Anu Agarwal was confronted with the relevant documents, he explained that they did not pertain to any undisclosed income. Therefore, they could not be said to be incriminating material *qua* each of the preceding AYs.

(ii) That neither was a copy of statement of Shri Tarun Goel recorded under section 132(4) provided to the assessee, nor Shri Tarun Goel offered for cross-examination, the onus was on the IT authorities to ensure his presence for cross-examination. Apart from the fact that Shri Tarun Goel retracted his statement, the fact that he was not produced for cross-examination was sufficient to discard his statement. The statements recorded under section 132(4) did not by themselves, constitute incriminating material. Having regard to the material seized in the course of search under section 132 and the statements that were made on behalf of the assessee under section 143(4), the assumption on the jurisdiction under section 153A and the consequent additions made by the AO were not justified.

It was, thus held that in a case of search and seizure operation under section 132 of the Act, statements recorded under section 132(4) did not by themselves, constitute incriminating material. It was further held that pursuant to a search and seizure operation under section 132, unless there is incriminating material *qua* each of the AYs in which additions are sought to be made, the assumption of jurisdiction under section 153A would be vitiated in law.

9. *Pr.CIT Vs Dipak Jashvantlal Panchal [2017] 397 ITR 153 (Guj)*

It was held in this case that from the heading of section 153A, the intention of the legislature is clear viz., to provide for assessment in case of search and requisition. When the very purpose of the provision is to make assessment in case of search or requisition, it goes without saying that the assessment has to have relation to the search or requisition. In other words, the assessment should be connected with something found during the search or requisition, viz., incriminating material which reveals undisclosed income. Thus, while in view of the mandate of subsection (1) of section 153A of the Act, in every case where there was a search or requisition, the Assessing Officer is

obliged to issue notice to such person to furnish returns of income for the six years preceding the assessment year relevant to the previous year in which the search is conducted or requisition is made, any addition or disallowance can be made only on the basis of material collected during the search or requisition.

It was, thus, held in this case that additions can be made in an assessment under section 153A only on the basis of material found during the search.

10. Chintels India Ltd. Vs. Dy.CIT [2017] 397 ITR 416 (Del) : 156 DTR 317 (Del)

One of the issues, in this case, before the High Court was validity of assessment under section 153A of the Act.

In this case, for the AY 2008-09, the assessee filed its return on 28.10.2008. The return was processed under section 143(1) on 27.3.2010 and a search operation took place on 25.3.2010. No notice was sent to the assessee under section 143(2) before the deadline i.e. 30.9.2009. After the search a notice, dt.10.3.2011, was issued by the AO to the assessee under section 153A(1) of the Act, asking to file its returns of income in respect of AYs 2004-05 to 2009-10. In response thereto, the assessee filed a return on 28.4.2011, declaring the same income as was declared in the return filed under section 139(1) of the Act. In the consequent assessment order, dt.30.12.2011, for AY 2008-09, the AO made an addition of Rs.84,84,910, under the head "*Bogus depreciation claimed*". The AO held that the assessee had not filed any document about the use of the software. On appeal by the assessee, the CIT(A) dismissed the appeal.

Thereafter, the assessee went before the Tribunal in respect of assessment orders for AYs 2008-09, 2009-10 and 2010-11. In regard to AY 2008-09, a specific plea was raised by the assessee that the assessment for the AY 2008-09, had abated. This was because no notice had been issued to the assessee either under section 143(2) or under section 142(1) of the Act within the stipulated time. The Tribunal concluded that the date of initiation of search was 25.3.2010 and the date of intimation under section 143(1) of the Act was 27.3.2010. The Tribunal, thus, concluded that as on the date of initiation of search, the assessment for AY 2008-09 was pending and hence had not abated.

On appeal before the High Court, it was held that no notice was sent to the assessee under section 143(2) before the deadline, i.e. 30.9.2009. The assessee filed its return on 28.10.2008. The return was processed under section 143(1) on 27.3.2010. The CBDT Circular No.549, dt.31.10.1989 makes it abundantly clear that once an assessee does not receive a notice under section 143(2)

within the period stipulated then such an assessee "*can take it that the return filed by him has become final and no scrutiny proceedings are to be started in respect of that return*". The inevitable conclusion, therefore, in the present case, is that the Tribunal was in error in holding that the assessment for AY 2008-09 should be treated as '*pending*' whereas in terms of the CBDT Circular it should be treated as final in respect of which no scrutiny is to be started. Consequently, impugned order of the Tribunal to the extent it negatives the plea of the assessee that the assessment for AY 2008-09 had abated, because no notice had been issued to the assessee either under section 143(2) or under section 142(1) within the stipulated time, is hereby set aside and the appeal is allowed.

It was, thus, held that once an assessee does not receive a notice under section 143(2) within the stipulated period, then such an assessee "*can take it that the return filed by him has become final and no scrutiny proceedings are to be started in respect of that return*". The Tribunal was, therefore, not justified in rejecting the plea of the assessee that assessment for AY 2008-09 had abated, because no notice either under section 143(2) or under section 142(1) had been issued to the assessee within the stipulated time.

In the present context, it will be appropriate to refer to Circular No.549, dated 31.10.1989, providing Explanatory Notes on the provisions of the Direct Tax Laws (Amendment) Act, 1987 [as amended by the Direct Tax Laws (Amendment) Act, 1989] - Part II.

Paragraph (5) of the aforesaid Circular deals with, "*Procedure for assessment – New scheme of assessment*". For our purpose, paragraph 5.13 of the aforesaid Circular is relevant, which is reproduced as follows :

"*5.13. A proviso to sub-section (2) provides that a notice under the sub-section can be served on the assessee only during the financial year in which the return is furnished or within six months from the end of the month in which the return is furnished, whichever is later. This means that the Department must serve the said notice on the assessee within this period, if a case is picked up for scrutiny.* ***It follows that if an assessee, after furnishing the return of income does not receive a notice under section 143(2) from the Department within the aforesaid period, he can take it that the return filed by him has become final and no scrutiny proceedings are to be started in respect of that return."*** (Emphasis added)

11. CIT Vs Deepak Kumar Agarwal [2017] 158 DTR 100 (Bom)

In this case, a search and seizure operation under section 132(1) of the Act was conducted on 3.1.2008, in the case of Evershine Group and in the case of the assessee, warrant of authorization under section 132 of the Act was executed on the same day. The assessment proceedings under section153A of the Act were initiated. The AO made several additions to the total income and passed an order under section 143(3), r.w.s. 153A, on 31.12.2009, on a total income of Rs. 40,07,379.

On appeal, the CIT(A) directed the AO to re-compute the disallowances made under section 14A of the Act, vide his order, dt.25.11.2010.

Being aggrieved, the Revenue preferred an appeal before the Tribunal and the assessee filed cross-appeal. Vide a common order, the Tribunal adjudicated upon twelve (12) appeals. As per the order of the Tribunal, dt.10.4.2014, it was held that the additions were made beyond the scope of section 153A / 153C of the Act, as no incriminating material in support of the additions made under section 68 and under section 14A were brought on record by the Revenue. Thus, the Tribunal allowed the assessee's appeal and dismissed the appeal of the Revenue.

On further appeal by the Revenue before the High Court, dismissing the appeals, it was held that no addition could have been made while completing the assessment under section 153A in the case of completed assessment, if no incriminating material is recovered and no undisclosed income was determinable from the material found as a result of search. It was further held that once there was no incriminating material brought on record by the Revenue, no addition could be made under section 68 of the Act.

12. *Nenshi L. Shah Vs Dy.CIT [2017] 57 ITR (Trib) 106 (Mum)*

It was held that the Department having produced no seized material pertaining to this assessment year relatable to the assessee in regard to the additions made by the Assessing Officer the assessment was without jurisdiction.

It was further held that the time limit for issuing notice under section 143(2) ended on August 31, 2004, whereas the search took place much later on August 3, 2006. Therefore as on the date of search there was an assessment completed by way of processing of returns of the assessees under section 143(1). Subsequently, in the assessment completed under section 143(3) read with section 153A, the Assessing Officer had brought to tax the gift received from G

without any incriminating material having been found during the course of search. The gift was disclosed in the returns as evidenced by the capital account and which had not been abated, the amount of gift could not be added.

In this case reliance was placed on the judgement of *CIT Vs Continental Warehousing Corporation (NHAVA SHEVA) Ltd [2015] 374 ITR 645 (Bom).*

Besides, a reference has also been made to the judgement of Special Bench of the Tribunal in the case of *All Cargo Global Logistics Ltd Vs Dy.CIT [2012] 18 ITR (Trib) 106 (Mum)(SB).*

The aforesaid judgement of the Tribunal has been affirmed by the Bombay High Court in the case of *CIT Vs Continental Warehousing Corporation (NHAVA SHEVA) Ltd [2015] 374 ITR 645 (Bom).*

13. *Smt.Anjali Pandit Vs ACIT [2016] 52 ITR (Trib) 404 (Mum) : [2017] 188 TTJ 645 (Mum)*

In this case the assessee contended before the Tribunal that the Assessing Officer had no jurisdiction to assess the long-term capital gains as income from other sources holding the long-term capital gains as non-genuine, as no incriminating material was found during the course of search on this issue. **The return for the assessment year 2002-03 was filed declaring an amount of Rs.12,34,485. No notice under section 143(2) was issued by the Assessing Officer and the time period for issuing such notice was 12 months from March 31, 2003, meaning thereby the deadline for issuance of notice under section 143(2) was expired on March 31, 2004. Thus, the returned income stood assessed and assessment attained finality. Thereafter, search and seizure under section 132 was conducted and carried out on January 24, 2006. The income returned in the original return attained finality on the date of search and the Assessing Officer had no jurisdiction to assess the income, which was not based on the search materials or incriminating materials found during the search. Therefore, the addition made in the assessment framed by the Assessing Officer was without jurisdiction and, hence, bad in law.**

Allowing the appeal of the assessee, it was held that the assessment in the year 2002-03 was not pending on the date of search. The return was filed on March 21, 2003, and no notice under section 143(2) was issued till March 31, 2004, and thus, the assessment for the year 2002-03 attained finality on the income returned by the assessee. The search action on the assessee was carried out on January 21, 2006 and on that date the assessment for the instant year was not

pending and the AO could not have disturbed the assessment unless the addition were made on the basis of materials found in the search in terms of the provisions of section 153A.

It was further held that the assessments in the period of six years in respect of which notice under section 153A was issued, but were not pending and attained finality on the date of search, could not be disturbed by the AO unless some incriminating material in respect of the completed assessments was found during the search.

It was also held that the additions of Rs.78,465 and Rs.79,237, respectively, made under section 69C were not based upon the seized or incriminating material found during the search and therefore, the additions were beyond the scope of assessment under section 153A of the Act.

14. *All Cargo Global Logistics Ltd Vs Dy.CIT [2012] 18 ITR (Trib) 106 (Mum)(SB) : 74 DTR 89 (Mum)(SB)*

It was held in this case that a harmonious interpretation of sections 132(1) and 153A together will produce the following results :

(a) In so far as pending assessments are concerned, the jurisdiction to make original assessment and assessment under section 153A merges into one and only one assessment for each assessment year shall be made separately on the basis of the findings of the search and any other material existing or brought on the record of the Assessing Officer.

(b) In respect of non-abated assessments, the assessment will be made on the basis of books of account or other documents not produced in the course of original assessment, but found in the course of search and undisclosed income or undisclosed property discovered in the course of search.

Reading section 153A in isolation would have the effect that in case of an assessment, which is not pending and where nothing is found, the same may be reopened. Such interpretation will produce a result that an assessment which has come to an end and for which there is no cause of reopening, shall revive simply because a search has been conducted. This will not be harmonious interpretation of various provisions of sections 132(1) and 153A. A harmonious interpretation of the two provisions does not amount to reading down section 153A, nor does it amount to supplying a *casus omissus* (A point un-provided by a statute), nor does it produce unreasonable or absurd results.

It was further held that the second proviso to section 153A uses the words "*pending on the date of initiation of search*" and provides that assessment so pending shall abate. The provision does not use the words "*completed assessment*".

This judgement has been approved by the Bombay High Court, in the case of *CIT Vs Continental Warehousing Corporation (NHAVA SHEVA) Ltd [2015] 374 ITR 645 (Bom).*

15. *ACIT Vs Layer Exports P.Ltd [2017] 53 ITR (Trib) 416 (Mum).*

It was, *inter-alia,* held in this case that an addition in assessment carried out pursuant to search action under section 132 had to be related to cogent and positive materials found during search which proved conclusively that the assessee had either earned an income or made an investment which had not been recorded in his regular books of account or that his case was covered under any of the deeming provisions contained in sections 68, 69, 69A to 69D.

Additions could not be sustained merely on the basis of rough notings made on a few loose sheets of papers, unless the Assessing Officer brought on record some independent and corroborative materials to prove irrefutably that the notings revealed either unaccounted income or unaccounted investment or unaccounted expenditure of the assessee.

The assessments for the years under appeal had been completed under section 153A, which relates to assessment in the case of search or requisition. The very purpose or essence of search conducted under section 132, is to unearth hidden income or property or get hold of books of account or documents, which have not been or will not be otherwise produced by the assessee in regular course on issue of summons or notice. In the assessee's case, the purported search action did not lead to discovery of any unaccounted money, bullion, jewellery or other valuable article or thing. Further no books of account revealing any undisclosed transactions of the assessee were found during the course of search. **The entire assessment order revolved around scribblings in loose sheets of papers seized from the premises of another person, in the course of search action on such other person. Rough loose sheets of papers scribbled by some anonymous person and seized in the course of search of another person could not be termed as "*documents*".** The loose papers were not in the form of pronotes or duly executed documents or books of account or certificates or money receipts which could prove conclusively the factum of any undisclosed income earned by the assessee or any unaccounted investments or expenditure made by him. **Additions could not be made simply on the basis of rough scribbling made by some unidentified person on a few loose sheets of papers.**

16. *Electro Steel Castings Ltd Vs Dy.CIT [2017] 53 ITR (Trib) 5 (Kol).*

It was, *inter-alia*, held that with respect to the additions made during the course of assessment proceedings under section 153A for the assessment years 2003-04 to 2005-06, there was no incriminating material found at the time of search and the assessment proceedings stood completed prior to the date of search. The issues with regard to deduction under section 80-IA and the arm's length price of the international transaction between the assessee and its associated enterprise could not and ought not to have been examined by the Assessing Officer in the assessment proceedings, under section 153A, as the issues stood concluded with the assessee's return on these issues being accepted in the assessment completed under section 143(3) prior to the date of search. **Since no material whatsoever was found in the course of search, the additions made by the Assessing Officer in the assessment completed under section 153A for the assessment years 2003-04 to 2005-06, could not have been a subject matter of proceedings under section 153A for those years.**

It was further held that the claim of the assessee in the assessment under section 153A for the assessment years that sales tax remission subsidy which was originally offered to tax and brought to tax in the original assessment under section 143(3) was not taxable could not be made by the assessee and could not have been and ought not to have been the subject matter of determination of total income under section 153A for the assessment years 2003-04 to 2005-06.

17. ACIT Vs SRJ Peety Steels (P) Ltd. [2011] 53 DTR (Trib) 347 (Pune) : 137 TTJ 627 (Pune)

It was held in this case that the search was initiated on 17.3.2006 in the residential and business premises of SRJ Group, covering the premises of the assessee company as well. Prior to the search, the returns of income for the AYs 2000-01 to 2005-06 had already been filed under section 139(1) accompanied by all requisite documents and proceeding under section 143(1) stood completed. During the course of search no incriminating materials were found relating to aforesaid years which could have been added back in the proceedings under section 153A. The details regarding the consumption of electricity for the production for each of the year under consideration was very well placed before the authorities below in the director's report of each year. The same has not been disputed by the Revenue. The tax audit report also contained the unit production of each year, which were accepted year after year, along with the returns and no query was ever raised by the Department. The matter of fluctuating consumption of electricity can by no means be said to be a finding of search since all details regarding electricity vis-à-vis

production were before the Department. If the Department had any doubts regarding the same, it could have been raised during the regular assessments and not in the assessment proceedings under section 153A. When nothing incriminating was found in the course of search relating to any of these assessment years, the assessments for such years could not be disturbed on this ground. In view of the aforesaid factual and legal position, the additions in question in AYs 2000-01 to 2005-06, are not corresponding to the seized material found during the course of search. The relevant I.T. returns for the said years were filed prior to the search in normal course disclosing the particulars of subject-matters already on record. The returns have already been accepted and no assessment as such could be said to be pending on the date of initiation of search and abated in light of the provisions of section 153A.

It was further held that none of the evidence collected as a result of search or detected during the course of assessment pertains to the AYs 2000-01 to 2005-06. It is an accepted fact that each year of the assessment is independent and evidences found relating to AY 2006-07, cannot have an adverse impact on the assessments of the assessee company for the AYs 2000-01 to 2005-06. Therefore, rejection of books for these years purely on the ground that there has been divergence in the consumption of electricity and application of section 144 is not at all justified. Accordingly, additions have rightly been deleted in AYs 2000-01 to 2005-06, in both the cases.

18. Summary

On the basis of the aforesaid legal precedents as laid down by the Bombay High Court, Delhi High Court and Gujarat High Court, as also the various Benches of the Tribunal, the correct legal position in respect of the assessments under section 153A of the Act, may be summarized as follows :

(i) The scope of assessment under section 153A of the Act is limited to the incriminating evidence found during the search and no further.

(ii) Unless there is incriminating material *qua* each of the assessment years in which additions are sought to be made, the assumption of jurisdiction under section 153A would be vitiated in law.

(iii) Additions can be made in the assessment under section 153A, only on the basis of material found during search.

(iv) If no notice under section 143(2) is issued by the AO and the time period for issuing such notice has expired on or before the date of search, then the assessment(s) completed under section 143(1) of the Act shall not abate. Such assessments could not be subject to proceedings under section 153A of the Act, unless incriminating material is found in the course of search.

(v) The statements recorded under section 132(4) of the Act, do not constitute incriminating material.

(vi) Reading section 153A in isolation would have the effect that in case of an assessment which is not pending and where nothing is found, the same may be reopened. Such interpretation will produce a result that an assessment which has come to an end and for which there is no cause of reopening, shall revive simply because a search has been conducted.

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