

IN THE INCOME TAX APPELLATE TRIBUNAL "G", BENCH MUMBAI
BEFORE SHRI MAHAVIR SINGH, JM
&
SHRI M.BALAGANESH, AM

ITA No.4181/Mum/2016 to 4187/Mum/2016
(Assessment Year :2006-07 TO 2012-13)

M/s. German Express Shipping Agency (I) P. Ltd., C/o. Kalyaniwalla & Mistry Army & Navy Building, 3 rd Floor, 148, M.G. Road Fort, Mumbai – 400 001	Vs.	Deputy Commissioner of Income Tax, Central Circle- 6(4), (formerly Asst. Commissioner of Income Tax, Central Circle 39) Air India Building, 19 th Floor, Nariman Point Mumbai – 400 021
PAN/GIR No.AABCG0117C		
(Appellant)	..	(Respondent)

Assessee by	Shri Nitesh Joshi
Revenue by	Shri B B Rajendra Prasad
Date of Hearing	27/02/2019
Date of Pronouncement	06/03/2019

ORDER

PER BENCH:

These appeals filed by assessee are directed against the order of Commissioner of Income Tax (Appeals)-54 [hereinafter referred to as the Id CITA] dated 16/04/2014 for A.Y.2006-07 in the matter of order passed u/s.143(3) r.w.s. 153A of the Income Tax Act, 1961. Since identical

issues are involved in these appeals, they were heard together and are being disposed off by this consolidated order for the sake of convenience.

2. Let us first take up the appeals of the assessee in ITA Nos. 4181 to 4185/Mum/2016 for the Asst Years 2006-07 to 2010-11. With the consent of both the parties, the appeal of Asst Year 2006-07 is taken as the lead case and the decision rendered thereon would apply to Asst Years 2007-08 to 2010-11 in view of identical facts except with variance in figures.

3. The preliminary issue to be decided in this appeal is as to whether the Id CITA was justified in upholding the addition of Rs 26,29,982/- towards disallowance of expenses already reflected in the regular cash book of the assessee in the search assessment framed u/s 153A/143(3) of the Act in the absence of any incriminating material found during the course of search to that effect.

4. The brief facts of this issue is that there was a search and seizure operation conducted u/s 132 of the Act on J.M.Baxi & Co. Group on 20.3.2012. The assessee is one of the companies in the said group. Consequent to the search, notice u/s 153A of the Act was issued and for the year under consideration, the assessee filed a letter dated 3.9.2012 to treat the original return of income filed on 31.10.2006 u/s 139(1) of the Act disclosing total income of Rs 16,24,63,299/- as a return in response to notice u/s 153A of the Act dated 25.7.2012. The assessee stated that against the original return filed on 31.10.2006, an assessment u/s 143(3) of the Act was framed in the hands of the assessee for the Asst Year 2006-

07 on 18.3.2008 accepting the income returned. For the Asst Years 2007-08 to 2009-10, the assessments against the original return of income filed u/s 139(1) of the Act were completed by the revenue u/s 143(3) of the Act. For the Asst Year 2010-11, though the assessee had furnished its original return of income u/s 139(1) of the Act, the time limit for issuance of notice u/s 143(2) of the Act had expired on 30.9.2011. Hence as on the date of search on 20.3.2012, the assessments for the Asst Years 2006-07 to 2010-11 fall under the category of completed / unabated assessments and hence the income assessed originally thereon could not be disturbed unless there is any incriminating material found in the course of search relating to such assessment year. It was argued that admittedly no incriminating materials were found for Asst years 2006-07 to 2010-11 in the course of search with regard to disallowance of certain expenses and accordingly pleaded not to disturb the originally assessed income, which is same as the returned income.

5. The brief facts as noted in the assessment order are as under:-

“5.1. M S J M Baxi Group was founded in 1916. It is the largest Shipping Agency House in India. The company has a strong presence in all its business activities and leadership in several of the shipping support services. Currently, over 200 National and International shipping companies avail their services, The group has over 70 offices in all major and minor port cities and other big cities. The company has set up a strong marketing network via various group companies / affiliates operating across the globe. The group companies of J M Baxi have their marketing offices located at London, Dubai and Singapore. The majority of the business activities are done through these marketing channels. The group is owned by Shri Naresh J Kotak and his nephew Shri Krishna B Kotak. The two sons of Shri Krishna B Kotak are also actively involved in the business. The other key person is Shri S K Parikh, CFO of the group.

5.2. Company is operating as licensed Custom House Agents at most Indian ports. M/s J M Baxi & Co. and its group provide clearing and freight forwarding services including custom clearance, compliance with import / export regulations and comprehensive multi nodal 'point to point' service comprising land, rail, air and sea transport and warehousing.

5.3. They have recently diversified into setting up of Container Freight Stations (CFS) and Inland Container Depots (ICDs).

The main activities of the assessee companies are:

- Shipping Agency
- Container Transport Management
- Boat Development & Terminal Management
- Project Logistics Division
- * Tanker Operations
- Chartering Brokers
- Warehousing and freight station
- International freight forwarding

5.4. The assessee, M/s German Express Shipping Agency (India) Pvt. Ltd. is one of the benchmark companies of this group. Shri Krishna B. Kotak and Shri Naresh B. Kotak are directors hi the company. The assessee company is handling agency work on vessels such as retainer. The company is a general agent in India for Hapag-Lyod, a German based shipping company, to look after import/ export of cargoes and all related activities. The operation also includes handling of passenger vessel calling at various ports. The company also has license to operate Public Mobile Radio Trunking Service for Navi Mumbai & New Delhi sites. Further, the company has also derived income from letting out of some of its equipments and also its godowns.”

6. The Id AO observed in his order as under: -

6. Personal Expenses:

6.1. During the course of search proceedings, it was noticed that Shri Naresh J Kotak, one of the directors and key person of the assessee group is staying at, Carlton Terrace, Bhulabhai Desai Road, Near Mahalaxmi

Temple, Mumbai. The premises consist of four floors. It was seen that various expenses pertaining to this building were booked in the company's accounts as business expenditure. Since, the expenditure pertaining to this building represented personal expenditure of Shri Naresh J Kotak, the search party confronted the same to the Directors of the company. Relevant portion of the statement given by Shri Krishna B. Kotak under section 132(4) on 21-03-2012 is reproduced below (the same statement was ratified by Shri Naresh J Kotak also):

"Q-8 : It is seen from the books found and seized, that the following amounts were cash to various persons as temporary wages and other expenses by M/s German Express shipping agency(I) Pvt. Ltd. However, these persons have worked at the residence of the directors instead of the company in the time period mentioned.

<i>F.Y.</i>	<i>Temp. Wages (Rs)</i>	<i>Other expenses (Rs.)</i>	<i>Total (Rs.)</i>
<i>2005-06</i>	<i>1718420</i>	<i>911562</i>	<i>2629982</i>
<i>2006-07</i>	<i>1 773325</i>	<i>969734</i>	<i>2743059</i>
<i>2007-08</i>	<i>1874387</i>	<i>986693</i>	<i>2861080</i>
<i>2008-09</i>	<i>1729763</i>	<i>1130020</i>	<i>2859783</i>
<i>2009-10</i>	<i>1932877</i>	<i>955358</i>	<i>2888235</i>
<i>2010-11</i>	<i>2029545</i>	<i>911246</i>	<i>2940791</i>
<i>2011-12</i>	<i>1849500</i>	<i>932475</i>	<i>2781975</i>
		<i>TOTAL</i>	<i>19,704,905</i>

Please confirm the same and explain as to why the same should be disallowed and treated as taxable income in the respective years.

Ans. I do confirm that the above mentioned amounts are paid in cash for the period and reason mentioned therein. I wish to say that the amount of

Rs.1,97,04,905/- may be treated as taxable income in M/s German Express Shipping Agency (I) Put. Ltd. in the respective years as mentioned."

6.2. However, the above statement was retracted by Shri Krishna B Kotak on 20-04-2012 u/s. 132(4) as under:

"In reply to question no. 8 of the statement u/s 132(4) dated 21.03.2012, with regard to payment of cash to various persons as temporary wages and other expenses by M/s German Express Shipping Agency (I) Pvt. Ltd., I have confirmed that those are paid in cash to those persons who have worked at the residence of the directors and offered the above amount of Rs.1,97,04,905 to tax. Here I would like to submit that these expenses are purely regular business expenses and not personal as stated earlier. We, the directors are of the practice of holding business meetings with our clients at our residences where adequate space and facilities are available to conduct business meetings and extend hospitality. This is done in order to save unnecessary expenditures at hotels^ to maintain personal rapport with the clients and also to save time. For this purpose we engage temporary workers as and when the necessity arises who are paid in cash. This practice is out of purely commercial decision and purely for the purpose of business. There is no personal element in these expenses. When considering the volume of the business of our group concerns this expenditure of Rs.1.97 crores, spanning over seven financial years, is very reasonable and also negligible. Further, during the course of statement u/s 132(4) on 21.03.12 I was under tremendous mental pressure and also not able to gather full details on this issue. Therefore, I now request you to kindly ignore the disclosure of Rs.1,97,04,905 given by me on 21.03.12 u/s 132(4) in the hands of M/s German Express Shipping Agency (I) Pvt. Ltd., I request to view this withdrawal leniently considering the disclosure of Rs.156.09 crores. "

7. The Id AO having found that the director of the assessee who had originally given the statement u/s 132(4) of the Act had subsequently retracted the same by giving some explanation, directed the assessee to provide necessary documentary evidences to show that the meetings were held at home with the clients in the following manner: -

<i>SI No</i>	<i>Name of Principal/ Client</i>	<i>Address of Principal/ Client</i>	<i>Date of Meeting</i>	<i>Period of Stay</i>	<i>Address of Hotel/Price of stay of Principals/ Clients</i>	<i>Expenses in</i>	<i>Nature Of such expenses</i>
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The Id AO also directed the assessee to furnish copies of relevant ledgers, bank account statements and cash books and provide a chart correlating the entries.

8. In response thereto, the assessee replied vide letters dated 4.12.2013 and 17.1.2014 that it is functioning as agents of international shipping company and in that connection, international guests visit Mumbai for the purpose of holding discussions and meetings for the purpose of improving business and solving problems relating thereto. In view of heavy pricing in 5 star hotels, the assessee thought it fit to house them in the residence of the director (i.e Carlton Terrace) for holding business meetings and during such meetings, hospitalities were to be extended by the assessee, for which purpose, certain temporary labourers were deployed and their wages, overtime allowance, conveyance, medical expenses etc were incurred apart from providing basic amenities to the guests. The details of various expenses were furnished as under:-

DETAILS OF EXPENSES AT CARLTON TERRACE

Particulars	2005-06	2006-07	2007-08	2008-09	2009-10	2010-11	2011-12	Total Amount
Provisions	4,00,943	4,19,701	4,34,145	5,27,209	3,53,036	3,37,934	3,63,665	28,36,633

Medical Expenses	61,323	63,552	59,202	70,501	85,535	73,629	75,522	4,89,264
LTA	23,957	26,368	28,935	35,208	38,660	36,850	37,723	2,27,701
Overtime	27,962	33,068	28,024	28,600	29,067	28,705	20,308	1,95,734
Uniform	10,598	8,402	9,612	11,636	9,847	9,112	16,177	75,384
Conveyance	69,852	84,293	79,601	1,08,601	1,31,642	1,24,658	95,219	6,93,866
Miscellaneous items	3,16,922	3,34,350	3,47,174	3,48,265	3,07,571	3,00,358	3,23,811	22,78,451
Total	9,11,562.00	9,69,734	9,86,693	11,30,020	9,55,358	9,11,246	9,32,425	67,97,038
Details of Provisions								
Grossary Bills	64,104	65,755	67,281	75,354	60,515	58,185	60,203	4,51,397
Vegetables	42,076	44,180	45,947	53,299	40,974	41,564	42,312	3,10,352
Milk	21,047	22,730	22,275	25,505	23,954	23,235	24,620	1,63,366
Bread/Butter	16,110	15,788	15,867	17,136	15,497	15,628	18,878	1,14,904
Eggs	36,076	36,436	36,071	40,399	32,915	33,024	36,345	2,51,266
Mutton	49,213	53,150	52,618	65,774	40,331	37,718	40,604	3,39,408
Chicken	80,133	84,906	96,392	1,30,271	64,676	60,442	66,381	5,83,201
Fish	62,098^	67,066	68,407	84,912	48,292	45,998	48,297	4,25,070
Softdrinks / Juries	30,091	29,690	29,287	34,559	25,882	22,140	26,025	1,97,674
Total	4,00,948	4,19,701	4,34,145	5,27,209	3,53,036	3,37,934	3,63,665	28,36,638

The assessee also furnished the year wise details of temporary wages paid to 15 to 17 labourers who were employed at Carlton Terrace for taking care of the guests at the residence of the director as under:-

<u>Asst Year</u>	<u>Temporary Wages</u>
2006-07	17,18,420

2007-08	17,73,325
2008-09	18,74,387
2009-10	17,29,763
2010-11	19,32,877
2011-12	20,29,545
2012-13	18,49,500

	1,29,07,817

The assessee further submitted that Mr N J Kotak, director, had paid separately for his personal staff of 4-5 persons throughout the concerned period from his personal funds. It was further submitted that Mr N J Kotak is a strict vegetarian, whereas the expenses incurred on Non-vegetarian items are more than 50% of the amount of the yearly expenses on provisions. Also the amount of vegetarian items were totally disproportionate for a single person aged 72 years old.

9. The Id AO however, did not heed to the contentions of the assessee and proceeded to disallow the entire expenses incurred at the residence as above treating the same as personal expenses of the director which had been absorbed as expenditure in the books of the assessee company. Accordingly, a sum of Rs 26,29,982/- was disallowed by the Id AO in Asst Year 2006-07. Similar disallowances were made for other asst years also upto Asst Year 2012-13. With regard to the preliminary objection raised by the assessee before the Id AO that for the Asst Years 2006-07 to 2010-11, that no disallowances could be made in respect of regular items debited in the profit and loss account of the assessee, without the existence of any incriminating materials found during the course of search, relating to those expenditure, the Id AO proceeded with the plea that the

assessments to be framed u/s 153A of the Act clears all the decks and would enable the Id AO to assess or reassess the total income as per the provisions of the Act irrespective of incriminating materials found in the search.

10. The assessee submitted before the Id CITA that absolutely there is no whisper of any reference to the seized materials found in the course of search for the Asst Years 2006-07 to 2010-11 for making the disallowance of expenses. It was vehemently pleaded that the entire disallowance of expenses was made only based on statement recorded during search u/s 132(4) of the Act which was later retracted by the same director with proper reasoning. But the Id CITA did not heed to these contentions of the assessee and upheld the action of the Id AO by observing that the assessee had not produced the books of accounts in the original assessment proceedings and hence the entries recorded therein which were noticed at the time of search would become incriminating materials. Aggrieved, the assessee is in appeals before us.

11. We have heard the rival submissions. We find that the Id DR argued **that the expression 'incriminating material' is not found in the provisions of the Act and it is only the Hon'ble Courts which had imported those words while rendering the decisions. He stated that the Hon'ble Courts are divided on this issue and placed reliance on the following decisions :-**

a) **Decision of Hon'ble Delhi High Court in the case of Smt Dayawanti vs CIT** reported in 390 ITR 496 (Del) wherein they had held that addition could be made based on the statements recorded during search.

b) **Decision of Hon'ble Chattisgarh High Court in the case of ACIT vs Hukum Chand Jain** reported in 337 ITR 238 (Chattisgarh) wherein it was held that when an assessee does not retract his statement given u/s 132(4) immediately after the conclusion of the search, then it could be said that the assessee had failed to discharge onus of proving that confession made by him u/s 132(4) of the Act was a result of intimidation, duress and coercion or that same was made as a result of mistaken belief of law or facts. In the facts before us in the instant case, we find that the retraction statement was made within a period of one month from the date of giving it together with proper reasoning by the assessee explaining the purpose of retraction.

c) Decision of Ahmedabad Tribunal in the case of Kantilal C Shah vs ACIT reported in 133 ITD 57 (Ahd ITAT) on the same lines of Chattisgarh High Court referred to supra.

11.1. The Id DR argued that the basic foundation for conducting the search is governed by the provisions of section 132 of the Act which has to be read harmoniously with section 153A of the Act. There are three conditions based on which a search action could be initiated u/s 132 of the Act on an assessee. They are :-

Section 132(1) - If the concerned authority has in consequence of information in his possession, has reason to believe that -

- (a) where a person fails to produce the books of accounts and other documents in response to notice u/s 142(1) or summons issued u/s 131(1) of the Act ; or
- (b) where a person fails to comply with the requirements of summons issued u/s 131(1) of the Act ; or
- (c) where a person is in possession of any money, bullion, jewellery or other valuable article or thing and such assets represents either wholly or partly income or property which has not been , or would not be, disclosed for the purposes of the Act (hereinafter referred to as the undisclosed income or property) ;

then the officer , so authorized could conduct a search and proceed as per the requirements laid down in the said section. He argued that the aforesaid three primary conditions for invoking search proceedings cannot be given a go by while framing section 153A assessments and the instant case falls under section 132(1)(c) of the Act.

11.2. The provisions of section **153A of the Act use the expression 'assess or reassess total income'** and hence the search assessment could be framed u/s 153A of the Act irrespective of any incriminating materials.

12. In response to this, the Id AR stated that the assessment for the Asst Year 2010-11 was originally completed u/s 143(1) of the Act as the case was not selected for scrutiny by issuance of notice u/s 143(2) of the Act on or before 30.9.2011. Other than this, the assessments from Asst Years

2006-07 to 2009-10 were completed u/s 143(3) of the Act. Hence all the assessments from Asst Years 2006-07 to 2010-11 would fall under the category of completed / unabated assessments. He reiterated the submissions made before the lower authorities with regard to framing of additions in section 153A assessments without any incriminating material found thereon. The Id AR stated that the decision relied upon by the Id DR **in the case of Smt Dayawanti by Hon'ble Delhi High Court supra had been duly distinguished by the Hon'ble Delhi High Court** in its subsequent decision rendered in the case of PCIT vs Best Infrastructure (India) Pvt Ltd and Others reported in 397 ITR 82 (Del). In the said decision, it was specifically held that the statements recorded u/s 132(4) of the Act does not constitute incriminating material for the purpose of section 153A of the **Act. The said decision duly followed the decision of Hon'ble Jurisdictional High Court** in the case of CIT vs Continental Warehousing Corporation (Nhava Sheva) Ltd reported in 374 ITR 645 (Bom), among other decisions. With regard to other two decisions relied upon by the Id DR supra, the distinguishing facts and features thereon were already discussed by us hereinabove.

13. We have heard the rival submissions. We find it would be necessary to address the preliminary issue of whether the addition could be framed u/s 153A of the Act in respect of a concluded proceeding without the existence of any incriminating materials found in the course of search. The scheme of the act provides for abatement of pending proceedings as on the date of search. It is not in dispute that the assessments for the Asst Years 2006-07 to 2010-11 were originally completed u/s 143(3) /

143(1) of the Act, as the case may be, and hence it falls under concluded proceeding, as on the date of search. We hold that the legislature does not differentiate whether the assessments originally were framed u/s 143(1) or 143(3) or 147 of the Act. Hence unless there is any incriminating material found during the course of search relating to such concluded year, the statute does not confer any power on the Id AO to disturb the findings given thereon and income determined thereon, as finality had already been reached thereon, and such proceeding was not pending on the date of search to get itself abated. It is not in dispute that both the Id AO and the Id CITA had admittedly not made any reference to any seized material found during the course of search in their orders relating to the completed assessment years with regard to the items of expenses that were subject matter of disallowance. In this regard, we hold that the expenses incurred in cash which are duly recorded in the regular cash books of the assessee which were already forming part of regular books of accounts of the assessee cannot be construed as incriminating in nature. Every assessee would be having its regular books of accounts (where books are maintained) and would be filing his regular returns of income and assessments framed accordingly. If such person is subjected to search and the very same regular books of accounts were found at the time of search and if the Id AO tries to take a different view on the already recorded transactions in the said regular books of accounts in the search assessment u/s 153A of the Act which is contrary to the view taken by him in the original scrutiny assessments u/s 143(3) or intimation u/s 143(1) of the Act, then it would only result in giving another innings to the Id AO to review his own earlier decision on the very same set of facts and figures.

This would make the entire scheme of the Act meaningless and the Id AO would be conferred with unfettered powers to review the earlier decisions taken either by him or by his predecessor on the very same issue , which in our considered opinion, cannot be the intention of the statute. That's why the legislature had duly drawn a distinction between the completed and abated assessments. The provisions of section 153A of the Act are reproduced hereunder for the sake of convenience :-

"[Assessment in case of search or requisition

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

- (a) issue notice to such person requiring him to furnish within such period, as may be specified in the notice, the return of income in respect of each assessment year falling within six assessment years referred to in clause (b), in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139;*
- (b) assess or reassess the total income of six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made :*

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

13.1. We find that the Co-ordinate Bench of Delhi Tribunal in the case of Dy. CIT v. Aggarwal Entertainment (P.) Ltd reported in [2016] 72 taxmann.com 340 (Delhi - Trib.) had addressed this aspect. The relevant headnotes is reproduced below:—

"Section 153A, read with section 143, of the Income-tax Act, 1961-Search and seizure - Assessment in case of (in case of section 143(1) assessment)- Assessment year 2004-05- Whether assessment in respect of which return has been processed under section 143(1), cannot be regarded as pending for purpose of section 153A as Assessing Officer is not required to do anything further about such a return and, thus, said assessment cannot be reopened in exercise of power of section 153A-Held yes (Paras 10 and 12) (In favour of assessee)."

13.2. We find that the Co-ordinate Bench of Kolkata Tribunal in the case of *ACIT vs Kanchan Oil Industries Ltd* in ITA No. 725/Kol/2011 dated 9.12.2015 reported in 2016-TIOL-167-ITAT-KOL had explained the aforesaid provisions as below:-

"6.4 In our opinion, the scheme of assessment proceedings should be understood in the following manner pursuant to the search conducted u/s. 132 of the Act :-

- (a) Notice u/s. 153A of the Act would be issued on the person on whom the warrant of authorization u/s. 132 of the Act was issued for the six assessment years preceding the year of search and assessments thereon would be completed u/s. 153A of the Act for those six assessment years.*
- (b) In respect of the year of search, notice u/s. 143(2) of the Act would be issued and assessment thereon would be completed u/s. 143(3) of the Act.*
- (c) In respect of concluded assessments prior to the year of search, no addition could be made in the relevant assessment year unless any incriminating material is found during the course of search with respect to the relevant assessment year.*
- (d) Pursuant to the search u/s. 132 of the Act, the pending proceedings would get abated. In respect of abated assessments, the total income needs to be determined afresh in accordance with the provisions of section 153A and other provisions of the Act.*

6.4.1 The concluded assessments for the purpose of section 153A of the Act shall be -

- (i) assessment years where assessments are already completed u/s. 143(1) and*

- time limit for issuance of notice u/s. 143(2) of the Act has expired or;*
- (ii) *assessment years where assessments are already completed u/s. 143(3) of the Act ;*
- unless they are reopened u/s. 147 of the Act for some other purpose in both the scenarios stated above.*

6.4.2 *The scheme of assessment proceedings contemplated u/s. 153A of the Act are totally different and distinct from the proceedings contemplated u/s. 147 of the Act and these procedures of assessment operate in different fields and have different purposes to be fulfilled altogether.*

6.4.3 *The expression 'assess or reassess' stated in section 153A(1)(b) has to be understood as below:-*

'assess' means assessments to be framed in respect of abated assessment years irrespective of the fact whether there are any incriminating materials found during the course of search with respect to relevant assessment years ;

'reassess' means assessments to be framed in respect of concluded assessment years where incriminating materials were found during the course of search in respect of the relevant assessment year."

13.3. We also find that recently the Hon'ble Delhi High Court in the case of CIT vs Kabul Chawla reported in (2016) 380 ITR 573 (Del) held as under:-

'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 Ld AOs as a fresh exercise.*
- (iii) *The Ld AO will exercise normal assessment powers in respect of the six years previous to the relevant AY in which the search takes place. The Ld 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 Ld AO which can be related to the evidence found, it does not mean that the assessment "can be arbitrary or made without any relevance or nexus with the seized material. Obviously an assessment has to be made under this Section only on the basis of seized material."*
- (v) *In absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made. The word 'assess' in Section 153 A is relatable to abated proceedings (i.e. those pending on the date of search) and the word 'reassess' to completed assessment proceedings.*
- (vi) *Insofar as pending assessments are concerned, the jurisdiction to make the original assessment and the assessment under Section 153A merges into one. Only one assessment shall be made separately for each AY on the basis of the findings of the search and any other material existing or brought on the record of the Ld AO.*
- (vii) *Completed assessments can be interfered with by the Ld 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."*

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.

13.4. At this juncture, it would be pertinent to address the decision of Hon'ble Delhi High Court in the case of *CIT vs Anil Kumar Bhatia* reported in (2013) 352 ITR 493 (Del) which is normally relied upon by the revenue

on the impugned issue before us. In our considered opinion, the reliance on the said decision does not in any manner advance the case of the **revenue as admittedly the Hon'ble Delhi High Court** in para 24 of its order had held as under: -

“24. We are not concerned with a case where no incriminating material was found during the search conducted under section 132 of the Act. We, therefore, express no opinion as to whether Section 153A can be invoked even in such a situation. That question is therefore left open.”

13.5. We find that the decision of Hon'ble Delhi High Court in the case of CIT vs Kabul Chawla reported in (2016) 380 ITR 573 (Del) had duly considered the decisions of CIT vs Anil Kumar Bhatia reported in (2013) 352 ITR 493 (Del) ; CIT vs Chetan Das Lachman Das reported in (2012) 211 Taxman 61 (Del HC) ; Madugula Venu vs DIT reported in (2013) 215 Taxman 298 (Del HC) ; Canara Housing Development Co. vs DCIT reported in (2014) 49 taxmann.com 98 (Kar HC) ; Filatex India Ltd vs CIT reported in (2014) 229 Taxman 555 (Del HC) ; Jai Steel (India) vs ACIT reported in (2013) 219 Taxman 223 (Del HC) ; CIT vs Murli Agro Products Ltd reported in (2014) 49 taxmann.com 172 (Bom HC) ; CIT vs Continental Warehousing Corporation (Nhava Sheva) Ltd reported in (2015) 374 ITR 645 (Bom HC) and All Cargo Global Logistics Ltd vs DCIT reported in (2012) 137 ITD 287 (Mum ITAT) (SB). We also find that **against the decision of the Hon'ble Delhi High Court in 380 ITR 573 (Del) , the revenue preferred Special Leave Petition before the Hon'ble Supreme Court and the same was dismissed by the apex court which is reported in 380 ITR (St.) 4 (SC).**

13.6. We also find that the ***Hon'ble Calcutta High Court in the case of Principal CIT vs M/s Salasar Stock Broking Ltd in G.A.No. 1929 of 2016 ITAT No. 264 of 2016 dated 24.8.2016*** had endorsed the aforesaid view of **Hon'ble Delhi High Court in Kabul Chawla's case and also placed reliance** on its own decision in the case of CIT vs Veerprabhu Marketing Ltd reported in (2016) 73 taxmann.com 149 (Cal HC).

13.7. We find that the provisions of section 132 of the Act relied upon by the revenue would be relevant only for the purpose of conducting the search action and initiating proceedings u/s 153A of the Act. Once the proceedings u/s 153A of the Act are initiated, which are special proceedings, the legislature in its wisdom bifurcates differential treatments for abated assessments and unabated assessments. At the cost of repetition, we state that in respect of abated assessments (i.e pending proceedings on the date of search) , fresh assessments are to be framed by the Id AO u/s 153A of the Act which would have a bearing on the determination of total income by considering all the aspects, wherein the existence of incriminating materials does not have any relevance. However, in respect of unabated assessments, the legislature had conferred powers on the Id AO to just follow the assessments already concluded unless there is an incriminating material found in the search to disturb the said concluded assessment. In our considered opinion, this would be the correct understanding of the provisions of section 153A of the Act , as otherwise, the necessity of bifurcation of abated and unabated assessments in section 153A of the Act would become redundant and would lose its relevance.

13.8. With regard to the observations made by the Id CITA that the assessee had not produced the books of accounts before the Id AO in the original scrutiny assessment proceedings and accordingly the very same books of accounts found during the course of search would become incriminating material and hence the Id AO could have a revisit of the entries already recorded therein by taking a different view is concerned, we find that the Id AR had placed on record the copy of the scrutiny assessment order for the Asst Year 2006-07 u/s 143(3) of the Act dated 18.3.2008 enclosed in pages 43 to 44 of the Paper Book. From the perusal of the said order, we find that the Id AO had categorically in para 1 of the said order had stated that in response to notices issued u/s 143(2) and 142(1) of the Act, the authorized representatives of the assessee attended and furnished the details and the case was discussed. After this, he had stated that the returned income of the assessee is accepted. In view of this, the finding of the Id CITA as stated supra is factually incorrect, without any basis and does not in any manner advance the case of the revenue.

13.9. In any case, we find that this issue had been the subject matter of **adjudication by the Hon'ble Jurisdictional High Court in the case of CIT vs Continental Warehousing Corporation (Nhava Sheva) Ltd** reported in 374 ITR 645 (Bom) which had been decided in favour of the assessee and accordingly would bind this tribunal.

13.10. In view of the aforesaid findings and respectfully following the judicial precedents relied upon hereinabove, we hold that the assessments framed u/s 143(3) of the Act for the Asst Years 2006-07 to 2009-10 and assessment framed u/s 143(1) of the Act for the Asst Year 2010-11, which were unabated / concluded assessments, on the date of search, deserves to be undisturbed in the absence of any incriminating material found in the course of search and accordingly the disallowance of expenses made thereon are hereby directed to be deleted. Since the issue is addressed on preliminary ground of absence of incriminating materials, we refrain to give our findings on the merits of the disallowance of expenses for the Asst Years 2006-07 to 2010-11 and they are left open. Accordingly the grounds raised by the assessee in this regard are allowed.

14. Let us now come to appeals of the assessee for the Asst Years 2011-12 and 2012-13 in ITA Nos. 4186 and 4187/Mum/2016 .

15. We have heard the rival submissions. The facts are already narrated in the earlier part of this order. At the time of hearing , the Bench directed the Id AR to accept for estimated disallowance of 25% of total expenditure for the Asst Years 2011-12 and 2012-13 which was agreed by the Id AR. The Id DR vehemently objected to the same. We find that the fact of holding business meetings by the director at his residence (Carlton Terrace) is not disputed by the revenue. Considering the fact that there could be some personal element included thereon and considering the totality of the facts and circumstances of the case as narrated hereinabove, we hold that the disallowance of expenses at the rate of

25% thereon for the Asst Years 2011-12 and 2012-13 would meet the ends of justice. Accordingly, the grounds raised by the assessee are partly allowed.

16. To sum up, the appeals of the assessee in ITA Nos. 4181 to 4185/Mum/2016 for the Asst Years 2006-07 to 2010-11 are allowed and appeals of the assessee in ITA Nos. 4186 & 4187/Mum/2016 for the Asst Years 2011-12 and 2012-13 are partly allowed.

Order pronounced in the open court on this 06/03/2019

Sd/-
(MAHAVIR SINGH)
JUDICIAL MEMBER

Sd/-
(M. BALAGANESH)
ACCOUNTANT MEMBER

Mumbai; Dated 06/03/2019

Karuna Sr.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A) Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai