आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ "डी" मुंबई
IN THE INCOME TAX APPELLATE TRIBUNAL "D" BENCH, MUMBAI

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER
AND SHRI RAJESH KUMAR, ACCOUNTANT MEMBER
सर्वश्री सक्तिजित डे, न्यायिक सदस्य एवं राजेश कुमार, लेखा सदस्य

आयकर अपील सं./I.T.A. No.414/Mum/2010
(**निर्धारण वर्ष /** Assessment Years : 2001-02)

Shri Ramesh Sumermal Shah, 220, Commerce House, 140 N M Road, Fort, Mumbai-400023	**बनाम**/ Vs.	Dy. Commissioner of Income Tax Circle 36, 11/43, Ground Floor, Aayakar Bhavan, M K Road, Mumbai-400020
स्थायी लेखा सं./ PAN : AAGPS9863H		
(अपीलार्थी **/Appellant**)	..	(प्रत्यर्थी / **Respondent**)

अपीलार्थी की ओर से/**Appellant by :**	Shri Nishit Gandhi
प्रत्यर्थी की ओर से/ **Respondent by :**	Shri Prawin Kumar

सुनवाई की तारीख **/ Date of Hearing :28.4.2016**

घोषणा की तारीख /**Date of Pronouncement :28 .11.2016**

आदेश / O R D E R

PER RAJESH KUMAR, Accountant Member

This is an appeal by the assessee against order dated 13/11/2009 of Ld. CIT(Appeals)-41 Mumbai for the assessment year 2001-02 passed against the assessment framed by the AO u/s 143(3) r.w.s. 153A of the Income Tax Act (hereinafter called the Act).

2. The grounds raised by the assessee are as under:-

"On the facts and in the circumstances of the case he ld. CIT(A) has erred in law in confirming the addition of Rs.2,25,00,000/- made by the AO on disbelieving gift received by the appellant"

3. The assessee has also taken additional ground as under :

ADDITIONAL GROUND OF APPEAL

3.1 The assessing officer ("the A.O") erred in initiating reassessment proceedings and framing assessment of the Appellant by invoking the provisions of Section 143(3) r.w.s.153A of the Income tax Act, 1961 ["the Act"].

3.2 While doing so, the A.O. failed to appreciate that the addition made was beyond the scope of assessment under section 153A of the Act.

3.3 It is submitted that in the facts and the circumstances of the case, and in law, the initiation as well as completion of the assessment proceedings were bad, illegal and void.

4. At the outset, the ld.AR for the assessee drew our attention to the application dated 18.11.2011 filed by the assessee requesting therein to admit additional ground which was not raised earlier. The ld. AR submitted that the ground proposed to be raised in the said application was arising out of the facts available on record before the lower authorities, though the said ground was not raised before the authorities below and was of purely legal and technical in nature. The ld. AR submitted that the since the issue raised in additional ground is legal in nature and hence the same may be admitted for adjudication. The ld. AR also submitted that if the additional ground raised by the assessee is admitted no prejudice would be caused to the revenue. In defence of his arguments, the ld. AR relied on the following case laws :

A) National Thermal Power Co Ltd Vs CIT(1998) 229 ITR 383(SC); and
B) All Cargo Global Logistics Ltd Vs Dy. CIT (2012)137 ITD26 (Mum)(SB).

5. We have heard the rival contentions and perused the material placed before us including the orders of authorities below and the case laws relied upon by the assessee. We find that the issue proposed to be raised challenging the jurisdiction to make additions while framing assessment u/s 143(3) r.w.s. 153A of the Act by way of filing of additional ground vide application dated 18.11.2011 are purely legal and technical in nature emanating from the facts of the case available on record available before the authorities below. After perusing the case law relied upon by the assessee, we are of the view that the said additional ground raised deserved to be admitted for adjudication as it required no investigation or verification of facts and accordingly we admit the same by following the ratio laid down in the above mentioned case laws by the Hon'ble Supreme Court and jurisdictional high court.

6. The issue raised in the additional ground by the assessee is qua jurisdiction of the AO to make addition under section 68 by treating the gift received from Shri N K Rajgharia as unexplained income which was already reflected in the return of income filed u/s 139 of the Act on 31.7.2001 and was not based on any incriminating materials and documents found during the course of search.

7. Facts of the case in brief are that the assessee filed its return of income on 31.7.2001 declaring total income of Rs.7,17,610/-. No notice u/s 143(2) of the Act was issued with the time prescribed under the Act and thus the income returned by the assessee was assessed and attained finality. Thereafter a search and seizure action was carried out under section 132 of the Income Tax Act, 1961 on Sumer Group of cases including the assessee on 6.1.2006. Accordingly, notice u/s 153A was issued on assessee on 20.8.2007 to file returns for six assessment years prior to the year of search including the year under consideration which was complied by the assessee by filing return on 27.11.2007 declaring a total income of Rs.7,17,610/- the same income as filed in the original return of income. During the course of assessment in search proceedings, the AO, on perusal of the capital of the assessee for the financial year 2000-01 found that the assessee had received a sum of Rs.2,25,00,000/- from Mr N. K. Rajgharia and asked the assessee to prove the identity and creditworthiness of the donor and genuineness of the transaction. Disbelieving the explanation of the assessee the AO added the same to the total income of the assessee as income from other sources u/s 68 of the Act while framing the assessment u/s 143(3) read with section 153A of the Act vide order dated 3.10.2008 by assessing the total income at Rs.23,217,610/- by inter alia making other additions also. The additions

were challenged before the first appellate authority on merit and the issue of gift received was sustained.

8. At the outset, the ld. AR submitted before us that the addition by the AO qua gift received by the assessee Rs.2.25 crores under section 68 of the Act as income from other sources was without jurisdiction as the same was based upon any incriminating materials seized during the course of search proceedings. The ld. AR submitted that the assessee had duly disclosed said gift in the original return of income filed on 31.7.2001 by crediting the same in the capital account of the assessee. The ld. AR while referring to the provisions of section 153A of the Act submitted that in the case of completed assessment which are not pending on the date of search, the addition could only be made on the basis of seized material and not otherwise. In the present case, the assessee filed return of income was filed 31.7.2001 and no notice u/s 143(2) of the Act was issued the time limit for which elapsed on 31.7.2002. The date on which the search was 6.11.2006 and thus the original return of income filed by the assessee u/s 139 of the Act has attained finality and was not pending on the date of search. The ld. AR prayed that in view of the provisions of section 153A of the Act the addition as made by the AO qua gift received and credited in the capital account was without jurisdiction and be deleted as the addition could be made on the basis

incriminating materials seized during the search action. In defence of his argument the ld.AR heavily relied on the decision of the Hon'ble Bombay High Court in the cases of CIT V/s Continental Warehousing Corporation (Nhava Sheva) Ltd. [2015] 374 ITR 645 (Bombay) and CIT vs. Murli Agro Products Ltd (Nagpur Bench of the Bombay High Court) 2014] 49 taxmann.com 172 (Bombay) and the decision of the co-ordinate Bench of the Tribunal in the case of Jignesh P Shah V/s DCIT in ITA Nos. 1553 and 3173/Mum/2010 (AY-2002-03 and 2004-05) dated 13.2.2015, wherein the identical issue has been decided in favour of the assessee.

9. On the other hand, the ld. DR strongly opposed the arguments advanced by the ld.AR by submitting that it was only in the proceedings under section 153A that the assessee was found to have received a gift of Rs.2.25 lakhs from Shri N. K. Rajgharia on 6.6.2000 which the assessee could not prove to be genuine and identity of the creditor could not be proved and genuineness of the transaction could not be established and therefore the AO rightly added the same u/s 68 of the Act and there was no need of any incriminating document or material in order to make said addition. The ld. DR heavily relied on the decision in the case of Satish L Babladi V/s DCIT in ITA No.1732 and 2109/Mum/2010 Assessment Years: 2004-05 & 2006-07 order dated 19.3.2013 and prayed that the orders of authorities below be confirmed by dismissing the appeal of the assessee.

10. In the rebuttal, the ld.AR argued that the case law relied upon by the ld. DR, of Satish L Babladi (supra) has been considered and distinguished by the decision of the Co-ordinate Bench of the Tribunal in the case of Jignesh P Shah (supra) as referred to and relied upon by the assessee and therefore need not be taken into consideration for adjudicating the issue as the issue is covered by the jurisdictional High Court and by the Hon'ble Apex Court.

11. We have considered the rival submissions and perused the material placed before us including the orders of authorities below and case laws relied upon by both the parties. We find from the record placed before us that the return of income was filed by the assessee on 31.07.2001 which processed under section 143(1) of the Act and no notice u/s 143(2) of the Act was issued the time limit for which expired on 31.7.2002. Thus the return filed by the assessee was already assessed and attained finality on the date of search which was conducted on 6.11.2006. In pursuance of search action notice under section 153A was issued on the assessee on 20.8.2007 which was complied by the assessee by filing return of income on 27.11.2007 declaring total income of Rs.7,17,610/- same as declared in the original return of income and assessment was completed under section 143(3) r.w.s.153A by an order dated 3.10.2008 by making various disallowances including the addition of Rs.2.25 crores on account of gift

received by the assessee from Shri N K Rajgharia on 6.6.2000. We also find from the record that the said gift was duly shown by the assessee in the return of income originally filed u/s 139 of the Act. After examining the punchanama and seized materials, we find that no incriminating material qua the said gift was found by the search team during the course of search and find merit in the contention of the ld.AR that any addition could only be made in case of completed assessment which has attained finality on the date of search on the basis of seized material and not otherwise as per the provisions of section 153A of the Act. Identical issue has been decided by the Jurisdictional High Court and the Hon'ble Apex Court as referred and relied by the AR.

In the case of Continental Warehousing Corporation (Nhava Sheva) Ltd. (supra), the Hon'ble Bombay High Court has held 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.[Para 22]

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.[Para 23]

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.[Para 24]

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 [Para 28]

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.[Para 29]

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.[Para 30]

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.[Para 31]

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.[Para 35]

In this case the revenue has filed Special Leave Petition before the hon'ble Supreme Court [2015] 64 taxmann.com 34 (SC), dated 12.10.2015, which has been granted as under :

> *"Section 80-IA of the Income-tax Act, 1961 - Deductions - Profits and gains from infrastructure undertakings (Infrastructure facility) - High Court by impugned order held that ICDs and CFSs are infrastructural facility entitled to deduction under sub-section (4) of section 80-IA - Whether Special Leave Petition filed against impugned order was to be granted - Held, yes [In favour of revenue]*
>
> *Section 153A of the Income-tax Act, 1961 - Search and seizure - Assessment in case of (Scope of) - High Court by impugned order held that no addition can be made in respect of assessments which have become final if no incriminating material is found during search or during 153A proceeding - Whether Special Leave Petition filed against impugned order was to be granted - Held, yes [In favour of revenue]"*

This proposition has been upheld and clarified by the Hon'ble jurisdictional High Court in the case of Murli Agro Products Ltd. (supra) in the following manner:-

> *"10. Thus on a plain reading of Section 153A of the Income-tax Act, it becomes clear that on initiation of proceedings under Section 153A, it is only the assessment/reassessment proceedings that are pending on the date of conducting search under Section 132 or making requisition under Section 132A of the Act stand abated and not the assessments/reassessments already finalised for those assessment years covered under Section 153A of the Act. By a circular No. 8 of 2003 dated 18-9-2003 (See 263 ITR (St) 61 at 107) the CBDT has clarified that on initiation of proceedings under Section 153A, the proceedings pending in appeal, revision or rectification proceedings against finalised assessment/reassessment shall not abate. It is only because, the finalised assessments/reassessments do not abate, the appeal, revision or rectification pending against finalised assessments/reassessments*

would not abate. Therefore, the argument of the revenue, that on initiation of proceedings under Section 153A,the aassessments/ reassessments finalised for the assessment years covered under Section 153A of the Income-tax Act stand abated cannot be accepted. Similarly on annulment of assessment made under Section 153A(1) what stands revived is the pending assessment/reassessment proceedings which stood abated as per section 153A(1).

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

12. Once it is held that the assessment finalized on 29.12.2000 has attained finality, then the deduction allowed under section 80 HHC of the Income-tax Act as well as the loss computed under the assessment dated 29-12-2000 would attain finality. In such a case, the A.O. while passing the independent assessment order under Section 153A read with Section 143(3) of the IT. Act could not have disturbed the assessment/ reassessment order which has attained finality, unless the materials gathered in the course of the proceedings under Section 153A of the Income-tax Act establish that the reliefs granted under the finalised assessment/reassessment were contrary to the facts unearthed during the course of 153A proceedings.

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

In the case of Jignesh P Shah (supra), the Tribunal has held as under :

7. We have heard the rival submissions on the legal issue raised in the additional grounds and the material placed on record. The

chronology of events relating to status of assessment of the impugned assessment years are as under:-

Event Dates	***Dates***	
	A.Y.2002-03	***A.Y..2004-05***
Date of filing of return of income u/s 139	*31.03.2003*	*31.3.2005*
Time limit for issuance of notice u/s 143(2) under the statute	*31.3.2004*	*31.3.2006*
Time limit for completing assessment u/s 143(3)	*31.3.2005*	*31.3.2007*
Date of search	*19.6.2007*	*19.6.2007*

From the above, it is evident that, prior to the date of search, the assessment for both the assessment years had attained finality as the return income stood assessed before the date of search. Accordingly, the assessment for the A.Ys. 2002-03 & 2003-04 does not gets abated in view of the second proviso to section 153A. The relevant provisions of section 153 A reads as under:-

> *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:*

Provided further that assessment or reassessment, if any, relating to any assessment year falling within the period of six assessment years referred to in this [sub-section] pending on the date of initiation of the search under section 132 or making of requisition under section 132A, as the case may be, shall abate".....

8. From the perusal of the aforesaid provision, it is evident that, where search has been initiated u/s 132 or requisition has been made under section 132A, it is incumbent upon the assessing officer to issue notices requiring the person searched to file return of income in respect of each assessment year falling within six assessment years immediately preceding the assessment year in which search is conducted. The assessing officer has to assess or reassess the total income in respect of each assessment year falling within six assessment years. Thus, it is statutory mandate upon the assessment officer to assess or reassess the total income on which a person can be said to be assessable under the provisions of the act. The first proviso covers the income which is to be assessed i.e. emanating not only, from the declared sources but also from any material found during the course of search. However if the assessment has already been made or finalized before the date of search, then the AO can reassess the total income on the basis of material found or gathered during the course of search over and above the income which already stood assessed. However, the second proviso carves out exception/limitation that, pending assessment or reassessment relating to any assessment year following within the period of six years on the date of search, the same gets abated. In other words, the assessments which have not attained finality and are pending on the date of search, then the same does not gets abated. The assessments which have abated, fresh determination of total income would be required which can be made on the basis of material already on record as well as material gathered during the course of search. However, the assessments which have already attained finality and does not get abated, then they have to be assessed on the same income and cannot include any time of income for which no incriminating material has been found. The reason being that the assessments which are pending and get abated, the entire income has to be determined which includes material already on record and also the material found as a result of search. However, statute has carved out the exception to those assessments which have attained finality, because those assessments does not get abated. In such a situation, the income which has already been assessed, the same cannot be disturbed unless some incriminating information or material is found suggesting that the income which already stood assessed requires to be reassessed on the basis of new material found. This proposition has been upheld and clarified by the Hon'ble jurisdictional High Court in the case of Murli Agro Products Ltd. (supra) in the following manner:-

"10. Thus on a plain reading of Section 153A of the Income-tax Act, it becomes clear that on initiation of proceedings under Section 153A, it is only the assessment/reassessment proceedings that are pending on the date of conducting search under Section 132 or making requisition under Section 132A of the Act stand abated and not the assessments/reassessments already finalised for those assessment years covered under Section 153A of the Act. By a circular No. 8 of 2003 dated 18-9-2003 (See 263 ITR (St) 61 at 107) the CBDT has clarified that on initiation of proceedings under Section 153A, the proceedings pending in appeal, revision or rectification proceedings against finalised assessment/reassessment shall not abate. It is only because, the finalised assessments/reassessments do not abate, the appeal, revision or rectification pending against finalised assessments/reassessments would not abate. Therefore, the argument of the revenue, that on initiation of proceedings under Section 153A,the aassessments/ reassessments finalised for the assessment years covered under Section 153A of the Income-tax Act stand abated cannot be accepted. Similarly on annulment of assessment made under Section 153A(1) what stands revived is the pending assessment/reassessment proceedings which stood abated as per section 153A(1).

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

12. Once it is held that the assessment finalized on 29.12.2000 has attained finality, then the deduction allowed under section 80 HHC of the Income-tax Act as well as the loss computed under the assessment dated 29-12-2000 would attain finality. In such a case, the A.O. while passing the independent assessment order under Section 153A read with Section 143(3) of the IT. Act could not have disturbed the assessment/ reassessment order which has attained finality, unless the materials gathered in the course of the proceedings under Section 153A of the Income-tax Act establish that the reliefs granted under the finalised assessment/reassessment were contrary to the facts unearthed during the course of 153A proceedings.

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

The principle and the ratio reiterated in para 12 of the aforesaid order makes it abundantly clear that, the assessing officer while passing the assessment order u/s 153A cannot disturb the assessments/reassessment order which had attained finality, unless material gathered in the course of search establishes that the earlier assessment finalized is contrary to the fact.

9. This principle has again been reiterated by the Hon'ble Rajasthan High Court, wherein Lordships after analyzing the entire provision of section 153A, held and concluded as under:-

'22. The underlying purpose of making assessment of total income under s. 153A of the Act is, therefore, to assess income which was not disclosed or would not have been disclosed. The purpose of second proviso is also very clear, in as much as once an assessment or reassessment is 'pending' on the date of initiation of search or requisition and in terms of s. 153A a return is filed and the AO is required to assess the same, there cannot be two assessment orders determining the total income of the assessee for the said assessment year and therefore, the proviso provides for abatement of such pending assessment and reassessment proceedings and it is only the assessment made under s.153A of the Act that would be the assessment for the said year.

23. The necessary corollary of the above second proviso is that the assessment or reassessment proceedings, which have already been 'completed' and assessment orders have been passed determining the assessee's total income and such orders are subsisting at the time when the search or the requisition is made there is no question of any abatement since no proceedings , are pending. In such cases, where the assessment already stands completed, the AO can reopen the assessments or reassessment already made without following

the provisions of ss. 147, 148 and 151 of the Act and determine the total income of the assessee.

24. The argument raised by the counsel for the appellant to the effect that once a notice under s. 153A of the Act is issued, the assessments for six years are at large both for the AO and assessee has no warrant in law.

25. In the firm opinion of this Court from a plain reading of the provision along with the purpose and purport of the said provision, which is intricately linked with search and requisition under ss. 132 and 132A of the Act it is apparent that: .

(a) the assessments or reassessments, which stand abated in terms of second proviso lo s. 153A of the Act the AO acts under his original jurisdiction, for which, assessments have to be made.

(b) regarding other cases, the addition to the income that has already been assessed, the assessment will be made on the basis of incriminating material and

(c) in absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made"

Thus, respectfully following the aforesaid proposition by the Hon'ble High Courts, we hold that in this case, the assessment for the A.Ys. 2002-03 and 2004-05 had attained finality and admittedly there being no incriminating material found during the course of search relating to the addition made on account of deemed dividend, therefore, such an addition de hors any material found during the course of the search, cannot be roped in the assessment made u/s 153A by the assessing officer.

10. Now, coming to the decision of ITAT Mumbai Bench in the case of Satish L. Babladi, as relied upon Ld. DR, from the perusal of the said decision it is seen that the Tribunal has strongly relied upon the decision of Hon'ble Delhi High Court in the case of CIT Vs. Anil Kumar Bhatia reported in (2013) ITR 493 (Delhi). The Hon'ble Delhi High Court with regard to the question, as to whether any addition

can be made in respect of completed assessment when no incriminating material was found has been left open to be answered. Other observations made by the Hon'ble High Court is in the form of 'Obiterdicta' because this specific issue has been left open. Moreover the Hon'ble jurisdictional High Court in case of Murli Agro Products Ltd. (supra) has categorically clarified that the assessment which had attained finality cannot be disturbed unless incriminating material is found in the course of search. Therefore, the decision of the Tribunal in S.L. Babladi's case, cannot be relied upon as they have not considered the ratio and principle laid down by the Hon'ble jurisdictional High Court.

11. Accordingly, the addition on account of deemed dividend of Rs.1,69,68,750/- in the A.Y. 2002-03 and addition of Rs.4,62,91,123/- on account of deemed dividend u/s 2(22)(e) is deleted as same is beyond the scope of assessment u/s 153A. The additional ground thus raised by the assessee is allowed. In view of the finding given here-inabove, we are not going into the merits of the addition as discussed by the AO as well as Ld. CIT(A), as they have become purely academic.

12. In the result, appeal filed by the assessee for both the assessment years are allowed.

12. Respectfully following the ratio laid down by the jurisdictional High Courts we hold that the addition made qua the gift received by the assessee *de hors* any material found during the course of search, cannot be roped in the assessment made under section 143(3) r.w.s. 153A of the Act by the AO. The decision of Mumbai Tribunal in the case of Satish L Babladi (supra) has been examined by us and it is seen that the Tribunal has strongly relied upon the decision of Hon'ble Delhi High Court in the case of CIT V/s Anil Kumar Bhatia reported in (2013) ITR 493 (Delhi), the Hon'ble High Court with regard to the question, as to whether any

addition can be made in respect of completed assessment when no incriminating material was found has been left open to be answered. The other objection made by the Hon'ble High Court is in the form of *'Obiter dicta'* because this specific issue has been left open. Moreover, the Hon'ble Jurisdictional High Court in the case of Murli Agro Products Ltd (supra), National Thermal Power Co Ltd and All Cargo Global Logistics Ltd (supra) categorically held that the assessment which had attained finality cannot be disturbed unless incriminating material was found in the course of search, therefore, the decision of the Tribunal in the case of S L Babladi's case cannot be relied upon as the Tribunal has not considered the ratio laid down lby the Hon'ble High Courts. Accordingly, the addition of Rs.2.25 crores made by the AO u/s 68 is to be deleted as the AO has no jurisdiction u/s 153A of the Act and the additional ground filed by the assessee is allowed. In view of our findings given above, we are not going into the merits of the case and addition as discussed by the AO as well as by the ld.CIT(A) as they have become purely academic.

13. In the result, appeal filed by the assessee is allowed.

Order pronounced in the open court on 28th Nov,2016.

आदेश की घोषणा खुले न्यायालय में दिनांकः28th Nov. 2016 को की गई ।

Sd sd

(सक्तिजित डे /SAKTIJIT DEY) (राजेश कुमार /RAJESH KUMAR)

न्यायिक सदस्य/Judicial Member **लेखा सदस्य**/Accountant Member

मुंबई Mumbai; दिनांक Dated 28th Nov.2016

व.नि.स./ SRL , Sr. PS

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

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

आदेशानुसार/ BY ORDER,

True copy

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**