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

BEFORE SHRI C.N. PRASAD, JUDICIAL MEMBER AND
SHRI RAJESH KUMAR, ACCOUNTANT MEMBER

ITA Nos.467 & 468/M/2015
Assessment Years: 2009-10 & 2010-11

M/s. Kanji Pitamber & Co., 40, Ground Floor, Hashim Building, Veer Nariman Road, Fort, Mumbai- 400 020 **PAN: AAFFK 3129B**	Vs.	DCIT Range-7(1), Old Range DCIT CC-40, 653, 6th Floor, Aayakar Bhavan, M.K. Road, Mumbai - 400020
(Appellant)		(Respondent)

Present for:
Assessee by : Shri Rahul K. Hakani, A.R.
Revenue by : Shri Anadi Varma, D.R.

Date of Hearing : 08 03.2018
Date of Pronouncement : 14.05.2018

O R D E R

Per Rajesh Kumar, Accountant Member:

The above titled appeals have been preferred by the assessee against the common order dated 10.10.2014 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment years 2009-10 & 2010-11.

ITA No.467/M/2015 (A.Y. 2009-10)

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

"1. The learned CIT (A)-38 erred in confirming the action of the Ld. DCIT - Central Circle 40, in computing disallowance u/s 37 of Income Tax Act, 1961 of aggregate expenses of Rs. 2,03,597/- being 10% of Entertainment expense of Rs. 6,70,060/- and Business

Promotion expense of Rs. 13,65,908/-, being personal expenses on estimated basis for want of verification, disregarding the fact that entire expenses were duly supported by bills, vouchers and generally paid by cheque and the expenses were incurred in ordinary course of business and allowed as expenses, as in past and therefore the disallowance made of Rs. 2,03,597/- be deleted.

2. The learned CIT(A) erred in holding that the expenses of Rs.15,079/- in the name of Narronndas Manordas; of Rs. 23,000/- incurred for Nuteche Mobile Shop, Samsung mobile battery and charger; of Rs. 46,359/- incurred on the name of Narronndas Manordas; of Rs. 4,000/- incurred for Novelty Stores and the bill of Rs. 30,000/- being the amount paid to Shopper Stop. Without calling for the supporting to ascertain the expenses incurred for the purpose of the business of the firm.

3. The Id. CIT (A)-38 erred in holding that he expenses are incurred for official of the public sector bank and further erred in holding that the payment were made to officials of public sector banks, disregarding the fact that none of the p yments were made to officials of the public sector banks and the entire amount of expenditure incurred on Business Promotion Expenses and Entertainment Expenses is allowable as business expenses.

4. The Ld. DCIT Central Circle 40 erred in allowing credit for tax deducted at source of Rs. 49,1 ,702/- from brokerage income of Rs. 6,65,40,557/- (Net of Service Tax) as against claim of Rs.71,01,041/- from brokerage income of Rs.6,65,40,557/- (Net of Service Tax) earned and there ore, it is prayed that the claim for TDS credit of Rs.71,01,041/- from brokerage income of Rs.6,65,40,557/- (Net of Service Tax) be a lowed as claimed in Return of income filed.

5. The L . DOT Central Circle 40 erred in law and on the facts of the case, in charging interest u/s 234B of the Income Tax Act, 1961, at Rs.480,245/-, without giving an opportunity of being heard, the liability of interest u/s 234B of the Income Tax Act, 1961 whereof is denied by the appellant and therefore it is prayed that the interest u/s 234B of the Income Tax Act, 1961 be recomputed at Rs. Nil, after giving credit of the claim of TDS of Rs.71,01,041/- from brokerage income of Rs.6,65,40,557/- (Net of Service Tax) as claimed in Return of income filed.

6. Your appellant prays for the leave to add, amend, alter, delete or modify any of the grounds of Appeal."

3. At the outset, the Ld. Counsel for the assessee submitted that ground Nos.4 & 5 are not pressed as has

been requested vide letter dated 02.03.17 on the plea that assessee has got relief in the order giving effect to the order of Ld. CIT(A). Therefore, the same are dismissed accordingly.

4. The issue raised in ground No.1 is against the confirmation of order passed under section 143(3) read with section 153A of the Act despite the fact that the assessment has already attained finality as no notice under section 143(2) of the Act was issued and served upon the assessee and also there being no incriminating material found during the course of search and thus the order passed under section 143(3) read with section 153A of the Act was bad in law.

5. The facts in brief are that the assessee filed the return income on 06.10.2009 declaring an income of Rs.4,23,76,130/-. The search action u/s. 132(1) of the Act was conducted at the office and residential premises of Bliss GVS Pharmaceutical Group on 16.11.2010. The assessee being associated member of the group and assessee's premises was also covered under the search and seizure action. Therefore, notices u/s 153A was served to the assessee on 28.05.2012 which was complied by the assessee by filing the return of income on 28.06.2012 declaring the same income as was declared in the return filed on 06.10.2009.

6. The aggrieved assessee challenged the validity of assessment framed by the AO.The Ld. CIT(A) observed that in this case merely a processing of section 143(1) of the Income Tax was made by the AO and also observed that in the assessment order it is mentioned that the case was selected for scrutiny but abated due to search and seizure action. Ld. CIT(A) also noted that no assessment was made under section 143(3)of the Act prior to the date of search except processing of return of income filed u/s 139(1) of the Act. The ld CIT(A) observed that it was stated in the assessment order that the pending assessment was abated due to search and seizure action u/s 132(1) of the Act and thus the scope of assessment expands to the original jurisdiction as well as jurisdiction conferred u/s 153A of the Act. The AO may conclude the assessment based on the findings of the search and also on the basis of any material ex sting or brought on record of the AO during the assessment proceedings and finally dismissed the appeal.

7. Now the Ld. A.R. vehemently submitted before us that in the present case the return was filed on 16.10.2009 whereas the search was conducted on 16.11.2010. The ld AR submitted that time limit for serving notice u/s 143(2) of the Act was expired on 30.09.10 meaning thereby that the assessment has attained finality and on the date of search. The Ld.

A.R. submitted that the law provides that the only pending assessment on the date of search abated and not the assessment which stands completed on the date of search. The Ld. A.R. further contended that in case of abated assessment the jurisdiction of the AO is same as under the normal assessment proceedings under section 143(3) of the Act whereas in respect of unabated assessment i.e. already completed assessment on the date of search cannot be disturbed except on the basis of information/material incriminating in nature found during the search and seizure. The Ld. A.R. submitted that it is undisputed that no incriminating material/evidences were found during the search. Therefore no addition could have been made under section 153A of the Act. The Ld. A.R. stated that the order of Ld. CIT(A) suffered from serious legal infirmities as it is based upon the conclusion that no assessment under section 143(3) was framed in this case and thus the AO has the powers to made assessment even without the incriminating materials. The Ld. A.R. relied on a series of decisions in support of his contention namely;

1. CIT vs. Gurinder Singh Bawa (2016) 386 ITR 483 (Bom.) (HC)
2. Gurinder Singh Bawa vs. Dy. CIT (2014) 150 ITD 40 (Mum.) (Trib.)
3. Nenshi L. Shah vs. Dy. CIT ITA No.3577, 3581, 3583 & 3575/Mum/2011, A.Y. 2003-04 dt.24/5/2017 (Mum.) (Trib.)
4. Atul Barot vs. Dy. CIT (2014) 65 SOT 83 (URO) (Mum.) (Tri.)

5. ACIT vs. Jayendra P. Jhaveri (2014) 65 SOT 118 (Mum.) (Trib.)
6. M/s. Ideal Appliances Co. Pvt. Ltd. vs. DCIT ITA No.173 to 177/M/2015, A.Y.s 2005-06 to 2009-10 dt.31.12/2015 (Mum.) (Trib.)

8. The Ld. D.R., on the other hand, relied on the order of Ld. CIT(A) by submitting that in this case no assessment was framed under section 143(3) of the Act prior to the search and therefore, the incriminating material was not necessary for making additions to the present case of the assessee as the AO powers are same as in the normal assessment proceedings under section 143(3) of the Act and thus relied heavily on the order of ld CIT(A).

9. We have heard the rival submissions of both the parties and perused the material on record. The undisputed facts are that the return was filed on 06.10.2009 whereas the search was conducted on 16.11.2010. Thus the time period for issue of notice u/s 143(2) of the Act expired on 30.09.2010 meaning thereby that the assessment attained finality on the date of search as the time limit for issue of notice u/s 143(2) has already expired. The Ld. CIT(A) has simply dismissed the ground of the assessee on this legal issue by holding that there was no assessment framed under section 143(3) of the Act prior to the date of search and therefore the AO has the powers which are co-extensive to powers in the normal assessment proceedings under

section 143(3) of the Act and thus justified the addition made by the AO. In our opinion, as per the provision of section 153A of the Act, the AO can reopen the six preceding years prior to the date of search and the addition in respect of those years which attained finality on the date of search can only be made on the basis of incriminating materials, if any, found during the course of search and not otherwise. Whereas in the current year the completed assessment was not abated due to search and seizure action u/s 132(1) of the Act and the findings of ld CIT(A) that the AO has powers which are co-extensive with the powers in the normal scrutiny proceedings even in the case of assessment which were final on the date of search is wrong and can not be sustained. Therefore, in our opinion, the addition in this case is wrong and cannot be justified. In the case of CIT vs. Gurinder Singh Bawa (supra) the Hon'ble Bombay High Court held that once an assessment was not pending but had attained finality for a particular year it could not be subject to proceedings under section 153A of the Act, if no incriminating materials were gathered in the course of search or during the proceedings under section 153A which were contrary to and were not disclosed during the regular assessment proceedings. In this case, the assessee filed the return of income which was processed under section 143(1) of the Act and no notice under section 143(2) was issued and the AO made assessment for the year in question

qua the sums declared by the assessee as gifts treating them as cash credit covered under section 153 of the Act. The Hon'ble Bombay High Court applied the view taken in the case of CIT vs. Continental Warehousing Corporation (Nhava Sheva) Ltd. (2015) 374 ITR 645 (Bom). We, therefore, respectfully following the ratio laid down by the Hon'ble Bombay High Court, direct the AO to delete all the additions made in this year as the same are not based on the incriminating material.

10. In the result, the appeal of the assessee is partly allowed.

ITA No.468/M/2015 (for A.Y. 2010-11)

11. At the outset, the Ld A.R. submitted vide letter 02.03.17 requesting the Bench that the ground Nos.4 & 5 are not pressed as the assessee has got relief in the order giving effect to the order of Ld. CIT(A) and accordingly the same are dismissed.

12. In ground No.1, the assessee has challenged the confirmation of addition by Ld. CIT(A) towards disallowance under section 37 of the Act aggregating to Rs.2,03,597/- being 10% of entertainment expenses, business promotion expenses as made by the AO towards the personal expenses estimated for the want of verification.

13. At the outset, the Ld. Counsel submitted before the Bench that the identical issue has already been decided by the co-ordinate bench of the Tribunal in the earlier year in ITA No.5015/M/2006 for A.Y. 2003-04 in assessee's own case where the co-ordinate bench of the Tribunal has allowed the appeal of the assessee. The Ld. A.R. submitted that since the assessee has incurred previous expenses for the purpose of business wholly and exclusively and therefore any disallowance on adhoc basis just on the whims and fancies of the AO and after confirmation by the Ld. CIT(A) was against the spirit of law and same should be deleted following the decision of co-ordinate bench of the Tribunal in assessee's own case.

14. The Ld. D.R., on the other hand, relied on the authorities below

15. We have heard the rival submissions of both the parties and perused the material on record including the decision cited by the Ld. A.R. in ITA No.5015/M/2006 for A.Y. 2003-04. We also find that the similar expenses were also involved in that year and the co-ordinate bench of the Tribunal deleted the addition by holding that the same is made on the basis of presumptions and surmises as has been decided in para 4 of the said order. To maintain the consistency with the order of co-ordinate bench of the Tribunal, we direct the AO to delete the addition of Rs. 2,03,597/-.

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

17. As a result, both the appeals of the assessee are partly allowed.

Order pronounced in the open court on 14.05.2018.

Sd/-	**Sd/-**
(C.N. Prasad)	**(Rajesh Kumar)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai, Dated: 14.05.2018.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.