IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH: KOLKATA

Before: **Shri P.M. Jagtap, Vice President and**
Shri S.S. Viswanethra Ravi, Judicial Member

ITA No. 2148/Kol/2017
(Assessment Year: 2011-12)

DCIT, CC – 2(1), Kolkata Appellant

Vs

M/s. Bhavya Merchandise Pvt. Ltd. Respondent
[PAN:AADCB 6137 F]

C.O. No. 110/Kol/2018
(Arising out of ITA No. 2148/Kol/2017
(Assessment Year: 2011-12)

M/s. Bhavya Merchandise Pvt. Ltd. Cross-Objector
[PAN:AADCB 6137 F]

Vs

DCIT, CC – 2(1), Kolkata Respondent

IT(SS)A No. 139/Kol/2017
(Assessment Year 2011-12)

DCIT, CC – 2(1), Kolkata Appellant

Vs

M/s. SRA Merchandise Pvt. Ltd. Respondent
[PAN: AAMCS 5239 C]

C.O. No. 09/Kol/2017
(Arising out of IT(SS)A No. 139/Kol/2017
(Assessment Year: 2011-12)

M/s. SRA Merchandise Pvt. Ltd. Cross-Objector
[PAN:AAMCS 5239 C]

Vs

DCIT, CC – 2(1), Kolkata Respondent

For the Revenue : Mr. Imokaba Jamir, CIT DR
For the Assessee : Mr. R.P. Agarwal, Advocate &
Mr. Nirav Seth, FCA

Date of hearing : 05.02.2020
Date of pronouncement : 18.03.2020

ORDER

Per S.S. Viswanethra Ravi, JM

The aforesaid two appeals and cross-objections filed by the revenue and assessee respectively against the separate orders dated 14.07.2017 and 18.07.2017 passed by the CIT(A) – 20, Kolkata for A.Y. 2011-12.

2. The ld. AR submits that the issues raised in the appeals as well as in the cross-objections are similar based on the same identical facts. The ld. DR accepted the same and with the consent of both the parties, we proceed to hear both the appeals and cross-objections together and pass con olidat d order for the sake of convenience.

3. **First of all we shall take up the appeal in TA No. 2148 of 2017**

4. The revenue raised ground no. 1 to 6 amongst which only issue arises for our consideration challenging the action of CIT(A) in holding the assessment made u/s 153A/143(3) of the Act is invalid n the absence of any incriminating material in the facts and circumstances f the case.

5. The brief facts relating o the issue on hand are that the assessee is a company engaged in the business of share dealing and interest income. A search u/d 132 of the Act was conducted in the office premises of the assessee on 05.08.2014 and on subsequent dates. During the course of search and seizure operation documents bearing identification marks BRL-5 was found and seized.

6. According to the AO, page no. 12 and 13 of the seized document reflects the details of shareholder as on 31.03.2014. Accordingly, a notice u/s 153A of the Act was issued, in response to the said notice, the assessee filed return of income declaring total income of Rs. 1,49,03,670/-. Notices u/s 143(2) and 142(1) of the Act issued and authorized representative on behalf of the assessee participated in assessment proceedings and furnished documents as called for and explained the return of income.

7. The AO completed the assessment and made addition of Rs. 3,26,50,000/- on account of unexplained cash credit u/s 68 of the Act, besides, also made addition u/s 69C and 14A of the Act vide assessment order dated 16.12.2016 passed u/s 143(3)/153A of the Act. As aggrieved by the order of AO, in the first appellate proceedings before the CIT(A), the assessee contended that the scope of unabated assessment completed by the Assessing Officer u/s 153A/143(3) of the Act was limited to assess the undisclosed income only on the basis of incriminating material found during the course of search and in the absence of any such incriminating material found during the course of search, the addition made by the AO u/s 68 by treating the share capital and share premium amount as unexplained cash credit is not justified. The CIT(A) found the submissions of the assessee acceptable and deleted the addition made by the AO u/s 68 of the Act.

8. We note that the CIT(A) held that there was no assessment pending on the date of search and no incriminating documents / papers were seized relevant to issue on hand and the assessment made u/s 153A/143(3) is not based on any incriminating documents. Further, the CIT(A) placed reliance on the decision of Hon'ble High Court of Calcutta in the case of Veerprabhu Marketing Ltd. and having not preferring an SLP by the revenue before the Hon'ble Supreme Court the CIT(A) held the ass ssment u/s 153A/143(3) of the Act is invalid. For ready reference relevant por ion in page 31 and 32 of the CIT(A) is reproduced herein below:

> *"I have consider d the findings of the AO in the assessment order, different case laws brought on record a d appe l orders passed by my predecessors on this legal issue. I find from the assessment order that during the search and seizure operations conducted u/s 132 of the I.T. Act, 1961, incriminating documents / papers were not seized. At least, additions made by the AO in the assessment order passed u/s 153A/143(3) are not based on any incriminating documents/papers seized during the search operation. It would also not be out of context to mention here that in this case, on the date of search, no assessment for this year was pending. Therefore, keeping in view the ratio decided by the Jurisdictional bench of Kolkata Tribunal in cases referred above and the ratio decided by the Hon'ble Calcutta High Court in the case of Veer Prabhu Marketing Ltd. (supra) in the light of CBDT's decision of not filing SLP in this case in the Supreme Court and keeping in view the Apex Court's decision to dismiss SLP on similar issue in the case of Pr. CIT vs Kurele Paper Mills Pvt. Ltd. SLP © No. 34554 of 2015 dtd. 07.12.2015, I am of this view that in order to maintain judicial continuity on this issue and respectfully following the ratio decided by the Hon'ble Calcutta High Court in the case of Veer Prabhu Marketing Ltd. (supra), assessee's appeal on ground no. 1, 2 and 3 are allowed and as such I am not inclined to adjudicate appeal on ground no. 4 to 7 on merit. Since the appeal in this case has been adjudicated on technical ground, therefore, I am not inclined to adjudicate appeals on other grounds on merit."*

9. Before us, the ld. DR Sri Imokaba Jamir submits that the language of section 153A makes it very clear that there is no explicit or intended

requirement of seizure of incriminating material during the search u/s 132(1) before issuing the notices u/s 153A. The jurisdiction of section 153A is automatic from the moment a search is initiated. There is no requirement of examination of seized material or recording any satisfaction w.r.t availability of seized material before issue of notice u/s 153A. The intention of legislature could be that the initiation of search itself is subject to recording of satisfaction u/s 132(1) by the PDIT(Inv) on grounds that:

> *(i) Upon issue of summons u/s 131(1), the assessee has failed to produce or would not produce the books of accounts or other documents so requisitioned; or*
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> *(ii) The assessee is in possession of money, bullion jewellery, article or thing which represents wholly or partly income has not been or would not be disclos d for the purposes of the Act*

10. The conjoint reading of section 153A and 132(1) would clearly imply that a satisfaction to issue notice u/s 153A is already deemed to be imported from the satisfaction recorded by PDIT(Inv). The existence of satisfaction recorded by PDIT(Inv) is liable to be challenged before courts and until such satisfaction is held invalid by any court, the satisfaction recorded by PDIT(Inv) shall continue to hold the fort for purposes of 153A also and it is for this reason there is no further requirement of recording any belief or satisfaction by AO for issue of notice u/s 153A.

11. The conditions of recording the satisfaction of PDIT(Inv), one of the conditions is regarding books or other documents which were not produced or would not have been produced on issue of summons. Thereby implying that post search, while the AO is making assessment, it has to examine the correctness of income disclosed not only based on what material has been gathered during search but also based on these books or documents which in the opinion of PDIT(Inv) would not have been produced upon issue of summons, whether or not such books of accounts or documents have been actually found during search. There are numerous instances when even the books of accounts as per audit reports are not found at any of the premises during search, when the searched entities represent only the shell companies. Similarly, there is a requirement of satisfaction by PDIT(Inv) in respect of income being fully or partly not disclosed for the purposes of the Act. Even if some income/ entry is

disclosed in books or audited accounts, the AO is mandated to examine whether such income / entry was disclosed fully or partly and/ or represents its real nature and source for the purposes of the Act. This inter alia would mean that even the entries disclosed in accounts which might represent income fully or partly would in itself be an incriminating material for which a search was initiated. When the non-production of books or other documents can give rise to a belief for initiating search u/s 132(1), then it may be counterproductive to conclude that the power of AO is restricted to assessment based only on incriminating material found in search, irrespective of any other item of income which might have remained fully or partly undisclosed for the purposes of the Act, based upon the entries already appearing in such books

12. Further, ld. DR submits that it is the 'assessment of total income' which is required to be made u/s 153A. The total income as defined u/s 2(45) would be the total income computed as per section 5 of the Act. The word 'assessment' cannot have a different meaning for different purposes under the same Act, unless restricted by specific provisions The process of assessment for the purposes of the Act is wide enough to include every kind of enquiry/examination for discovery, quantification and assessment of any income wholly or partly for the purposes of the Act and the process of 'assessment of total income' u/s 153A can neither be restrictive nor have a different connotation for assessment under section 153A vis a vis 143(3) or 147. As per the scheme under the Act, the satisfaction recorded u/s 132(1) and the results of search are intended to be brought to a logical conclusion by initiating the proceedings u/s 153A without any further act of the AO. It is in the scheme of the Act that after issuance of notice u/s 153A, the next action of the AO must follow the examination of all aspects for which a search has been initiated and it cannot be said that the AO u/s 153A cannot proceed to examine the books of accounts or documents, entries which were produced before him subsequently, wherein might also represent income wholly or partly, which has not been disclosed for the purposes of the Act and it may be contrary to the scheme of the provisions of 132(1) r/w 153A, if it were to be held that power of AO is restricted only to make assessment the evidence found during search. The provisions of 153A not only require assessment of undisclosed income but total income also and the

expression 'total income' would include the income emanating from disclosed items, income emanating from partly or wrongly disclosed items as well as income emanating from undisclosed items. U/s 153A, no distinction is made for assessment of total income in the cases which were earlier completed u/s 143(1), the cases which were earlier completed u/s 143(3)/147 or the cases where no return was filed prior to search and in all the three categories, it is as per the scheme of the Act that the total income of the assessee as defined u/s 2(45) needs to be assessed for all the six (6) AYs for which the AO is mandated to issue notice u/s 153A.

13. Further, he argued that u/s 153A, there is a provision for abatement of pending assessments whether or not any evidences were found for that year. There can also be a situation where neither any regular assessments were made earlier nor any proceedings were pending, which could be abated. The section also envisages the issue of notice u/s 153A whe her or not any evidences were found for that year. It is also implicit that u/s 153A, the items of total income which could be assessed u/s 153A in abated proceedings cannot be different for the cases which could not be abated such as i) where no proceedings were pending; or ii) where earlier assessments were completed u/s 143(3)/147; or iii) where earlier assessments were not made at all. The only caveat could be that before making any addition to the total income, the AO must bring on the record how such items are fa ling into the category of total income for the purposes of the Act.

14. If it were to be held that no addition can be made without any incriminating material in respect of the years covered by section 153A, then it would lead to an absurd consequence whereby the powers granted to issue notices u/s 153A would be rendered otiose in cases which got abated for any particular AY. In the absence of any seized material, AO may not be able to proceed to make any assessment of any other item of total income implying that the process of making assessment of total income as envisaged in section 153A fails in abated cases and a statute can never be interpreted in a manner to make it redundant. Section 153A does not say that additions should be strictly made

on the basis of evidence found in the course of search, or on the basis of any other post-search material or information available with the AO though such assessment cannot be arbitrary. The provisions u/s 147 and 153A, though have different conditions to assume jurisdiction but both operate to make the assessment of total income only. The Memorandum explaining the provisions of Finance (No. 2) Bill of 2009 while inserting explanation 3 to section 147 reads as under:

> *"Some courts have held that the Assessing Officer has to restrict the reassessment proceedings only to issues in respect of which the reasons have been recorded for reopening the assessment. He is not empowered to touch upon any other issue for which no reasons have been recorded. The above interpretation is contrary to the legislative intent.*
>
> *Therefore to articulate the legislative intent clearly, explanation 3 has been inserted in section 147 to provide that assessing officer may examine, assess or reassess any issue relevant to income which comes to his notice subsequently in the ourse of proceedings under this section, notwithstanding that the reasons for such issue has not been included in the reasons recorded under subsection(2) of section 148".*

15. Further he adds that even in absence of any explanation u/s 153A also similar to the explanation 3 u/s 147, the intention of the legislature and the scheme of the Act for making assessment u/s 153A where search u/s 132 is initiated, is same i.e. in order to make assessment of total income, after having assumed the jurisdiction to assess total income, the powers of AO shall not remain restricted to mere those material which were seized during search but shall also include the as essment of income based on any entry already recorded prior to search or any claim/relief allowed prior to search, which has been found to be erroneous during the proceedings u/s 153A. There is divergence of judicial opinion on the question of whether assessment u/s 153A can be restricted to only the incriminating material seized during the search or whether the AO can also take a view based on something which might be noticed otherwise during the course of assessment proceedings u/s 153A? And referred to case laws as under:

> *(a) Allahabad High Court in Raj Kumar Arora 367 ITR 517 has held that there is no requirement of incriminating material for invoking provisions of 153A.*
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> *(b) However, the same Delhi High Court in case of Dayawanti Gupta Vs CIT 390 ITR 496(Del) in para 16 has observed that:*
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> *"Section 153A, which provides for an assessment in case of search, and was introduced by the Finance Act, 2003 HYPERLINK "https://taxguru.in/custom-duty/section-166-finance-act-2003-incorporation-provisions-relating-prosecution-finance-act-1989-respect-inland-air-travel-taxreg.html" with effect from 1-6-2003, does not provide that a search assessment has to be made strictly on the basis of evidence found as a result of search or other documents and such other materials or information as are available*

with the Assessing Officer and relatable to the evidence found. The earlier section 158BB which is not applicable in case of a search conducted after 31-5-2003, provided that the computation of the undisclosed income can only be on the basis of the evidence found as a result of search or other documents and materials or information as are available with the Assessing Officer, provided they are related to the materials found. Section 153A(1)(b) requires assessment or reassessment of total income of the six assessment years immediately preceding the assessment year relevant to the previous year in which the search took place. This, however, does not mean that the assessment under section 153A can be arbitrary or made without any relevance or nexus with the seized material".

(c) Filatex India Ltd Vs CIT-IV 229 Taxman 555 (Delhi)

Whether during assessment under section 153A, additions need not be restricted or limited to incriminating material found during course of search and, hence, argument of assessee that addition under section 115JB was not justified in order under section 153A as no incriminating material was found concerning said addition had to be rejected – Held, yes.

(d) Sunny Jacob jewelers and wedding center Vs DCIT 362 ITR 664 (K r)

Whether there is no requirement under provisions of Act requiring d partment to collect information and evidence for each and every year for six previou years in order to initiate proceedings under section 153A – Held, yes

(f) CIT Vs Anil Kumar Bhatia 352 ITR 493(Delhi)

Whether even if assessment order had already been pass d in espect of all or any of those six assessment years, either under section 143(1)(a) or section 143(3) prior to initiation of search/requisition, still Assessing O ficer is empowered to reopen those proceedings under section 153A without any fetters nd reassess total income taking note of undisclosed income, if any, unearthed during search – Held, yes

(g) CIT-II Vs continental warehousing corporatio 235 Taxman 568 (SC)

The 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 – H ld, yes

(i) The dismissal of SLP by supreme court in case of PCIT vs Meeta Gutgutia wherein also the same views were expressed as in Kabul Chawla, would also not lead to conclusion that the question decided by Delhi High court against the revenue in Meeta Gutgutia is settled because the SLP has already been admitted by SC for hearing on the same question i everal other cases such as Continental warehousing, Best Infrastructure(supra).

Further, Supreme Court in Sinhgad Tech Edu Society 397 ITR 344(SC) held that no notice u/ 153C could be invoked unless there was incriminating material is also of no consequence as the provisions of section 153C has been amended w.e.f 1/4/2005 and that the decision of Sinhgad Tech Edu society was for period prior to 1/4/2005.

16**.** He reiterates that the sum and substance of all the decisions above could only indicate that the question of whether the AO has powers u/s 153A to assess total income as defined u/s 2(45) dehors the incriminating material also, has not at all become final and the same is yet pending final adjudication before the Supreme Court in SLPs admitted and the arguments made in preceding paragraphs can be pitched up to support the revenues' contention before courts.

17. He raised next set of questions that the 'incriminating material' can be in any form such as evidence in the nature of i) a document, content of any document; ii) an entry in books of account; iii) an asset; iv) a statement given on oath; v) absence of any fact claimed earlier but coming to notice during search; vi) absence of books being found during search; or vii) absence of the office/ business premises as claimed during returns filed or any other documents, etc. In short, any fact/ evidence which could suggest that the documents/ transactions claimed or submitted in any earlier proceedings were not genuine, being only a device/ make belief based on non-existent facts or suppressed/ misrepresented facts, would constitute an incriminating material sufficient to make assessment for the purposes of the Act. A mere statement u/s 132(4) is an evidence for making an assessment as held by apex court in **B Kishore Kumar Vs DCIT** 234 Taxman 771(SC) and even a statement u/s 132(4) shall also constitute incriminating material to dislodge any earlier finding for the purpose of making an assessment u/s 153A.

18. The requirement of incriminating material is not specifically mentioned in the Act and w.e.f. 1/4/2005 the p ovisions of section 153C have been amended so as to allow the invocation of proceedings u/s 153C if any document, an entry or an asset is found in relation or pertaining to a person other than the searched person, which has bearing on the assessment of total income as per the provisions of the I T Act The word "incriminating", as used by the courts in context of section 153C, needs to be applied in the context of section 153A also which has to be seen as something which can have a bearing on the assessment of correct total income u/s 2(45) as per provisions of the Act.

19. The expression 'have a bearing on determination' as used u/s 153C also has a wide connotation which implies that the nexus of the seized documents/ assets to income should only be a logical nexus to the ultimate process of determination of total income and that such evidence need not be in the nature of direct hard evidence. Applying the same principles, the incriminating material for the purposes of section 153A also has to be necessarily construed to be in the nature of a prima facie evidence only (including a circumstantial evidence)

and not a hard evidence. The use of the expression **'books of accounts** u/s 153C again suggests that even the entries recorded in the books of accounts, which have not been correctly recorded or camouflaged would also partake the character of incriminating material, if the same has a bearing on the determination of income which has not been already disclosed in the return filed, if any. The entries in the regular books of accounts would also trigger the assessment u/s 153A/C, if there is some prima facie evidence that the entry recorded therein is camouflaged, or incorrect, wholly or partially, and such entries have a bearing on determination of total income of such person. The definition under clause (ii) of 271AAB(c) also defines undisclosed income as "any income based on entry in books of accounts wholly or partly false and would not have been found to be so, had the search not been conducted". This clearly implies that any entry even recorded in the books, which is found to be wholly or partly false along with having a bearing on determination of income based on evidence gathered during search, would also be in the nature of incriminating material. Further, recently introduced section 270A, which is also applicable to search asstt. for AYs other than specif ed years, mandates to levy penalty even in cases where the expenses had been claimed in the books without any evidence or where the entries recorded in the books were found to be false. This also supports the contention that mere recording of an entry in the books of accounts does not tak away its incriminating character, if such entry was without evidence or had been falsely recorded in the books of accounts. The same principle will also hold good for the documents submitted earlier in relation to entries recorded in the books but later found that the documents were not genuine or manipulated or camouflaged. Hon'ble Supreme Court in Sinhgad Tech Edu Society or Delhi High Court in Kabul Chawla never considered the implication of section 270A and 271AAB as explained above while considering as to what material would constitute incriminating for the purposes of assessment of total income under section 153A/C.

20. The provisions of section 153A/153C are not the normal assessment provisions like 143(3); rather they are curative provisions to plug the mischief of evasion of taxable income based on evidences found in pursuance to search and if on account of search, the facts and circumstances suggest that any entry

already appearing in books or accepted in earlier assessments based on documents submitted at that point of time, are camouflaged or manipulated or reflected to be in the nature or from a source which is different from the real nature or source as appearing from the evidences found during a subsequent search, then such material/ facts coming to fore now will definitely constitute an incriminating material. In consequence of the same the earlier recorded entries/earlier admitted documents and evidence shall have no force as genuine evidence. If it were held not to be so, then the purpose of 153A would be defeated as it would fail to prevent the mischief, which it sought to prevent just because the entries were already recoded in the books or some documents had already been accepted. Applying the Hayden's rule of mischief, the mere fact that such entries are recorded in the books of accounts or some fabricated or colourful documents have already been accepted as correct, will not prevent such material or entry from being incriminating, if the circumstances suggest otherwise. The Hayden's rule of mischief has been judicially accepted and applied by Calcutta High Court in Reckitt Colman of India Ltd. vs. ACIT (2001) 252 ITR 550 (Cal).

21. The incriminating material can be from the search or even from subsequent surveys or any other enquiries. Recently in CIT Chennai vs Ajit S Kumar 93 Taxman.com294(SC), the court in the context of section 158BB has upheld the use of information collected in a survey in case of connected person carried along wi h search in other person for the purpose of making asstt. u/s 158BB. Prov sions of 158BB are Pari Materia to section 153A.

> *The Delhi High court in **PCIT Vs Kabul Chawla** in para 37(iv) observed as under:*
>
> *"iv. Although Section 153 A **does not say** that additions should be strictly made on the basis of evidence found in the course of the search, or other post-search material or information available with the AO which can be related to the evidence found, it does not mean that the assessment "can be arbitrary or made without any relevance or nexus with the seized material. Obviously, an assessment has to be made under this Section only on the basis of seized material."*

22. The Delhi High court has thus explained the underlying principle that though the assessment may not be based on seized evidence only but the addition cannot be arbitrary. There can be no dispute on this proposition. It has to be based on evidences found during search, or post search or information

available with the AO which can be related to the evidence found. Any entry already recorded in the books which is not true in its nature or source and any information even coming to the AO post search shall constitute incriminating material for the purpose of making an assessment u/s 153A.

23**.** There is a distinction between a mere change of opinion and a change of opinion based on fresh facts. The latter would imply that the earlier conclusions of the AO were misled by placing evidence on suppression or misrepresentation of material facts. An order passed by the AO relying upon such make belief documents, suppressed or misrepresented facts, which were later found to be not true, shall become void or voidable, as the case may be. Under such circumstances, the acceptance of any claim, relief etc in any earlier order shall also have no binding force in any subsequent proceedings and the change of opinion would be permissible. The Courts have accepted the principle that any fraud practiced on the court is always a ground for vacating the judgment, as where the court is deceived or misled as to material circumstances, or its process is abused, resulting in the rendition of a judgment, which would not have been given if the whole conduct of the case had been fair".

24. The Madras High Court in case of **L. Mohanam vs Mohamed Idris** on 24 June, 2011 in O.S.A.No.310 of 2010 has observed as under:

> *19. In suppo t of his contention, the learned senior counsel for the appellant/plaintiff relied on the dec sion of the Hon'ble Supreme Court in Hamza Haji V. State of Kerala and ano her reported in (2006) 7 SCC 416, wherein it has been observed that a decision obtained by playing a fraud on Court is liable to be set aside on the basic principle that the party who secured such a decision by fraud cannot be allowed to enjoy its fruits. The learned senior counsel also relied on the observation of the Hon'ble Supreme Court in State of Andhra Pradesh and another Vs. T.Suryachandra Rao reported in (2005) 6 SCC 149 to the effect that the fraud vitiates every solemn Act and fraud and justice never dwell together. In A.V.Papayya Sastry and Others Vs. Govt. Of Andhra Pradesh and others reported in (2007) 4 Supreme Court Cases 221 also, the Hon'ble Supreme Court has observed that fraud vitiates all judicial acts whether in rem or in personam and that a judgment, decree or order obtained by fraud has to be treated as non-est and nullity, whether by the Court of first instance or by the final Court and that the same can be challenged in any Court, at any time, in appeal, revision, writ or even in collateral proceedings. In North Eastern Railway Administration, Gorakhpur Vs. Bhagwan Das (dead) By Lrs reported in (2008) 8 Supreme Court Cases 511, the Hon'ble Supreme Court has again reiterated the point that a judgment or decree obtained by fraud either in the first court or in the highest Court, is a nullity in the eye of law.*

25. Section 44 of the Evidence Act also enables a party otherwise bound by a previous adjudication to show that it was not final or binding because it is vitiated by fraud. The provision gives jurisdiction and authority to a Court to consider and decide the question whether a prior adjudication is vitiated by fraud. The above propositions of law abundantly make clear that the AO also being a quasi-judicial authority, while functioning under the Act, shall also be bound by similar principles of jurisprudence. For the purposes of assessment of total income u/s 153A also, any findings given in respect of any claim/relief in earlier proceedings shall stand vacated by operation of legal principles where it is found that in earlier proceedings the AO has been misled by suppression or misrepresentation of material facts or by producing only make belief documents, which were not found to be genuine subsequently based on emergence of new facts during enquiries. The view that the AO cannot rescind from accepting the documents admitted earlier is not a gospel t uth which can be applied in each and every circumstance.

26. **T**he Apex court in **ITO Vs. Techspan India (P.) Ltd.** 92 taxmann.com 361 (SC) observed as under:

> *Whether before interfering with proposed re-opening of assessment on ground that same is based nly on a change of opinion, Court ought to verify whether assessment earlier m de has either expressly or by necessary implication expressed an opi ion on a matter which is basis of alleged escapement of income that was taxable; if assessment order is non-speaking, cryptic or perfunctor in nature, it may be difficult to attribute to Assessing Officer any opinion on questi ns that are raised in proposed re-assessment proceedings – Held yes – Whether every attempt to bring to tax income that has escaped assessment, cannot be absorbed by judicial intervention on an assumed change of opinion even in cases where order of assessment does not address itself to a given aspect sought to be examined in re-assessment proceedings – Held, yes*

27. Applying the above principle in the present context also, it can be safely concluded that in the absence of any categorical finding on the genuineness of a claim in an earlier assessment having being accepted on make belief documents/evidences only, it cannot be said that the A.O. has expressed any opinion on the correctness or otherwise of the items/entries disclosed in the return of income already filed prior to the search. The judicial view is very clear wherein it has been held that the mere submission of some documents proving identity or bank account, affidavits in contrast to the other evidences suggesting

the transaction to be suspicious cannot be accepted to have established the genuineness of transaction. If any earlier finding has been found to be vitiated or incorrect based on material found subsequently, the AO shall have powers to review such findings based on any tangible material coming to his notice, while exercising power of assessment of total income u/s 153A.

28. He 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. As per the decision of the *Hon'ble Karnataka High Court in the case of Canara Housing Development Co. vs. D.C.I.T. reported in (2014) 49 taxmann.com 98 (Kar Hc)* and also as per the decisions of Kerala High Court in the case of *St. Francis Clay Décor Tiles 2016, 70 tamann. 234 Kerala, 22 March, 2016 and E. N. Gopa Kumar vs. C.I.T.(Central), 30 October, 2016* it was held that search assessments could be framed even without the existence of incriminating materials found in the course of search.

29. 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 –*
>
> *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*
>
> *where a person fails to comply with the requirements of summons issued u/s. 131(1) of the Act ; or*
>
> *where a person is in possession of any money, bullion, jewelry or other valuable article or thing and such assets represents either wholly or partly income of 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) ;*

30. The officer, so authorized could conduct a search and proceed as per the requirements laid down in the said section. 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. Once the search is conducted and notice u/s. 153A is issued the assessee has to file the return of "total income" whether there was any seized material or not. It shows that seized material or undisclosed income is not the criteria for filing of return declaring total income. What is required to file return of income for assessee is that (1) there should be search and (ii) 153A notice should be issued. Once the notice is issued u/s. 153A and assessee's file its return of income for six years then the earlier returns became non est and the returns filed in response to notice u/s. 153A becomes the final return and the A.O. has power to assess or reassess the case for entire six years. The earlier assessment also becomes non est as the earlier return filed by the assessee became non est.

31. The Delhi High Court decision of Pr Commissioner of Income Tax vs. Niraj Jindal dated February 9, 2017 wherein it is held that once the assessing officer accepts the returns filed u/s. 153A the original return filed u/s. 153A becomes non est which means there was no such return in the eyes of law and action taken over such assessment also becomes non est which shows that Section 153A empowers assessee to file its disclosed and undisclosed return both and similarly it empowers to the A.O. also to assess or reassess the income accordingly. The decis on of Pr. Commissioner of Income Tax vs. Niraj Jindal of Delhi High Court which has been affirmed by the Hon'ble Supreme Court, has also interpreted the same and holds that once notice under section 153A is issued and appellant files returns before the assessing officer, the earlier return filed by the appellant becomes non est. The aforesaid decision is in consonance with the interpretation of clause (a) and (b) and proviso one of Section 153A(1).

32. It is further to point out that the provision of Section 153A are non obstanse clause which does not have any conditions of seized material or incriminating material for making assessment, filing of return or conditions for issuance of notice u/s. 153A. Wherever the search has been conducted 153A has to be issued indiscriminately without any seized material and assessment of that return is to be made. The Apex Court in the case of CST v. Modi Sugar Mills

Ltd. [1961] 12 STC 182 (SC) ; AIR 1961 SC 1047 and in CIT v. Calcutta Knitwears [2014] 362 ITR 673 (SC) has held that the while interpreting fiscal statutes, the court must not add or substitute the word in the provision and prayed to allow the grounds raised by the appellant revenue.

33. In reply to Revenue's contention, Sri R.P. Agarwal, Sr. Advocate placed reliance on the order passed by the Ld. CIT(A) and submitted that the additions are not based on any incriminating seized material in course of search. As per section 153A, the assessments are classified in two categories, i.e.(i) Completed Assessment and (ii) Pending or Abated Assessment. Completed Assessment refers to the assessment which are not pending as on the date of search and the time limit for issuance of notice u/s 143(2) has expired. The assessment for the year has attained finality and any addition in the completed assessments can be made only on the basis of Incriminating material found during the course of search. Pending or Abated Assessment refers to the assessment which are pending as on the date of search and merges with the Block Assessment proceedings u/s 153A and assessment is made normally by the AO. The present case falls in the category of the Completed Assessment as no assessment for the instant year was pending as on the date of search. The instant appeal is against the addition of the items duly disclosed by the assessee in course of regular assessment. The Ld. AO while exercising the powers conferred upon him u/s l53A of the Act has fai ed to appreciate the legal position that the addition in the case of search assessments has to be made only on the basis of incriminating material. The Ld AO also can not start doing a fresh assessment that had already been completed either u/s 143(3) or u/s 143 (l) under the Act without having any incriminating material on record.

34. Further in proceedings u/s l53A/153C to reopen the completed assessment is restricted only to the extent of incriminating documents if any. The various High Courts including the jurisdictional Calcutta High Court and jurisdictional ITAT have already held that issues forming part of the items of the regular assessment, are beyond the scope of the search assessment u/s l53Al153C and the AO has no jurisdiction to make additions otherwise than on the basis of the incriminating material found in the course of search. During the

course of search, no incriminating document relating to the addition made u/s 68 in respect of share capital was found and seized which is evident from the assessment order as the Ld AO is silent about any incriminating documents found in the course of search.

35. Referring to the Ld. DR's submissions, he submits that generalised allegations have been made which are completely irrelevant given the facts of the instant case. The Ld. DR in his submission has alleged that the term 'incriminating material' has not been defined under any provisions of the Act. He placed reliance on various case laws of different courts saying that additions u/s 153A can be made without having any incriminating material on record.

36. Regarding certain decisions as relied on by Ld. DR out of which most of the decisions are irrelevant to the instant case and distinguished the same.

a. In respect of the decision of Hon'ble Delhi High Court in the case of M/s. Filatex India Ltd. vs CIT (229 Taxman 555) and CIT vs Anil Kumar Bhatia (352 ITR 493) and submit that both the decisions as relied by the Ld. DR are completely on different facts and have been considered and distinguished by the Hon'ble High Court of Delhi while passing the decision of CIT vs Kabul Chawla (380 ITR 573). Therefore, the decision in Kabul Chawla (supra), negates the contention of the Ld. DR.

b. Regarding the decision of Hon'ble Allahabad High Court in case of Raj Kumar Arora (in 367 ITR 517) and submitted th t the above mentioned decision of Raj Kumar Arora has been given by the Hon'ble All habad High Court by relying on the decision of Hon'ble Delhi High Court in case f CIT vs Anil Kumar Bhatia (352 ITR 493). As mentioned above, the case of Anil Kumar Bhatia has been considered and distinguished by the Hon'ble High Court of Delhi while passing the decision of CIT vs Kabul Chawla (380 ITR 573).

c. Regarding the decision of High Court of Kerala Sunny Jacob Jewellers and Wedding Center vs DCIT in 362 ITR and submitted that the facts of the above mentioned case are comp etely different from the present case and thus have no relevance. In this case, there wer incriminating material found against the assessee and thus the case was set aside to the file of the AO for considering the same after giving an opportunity to the assessee. But in the present case no such incriminating material has been found by the department as a result of search nor the addition has been made based on the incriminating documents.

d. Regarding the decision of Hon'ble Delhi High Court in case of Smt. Dayawanti Gupto Vs. CIT(390 ITR 496) and submitted that the decision in Dayawanti Gupta (supra) is on different facts. In that case, there was an admission by the assessee that they were not maintaining regular books of accounts and the AO in those cases had specifically rejected the books of accounts. There was a confirmation in response to Question No. 11 in Dayawanti Gupta (supra) that there was no year-wise recording of transactions. In the present case, however, there was no such admission; the books of accounts were accepted by the AO. In the present case, during the course of search operations u/s 132 of the Act which was conducted on 05-08-2014, since the assessee company were not able to instantly produce all the relevant documentation or paper works which may be required by the department, the assessee company had offered an additional income of Rs.1,50,00,000/- to demonstrate co-operative attitude and to avoid unnecessary

long drawn litigations with the department and to buy peace. Further the said income of Rs. 1,50,00,000/- formed part of return of income filed under section 153A of the Act.

e. Further, that the case of Smt. Dayawanti (supra) has been considered and distinguished by the Hon'ble High Court of Delhi while passing the decision of PCIT vs Meeta Gutgutia (2017) 82 taxmann.com 287 (Delhi). The SLP filed by the department against the order passed by the Hon'ble Delhi High Court was dismissed by the Apex court [2018] 96 taxmann.com 468
(SC).

f. Regarding the admission of SLP by the Hon'ble Apex Court in case of Continental Warehousing Corporation 235 Taxman 568 and submits that mere admission of SLP does not mean that the case has been decided in favour of the revenue.

g. In respect of the decision of Hon'ble Apex Court in case of CIT vs S. Ajit Kumar in 404 ITR 526 and Hon'ble Apex Court have held that material found or statement recorded in a survey conducted simultaneously at the premises of a connected person can be treated as incriminating material for the purpose of making the addition u/s 153A. However, in our case, no such survey has been conducted u/s 133A.

37. Further, that the present case is completely covered in the favour of the assessee by various decisions of various High Courts & ITAT including the Jurisdictional High Court & ITAT and also by the decision of Hon'ble Apex Court.

38. The Hon'ble Supreme Court in case of PCIT Vs. Meeta Gutgutia Hon'ble held as under:

"section 153A of the Income-tax Act 1961 - Search and seizure (General principles) - Assessment years 2001 -02 to 2003 -04 and 2004- 05 - High Court in impugned order held that invocation of section 153A to re-open concluded assessments of assessment years earlier to year of search was not justified in absence of incriminating material found during search qua a h such earlier assessment year - Whether SLP against said decision was to be dism ssed - Held, yes (Para 2) [In favour of assessee]

Section 69 read with sections 132 and 153A of the Income-tax Act 1961 - Undisclosed investment (Franchise fees) - Assessment years 2001-02 to 2004 -05 - During course of search, assessee m de a disclosure on account of change in method of accounting of franchise fee and undisclosed franchise fees for relevant year - On basis of said statement Asse sing Officer opined that number of outlets for which franchise fee was received had more or less remained some in all assessment years from 2001-02 to 2006-07 and estimated undisclosed income at a certain percentage of amount of disclosure made by assessee in her statement under section 132(4) - High Court in impugned order held that since no incriminating material was unearthed to show that there was failure by assessee to disclose franchise income/ addition made by Assessing Officer was unjustified- whether SLP against said decision was to be dismissed - Held, yes [Para 2] [In favour of assessee]"

39. Further referred to the Hon'ble Delhi High Court in the case of PCIT Vs. Kurele Paper Mills Pvt. Ltd. (2016) 380 ITR 571 (DEL) held that in case of search assessment, addition u/s 68 is not justified if no incriminating evidence relating to share capital found in the course of search.

40. The department had filed special leave petition before the Hon'ble Apex Court against the above judgment of the Delhi High Court (Pr. CIT vs Kurule Paper Mills P. Ltd.): SLP(C) No. 34554 of 2015 [2016] 380 ITR (st) 64 Ed). The Hon'ble Apex Court dismissed the special leave petition filed by the department; The relevant para as mentioned in the ITR is reproduced as under.

> *"Their Lordships Madan B. Lokur and SA. Bobde JJ dismissed the departments special leave petition against the judgment dated July 06, 2015 of the Delhi High Court in ITA No. 369 of 2015, whereby the High Court held that no substantial question of law arose since there was a factual finding that no incriminating evidence related to share capital issued was found during the course of search and that the Assessing Officer was not justified in invoking section 68 of the Act for the purpose of making additions on account of share capital."*

41. The Hon'ble Jurisdictional High Court of Calcutta has time and again reiterated its view that the additions in case of the search assessments have to be made on the basis of incriminating material. Some of the recent decision of the Hon'ble Jurisdictional High Court as well as other courts are discussed hereunder for ready reference.

- PCIT-2, Kolkata vs Salasar Stock Broking Ltd (ITAT No. 264 of 2016 dated 24.08.2016): (Calcutta)
- CIT, Kolkata – III vs Veerprabhu Marketing Ltd. (2016) 73 taxmann.com 149 (Calcutta)
- CIT vs Kabul Chawla (2016) 380 ITR 0573 (Delhi)
- Mridul Commodities Pvt. Ltd vs DCIT, Cent, Cir-XXI, Kolkata in [IT(SS)A Nos. 14 & 15/Kol/2015] dated 07 10.2016.
- M/s. All Cargo Global Logistics Ltd. vs DCIT, Cent. Circle – 44, Special Bench Mumbai (IT Appeal Nos. S018 to S022 & S059 (Mum) of 2010 dated 06.07.2012.
- ACIT s M/s. PHPL Stock Broking Pvt. Ltd. in IT(SS)A No. 12/Kol/2017 dated 21.08.2018.
- DCIT vs M/s. B.R. Infraprojects Pvt. Ltd. in IT(SS)A No. 11/Kol/2017 dated 26.09.2018.
- DCIT vs M/s. Rosemarry Sponge & Ispat Pvt. Ltd. in IT(SS)A No. 75 & 76/Kol/2017 dated 30.11.2018.

42. Further, submits the Ld. CIT(A) has given a very categorical finding that no incriminating material has been found during the course of search based on which the addition has been made by the AO.

43. The order of the Ld. CIT(A) and further in view of the above case laws relied on prayed that all the above additions made by the Assessing Officer u/s 153A/143(3) cannot be sustained in the eyes of law in the re-assessment proceedings in absence of any incriminating seized material / document.

44. Heard both the parties and perusal of the material available on record. We note that the contention of the ld. DR is that the language of section 153A of the Act makes it clear that there is no explicit or intended requirement of seizure of incriminating material during the search u/s 132(1) of the Act before issuing the notice u/s 153A. According to him, the jurisdiction u/s 153A is automatic from the moment a search is initiated. For completion of assessment there is no requirement of examination of seized material or recording any satisfaction with regard to the availability of seized material before issuance of notice u/s 153A. According to the ld. AR, the assessment in the present appeal was completed and unless there is any incriminating material, the AO as no jurisdiction to reopen the assessment which had already been completed. It means to say that without having any incriminating material said to have been found during the course of search that there cannot be any addition in the completed assessment if at all any addition that should be on the basis of incriminating material.

45. In support of its contention, the ld. DR placed the reliance in the case of Raj Kumar Arora 367 ITR 517 which held that there is no requirement of incriminating material for invoking provisions contained u/s 153A of the Act. The ld. AR submits that the decision of Hon'ble High Court Allhabad in the case of Raj Kumar Arora (supra) has been considered in the case of Anil Kumar Bhatia reported in 352 ITR 493 by the Hon'ble High Court of Delhi which also considered in the case of Kabul Chawla reported in 380 ITR 573.

46. It is pertinent to mention that the Hon'ble Jurisdictional High Court of Calcutta considered the same in the case of Salasar Stock Broking Ltd. vide (ITAT No. 264 of 2016 dated 24.08.2016) and upheld the order of Kolkata Benches ITAT by holding that the addition made by the AO in the assessment completed was beyond the scope in the absence of any incriminating material found during the course of search.

47. For our benefit, let us examine that the decision of Hon'ble High Court of Delhi in the case of Kabul Chawla. We note that a search was conducted in the case of Kabul Chawla as on the date of said search, no assessment proceeding was pending with the relevant assessment year. The AO reopened the said assessment pursuant to the search on account of deemed dividend u/s 2(22)(e) of the Act. The Tribunal deleted the said addition which was not based on any incriminating material found during the course of search. The Hon'ble High Court of Delhi upheld the order of Tribunal by holding that the additions made to the income of assessee for the relevant assessment years u/s 2(22)(e) were not sustainable as there was no incriminating material concerning such additions was found during the course of search. In the present case there is no dispute that the assessment was completed as on the date of sea ch and we find the CIT(A) in his impugned order categorically held that no incriminating documents / papers relevant to the issue on hand were not seized during the course search and seizure operation. Further, the additions made by the AO in the assessment completed u/s 153A/143(3) are not based on any incriminating material documents / papers. Further the IT(A) placed reliance in the case of Veerprabhu Marketing Ltd. of Hon'ble High Court of Calcutta reported in (2016) 73 taxmann.com 149. While deciding the issue in the case of Veerprabhu Marketing Ltd. (supra), the Hon'ble High Court of Calcutta agreed with the view expressed by the Hon'ble High Court of Karnataka wherein it was held that incriminating material is a pre-requisite / power could have been exercised u/s 153C r.w.s. 153A of the Act.

48. Regarding that the decision of Hon'ble High Court Delhi in the case of Smt. Dayawanti Gupta reported in 390 ITR 496 (Delhi) as relied on by the ld. DR which held that section 153A came into effect from 01.06.2003 which does not provide that a search assessment has to be made strictly on the basis of evidence found as a result of search or other documents, materials, information are available with the Assessing Officer.

49. According to ld. AR that there was an admission in the case of Dayawanti Gupta regarding non-maintenance of regular books of account and a clear confirmation to a question that there was no recording of year-wise transaction.

We note that no admission by the assessee brought on record during the course of search operation and in our opinion that the decision in the case of Dayawanti Gupta is distinguishable.

50. Further regarding that the decision of Hon'ble High Court of Kerala in the case of Sunny Jacob Jewellers and Wedding Center which held that there is no requirement under the provisions of the Act requiring revenue department to collect information and evidence for each and every year in order to initiate proceedings u/s 153A of the Act. We find force in the arguments of the ld. AR that the facts of the present case are entirely different from the facts of Sunny Jacob Jewellers and Wedding Center wherein we note that the Hon'ble High Court of Kerala found incriminating material against he assessee and was remanded to the file of AO for his consideration by giving an opportunity to the assessee. In the present case as held by the CIT(A) that no incriminating material found during the course of search. Therefore, the ratio laid down by the Hon'ble High Court of Kerala is not applicable to the present case.

51. Regarding the decision of Hon'ble Supreme Court in the case of Continental Warehousing Corporation reported in 235 Taxman 568 (SC) wherein we find a special leave petition has been admitted by the Hon'ble Supreme Court and no final order brought on record by both the parties.

52. We note that as rightly argued by the Ld.AR the Hon'ble High Court of Calcutta have been consistently held that the additions in the case of search assessment have to be made on the basis of incriminating material, supporting the same, the citation of which have been reproduced in the afore-mentioned paragraph. Therefore, considering the facts and circumstances of the case and submissions of ld. DR and AR along with the decisions relied on, we find no infirmity in the order of CIT(A) and it is justified. Thug ground nos. 1 to 6 raised by the revenue are dismissed.

53. Ground No. 7 and 8 raised by the revenue becomes infructuous in view of our decision involving ground nos. 1 to 6 in the above mentioned paragraph. Therefore ground no. 7 & 8 raised by the revenue are dismissed.

54. We shall take up **C.O. No. 110 of 2018** of assessee of ITA 148/KOL/2017

55. We find that the assessee raised grounds nos. 1 to 4 supporting the order of CIT(A) wherein we dealt the issues in the revenue's appeal and taken a decision to uphold the order of CIT(A). In view of the same, the grounds raised in cross-objections are become academic requiring no adjudication. Hence grounds raised by the assessee in cross-objection 1 to 4 are allowed.

56. Now, we shall take up IT(SS)A No. 139 of 2018 of Revenue.

57. There is no dispute that the facts and circumstan es and issues raised in this appeal are not identical to the facts and circumstances of the case of the appeal in ITA No. 2148 of 2017, wherein in the afore-mentioned paragraphs, we upheld the order of CIT(A) in holding the additions are not maintainable in the absence of incriminating material/documents. The view taken by us in the revenue's appeal in ITA No. 2148 of 2017 for AY:11-12 is equally applicable to this appeal. Thus, ground nos. 1 to 6 raised by the revenue are dismissed.

58. We shall take up C.O. No. 9 of 2017 of assessee of IT(SS)A 139/Kol/2017

59. We find grounds raised by the assessee in this cross-objection supporting the order of CIT(A). In view of the decision in upholding the order of CIT(A) ground nos. 1 to 4 raised by the assessee in this cross-objection are becomes academic equiring no adjudication, Hence, are allowed.

60. In the result, appeals by the revenue are dismissed and cross-objections by the assessee are allowed.

Order Pronounced in the Open Court on 18.03.2020.

Sd/-	Sd/-
[P.M Jagtap]	[S.S. Viswanethra Ravi]
VICE-PRESIDENT	JUDICIAL MEMBER

Dated: 18/03/2020
Biswajit, Sr.PS

Copy of order forwarded to:

- DCIT, CC – 2(1), Kolkata.
- M/s. Bhavya Merchandise Pvt. Ltd., P-128, Block-B, Lake Town, Kolkata – 700 089. & M/s. SRA Merchandise Pvt. Ltd., 5A, Space Town Housing Complex, VIP Road, Block-I, Kolkata – 700 052.
- The CIT(A)
- The CIT
- DR

True Copy,

By order,

Assis ant Registrar
ITAT, Kolkata