IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL 1934 OF 2017

Pr. Commissioner of Income Tax, Central-2,
R. No. 1920, Air India Building
Nariman Point, Mumbai- 400 021. .. Appellant

v/s.

M/s. JSW Steel Ltd. (Sucessor on
amalgamation of JSW Ispat Steel Ltd.)
JSW Centre, Bandra Kurla Complex,
Bandra (East),
Mumbai – 400 051 .. Respondent

Mr. A.R. Malhotra for Appellant.

CORAM: UJJAL BHUYAN, &
MILIND N. JADHAV, JJ.

RESERVED ON : 20 JANUARY, 2020
PRONOUNCED ON : 05 FEBRUARY, 2020

JUDGMENT (PER MILIND N. JADHAV, J.) :-

1. The present appeal under Section 260A of the Income Tax Act, 1961 takes exception to the order dated 28.09.2016 passed by the Income Tax Appellate Tribunal, 'J' Bench, Mumbai (hereinafter referred

to as "ITAT/Tribunal"), interalia, allowing the assessee's appeal i.e. ITA No.33/Mum/2015. The order has arisen out of the orders of CIT (Appeals)-39, Mumbai, in Appeal Nos. CIT-39/IT-14-15 and 16/2013-14 both of even date 02.10.2014. Assessments were finalised by DCIT, Central Circle 18 & 19, Mumbai for Assessment Years 2008-09, 2009-10 and 2010-11 under the provisions of Section 153A read with Section 143(3) of the Income Tax Act, 1961(hereinafter referred to as "the said Act") by order dated 25.03.2013. The impugned order is for the Assessment Year 2008-09.

2. The assessee is a widely held public limited company engaged in various activities including production of sponge iron, galvanized sheets and cold-rolled coils through its steel plants located at Dolve and Kalmeshwar in Maharashtra. The assessee filed original return of income on 30.09.2008 for Assessment Year 2008-09 declaring loss at Rs.104,17,70,752/- under the provisions of Section 139(1) of the said Act. The assessee's case was selected for scrutiny under Section 143(2) of the said Act on 03.09.2009.

3. During pendency of the assessment proceedings, a search was conducted under Section 132 of the said Act on the ISPAT Group of companies on 30.11.2010.

3.1. Following the search, notice under Section 153A of the Act was issued. In response, assessee filed return of income declaring total loss at Rs.419,48,90,102/- on 29.03.2012. In this return of income assessee made a new claim for treating gain on pre-payment of deferred VAT/sales tax on Net Present Value (NPV) basis for an amount of Rs.318,10,93,993/- as "capital receipt".

4. This new/fresh claim of assessee was disallowed by the Assessing Officer (hereinafter referred to as "AO) while finalising assessment under Section 143(3) read with Section 153A of the said Act vide the order dated 25.03.2013 by considering the same as "revenue receipt" instead of "capital receipt". The reasoning given by the AO was that the assessee had availed of sales tax deferral scheme and the State Government had permitted premature re-payment of deferred sales tax liability at the NPV basis. Therefore, according to the AO, assessee treated this as capital receipt even though the same was

credited to the assessee's profit and loss account being difference between the deferred sales tax and its NPV.

5. However, the primary question that arose before the AO was whether the claim which was not made in the earlier original return of income filed under Section 139(1) of the said Act, could be filed and considered in the subsequent return filed by the assessee in pursuance to notice under Section 153A of the said Act (which was consequent to search action conducted under Section 132 of the said Act). AO held that the assessee could not raise a new claim in the return filed under Section 153A which was not raised in the original return of income filed under Section 139(1). Thereafter, the claim was disallowed and was treated as "revenue receipt".

5.1 By order dated 15.04.2013, the first appellate authority i.e. the Commissioner of Income Tax (Appeals) (hereinafter referred to as "CIT(A)") upheld the order passed by the A.O. In further appeal, the I.T.A.T., however, by the impugned order dated 28.09.2016, allowed the assessee's appeal and set aside both the orders passed by the A.O. and C.I.T.(A).

5.2 Hence the appeal by the revenue.

6. Shri A.R. Malhotra, learned counsel appearing on behalf of the appellant opened his submissions by placing the admitted position on record. He submitted that in the original return dated 30.09.2008 filed under Section 139(1) of the said Act, no claim regarding gain on pre-payment of deferred VAT/sales tax on NPV basis was made by assessee. The assessee had in fact claimed the said as "revenue receipt". He submitted that now the assessee claimed this as "capital receipt" in the subsequent return which was filed by the assessee pursuant to compliance of statutory notice received under Section 153A on 29.03.2012, which was in consequence to search action initiated under Section 132 of the said Act on 30.11.2010. He, therefore, submitted that the impugned order dated 28.09.2016 needs to be examined closely in the realm of the aforesaid admitted facts.

6.1. Mr. A.R.Malhotra drew our attention to the proposed question of law in the present appeal which reads thus :

"Whether on the facts and in the circumstances of the case

and in Law, the Hon'ble Tribunal was justified in holding that in the return of Income filed u/s. 153 A of the I.T. Act, 1961 or even during the course of assessment proceedings undertaken u/s. 153A of the I.T.Act, 1961 the assessee can lodge new claims, deduction or exemption or relief which remained to be claimed in regular return of income?"

6.2. Shri A.R.Malhotra submitted that the Tribunal failed to interpret the language and applicability of the provisions of Section 153A in the facts and circumstances of the present case in its right perspective and true meaning. He submitted that it was incorrect on the part of the Tribunal to hold and conclude that the assessee could lodge new claims, deductions, exemption or relief (which the assessee had failed to claim in his regular return of income) which came to be filed by the assessee under the provisions of Section 153A of the said Act. He submitted that the conclusion arried at by the Tribunal that the assessee could make fresh claim in the return of income filed under Section 153A of the said Act was incorrect in law in as much as once the assessment got abated under the second proviso to Section 153A(1)of the said Act, the assessee was precluded from making any

new claim, deduction or exemption or relief which had remained to be claimed by the assessee in the original regular return of income which was filed earlier. He submitted that the assessee had treated the said receipts in the original return of income as "revenue receipt" and credited the same to his profit and loss account. Subsequently the assessee had however made a fresh claim in the return of income which came to be filed on 29.03.2012 under the provisions of Section 153A of the said Act in consequence of the search action, in which the assessee had treated the same receipts as "capital receipt". He submitted that this change of stand on the part of the assessee in the subsequent return should not have been allowed as it was contrary to the stand taken by the assessee in his original return of income. He fairly submitted that the original return of income filed under Section 139(1) of the said Act was processed under Section 143(1) of the Act, but notice under Section 143(2) of the said Act for scrutinizing the said return of income was pending as on the date of search conducted on the assessee.

6.3. Shri A.R.Malhotran also drew our attention to the order passed by the CIT(A) and more specifically to para Nos. 6 to 6.3 of the

said order. He submits that CIT(A) has correctly analyzed the provisions of Section 153A and come to the conclusion that the assessment or reassessment made pursuant to the notice under Section 153 A of the said Act "**are not *de novo* assessments.**" He submitted that CIT(A) has correctly held that the assessee could lodge new claim, deduction, exemption or relief which had remained to be claimed in the earlier regular return of income in the course of assessment proceedings undertaken under Section 153A of the said Act. He submitted that primary objection of the revenue was that the claim was not made by the assessee in the original return of income nor revised return of income was filed under Section 139(5) of the said Act. Therefore, it was not open to the assessee to use the proceedings initiated under Section 153A of the said act to lodge a fresh claim.

6.4. Shri A.R.Malhotra has clarified that the assessee had contended : (i) that there was no specific inhibition or restriction on the assessee to make a new claim, deduction, exemption and/or relief which was not claimed in the original assessment; (ii) that under Section 153A of the said Act, a return filed is deemed to be a return filed under Section 139(1) of the Act; (iii) that the provisions of the said Act

would apply to the same accordingly; (iv) that once assessment got abated, the assessee was at liberty to make such claim/ addition as per normal assessment proceedings because the assessment got abated and therefore the AO retained original jurisdiction as well as jurisdiction conferred on him under Section 153A of the said Act which was in consequence to search under Section 132 of the said Act.

6.5. He, however, fairly referred to the following two cases delivered by this Hon'ble Court, viz; ***CIT Vs Continental Warehousing Corporation (Nhava Sheva) Ltd. (2015) 374 ITR 645 (Bom) and DCIT Vs Eversmile Construction Co. Pvt. Ltd. 65 DTR 39*** in support of the proposition that the assessee was entitled to make a fresh claim in the return filed in pursuance to initiation of proceedings under Section 153A of the Act which were referred to by the Tribunal in the impugned order. This stand of Mr. Malhotra is appreciated.

7. Submissions made by learned standing counsel have been considered.

8. At the outset, we may advert to Section 153-A of the Act. It deals with assessment in case of search or requisition. Sub-section (1) is relevant. It says that notwithstanding anything contained in Sections

139, 147, 148, 149, 151 and 153, in the case of a person where a search is initiated under Section 132 or books of account, etc. are requisitioned under Section 132-A, after 31.05.2003, the assessing officer shall - (a) issue notice to such person for furnishing return of income in respect of each assessment year falling within six assessment years, within such time as may be specified and upon such return of income being filed, the provisions of the Act shall apply as if such return were a return required to be furnished under Section 139; and (b) assess or re-assess 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.

8.1. In other words, Section 153-A(1) provides that where a person is subjected to a search under Section 132 or his books of accounts, etc. are requisitioned under Section 132-A after 31.05.2003, the assessing officer is mandated to issue notice to such person to furnish return of income in respect of each assessment year falling within six assessment years immediately preceding the assessment year relevant to the previous year in which search is conducted or requisition is made. Such returns of income shall be treated to be

returns of income furnished under Section 139. Once returns are furnished, income is to be assessed or re-assessed for the six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made. Thus, once Section 153-A(1) is invoked, assessment for 6 assessment years immediately preceding the assessment year in which search is conducted or requisition is made becomes open to assessment or re-assessment. Two aspects are crucial here. One is use of the expression "notwithstanding" in sub-section (1); and secondly, that returns of income filed pursuant to notice under Section 153-A (1)(a) would be construed to be returns under Section 139. The use of *non obstante* clause in sub-section (1) of Section 153-A i.e., use of the expression "notwithstanding" is indicative of the legislative intent that provisions of Section 153-A(1) would have overriding effect over the provisions contained in Sections 139, 147, 148, 149, 151 and 153.

8.2. Having noticed the above, we may also refer to the second and the third proviso to Section 153-A(1). For the sake of convenience, the second and third proviso to Section 153A(1) of the said Act which is relevant is reproduced below and reads thus :

> ***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:*
>
> *[**Provided also** that the Central Government may by rules made by it and published in the Official Gazette (except in cases where any assessment or reassessment has abated under the second proviso), specify the class or classes of cases in which the Assessing Officer shall not be required to issue notice for assessing or reassessing the total income for six assessment years immediately preceding the assessment year relevant to the previous year in which search is conducted or requisition is made.*

8.3. The second proviso says that any assessment or re-assessment proceedings falling within the said period of six assessment years pending on the date of initiation of search under Section 132 or making of requisition under Section 132-A shall abate. The third proviso mentions that the Central Government may frame rules to specify such class or classes of cases in which the assessing officer shall not be required to issue notice for assessing or re-assessing the total income for the said six assessment years.

8.4. Reverting back to the second proviso what is to be noticed is that as per this proviso, any assessment or re-assessment in respect of any assessment year falling within the said period of six assessment years is pending on the date of initiation of search or making of

requisition, those assessment or re-assessment proceedings shall abate. In other words, pending assessment or re-assessment proceedings on the date of initiation of search or making of requisition shall abate.

8.5. That brings us to the crucial expression, which is 'abate'. The ordinary dictionary meaning of the word 'abate', as per Concise Oxford English Dictionary, Indian Edition, is to reduce or remove (a nuisance). Derivative of abate is abatement. In Black's Law Dictionary, Eighth Edition, 'abatement' has been defined to mean an act of eliminating or nullifying; the suspension or defeat of a pending action for a reason unrelated to the merits of the claim. In Supreme Court on Words and Phrases (1950-2008), "abating" has been defined to mean "an extinguishment of the very right of action itself"; to "abate", as applied to an action, is to cease, terminate, or come to an end prematurely.

9. Therefore, from a critical analysis of the provisions contained in Section 153-A(1) of the Act more particularly the key expressions as referred to above, it is evident that assessments or re-assessments pending on the date of initiation of search would stand

abated. Return of income filed by the person concerned for the six assessment years in terms of Section 153-A(1)(a) would be construed to be a return of income under Section 139 of the Act.

10. It will be trite to also refer to the judicial decisions referred to and relied upon by the assessee before the Tribunal, viz; in the case of Continental Warehousing Corporation (Nhava Sheva) Ltd. (supra) and which finds mention in the Tribunal's order and more specifically in paragraph 17 & 18 of the order which reads thus :

> *"17. On the other hand, while canvassing the lead arguments, Mr. Dastur, learned senior counsel appearing for the assessee - All Cargo Global Logistics Ltd. would submit that the power under section of the IT Act and its ambit and scope has rightly been interpreted in the impugned judgment. Mr. Dastur submits that the title of the section itself is indicative of the object and namely assessment in case of search or requisition. This section contains a non-obstante clause so as to not to restrict the powers which are conferred by virtue of section 153A in the Assessing Officer. However, the exercise of power under that provision is where search is initiated under section 132 or books of account or other documents or assets are requisitioned under section 132A of the Act after 31st May, 2003. Then the Assessing Officer shall 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) of sub-section (1) of section 153A and clause (b) postulates assessment or reassessment of the total income of six years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made. The first proviso mandates that the Assessing Officer shall assess or reassess the total income in respect of each assessment year falling within such six assessment years. The second proviso, according to Mr. Dastur, is important because the assessment or reassessment, if any, relating to any*

assessment year falling within the period of six assessment years referred to in sub-section (1) 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. Equally, sub-section (2) of section 153A deals with a situation where any proceeding initiated or any order of assessment or reassessment is made under sub-section (1) but that has been annulled in appeal or any other legal proceeding, then, notwithstanding anything contained in sub-section or section 153, the assessment or reassessment relating to any assessment year which has abated under the second proviso to sub-section (1), shall stand revived with effect from the date of receipt of the order of such annulment by the Commissioner. Further, proviso to this sub-section says that such revival shall cease to have effect if the order of annulment is set aside.10

18. Mr. Dastur would submit that the Revenue is protected completely in this case. The power is of drastic nature and has to be exercised within constitutional parameters. However, though the second proviso to sub-section (1) of section 153A would not apply in the first three years of this case, yet, as far as the second three year period is concerned, the assessments were pending. The proceedings in relation thereto abate. Now the entire assessment in relation to the second phase of three years can be made but the foundation for all this and the action under section 153A is a search under section 132 or requisition of books of account and other assets under section 132A.

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

In any event, the issue stands concluded by a Division Bench judgment of this Court rendered in the case of Commissioner of Income Tax (Central) Nagpur vs. M/s. Murli Agro Products Limited in Income Tax Appeal No.36 of 2009 decided on 29th October, 2010. It is, therefore, apparent that the law laid down by this Court is binding on the Revenue. If that is binding then the questions of law and with regard to applicability of section 153A need to be answered against the Revenue and in favour of the

assessee".

11. It will also be fruitful to extract the relevant findings of the Division Bench of this Court in the case of Continental Warehousing Corporation (Nhava Sheva) Ltd. (Bom.) (supra), para Nos.27, 28, 31 & 36 which read thus :

> *"27. However, the Revenue's argument was that once proceedings under section 153A of the Act are initiated, then, the original assessment / reassessment order already passed in the assessment years covered under section 153A stand abated and the Assessing Officer is obliged to pass fresh assessment / reassessment orders and determine the total income afresh for those assessment years. Thus, earlier assessment orders abate as the proceedings in which they are passed have no legal consequence was the argument. Once the notice under section 153A was issued and an assessment order passed pursuant thereto, it is that order which was erroneous and prejudicial to the interest of the Revenue.*
>
> *28. In dealing with those arguments, the Division Bench outlined the ambit and scope of the powers conferred by section 153A and observed thus :*

"8) We find it difficult to accept the above contention raised on behalf of the revenue. The object of inserting Sections 153A, 153B and 153C by Finance Act, 2003 by discarding the existing provisions relating to search cases contained in Chapter XIV B of the Income-tax Act, as stated in the Memorandum explaining the provisions in the Finance Bill 2003 (see 260 ITR (St) 191 at 219) was that under the existing provisions relating to search cases, often disputes were raised on the question, as to whether a particular income could be treated as `undisclosed income' or whether a particular income could be said to be relatable to the material found during the course of search, etc. which led to prolonged litigation. To overcome that difficulty, the legislature by Finance Act 2003, decided to discard Chapter XIV B provisions and introduce Sections 153A, 153B and 153C in the IT Act.

9) What Section 153A contemplates is that, notwithstanding the regular provisions for assessment/reassessment contained in the IT Act, where search is conducted under Section 132 or requisition is made under Section 132A on or after 31/5/2003 in the case of any person, the Assessing Officer shall issue notice to

such person requiring him to furnish return of income within the time stipulated therein, in respect of six assessment years immediately preceding the assessment year relevant to the previous year in which the search is conducted or requisition is made and thereafter assess or reassess the total income for those assessment years. The second proviso to Section 153A provides for abatement of assessment/reassessment proceedings which are pending on the date of search/requisition. Section 153A (2) provides that when the assessment made under Section 153(A)(1)is annulled, the assessment or reassessment that stood abated shall stand revived.

10) Thus on a plain reading of Section 153A of the Income-tax Act, 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 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 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 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 assessment year 1998-99 was finalised on the 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 finalised 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 I.T. 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 153 A 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 80 HHC was erroneous. In such a case, the A.O. while passing order under Section 153A read with Section 143(3) could not have disturbed the assessment

order finalised on 29.12.2000 relating to Section 80 HHC deduction and consequently the C.I.T. could not have invoked jurisdiction under Section 263 of the Act."

31. We, therefore, hold that 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. The Special Bench in that regard held as under :

"48. The provision under section 153A is applicable where a search or requisition is initiated after 31.5.2003. In such a case the AO is obliged to issue notice u/s 153A in respect of 6 preceding years, preceding the year in which search etc. has been initiated. Thereafter he has to assess or reassess the total income of these six years. It is obligatory on the part of the AO to assess or reassess total income of the six years as provided in section 153A(1)(b) and reiterated in the 1 st proviso to this section. The second proviso states that the assessment or reassessment pending on the date of initiation of the search or requisition shall abate. We find that there is no divergence of views in so far as the provision contained in section 153A till the 1 st

proviso. The divergence starts from the second proviso which states that pending assessment or reassessment on the date of initiation of search shall abate. This means that an assessment or reassessment pending on the date of initiation of search shall cease to exist and no further action shall be taken thereon. The assessment shall now be made u/s 153A. The case of Ld. Counsel for the assessee is that necessary corollary to this provision is that completed assessment shall not abate. These assessments become final except in so far and to the extent as undisclosed income is found in the course of search. On the other hand, it has been argued by the Ld. Standing Counsel that abatement of pending assessment is only for the purpose of avoiding two assessments for the same year, one being regular assessment and the other being assessment u/s 153A. In other words these two assessments coalesce into one assessment. The second proviso does not contain any word or words to the effect that no reassessment shall be made in respect of a completed assessment. The language is clear in this behalf and therefore literal interpretation should be followed. Such interpretation does not produce manifestly absurd or unjust results as section 153A (i)(b) and the first proviso clearly

provide for assessment or reassessment of all six years. It may cause hardship to some assesses where one or more of such assessments has or have been completed before the date of initiation of search. This is hardly of any relevance in view of clear and unambiguous words used by the legislature. This interpretation does not cause any absurd etc. results. There is no casus omissus and supplying any would be against the legislative intent and against the very rule in this behalf that it should be supplied for the purpose of achieving legislative intent. The submissions of the Ld. Counsels are manifold, the foremost being that the provision u/s 153A should be read in conjunction with the provision contained in section 132(1), the reason being that the latter deals with search and seizure and the former deals with assessment in case of search etc, thus, the two are inextricably linked with each other.

49. Before proceeding further, we may now examine the provision contained in sub-section (2) of section 153, which has been dealt with by Ld. Counsel. It provides that if any assessment made under sub- section (1) is annulled in appeal etc., then the abated assessment revives. However, if such annulment is further nullified, the assessment again

abates. The case of the Ld. Counsel is that this provision further shows that completed assessments stand on a different footing from the pending assessments because appeals etc. proceedings continue to remain in force in case of completed assessments and their fate depends upon subsequent orders in appeal. On consideration of the provision and the submissions, we find that this provision also makes it clear that the abatement of pending proceedings is not of such permanent nature that they cease to exist for all times to come. The interpretation of the Ld. Counsel, though not specifically stated, would be that on annulment of the assessment made u/s 153(1), the AO gets the jurisdiction to assess the total income which was vested in him earlier independent of the search and which came to an end due to initiation of the search.

50. The provision contained in section 132 (1) empowers the officer to issue a warrant of search of the premises of a person where any one or more of conditions mentioned therein is or are satisfied, i.e. - a) summons or notice has been issued to produce books of account or other documents but such books of account or documents have

not been produced, b) summons or notice has been or might be issued, he will not produce the books of account or other documents mentioned therein, or c) he is in possession of any money or bullion etc. which represents wholly or partly the income or property which has not been and which would not be disclosed for the purpose of assessment, called as undisclosed income or property. We find that the provision in section 132 (1) does not use the word "incriminating document". Clauses (a) and (b) of section 132(1) employ the words "books of account or other documents". For harmonious interpretation of this provision with provision contained in section 153A, all the three conditions on satisfaction of which a warrant of search can be issued will have to be taken into account.

51. Having held so, an assessment or reassessment u/s 153A arises only when a search has been initiated and conducted. Therefore, such an assessment has a vital link with the initiation and conduct of the search. We have mentioned that a search can be authorised on satisfaction of one of the three conditions enumerated earlier. Therefore, while interpreting the provision contained in section 153A,

all these conditions will have to be taken into account. With this, we proceed to literally interpret to provision in 153A as it exists and read it alongside the provision contained in section 132(1).

52. The provision comes into operation if a search or requisition is initiated after 31.5.2003. On satisfaction of this condition, the AO is under obligation to issue notice to the person requiring him to furnish the return of income of six years immediately preceding the year of search. The word used is "shall" and, thus, there is no option but to issue such a notice. Thereafter he has to assess or reassess total income of these six years. In this respect also, the word used is "shall" and, therefore, the AO has no option but to assess or reassess the total income of these six years. The pending proceedings shall abate. This means that out of six years, if any assessment or reassessment is pending on the date of initiation of the search, it shall abate. In other words pending proceedings will not be proceeded with thereafter. The assessment has now to be made u/s 153A(1)(b) and the first proviso. It also means that only one assessment will be made under the aforesaid provisions as the two

proceedings i.e. assessment or reassessment proceedings and proceedings under this provision merge into one. If assessment made under sub-section (1) is annulled in appeal or other legal proceedings, then the abated assessment or reassessment shall revive. This means that the assessment or reassessment, which had
abated, shall be made, for which extension of time has been provided under section 153B.

53. The question now is - what is the scope of assessment or reassessment of total income u/s 153A (1)(b) and the first proviso ? We are of the view that for answering this question, guidance will have to be sought from section 132(1). If any books of account or other documents relevant to the assessment had not been produced in the course of original assessment and found in the course of search in our humble opinion such books of account or other documents have to be taken into account while making assessment or reassessment of total income under the aforesaid provision. Similar position will obtain in a case where undisclosed income or undisclosed property has been found as a consequence of search. In other words, harmonious

interpretation will produce the following results :-

a) In so far as pending assessments are concerned, the jurisdiction to make original assessment and assessment u/s 153A merge into one and only one assessment for each assessment year shall be made separately on the basis of the findings of the search and any other material existing or brought on the record of the AO,

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

54. It may be mentioned here that Ld. Counsel for All Cargo Global Logistics Ltd. was questioned about the scope of pending assessments as it was his contention that all six assessments are to be made, if necessary, on the basis of undisclosed income discovered in the course of search. He was specifically questioned about the jurisdiction of the AO

to make original assessment along with assessment u/s 153A, merging into one. However he took an evasive view submitting that this question need not be decided in his case although the question of jurisdiction u/s 153A was vehemently pressed on account of which ground No.1 in the appeal for assessment year 2004-05 was admitted as additional ground. He also wanted the additional ground to be retained in case of any future contingency. "

36. Similar is the case with the Division Bench judgment of the High Court of Karnataka at Bangalore. There as well a real estate firm was the assessee. A return of income was filed and when an order under section 143(3) of the Act came to be passed on 31st December, 2010, for assessment year 2008-09 that a search took place in the premises of the assessee on 12 th April, 2011. In the course of search, incriminating material leading to undisclosed income was seized. Therefore, the proceedings under section 153A of the Act calling upon the assessee to file return of income under section 153A(1)(a) came to be initiated by a notice dated 13 th January, 2012. Return of income was filed pursuant to receipt of such notice and for six years as required by the provision. When this return was under consideration on 14th March, 2013, the

Commissioner of Income Tax initiated proceedings under section 263 of the Act on the ground that the order dated 31 st December, 2010 in relation to the return of income for assessment year 2008-09 and holding that the same is erroneous and prejudicial to the interest of the Revenue came to be passed. The assessee filed his objection but the Commissioner maintained his action under section 263. That is how the aggrieved assessee carried the matter in appeal to the Tribunal and before the Tribunal it was contended that once section 263 of the Act has been invoked during the pendency of proceedings under section 153A of the Act, then, that was impermissible. That was impermissible for the assessments including for the assessment year 2008-09 stand reopened. Once they are reopened, then, there is no order of assessment in force and in regard to which any action under section 263 of the IT Act can be initiated. It is in dealing with this argument and which was negatived by the Tribunal that all the observations of the High Court of Karnataka have been made. In paragraphs 5 and 6, the arguments have been noted and thereafter the provision has been reproduced. In paragraph 9, extensive reference has been made to the judgment in Anil Kumar Bhatia of the High Court of Delhi (supra) and then the following observations in paragraphs 10 and 11 are made :

"10. Section 153A of the Acts start with a non obstante clause. The fetters imposed upon the Assessing Officer by the strict procedure to assume jurisdiction to reopen the assessment under Sections 147 and 148, have been removed by the non obstante clause with which sub section (1) of Section 153A opens. The time-limit within which the notice under Section 148 can be issued, as provided in Section 149 has also been made inapplicable by the non obstante clause. Section 151 which requires sanction to be obtained by the Assessing Officer by issue of notice to reopen the assessment under Section 148 has also been excluded in a case covered by Section 153A. The time-limit prescribed for completion of an assessment or reassessment by Section 153 has also been done away with in a case covered by Section 153A. With all the stops having been pulled out, the Assessing Officer under Section 153A has been entrusted with the duty of bringing to tax the total income of an assessee whose case is covered by Section 153A, by even making reassessments without any fetters, if need be. Therefore, it is clear even if an assessment order is passed under Section 143(1) or 143(3)

of the Act, the Assessing Officer is empowered to reopen those proceedings and reassess the total income taking note of the undisclosed income, if any, unearthed during the search. After such reopening of the assessment, the Assessing Officer is empowered to assess or reassess the total income of the aforesaid years. The condition precedent for application of Section 153A is there should be a search under Section 132. Initiation of proceedings under Section 153A is not dependent on any undisclosed income being unearthed during such search. The proviso to the aforesaid section makes it clear the assessing officer shall assess or reassess the total income in respect of each assessment year falling within such six assessment years. If any assessment proceedings are pending within the period of six assessment years referred to in the aforesaid sub-section on the date of initiation of the search under Section 132, the said proceeding shall abate. If such proceedings are already concluded by the assessing officer by initiation of proceedings under Section 153A, the legal effect is the assessment gets reopened. The block assessment roped in only the undisclosed income and the regular assessment proceedings were preserved, resulting in multiple

assessments. Under Section 153A, however, the Assessing Officer has been given the power to assess or reassess the "total income" of the six assessment years in question in separate assessment orders.The Assessing Officer is empowered to reopen those proceedings and reassess the total income, taking note of the undisclosed income, if any, unearthed during the search. He has been entrusted with the duty of bringing to tax the total income of an assessee whose case is covered by Section 153A, by even making reassessments without any fetters. This means that there can be only one assessment order in respect of each of the six assessment years, in which both the disclosed and the undisclosed income would be brought to tax. When once the proceedings are initiated under Section 153A of the Act, the legal effect is even in case where the assessment order is passed it stands reopened. In the eye of law there is no order of assessment. Re-opened means to deal with or begin with again. It means the Assessing Officer shall assess or reassess the total income of six assessment years. Once the assessment is reopened, the assessing authority can take note of the income disclosed in the earlier return, any undisclosed income found during search or and also

any other income which is not disclosed in the earlier return or which is not unearthed during the search, in order to find out what is the "total income" of each year and then pass the assessment order. Therefore, the Commissioner by virtue of the power conferred under Section 263 of the Act gets no jurisdiction to initiate proceedings under the said provision because the condition precedent for initiating proceedings under Section 263 is any order passed under the Act by the Assessing Officer is erroneous insofar as it is prejudicial to the interest of the revenue. Once the order passed by the Assessing Officer gets reopened, there is no order which can be said to be erroneous insofar as it is prejudicial to the interest of the revenue which confers jurisdiction on the Commissioner to exercise the power of the jurisdiction."

12. In this perspective we are called upon to decide the question projected by the revenue as substantial question of law arising from the order of the Tribunal. We have considered the grounds of appeal and the orders passed by the AO, CIT(A) and the Tribunal with the assistance of learned counsel for the Appellant. From a reading of the above it is clear that Section 153A of the said Act, provides for the

procedure for assessment in search cases. As alluded to hereinabove, the said section starts with a non-obstante clause stating that it is, "notwithstanding anything contained in section 147, 148 and 149……." Further sub Section(a) of Section 153A(1) provides for issuance of notice to the persons searched under Section 132 of the Act to furnish a return of income. However, the second proviso to Section 153 A of the said act makes it clear that assessment relating to any assessment year filed within a period of the six assessment years pending on the date of search under Section 132 of the Act shall abate. Thus if on the date of initiation of search under Section 132, any assessment proceeding relating to any assessment year falling within the period of the said six assessment years is pending, the same shall stand abated and the Assessing Authority cannot proceed with such pending assessment after initiation of search under section 132 of the said Act.

13. In the present case, search was conducted on the assessee on 30.11.2010. At that point of time assessment in the case of assessee for the assessment year 2008-09 was pending scrutiny since notice under Section 143(2) of the Act was issued and assessment was not completed.

Therefore, in view of the second proviso to Section 153A of the said Act, once assessment got abated, it meant that it was open for both the parties, i.e. the assessee as well as revenue to make claims for allowance or to make disallowance, as the case may be, etc. That apart, assessee could lodge a new claim for deduction etc. which remained to be claimed in his earlier/ regular return of income. This is so because assessment was never made in the case of the assessee in such a situation. It is fortified that once the assessment gets abated, the original return which had been filed looses its originality and the subsequent return filed under Section 153A of the said Act (which is in consequence to the search action under Section 132) takes the place of the original return. In such a case, the return of income filed under Section 153A(1) of the said Act, would be construed to be one filed under Section 139(1) of the Act and the provisions of the said Act shall apply to the same accordingly. If that be the position, all legitimate claims would be open to the assessee to raise in the return of income filed under Section 153A(1).

14. We would further like to emphasis on the judgment passed by this Court in the case of ***Continental Warehousing (supra)*** which

also explains the second proviso to Section 153A(1). The explanation is that pending assessment or reassessment on the date of initiation of search if abated, then the assessment pending on the date of initiation of search shall cease to exist and no further action with respect to that assessment shall be taken by the AO. In such a situation the assessment is required to be undertaken by the AO under Section 153A(1) of the said Act.

15. In view of the above, we are in agreement with the findings given by the Tribunal in respect of allowing of the assessee's appeal in paragraph -14 of the order under challenge dated 28.09.2016, which reads thus :

> *"14. From the above discussion and precedence, the scheme of assessment u/s 153A of the Act in case of search, the AO shall issue notice to searched 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) of sub-section (1) of section 153A and clause (b) postulates assessment or reassessment of the total income of six years immediately preceding the assessment year relevant to the previous year in which such search is conducted. The first proviso mandates that the AO shall assess or reassess the total income in respect of each assessment year falling within such six assessment years. The second proviso postulates that the assessment or reassessment, if any, relating to any assessment year falling within the period of six assessment years referred to in sub-section (1) is pending on the date of initiation of the search u/s 132 of the Act shall abate. In the present case*

> *before us, however, though the second proviso to sub-section (1) of section 153A would not apply in the first three years of this case, yet, as far as the second three year period is concerned (which are pending before us), the assessments were pending. The proceedings in relation thereto abate. Now the entire assessment in relation to the second phase of three years can be made. The pending assessment in that case may be undertaken u/s 153A of the Act. The abatement of pending assessment is for the purpose of avoiding two assessments for the same year i.e. one being regular assessment and the other being search assessment u/s 153A of the Act. In other words, these two assessments merge into one assessment. It means that completed assessments stand on different footing from the pending assessments. Hence, in so far as pending assessments are concerned, the jurisdiction to make original assessment and assessment u/s 153A of the Act merge into one and in that case only one assessment for the remaining set of years, where assessment is pending, is to be made separately on the basis of search materials and the regular material existing or brought on record before the AO/Revenue. It means that the assessee can make any new claim in the return of income filed u/s 153A of the Act or even during the course of assessment proceedings undertaken u/s 153A of the Act. In our view, and in view of the second proviso to Section 153A (1) of the Act, once assessment get abated it is opened both way i.e. for the Revenue to make any additions apart from seized material even regular items declared in the return can be subject matter if there is doubt about the genuineness of those items and similarly the assessee also can lodge new claim, deduction or exemption or relief which remained to be claimed in regular return of income, because assessment was never made in the case of the assessee in such situation. Hence, we allow this issue of assessee "s appeal."*

16. From the above we conclude that in view of the second proviso to Section 153A(1) of the said Act, once assessment gets abated, it is open for the assessee to lodge a new claim in a proceeding under Section 153A(1) which was not claimed in his regular return of

income, because assessment was never made/finalised in the case of the assessee in such a situation.

17. We are therefore of the considered opinion that the present appeal filed by the Revenue does not give rise to any substantial question of law. Thus, the appeal filed by the Revenue is found to be devoid of merit and the same is liable to be dismissed.

18. The appeal filed by the Revenue is accordingly dismissed with no order as to costs.

(MILIND N. JADHAV, J.) **(UJJAL BHUYAN,J.)**