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IN THE INCOME TAX APPELLATE TRIBUNAL "I" BENCH, MUMBAI
BEFORE SHRI D. KARUNAKARA RAO, ACCOUNTANT MEMBER
AND SHRI SANDEEP GOSAIN, JUDICIAL MEMBER
I.T.A. No. 173/M/2015 **(AY: 2005-2006**)
I.T.A. No. 174/M/2015 **(AY: 2006-2007**)
I.T.A. No. 175/M/2015 **(AY: 2007-2008**)
I.T.A. No. 176/M/2015 **(AY: 2008-2009**)
I.T.A. No. 177/M/2015 **(AY: 2009-2010**)

M/s. Ideal Appliances Co. Pvt. Ltd., 1117, Maker Chambers V, 11th Floor, Nariman Point, Mumbai – 400 021.	बनाम/ Vs.	DCIT- Central Circle-44, Mumbai.
स्थायी लेखा सं./PAN : AAAC10385H		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से / Appellant by :	Shri Rahul Hakani
प्रत्यर्थी की ओर से/ Respondent by :	Shri Pratap Singh, DR

सुनवाई की तारीख /Date of Hearing : 01.10.2015
घोषणा की तारीख /Date of Pronouncement :31.12.2015

आदेश / O R D E R

PER D. KARUNAKARA RAO, AM:

There are **five** appeals under consideration pertaining to the AYs 2005-06 to 2009-10. Since, the issues raised in all these appeals are connected, therefore, for the sake of convenience they are clubbed, heard together and disposed of in this consolidated order. Appeal wise adjudication is given in the following paras of this order.

2. The **legal issue** raised in all these appeals is similar and the adjudication of the same will decide the fate of the instant appeals. Considering the same, we shall proceed to adjudicate the legal issue and the relevant grounds raised in these appeals read as under:

> *"1. The Ld CIT (A) failed to appreciate the fact that no incriminating documents / evidences were found during the course of search of third party, and hence, recomputing the income u/s 153A is bad in law and liable to be quashed.*

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2. *The Ld CIT (A) failed to appreciate the fact that original assessment was made u/s 143(3) vide order 31st August 2007 after considering all the documents and materials on record and due application of mind and hence recomputing the income by merely changing head of income for the said year under the grab of section 153A based on same documents and materials, is bad in law and order is liable to be quashed.*

3. *The Ld CIT (A) erred in confirming the action of the AO reassessing the income u/s 143(3) r.w.s 153A, without appreciating the fact that only pending assessment abet and not the completed assessments and hence the order u/s 143(3) r.w.s 153A is bad in law and liable to be quashed.*

4. *The Ld CIT (A) erred in not allowing the decision of jurisdictional High Court wherein it was held that no addition can be made u/s 153A if no incriminating material / documents are found during search. Therefore, the order of the CIT (A) is bad in law."*

3. Briefly stated relevant facts of the case are that the assessee is engaged in the business of financing and letting of cars and commercially exploiting properties. Assessee filed the return of income on 29.10.2005 declaring the total income of Rs. 26,52,740/- for the AY 2005-06. As a result of the scrutiny assessment, assessee's income was determined at Rs. 26,99,231/-. A search action u/s 132 of the Act was conducted on 6.10.2010 at the premises of M/s. Ideal Appliance Company Private Limited, Mumbai. Subsequently, assessee was issued notice u/s 153A of the Act. In response to the said notice u/s 153A of the Act, assessee filed the revised return of income declaring the total income of Rs. 26,93,886/- on 11.2.2013. In the process, AO issued notice u/s 142(1) of the Act on 14.1.2013. After considering the assessee's submissions and relevant documents, AO passed the order u/s 143 (3) r.w.s 153A of the Act and the assessed income is determined at Rs. 45,41,618/-. Aggrieved with the said decision of the AO, assessee carried the matter in appeal before the first appellate authority.

4. During the proceedings before the first appellate authority, assessee contended that only pending assessments can abet and not the completed assessments, and therefore, the AO's order made u/s 143(3) r.w.s 153A of the Act is unsustainable and bad in law. Assessee further contended that, where the original assessment was made u/s 143(3) of the Act after appreciating all the documents / material on record and with due application of mind, re-computing the income u/s 153A basing on the same documents is bad in law and liable to be quashed. Assessee further submitted that since, no incriminating material / evidences were found during the course of search, therefore, no addition can be made u/s 153A of the Act. In this regard, assessee also placed reliance on the decision of the ITAT,

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Special Bench in the case of All Cargo Global Logistics Ltd vs. DCIT [2012] 137 ITD (Mum.)(SB). Assessee also contended the merits of the additions made by the AO. After considering the submissions of the assessee, CIT (A) dismissed the legal issue raised before him and partly allowed the appeal on merits. Again aggrieved with the said decision of the CIT (A), assessee is in appeal before the Tribunal.

5. During the proceedings before us, Ld Counsel for the assessee narrated the brief facts of the case. At the outset, Ld Counsel for the assessee demonstrated that all appeals under consideration have a legal issue and the same is summarized *as and when the assessments involved are non-abated assessment (either regular assessments are completed u/s 143(3) and the quantum proceedings are not pending or the due date for issue of notice us 143(2) has expired, the additions, if any, in the search assessment can be made basing on any incriminating material seized u/s 132 of the Act and forwarded to the concerned AO as per the procedure laid down in the Act.* Drawing our attention to each of the assessment order and each of the additions made by the AO in all the AYs under consideration, Ld Counsel for the assessee demonstrated that there is no reference to the seized material in any of the additions made by the AO in all the 5 AYs. Further, he mentioned that the additions made were actually in the nature of routine additions which are made under regular assessment. Ld Counsel for the assessee also argued that such additions are unsustainable in law. In support of his contention, Ld Counsel for the assessee filed voluminous papers books and demonstrated that the additions made by the AO are unsustainable in law and no incriminating material was found during the search. Ld Counsel for the assessee relied on various decisions of the Tribunal viz., the decision of the Tribunal in the case of **Shri Govind Agarwal v. ACIT** being ITA No: 3389/Mum/2011 dated 10.01.2014 (copy already on record) wherein the Hon'ble Tribunal held that **in case of non-abated years, addition can only be made with respect to seized material found during the course of search**. While arriving at this conclusion, the Hon'ble Tribunal has relied upon the order of the Hon'ble Tribunal in the case of **All Cargo Global Logistics v. Addl.CIT** 137 ITD 287(Mum)(SB) which has since been upheld by the Hon'ble Bombay High Court referred above. Hence, as per the decision of the Hon'ble Bombay high Court and the order of the Hon'ble Tribunal, **no addition can be made on account of notional**

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interest and deemed dividend since no incriminating material has been found during the course of search. In view of the above, it is the submission of the Ld AR that on the basis of the legal propositions, the additions made by the Assessing Officer are bad in law and hence are to be deleted.

6. On the other hand, Ld DR relied on the order of the AO and the CIT (A). Further, on the legal propositions, Ld DR has nothing to controvert except relying on the decisions of the Revenue Authorities.

7. We have heard both the parties and perused the orders of the Revenue Authorities as well as the cited decision of the Tribunal in the case of **Shri Govind Agarwal v. ACIT** being ITA No: 3389/Mum/2011 dated 10.01.2014 (supra); **All Cargo Global Logistics v. Addl.CIT** (supra); **SKS Ispat and Power Limited vs. DCIT** CC 45 (ITA 8746/M/12 and ITA 8747/M/12) (supra) as well as the judgment of the Hon'ble Bombay High Court in the cases of **CIT v. All Cargo Global Logistic** (374 ITR 645) (supra), copies of which are placed on record. On perusal of the said decisions, we find they are relevant for the proposition that "*when no assessment has abated, the question of making any addition or making disallowance which are not based on only material found during the search is bad in law".* In this regard, we find it relevant to extract the relevant paras from the decision of the Tribunal in the case of Shri Govind Agarwal (supra) and the same is as follows:

> *"12. We have heard the parties and their divergent stands on the legal issue and the validity of the instant assessment/reassessment with the **routine additions u/s 68** and section 14A of the Act based on the accounted transactions. The instant case for the AY 2002-03 deals with the case of disturbing the 'completed assessment'. Earlier the assessment was completed u/s 143(1) of the Act. Completeness of the summary assessment is considered and held in favour of the assessee vide many judgments cited above. In the assessment u/s 153A, the AO made (i) **Addition u/s 68** on account of artificially inflated investment in house duly disclosed in the balance sheet of the assessee Rs.31,33,070/-; and (ii) disallowance u/s 14A: Rs. 23,31,469/-. Admittedly, there is no incriminating material before the AO to support the above additions. The valuation report, which is garnered by the authorities constitutes mere estimates and the provisions of section 132 is not required to obtain such report from the DVO. As such, for making aforesaid additions of Rs 31,33,070/-, AO has not used even the said valuation report and the AO disallowed what is reported in the books. Similar is the case with the additions u/s 14A of the Act. Therefore, undisputedly, the impugned quantum additions are made merely based on the entries in the accounted books and certainly not based on either the unaccounted books of accounts of the assessee or books not produced to the AO earlier or the incriminating material gathered by the investigation wing of the revenue. Considering the legal propositions place before us by the assessee's counsel, we are of the opinion, such assessments or additions are unsustainable in law.*

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13. For the sake completeness of the assessee, we insert here some of the extracts from relevant judgments and they are:

A. [2013 36 taxmann.com 523 (Rajasthan) in the case of Jai Steel (India) vs. ACIT - From Held portion:

*….The requirement of assessment or reassessment under the said section has to be read in the context of sections 132 or 132A, inasmuch as, **in case nothing incriminating is found on account of such search or requisition, then the question of reassessment of the concluded assessments does not arise**, which would require more **reiteration** and it is only in the context of the abated assessment under second proviso which is required to be assessed.*

…….
…….
***Para 26 of the Judgment:** The plea raised on behalf of the assessee that as the first proviso provides for assessment or reassessment of the total income in respect of each assessment year falling within the six assessment years, is merely reading the said provision in isolation and not in the context of the entire section. The words 'assess' or 'reassess' have been used at more than one place in the Section and a harmonious construction of the entire provision would lead to an irresistible conclusion that the word 'assess' has been used in the context of an abated proceedings and reassess has been used for completed assessment proceedings, which would not abate as they are not pending on the date of initiation of the search or making of requisition and which would also necessarily support the interpretation that for the completed assessments, **the same can be tinkered only based on the incriminating material found** during the course of search or requisition of documents.*

B. *[2012] 28 Taxmann.com 328 (Mumbai –Trib.) in the case of Gurinder Singh Bava vs. DCIT*

***….** Whether since assessment under section 153A was passed by Assessing Officer on basis of material available in return of income and there was no reference to any incriminating material found during search and since no assessment was abated, assessment under section 153A was to be quashed being made without jurisdiction available under section 153A - Held, yes [Para 6.2] [In favour of assessee]*

***Para 6.1 of the Order:** The Special bench in the case of Alcargo Global Logistics Ltd. (supra), has held that provisions of section 153A come into operation if a search or requisition is initiated after 31.5.2003 and on satisfaction of this condition, the AO is under obligation to issue notice to the person requiring him to furnish the return of income for six years immediately preceding the year of search. The Special Bench further held that in case assessment has abated, the AO retains the original jurisdiction as well as jurisdiction under section 153A for which assessment shall be made for each assessment year separately. Thus in case where assessment has abated the AO can make additions in the assessment, even if no incriminating material has been found. But in other cases the Special Bench held that the assessment under section 153A can be made on the basis of incriminating material which in the context of relevant provisions means books of account and other documents found in the course of search but not produced in the course of original assessment and undisclosed income or property disclosed during the course of search. In the present case, the assessment had been completed under summary scheme under section 143(1) and time limit for issue of notice under section 143(2) had expired on the date of search. Therefore, there was no assessment pending in this case and in such a case there was no question of abatement. Therefore, addition could be made only on the basis of incriminating material found during search.*

B. All Cargo Global Logistics Ltd. v. Deputy Commissioner of Income-tax, Central Circle-44 [2012] 23 taxmann.com 103 (Mum.) (SB)

***Para 58 of SB decisions:** Thus, question No.1 before us is answered as under :*

(a) In assessments that are abated, the AO retains the original jurisdiction as well as jurisdiction conferred on him u/s 153A for which assessments shall be made for each of the six assessment years separately ;

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(b) ***In other cases***, *in addition to the income that has already been assessed, the assessment u/s 153A will be made* ***on the basis of incriminating material***, *which in the context of relevant provisions means - (i) books of account, other documents, found in the course of search but not produced in the course of original assessment, and (ii) undisclosed income or property discovered in the course of search.*

14. Thus, in case of the completed assessments either u/s 143(1) or 143(3), the above extracts are uniform in advocating against making additions in routine manner in the assessments made u/s 153A of the Act when there is no incriminating material gathered in the search action. Statutory notice u/s 153A of the Act can also be issued to reiterate the returned income or for making additions based on the incriminating material or unproduced books of account. Otherwise, additions made in routine matter as in the present appeal are not sustainable. Further, for the sake completeness of the order, we have perused the orders/judgments relied upon by Ld DR for the revenue and found they are ***distinguishable*** *on facts for one reason or other. To start with, we have perused the judgment of Honble Hon'ble Delhi High Court in the case of* ***Madugula Venu*** *(supra) and find that, though explained the provisions in plain language, it does not dealt with the relevance or factum of incriminating material. Further, the judgment of Andhra Pradesh High Court in the case of* ***Gopal Lal Bhadruka*** *(supra) is not on the notices issued u/s 153A of the Act and the same is pronounced in the context of the notice u/s 153C of the Act. Further, also, the Coordinate Bench decision in the case of* ***Scope (P) Ltd*** *(supra) has granted relief to the assessee though the notice issued u/s 153A of the Act was upheld. However, this order has not considered the then existing decision of the Coordinate Bench decision in the case of* ***Pratibha Industries Ltd*** *(supra) which is relevant for the proposition that the completed assessment may not be disturbed in the absence of any incriminating material specific to the assessee. In fact, all these judgments take spirit from the Special Bench decision in the case of* ***All Cargo Global Logistics Ltd*** *(supra), which is relevant for the proposition that the assessment u/s 153A will be made on the basis of incriminating material such as books of accounts, other documents found in the search but not produced in the course of original assessment and undisclosed income or property discovered in the course of the search.*

15. .....

16. In these circumstances, we have no doubt about the absence of any seized material which are incriminating in nature to back the additions u/s 68 or 14A of the Act made in the assessment made u/s 153A of the Act for the AY under consideration. Regarding the DVO's report gathered during the search action, we find that the report suffers from certain deficiencies qua cost of construction of residential property and the land obtained thereto. The said report constitutes an opinion of the third party which cannot be used by the AO for making additions and such additions, if any, cannot be sustained legally. As such, we find that the AO has not used the said report of the DVO also for making additions of Rs. 31,33,007/-, the difference between accounted amount of Rs. 46,13,007/-, claimed as the amount spent on construction of house and acquisition of land as on 31.3.2002 ***minus*** *Rs. Rs. 14.8 lakhs, the investment made on the land plots. AO made addition for assessee's failure to provide evidences / bills in support of the claim of expenditure on the construction. It the presumption of the AO that the plots since acquired only by July 2001, the assessee would not have spend Rs. 31,33,007/- by 31.3.2002. This is merely a presumption rather conclusion based on any evidences. Such additions are unsustainable in law in the assessments made u/s 153A r.w.s 143(3) of the Act.*

17. Rajasthan High Court judgment in the case of Jai Steel (India) (supra), vide para 18, it is categorically mentioned that "the requirement of assessment or reassessment under the said section (153A) has to be read in the context of sections 132 or 132A of the Act, inasmuch as, in case nothing incriminating is found on account of search or requisition, then the question of reassessment of the concluded assessments does not arise, which would more reiteration……". Thus, the judgment of Hon'ble High court in the case of Jai Steel Ltd, supra and above decisions of the Tribunal are categorical in concluding that, in case of the concluded assessments like the present one, the additions are made only based on the incriminating material discovered during the search action. The facts of the Jai Steel Ltd (supra) are identical to the present one ie AO made additions by reassessing u/s 153A on the completed assessment u/s 143(1) of the Act. Thus, considering the judgment in the case of the Jai Steel Ltd (supra), the arguments on the legal issue raised before us stands covered. Therefore, considering the Rajasthan High Court's judgment in the case of Jai Steels Ltd,

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supra, we have no difficulty in (i) upholding the issue of notice u/s 153A of the Act and (2) in disapproving the making of the impugned additions u/s 68 and 14A of the Act, which are not backed by the incriminating materials. In the absence of incriminating material, the role of the AO is only to reiterate the returned income filed in response to the notice u/s 153A of the Act. Accordingly, in substance, the common legal issue raised in the grounds for both the appeals of the assessee (ITA NO 3389&3390/M/2011) is ***allowed****."*

8. Further, in the recent past, similar issue was adjudicated by the Hon'ble Delhi High Court in the case of **CIT vs. Kabul Chawla** vide ITA Nos. 707/2014 and others, dated 28.8.2015, wherein the Hon'ble Delhi High Court has reiterated the above settled legal proposition that *since no incriminating material was unearthed during the search, no additions could have been made to the income already assessed.* In this regard, we find it relevant to extract the summary of the legal propositions and the conclusion of said judgment of the Hon'ble Delhi High Court which is as follows:

Summary of the legal position:

37. On a conspectus of Section 153A(1) of the Act, read with the provisos thereto, and in the light of the law explained in the aforementioned decisions, the legal position that emerges is as under:

i. Once a search takes place under Section 132 of the Act, notice under Section 153 A (1) will have to be mandatorily issued to the person searched requiring him to file returns for six AYs immediately preceding the previous year relevant to the AY in which the search takes place.

ii. Assessments and reassessments pending on the date of the search shall abate. The total income for such AYs will have to be computed by the AOs as a fresh exercise.

iii. The AO will exercise normal assessment powers in respect of the six years previous to the relevant AY in which the search takes place. The AO has the power to assess and reassess the 'total income' of the aforementioned six years in separate assessment orders for each of the six years. In other words there will be only one assessment order in respect of each of the six AYs "in which both the disclosed and the undisclosed income would be brought to tax".

iv. Although Section 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."

v. In absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made. The word 'assess' in Section 153 A is relatable to abated proceedings (i.e. those pending on the date of search) and the word 'reassess' to completed assessment proceedings.

vi. Insofar as pending assessments are concerned, the jurisdiction to make the original assessment and the assessment under Section 153A merges into one. Only one assessment shall be made separately for each AY on

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the basis of the findings of the search and any other material existing or brought on the record of the AO.

vii. *Completed assessments can be interfered with by the AO while making the assessment under Section 153 A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment.*

Conclusion

38. The present appeals concern AYs, 2002-03, 2005-06 and 2006-07.On the date of the search the said assessments already stood completed. ***Since no incriminating material was unearthed during the search, no additions could have been made to the income already assessed.***

39. The ***question framed by the Court is answered in favour of the Assessee and against the Revenue."***

9. From the above settled legal position of the issue that *in the absence of any incriminating material found during search, additions made on the assessed income are unsustainable in law,* we are of the considered opinion that the additions made in the instant case are not sustainable and accordingly, we delete the same. Considering our decision on the legal issue in favour of the assessee, the other grounds demand no specific adjudication. Thus, on the legal ground the assessee succeeds and rest of the **grounds are dismissed** as academic.

9.1. Further, regarding the non-abated nature of the assessments relating to the AYs 2007-2008, 2008-2009 and 2009-2010, it is a decided issued that the time limit for the issue of notice u/s 143(2) in the said AYs since expired on 30.9.2008 and they constitute non-abated assessments and therefore, the assessments for those AYs have to be reassessed under the special provisions in the light of the incriminating material seized during the search. The above said ratio was also followed by the Tribunal in the case of Gurinder Singh Bava vs. CIT (supra) wherein it was held that '.....*where the assessment had been completed under summary scheme under section 143(1) and time limit for issue of notice under section 143(2) had expired on the date of search.....there was no assessment pending.....in such a case there was no question of abatement. Therefore, addition could be made only on the basis of incriminating material found during search."*

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10. Since, the issues raised in all the AYs under consideration ie AY 2005-06 to 2009-2010, therefore, our decision given on the legal issue raised the AY 2005-06, squarely applies to the rest of the AYs ie 2006-07 to 2009-10 too. Considering the same, legal issue raised in all the AYs under consideration is allowed in favour of the assessee and rest of the **grounds are dismissed** as academic.

11. In the **all the five appeals filed by the assessee are allowed**.

Order pronounced in the open court on 31st December, 2015.

Sd/- Sd/-

(SANDEEP GOSAIN) **(D. KARUNAKARA RAO)**
JUDICIAL MEMBER ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक 31.12.2015
व.नि.स./ *OKK* , Sr. PS

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

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

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आदेशानुसार/ BY ORDER,
उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**