IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on : August 13, 2015
Decision on: August 28, 2015

ITA 707/2014

COMMISSIONER OF INCOME TAX (CENTRAL)-III ... Appellant
Through: Ms. Suruchi Aggarwal, Senior Standing counsel with Ms. Lakshmi Gurung, Advocate.

versus

KABUL CHAWLA ..... Respondent
Through: Mr. C.S. Aggarwal, Senior Advocate with Mr. Manish Sharma, Mr. Prakash Kumar and Mr. Pranay Raj Singh, Advocates.

WITH

\+ **ITA 709/2014**

COMMISSIONER OF INCOME TAX (CENTRAL)-III ... Appellant
Through: Ms. Suruchi Aggarwal, Senior Standing counsel with Ms. Lakshmi Gurung, Advocate.

versus

KABUL CHAWLA ..... Respondent
Through: Mr. C.S. Aggarwal, Senior Advocate with Mr. Manish Sharma, Mr. Prakash Kumar and Mr. Pranay Raj Singh, Advocates.

AND

\+ **ITA 713/2014**

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CORAM:
HON'BLE DR. JUSTICE S. MURALIDHAR
HON'BLE MR. JUSTICE VIBHU BAKHRU

J U D G M E N T

% 28.08.2015

Dr. S. Muralidhar, J.

The issue

1. These three appeals by the Revenue under Section 260A of the Income Tax Act, 1961 („Act") are directed against the common order dated 25th May 2014 passed by the Income Tax Appellate Tribunal („ITAT") in ITA Nos. 779, 780and 781/Del/2013 relating to Assessment Years („AYs") 2002-03, 2005-06 and 2006-07.

2. The issue that the Court proposes to address in these appeals is the same that was considered by the ITAT viz., 'Whether the additions made to the income of the Respondent Assessee for the said AYs under Section 2(22)(e) of the Income Tax Act, 1961 („Act") were not sustainable because no incriminating material concerning such additions were found during the course of search and further no assessments for such years were pending on

the date of search?'

Background facts

3. A search was carried out under Section 132 of the Act on 15th November 2007 on BPTP Ltd., a leading real estate developer operating all over India and mainly in the National Capital region and some of its group companies. A search was on the same date carried out in the premises of the Assessee who along with his wife Mrs. Anjali Chawla owned and controlled the group. As on the date of the search, no assessment proceedings were pending for AYs 2002-03, 2005-06 and 2006-07. For the said AYs, assessments had already been made under Section 143(1) of the Act.

4. Pursuant to the search a notice under Section 153A (1) of the Act was issued to the Assessee on 3rd September 2008. Pursuant to the said notice, the Assessee filed returns for the three AYs on 19th January 2009. For AY 2002-03, the Assessee declared a total income of Rs.12,42,740. The assessment was finally completed by the Assessing Officer (AO) on the total income of Rs.68,31,740 which, *inter alia*, included an addition of Rs. 50 lakhs on account of a gift received by the Assessee from Mrs. Gianna Fissore, Rs. 2 lakhs on account of low house withdrawals and Rs. 37,162 on account of deemed dividend under Section 2 (22) (e) of the Act. For AY 2005-06, the income was assessed at Rs. 82,51,126 which, *inter alia*, included an addition of Rs. 2 lakhs on account of low house withdrawals and Rs. 62,70,496 on account of deemed dividend under Section 2 (22) (e) of the Act corresponding to the additions made on protective basis in the hands of Business Park Overseas Pvt. Ltd. (BPOPL), Countrywide Promoters &

Developers Pvt. Ltd. (CPDPL) and Poonam Promoters & Developers Pvt. Ltd. (PPDPL), in which companies the Assessee was a substantial shareholder. For the AY 2006-07, the income was assessed at Rs. 1,35,87,112 which, *inter alia*, included two additions of Rs. 12,77,193 and Rs. 90,26,389 on account of deemed dividend under Section 2 (22) (e) of the Act corresponding to the additions made on protective basis in the hands of Shalimar Town Planners Pvt. Ltd. (STTPL) and on a substantive basis in the hands of other companies of the BPTP Group in which the Assessee was a substantial shareholder.

5. The Assessee filed an application under Section 154 of the Act seeking rectification of the assessments on the ground that the accumulated profits of the companies paying the dividend were less than the amount of loan or advance given by them to the recipient companies. Negativing the contention, the Assessing Officer („AO") decline to rectify the assessments.

The order of the CIT (A)

6. The Assessee filed appeals before the Commissioner of Income Tax (Appeals) [„CIT (A)"]. The grounds urged before the CIT (A) was that as far as the additions made under Section 2 (22) (e) of the Act were concerned, no evidence had been unearthed during the search to warrant such additions. It may be mentioned here that as far as AY 2002-03 was concerned, the Assessee did not contest the addition of Rs.50 lakhs made on account of the gift received from Ms. Fissore and tax thereon was paid.

7. By the orders dated 27th November 2012, the CIT (A) dismissed the

appeals. The CIT (A) noted the submission of the Assessee that the additions on account of deemed dividend had been made only because additions of the corresponding amounts had been made on protective basis in the hands of STPPL, BPOPL, CPDPL, PPDPL and the companies in the BPTP Group. Each of the above companies had contended that they were not registered shareholders in the companies which advanced loans to them and that the said loan amounts could be considered as deemed dividend only in the hands of the registered shareholder of the lending companies concerned. The AO had observed that in the respective assessment orders of STPPL etc for the relevant AYs it had been noted that the Assessee herein was a registered shareholder in the companies that had advanced them loans. The AO had rejected the contention of the Assessee herein that he himself had not received any sum by way of dividend and that the advance had been received by the sister concerns of the group during the normal course of business.

8. The CIT (A) noted that the Assessee was a beneficiary/owner having more than 10% of the voting rights in both STPPL and PPDPL as well as the company from which the loan was received. The undisputed facts were that some other sister concerns of the BPTP Group had made advances to the said companies. All the concerns involved in the transaction were companies where the public was not substantially interested. The CIT (A) referred to the decision in ***CIT v. Ankitech Pvt. Ltd. (2011) 11 Taxmann. Com 100 (Del)*** and held that giving such loans or advances to the sister concerns was with the ultimate aim of making the money available to the shareholders of such sister concerns. In the present case since the loans and advances were

given by one group company to other group company where the Assessee had shares constituting more than 10% of voting rights, such loans and advances were to be assessed in the hands of the Assessee as deemed dividend under Section 2(22)(e) of the Act. There were no facts supporting the contention that the advances were given during the normal course of business and, therefore, that contention was rejected. As regards the failure to unearth any incriminating materials, reference was made to the decision of the High Court in ***CIT v. Anil Kumar Bhatia [2013] 352 ITR 493 (Del)***. It was held that the addition need not be restricted only to the seized material.

The order of the ITAT

9. The Assessee then appealed to the ITAT. One of the issues considered by the ITAT was whether the completed assessment on the date of the search would stand on the same footing as the pending assessments which in terms of the second proviso to Section 153A(1) of the Act would abate. It was noticed that in ***CIT v. Anil Kumar Bhatia*** (*supra*), this Court had left open the question whether in order to frame an assessment in terms of the first proviso to Section 153A(1) of the Act in respect of those AYs for which the assessments had already been completed, there was a requirement that some incriminating material should be unearthed during the search. Nevertheless there were some observations in ***CIT v. Anil Kumar Bhatia*** (*supra*), which would indicate that the AO would be able to reopen the assessments for those years for which the assessment already stood completed at the time of the search, only if some incriminating material was unearthed during the search. The ITAT concluded "if no incriminating material is found in

respect of such completed assessments then the total income in the proceedings under Section 153A(1) of the Act shall be computed by considering the originally determined income. If some incriminating material is found in respect of such assessment years for which assessment is not pending, then the total income would be determined by considering the originally determined income plus (+) income emanating from the incriminating material found during the course of search."

10. In the facts of the present cases, the ITAT concluded that the additions made for AY 2002-2003, 2005-2006 and 2006-2007 under Section 2 (22) (e) of the Act were not based on any incriminating material found during search operation. Accordingly, these were held not sustainable in law, the impugned assessment orders for the said AYs were set aside and the additions directed to be deleted. However, the additions made for AYs 2007-2008 and 2008-2009 were sustained by the same impugned order of the ITAT. The present appeals do not pertain to the said two AYs.

Submissions of counsel

11. The submission of Ms. Suruchi Aggarwal, learned Senior Standing Counsel for the Revenue, is that there is no mention in Section 153A of the Act that any incriminating material had to be found during the search in order that an assessment could be framed in terms of the first proviso to Section 153A(1) of the Act for those AYs where the assessment already stood completed on the date of the search. Referring the judgement of this Court in ***Madugula Venu v. Director of Income Tax [2013] 29 Taxmann.Com 200 (Delhi)***, she submitted that in terms of Section 153A(1)

of the Act it was mandatory for the AO to issue a notice to the searched person once a search took place whether or not any incriminating material was found. The logical corollary of this was that irrespective of whether any such incriminating material was found the search, since notice had been issued under Section 153A(1)(a) of the Act, the returns for the six preceding years had to mandatorily be filed by the Assessee and the assessment for each of the six previous years had to be carried to the logical end. If in that process any undisclosed income relating to completed assessments came to light, it would be open to the AO to proceed to make such additions, as was done in the present case.

12. Ms. Aggarwal also placed reliance on the decision dated 7th August, 2012 of this Court in ITA No.2021/2010 (***CIT v. Chetan Das Lachman Das***). Referring to the observations of the Court in ***Filatex India Ltd. v. CIT-IV [2014] 49 Taxmann.Com 465 (Delhi)***, she submitted that the additions made in the course of assessment in terms of the first proviso to Section 153A(1) of the Act need not be restricted or limited to incriminating material found during the course of search. On merits she submitted that the AO was perfectly justified in making a substantive assessment of the return of the Assessee qua the deemed dividend income under Section 2 (22) (e) of the Act corresponding to the respective protective assessments in the hands of two entities, i.e. STPPL and PPDPL.

13. Replying to the above arguments, Mr. C.S. Aggarwal, learned Senior Counsel for the Assessee, referred to the observations in ***CIT v. Anil Kumar Bhatia*** (*supra*) and the subsequent judgements and emphasised that

notwithstanding that Section 153A(1) of the Act may itself not specifically state that some incriminating material had to be found during the course of search on the basis of which an addition could be made to the income in the course of the assessment or reassessment in respect of each AY falling within six assessments previous to which the search took place, the settled law in terms of decisions of this Court indicates that there was such a legal requirement. He also referred to Explanation 3 to Section 147 of the Act to draw a distinction as to the basis on which an AO may come to a conclusion that some income has escaped assessment. Reference was made to the decision of this Court in ***Ranbaxy Laboratories Ltd. v. Commissioner of Income Tax [2011] 12 Taxmann.Com 74 (Del)***, of the Rajasthan High Court in ***Jai Steel (India), Jodhpur v. ACIT [2013] 36 Taxmann.Com 523 (Raj)*** and the judgement dated 29th October, 2010 of the Bombay High Court in ITA No.36/2009 (***CIT v. M/s. Murli Agro Products Ltd.***).

14. Mr. Aggarwal added that if, in the absence of any material unearthed during the course of search, an AO has come to a different conclusion on the documents and evidence already available at the time of finalisation of the earlier assessment, then it would be only a change of opinion which in any event would be unsustainable in terms of Section 147 of the Act. In other words even if the AO could have sought to reopen the assessment under Section 147 of the Act his satisfaction would have to be based on some tangible material. He submitted that in the facts and circumstances of the case the AO could not have made an addition even if he had recourse to Section 147 of the Act since there existed no material for the reasonable belief "that any income had escaped assessment".

The decision in Anil Kumar Bhatia

15. At the outset this Court would like to observe that an analysis of the provisions of Section 153A of the Act has been undertaken by this Court in the decision in ***CIT v. Anil Kumar Bhatia*** (*supra*), which decision was given on the same date that the Court rendered another decision in ***CIT v. Chetan Das Lachman Das*** (*supra*). However, in neither case was the Court considering a situation where there was absolutely no material unearthed during the search, much less any incriminating material.

16. In ***CIT v. Anil Kumar Bhatia*** (*supra*), pursuant to the search conducted in the Assessee"s residence and business premises on 13th December 2005 under Section 132 of the Act, the AO issued notices under Section 153A calling upon the Assessee to file returns for the six assessment years prior to the year in which the search took place. Notices were also sent under Section 142(1) and 143(2) of the Act to the Assessee on 20th November, 2007 along with detailed questionnaire. In response thereto the Assessee on 29th November, 2007 submitted an explanation. Thereafter the AO made additions to the income including a sum of Rs.1.50 lakh given by the Assessee as loan to one Mrs. Mohini Sharma on 10th February, 2003. The information regarding giving of the loan was available from a document seized from the premises during search and found undisclosed in the return filed for AY 2003-2004. Concluding that the loan was given out of unaccounted income, the AO added it to the income for AY 2003-2004. After the CIT (A) confirmed the addition, the Assessee appealed to the ITAT. The ITAT agreed with the Assessee that since no material was found

in the search pertaining to the addition made, it was not sustainable in law. The ITAT noted that the document recovered in the search during the search did not bear the signature of the assessee or Mrs. Mohini Sharma, the alleged borrower who was also not examined by the Department. The question before the Court, therefore, was whether the AO had wrongly invoked Section 153A of the Act since no material had been found during the search to justify the addition made ?

17. This Court in ***CIT v. Anil Kumar Bhatia*** (*supra*) then analysed Section 153A of the Act and explained that with the introduction of the group of sections, viz., Sections 153A to 153C, the concept of a single block assessment was given a go-by. It was explained that where a search was made after 31st May, 2003 the AO was obliged to issue notices calling upon the searched person to furnish returns for the six AYs immediately preceding the AYs relevant to the previous year in which the search was conducted. Under Section 153A, the AO was required to exercise normal assessment powers in respect of the previous year in which the search took place. Another significant feature was that the AO had power to assess and reassess the 'total income' of the aforementioned six years in separate assessment orders for each of the six years. This meant that there could 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".

18. This Court in ***CIT v. Anil Kumar Bhatia*** (*supra*) posed the question as under:

"21. A question may arise as to how this is sought to be achieved

> where an assessment order had already been passed in respect of all or any of those six assessment years, either under Section 143(1)(a) or Section 143(3) of the Act. If such an order is already in existence, having obviously been passed prior to the initiation of the search/requisition, 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. For this purpose, 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."

19. The Court then explained that the concept of time-limit for completion of assessment or reassessment under Section 153 had been done away with in a case covered by Section 153A and "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." The Court then dealt with the second proviso to Section 153A, which states that pending assessment or reassessment proceedings in relation to any AY falling out of the period of six AYs previous to the search shall abate. In such cases all pending assessments, the Court explained that once those proceedings abate, the decks were cleared, for the AO to pass assessment orders for each of those six years determining the total income of the Assessee. Such 'total income' would include "both the income declared in the returns, if any, furnished by the Assessee as well as the undisclosed income, if any, **unearthed during the search or requisition**." Therefore, merely because the returns of income filed by the Assessee for the AYs previous to the date of the search already stood processed under Section

153A(1)(a) of the Act it could not be held that the provisions of Section 153A could not be invoked.

20. As regards the material unearthed during the search the Court in ***CIT v. Anil Kumar Bhatia*** (*supra*) observed that "if it is not in dispute that the document was found in the course of the search of the Assessee, then Section 153A is triggered. Once the Section is triggered, it appears mandatory for the Assessing Officer to issue notices under Section 153A calling upon the Assessee to file returns for the six assessment years prior to the year in which the search took place." The Court clarified in para 24 as under:

> "24. We are not concerned with a case where no incriminating material was found during the search conducted under Section 132 of the Act. We, therefore, express no opinion as to whether Section 153A can be invoked even in such a situation. That question is therefore left open."

21. Therefore it is clear that the decision in ***CIT v. Anil Kumar Bhatia*** (*supra*) does not deal with a situation where, as in the present case, no incriminating material was found during the search conducted under Section 132 of the Act.

The decision in Chetan Das Lachman Das

22. On the same date as it rendered the above decision, this Court also pronounced its decision in ***CIT v. Chetan Das Lachman Das*** (*supra*). In the latter case, again, a search was undertaken in the Assessee‟s premises under Section 132 of the Act on 13th December, 2005. The decision itself

notes: "in the course of the search certain documents were found which according to the Assessing Officer suggested gross under invoicing of sales and suppression of production/ yield of Hing." Consequently that was again not a case where there was no material unearthed during the search. The judgement also notes that it is on the basis of the material unearthed that the AO made additions of suppressed sale value of Hing and compound Hing. The High Court interfered with the order of the ITAT on the ground that it had failed to examine the seized material itself to find out if the findings of the CIT(A) were justified. Consequently the decision in ***CIT v. Chetan Das Lachman Das*** (supra) does not deal with the fact situation that arises in the present case.

23. Nevertheless it is interesting to note that in ***CIT v. Chetan Das Lachman Das*** (*supra*) the Court underscored the need for to Department to have unearthed material during search justifying the assessment sought to be made, in the following words:

> "11. ....Section 153A (1) (b) provides for the assessment or reassessment of the total income of the six assessment years immediately preceding the assessment year relevant to the previous year in which the search took place. To repeat, there is no condition in this Section 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 Assessing Officer which can be related to the evidence found. 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. Obviously an assessment has to be made under this Section only on the basis of seized material...."

The decision in Madugula Venu

24. Turning to the decision in ***Madugula Venu v. Director of Income Tax*** (*supra*), the question there was not whether in the absence of any incriminating material the assessment could be completed under Section 153A of the Act. No doubt a contention was put forth on behalf of the Assessee that "no material which would implicate him, in the earning of any undisclosed income was unearthed during the search and, therefore, there was no basis to issue the notice under section 153A." It must be remembered that the Petitioner in that case had come forth with a writ petition to challenge the search and seizure proceedings under Section 132 of the Act by questioning the very issuance of notice under Section 153A of the Act. It is in that context that the Court found no merit in the writ petition and observed that once a search was conducted under Section 132 of the Act, it was mandatory for the AO to issue notice to the person searched requiring him to furnish returns of income for the six AYs immediately preceding the AY relevant to the previous year in which the search was conducted. The Court was not entering into a discussion on whether any additions could be made in the assessment by the AO in the absence of any incriminating material unearthed during search. On the other hand, it left it open to the Assessee to raise all contentions in the assessment proceedings. The Court observed "in case he has evidence or material to show that he has not earned any income which is not disclosed to the income tax authorities or to rebut the material gathered during the search, it is perfectly open to him to do so." One observation in the said judgement is, however, important. While explaining Section 153A of the Act, the Court observed "it is not merely the undisclosed income that will be brought to tax in such assessments, but the

total income of the assessee, including both the income earlier disclosed and income found consequent to the search, would be brought to tax." The Court, however, did not answer the question of whether a finding of undisclosed income would have to be based on some material unearthed during the search.

The decision in Canara Housing

25. The Court would also like to refer to a judgement of the Karnataka High Court dated 25th July, 2014 in ITA No.38/2014 (***M/s. Canara Housing Development Company v. The DCIT***). There the Assessee, which was carrying on real estate business filed its return for AY 2008-2009. His case was taken up under Section 143(3) of the Act and an order came to be passed on 31st December, 2010. Subsequently a search took place in the premises of the Assessee under Section 132 of the Act on 12th April, 2011. The judgement notes "in the course of search, incriminating material leading to undisclosed income was seized." The notice was issued to the Assessee under Section 153A(1) of the Act to file return of income on 13th January, 2012. Even while the return was under consideration, the CIT initiated proceedings under Section 263 of the Act on the ground that the order passed on 31st December, 2010 under Section 143(3) of the Act was prejudicial to the interests of the Revenue. When the CIT negated the objections of the Assessee to the said order, the Assessee appealed to the ITAT. The ITAT negated the plea of the Assessee that by virtue of the proceedings initiated under Section 153A of the Act, the assessment for six years stood reopened and it is for the assessing authority to pass appropriate order on the basis of the return filed under Section 153A(1)(a) of the Act.

26. In the High Court the question was whether the CIT could invoke the power under Section 263 of the Act once the proceedings under Section 153A was initiated. The High Court in ***Canara Housing*** (*supra*) answered the question in the negative. It referred to the decision of this Court in ***CIT v. Anil Kumar Bhatia*** (supra) and came to the conclusion that once proceedings are initiated under Section 153A of the Act the legal effect was that even where an assessment order is passed, it would stand reopened. In the eye of law there was no order of assessment. It meant that the AO "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."

27. It is important to note that ***Canara Housing*** was also a case where some material was unearthed during the search. Further, the High Court was clear that the addition to the income already disclosed would have to be based on some material unearthed during the search. This is clear from the observation in para 9 of the decision to the effect: "The AO is empowered to reopen those proceedings and reassess the total income, **taking note of the undisclosed income, if any, unearthed during the search**." It was further observed that in the facts of that case if the CIT had come across any income that the AO had not taken note of while passing the earlier order, "the said material can be furnished to the assessing authority" who will take note of it

while determining total income.

The decision in Filatex India Ltd.

28. In ***Filatex India Ltd. v. CIT-IV*** (*supra*), one of the questions framed was whether the ITAT erred on facts and in law in not holding that re-computation of book profit, *de-hors* any material found during the course of search, in the order passed under Section 153A of the Act was without jurisdiction, being outside the scope of proceedings under that Section? The facts of the case were that there was incriminating material found during the course of search conducted in the premises of the Assessee on 18th January, 2006 and subsequent dates. This included a statement of the General Manager (Marketing). On the basis of the said material and statement additions were made to the disclosed income under Section 115 JB although no material was found specific to such addition. The Court held that under Section 153A "the additions need not be restricted or limited to the incriminating material, which was found during the course of search." Consequently even if no incriminating material was found for the addition under Section 115JB of the Act, since there was some incriminating material found which would sustain additions made and since the 'total income' had to be computed, they were sustained by the High Court.

29. In ***Filatex India Ltd.*** the Court sought to explain the observations in ***CIT v. Chetan Das Lachman Das*** (*supra*) in the following manner:

> "3. Learned counsel for the appellant-assessee has relied on the decision of this Court in *CIT v. Chetan Das Lachman Das [20121 211 Taxman 61/25 taxmann.com 227*. The said decision notices insertion of Section 153A by Finance Act, 2003, its purpose and object, and the

> earlier proceedings for block assessment under Chapter XIVB, the difficulties and the legal issues which had arisen on the difference between regular assessment and block assessment. It is in this context that in the case of *Chetan Das Lachman Das* (*supra*), the Division Bench, [to which one of us (Sanjiv Khanna, J) was a party], has observed that Section 153A(l)(b) provides for assessment or re-assessment of the total income of six assessment years immediately preceding the assessment year relevant to the previous year in which the search took place. It was emphasized that there is no condition in this Section that the additions should be strictly made on the basis of evidence found during the course of the search or other post search material or information available with the Assessing Officer, related to the evidence found. Subsequent observation to the effect that the assessment under section 153A should not be arbitrary or made without any relevance or nexus with the seized material, is basically clarificatory that the assessment under Section 153A emanates and starts on the foundation of the search, which is the jurisdictional precondition. The additions cannot and should not be arbitrary...."

30. The above passage in ***Filatex India Ltd.*** (*supra*), paraphrases *inter alia*, the following line in ***CIT v. Chetan Das Lachman Das*** (*supra*): "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". However, the immediately next line in ***CIT v. Chetan Das Lachman Das*** (*supra*)reads: "Obviously an assessment has to be made under this Section only on the basis of seized material...."

31. What distinguishes the decisions both in ***CIT v. Chetan Das Lachman Das*** (*supra*) and ***Filatex India Ltd. v. CIT-IV*** (*supra*) in their application to the present case is that in both the said cases there was some material unearthed during the search, whereas in the present case there admittedly

was none. Secondly, it is plain from a careful reading of the said two decisions that they do not hold that additions can be validly made to income forming the subject matter of completed assessments prior to the search even if no incriminating material whatsoever was unearthed during the search.

32. Recently by its order dated 6th July 2015 in ITA No. 369 of 2015 (***Pr. Commissioner of Income Tax v. Kurele Paper Mills P. Ltd***.), this Court declined to frame a question of law in a case where, in the absence of any incriminating material being found during the search under Section 132 of the Act, the Revenue sought to justify initiation of proceedings under Section 153A of the Act and make an addition under Section 68 of the Act on bogus share capital gain. The order of the CIT(A), affirmed by the ITAT, deleting the addition, was not interfered with.

The decision in Jai Steel India

33. The decision of the Rajasthan High Court in ***Jai Steel (India), Jodhpur v. ACIT*** (*supra*) involved a case where certain books of accounts and other documents that had not been produced in the course of original assessment were found in the course of search. It was held where undisclosed income or undisclosed property has been found as a consequence of the search, the same would also be taken into consideration while computing the total income under Section 153A of the Act. The Court then explained as under:

> "22. In the firm opinion of this Court from a plain reading of the provision along with the purpose and purport of the said provision, which is intricately linked with search and requisition under Sections 132 and 132A of the Act, it is apparent that:

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

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

and

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

34. The argument of the Revenue that the AO was free to disturb income *de hors* the incriminating material while making assessment under Section 153A of the Act was specifically rejected by the Court on the ground that it was "not borne out from the scheme of the said provision" which was in the context of search and/or requisition. The Court also explained the purport of the words "assess" and "reassess", which have been found at more than one place in Section 153A of the Act as under:

"26. 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."

The decision in Continental Warehousing

35. In ***Commissioner of Income Tax v. Continental Warehousing Corporation (Nhava Sheva) Ltd. [2015] 58 Taxmann.Com 78 (Bom)*** the question addressed by the Bombay High Court was whether the scope of assessment under Section 153A encompasses additions, not based on any incriminating material found during the course of search? It was held that no addition could be made in respect of the assessments that had become final in the event no incriminating material was found during search. The Bombay High Court relied on the earlier decision in ***CIT v. M/s. Murli Agro Products Ltd.*** (*supra*) and discussed the scope and ambit of the proceedings for assessment and reassessment of total income under Section 153A (1) of the Act and the provisos thereto. One of the specific pleas taken by the Assessee was that if no incriminating material was found during the course of search in respect of an issue then no addition in respect of any issue can be made to the assessment under Sections 153A and 153C. It was observed that the assessment or reassessment under Section 153A arises only when a search has been initiated and conducted and, therefore, "such an assessment has a vital link with the initiation and conduct of the search." The Court then reproduced and affirmed the decision of the Special Bench of the ITAT in ***All Cargo Global Logistics Ltd. v. Deputy Commissioner of Income Tax [2012] 23 taxmann.com 103 (Mum.) (SB)*** and answered the question as regards the scope of the assessment of total income as under:

> "53. ....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) Insofar 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"

36. Ultimately in ***Continental Warehousing*** (*supra*), the Bombay High Court answered the question framed by it as under:

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

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."

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 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.

40. The appeals are accordingly dismissed but in the circumstances no orders as to costs.

S. MURALIDHAR, J

VIBHU BAKHRU, J

AUGUST 28, 2015
dn/b'nesh