IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 28TH DAY OF APRIL, 2016

PRESENT

THE HON'BLE MR. JUSTICE JAYANT PATEL

AND

THE HON'BLE MRS. JUSTICE B.V. NAGARATHNA

I.T.A. Nos.403/2009, C/W 402/2009, 410-412/2014, 394/2014 & 271/2015, 399/2014, 400/2014 & 351/2015, 402/2014 & 352/2015

IN I.T.A.No.403/2009

BETWEEN:

1. THE COMMISSIONER OF INCOME-TAX,
C.R.BUILDING, QUEENS ROAD,
BANGALORE.

2. THE DEPUTY COMMISSIONER OF INCOME-TAX,
CIRCLE - 11(4), C.R.BUILDING,
QUEENS ROAD,
BANGALORE. ... APPELLANTS

(BY SRI: K.V. ARAVIND, ADVOCATE)

AND:

M/S. IBC KNOWLEDGE PARK PVT. LTD.,
SHERIFF CENTRE,
73/1, 5TH FLOOR,
ST. MARKS ROAD,
BANGALORE. ... RESPONDENT

(BY SRI: A. SHANKAR & SRI. M. LAVA, ADVOCATES)

*****

THIS ITA IS FILED U/S.260-A OF I.T.ACT, 1961 ARISING OUT OF ORDER DATED 27-2-2009 PASSED IN ITA NO.1079/BNG/2008, FOR THE ASSESSMENT YEAR 2004-2005,

PRAYING THAT THIS HON'BLE COURT MAY BE PLEASED TO: i. FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW STATED THEREIN AND ETC.,

IN I.T.A.No.402/2009

BETWEEN:

1. THE COMMISSIONER OF INCOME-TAX,
C.R.BUILDING, QUEENS ROAD,
BANGALORE.

2. THE DEPUTY COMMISSIONER OF INCOME-TAX,
CIRCLE - II(4), C.R.BUILDING,
QUEENS ROAD,
BANGALORE. ... APPELLANTS

(BY SRI: K.V. ARAVIND, ADVOCATE)

AND:

M/S. IBC KNOWLEDGE PARK PVT. LTD.,
SHERIFF CENTRE,
73/1, 5TH FLOOR,
ST. MARKS ROAD,
BANGALORE ... RESPONDENT

(BY SRI: A. SHANKAR & SRI. M. LAVA, ADVOCATES)

*****

THIS ITA IS FILED U/S.260-A OF I.T.ACT, 1961 ARISING OUT OF ORDER DATED 27-2-2009 PASSED IN C.O.No.100/BANG/2008 IN ITA.NO.1079/BANG/2008, ASSESSMENT YEAR 2004-05, PRAYING THIS HON'BLE COURT TO: i. FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW STATED THEREIN AND ETC.,

IN I.T.A.Nos.410-412/2014

BETWEEN:

IBC KNOWLEDGE PARK PVT. LTD.,
NO.150, DIAMOND DISTRICT
TOWER B, PENT HOUSE, AIRPORT ROAD,

BANGALORE.
REPRESENTED HEREIN BY ITS
GENERAL MANAGER - FINANCE
MR. JANAKI RAM SETTY. ... APPELLANT

(BY SRI: K.P. KUMAR, SENIOR COUNSEL FOR SRI. T. SURYANARAYANA, ADVOCATE)

AND:

1. THE DEPUTY COMMISSIONER OF INCOME-TAX,
CIRCLE - 11(4), III FLOOR,
C.R. BUILDING, QUEENS ROAD,
BANGALORE – 560 001.

2. THE COMMISSIONER OF INCOME TAX-I,
C.R. BUILDING, QUEENS ROAD,
BANGALORE – 560 001. ... RESPONDENTS

(BY SRI: K.V. ARAVIND, ADVOCATE)

*****

THESE APPEALS ARE FILED UNDER SEC.260-A OF INCOME TAX ACT 1961, ARISING OUT OF ORDER DATED:25/04/2014 PASSED IN CO NOS. 103 TO 105/BANG/2013 IN ITA NO.903-905/BANG/2013, FOR THE ASSESSMENT YEAR 2010-2011 AND ETC.,

IN I.T.A.Nos.394/2014 & 271/2015

BETWEEN:

1. THE COMMISSIONER OF INCOME-TAX,
C.R. BUILDING, QUEENS ROAD,
BANGALORE.

2. THE DEPUTY COMMISSIONER OF INCOME-TAX,
CIRCLE - 11(4),
RASHTROTHANA BHAVAN,
NRUPATHUNGA ROAD,
BANGALORE. ... APPELLANTS

(BY SRI: K.V. ARAVIND, ADVOCATE)

AND:

M/S. IBC KNOWLEDGE PARK PVT. LTD.,
NO. 150, DIAMOND DISTRICT,
TOWER B, PENT HOUSE,
AIRPORT ROAD,
BANGALORE – 560 038. ... RESPONDENT

(BY SRI: K.P. KUMAR, SENIOR COUNSEL FOR SRI. T. SURYANARAYANA, ADVOCATE)

*****

THESE APPEALS ARE FILED UNDER SEC.260-A OF INCOME TAX ACT 1961, ARISING OUT OF ORDER DATED 25.04.2014 PASSED IN ITA.NO.903/BANG/2013 AND CO.NO.103/BANG/2013 FOR THE ASSESSMENT YEAR 2004-05 AND ETC.,

IN I.T.A.No.399/2014

BETWEEN:

1. THE COMMISSIONER OF INCOME-TAX,
C.R. BUILDING, QUEENS ROAD,
BANGALORE.

2. THE DEPUTY COMMISSIONER OF INCOME-TAX,
CIRCLE - 11(4),
RASHTROTHANA BHAVAN,
NRUPATHUNGA ROAD,
BANGALORE. ... APPELLANTS

(BY SRI: K.V. ARAVIND, ADVOCATE)

AND:

M/S. IBC KNOWLEDGE PARK PVT. LTD.,
NO. 150, DIAMOND DISTRICT,
TOWER B, PENT HOUSE,
AIRPORT ROAD,
BANGALORE. ... RESPONDENT

(BY SRI: K.P. KUMAR, SENIOR COUNSEL FOR SRI. T. SURYANARAYANA, ADVOCATE)

*****

THIS ITA IS FILED UNDER SEC.260-A OF INCOME TAX ACT 1961, ARISING OUT OF ORDER DATED:25/04/2014 PASSED IN ITA.NO.906/BANG/2013, FOR THE ASSESSMENT YEAR 2009-2010 AND ETC.,

IN I.T.A.Nos.400/2014 & 351/2015

BETWEEN:

1. THE COMMISSIONER OF INCOME-TAX,
C.R. BUILDING, QUEENS ROAD,
BANGALORE.

2. THE DEPUTY COMMISSIONER OF INCOME-TAX,
CIRCLE - 11(4),
RASHTROTHANA BHAVAN,
NRUPATHUNGA ROAD,
BANGALORE. ... APPELLANTS

(BY SRI: K.V. ARAVIND, ADVOCATE)

AND:

M/S. IBC KNOWLEDGE PARK PVT. LTD.,
NO. 150, DIAMOND DISTRICT,
TOWER B, PENT HOUSE,
AIRPORT ROAD,
BANGALORE – 560 038. ... RESPONDENT

(BY SRI: K.P. KUMAR, SENIOR COUNSEL FOR SRI. T. SURYANARAYANA, ADVOCATE)

*****

THESE APPEALS ARE FILED UNDER SEC.260-A OF INCOME TAX ACT 1961, ARISING OUT OF ORDER DATED:25/04/2014 PASSED IN ITA.NO.904/BANG/2013 & CO.NO.104/BANG/2013, FOR THE ASSESSMENT YEAR 2005-2006 AND ETC.,

IN I.T.A.Nos.402/2014 & 352/2015

BETWEEN:

1. THE COMMISSIONER OF INCOME-TAX,
C.R. BUILDING, QUEENS ROAD,
BANGALORE.

2. THE DEPUTY COMMISSIONER OF INCOME-TAX,
CIRCLE - 11(4),
RASHTROTHANA BHAVAN,
NRUPATHUNGA ROAD,
BANGALORE. ... APPELLANTS

(BY SRI: K.V. ARAVIND, ADVOCATE)

AND:

M/S. IBC KNOWLEDGE PARK PVT. LTD.,
NO. 150, DIAMOND DISTRICT,
TOWER B, PENT HOUSE,
AIRPORT ROAD,
BANGALORE – 560 038. ... RESPONDENT

(BY SRI: K.P. KUMAR, SENIOR COUNSEL FOR SRI. T. SURYANARAYANA, ADVOCATE)

*****

THESE APPEALS ARE FILED UNDER SEC.260-A OF INCOME TAX ACT 1961, ARISING OUT OF ORDER DATED:25/04/2014 PASSED IN ITA.NO.905/BANG/2013 & CO.NO.105/BANG/2013, FOR THE ASSESSMENT YEAR 2006-2007 AND ETC.,

THESE APPEALS HAVING BEEN RESERVED ON 10/03/2016 AND BEING LISTED FOR PRONOUNCEMENT OF ORDER TODAY, ***NAGARATHNA J.,*** PRONOUNCED THE FOLLOWING:

JUDGMENT

These appeals, filed by the Revenue as well as the assessee, assail order dated 25/4/2014, passed by the Income Tax Appellate Tribunal (hereinafter referred to as "the Tribunal" for the sake of convenience), in ITA. Nos.903-905/Bang/2013 and C.O.Nos.103-105/Bang/2013 dated 25/4/2014. By the said order, the Tribunal has confirmed the order of the Commissioner of Income Tax (Appeals) (hereinafter referred to as "the Appellate Commissioner") and dismissed the appeals.

2. ITA.Nos.410-412/2014 are filed by the assessee, while ITA.Nos.403/2009 C/w. ITA.Nos.402/2009, 394/2014 & 271/2015, 399/2014, 400/2014 & 351/2015, 402/2014 & 352/2015 are filed by the Revenue.

3. By order dated 3/8/2015, the appeals filed by the assessee were admitted on the following substantial questions of law:

a) *Whether the Tribunal was right in holding that the initiation of proceedings and the consequent order passed under Section 153C of the Act were valid, on a mere*

coincidence that the appellant was also carrying on its business in the searched premises along with the searched persons?

b) *Whether the Tribunal was correct in holding that the assessment under Section 153C was valid despite there being no satisfaction recorded that the documents found during the search on 17.06.2008 were incriminating in nature and prima facie represented undisclosed income?*

c) *Whether the Tribunal was justified in rejecting the contention of the appellant that proceedings under Section 153C ought to be initiated only for assessment years in respect of which the documents were found during the search?*

d) *Whether the Tribunal was correct in upholding the validity of the order under Section 153C of the Act for the assessment year 2005-06 despite there being no pending assessment as on the date of search and the documents not revealing any undisclosed income?*

4. The appeals filed by the Revenue raise the following substantial questions of law and were admitted on 28/5/2010 and 3/8/2015:

> *"(i) Whether the Appellate Authorities were correct in holding that separate depreciation is allowable in respect of 'Electrical installations, elevators, DG set' installed in building which has been let-out and the assessee is receiving rental income on the buildings?*
>
> *(ii) Whether the Appellate Authorities were correct in holding that a sum of Rs.72 lakhs interest on borrowed capital is an allowable business expenditure, when the assessee's buiness had not commenced and there was no declaration of income from business and the assessee had only received rental income under the head 'House property'?*
>
> *(iii) Whether the Appellate Authorities were correct in holding that a sum of Rs.1.91 crores cannot be disallowed as held by the Assessing Officer despite the same not been reflected in the Balance Sheet and no particulars having been furnished*

recorded a perverse finding, not supported by materials?

(iv) *Whether the Tribunal was correct in holding that the claim of Rs.1,29,08,375/- shown as construction management fee is allowable to the extent of 25% even though no evidence has been adduced in support of the claim when this expense related to the property constructed by the assessee was let-out and rental income was received under the head 'Income from House Property' and the question of earning expenses did not arise and the same could be capitalized?*

"Whether the Tribunal was correct in allowing depreciation on elevators, DG sets, Transformers and fixtures without appreciating that the assessee is not in the business of leasing out any of these assets and these fixtures are affixed with the building and were part of the leased are part of the leased building which do not have any independent existence and that no independent receipt/fees/ maintenance charges were received against these facilities/services and

therefore, they are receipts are taxable as "income from house property?"

5. Briefly stated, the facts are that the assessee is a company registered under the Companies Act, 1956 and is engaged in the business of development of properties, construction and engineering activities and such other activities in relation to development of properties. One Mr.Yunus Zia, Mr.Ziaulla Sheriff and M/s.India Builders Corporation were subjected to a search operation on 17/6/2008 under Section 132 of the Income Tax Act, 1961 (hereinafter referred to as "the Act" for short). The assessee i.e., M/s. IBC Knowledge Park Pvt. Ltd., has its registered office at the ver same premises where the search was conducted. During the search operation, certain documents and books of accounts ybelonging to the assessee were seized from the premises searched. Documents of the assessee seized during the search operation were transferred by the Assessing Officer, who searched the premises, to the Deputy Commissioner of Income Tax, Central Circle-1(3) (hereinafter referred to as "the Assessing Officer") of the assessee. The Assessing Officer issued notice under Section 153C of the Act. The

assessee requested the Assessing Officer to furnish reasons for initiating action under that section. The Assessing Officer, then proceeded to pass assessment orders under Section 143(3) read with Section 153C of the Act for the assessment years 2004-05 to 2008-09 making several disallowances of deductions claimed as well as additions to the income of the assessee. Copies of the assessment orders for the aforesaid assessment years, all dated 31/12/2012, are produced as Annexures-A1, A2 and A3 respectively, in ITA.Nos.410-412/2014.

6. The disallowance made by the Assessing Officer for the relevant assessment years are in respect of the following:

i) Depreciation on Elevators, DG Set and other such items (for all assessment years)

ii) Professional charges (for assessment year 2004-05)

iii) Interest expenses (for assessment year 2004-05)

iv) Disallowance of interest capitalized (for assessment years 2004-05 and 2006-07)

7. That in respect of the assessment year 2004-05, the order under Section 143(3) had been passed on 27/12/2006 and in that assessment order, all deductions were disallowed by the order passed under Section 153C, except one, which had already been disallowed.

8. The assessee filed an appeal against the assessment order dated 31/12/2012 before the Appellate Commissioner.

9. In the appeal preferred before the Appellate Commissioner by the assessee by common order dated 21/3/2013, the Appellate Commissioner disposed of the appeals rejecting the challenge made by the assessee with regard to initiation of proceedings under Section 153C of the Act, while granting relief against disallowances made by the Assessing Officer by following the earlier order of the Tribunal for the assessment year 2004-05. The orders of the Assessing Officer, Appellate Authority and the Tribunal are at Annexures-A to F respectively.

10. Against the order of the Appellate Commissioner, Revenue had filed appeals before the Tribunal for three assessment years in question, which

were numbered as ITA.Nos.903-905/2013. As regards the initiation of proceedings under Section 153C of the Act, the assessee filed cross-objections before the Tribunal and the same were numbered as C.O.Nos.103-105/Bang/2013. The Tribunal considered all the matters together and dismissed the appeals filed by the Revenue as well as the assessee's cross-objections by its order dated 25/4/2014, a copy of which is produced as Annexure-F. Thus, we have before us the appeals filed by the Revenue as well as by the assessee as noted above.

11. We have heard Sri. K.VS.Aravind, learned counsel for the Revenue, Sri. K.P.Kumar, learned Senior Counsel appearing for Sri.J.Suryanarayana, learned counsel for M/s. King & Partridge as well as Sri. A.Shankar, learned counsel for the assessee and perused the material on record.

We now consider the substantial questions of law raised by the Revenue in seriatim along with the submissions of the learned counsel.

12. The first substantial question of law is with regard to depreciation allowable in respect of electrical

installations, elevators, DG sets installed in the building, which have been let-out by the assessee, which is receiving rental income from the said building. The Appellate Commissioner had directed the Assessing Officer to allow depreciation on DG sets, transformers, photocopier system and security camera, but not elevators (lifts). Aggrieved by the finding, the Revenue had filed the appeal and the assessee has taken a ground in the cross-objection before the Tribunal. The Tribunal on going through the agreement of lease entered into by the assessee with various lessees held that the agreement indicated that rentals of the building and rent for the electrical installation were being separately charged, which was not denied by the Revenue. The assessee was also entitled to claim depreciation in respect of maintenance of amenities for which it received a separate fee. The assessee had computed such income under the head profit and gains of business and profession and therefore, the claim of depreciation was permissible. The assessee was supposed to provide services like lift, transformer, DG sets, which required employment of personnel to discharge such responsibility. While the Assessing Officer held that

elevators, transformers, DG sets etc., were held to be part of the commercial building and did not grant any depreciation on those items, the Appellate Authority had granted depreciation on those items except elevators or lifts, while the Tribunal granted depreciation on elevators and lifts also.

13. It is contended on behalf of the Revenue that the fixtures such as, transformers, D.G.sets, elevators etc., were part of the building and income from letting out of building is chargeable to tax under the head income from house property. That the assessing officer had rightly disallowed the claim of the assessee for deduction on account of depreciation on the aforesaid assets against income received in the form of maintenance fee charged from the tenants of the building, which was offered to tax under the head income from business by the assessee. Reference was made to various clauses of the lease agreement dated 11/8/2003 entered into with M/s. Accenture Services Pvt. Ltd., to contend that the aforesaid facilities are fixtures and the maintenance fee received from the lessee in respect of those fixtures ought to be considered as income from house property and not income

from business. He therefore contended that the assessee was not entitled to seek depreciation in respect of maintenance of amenities for which it received a separate fee.

14. *Per contra,* the submission of learned counsel for the assessee is that the issue was already decided by the Tribunal in the case of this very assessee for the assessment year 2004-05, wherein the Tribunal had held that rentals for the building and rent for the aforesaid facilities were separately charged and that the assessee was entitled to claim depreciation on the said assets in respect of maintenance of amenities for which it has received a separate fee. Items like elevators, transformers, DG sets etc., are not integral to the building as such, the income received from providing such facilities has to be charged under the head profits and gains of business and profession and therefore, depreciation has to be allowed. That reference made to Section 24 of the Act by the counsel for the Revenue is incorrect. He, therefore, contended that the Tribunal has rightly granted the depreciation on elevators also.

15. We have considered the aforesaid submissions in light of the lease agreement dated 11/8/2003, which was submitted during the course of arguments. On perusal of the said agreement, relevant portions of Clause 1 provides as under:

> *"1. The LESSORS doth hereby grant on lease and the LESSEE doth hereby take on lease the Demised Premises (Demised Premises are described in Schedule "B" hereto).*
>
> *a)*
> *(i) The first term of the lease for the Demised Premises shall be for a period of Five (5) years, commencing from the date provided in Clause 1 (b) below, at a monthly rent at the rate of Rs. 22/- (Rupees Twenty Two only) per sq. ft. (of which 18% shall be towards Electro Mechanical charges throughout the tenure of the lease) calculated for the first 3 years, and Rs. 25.30 per sq., ft. calculated for the 4th and the 5th years, for the super built up area of the said six floors of the Building, including bridge areas but not including any of the terraces or basements of the demised premises or any other portion/building of IBC Knowledge Park. The exact amount*

of rent payable shall be as provided in Clause 1(a)(iv) below and at present is estimated at Rs. 52,44,962 (Rupees Fifty Two Lakhs Forty Four Thousand Nine Hundred Sixty Two Only).

It is agreed that the area being leased to the LESSEE is as described in Schedule "B" and only as regards the rent agreed, the super built up area of the ground plus six floors of Tower A (including bridge areas), shall be taken into account, and shall not include the areas of any terraces or basements or the common / service areas attributable to the Tower "A" for purposes of calculation of rent payable, and the same is the rent agreed to be payable for the entire Demised Premises. For clarification it is understood that the calculation of the rent shall be arrived at in terms of Clause (1(a)(iv) below;

The LESSEE shall be entitled to renew the lease for an additional term of 4 years as per Clause 7 (d), by execution of a fresh lease which shall be duly registered, and the rent payable for the renewed term shall also be as provided in Annexure III. The detailed

calculations of rent payable by the LESSEE for the entire duration of the lease and its renewal, is set out in Annexure III.

The LESSEE shall pay an amount of Rs.52,44,962/= to the LESSORS, towards one month's rent in advance and to be adjusted against rent for Tower A on commencement of the lease and after complete adjustment of the said amount, the LESSEE shall pay further amounts towards rent as provided herein. If, however, the lease is terminated prior to April 1, 2004, the said amount shall be refunded to the LESSEE and / or adjusted by the LESSEE against proceeds of the said Instruments."

x x x

(iv) *Notwithstanding anything contained to the contrary, the rent payable shall be [(Actual Plinth Area + (27% of Actual Plinth Area)) multiplied by Rs.22/-] for the first three years and thereafter for the 4th and the 5th year it shall be multiplied Rs.25.30p (instead of Rs.22/-) per Sq. Ft. per month of actual plinth area."*

Clauses 3 (a) and (f) read as under:

"3.

a) The LESSORS agree that it is imperative for the quiet and peaceful occupation and use of the Demised Premises by the LESSEE and for the purpose the LESSEE intends to occupy and use the Demised Premises, that the Demised Premises have, at all times, the provision of services and facilities stipulated in Annexure II and as per the specifications and requirements stipulated therein, Annexure V and elsewhere in this lease or any of the annexures, which include but are not limited to requisite lifts and generators, Primary Power and 100% Power Back-up for Common Areas, cleanliness and upkeep of Tower A maintenance of lawn security services, water etc. for Tower A and such necessary area of IBC Knowledge Park for ingress and egress to and from Tower "A". Accordingly, the LESSORS shall provide and agree to be responsible for ensuring that the services and facilities set out in Annexure II and provision of primary power and 100% power backup for common Areas, and in the manner they are set out in this lease and all the

Annexures, are provided to the LESSEE by the LESSORS at all times while the LESSEE is in occupation of the Demised Premises or any portion thereof. However, the LESSORS shall be entitled to nominate a Maintenance Agency to maintain the said services, while being responsible for all acts of the Maintenance Agency and for the provision of the said services and facilities.

x x x

f) The LESSEE shall, over and above the rent herein reserved, be required to pay only the following charges, which are towards provision and maintenance of facilities and services provided in Annexure II

i. For the first term of the lease, a monthly maintenance charge of Rs.3/- (Rupees Three only) per Sq. Ft. of super built up area of the Ground plus six floors, including bridge areas only if they are authorized for commercial use, being an amount of Rs. 7,15,222/= per month if the bridge area is authorized for commercial use, and being an amount of Rs,. 6,43,715/- per month if the bridge

area is not authorized for commercial use. The LESSORS shall not be entitled to any escalation during the three years of the first term, for any reason whatsoever. The said amounts to be paid alongwith lease rents.

ii. For the second term of the lease, if the charges exceed Rs. 4/= per square foot per month, the same shall be payable by the LESSEE, only on the same being justified by the LESSOR and subject to LESSORS providing information and documents, to the satisfaction of the LESSEE, entitling the LESSORS to the escalation."

16. Thus, the lessee is required to pay not only the rentals on the building but also charges for the facilities provided by the assessee. The facilities and services provided by the assessee are at Annexure–2 to the said agreement. On a conjoint reading, it becomes clear that the rental income is income from house property. But the charges received towards provision and maintenance of facilities and services as per Annexure-2 cannot be construed to be income from house property. The said income, in our view, has to be considered as income from

business and therefore, the claim for depreciation has to be allowed, which has been rightly done so by the Tribunal. Substantial question of law No.1 is accordingly answered in favour of the assessee.

17. As far as the second question of law is concerned, the same relates to payment of interest of Rs.72.00 lakh on borrowed capital, as an allowable business expenditure. The contention of the Revenue is that there was no income from business i.e., in respect of sale of building and therefore, interest could not be allowed as business expenditure. According to the Revenue, under Section 24, only interest on amount borrowed for the purposes of acquisition or construction of the property is eligible for deduction. But the assessee had not sold any building and therefore, the business of the assessee had not commenced. The stand of the Revenue is that the sale of flats or building constructed was a *sine qua non* for commencement of its business.

18. On the other hand, the assessee had contended that it had purchased land and on obtaining sanctioned plan had started construction and had

completed a few towers by 31/3/2004. Therefore, assessee's business had commenced. Disallowance of interest was incorrect. The Tribunal noted that the assessee was in the business of developing immovable property and selling them. During the financial year 2003-04, it has constructed M/s. IBC Knowledge Park Pvt. Ltd., on Bannerghatta Road, Bengaluru. Disputes arose between the assessee and Bengaluru Housing Development and Investment, a partnership firm with whom assessee had entered into a joint development agreement. On account of the said dispute, assessee could not proceed with the sale of properties.

19. It is noted that the Assessing Officer had disallowed a sum of Rs.52.56 crore related to investment in the construction of the towers, which have been let-out and proportionate interest was allowed under Section 24 of the Act, but the balance amount of Rs.72.00 lakh was disallowed on the ground that the building in respect of which the loan was taken had not yet been let-out. But the Tribunal noted that where interest on borrowed funds were utilized towards other current assets and the loan

was not taken for a specific construction activity, then the interest paid had to be allowed as a business expenditure.

20. Learned counsel for the appellant contended before us that the Appellate Authorities were not right in holding that a sum of Rs.72.00 lakh paid as interest on borrowed capital was not an allowable business expenditure when assessee's business had not commenced as there was no declaration of income from business and assessee had received only rental income, which was income from house property.

21. *Per contra,* learned counsel for the assessee contended that merely because the assessee had not sold the flats it had constructed, it could not be said that the assessee had not commenced business. The moment land was purchased and several steps were taken towards construction of towers would imply that the assessee had commenced business. Therefore, disallowance on payment of interest was incorrect.

22. It is noted that in the financial year 2003-04, assessee had constructed a project known as M/s.IBC Knowledge Park Pvt. Ltd., on Bannerghatta Road,

Bengaluru. However, there were disputes between the assessee and Bangalore Housing Development and Investments, a partnership firm, with whom the assessee had entered into a joint development agreement. As a result, assessee could not sell the constructed properties. Sale of constructed properties is not a *sine qua non* for commencement of business. Assessee's business commenced when it had purchased land, obtained plan sanction and put up construction. Thus, when the business of the assessee had commenced during the financial year 2003-04, interest paid by the assessee on borrowed capital cannot be added back to the work in progress. The Tribunal in this regard has relied upon a decision in the case of ***K.Raheja Development [102 ITD 414],*** which has been held to be correct by this court. We hold that the Tribunal was right in giving relief to the assessee and the findings of the Tribunal would not call for any interference. Accordingly, the second substantial question of law is answered against the Revenue.

23. Third substantial question of law is with regard to the disallowance of interest of Rs.1,91,14,354/-. The Assessing Officer had held that the balance sheet did not

reflect any accrued interest and hence, the same could not be allowed as a deduction. The Appellate Commissioner had directed the Assessing Officer to allow deduction on payment of interest. As noted from the order, in ITA.Nos.903 to 906/Bang/2013, letter dated 30/9/2006 was filed by the assessee before the Assessing Officer, which was furnished to the Tribunal as well. The Appellate Commissioner had held that the detailed working of interest on borrowings for Tower 'A' were furnished and that Tower 'A' had been let-out and the interest pertaining to the said aspect amounted to Rs.1,91,14,354/- paid during the previous years. The Tribunal held that there was no infirmity in the order of the Appellate Commissioner in granting relief to the assessee. Therefore, the same was confirmed.

24. Learned counsel for the Revenue, however, contended that the Appellate Authorities were not right in holding that a sum of Rs.1.91 crore cannot be disallowed as a deduction. He submitted that the said amount was not reflected in the balance sheet and no particulars had been furnished by the assessee in that regard. Learned counsel contended that the Appellate Authorities were not

right in directing the Assessing Officer to allow the interest, which direction has been affirmed by the Tribunal.

25. *Per contra,* learned counsel for the assessee supported the order of the Appellate Commissioner as well as the Tribunal on this issue. The Tribunal has found that the assessee had filed a letter dated 30/9/2006 before the Assessing Officer. In paragraph No. 21 of the said letter, detailed workout of interest on borrowings for 'Tower A' is furnished. 'Tower A' had been let-out and the interest amount was paid during the previous year. Interest in respect of 'Tower B' had not been claimed as deduction.

26. On going through the letter dated 30/9/2006, the Tribunal did not find any infirmity in the order of the Appellate Commissioner in granting relief to the assessee. We do not find any infirmity in the order of the Tribunal. Accordingly, substantial question of law No.3 is answered against the Revenue.

27. Fourth substantial question of law is with regard to the correctness of allowing the claim of deduction on construction management fee to an extent of 25% even though no evidence has been adduced in

support of the claim, when this expense related to the property constructed by the assessee which was let-out and rental income was received under the head Income from House Property and therefore, the question of earning expense did not arise and therefore, the same could not be capitalized. The case of the assessee is that it had supervised all the setting up of the interiors on behalf of M/s. Accenture Services Pvt. Ltd., and had earned income of Rs.78.25 lakh towards construction management fee. During the course of such work, it had incurred certain expenses towards payment of professional charges to consultants and other services. According to the Revenue, expenses incurred under the head professional charges was Rs.1,29,08,375/- had to be disallowed as it was not meant for management of construction, but on other expenses, such as advertisement, sales promotion etc. Therefore, the income had to be assessed under the head income from other sources. The Tribunal held that the income had to be assessed as business income and the assessee could not have received a sum of Rs.78.25 lakh without incurring

expenses. Therefore, 25% of the gross fee earned was allowed as expenses.

28. Learned counsel for the Revenue contended that the assessee had not produced any evidence with regard to the claim of Rs.1,29,08,375/- as construction management fee for being deducted from the income. He contended that the said expense related to the property constructed and the assessee had let-out the said property and had received rental income from the house property. Hence, expenses in that regard did not arise.

29. *Per contra,* assessee's counsel supported the finding of the Tribunal by contending that the assessee had earned income of Rs.78.25 lakh as construction management fee. It had set up the interiors of M/s.Accenture Services Pvt. Ltd., and the aforesaid disputed amount was the expenses incurred in the process.

30. It is noted that M/s. Accenture Services Pvt. Ltd., had engaged the services of the assessee herein as construction management services. The income earned is business income and cannot be considered as income from

other sources. Also, if the assessee had received income of Rs.78.25 lakh towards construction management services, it would have incurred expenditure in various forms. But the details of expenditure was not putforth by the assessee. In the circumstances, the Tribunal assessed the expenditure to be allowed as expenses at 25% of the gross fee. We think that the Tribunal was right in construing the said income as business income and not as income from other sources. We do not find any perversity in the said assessment of 25% being the expenditure incurred from the gross fee. Therefore, there is no merit in the substantial question of law raised, which is answered against the Revenue. In the result, the appeals filed by the Revenue are liable to be dismissed.

ASSESSEE'S APPEALS:

31. As far as the appeals filed by the assessee with regard to the proceedings under Section 153C is concerned, submission of learned Senior Counsel, Sri.K.P.Kumar, appearing for the assessee is that under Section 132 of the Act, search was conducted on Mr. Yunus Zia, Mr.Ziaulla Sheriff and M/s. India Builders Corporation

on 17/6/2008. One of the offices of the assessee is in the same premises where the search took place. Certain documents belonging to the assessee were seized and the Assessing Officer of the persons searched transferred the documents to the Assessing Officer of the assessee under Section 153C of the Act. The Assessment Orders under Section 153(3) read with section 153C were passed for the assessment years 2004-05 to 2008-09. The assessee's appeals pertain to 2004-05 to 2006-07 only. While highlighting the aforesaid factual details, learned Senior Counsel contended that in the absence of any incriminating material found during the search operation, the assessments made under Section 153C were without jurisdiction. That the purpose of Sections 153A to 153C of the Act is to bring to tax undisclosed income. However, for the relevant assessment years no new additions were made on the basis of the documents seized. That the additions made were the very same ones made in the earlier assessment order dated 27/12/2006. That before any notice under Section 153C is issued, the Assessing Officer must be satisfied that the documents seized have a bearing on the total income of the assessee, which is not

so in the present case. In support of these legal propositions, learned Senior Counsel for the assessee, Sri.K.P.Kumar, relied on certain decisions which shall be adverted later.

32. Learned Senior Counsel further contended that the documents belonging to the assessee which were seized during the search of the aforesaid three parties were bound to be found in the premises searched as it carries on business from the very same premises. Merely because documents of the assessee were found and seized, proceedings under Section 153C could not have been initiated. The requisite procedure under Section 132 of the Act cannot be ignored while invoking Section 153C of the Act. Further, for the accounting year 2004-05, assessment had been completed on 12/12/2006 and thus, the assessment proceedings did not abate. Hence, no order under Section 153C could have been made except with regard to any undisclosed income based on incriminating material. That the Revenue has filed an appeal against the order of the Tribunal in this regard, which is without merit. For the accounting year 2005-06, an intimation under Section 143(1)(a) had already been

issued and the time for issuance of notice under Section 143(2) had already lapsed and therefore, no assessment could be said to be pending, for it to abate. As far as accounting year 2006-07 is concerned, no notice for assessment was pending under Section 143(2) had been issued.

33. Learned Senior Counsel further contended that the precedents relied upon by the Revenue do not support the proposition, that even in the absence of any incriminating material found assessment under Section 153A/153C could be made. Learned Senior Counsel lastly contended on merits, the judgment to be passed in ITA.No.402/2009 arising out of original scrutiny assessment proceedings for assessment year 2004-05 would be applicable to the assessee and that in other respects, Revenue's appeals may be dismissed and assessee's appeals may be allowed.

34. *Per contra,* learned counsel for the Revenue submitted that prior to the insertion of Sections 153A and 153C of the Act with effect from 1/6/2003, the assessments made pursuant to a search conducted under

Section 132 or a requisition under Section 132A of the Act, were made under Sections 158BB, 158BC and 158BD of the Act. The aforesaid three sections deal with undisclosed income on the basis of the evidence found as a result of search or requisition of books of accounts or other documents and such other materials or information that are available with the Assessing Officer and such other relatable evidence. In other words, detection of undisclosed income was a *sine qua non* for invocation of those sections. But Section 153C of the Act mandates recording of satisfaction only to the extent of any money, bullion or other valuable articles or books of accounts or documents seized, which belong to the person other than the person who is searched. Therefore, what is required is recording of satisfaction regarding finding of material belonging to the other person. Sections 153A and 153C are silent about tracing of any undisclosed income. Further, on account of change in the scheme of the Act, introducing the concept of single assessment under Sections 153A and 153C of the Act, any incriminating material found during the course of search or requisition is sufficient for reopening the assessment, it is not necessary

that undisclosed income must be found. Thus, according to learned counsel, detection of any undisclosed income during search operation or requisition is not a *sine qua non* for reopening of assessment under Sections 153A and 153C and that the finding of the Tribunal in that regard is not correct.

35. He further submitted that as per the earlier scheme under Sections 158BC and 158BD of the Act, block assessment had to be made for six assessment years preceding previous year in which the search or requisition was made and until the date of commencement of the search or date of such requisition in the previous year in which the search was conducted or requisition made. That is not so under the present scheme as an independent assessment could be made. That in the instant case, out of six assessment years, no undisclosed income was found for the assessment year 2004-05 and hence, the assessment under Section 153C of the Act was not valid and the original assessment was reiterated, but all the six assessment years were rightly reopened under Section 153C of the Act.

36. Thus, according to learned counsel for Revenue, the finding of the Tribunal that assessment under Sections 153A and 153C have to be confined to only when undisclosed income was detected on the basis of the incriminating material found during the course of search would imply that the Assessing Officer cannot make use of any other information coming to his notice while assessment under Sections 153A and 153C is made. Also, if the limitation period prescribed as provided under Section 153C has lapsed and no action could be taken regarding escapement of income under that section and if the interpretation as made by the Tribunal is to be applied with regard to Sections 153A and 153C, there would, in fact, be escapement of income. This is not intended under the scheme of the Act, is the submission.

37. Learned counsel for the Revenue contended that the Assessing Officer under Section 153C of the Act has to record satisfaction regarding the material seized in the course of search of a person when it belonged to any other person. But detection of undisclosed income is not material. Relying on certain decisions of the Hon'ble Supreme Court as well as various High Courts, learned

counsel for Revenue sought for dismissal of assessee's appeals.

38. Both sides have relied upon decisions of the Hon'ble Supreme Court as well as various High Courts including this Court in support of their respective contentions, which shall be referred to later.

39. On a perusal of the material on record, it is noted that during the course of search in the premises of M/s.India Builders Corporation on 17/06/2008, certain documents of the assessee company were found and seized by the concerned officer. Subsequently, proceedings under Section 153C of the Act were initiated by the Assessing Officer of the assessee. Assessee's contention that the proceedings were not initiated in accordance with law, was not accepted by the appellate Commissioner, who dismissed the appeals. Before the Tribunal, it was contended that the assessee also carried out its functions from the very premises which was searched. Therefore, assesse's documents were bound to be found in the said premises. Therefore, it was contended that Section 153C could not be invoked.

40. It was next contended before the Tribunal that the documents found did not lead to disclosure of undisclosed income of the assessee nor were they incriminating in nature. That the fundamental purpose of the search is to unearth undisclosed income. Therefore, unless the documents seized *prima facie* showed undisclosed income, Section 153C of the Act could not be invoked. That before any satisfaction under Section 153C of the Act was recorded, the Assessing Officer must make enquiries and find out *prima facie* that the documents represented undisclosed income. It was also contended that the assessment under Section 153A read with Section 153C could be made only in respect of those assessment years relating to the documents detected.

41. The Tribunal while considering the aforesaid contentions held that the assessee shared common business premises with the person searched. But the fact that it *ipso facto* could not face proceedings under Section 153C of the Act, unless there was undisclosed income on the part of the assessee detected in the search operation, was not correct. Also, it was not necessary that satisfaction should be recorded regarding the seized

articles found in the course of search which lead to undisclosed income at the stage of detection during the course of search. The Tribunal also held that once the condition for invoking Section 153A was satisfied, the Assessing Officer could proceed in accordance with Section 153C of the Act and pass an order of assessment for six assessment years immediately preceding the assessment year relevant to previous year in which search was conducted or requisition was made.

42. As far as the assessment year 2004-05 was concerned, the Tribunal noted that as on the date the search was conducted i.e., on 17/06/2008, no assessment proceeding for that year was pending and the additions made for the assessment year under Section 153A r/w Section 153C are identical to the ones made in the assessment order dated 27/12/2006 for the said year. As no undisclosed income was detected, the assessment made under Section 153A r/w Section 153C of the Act was quashed by the Tribunal.

43. As far as assessment year 2005-06 was concerned, though order under Section 143(3) was not

passed, an intimation under Section 143(1) was issued on 28/03/2007 which fact is noted in the order 31/12/2010 passed under Section 153A r/w 153C of the Act. The Tribunal held that for the purpose of Section 153A r/w 153C of the Act, an intimation under Section 143(1) is also an order of assessment, and therefore, the argument of the assessee was not accepted. In the circumstances, cross-objection of the assessee was partly allowed for the assessment year 2004-05 and for the assessment years 2005-06 and 2006-07 were dismissed by the Tribunal.

44. Before considering the rival contentions, it is necessary to advert to the scheme of the Act regarding special procedure for assessment in cases of search. Sub-section (1) of Section 132 of the Act states that where the Chief Commissioner or any other officer mentioned therein having information in his possession, has reason to believe that *inter alia,* any person is in possession of any money, bullion, jewellery or other valuable article or thing (hereinafter referred to as "valuable assets" for the sake of convenience) and such valuable assets represents either wholly or partly income or property, which has not been, or would not be, disclosed for the purposes of the Act,

then, the authorized officer can enter and search any building, place, vessel, vehicle or aircraft, where he has reason to suspect that such books of account, other documents, or valuable assets are kept or search any person, break open the lock of any door etc., seize any books of account, other documents, or other valuable assets found as a result of such search and do all other things necessary as prescribed under Section 132 of the Act.

45. Sections 153A, 153B and 153C were inserted by the Finance Act, 2003, with effect from 1/6/2003. They have replaced the post-search block assessment scheme in respect of any search or requisition made after 31/5/2003. Sub-section (1) of Section 153A *inter alia* deals with assessment in case of search or requisition. It begins with a *non obstante* clause and states 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, other documents or any valuable assets are requisitioned under Section 132A, the Assessing Officer shall issue notice to such person requiring him to furnish within such period, as may

be specified in the notice, return of income in respect of each assessment year falling within six assessment years referred to in clause (b) of Section 153(1) in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed and the provisions of the Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under Section 139. The Assessing Officer can 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. However, assessment or re-assessment, 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. The explanation states, save as otherwise provided in Sections 153A, 153B and 153C, all other provisions of the Act shall apply to the assessment made under Section 153A. Section 153B speaks about time-limit for completion of assessment under Section 153A.

46. 153C is relevant for the purposes of this case. Sub-section (1) of Section 153C begins with a *non obstante* clause and it states that notwithstanding anything contained in Sections 139, 147, 148, 149, 151 and 153, where the Assessing Officer is satisfied that any valuable assets, seized or requisitioned, belongs to, or any books of account or documents, seized or requisitioned, pertains or pertain to, or any information contained therein, relates to a person other than the person referred to in Section 153A, then, the books of account or documents or valuable assets, seized or requisitioned shall be handed over to the Assessing Officer having jurisdiction over such other person and that Assessing Officer shall proceed against each such other person and issue notice and assess or re-assess the income of the other person in accordance with the provisions of Section 153A, if that Assessing Officer is satisfied that the books of account or documents or valuable assets seized or requisitioned have a bearing on the determination of the total income of such other person for the relevant assessment year or years referred to in sub-section (1) of Section 153A.

Sub-section (2) of Section 153C states that where books of account or documents or valuable assets seized or requisitioned as referred to in sub-section (1) has or have been received by the Assessing Officer having jurisdiction over such other person after the due date for furnishing the return of income for the assessment year relevant to the previous year in which search is conducted under Section 132 or requisition is made under Section 132A and in respect of such assessment year - (a) no return of income has been furnished by such other person and no notice under sub-section (1) of Section 142 has been issued to him, or (b) a return of income has been furnished by such other person but no notice under sub-section (2) of Section 143 has been served and limitation of serving the notice under sub-section (2) of Section 143 has expired, or (c) assessment or reassessment, if any, has been made, before the date of receiving the books of account or documents or valuable assets seized or requisitioned by the Assessing Officer having jurisdiction over such other person, such Assessing Officer shall issue notice and assess or reassess total income of such other

person of such assessment year in the manner provided in Section 153A**.**

47. Chapter XIV-B consists of Section 158B to 158BH, inserted with effect from 01/07/1995, deals with special procedure for assessment in search cases. The Finance Act, 1995 inserted Chapter XIV-B in the Act, incorporating a new scheme of block assessment in cases relating to search conducted under Section 132 of the Act or requisitions made under Section 132A after 30/06/1995. Section 158B(b) defines 'undisclosed income' to include any money, bullion, jewellery or other valuable article or thing or any income based on any entry in the books of account or other documents or transactions, where such money, bullion, jewellery, valuable article, thing, entry in the books of account or other document or transaction represents wholly or partly income or property, which has not been or would not have been disclosed for the purposes of this Act or any expense, deduction or allowance claimed under this Act which is found to be false. Section 158BA deals with assessment of undisclosed income as a result of search, while Section 158BB deals with computation of undisclosed income of the block

period. Block period is defined in Section 158B(a) to mean the period comprising previous years relevant to six assessment years preceding the previous year in which the search was conducted under Section 132 or any requisition was made under Section 132A and also includes the period up to the date of commencement of such search or date of such requisition in the previous year in which the said search was conducted or requisition was made. The proviso is not relevant for the purpose of this case.

48. Section 158BD is relevant for the present case and it states that where the Assessing Officer is satisfied that any undisclosed income belongs to any person, other than the person with respect to whom search was made under Section 132 or whose books of account or other documents or any assets were requisitioned under Section 132A, then the books of account, other documents or valuable assets seized or requisitioned shall be handed over to the Assessing Officer having jurisdiction over such other person and that Assessing Officer shall proceed under Section 158BC against such other person and the provisions of Chapter XIV-B shall apply accordingly. Section 158BE prescribes time limit for completion of block

assessment. Section 158BH states that except as otherwise provided in Chapter XIV-B all other provisions of the Act shall apply to the assessment made under the said chapter. Section 153C provides for the role of the Assessing Officer having jurisdiction over the person searched/requisitioned as regards third party liability. The said section covers assessments which have become necessary, because of books of accounts, documents or valuable assets of third parties indicating their undisclosed income found during the search or requisition under Section 132/132A leading to a *prima facie* tax liability. A special procedure is contemplated in such cases. Such books of accounts, documents or valuable assets are required to be handed over by the Assessing Officer having jurisdiction over the persons searched requisitioned to the assessing officer of a third party on his satisfaction that they belong to a third party before handing over.

49. On a conjoint reading of the aforesaid provisions, it becomes clear that a search can take place only when a concerned officer has information and reason to believe that any person is in possession of any valuable assets, which has not been or would not be disclosed

under the Act. In such a case, a search can take place. Following the search, if any books of account, other documents, any valuable assets is or are found in the possession or control of any person in the course of a search, then the books of account or other documents or valuable assets could be seized. Under Section 153A, the satisfaction regarding an inference of liability must be recorded. The Assessing Officer has to issue notice to the assessee i.e., the person searched for the purpose of assessment or re-assessment of the total income of six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted. Section 153C as already noted, deals with assessment of income of any other person, when the Assessing Officer is satisfied that the books of account or documents or valuable assets seized or requisitioned have a bearing on the determination of the total income of such other person for the relevant assessment year or years referred to under sub-section(1) of Section 153A of the Act. In such a case, the Assessing Officer has to issue notice to assess or re-assess income of other person under Section 153A of the Act. Thus, the fact that search has

been conducted would not justify issuance of notice under Section 153A. If it is only during a valid search when certain incriminating materials are detected, notice could be issued.

50. Chapter XIV-B which deals with special procedure for assessment of search cases deals with undisclosed income as a result of search, the computation thereof and such other provisions. Undisclosed income is defined in Clause (b) of Section 153B. Undisclosed income includes money, bullion or other valuable assets. It is only when the concerned officer has information about the same and has reason to believe that the said valuable assets has not been or would not be disclosed would give jurisdiction to the officer authorized to conduct a search operation. Therefore, the object and purpose of a search is to detect undisclosed income. As defined under Clause (b) of Section 158B of the Act, it is only when the undisclosed income is detected in a search operation that there would be assessment or re-assessment, under the provisions of Chapter XIV-B of the Act, of the person who is presumed to be in possession of the undisclosed income. If during the course of search, any valuable assets

belongs to or any books of account or document seized or requisitioned pertains to or any information contained therein relates to a person other than the persons searched, then the Assessing Officer, on recording satisfaction, can also assess and re-assess the income of any other person. Thus, what emerges is that the *sine qua non* for the purpose of assessment or re-assessment pursuant to a search operation is detection of undisclosed income. In fact, the initiation of search proceeding is also based on possession of information and reason to believe that a person is in possession of certain valuable assets, which has not been or would not be disclosed under the Act. The same is nothing but 'undisclosed income' as defined in Clause (b) of Section 158B(b) of the Act. This becomes even more clear on a comparison of section 132(1)(c) with Section 158B(b) of the Act. It is for the above reason that Sections 153A and 153C begin with a *non obstante* clause in order to make these provisions exclusive of Sections 139, 147, 148, 149, 151 and 153 of the Act. If a search operation does not lead to detection of undisclosed income as defined in Chapter XIV-B of the Act, then no purpose would be served in reopening the

assessment already completed. Also, if there is no detection of any undisclosed income, then there would be no need for pending assessment to abate. Thus, when particulars of income declared in the return is already available with the Assessing Officer, such income cannot form part of undisclosed income even if such return is filed beyond the time limit, but before search, as long as they relate to any year covered in the block. Thus, a block assessment is justified only on the basis of evidence found during search and the materials or information relatable thereto.

Section 153C is in *pari materia* with Section 158BD conferring jurisdiction over third parties to a search providing certain conditions before the Assessing Officer having jurisdiction over a third party can assume jurisdiction. Materials such as books of accounts, documents or valuable assets found during a search should belong to a third party which would lead to an inference of undisclosed income of such third party. Such an inference should be recorded by the Assessing Officer having jurisdiction over the searched persons and communicated to the Assessing Officer having jurisdiction over such third

party along with the seized documents and other incriminating materials on the basis of which the Assessing Officer having jurisdiction over such third party would issue notice under Section 153C. On receipt of the aforesaid material, the Assessing Officer having jurisdiction over such third party would proceed against the said third party. Thus, where no material belonging to a third party is found during a search, but only an inference of an undisclosed income is drawn during the course of enquiry, during search or during post-search enquiry, Section 153C would have no application. Thus, the detection of incriminating material leading to an inference of undisclosed income is a *sine qua non* for invocation of Section 153C of the Act.

51. Before considering the decisions cited at the Bar, it is necessary to refer to a decision of the Hon'ble Supreme Court in ***Manish Maheshwari vs. Asst. Commissioner of Income-Tax & another [(2007) 289 ITR 341 (SC)]***. In that case, search was conducted on one of the directors of the assessee-company M/s.Indore Construction (Pvt.) Ltd. When the search was conducted in the premises of the director Sri. Manish Maheshwari and

his wife several incriminating documents relating to the company were seized. While dealing with Section 158BD of the Act, the Hon'ble Supreme Court has observed as under:

> *"Condition precedent for invoking a block assessment is that a search has been conducted under Section 132, or documents or assets have been requisitioned under Section 132A. The said provision would apply in the case of any person in respect of whom search has been carried out under Section 132A or documents or assets have been requisitioned under Section 132A. Section 158BD, however, provides for taking recourse to a block assessment in terms of Section 158BC in respect of any other person, the conditions precedents wherefor are : (i) Satisfaction must be recorded by the Assessing Officer that any undisclosed income belongs to any person, other than the person with respect to whom search was made under Section 132 of the Act; (ii) The books of account or other documents or assets seized or requisitioned had been handed over to the Assessing Officer having jurisdiction over such other person; and (iii) The Assessing Officer has proceeded under Section 158BC against such other person.*

The conditions precedent for invoking the provisions of Section 158BD, thus, are required to be satisfied before the provisions of the said chapter are applied in relation to any person other than the person whose premises had been searched or whose documents and other assets had been requisitioned under Section 132A of the Act."

In that case, it was held that the Assessing Officer had not recorded his satisfaction, which is mandatory; nor had he transferred the case to the Assessing Officer having jurisdiction over the matter. Therefore, the judgment of the High Court was set aside and the appeals were allowed.

52. The decisions relied upon by the learned Senior Counsel appearing for the assessee are as under:

(a) In ***Commissioner of Income-Tax vs. Calcutta Knitwears [(2014)362 ITR 673 (SC)],*** the Hon'ble Supreme Court considered the question, as to at what stage of the proceedings under Chapter XIV-B, the Assessing Authority was required to record his satisfaction for issuing notice under Section 158BD of the Act. In that case, the facts were that a search operation under Section

132 of the Act was carried out in two premises of the Bhatia Group, namely M/s. Swastik Trading Co., and M/s.Kavita International Co., on 5/2/2003 and certain incriminating documents pertaining to the assessee-firm i.e., Calcutta Knitwear were traced in the said search. After completion of the investigation by the investigating agency and handing over of the documents to the assessee to the Assessing Authority, the latter had completed the block assessments in the case of Bhatia group. Since certain other documents did not pertain to the person searched under Section 132 of the Act, the Assessing Authority therein thought it fit to transmit those documents, which according to him pertained to undisclosed income on account of investment element and profit element of the assessee-firm and required to be assessed under Section 158BC read with Section 158BD of the Act to another Assessing Authority in whose jurisdiction the assessments could be completed. In doing so, the Assessing Authority recorded his satisfaction note dated 15/7/2005. The jurisdictional Assessing Authority for the assessee had issued show-cause notice under Section 158BD for the block period of six years dated

10/2/2006 to the assessee. The assessee had replied that no action could be initiated against the assessee and requested the Assessing Authority to drop the proceedings. The stand of the assessee was rejected by the Assessing Authority, who concluded the assessment proceedings under Section 158BD of the Act. It was also heid that notice could be issued even after completion of the proceedings of the searched person under Section 158BC of the Act.

Aggrieved by the order of the Assessing Officer, the assessee therein had filed an appeal before the Appellate Authority, who had partly allowed the appeal. The Revenue had carried the matter further by filing an appeal before the Tribunal and the assessee therein filed cross-objection. The Tribunal rejected Revenue's appeal, which filed an appeal before the High Court, which also rejected the Revenue's appeal and confirmed the order of the Tribunal. The Revenue, then approached the Hon'ble Supreme Court. While dealing with various provisions of Chapter XIV-B of the Act pertaining to assessment in the case of search operation, the Hon'ble Supreme Court held that Section 158BD of the Act deals with undisclosed

income of any other person. On the question of recording satisfaction that there is an undisclosed income, which had been traced where a person was searched under Section 132 of the Act or books of accounts, other documents or valuable assets are requisitioned under Section 132A of the Act, the Hon'ble Supreme Court opined as under:

> *"We would certainly say that before initiating proceedings under section 158BD of the Act , the Assessing Officer who has initiated proceedings for completion of the assessments under section 158BC of the Act should be satisfied that there is an undisclosed income which has been traced out when a person was searched under Section 132 or the books of account were requisitioned under Section 132A of the Act. This is in contrast to the provisions of section 148 of the Act where recording of reasons in writing are a sine qua non. Under Section 158BD, the existence of cogent and demonstrative material is germane to the Assessing Officers' satisfaction in concluding that the seized documents belong to a person other than the searched person is necessary for initiation of action under Section 158BD. The bare reading of the provision indicates that the satisfaction note could be prepared by the Assessing Officer either at the*

time of initiating proceedings for completion of assessment of a searched person under Section 158BC of the Act or during the stage of the assessment proceedings. It does not mean that after completion of the assessment, the Assessing Officer cannot prepare the satisfaction note to the effect that there exists income-tax belonging to any person other than the searched person in respect of whom a search was made under Section 132 or requisition of books of account were made under Section 132A of the Act. The language of the provision is clear and unambiguous. The Legislation has not imposed any embargo on the Assessing Officer in respect of the stage of proceedings during which the satisfaction is to be reached and recorded in respect of the person other than the searched person.

Further Section 158BE(2)(b) only provides for the period of limitation for completion of block assessment under Section 158BD in case of the person other than the searched person as two years from the end of the month in which the notice under this Chapter was served on such other person in respect of search carried on after January 1, 1997. The said section does neither provide for nor impose any restrictions or conditions on the period of limitation for preparation of the

satisfaction note under Section 158BD and consequent issuance of notice to the other person.

In the result, we hold that for the purpose of Section 158BD of the Act a satisfaction note is sine qua non and must be prepared by the Assessing Officer before he transmits the records to the other Assessing Officer who has jurisdiction over such other person. The satisfaction note could be prepared at either of the following stages: (a) at the time of or along with the initiation of proceedings against the searched person under Section 158BC of the Act; (b) along with the assessment proceedings under Section 158BC of the Act; and (c) immediately after the assessment proceedings are completed under Section 158BC of the Act of the searched person."

In that case, the Hon'ble Supreme Court remanded the matters to the concerned High Court for consideration of the individual cases in light of observations made above on the scope and interpretation of Section 158BD of the Act.

(b) In ***Commissioner of Income Tax vs. M/s.Lancy Constructions [ITA.No.528/2014 & connected matters disposed of by this Court on 15/12/2015]***, it was held that there were no incriminating documents during the course of search on the basis of which additions could have been made by the Assessing Officer. That the accounts which were submitted by the assessee at the time of regular assessment were duly verified during the course of such assessment and accepted by the Assessing Officer. In the absence of any incriminating documents having been found, the same accounts of the assessee were re-assessed by making further investigations, which was impermissible, as the same would amount to reopening of a concluded assessment, without there being any additional material found at the time of search. Otherwise, it would give the Revenue a second opportunity to reopen a concluded assessment, which is impermissible in law. Merely because a search is conducted in the premises of the assessee, would not entitle the Revenue to initiate the process of re-assessment, for which, there is a separate procedure prescribed in the statute. It is only when the

conditions prescribed for re-assessment are fulfilled that a concluded assessment can be reopened. The very same accounts which were submitted by the assessee, on the basis of which assessment had been concluded, cannot be re-appreciated by the Assessing Officer merely because a search had been conducted in the premises of the assessee.

(c) In ***Jai Steel (India), Jodhpur vs. Assistant Commissioner of Income-tax [(2013) 36 taxmann.com 523 (Rajasthan)]***, it was held that no doubt the Assessing Officer is free to disturb income, expenditure or deduction *de hors* any incriminating material, while making an assessment under Section 153A of the Act. But in the context of a search, Section 153A to 153C cannot be interpreted to be a "further innings" for the Assessing Officer and/or the assessee beyond the provisions of Sections 139 (return of income); 139(5) (revised return of income); 147 (income escaping assessment) and 263 (revision of orders) of the Act.

It was also held that it was not open for the assessee to seek deduction or claim expenditure, which had not

been claimed in the original assessment, which assessment already stood completed, only because a assessment under Section 153A of the Act in pursuance of search or requisition was required to be made.

(d) In ***Commissioner of Income-Tax vs. Kabui Chawla [(2016) 380 ITR 573 (Delhi)]***, the Delhi High Court has held that (i) once a search takes place under Section 132 of the Act, notice under Section 153A(1) will have to be mandatorily issued to the person in respect of whom search was conducted requiring him to file returns for six assessment years immediately proceeding the previous year relevant to the assessment year in which the search takes place. (ii) Assessment and re-assessments pending on the date of the search shall abate. The total income for such assessment years will have to be computed by the Assessing Officers as a fresh exercise. (iii) The Assessing Officer will exercise normal assessment powers in respect of the six years previous to the relevant assessment year in which the search takes place. The Assessing Officer has the power to assess and re-assess the "total income" of the 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 assessment years in which both the disclosed and the undisclosed income would be brought to tax. (iv) Although Section 153A 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 Assessing Officer 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 the seized material. (v) In the 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 153A 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 assessment year on the basis of the

finding of the search and any other material existing or brought on record of the Assessing Officer. (vii) Completed assessments can be interfered with by the Assessing Officer while making the assessment under Section 153A 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.

The Delhi High Court further held that in the cases before it on the date of the search the assessment already stood concluded since no incriminating material was unearthed during the search, no additions could have been made to the income already assessed. The questions were accordingly answered in favour of the assessee.

53. Learned counsel for the Revenue has relied upon the following citations in support of his contentions:

(a) In ***Kamleshbhai Dharamshibhai Patel vs. CIT [(2013) 31 Taxmann.com 50 (Gujarat)]***, on considering Section 153C of the Act, it was observed that the said section begins with a *non obstante* clause.

Requirements for assuming jurisdiction under Section 153C (1) are, that the Assessing Officer is satisfied that any valuable assets or books of account or document seized or requisitioned belongs to a person other than the person referred in section 153A of the Act. In such a case, he shall handover to the Assessing Officer having jurisdiction of such other person, the books of account or document or documents or valuable assets seized or requisitioned. That the valuable assets or books of account seized or documents seized or requisitioned should belong to a person other than a person referred in Section 153A of the Act.

(b) In ***Filatex India Ltd. vs. CIT [49 Taxman 465 (Delhi)]***, the court rejected the argument that during assessment under Section 153A additions had to be restricted or limited to incriminating material only, found during course of search.

(c) In ***Savesh Kumar Agarwal vs. Union of India ((2013) 35 Taxmann.com 85 (Allahabad)]***, the question considered was whether on receipt of satisfaction note, the Assessing Officer had not found anything adverse

against the assessee and seized goods having been released in favour of the assessee, notice could be issued under Section 153C of the Act to file returns for six years. The stand of the Revenue therein was that the Assessing Officer could still proceed under Section 153A of the Act in order to find out the source of income. In that case the writ petition filed under Article 226 of the Constitution of India challenging the notice was dismissed on the premises that the power under Section 153C exists in the Assessing Officer, if he is satisfied with regard to the need for examination of the source of income.

(d) In ***Dr. K.M.Mehaboob vs. DCIT [(2012) 26 Taxmann.com 54 (Kerala)]***, it was held that unlike under Section 158BD, for transferring a file under Section 153C, there is no need to examine whether the books of accounts or other evidence or materials seized in the course of search of an assessee represents or proves undisclosed income of another assessee. On the other hand, for transferring the file to the Assessing Officer of such other assessee, all that is required to be considered is whether the materials or books of accounts or evidence recovered relates to another assessee, which may or may

not lead to an assessment in the case of the other assessee after transfer of the file to his Assessing Officer. This is only an internal arrangement to be made between two Departmental Officers and in this regard the only fact that needs to be verified is whether the assessee whose books of accounts or materials are recovered in the course of search of any other assessee, is a regular assessee before another Officer, and if so, to transfer the file to such other Officer for his consideration and for passing orders, whether assessment or penalty or such other order permissible under the Act by that Officer.

(e) In ***Canara Housing Developnment Co. vs. D.C.I.T. [(2015) 274 CTR 122 (Kar.)],*** a Division Bench of this court in the said case noted that in the course of search, incriminating material leading to undisclosed income being seized, held that 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. 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 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 assessment order.

(f) Similarly, in ***Gopal Lal Badruka vs. DCIT [(2012) 346 ITR 106],*** the search revealed incriminating material and undisclosed income.

(g) in ***SSP Aviation Ltd. vs. DCIT [(2012) 20 Taxmann.com 214 (Delhi)]***, the observations of the court were in light of the fact that incriminating material had been found.

(h) In ***CIT vs. Anil Kumar Bhatia [(2012) 211 Taxman 453 (Delhi)]***, the court did not express any opinion as to whether Section 153 A can be invoked in a case where no incriminating material was found during the search as it was in fact dealing with a case where incriminating material had been found.

54. On a consideration of the relevant sections as well as judicial precedent referred to above, what emerges is that, Section 158BD of the Act deals with undisclosed income of a third party. However, insofar as the incriminating material of the searched person or other person detected during the course of search is concerned, the same can be considered during the course of assessment. Further, such incriminating material must relate to undisclosed income which would empower the Assessing Officer to upset or disturb a concluded assessment of the other person. Otherwise, a concluded assessment would be disturbed without there being any basis for doing so which is impermissible in law. Even in case of a searched person, the same reason would hold good as in case of any other person. As observed by us, detection or the existence of incriminating material is a must for disturbing the assessment already made and concluded. But, at the same time, such can be at three stages: one, at the stage when the re-assessment is initiated, the second, at the stage during the course of re-assessment and third, at a stage where the re-assessment is altered by a different assessment in respect of searched

person or in respect of third party. In this regard, reference may be made to the decision of Apex Court in case of *M/s.Calcutta Knitwear (supra)* and based on the said decision, the CBDT has also issued circular dated 31.12.2015 vide No.24/2015.The relevant extract of the circular for ready reference can be extracted as under:

> *"The issue of recording of satisfaction for the purposes of section 158BD/153C has been subject matter of litigation.*
>
> *2. The Hon'ble Supreme Court in the case of M/s Calcutta Knitwears in its detailed judgment in Civil Appeal No.3958 of 2014 dated 12.3.2014(available in NJRS at 2014-LL-0312-51) has laid down that for the purpose of Section 158BD of the Act, recording of a satisfaction note is a prerequisite and the satisfaction note must be prepared by the AO before he transmits the record to the other AO who has jurisdiction over such other person u/s 158BD. The Hon'ble Court held that "the satisfaction note could be prepared at any of the following stages:*
>
> *(a) at the time of or along with the initiation of proceedings against the searched person under section 158BC of the act; or (b) in the course of the assessment proceedings under*

section 158BC of the Act; or (c) immediately after the assessment proceedings are completed under section 158BC of the Act of the searched person."

2. Several High Courts have held that the provisions of section 153C of the Act are substantially similar/pari-materia to the provisions of section 158BD of the Act and therefore, the above guidelines of the Hon'ble SC, apply to proceedings u/s 153C of the IT Act, for the purposes of assessment of income of other than the searched person. This view has been accepted by CBDT.

3. The guidelines of the Hon'ble Supreme Court as referred to in para 2 above, with regard to recording of satisfaction note, may be brought to the notice of all for strict compliance. It is further clarified that even if the AO of the searched person and the "other person" is one and the same, then also he is required to record his satisfaction as has been held by the Courts.

4. In view of the above, filing of appeals on the issue of recording of satisfaction note should also be decided in the light of the above judgment. Accordingly, the Board hereby directs that pending litigation with regard to

recording of satisfaction note under section 158BD/153C should be withdrawn/not pressed if it does not meet the guidelines laid down by the Apex Court."

As per the aforesaid circular, at the time of or along with initiation of the proceedings, against the searched person or third party under Section 153C or in the course of assessment proceedings under Section 153C of the Act or immediately after the assessment proceedings are completed under Section 153C of the Act, recording of satisfaction is required.

55. If the observations made by the Tribunal are considered in this regard, it is noted by the Tribunal that it is not necessary that satisfaction should be recorded that documents or valuable assets found in the course of search showed undisclosed income. In view of the aforesaid discussion, we do not think that such can be the correct position of law.

56. Further, in the judgments referred to by the learned counsel for the Revenue, where incriminating material leading to undisclosed income of another assessee was detected in a search operation, in those cases,

reopening of the concluded assessment have taken place. There has been no single decision cited by the learned counsel for the Revenue where the assumption of jurisdiction of the Assessing Officer is in the absence of any incriminating material or undisclosed income having been detected during the course of search leading to reopening of a concluded assessment. In the instant case, though documents belonging to the assessee were seized at the time of search operation, there was no incriminating material found leading to undisclosed income. Therefore, assessment of income of the assessee was unwarranted. Consequently, no satisfaction was recorded in the case of the assessee.

We answer substantial question of law No.2 by holding that the Tribunal was not correct in holding that the assessment under Section 153C was valid despite there being no satisfaction recorded to the effect that the documents found during the search on 17/06/2008 were incriminating in nature and *prima facie* represented undisclosed income.

57. In the instant case, one of the conditions precedent for invoking a block assessment pursuant to a search in respect of a third party under Section 158BD of

the Act, i.e., recording satisfaction that undisclosed income belongs to the third party, which was detected pursuant to a search under Section 133 of the Act, has not been complied with in the instant case. Therefore, the reassessment as such made under Section 158BD in respect of the assessee is not in accordance with law. We accordingly answer substantial question No.2 in favour of assessee. In view of our answer to the aforesaid question, we do not find it necessary to answer substantial question of law Nos.1, 3 and 4 in these appeals. The said questions are kept open to be raised at an appropriate time if the occasion arises.

58. In the result, the appeals filed by the Revenue are dismissed. The appeals filed by the assessee are allowed to the aforesaid extent.

59. Parties to bear their respective costs.

Sd/-
JUDGE

Sd/-
JUDGE

*s/*mvs*