

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL NO. 24 of 2016

FOR APPROVAL AND SIGNATURE:

HONOURABLE MS.JUSTICE HARSHA DEVANI

and

HONOURABLE MR.JUSTICE G.R.UDHWANI

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

PR.COMMISSIONER OF INCOME TAX-4....Appellant

Versus

SAUMYA CONSTRUCTION PVT LTD.... Respondent

Appearance:

MR NITIN K MEHTA, ADVOCATE for the Appellant

MS SN SOPARKAR, SR. ADVOCATE with MR B S SOPARKAR, CAVEATOR
for the RespondentCORAM: **HONOURABLE MS.JUSTICE HARSHA DEVANI**

and

HONOURABLE MR.JUSTICE G.R.UDHWANI

Date : 14/03/2016

ORAL JUDGMENT

(PER : HONOURABLE MS.JUSTICE HARSHA DEVANI)

1. The appellant – revenue in this appeal under section 260A of the Income Tax Act, 1961 (hereinafter referred to as “the Act”) has called in question the order dated 21st August, 2015 passed by the Income Tax Appellate Tribunal, Ahmedabad, Bench “D” (hereinafter referred to as “the Tribunal”) in ITA No.3/Ahd/2014, by proposing the following three questions:

“[A] Whether the order of Tribunal is right in law and on facts in deleting the addition made in assessment made u/s 153A of the Act?

[B] Whether the Tribunal is right in law in holding that the addition should be based on the incriminating material found during the course of search under new procedure of assessment u/s 153A which is different from earlier procedure u/s 158BC r.w.s. 158BB of the Act and by reading into the section, the words ‘the incriminating material found during the course of search’ which are not there in section 153A?

[C] Whether the Tribunal erred in relying on the ITAT order in Sanjay Aggarwal Vs. DCIT (2014) 47 Taxmann.Com 210 (Del) which has interpreted undisclosed income unearthed during the search to imply incriminating material, as against the finding of

the Delhi High Court in Filatex India Ltd. Vs. CIT-IV (2015) 229 Taxman 555 (Delhi) wherein it is held that during the assessment u/s 153A additions need not be restricted or limited to incriminating material found during the course of search?"

2. The assessment year is 2006-07 and the relevant accounting period is the previous year 2005-06. The assessee – M/s Saumya Construction Pvt. Ltd. is engaged in the business of construction and development of properties, trading in fabrics and garments. A search and seizure operation was carried out on 07.10.2009 and an assessment came to be framed under section 143(3) read with section 153A(1)(b) of the Act on 30.12.2011 determining the total income of the respondent assessee at Rs.14,49,51,130/- against the declared income at Rs.3,44,00,130/-. During the course of assessment proceedings, it was noticed that the assessee had paid Rs.11,05,51,000/- to one Shri Rohit Modi in respect of the land situated at Shilaj, Taluka Daskroi (known as Tapovan land) (which was transacted by The Sandesh Ltd. as confirming party, M/s Saumya Construction Pvt. Ltd. as third party and Aryaman Co-operative Housing Society Ltd. as purchaser from Shri Rohit P. Modi and Pareshaben K. Modi) through a sale deed dated 01.06.2006. Shri Rohit Modi, in his assessment, admitted receipt of Rs.11,05,51,000/- as on-money received in cash in the transaction of land. The Assessing Officer held that the on-money has been paid by the assessee in the transaction for the purchase of land from Shri Rohit P. Modi and Pareshaben K. Modi and accordingly, added an amount of Rs.11,05,51,000/- to the total income of the assessee under section 68 of the Act in respect of the unexplained investment for purchase of land.

The assessee carried the matter in appeal before the Commissioner (Appeals), who confirmed the addition on the ground that the payment was made by the assessee because the assessee was the purchaser as all rights of development had been vested in the assessee by virtue of the conveyance deed dated 01.06.2006. The assessee carried the matter in further appeal before the Tribunal, which, placing reliance upon its earlier decision in the case of **Sanjay Aggarwal v. DCIT, (2014) 47 Taxmann.com 210 (Delhi)**, held that the addition is not based on any incriminating material found during the search operations on the assessee and hence, such addition could not be made under section 153A of the Act.

3. Mr. Nitin Mehta, learned senior standing counsel for the appellant, submitted that the Tribunal has grossly erred in holding that addition can be made under section 153A only if incriminating material is found during the course of the search, that too, in relation to each of the six assessment years and that in respect of any assessment year, if no incriminating material is found, addition cannot be made under section 153A of the Act. It was argued that there is no condition in section 153A that additions should be made strictly on the basis of the evidence found during the course of search or other post search material or information available with the Assessing Officer, related to the evidence found. It was submitted that section 153A of the Act has two trigger points after which there is a mandate on the Assessing Officer to issue notice for assessment in each of the six years prior to the date of the search. It was submitted that the Tribunal, while holding that the addition should be based upon the incriminating material, found during the search under the new procedure provided

under section 153A, failed to appreciate that the new procedure is different from the earlier procedure under section 158BC read with section 158BB of the Act.

3.1 Reference was made to the decision of the Delhi High Court in the case of **Commissioner of Income Tax v. Anil Kumar Bhatia**, [2012] 211 Taxman 453, to point out that the court has discussed the distinction between the previous scheme under Chapter XIV of the Act which provided for what is popularly known as 'block assessment' and the new scheme under section 153A to 153C of the Act, whereby the single block assessment concept was given a go-bye. It was submitted that the new scheme envisages assessment of the total income whether by way of assessment or reassessment. Such income would, therefore, include the income disclosed, income unearthed and any other income. It was submitted that the court has held that the Assessing Officer under section 153A of the Act has been entrusted with the duty of bringing to tax the total income of any assessee whose case is covered by the said provision, by even making reassessments without any fetters, if need be. It was pointed out that the court has also held that the Assessing Officer has the power under section 153A to make assessment for all the six years and compute the total income of the assessee, including the undisclosed income, notwithstanding that assessee has filed returns before the date of the search which stood processed under section 143(1)(a) of the Act.

3.2 Strong reliance was placed upon the decision of the Delhi High Court in **Filatex India Ltd. v. Commissioner of Income Tax-IV**, (2015) 229 Taxman 555 (Delhi), to submit

that it has been held that additions need not be restricted to incriminating material found during the course of search. Reliance was also placed upon the decision of the Karnataka High Court in the case of **Canara Housing Development Company v. Deputy Commissioner of Income Tax, (2015) 274 CTR 0122 (Kar)**, for the proposition that when once the proceedings are initiated under section 153A of the Act, the legal effect is that even in case where the assessment order is passed, it stands reopened. In the eyes of law, there is no order of assessment. Re-opened means to deal with or begin with again. It means the Assessing Officer shall assess or reassess the total income of six assessment years. Once the assessment is reopened, the assessing authority can take note of the income disclosed in the earlier return, any undisclosed income found during search 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. It was submitted that the shift which the legislature wanted from section 158BA by introducing section 153A of the Act is clear, inasmuch as, while section 158BA provided for assessment of only undisclosed income, in contrast, section 153A clearly specifies what is to be taxed is the total income of each of the six preceding assessment years. Thus, there is a clear contrast between the previous and the new regimes. It was submitted that assuming for the sake of argument that additions or disallowances can be made only on the basis of incriminating material found during the search or requisition, once any incriminating material is found, it would be sufficient to make additions and disallowances in relation to each of the six assessment years and not only in respect of the assessment

year in relation to which such material is found. It was submitted that in the present case, it is not as if no incriminating material has been found during the search, the case of the respondent is that no incriminating material is found in relation to the year under consideration. Once, some incriminating material is found, it would enure for all the six assessment years and hence, it cannot be said that there was no incriminating material found during the course of the search.

3.3 It was contended that once section 153A of the Act is invoked, resort to section 147 is prohibited, under the circumstances, the Assessing Officer, thereafter, cannot reopen the assessment under section 147 of the Act. It is in these circumstances that section 153A of the Act envisages assessment of the total income which would include reopening of the assessment if any income is found to have escaped assessment. It was submitted that the above three decisions cumulatively hold that there is a change in regime, and that six individual assessment years have to be assessed, and the total income of each assessment year has to be assessed. What would constitute total income are three things: income disclosed, income unearthed and any other income. It was submitted that under section 153A of the Act, there are unfettered powers.

3.4 It was emphatically argued that the requirement of section 153A of the Act is to assess the total income in contradistinction to undisclosed income and hence, the Tribunal was not justified in holding that addition under that

provision could be made only if something incriminating is found during the search / requisition. It was, accordingly, urged that the appeal requires consideration on the questions of law as proposed or as may be formulated by the court.

4. Opposing the appeal, Mr. S. N. Soparkar, Senior Advocate, learned counsel with Mr. Bandish Soparkar, learned advocate for the respondent – assessee appearing on caveat, submitted that the controversy in issue is no longer *res integra* inasmuch as, the issue stands concluded by an unreported decision of this court in the case of **Commissioner of Income-tax-1 v. Jayaben Ratilal Sorathia**, rendered on 02.07.2013 in Tax Appeal No.914 of 2012, wherein it has been held that while it cannot be disputed that considering section 153A of the Act, the Assessing Officer can reopen and/or assess the return with respect to six preceding years; however, there must be some incriminating material available with the Assessing Officer with respect to the sale transactions in the particular assessment year. It was submitted that the impugned order passed by the Tribunal being in consonance with the view taken by the jurisdictional High Court, does not give rise to any question of law, warranting interference.

4.1 Referring to the decision of the Delhi High Court in the case of **Commissioner of Income Tax v. Anil Kumar Bhatia** (supra), it was pointed out that in paragraph 23 thereof, the court has specifically observed that it is not concerned with a case where no incriminating material was found during the search conducted under section 132 of the Act and therefore, did not express any opinion as to whether section 153A can be invoked even in such a situation and left the question open.

Reference was made to the decision of the Rajasthan High Court in the case of **Jai Steel (India), Jodhpur v. Assistant Commissioner of Income-tax**, [2013] 36 taxmann.com 523 (Rajasthan), wherein the court did not accept the argument of the revenue that the Assessing Officer is free to disturb income, expenditure or deduction *de hors* the incriminating material, while making assessment under section 153A of the Act as the same is not borne out from the scheme of the said provision which is essentially in the context of search and/or requisition. The court held that the provisions of 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. Reliance was placed upon the decision of the Bombay High Court in the case of **Commissioner of Income-tax v. Sinhgad Technical Education Society**, [2015] 378 ITR 84 (Bom.) and the decision of the Delhi High Court in **Commissioner of Income-tax (Central)-III v. Kabul Chawla**, [2015] 61 taxmann.com 412, reference to which shall be made subsequently.

4.2 It was submitted that section 153C of the Act does not lay down any different procedure than that provided under section 153A of the Act and that Tax Appeal No.914 of 2012 covers both sections 153A and 153C and is directly on the issue. It was submitted that the law in this regard is very well settled and this court has already taken a view and hence, the controversy stands concluded in favour of the assessee. The appeal, therefore, does not give rise to any question of law and deserves to be dismissed.

5. Before adverting to the merits of the rival contentions, reference may be made to the decisions of different High Courts on which reliance has been placed by the learned counsel for the respective parties. The lead judgment in this regard is the decision of the Delhi High Court in the case of **Commissioner of Income Tax v. Anil Kumar Bhatia** (supra), wherein the court held thus :

“18. A perusal of [Section 153A](#) shows that it starts with a non obstante clause relating to normal assessment procedure which is covered by sections 139, 147, 148, 149, 151 and [153](#) in respect of searches made after 31.5.2003. These sections, the applicability of which has been excluded, relate to returns, assessment and reassessment provisions. Prior to, the introduction of these three sections, there was Chapter XIV-B of the Act which took care of the assessment to be made in cases of search and seizure. Such an assessment was popularly known as “block assessment” because the Chapter provided for a single assessment to be made in respect of a period of a block of ten assessment years prior to the assessment year in which the search was made. In addition to these ten assessment years, the broken period up to the date on which the search was conducted was also included in what was known as “block period”. Though a single assessment order was to be passed, the undisclosed income was to be assessed in the different assessment years to which it related. But all this had to be made in a single assessment order. The block assessment so made was

independent of and in addition to the normal assessment proceedings as clarified by the Explanation below [Section 158BA\(2\)](#). After the introduction of the group of Sections namely, 153A to 153C, the single block assessment concept was given a go-by. Under the new [Section 153A](#), in a case where a search is initiated under [Section 132](#) or requisition of books of account, documents or assets is made under [Section 132A](#) after 31.5.2003, the Assessing Officer is obliged to issue notices calling upon the searched person to furnish returns for the six assessment years immediately preceding the assessment year relevant to the previous year in which the search was conducted or requisition was made. The other difference is that there is no broken period from the first day of April of the financial year in which the search took place or the requisition was made and ending with the date of search/requisition. Under [Section 153A](#) and the new scheme provided for, the AO is required to exercise the normal assessment powers in respect of the previous year in which the search took place.

19. Under the provisions of [Section 153A](#), as we have already noticed, the Assessing Officer is bound to issue notice to the assessee to furnish returns for each assessment year falling within the six assessment years immediately preceding the assessment year relevant to the previous year in which the search or requisition was made. Another significant feature of this Section is that the Assessing Officer is empowered to assess or reassess the "total income" of the aforesaid years. This

is a significant departure from the earlier block assessment scheme in which 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. This means that there can be only one assessment order in respect of each of the six assessment years, in which both the disclosed and the undisclosed income would be brought to tax.

20. 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. The time-limit within which the notice under [Section 148](#) can be issued, as provided in [Section 149](#) has also been made inapplicable by the non obstante clause. [Section 151](#)

which requires sanction to be obtained by the Assessing Officer by issue of notice to reopen the assessment under [Section 148](#) has also been excluded in a case covered by [Section 153A](#). The time-limit prescribed for completion of an assessment or reassessment by [Section 153](#) has also been done away with in a case covered by [Section 153A](#). With all the stops having been pulled out, the Assessing Officer under [Section 153A](#) has been entrusted with the duty of bringing to tax the total income of an assessee whose case is covered by [Section 153A](#), by even making reassessments without any fetters, if need be.

21. Now there can be cases where at the time when the search is initiated or requisition is made, the assessment or reassessment proceedings relating to any assessment year falling within the period of the six assessment years mentioned above, may be pending. In such a case, the second proviso to sub section (1) of section 153A says that such proceedings "shall abate". The reason is not far to seek. Under section 153A, there is no room for multiple assessment orders in respect of any of the six assessment years under consideration. That is because the Assessing Officer has to determine not merely the undisclosed income of the assessee, but also the „total income“ of the assessee in whose case a search or requisition has been initiated. Obviously there cannot be several orders for the same assessment year determining the total income of the assessee. In order to ensure this state of affairs namely, that in respect of the six assessment years preceding the assessment

year relevant to the year in which the search took place there is only one determination of the total income, it has been provided in the second proviso of sub Section (1) of section 153A that any proceedings for assessment or reassessment of the assessee which are pending on the date of initiation of the search or making requisition "shall abate". Once those proceedings abate, the decks are cleared, for the Assessing Officer to pass assessment orders for each of those six years determining the total income of the assessee which 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. The position thus emerging is that where assessment or reassessment proceedings are pending completion when the search is initiated or requisition is made, they will abate making way for the Assessing Officer to determine the total income of the assessee in which the undisclosed income would also be included, but in cases where the assessment or reassessment proceedings have already been completed and assessment orders have been passed determining the assessee"s total income and such orders are subsisting at the time when the search or the requisition is made, there is no question of any abatement since no proceedings are pending. In this latter situation, the Assessing Officer will reopen the assessments or reassessments already made (without having the need to follow the strict provisions or complying with the strict conditions of sections 147, 148 and 151) and determine the total income of the assessee. Such determination in

the orders passed under section 153A would be similar to the orders passed in any reassessment, where the total income determined in the original assessment order and the income that escaped assessment are clubbed together and assessed as the total income. In such a case, to reiterate, there is no question of any abatement of the earlier proceedings for the simple reason that no proceedings for assessment or reassessment were pending since they had already culminated in assessment or reassessment orders when the search was initiated or the requisition was made."

6. In ***Filatex India Ltd. v. Commissioner of Income Tax-IV*** (supra), the Delhi High Court has held thus :

"2. On the first question, we note that the Assessing Officer, in the proceedings under Section 153A of the Act, had made several additions, relying upon the incriminating material found in the course of search, which was conducted on 18th January, 2006 and subsequent dates. A perusal of the impugned order by the Tribunal would disclose that incriminating material including statement of Sanjay Agrawal, GM(Marketing) have resulted in additions, which have been upheld. It is not the case of the appellant-assessee that initiation of proceedings under Section 153A was bad or unwarranted in law as no incriminating material was found during the search. The contention raised by the appellant-assessee is that the addition, which is the subject matter of questions No.(ii) and (iii), was/is not justified in the

assessment order under Section 153A, as no incriminating material was found concerning the addition under Section 115 JB of the Act. The said argument has no substance and has to be rejected. Under Section 153A of the Act, the additions need not be restricted or limited to the incriminating material, which was found during the course of search. There cannot be multiple assessments, once Section 153A of the Act is applicable. Section 153A(1) postulates one assessment, computing the total income of six assessment years immediately preceding the assessment year relevant to the previous year in which search was conducted or requisition was made. Total income is assessed or reassessed in the order under Section 153A of the Act and the Section applies notwithstanding Sections 139, 147, 148, 149, 151 and 153 of the Act.”

7. In **Jai Steel (India), Jodhpur v. Assistant Commissioner of Income Tax** (supra), the Rajasthan High Court held thus :

“15. A plain reading of the above provision would reveal that if a search or requisition is initiated after 31.05.2003, the AO is under an obligation to issue notice to such person, who has been subjected to search/requisition to furnish the return of income of six years immediately preceding the year of search. The AO is then required to assess or reassess total income of the said six years and, out of the six years, if any assessment or reassessment is pending on the date of

initiation of the search, the same would abate i.e. pending proceedings qua the said assessment year shall not proceed thereafter and the assessment has to be made under Section 153A(1)(b) of the Act read with the first proviso thereunder.

16. Further provisions have been made contemplating a situation where an assessment made under sub-section (1) is annulled in appeal or other legal proceedings. The Section starts with a non obstante clause, which removes the restrictions upon the AO from assuming jurisdiction to reopen the assessment under Sections 147, 148 and 151 etc.

17. Prior to introduction of Sections 153A to 153C, Chapter XIVB of the Act took care of the assessments to be made in cases of search and seizure, which were called 'block assessment', whereby, a single assessment was required to be in respect of a period of block of ten years prior to the assessment year, in which, the search was made. After the introduction of Sections 153A to 153C, a single block assessment concept has been given a go bye and now the AO has been given the power to assess or reassess the 'total income' of the six years in question in separate assessment orders.

18. To consider the rival submissions made at the Bar in the context of the present case and the substantial question of law framed, the scope of 'assessment and reassessment of total income' under Section 153A(1)(b) and the first and second proviso have to be considered.

Further, for answering the above issues, guidance will have to be sought from Section 132(1) of the Act, as Section 153A of the Act cannot be read in isolation, inasmuch as, the same is triggered only on account of any search/requisition under Sections 132 or 132A of the Act. If any books of accounts or other documents relevant to the assessment had not been produced in the course of original assessment and, found in the course of search, such books of accounts or other documents have to be taken into consideration while assessing or reassessing the total income under the provisions of Section 153A of the Act. Even in a case where undisclosed income or undisclosed property has been found as a consequence of the search, the same would also be taken into consideration. The requirement of assessment or reassessment under the said section has to be read in the context of Sections 132 or 132A of the Act, inasmuch as, in case nothing incriminating is found on account of such search or requisition, then the question of reassessment of the concluded assessments does not arise, which would require more reiteration and it is only in the context of the abated assessment under second proviso which is required to be assessed.

19. The underline purpose of making assessment of total income under Section 153A of the Act is, therefore, to assess income which was not disclosed or would not have been disclosed. The purpose of second proviso is also very clear, inasmuch as, once a assessment or reassessment is 'pending' on the date of initiation of search or requisition and in terms of Section 153A a

return is filed and the AO is required to assess the same, there cannot be two assessment orders determining the total income of the assessee for the said assessment year and, therefore, the proviso provides for abatement of such pending assessment and reassessment proceedings and it is only the assessment made under Section 153A of the Act would be the assessment for the said year.

20. The necessary corollary of the above second proviso is that the assessment or reassessment proceedings, which have already been 'completed' and assessment orders have been passed determining the assessee's total income and, such orders are subsisting at the time when the search or the requisition is made, there is no question of any abatement since no proceedings are pending. In such cases, where the assessments already stands completed, the AO can reopen the assessments or reassessments already made without following the provisions of Sections 147, 148 and 151 of the Act and determine the total income of the assessee.

21. The argument raised by the counsel for the appellant to the effect that once a notice under Section 153A of the Act is issued, the assessments for six years are at large both for the AO and assessee has no warrant in law.

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.

Though such a claim by the assessee for the first time under Section 153A of the Act is not completed, the case in hand, has to be considered at best similar to a case where in spite of a search and/or requisition, nothing incriminating is found. In such a case though Section 153A of the Act would be triggered and assessment or reassessment to ascertain the total income of the person is required to be done, however, the same would in that case not result in any addition and the assessments passed earlier may have to be reiterated."

8. In **Commissioner of Income Tax (Central)-III v. Kabul Chawla**, the Delhi High Court after considering its earlier decisions in the case of *Commissioner of Income Tax v. Anil Kumar Bhatia* (supra), *Commissioner of Income Tax v. Chetan Das Lachman Das*, (2012) 211 Taxman 61, *Filatex India*

Ltd. v. Commissioner of Income Tax-IV (supra) decision of the Karnataka High Court in the case of *Canara Housing Development Company v. Deputy Commissioner of Income Tax (supra)* as well as the other decisions, held thus:

“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."

9. Section 153A of the Act reads thus :

“153A. Assessment in case of search or requisition.- (1) *Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, in the case of a person where a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A after the 31st day of May, 2003, the Assessing Officer shall—*

(a) issue notice to such person requiring him to furnish within such period, as may be specified in the notice, the return of income in respect of each assessment year falling within six assessment years referred to in clause (b), in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139;

(b) assess or reassess 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:

Provided that the Assessing Officer shall assess or reassess the total income in respect of each assessment year falling within such six assessment years:

Provided further that assessment or reassessment, if any, relating to any assessment year falling within the period of six assessment years referred to in this sub-

section pending on the date of initiation of the search under section 132 or making of requisition under section 132A, as the case may be, shall abate.

(2) If any proceeding initiated or any order of assessment or reassessment made under sub-section (1) has been annulled in appeal or any other legal proceeding, then, notwithstanding anything contained in sub-section (1) or section 153, the assessment or reassessment relating to any assessment year which has abated under the second proviso to sub-section (1), shall stand revived with effect from the date of receipt of the order of such annulment by the Commissioner:

Provided that such revival shall cease to have effect, if such order of annulment is set aside.

Explanation.—For the removal of doubts, it is hereby declared that,—

(i) save as otherwise provided in this section, section 153B and section 153C, all other provisions of this Act shall apply to the assessment made under this section;

(ii) in an assessment or reassessment made in respect of an assessment year under this section, the tax shall be chargeable at the rate or rates as applicable to such assessment year.”

10. Since the assessment under section 153A is required to be made after a search under section 132 or requisition under section 132A, it may be germane to refer to the provisions of sections 132 and 132A of the Act. Section 132 of the Act

provides for search and seizure, and to the extent the same is relevant for the present purpose, reads thus:

“132. Search and seizure. - (1) Where the Director General or Director or the Chief Commissioner or Commissioner or any such Deputy Director or Deputy Commissioner as may be empowered in this behalf by the Board, in consequence of information in his possession, has reason to believe that-

(a) any person to whom a summons under sub- section (1) of section 37 of the Indian Income- tax Act, 1922 (11 of 1922) or under subsection (1) of section 131 of this Act, or a notice under sub- section (4) of section 22 of the Indian Income- tax Act, 1922 (11 of 1922), or under sub- section (1) of section 142 of this Act was issued to produce, or cause to be produced, any books of account or other documents has omitted or failed to produce, or cause to be produced, such books of account or other documents as required by such summons or notice, or

(b) any person to whom a summons or notice as aforesaid has been or might be issued will not, or would not, produce or cause to be produced, any books of account or other documents which will be useful for, or relevant to, any proceeding under the Indian Income- tax Act, 1922 (11 of 1922), or under this Act, or

(c) any person is in possession of any money, bullion, jewellery or other valuable article or thing and such money, bullion, jewellery or other valuable article or

thing represents either wholly or partly income or property which has not been, or would not be disclosed for the purposes of the Indian Income- tax Act, 1922 (11 of 1922) or this Act (hereinafter in this section referred to as the undisclosed income or property), then,-

(A) the Director General or Director] or the Chief Commissioner or Commissioner, as the case may be, may authorise any Deputy Director, Deputy Commissioner, Assistant Director, Assistant Commissioner or Income- tax Officer, or

(B) such Deputy Director or Deputy Commissioner, as the case may be, may authorise any Assistant Director, Assistant Commissioner or Income-tax Officer, the officer so authorised in all cases being hereinafter referred to as the authorised officer to-

(i) enter and search any building, place, vessel, vehicle or aircraft] where he has reason to suspect that such books of account, other documents, money, bullion, jewellery or other valuable article or thing are kept;

(ii) break open the lock of any door, box, locker, safe, almirah or other receptacle for exercising the powers conferred by clause (i) where the keys thereof are not available;

(iia) search any person who has got out of, or is about to get into, or is in the building, place, vessel, vehicle or aircraft, if the authorized officer has reason to suspect

that a such person has secreted about his person any such books of account, other documents, money bullion, jewellery or other valuable article or thing;

(iii) seize any such books of account, other documents, money, bullion, jewellery or other valuable article or thing found as a result of such search;

(iv) place marks of identification on any books of account or other documents or make or cause to be made extracts or copies therefrom;

(v) make a note or an inventory of any such money, bullion, jewellery or other valuable article or thing: Provided that where any building, place, vessel, vehicle or aircraft referred to in clause (i) is within the are of jurisdiction of any Chief Commissioner or Commissioner], but such Chief Commissioner or Commissioner] has no jurisdiction over the person referred to in clause (a) or clause (b) or clause (c), then notwithstanding anything contained in section 120], it shall be competent for him to exercise the powers under this sub- section in all cases where he has reason to believe that any delay in getting the authorisation for the Chief Commissioner or Commissioner] having jurisdiction over such person may be prejudicial to the interest of the revenue:] Provided further that where it is not possible or practicable to take physical possession of any valuable article or thing and remove it to a safe place due to its volume, weight or other physical characteristics or due to its being of a dangerous nature,

the authorised officer may serve an order on the owner or the person who is in immediate possession or control on the owner or the person who is in immediate possession or control thereof that he shall not remove part with or otherwise deal with it, except with the previous permission of such authorised officer and such action of the authorised officer shall be deemed to be seizure of such valuable article or thing under clause (iii)”

11. Section 132A of the Act provides for “Power to requisition books of account, etc.” and to the extent the same is relevant for the present purpose, reads thus:

“132A. Powers to requisition books of account, etc.

(1) Where the Director General or Director or the Chief Commissioner or Commissioner, in consequence of information in his possession, has reason to believe that -

(a) any person to whom a summons under sub-section (1) of section 37 of the Indian Income-tax Act, 1922, or under sub-section (1) of sec. 131 of this Act, or a notice under subsection (4) of section 22 of the Indian Income-tax Act, 1922, or under sub-section (1) of section 142 of this Act was issued to produce, or cause to be produced, any books of account or other documents has omitted or failed to produce, or cause to be produced, such books of account or other documents, as required by such summons or notice and the said books of account or

other documents have been taken into custody by any officer or authority under any other law for the time being in force, or

(b) any books of account or other documents will be useful for, or relevant to, any proceeding under the Indian Income-tax Act, 1922 (11 of 1922), or under this Act and any person to whom a summons or notice as aforesaid has been or might be issued will not or would not produce or cause to be produced, such books of account or other documents on the return of such books of account or other documents by any officer or authority by whom or which such books of account or other documents have been taken into custody under any other law for the time being in force, or

(c) any assets represent either wholly or partly income or property which has not been, or would not have been, disclosed for the purposes of the Indian Income-tax Act, 1922, or this Act by any person from whose possession or control such assets have been taken into custody by any officer or authority under any other law for the time being in force,

then, the Director General or Director or the Chief Commissioner or Commissioner may authorise any Deputy Director, Deputy Commissioner, Assistant Director [Assistant Commissioner or Income-tax Officer] (hereafter in this section and in sub-section (2) of section 278D referred to as the requisitioning officer) to require the officer or authority referred to in clause (a) or clause (b) or clause (c), as the case may be, to deliver such books of account, other documents or assets to the requisitioning officer."

12. Section 132 of the Act makes provision for search and seizure. The powers of search and seizure can be exercised thereunder provided the requirements of sub-section (1) thereof are satisfied. For exercise of powers thereunder, the Commissioner would have to record satisfaction that despite issuance of notice under section 142(1) of the Act, the assessee has omitted or failed to produce or cause to produce books of account or other documents; or if such notice is issued, the assessee would fail to produce the books of account or other documents; or the assessee possesses money, bullion, jewellery, or other valuable article or thing which represents income which is not wholly or partly income or property, which has not been or would not be disclosed by the assessee. Thus, it appears that the objective of a search under section 132 of the Act is to secure evidence which is not likely to be made available by issue of summons or by visiting, in ordinary course, the premises concerned. The authorities under the Act have powers to summon persons and documents and have to resort to search and seizure when there is evidence of undisputed documents or assets which have not been and would not have been disclosed in the ordinary course.

13. Similarly, under section 132A of the Act, the authorizing authority would acquire the jurisdiction to authorize an officer to requisition books of account or other documents or assets which have been taken into custody by an officer or authority under any law and thereafter to proceed to deal with the assets provided in the manner provided under section 132 and 132B only where the authorizing authority has in consequence

of any information in his possession reason to believe that such assets represent wholly or partly income or property which has not been or would not have been disclosed for the purposes of the Act by any person from whose possession or control such assets had been taken into custody by the officer or authority from whom these were requisitioned.

14. Essentially, therefore, both the provisions contemplate search and requisition where the assessee is not likely to disclose his income. It appears that the object of both the provisions is to unearth the income which the assessee has not or is not likely to disclose.

15. On a plain reading of section 153A of the Act, it is evident that the trigger point for exercise of powers thereunder is a search under section 132 or a requisition under section 132A of the Act. Once a search or requisition is made, a mandate is cast upon the Assessing Officer to issue notice under section 153A of the Act to the person, requiring him to furnish the return of income in respect of each assessment year falling within six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made and assess or reassess the same. Since the assessment under section 153A of the Act is linked with search and requisition under sections 132 and 132A of the Act, it is evident that the object of the section is to bring to tax the undisclosed income which is found during the course of or pursuant to the search or requisition. However, instead of the earlier regime of block assessment whereby, it was only the undisclosed income of the block period that was assessed, section 153A of the Act seeks to

assess the total income for the assessment year, which is clear from the first proviso thereto which provides that the Assessing Officer shall assess or reassess the total income in respect of each assessment year falling within such six assessment years. The second proviso makes the intention of the legislature clear as the same provides that assessment or reassessment, if any, relating to the six assessment years referred to in the sub-section pending on the date of initiation of search under section 132 or requisition under section 132A, as the case may be, shall abate. Sub-section (2) of section 153A of the Act provides that if any proceeding or any order of assessment or reassessment made under sub-section (1) is annulled in appeal or any other legal provision, then the assessment or reassessment relating to any assessment year which had abated under the second proviso would stand revived. The proviso thereto says that such revival shall cease to have effect if such order of annulment is set aside. Thus, any proceeding of assessment or reassessment falling within the six assessment years prior to the search or requisition stands abated and the total income of the assessee is required to be determined under section 153A of the Act. Similarly, sub-section (2) provides for revival of any assessment or reassessment which stood abated, if any proceeding or any order of assessment or reassessment made under section 153A of the Act is annulled in appeal or any other proceeding.

16. Section 153A bears the heading "Assessment in case of search or requisition". It is well settled as held by the Supreme Court in a catena of decisions that the heading of the section can be regarded as a key to the interpretation of the operative portion of the section and if there is no ambiguity in the

language or if it is plain and clear, then the heading used in the section strengthens that meaning. From the heading of section 153, the intention of the legislature is clear viz., to provide for assessment in case of search and requisition. When the very purpose of the provision is to make assessment in case of search or requisition, it goes without saying that the assessment has to have relation to the search or requisition. In other words, the assessment should be connected with something found during the search or requisition, viz., incriminating material which reveals undisclosed income. Thus, while in view of the mandate of sub-section (1) of section 153A of the Act, in every case where there is a search or requisition, the Assessing Officer is obliged to issue notice to such person to furnish returns of income for the six years preceding the assessment year relevant to the previous year in which the search is conducted or requisition is made, any addition or disallowance can be made only on the basis of material collected during the search or requisition. In case no incriminating material is found, as held by the Rajasthan High Court in the case of **Jai Steel (India), Jodhpur v. Assistant Commissioner of Income Tax** (supra), the earlier assessment would have to be reiterated. In case where pending assessments have abated, the Assessing Officer can pass assessment orders for each of the six years determining the total income of the assessee which would include income declared in the returns, if any, furnished by the assessee as well as undisclosed income, if any, unearthed during the search or requisition. In case where a pending reassessment under section 147 of the Act has abated, needless to state that the scope and ambit of the assessment would include any order which the Assessing Officer could have passed under

section 147 of the Act as well as under section 153A of the Act.

17. In the facts of the present case, a search came to be conducted on 07.10.2009 and the notice was issued to the assessee under section 153A of the Act for assessment year 2006-07 on 04.08.2010. In response to the notice, the assessee filed return of income on 18.11.2010. In terms of section 153B, the assessment was required to be completed within a period of two years from the end of the financial year in which the search came to be carried out, namely, on or before 31st March, 2012. Here, insofar as the impugned addition is concerned, the notice in respect thereof came to be issued on 19.12.2011 seeking an explanation from the assessee. The assessee gave its response by reply dated 21.12.2011 calling upon the Assessing Officer to provide copies of statements recorded on oath of Shri Rohit P. Modi and Smt. Pareshaben K. Modi during the search as well as the copies of the documents upon which the department placed reliance for the purpose of making the proposed addition as well as the copy of the explanation given by Shri Rohit P. Modi and Smt. Pareshaben K. Modi regarding the on-money received, copies of the assessment orders in case of said persons and also requested the Assessing Officer to permit him to cross-examine the said persons. The Assessing Officer issued summons to the said persons, however, they were out of station and it was not known as to when they would return. In this backdrop, without affording any opportunity to the assessee to cross-examine the said persons, the Assessing Officer made the addition in question.

18. In this case, it is not the case of the appellant that any

incriminating material in respect of the assessment year under consideration was found during the course of search. At the relevant time when the notice came to be issued under section 153A of the Act, the assessee filed its return of income. Much later, at the fag end of the period within which the order under section 153A of the Act was to be made, in other words, when the limit for framing the assessment as provided under section 153 was about to expire, the notice has been issued in the present case seeking to make the proposed addition of Rs.11,05,51,000/- on the basis of the material which was not found during the course of search, but on the basis of a statement of another person. In the opinion of this court, in a case like the present one, where an assessment has been framed earlier and no assessment or reassessment was pending on the date of initiation of search under section 132 or making of requisition under section 132A, while computing the total income of the assessee under section 153A of the Act, additions or disallowances can be made only on the basis of the incriminating material found during the search or requisition. In the present case, it is an admitted position that no incriminating material was found during the course of search, however, it is on the basis of some material collected by the Assessing Officer much subsequent to the search, that the impugned additions came to be made.

19. On behalf of the appellant, it has been contended that if any incriminating material is found, notwithstanding that in relation to the year under consideration, no incriminating material is found, it would be permissible to make additions and disallowance in respect of all the six assessment years. In the opinion of this court, the said contention does not merit

acceptance, inasmuch as, the assessment in respect of each of the six assessment years is a separate and distinct assessment. Under section 153A of the Act, an assessment has to be made in relation to the search or requisition, namely, in relation to material disclosed during the search or requisition. If in relation to any assessment year, no incriminating material is found, no addition or disallowance can be made in relation to that assessment year in exercise of powers under section 153A of the Act and the earlier assessment shall have to be reiterated. In this regard, this court is in complete agreement with the view adopted by the Rajasthan High Court in the case of **Jai Steel (India), Jodhpur v. Assistant Commissioner of Income Tax** (supra). Besides, as rightly pointed out by the learned counsel for the respondent, the controversy involved in the present case stands concluded by the decision of this court in the case of **Commissioner of Income-tax-1 v. Jayaben Ratilal Sorathia** (supra) wherein it has been held that while it cannot be disputed that considering section 153A of the Act, the Assessing Officer can reopen and/or assess the return with respect to six preceding years; however, there must be some incriminating material available with the Assessing Officer with respect to the sale transactions in the particular assessment year.

20. For the foregoing reasons, it is not possible to state that the impugned order passed by the Tribunal suffers from any legal infirmity so as to give rise to a question of law, much less, a substantial question of law, warranting interference. The appeal, therefore, fails and is, accordingly, dismissed.

(HARSHA DEVANI, J.)

(G.R.UDHWANI, J.)

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