The Income Tax Act 1961 (the Act), as originally enacted, did not contain any special provisions relating to assessment in search cases. For the first time, the legislature enacted special provisions by introducing Chapter XIV-B in the Act by Finance Act 1995 containing sections 158B to 158BH for assessment of search cases where search was initiated on or after 1.7.95. Lot of litigation arose between the tax payers and the revenue authorities. Most of the issues arising from the litigations were settled by various decisions of the Tribunal and the High Courts. However, the legislature, for the reasons best known to it, enacted new provisions by inserting sections 153A to 153C in the Act by Finance Act 2003 for assessment in search cases where search is initiated u/132 or requisition is made u/s 132A on or after 1.6.2003. In order to understand the true scope of the new provisions, it would be appropriate to know the salient features of both the schemes which are being discussed hereafter.

A comparative study of both the schemes relating to assessment in search cases clearly shows that the legislature has departed from the earlier scheme in the following manner:-

a) Unlike block assessment under chapter XIV-B where the assessment was to be made for the block period, the new scheme provides for separate assessment in respect of each of the six assessment years,

b) Under the new scheme, the entire assessment for six years stand reopened and the AO is vested with the powers to assess the total income of each year contrary to the assessment of undisclosed income only in the earlier scheme.

c) Under the new scheme, only one stream of assessment is provided while under the old scheme, two parallel streams of assessment were available i.e the regular assessment for the disclosed income and the separate assessment for the undisclosed income.

d) The earlier scheme provided for assessment of the undisclosed income on the basis of the materials /evidences found in the course of search while the new scheme provides assessment as per the provisions of sections 142 to145 i.e. on the basis of material or evidence on the record either furnished by assessee or gathered in the course of search or by the AO otherwise.

e) There is no provision under the new section 153A for assessing the total income of the person searched in respect of the previous year in which search is conducted while under the block assessment scheme, such assessment was provided. However u/s 153C, such assessment is permissible.

d) U/s158BD, assessment of undisclosed income of a person other than the person searched was permissible if the A.O. was satisfied that any undisclosed income belonged to the other person while under the new scheme, assessment of the person other than the person searched is permissible only if the assets or books of account or documents etc. seized or requisitioned belong to the other person. Thus, the criterion for assessing the income of third person has been changed.
e) The procedure as provided in Sec 158BC has been modified under the new scheme since it has adopted the procedure for making the regular assessment as per the provisions of the Explanation to Sec 153A. Now, under the new scheme the assessee would be entitled to revise its return as per the provisions of section 139(5) of the Act while under the earlier scheme, such right was not available.

f) Under the old scheme, period of limitation was to run from the end of the month in which the last of the authorizations for search u/s 132 or for requisition u/s 132A was executed while under the new scheme it would run from the end of the Financial Year in which the last of the authorizations or requisition was executed.

g) Under the earlier scheme, the levy of interest u/s 234A/B/C or penalty u/s271(1)(c)/271A/271B was not permissible and the special provisions were made for levy of interest /penalty u/s158BFA. However under the new scheme, all the provisions for levy of interest/ penalty would be applicable as per the Explanation to Sec 153A.

h) Under the new scheme, three more situations have been provided in the Explanation to Sec 153B for excluding the time stated therein for the purpose of computing the limitation period.

i) Under the earlier scheme, assessment could be made by ACIT/DCIT/Asst Dir/Dy Dir subject to the approval of CIT/Dir while under the new scheme, assessment can not be made by an officer below the rank of ACIT except with the approval of JCIT. That means, now even an I.T.O can make the assessment after such approval.

j) Under the earlier scheme, special rate of tax as prescribed u/s 113 was applicable while under the new scheme, normal rate of tax is to be applied.

SIMILARITIES.

a) Under both the schemes, other provisions of the Act are applicable except otherwise provided under the schemes itself.

b) Under both the schemes, satisfaction of the A.O. is required as provided under sections 158BD and 153C. Therefore, decision of the apex court in the case of Manish Maheshwari 289 ITR 341 SC would also apply where assessment is to be made u/s 153C.

Though at the cost of repetition, the Salient features of the new scheme provided in the Sections 153A to 153C are narrated below:

1. Applicable where search is initiated or requisition is made after 31.5.2003,
2. These provisions have the overriding effect over the provisions of sections 139,147,148,149,151 and 153 of the Act since these provisions are non obstante provisions.
3. The assessment proceedings are initiated for six assessment years immediately preceding the year in which search u/s 132 is initiated or requisition is made u/s 132A.
4. The returns filed u/s 153A are to be dealt with in the same manner as if such returns were filed u/s 139 and therefore all consequences would follow i.e. notice u/s 143(2) will have to be issued by AO within the prescribed time as recently held by the apex
court in the case of Hotel Blue Moon (322 ITR 158 SC) while interpreting the similar provisions u/s 158BC,

5. The assessment is to be made in respect of total income of the assessee of said six years.
6. The assessment is to be made in respect of each assessment year.
7. If assessment/reassessment in respect of any of the said six years is pending on the date of initiation of search/requisition then, such assessment or reassessment shall abate.
8. If any assessment/reassessment made under these provisions is annulled in appeal/any legal proceeding then assessment proceedings abated shall revive from the date of receipt of order of such annulment by the CIT.
9. If such order of annulment is set aside then such revival shall cease to have effect.
10. Save as otherwise provided in sec 153B/153C, all other provisions of the Act would apply e.g provisions relating to levy of interest/penalty or provisions relating to deductions/exemptions/appeals etc..
11. The tax chargeable would be rate applicable to the concerned assessment year.
12. The assessment of the said six years is to be completed within period of two years from the end of the financial year in which the last of the authorizations for search u/s 132 or for requisition u/s 132A was executed. Similarly, assessment in respect of the year in which search was conducted or the requisition was made is required to be made within two years from the end of the financial year in which last of authorizations/requisition was executed.
13. The assessment u/s 153C shall be completed within the period specified above or one year from the end of the financial year in which books of account/documents/assets seized or requisitioned were handed over to the AO having jurisdiction over the other person, whichever is later. The period of ‘two years’ shall be substituted by the period as ‘twenty one months’ if the last of the authorizations u/s 132/132A was executed in the financial year commencing on or after 1.4.2004 as mentioned in second proviso. However, the period of limitation would be thirty three months where such authorization for search/requisition is executed on or after 1.4.2005 and during the course of assessment proceedings, reference is made to TPO u/s 92CA--(i) was made before 1.6.2007 but an order u/s 92CA(3) has not been made; or (ii) is made on or after 1.6.07.
14. If the AO having jurisdiction over the searched person is satisfied that any money, bullion, jewellery or any other valuable article or thing or books of account or documents seized or requisitioned belong to other person(s), then such AO shall hand over the same to the AO having jurisdiction over the other person and thereafter such AO shall proceed to assess the other person in accordance with the provisions of sec 153A.
15. As per the proviso to section153C, the abatement shall be with reference to the date of receiving the books of account/documents/assets seized/requisitioned.
16. Sub section (2) of section 153C empowers the AO to make assessment in respect of the financial year in which search is conducted or requisition is made where books of account/documents/assets seized or requisitioned have been handed over to the AO having jurisdiction over the other person after the due date for furnishing return of income for the year in which search is conducted/requisition is made if in respect of such year (a) no return has been filed and notice u/s 142(1) has not been issued, or (b) return has been filed but notice u/s 143(2) has not been served and period specified u/s 143(2) has expired, or (iii) assessment or reassessment, if any, has been made. If these conditions are not satisfied, assessment for this will have to be made as per normal provisions.
17. The assessment shall not be made by an officer below the rank of ACIT except with prior approval of JCIT.
Having discussed the salient features of the search provisions, it would be appropriate to discuss the various issues which are emerging from the litigations between the tax payers and tax authorities.

**Whether assessment u/s 153A is mandatory even where no incriminating material is found in the course of search u/s 132 or requisition made u/s 132A.**

**One view** is that the assessment under the above provisions is mandatory in all cases even if no incriminating material is found in the course of search u/s 132/requisition made u/s 132A as held by the Tribunal in the case of *Rajat Tradecom India 120 ITD 48 (Indore)*. This view appears to be based on the principle that if the language of a statute is plain and clear and there is no ambiguity then the natural and ordinary meaning of the words should be adopted as held by the Apex court in the following cases: *Taru Lata Shyam v CIT 108 ITR 345; Keshavji Raoji & co v CIT 183 ITR 1; Guru Devdutta VKSSS Maryadit v State of Maharashtra AIR 2001 SC 1980 and CIT v Anjum M.H.Ghaswala 252 ITR 1(Constitution bench)*. The other view, as often has been canvassed on behalf of the assessee before the appellate authorities, is that the provisions of section 153A can not be resorted to where no incriminating material is found in the course of search/requisition made. It has been contended that at least, there must be some incriminating material relating to any of the six years mentioned in section 153A since purpose of these provisions is to assess the undisclosed income. This view is based on the principle of purposive interpretation of the statute. In support of this preposition, reliance is placed on the decision of hon'ble Delhi High Court, in the case of *Saraya Industries Ltd v UOI 306 ITR 189*, wherein it has been held “that the seizure or requisition must be of such a character as to persuade the AO to even reopen the closed assessment. In this sense, there is no hostile discrimination between two categories of persons.”

**In my humble opinion**, the first view is correct. It is the cardinal rule of interpretation of statute that the words of a statute must be understood in their natural, ordinary or popular sense unless the language of the statute is ambiguous.(AIR 2001 SC 1980 and 183 ITR 1 SC) The constitution bench of the apex court in the case of *Anjuman Ghaswala (supra)* has held that the purposive interpretation can be resorted to only where the language of the statute is either ambiguous or conflicting or gives a meaning leading to absurdity. The language of section 153A, in my opinion, is simple, clear and unambiguous in as much as it empowers the AO to issue notice and make assessment of specified six years where a search is initiated u/s 132 or requisition is made u/s 132A of the Act. The initiation of valid search u/s 132 or requisition u/s 132A is the only condition for invoking the provisions of section 153A. The seizure of incriminating material is not the condition for invoking such provisions. Further, unlike provisions of chapter XIV-B, section 153A, in clear terms provides that in case where search is initiated after 31st day of May 2003, the AO shall issue the notice in respect of specified six years and assess/reassess the total income of the of assessee and not the undisclosed income. The decision of the hon’ble Delhi High Court in the case of *Saraya Industries Ltd (supra)* relates to constitutional validity of the provisions of sections 153A and 153C on account of discrimination under Article 14 of the Constitution of India and therefore, can not be applied for resolving this issue in as much as it is the validity of search and not the character of seizure which is relevant for invoking section 153A of the Act.
Whether additions can be made only in respect of the undisclosed income on the basis of material found in the course of search.

As already pointed out, the legislature has made a departure from the earlier scheme under Chapter XIV-B wherein the assessment was to be made in respect of the undisclosed income on the basis of material found in the course of the search (sections 158BA r/w 158BB). Section 153A empowers the AO to assess the total income which, undoubtedly, would include disclosed as well as undisclosed income. In some unreported cases, the tribunal has taken the view that only undisclosed income can be assessed and that too on the basis of search materials. In my view, this is not the legislative intent. As per the settled legal position, the court cannot add to or subtract from the language used by the legislature if such language is plain and simple. At the time when sec 153A was introduced, three expressions were already there in the Act i.e. ‘total income’, ‘income escaping assessment’ and ‘undisclosed income’. It means the legislature had deliberately departed from the concept of ‘undisclosed income’ and consciously used the word ‘total income’. Further, there is nothing in the language to infer that assessment is to be made only on the basis of search material. If the assessment was intended to be made of undisclosed income only on the basis of search material then there was no need to switch over to the new scheme. There is complete departure by the legislature from the earlier scheme contained in chapter XIV-B. Therefore, in my view, Delhi bench of the Tribunal has taken the correct view in the cases: Shivnathrai Narain (India) Ltd –v- DCIT 117 TTJ 480 and Shyam Lata Kaushik-v- ACIT 114 ITD 305 wherein it has been held that there is no requirement in Sec.153A for making assessment on the basis of search material. The Indore Bench of the Tribunal, in the case of Rajat Tradecom India 120 ITD 48 [Ind], has also held that once search is made, assessments gets reopened for six years even if no incriminating material is found. However, in the case of Anil Kumar Bhatia & others- ACIT (ITA nos2660/del/2009), it has been held by the Tribunal that no addition can be made in the absence of seized/incriminating material. Similarly, in the case of LMJ International-vs-DCIT 119 TTJ 214 (Kol), it has been held that only undisclosed income unearthed during the search can be assessed u/s 153A. With due respect and in my opinion, these two decisions do not lay down the correct legal position for the reasons given above.

Reference can also be made to the judgment of the hon’ble Jharkhand High Court in the case of Abhey Kumar Shroff 290 ITR 114. In this judgment, some observations have been made to the effect that undisclosed income is to be assessed in search cases. It is respectfully submitted that the question before the hon’ble court was whether regular assessment proceedings, pending on the date of search, could be continued by the AO without invoking the provisions of section 153A. The court answered in the negative since assessment pending on the date of search stood abated by virtue of the second proviso to section 153A. The question whether assessment could be made only of undisclosed income was never before the High Court. The observations regarding assessment of undisclosed were merely by way of passing remarks and therefore, cannot be treated as ratio of the decision/precedent in view of the decision of the hon’ble Supreme Court in the case of Goodyear India Ltd 188 ITR 402 SC.

The scope of making additions under sections 153A & 153C:

As discussed earlier, the assessment is to be made of total income in accordance with the normal procedure mentioned in sections 142 to 145A since the return filed u/s 153A is to be a return filed u/s 139 and consequently the other provisions of this Act would apply so far as they can be
If specific provisions are made in respect of any matter u/s 153A-153C then such provisions would prevail. In such cases, assessee is required to prove that the return filed by him is correct. If the AO is not satisfied with the correctness of the return, he can make necessary enquiries u/s 142 & 143(3) and then may make additions on the basis of material on record, either produced by the assessee or gathered by him or found in the course of search. No doubt, the AO is required to comply with the principles of natural justice. If the assessee does not cooperate, the AO can make the best judgment assessment as per law. However, such assessment cannot be arbitrary. Though guess work may be there yet it must be based on material on record as held by the apex court in various cases. Reference can be made to the observations of the hon’ble Supreme Court in the following cases:

Kachwala Gems-vs-JCIT 288 ITR 10 SC

“It is well-settled that in a best judgment assessment there is always a certain degree of guess work. No doubt the authorities concerned should try to make an honest and fair estimate of the income even in a best judgment assessment, and should not act totally arbitrarily, but there is necessarily some amount of guess work involved in a best judgment assessment, and it is the assessee himself who is to blame as he did not submit proper accounts.”

Raghubar Mandal Harihar Mandal –vs- State of Bihar 8 STC 770 SC

“When the returns and the books of accounts are rejected, the AO must make an estimate and to that extent he must make an estimate and to that extent he must make a guess but the estimate must be related to some evidence or material and it must be something more than mere suspicion.”

State of Orissa-vs- Maharaja Shri B.P. Singh Deo 76 ITR 690 SC

“The mere fact that the material placed by the assessee before the assessing authorities is unreliable does not empower those authorities to make an arbitrary order. The power to levy assessment on the basis of best judgment is not an arbitrary power; it is an assessment on the basis of best judgment. In other words, that assessment must be based on some relevant material. It is not a power that can be exercised under the sweet will and pleasure concerned authorities. The scope of that power has been explained over and over again by this court.”

Commissioner of Income-tax v. Laxminarayan Badridas 5 ITR 170 PC:

" He (the assessing authority) must not act dishonestly, or vindictively or capriciously because he must exercise judgment in the matter. He must make what he honestly believes to be a fair estimate of the proper figure of assessment, and for this purpose he must, their Lordships think, be able to take into consideration local knowledge and repute in regard to the assessee's circumstances, and his own knowledge of previous returns by and assessments of the assessee, and all other matters which he thinks will assist him in arriving at a fair and proper estimate; and though there must
necessarily be guess-work in the matter, it must be honest guess-work. In that sense, too, the assessment must be to some extent arbitrary."

Another important aspect to be considered is whether additions are permissible in all the six assessment years specified in section 153A of the Act on the basis of incriminating material found in the course of search relating to only one year or for a certain period. It is seen that the department tries to make the additions for the entire period of six years merely on the presumption that assessee must have entered in to unaccounted transactions in all the years. In my considered opinion, such course of action is not permissible in law since no such presumption exist in law. It is to be noted that search provisions u/s 132 are invoked to unearth the entire unaccounted transactions relating to the person searched. The information with the department for initiating search action u/s 132 may or may not be correct. There may be cases where nothing could be found in such search against the assessee. In such cases, the question of making addition in the name of unaccounted income does not arise. However, the addition can be made in such cases as per the normal procedure of assessment, if warranted on the facts of the case. For example, in some of the six years, assessment u/s 143(3) might not have been made. As per the provisions of section 153A, the AO is bound to assess such years as per section 143(3). In the course of such proceedings, the AO may find from the evidence furnished by the assessee in support of his return that the books of account are not reliable or the cash credits are not genuine or any claim of assessee is not in accordance with law. Hence, in such situation, the necessary additions may be made though as per the settled legal position.

Now, let us revert to the main question. As already noted, the search provisions u/s 132 are invoked to unearth the entire unaccounted transactions relating to the person searched. Once, such exercise is carried out, it would be wrong to presume that assessee must have entered into more unaccounted transactions other than the one found in the course of search unless the material found indicate otherwise. In search cases, in my opinion, nothing can be presumed against the assessee for all the years on the basis of material found in the course of search. For example, it is found that the assessee had purchased a property outside the books of account in the year ‘x’. On this basis can it be presumed that he must have purchased properties in all other years. The answer is completely ‘no’. In this connection, reference can be made to the decision of the hon’ble Supreme Court in the case of State of Kerela-vs- C Vellukutty 60 ITR 239 (SC) wherein it was observed as under:

“Can it be said that in the instant case the impugned assessment satisfied the said tests? From the discovery of secret accounts in the head office, it does not necessarily follow that a corresponding set of secret accounts were maintained in the branch office, though it is probable that such accounts were maintained. But, as the accounts were secret, it is also not improbable that the branch office might not have kept parallel accounts, as duplication of false accounts would facilitate discovery of fraud and it would have been thought advisable to maintain only one set of false accounts in the head office. Be that as it may, the maintenance of secret accounts in the branch office cannot be assumed in the circumstances of the case. That apart, the maintenance of secret accounts in the branch office might lead to an inference that the accounts disclosed did not comprehend all the transactions of the branch office. But that does not establish or even probabilize the finding that 135% or 200% or 500% of the disclosed turnover was suppressed. That could have been ascertained from other materials. The branch office had dealings with other customers.”
In the case of CIT-vs- Mahesh Chand 199 ITR 247 All, the hon’ble High Court upheld the decision of the Tribunal that addition cannot be made on the basis of addition in the preceding year. In the case of CIT-vs- Dr M.K.E.Memon 248 ITR 310 (Bom), the search was carried out in December 96 in the course of which certain books were found for the period November 93 to December 96. The AO made the addition for the entire block period on the basis of such books. The court held that addition could not be made for the period prior to November 93. At this stage, it is to be noted that the AO had made the addition on the basis of decision of the apex court in the case of H.M.Esufalali 90 ITR 271 (SC) but the hon’ble Bombay High Court observed that the said decision is to be restricted to the facts of that case. In fact the decision of the Bombay High Court is in consonance with the decision of the hon’ble Supreme Court in the case of State of Kerela-vs-C Vellukutty (supra). Similarly, in the case of Samrat Beer 75 ITD 19 Pune(TM), the issue for adjudication was whether addition could be made for the block period on the basis of books found for the period 28.9.88 to 25.8 89. The hon’ble third member held that action of AO was unjustified.

In view of the above discussion, I am of the view that in the proceeding u/s 153A-153C, addition cannot be made in all the six years on basis of material related to a particular year unless warranted on facts otherwise.

There may be cases where the assessments were made u/s 143(3) before the date of search. There is no decision directly on the issue whether addition can be made on the matters already concluded. In my humble opinion, if any issue has been examined by the AO in the original assessment proceedings u/s 143(3) after examining the books of account and the relevant material on the record then no addition can be made on the basis of same set of facts and law. The legislative intent is not to harass the taxpayer but to assess the correct income. In the case of Kelvinator of India Ltd. 256 ITR 1, the Hon’ble Delhi high court has observed that in the case of assessment u/s 143(3), it can be presumed that assessment has been made after application of mind to the facts of the case and relevant provisions of law and therefore, reassessment proceedings can not be initiated on mere change of opinion. In my opinion, this analogy can be applied to the assessment u/s 153A. However, if the AO has some incriminating material in his possession, gathered either in the course of search or otherwise, he can make the addition after giving reasonable opportunity of being heard. There may also be cases where legal position has been changed after the original assessment by way of retrospective amendment or judge made law. In such cases, addition can be made on the basis of such change in law.

The scope of the words ‘pending’ & ’abate’ used by the legislature in the second proviso of section 153A of the Act.

This proviso says that assessment/reassessment relating to any of the six assessment years specified in section 153A(1) pending on the date of the initiation of the search/requisition shall abate. The consequence would be that AO would be precluded to proceed to make assessment/reassessment in such cases under normal procedure of assessment/reassessment. The legislative intent is to depart from the earlier scheme where two streams of assessment were permissible simultaneously i.e. the regular assessment and the assessment under Chapter XIV-B. Therefore, to understand the scope of this proviso, it would be necessary to understand the meaning of these words.
Scope of the word “pending” This word has already been judicially considered by the constitution bench of the hon’ble apex court in the case of Ghanshyamdass –v- Regional ACST 51 ITR 557 SC wherein it has been held as under:-

“The assessment proceedings must be held to be pending from the time the said proceedings are initiated until they are terminated by a final order of assessment.”

“Proceedings before an authority start factually when a return is filed or when a notice is issued to the assessee to file the return”

Further, in the case of Asgarali Nazarali –v- State of Bombay AIR 1957 SC 503 at 509, the hon’ble court held as under:-

“In my opinion, it includes every insolvency in which any proceeding can, by any possibility, be taken. That I think is the meaning of the word ‘pending’—A cause is said to be pending in a court of justice when any proceeding can be taken in it. That is the test.”

Stroud’s Dictionary

“A legal proceeding is pending as soon as commenced and until it is concluded”

In view of the above, it is clear that assessment proceedings, once commenced, continue to remain pending till the proceedings are concluded or terminated by a final order of assessment.

Now, the question arises whether assessment proceedings can be said to be pending after issuance of intimation u/s 143(1) of the Act. In this regard, attention is invited to decision of the Hon’ble Supreme Court in the case of Rajesh Jhaveri Stock Brokers –V- CIT 291 ITR 500 SC-

It has been held that processing of the return u/s 143(1) does not amount to assessment and therefore intimation does not amount to an order of assessment. In view of the above authoritative pronouncement, it can not be said that the assessment is concluded on processing of the return u/s 143(1). In this connection, it is also pertinent to note the following observations of the hon’ble Punjab & Haryana High Court in the case of Vipin Khanna-V-CIT 255 ITR 220 (PH):-

“Therefore, in a case where a return is filed and is processed u/s 143(1) of the Act and no notice under sub section (2) of section (143) thereafter is served on the assessee within the stipulated period of 12 months, the assessment proceeding u/s 143 come to an end and the matter becomes final. Thus, although technically no assessment is framed in such a case, yet the proceedings for assessment stand terminated.”

The combined reading of these decisions reveals (i) that the intimation issued u/s 143(1) does not terminate the assessment proceedings and (ii) since the proceedings are open to assessment u/s 143(2), assessment proceedings remain pending till the expiry of the time prescribed therein. In the unreported decision in the case of Anil Kumar Bhatia & others-v-ACIT (ITA nos2660/del/2009), the tribunal has taken the view that assessment proceedings do not remain pending after the return is processed u/s 143(1).In my view, with due respect, the said decision is incorrect for the reasons given above. It appears to be a legal mistake as the above decisions were not cited before the bench.
Scope of the word Abatement:-

Chamber’s Dictionary
   ‘Demolition, put an end to’
Law lexicon
   ‘to throw down, destroy, quash or put an end to’
Advanced Law Lexicon
   ‘to diminish or take away or put an end to or come to a naught’
Black’s Legal Dictionary
   ‘Abatement’ means the act of eliminating or nullifying or suppression or defeat of a
   pending action.’

In view of the above definitions, it can be said that by virtue of the second proviso to section
153A, the pending assessment/reassessment proceedings as on the date of the
initiation of the search/date of requisition would come to an end and consequently the AO would be
precluded from taking any action with reference to such proceedings Therefore, it is to be
noted that it is only the pending proceeding which can be said to be abated and not the
proceedings which have already been concluded by an order of assessment or where assessment
proceedings stand terminated by expiry of the limitation period specified in section 143(2) of the
Act in view of decision of Hon'ble Punjab & Haryana High Court in the case of Vipin Khanna
(supra). Hence, question of abating the proceedings already terminated does not arise. If we look
into the budget speech of FM for F.Y’2003-04, the purpose was to do away with old scheme of
dual assessments and the same has been achieved by abating the pending proceedings on the date
of search. Meaning thereby, the AO can not continue the assessment/reassessment proceedings
which were pending on the date when the search was initiated/requisition made. Such
proceedings are to be treated as non existent by virtue of the said proviso. Reference can be made
to the judgment of the Hon'ble Jharkhand High Court in the case of Abhey Kumar Shroff
290 ITR 114. In that case, the search was carried out on 24.8.06 when admittedly proceedings
were pending on the date of search. The AO, instead of issuing notice u/s 153A for the specified
six years, proceeded to complete the assessment proceedings which were pending on the date of
search. The said assessment was challenged before the High Court which declared the said
assessment as illegal since assessment pending on the date of search stood abated by virtue of the
said proviso of section 153A. However, it may be noted that the concluded proceedings of
assessment/reassessment get reopened only by issue of notice u/s 153A. The intention of the
legislature is to give clear and uninterrupted jurisdiction to assess the total income of six years
irrespective of the assessment pending or not.

Just to illustrate, the assessment/reassessment can be said to be pending in the following
cases:-
1. Where notice u/s 142(1)/148 has been issued but no return has been filed by the assessee;
2. Where return has been filed but no action has been taken by the AO and the time
   specified in section 143(2) has not expired;
3. Where intimation u/s 143(1) has been issued and the time for issuing the notice u/s
   143(2) is still available;
4. Where notice u/s 143(2) has been issued but the assessment/reassessment is not yet made
   and limitation u/s 153 has not expired. Abhey Kumar Shroff-vs-CIT 290 ITR 114
   (Jharkhand).
In the above cases, the assessment/reassessment would stand abated and the AO can proceed only in accordance with the provisions of section 153A. In other cases where assessment is concluded by an order of assessment or on account of expiry of limitation period, such proceedings get reopened only by issue of the notice under section 153A.

**Procedure of assessment/reassessment**

Section 153A(1)(a) provides that in respect of the return filed by the assessee in response to notice u/s 153A(1), the provisions of this Act, so far as may be, would apply as if such return were a return required to be furnished u/s 139. Further, Explanation (i) to this section provides that except as provided in sections 153A to 153C, all other provisions of the Act would apply. That means that assessment/reassessment has to be made as per the normal procedure provided in sections 142 to 145A. It is to be noted that similar provisions are contained in Chapter XIV-B (Sec 158BC r/w 158BH). The hon’ble Supreme Court had to consider such issue with reference to the provisions of section 158BC in the case of Hotel Blue Moon 322 ITR 158 SC. The issue to be considered was whether AO must issue the notice u/s 143(2) within the stipulated time before making assessment under the provisions of chapter XIV-B. It was held by the apex court that the service of notice within the period specified in section 143(2) is a condition precedent for making assessment. In the absence of such service, the assessment made would be null and void. Apart from this, the following legal preposition, in my opinion, would emerge:-

1. **The return filed u/s 153A can be revised** as per section 139(5) provided the original return is filed within time specified in the notice. Belated return has to be treated as return u/s 139(4) and therefore cannot be revised as held by the apex court in the case of Kumar Jagdish Chandra Sinha 220 ITR 67(SC). It is also to be noted that unlike the provisions of section 158BC, there is no prohibition against filing of revised return.
2. The provisions of sections 148, 149, and 151 would not apply as section 153A overrides such provisions. Meaning thereby that concluded assessments would get reopened by issue of notice u/s 153A without complying with these provisions.
3. That assessment/reassessment is required to be completed within the period specified in section 153B.
4. The provisions for levy of interest under sections 220/234A/234B/234C would apply.
5. Similarly, the provisions for levy of penalties provided under the Act would apply.
6. The total income has also to be computed in accordance with the provisions of the Act. Therefore, in my opinion, the assessee would be entitled to claim deduction/exemption in the return filed in response to notice u/s 153A even if not claimed earlier since assessee is required to file the return of total income which is to be computed after claiming all permissible deductions/exemptions. For example, if the assessee had not claimed depreciation in the earlier return, he can claim the same in this return. Similarly, claim made earlier can be modified if warranted because of additional income on account of seized material. The decision of the hon’ble Supreme Court in the case of Sun Engineering Works 198 ITR 297 to the effect that reassessment proceedings are for the benefit of revenue cannot be applied to these proceedings in as much as the AO is required to assess only the escaped income u/s 147 while u/s 153A, he is required to assess the total income which includes the disclosed as well as undisclosed income.

**Assumption of jurisdiction u/s 153C**

Assessment Of Search & Seizure Cases: A Treatise 11 http://www.itatonline.org
As already stated, the provisions of section 153C are analogous to section 158BD and therefore, the decisions rendered with reference to the provisions of section 158BD would apply with reference to cases falling u/s 153C unless the context requires otherwise. The apex court in the case of Manish Maheshwari 289ITR341, after considering the provisions of section 158BD, held that:

“Section 158BD, however, provides for taking recourse to a block assessment in terms of section 158BC in respect of any other person, the conditions precedent 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.”

Since provisions of section 153A are analogous to the provisions of section 158BD in this regard, the above observations of the Apex court would squarely apply as held by the Tribunal in the case of Jindal stainless Ltd 120 ITD301[Del.] In this case, search was conducted at the residence of employee as well as in that portion of the office premises of assessee company where he worked. Material seized from the possession of the employee revealed some undisclosed income of assessee. On that basis, notice u/s 153A was issued to assessee and huge assessment was made. It was held by the Tribunal that action was invalid since assessment could be made only by invoking the provisions of sec 153C.

Another important question which arises for consideration is whether section 153C would apply where seized material does not belong to third party but the transactions entered in the seized document belong to third party. In my view, the answer is in negative. There is complete departure by the legislature in this regard in as much as u/s 158BD, the AO is required to record the satisfaction that undisclosed income belongs to the person other than the person searched while u/s 153A, he is required to record the satisfaction that the seized assets/books of account/documents belong to the person other than the person searched. Therefore, if the books of account belong to the person searched but entry in such books reflect the undisclosed income of the third party then, in my view, the AO cannot assume jurisdiction u/s 153C to assess such undisclosed income. The only course open to him would be to invoke the provisions of section 147. This view is supported by the decision of Bangalore bench of the tribunal in the case of P. Shrinivas Naik 306 ITR 411. In this case, search was conducted at the premises of ‘R’ in the course of which certain books were seized. One of the books showed that assessee had advanced a loan to ‘R’. On that basis, section 153C was invoked and assessment was made in the hands of assessee. Held that sec 153C could not be invoked as books seized did not belong to assessee.

**Limitation**

Assessment/reassessment in search cases is required to be made within the time specified u/s 153B of the Act. The assessment/reassessment in respect of six assessment years specified in section 153A (1)(b) as well as the assessment year relevant to the previous year in which search is
conducted u/s 132 or requisition is made u/s 132A has to be made within a period of two years from the end of the financial years in which last of the authorizations for search u/s 132 or requisition u/s 132A was executed.

However, the first proviso to section 153B provides that assessment/reassessment in respect of person referred to in section 153C has to be made within a period of two years as mentioned in the preceding paragraph or one year from the end of the financial year in which books of account or documents or assets seized or requisitioned are handed over u/s 153C to the AO having jurisdiction over such other person, whichever is later. However, the period specified under various clauses of the Explanation to section 153B will have to be excluded while computing the period of limitation u/s 153B. This limitation period is applicable to those cases where last of the authorisations for search u/s 132 or requisition u/s 132A was executed before 1.4.2004. Where such authorisation has been executed on or after 1.4.2004, the period of limitation would be 21 months as per the second proviso. The third proviso provides the period of limitation as 33 months where (i) last of the authorisations u/s 132 or 132A was executed on or after 1.4.2005 and (ii) during the course of assessment proceedings a reference u/s 92CA—(a) was made before 1.6.07 but an order u/s 92CA(3) was not made before such date; or (b) is made on or after 1.6.07. That means where order u/s 92CA(3) has been made before 1.6.07, the period of limitation would be as per the main provisions of sub section (1) or the first or second proviso as the case may be. The fourth proviso is applicable to the proceedings which were initiated with reference to section 153C and reference u/s 92CA has been made as mentioned in the third proviso. In such cases, the period of limitation is 33 months from the end of the financial year in last of authorisations u/s 132/132A was executed or 21 months from the end of the financial year in which books of account or documents or assets seized or requisitioned are handed over u/s 153C to the AO having jurisdiction over such other person, whichever is later.

It is also to be noted that the ‘authorization’ mentioned in section 153B shall be deemed to have been executed when the last panchnama is drawn in the case of search or on the date when the books of account/other documents/assets are actually received in the case of requisition u/s 132A as per Explanation (2) to section 153B.

The provisions of section 153B are more or less similar to the provisions of section 158 BE of the Act. Therefore, the decisions rendered with reference to the provisions of section 158BE would be relevant while deciding the issue of limitation u/s 153B.

At this stage, it would be important to understand the scope of the expression “Panchnama”. "Panchnama" has not been defined in the Act. The provisions of the Code of Criminal Procedure, 1973 ("Cr.PC") relating to search and seizure have been made applicable to the searches and seizure under sub-section (1) and sub-section (1A) of section 132 of the Act by virtue of sub-section (13) of section 132. Even the relevant provisions relating to searches and seizure in Cr.PC do not define the word "panchnama". Only a format is provided in which panchnamas is to be prepared. The said format has been adopted by the Income-tax Department for preparing the panchnamas. "Panchnama" is also not a word of English language. However, in India, "Panchnama" is a word of judicial recognition. "Panchnama" comprises of two Indian words "Panch" and "Nama". "Panch" means -"witness" while "nama" is used to represent a "document". Thus, "panchnama" in common parlance as well as in judicial circle is understood as a document prepared in respect of any proceeding in the presence of witnesses. The concept of "panchnama"
has been brought or introduced vis-a-vis the search and seizure proceedings in order to safeguard the interest of the person where premises have been searched and to curb the misuse of the powers of search party. That means the requirement of the presence of witnesses is a sine qua non for conducting of a valid search in respect of which panchnama is to be prepared. Further, the object behind this requirement is that, anything found and seized is truly recorded in the panchnama. If nothing is found, then such fact must be mentioned in the panchnama. On the other hand, if something is found, then it must be duly inventorised in the presence of witnesses. Further, if any seizure is required to be made, then the same should also be made in their presence. Once it is done, the same should be truly recorded in such panchnama. Search can be said to be concluded if all these transactions are complied with. {-See para 6 of the order of judicial member in the case of Nandlal Gandhi 115 ITD 1 (Mum)(TM)—no other view is available on this aspect}

In the case of CIT-vs- Sandhya P Naik 253 ITR 534 (Bom), the question was whether the prohibitory order u/s 132(3) would extend the period of limitation u/s 158BE. The court decided against the revenue by observing as under:

"Action under section 132(3) of the Income-tax Act can be resorted to only if there is any practical difficulty in seizing the item which is liable to be seized. When there is no such practical difficulty, the officer is left with no other alternative but to seize the item, if he is of the view that it represented undisclosed income. Power under section 132(3) of the Income-tax Act thus cannot be exercised so as to circumvent the provisions of section 132(3) read with section 132(5) of the Income-tax Act. The position has become much more clear after the insertion of the Explanation to section 132(3) effective from 1-7-1995, that a restraint order does not amount to seizure. Therefore, by passing a restraint order, the time-limit available for framing of the order cannot be extended."

In the case of B.K. Nowlakha & others-vs-UOI 192 ITR 436 Del, the search was conducted on 11.2.91 in the course of which certain unexplained assets including antique pieces were found. No seizure was made on that date but order of restraint was passed u/s 132(3) of the Act which was lifted on 9.4.91. The question before the court was whether such order was valid one so that period of limitation could be extended for the purpose of section 132(5) of the Act. The hon’ble court answered the question in favour of the assessee by observing as under:

"Coming to the facts of the present case, we find that the restraint orders which have been issued under section 132(3), from time to time, suffer from two infirmities, firstly, for the reasons stated in the reply affidavit, which are also borne out from the Department's record, it cannot be said that it was not practicable to effect seizure. In other words, the conditions necessary for the exercise of the jurisdiction under section 132(3) did not exist. Secondly, we find that the restraint orders have been cancelled and renewed from time to time and, in the present circumstances, we do not think that this was validly done."

“Section 132(3) can be resorted to if there is any practical difficulty in seizing the item which is liable to be seized. If there is no practical difficulty, then an authorised officer has the jurisdiction and duty to seize the books of account, other documents, money, bullion, valuable articles, etc., which are found as a result of the search, if no
explanation is coming forward in respect thereof. Therefore, when the search was
effected on February 11, 1991, and the petitioners were unable to give any valid
explanation as demanded by the respondents, then the only power which could have been
exercised or should have been exercised by the authorised officer was to effect seizure.”

Though the above decision was rendered with reference to limitation u/s 132(5) of the Act yet it
would be relevant for deciding the issue of limitation u/s 153B since validity of order u/s 132(3)
would affect the period of limitation in as much the validity of last panchnama would depend on
the validity of the order u/s 132(3).

In the case of Nand Lal Gandhi-vs-ACIT 115 ITD 1(Mum)(TM), search was conducted on
28.7.97 in the course of which certain incriminating materials including shares and jewellery
were found which were inventorised. Valuation of jewellery was also made. A panchnama was
prepared in which it was mentioned that only books of account and documents were being seized
and the search was stated to be temporarily concluded. A prohibitory order was issued u/s 132(3)
in respect of the shares and jewellery which was lifted on 8.9.97. A panchnama was also prepared
on that day which merely stated that search was concluded. The block assessment was concluded
on 30.9.99. The question before the Tribunal was whether assessment was time barred. The
tribunal, by majority opinion, held that panchama dated 8.9.97 as well as restraint order were
invalid and therefore, the period of limitation was to be counted from the end of the month of July
97. Hence, the assessment was time barred. The reason given by the tribunal was that every act
of search was completed on 28.7.97 and nothing remained to be done with reference to the shares
& jewellery since the same had already been inventorised and valued. Further nothing was done
on 8.9.97 except lifting the order. Therefore, the order u/s 132(3) was invalid in view of Bombay
High Court judgment in the case of Sandhya Naik (supra). Similar view has been taken by the
tribunal in the case of DCIT-vs-Adolf Patric Pinto 100 ITD 191(Mum), Sarb Consulate Marine
Products 97 ITD 333 (Del)

In the case of V.L.S.Finance Ltd-vs-CIT 289 ITR 286 (Del), a search warrant was issued and
search was conducted on 22.6.98. However, due to voluminous record, search had to be
conducted again and again till 5.8.98 when the last panchnama was prepared. The block
assessment remained pending till 29.6.2000 when order for special audit u/s 142(2A) was passed
which was allegedly not received by the assessee by 30.6.2000. The assessee challenged the said
order in the writ petition before the hon’ble Delhi High Court. Later on, the petition was amended
to contend that assessment proceedings had become time barred u/s 158BE of the Act since
period of limitation should be counted from the end of the month of June 98 in as much as search
could not be validly continued till 5.8.98 on the basis of single authorisation. The court found that
the said authorisation was revalidated from time to time and therefore search was validly
continued till 5.8.98. Consequently, it was held that the period of limitation had to be counted
from the end of the month of August 98 since last panchnama was prepared on 5.8.98.

The legal position emerging from the above decisions is that if all actions of search are completed
and nothing is left to be done by the search party then, the action of the authorised officer u/s
132(3) would be illegal and consequently any panchnama prepared on the date of lifting the order
u/s 132(3) would be of no consequence for the purpose of computing the limitation period u/s
153B.
However an interesting question arose about the scope of the expression “last of the authorisations” mentioned in section 158BE which also appear in section 153B before the tribunal in the case of Shah Rukh Khan-vs-ACIT 104 ITD 221(Mum). In that case, one authorisation was issued in respect of residence on 17.12.96 while two authorisations were issued on 23.12.96 in respect of two lockers. In respect of search of lockers, panchamas were prepared on the same date. However, the authorisation dated 17.12.96 was used on three dates i.e. 17.12.96, 23.12.96 and 30.1.97. the case of revenue was that period of limitation woud commence from the end of the month of January 97 while the case of assessee was that it would commence from the end of the month of December 96. The tribunal agreed with the contention of assessee by observing as under:

“18. From bare reading of section 158BE it is clear that the assessment has to be concluded under section 158BC, in cases where the search is initiated after 30-6-1996 but before 1-6-1997, within one year from the end of the month in which the last of the authorizations for the search under section 132 was executed. The Explanation 2 of section 158BC was inserted by Finance (No.2) Act, 1998 with retrospective effect from 1-7-1995, which makes it clear that the authorization referred to subsection (1) of section 158BE shall be deemed to have been executed on the conclusion of search as recorded in the last panchanama drawn in relation to any person in whose case the warrant of authorization has been issued. The said Explanation is with regard to authorization referred to sub-section (1) which refers to last of the authorizations. Which means that the last of the panchanama has to be taken into account in respect of last of the authorisations for search, as there could be more than one panchamas in respect of same authorization. The crux of the matter remains that the limitation shall start from the end of the month in which last of the authorization is executed.

21. We do not agree with the contentions of the ld. CIT DR that all the authorizations are to be treated as common kitty and the last date of any of the authorizations should be taken as starting point for the purpose of limitation. The section 158BE clearly states that the limitation will start from the end of the month in which last of the authorizations was executed. It pre-supposes that there can be a situation where more than one authorizations for search under section 132 are issued and the execution of the last of the such authorizations is to be considered as the starting point for the purpose of limitation. It clearly refers to the last authorization in case where more than one authorizations are issued. As such it cannot be held that all the authorizations issued should be treated as a common kitty and anyone of the authorization which is executed at the end should be considered for the purpose of limitation.”

It would, thus, be clear that where various authorisations are issued and various panchamas are prepared, it is not the last panchama of any authorisation but it is the last panchama prepared in respect of last authorisation which is relevant for computing the limitation period. However, it is learnt that this view has not been accepted by the hon’ble Delhi High Court in a recent judgment (not yet reported) by holding that limitation would commence with reference to the last panchanama drawn irrespective of the date of authorisation.

**Applicability of other provisions**
This aspect of the issue has already been discussed earlier at various places. However, it is summarized even at the cost of repetition. At the outset it is to be noted that the provisions of section 153A are non obstante provisions qua sections 139, 147 to 149, 151, 153. It means that in search cases, all these provisions would become inapplicable. The assessee would be required to file the returns in respect of the specified years in pursuance of notice u/s 153A issued by AO irrespective of the returns filed earlier. Further the requirements for reopening the assessment u/s 147 to 151 are to be dispensed with. The period of limitation as prescribed in section 153B would apply instead of the period specified u/s 153.

Section 153A (1) provides that the provisions of this Act would, so far are may be, apply accordingly as would have been applicable to the return filed under section 139. Further, Explanation to this section provides that except as provided in sections 153A to 153C, all other provisions of this Act would apply. That means that normal procedure of assessment would apply in accordance with the provisions of section 142 to 145A as mentioned earlier. Similarly, the provisions for levy of interest and penalty, the provisions relating to rectification, revision and appeal as well as the provisions for computation of total income as contained in this Act would become applicable.

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