IN THE INCOME TAX APPELLATE TRIBUNAL, BENCH "A", KOLKATA

[Before Hon'ble Sri Mahavir Singh, JM & Hon'ble Sri Shamim Yahya, AM]

IT(SS)A Nos.84-86/Kol/2011
Assessment Years : **2004-05,2005-06&2006-07**

(APPELLANT)		(RESPONDENT)
Trishul Hi-Tech Industries Kolkata (PAN:AACFT 3457 G)	-vs-	D.C.I.T., Central-XI, Kolkata

IT(SS)A No.82/Kol/2011
Assessment Year : **2004-05**

(APPELLANT)		(RESPONDENT)
D.C.I.T., Central-XI, Kolkata	-vs-	Trishul Hi-Tech Industries Kolkata (PAN:AACFT 3457 G)

For the Assessee	Shri Somnath Ghosh, Advocate
For the Department	Shri Swetabh Suman, CIT(DR)

Date of Hearing : 27.08.2014
Date of Pronouncement : 24.09.2014.

ORDER

Per Shri Shamim Yahya, AM

The appeals in IT(SS)A.84, 85 and 86/Kol/2011 are filed by the assessee against respective order of ld. C.I.T.(A)- Central-I, Kolkata for Assessment years 2004-05, 2005-06 and 2006-07 respectively.. IT(SS)A.82/Kol/2011 is filed by the Revenue against the order of ld. CIT(A) for A.Yr.2004-05.

Assessee's Appeals :-

2. Since the grounds raised are common we are adjudicating these appeals with reference to the grounds and the facts taken for A.Yr.2004-05.

3. The grounds of appeal raised by assessee in these appeals read as under :-

"1. For that in the facts and circumstances of the instant case, the Ld.Commissioner of Income Tax(Appeals) Central-I, Kolkata acted unlawfully in failing to appreciate that none of the conditions precedent existed and/or have been complied with and/or fulfilled for the Ld. Deputy Commissioner of Income Tax, Central Circle XI, Kolkata to assume

jurisdiction u/s 153C of the Income Tax Act, 1961 and thereby upholding the assessment order u/s 153C/143(3) of the Act simply following the findings in the assessment order passed in original assessment proceeding without any application of mind on the matter and /or passing any speaking order on the issues involved and his purported findings on that behalf are absolutely is ab initio void, ultra vires and null in law.

2. FOR THAT the specious action of the Ld.Commissioner of Income Tax (Appeals) Central I, Kolkata in upholding the action of the Ld.Deputy Commissioner of Income Tax, Central Circle XI, Kolkata of denial of deduction claimed u/s 80IB of the Income Tax Act, 1961 on account of transport subsidy and crane hire charges on the allegation that such receipts being of income nature is altogether unlawful, illegal, invalid and untenable in law.

3. FOR THAT the Ld. Commissioner of Income Tax (Appeals) Central I, Kolkata was unjustified in upholding the finding of the Ld.Deputy Commissioner of Income Tax, Central Circle XI, Kolkata denying claim of deduction under the provisions of s.80IB of the Income Tax Act, 1961 derived on account of transport subsidy and crane hire charges without considering the pith and substance of that enactment and his purported finding on that behalf is wholly capricious, unreasonable and perverse.

4. FOR THAT the Ld. Commissioner of Income Tax (Appeals) Central I, Kolkata misread facts, considered improper issues, failed to consider proper position in law, misplaced onus of proof and came to erroneous findings thereupon in upholding the impugned action of the Ld.Deputy Commissioner of Income Tax, Central Circle-XI, Kolkata which is not predicated on merits."

4. At the outset, in this case the ld. Counsel of the assessee challenged the assessment order passed in this case on the ground that the AO has no jurisdiction in this case to pass an order u/s 153C of the Act for the concerned assessment year in as much as no incriminating material was found during the search.

5. We note that the assessee has admitted that though arguments as regards the validity of the assessment framed u/s 153C/143(3) of the IT Act was advanced before the Ld.CIT(A), however in the grounds of appeal no specific ground was urged for adjudication. The assessee has pleaded that in ground No.1 of the appeal before us the assessee has challenged the jurisdiction. It has been contended that the aforesaid ground is purely legal in nature and goes to the root of the matter and as such leave to argue the ground may please be granted.

6. We have heard the ld. DR. Upon careful consideration we find that the issue is purely a legal one and goes to the root of the matter. Accordingly on the anvil of the

Hon'ble Apex Court in the case of NTPC vs CIT 229 ITR 383 (SC) we are adjudicating the aforesaid ground raised on jurisdiction.

7. We have heard both the counsel and carefully perused the records. We can gainfully reproduce the submissions of the ld.counsel of the assessee on the issue of jurisdiction in this regard as under :

> "The original assessment order u/s 143(3) of the Act for the assessment year under dispute was passed on 31-03-2006 by denying deduction u/s 80IB of the Income Tax Act, 1961 on the Transport Subsidy, Capital Investment subsidy, Project report subsidy, Central Sales Tax Subsidy and Power subsidy, was in litigation before the Ld.Commissioner of Income Tax (Appeals) and thereafter in the Hon'ble Income Tax Appellate Tribunal, Gauhati Benches. In the present context, the Ld. Assessing Officer framed the impugned assessment order u/s 153C/143(3) of the Act by taking the total income arrived at in the original assessment order u/s 143(3)/154 of the Income Tax Act, 1961 dated 02-08-2006 which included the denial of deduction u/s 80IB of the Act on the subsidies. As these issues were subject matter of the proceedings u/s 143(3) of the Act and were in further litigation before the higher authorities and accordingly, the assessment for the assessment year under dispute was not pending on the date of initiation of action u/s 153C of the Act. The appeal pending in the Income Tax Appellate Tribunal, Gauhati Benches cannot abate in terms of second proviso to s.153A of the Act. Even if it is pending on the date of search, no such intention was indicated by the Legislators in terms of second proviso to s.153A of the Income Tax Act, 1961, to abate such proceedings, which have been completed, or concluded and to restore the assessment to the file of the Assessing Authority. Only the assessment or reassessment which is pending before the Assessing Officer on the date of initiation of search shall abate. It is clarified by the CIRCULAR NO.7 OF 2003 (2003) 263 ITR (ST) 62 that an appeal, revision or rectification proceedings pending on the date of initiation of search under section 132 or requisition shall not abate. Admittedly, in the instant case, the handing over of the materials which allegedly belonged to the appellant was taken much later after the passing of assessment order u/s 143(3) of the Act and accordingly, such assessment did not abate. Therefore, the action of the Ld.Assessing Officer in assuming jurisdiction u/s 153C of the Income Tax Act, 1961 in the instant case was in contradiction to the second proviso to s.153A of the Act as it led to serious illegality, injustice and absurdity. A provision of the law has to be interpreted in a manner for which it is intended. It cannot be interpreted so as to advance injustice to the subjects. Where none of the assessments were pending on the date of search, the AO is precluded from re-agitating issues u/s 153C which have attained finality in original assessments, though pending in for appeals [MEGHMANI INDUSTRIES & ORGANICS LTD –VS- DCIT(2010) 129 TTJ (AHD) 255]. Further, in the case of CIT –vs- SHAILA AGARWAL (2012) 346 ITR 130 (ALL) it was held that the second proviso to section 153A of the Act, refers to abatement of the pending assessment or re-assessment proceedings. The word 'pending' does not operate any such interpretation, that wherever the appeal against such assessment or reassessment is pending, the same along with assessment or reassessment proceedings is liable to be abated. The principles of interpretation of taxing statutes do not permit the Court to interpret the second proviso to section 153A in a manner that where the assessment or reassessment proceedings are complete, and the matter is pending in appeal in the Tribunal, the entire proceedings will abate. Thus, the only action left for the Ld. Assessing officer in that respect, as no

addition was conceived on incriminating materials is to drop the proceedings. In fact, such procedure was laid down in the case of SSP AVIATION LTD –VS DCIT (2012) 346 ITR 177 (DEL) as under :-

"…….It is only a first step to the enquiry, which is to follow. The Assessing Officer who has reached the satisfaction that the document relates to a person other than the searched person can do nothing except to forward the document to the Assessing officer having jurisdiction over the other person and thereafter it is for the Assessing Officer having jurisdiction over the other person to follow the procedure prescribed by Section 153A in an attempt to ensure that the income reflected by the document has been accounted for by such other person. If he is so satisfied after obtaining the returns from such other person for the six assessment years, the proceedings will have to be closed ……..""(Emphasis Supplied)

Thus, as there was no addition conceived by the Ld.Assessing Officer on the basis of searched material for framing assessment u/s 153C of the Act, he ought to have closed the proceedings by referring to the assessment framed u/s 143(3) of the Act. It is trite that where assessments do not abate the proceedings initiated u/s 153C of the Act is *ex-facie* void and accordingly, is liable to be quashed on this score also.

Further, the Ld. Assessing Officer in the instant case assumed jurisdiction u/s 153C of the Act without any application of mind on the materials which did not reveal issues of incriminating nature so as to justify his action. In fact, the assessment framed u/s 153C/143(3) of the Act by reiterating only the additions made in the original assessment as well as another disallowance resorted to u/s 36(1)(va) read with s.2(24)(x) of the Act. Therefore, it is apparent from such action of the Ld. Assessing Officer that there was, in fact, no material, far from any of incriminating nature, belonging to the appellant which were seized during the search and seizure proceedings u/s 132 of the Act to justify the purported action u/s 153C of the Act. In fact, there was no satisfaction recorded by the Ld.Assessing Officer by forming his own opinion that the materials gathered were incriminating in nature. It is not in dispute that the Ld.Assessing Officer after assuming jurisdiction did not even raise a query in respect of such materials as he was sure that such materials do not reflect any undisclosed income justifying his action u/s 153C of the Act. In fact, the specious satisfaction reached by the Ld.Assessing Officer was merely an eye wash and has no validity in the eyes of law. It is the satisfaction of the ld. Assessing Officer that there were material belonging to the assessee which constitutes the foundation of the proceeding. It is fact that such satisfaction confers jurisdiction to assess such other person for six years excluding the year in which the search took place and as such, this recording of satisfaction cannot be an empty formality. The recordings of satisfaction has to be examined with the materials brought on record so as to justify the action of the Ld.Assessing Officer. In the instant case, apart from recording of satisfaction, nothing has been adduced on record to disturb a completed assessment u/s 143(3) of the Income Tax Act, 1961. It is an admitted fact that none of the seized documents suggest any evidence of hidden income. It is further admitted that nowhere in the impugned assessment order, it has been specified by the Ld.Assessing Officer as to which particular seized paper/document was of incriminating nature and its relation to the assessment year under dispute. The provisions of sections 153A to 153D of the Income Tax Act, 1961 were introduced in the statute with effect from 01-06-2003, wherein s.153A of the Act begins with the non obstante phrase "Notwithstanding….". Therefore, as soon as the search is concluded, a duty is cast upon the Assessing Authority having jurisdiction over the assessee, to issue notices u/s 153A(1) of the Act, for the preceding six years, calling upon that person to file its returns. As soon as the notices are issued, due process of law shall begin and the

Assessing Authority and the assessee are required to follow the same, which shall culminate with the Assessing Authority to assess or reassess the total income of the searched person in all the six years in question. While conferring such jurisdiction upon the Assessing Authority, the Legislature, to remove all the difficulties with regard to the multiplicity of proceedings pending on the date of initiation of search, through 2nd Proviso to s.153A of the Act, directed abatement of all those proceedings which are pending on that date, so that the assessee and the Assessing Authority shall deal with only one type of proceedings, wherein the Assessing Authority shall assess or reassess the total income of the searched person. This barrier has been set up by the legislature only with regard to proceedings that were found pending before the Assessing Authority on the date of search. Therefore, only a proceeding which is pending shall get abated. In other words, any proceeding that has reached its finality shall not be disturbed, as per the clarification issued by the CBDT CIRCULAR NO.7 DATED 05-09-2003 (supra), unless there are materials found, indicating existence of income embedded in those incriminating documents. No material is adduced to prove that the Ld.Assessing Officer in the case of person searched was satisfied that any money, bullion, jewellery or other valuable articles or things or books of accounts or documents seized or requisitioned belongs to or belong to the appellant referred to as the other person in the provisions of s.153A of the Act. The Ld. Assessing Officer did not adduce any material to show if any such satisfaction as required u/s 153C of the Act was recorded in the case of the appellant. No material is adduced in record to comply with such requirement. The existence of subject-wise and year-wise incriminating document is a condition precedent to proceed u/s 153C of the Income Tax Act, 1961 and in absence of such essentially required satisfaction, the action of the Ld.Assessing Officer cannot be sustained for judicial scrutiny. Where nothing incriminating is found in the course of search relating to any assessment years, the assessments for such assessment years cannot be disturbed [LMJ INTERNATIONAL LTD. –VS- DCIT (2008) 119 TTJ(KOL) 214]. Further, in absence of any reference to any assessment year specific incriminating information or document relatable to the assessee for the assessment years in question in the reasons recorded by the AO, impugned assessment u/s 153C is bad in law [SINGHAD TECHNICAL EDUCATION SOCIETY VS ACIT (2011) 140 TTJ (PN) 233}. The provisions of s.153 C of the Act cannot be invoked automatically in respect of any assessment year unless there exists incriminating documents for that previous year and the provision of s.153C of the Act cannot be invoked based on routine information or already accounted information disclosed in the original return. As there was no material found of incriminating nature belonging to the appellant which would have resulted in the proceedings conceived u/s 153C and as a consequence thereof, to reopen the completed assessment by reiterating the amounts assessed u/s 143(3) of the Act was wholly illegal.

However, such settled view was undone in the decision of SSP AVIATION LTD VS DCIT (Supra) wherein it was held that :-

"It needs to be appreciated that the satisfaction that is required to be reached by the Assessing Officer having jurisdiction over the searched person is that the valuable article or books of account or documents seized during the search belong to a person other than the searched person. There is no requirement in section 153C(1) that the Assessing officer should also be satisfied that such valuable articles or books of account or documents belonging to the other person must conclusively reflect or disclose any undisclosed income." (Emphasis Supplied).

This decision was followed by various authorities across the country and as such proceedings u/s 153C of the Act were upheld even if no incriminating material relating

to the other person were found in the search thereby leading to infructuous litigation. In fact, such was the situation that the addition resulted in the assessment order framed u/s 143(3) of the Act was identical to the one assessed u/s 153C/143(3) of the Act thereby raising two tax demands of identical amounts involving same subject matter for the assessment year 2003-2004. Thus, such action was leading to absurdity and unintended consequences.

While inserting the provisions of s.153C of the Act, the Legislature did not envisage such a situation where no incriminating materials relating to a third party was found in the course of search but still such party has to undergo assessment proceedings for six previous years excluding the year in which the search took place and/or the documents handed over to the concerned Assessing Authority irrespective of the fact that there was no material wherefrom undisclosed income, which was not assessed, could be computed.

In principle, the Legislatures found that the provision of s.153C of the Act was not interpreted according to their intention. The proposition that even bald documents which do not have any bearing on the assessment was enough to trigger the provisions of s.153C of the Act is fraught with absurdity. The consequences of s.153A and/or 153C of the Act are an outcome of a search and seizure proceedings u/s 132 of the Act. Therefore, if any undisclosed income is not found relating to a person, in principle, no action is liable to be taken against him. Thus, the Legislature amended the provisions to that effect that only in case of unearthing of incriminating documents belonging to a third party, which will have a bearing on the assessments of such party, the AO after recording such reasons may proceed to act u/s 153C of the Act. The provisions of s.153C(1) of the Act, prior to passing of Finance (Nos.) Act, 2014, used to read as under :-

153C*(1) Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, where the Assessing Officer is satisfied that any money, bullion, jewellery or other valuable article or thing or books of account or documents seized or requisitioned belongs or belong to a person other than the person referred to in section 153A, then the books of account or documents or assets seized or requisitioned shall be handed over to the Assessing Officer having jurisdiction over such other person and that Assessing Officer shall proceed against each other person and issue such other person notice and assess or reassess income of such other person in accordance with the provisions of section 153A:*

The Finance (No.2) Act, 2014 amended s.153C of the Act, with effect from 01-10-2014 which reads as under :-

*"**153C**(1) Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, where the Assessing Officer is satisfied that any money, bullion, jewellery or other valuable article or thing or books of account or documents seized or requisitioned belongs or belong to a person other than the person referred to in section 153A, then the books of account or documents or assets seized or requisitioned shall be handed over to the Assessing Officer having jurisdiction over such other person and that Assessing Officer shall proceed against each other person and issue notice and assess or reassess the income of the other person in accordance with the provisions of section 153A, if, that Assessing Officer is satisfied that the books of account or documents or assets seized or requisitioned have a bearing on the determination of the total income of such other person for the relevant assessment year or years referred to in sub-section (1) of section 153A".*

The provisions of s.153C of the Act was amended to obviate practical difficulties which arose in its interpretation from time to time. The amendment made by Finance (No.2) Act, 2014 as the Legislature found that different authorities were assigning different meanings to the provisions. As such, a state of affairs resulted in ambiguities which gave rise to conflicting decisions on subject, the Legislature in its wisdom thought it prudent to change the language thoroughly explicit. It so happened from time to time that during the course of conducting a search and seizure operation u/s 132 of the Act, money, bullion, jewellery or other valuable article or thing or books of account or documents belonging to another person were seized. On one hand, the seized materials were sent to the Assessing Authority having jurisdiction over the other person and on the other hand, the Assessing Authority receiving such seized material acts mechanically initiates proceedings u/s 153C of the Act without any verification. Such interpretation is never the intendment of the Legislature. The Legislature found that multiplicity of proceedings resulted and confusion reigned supreme. In order to eliminate such contradictory situations, it was made clear that the Assessing Authority while receiving such seized material belonging to the other person shall be satisfied that such material must be of "incriminating nature". Thus, the Amending Act, in fact, explained the procedure to deal with a situation where incriminating materials found in course of a search belonged to a third person. The provision was amended to stop unintended consequences and to prevent undue hardship on the third party who is not being searched. The scheme that even a partnership deed or a disclosed bank statement or projected statement was enough to assume jurisdiction u/s 153C of the Act was curtailed to the extent of incriminating materials found. In fact a logical conclusion was drawn to that effect. In fact, the interpretation of the existing provisions was defeating the object and purpose of the enactment and was leading to infructuous litigation without any rhyme or reason. By such interpretation, there were two assessment orders standing on the same issues raising identical tax demands for the same assessment years which is an absurd proposition. This based on the maxim *Ut Res Magis Valeat Quam Pareat*. The construction which would reduce the legislation to a futility should be avoided; an alternative that will introduce uncertainty, friction or confusion into the working of the system should be rejected. An interpretation which leads to unworkable results and brings about absurdity cannot be accepted. In any case, such a situation was never the intention of the Legislatures. To do away with this judicial error, the Act was amended to cure the obvious omission and to clarify the intention behind the enactment.

There is no doubt or dispute to the fact that the provision of s.153C of the Act is a procedural provision. Law of procedure are meant to regulate effectively, assist and aid of substantial and real justice and not to foreclose even an adjudication on the substantial rights of citizens of property, personal and other laws. In the case of STATE OF UTTAR PRADESH VS SINGHARA SINGH (AIR 1964 SC 358),the Apex Court quoted with approval the decision in the case of TAYLOR VS TAYLOR (1875) 1 CH D 426, for the proposition that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all and that other methods of dealing with the matter are necessarily forbidden. Further, in contrast to statutes dealing with substantive rights, statutes dealing with merely matters of procedure are presumed to be retrospective unless such a construction is textually inadmissible [DELHI CLOTH & GENERAL MILLS CO.LTD. VS CIT (AIR 1927 PC 242)]. Further, as stated by Lord Denning that the rule that an act of Parliament is not to be given retrospective effects applies only to statues which affect vested rights. It doesn't apply to statues which only alter the form of procedure or the admissibility of evidence, or the effect which the

courts give to evidence [BLYTH VS BLYTH (1966) 1 ALL ER 524 (HL)]. If the new act affects matters of procedure only, then, prima facie, it applies to all action pending as well as future [K.EAPIN CHACKO VS PROVIDENT FUND INVESTMENT COMPANY(P) :TD (AIR 1976 SC 2610)]. In stating the principle that a change in the law of procedure operates retrospectively, it was settled that with approval the reason of the rule as expressed by Maxwell that no person has a vested right in any course of procedure. He has only the right of prosecution or defence in the manner prescribed for the time being by or for the Court in which the case is pending, and if, by an act of Parliament the mode of procedure is altered, he has no other right than to proceed to the altered mode [TIKARAM & SONS VS CST (AIR 1968 SC 1286)]. The factum of satisfaction of the Assessing Officer that the documents seized are incriminating in nature so as to castigate the other person is a matter of procedure. No substantive or vested right of a party is affected thereby. Thus, the provision is remedial of the erstwhile legislation, designed to eliminate unintended consequences which was causing undue hardship on the subjects and is also clarificatory in nature. It is settled that rule 1BB is essentially a rule of evidence as to the choice of one of the well-accepted methods of valuation in respect of certain kinds of properties with a view to achieving uniformity in valuation and avoiding disparate valuations resulting from application of different methods of valuation respecting properties of a similar nature and character and accordingly is a procedural law which is applicable to pending cases [CWT VS SHARVAN KUMAR SWAMP & SONS (1992) 210 ITR 886 (SC)]. In the facts of the instant case, due to the unintended interpretation of the scope of the provisions of s.153C of the Act, the law was amended to ensure a reasonable approach or as otherwise, due to conflicting decisions on the subject, the construction of such provisions was leading to absurdity. Without taking the aid of the amended provision, the scope and ambit of such provision was leading to ambiguous proposition which is not the intendment of the Legislature. It, therefore, follows that the amended provision of s.153C of the Act is also declaratory. It seeks to clarify the law so as to remove doubts leading to the Courts giving conflicting decisions. Being clarificatory in nature, it must be held to be restrospective in the facts and in the circumstances of the case. The Legislature may pass a declaratory Act to set aside what the Legislature deems to have been a judicial error in the interpretation of statute. It only seeks to clear the meaning of a provision of the principal Act and make explicit that which was already implicit. It is settled that section 154 is a procedural provision. It is settled law that an amendment of a procedural law is normally regarded as retrospective in operation because no one has any vested right in a procedural law and the Tribunal was therefore, justified in holding that section 154(1)(bb) which was inserted during the financial year 1964-1965, could be applied for the assessment year 1963-1964, and the IAC had jurisdiction under section 154(1)(bb) to rectify the mistake in the penalty order dated 4-3-1970 for the assessment year 1963-64 [NURUDDIN & BROS VS CIT (1979) 116 ITR 704 (CAL)]. Thus, the provisions of s.153C of the Act as amended by Finance (No.2) Act, 2014 was made applicable on and from 01-10-2014 and is relevant for the assessment year under dispute as it cures the infirmities of the previous legislation and also makes the provisions workable by avoiding absurd consequences. Accordingly, such provision is to be given retrospective operation and is also applicable to pending proceedings. That being so, the action of the Ld.Assessing Officer is fraught with illegality as he proceeded *de hors* any incriminating materials to assume jurisdiction u/s 153C of the Act in the instant case and accordingly, his action is liable to be quashed being *ab initio void, ultra vires* and *ex-facie* null in law."

7.1. As regards the merits of the case ld. Counsel of the assessee contended that the issue is covered in favour of the assessee by the decision of Hon'ble Gauhati High Court in the case of CIT vs. Meghalaya Steels Ltd. 217 Taxman 184.

8. The ld. DR, on the other hand, relied upon the orders of the authorities below. However, the ld. DR could not controvert the submissions that no incriminating material was found in the course of search for the concerned assessment years.

9. Upon careful consideration we note that assessment order u/s 143(3) of the Act for the concerned assessment year was passed on 31.03.2006 by making various disallowances and additions. The matter was subsequently taken before the ld. CIT(A) and thereafter before ITAT. In the present case the AO framed the impugned assessment order u/s 153C/143(3) of the Act despite the fact that no incriminating material was found during the course of search. This aspect is evident by the fact that the AO framed the impugned assessment order u/s 153C/143(3) of the Act by taking the total income arrived at in the original assessment order u/s 143(3)/154 of the Act dated 02.08.2006 which included various disallowance and additions. Hence order u/s 143(3) of the Act has been passed earlier and the issue was further adjudicated before the higher authorities and accordingly the assessment for assessment year under dispute was not pending on the date of initiation of action u/s 153C of the Act. Admittedly in the instant case the hand over of the materials which allegedly belonged to the assessee was taken much later after passing of assessment order us 143(3) of the Act. Hence such assessment did not abate. We may gainfully refer to the 2nd proviso to section 153A of the Act :

> *"**Assessment in case of search or requisition***
> *153A (1) Notwithstanding any thing 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 132or 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 ot 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]."*

9.1. Thus it is evident that on the basis of facts narrated above the action of the AO in assuming jurisdiction u/s 153C of the Act in the instant case was contradictory to the second proviso to section 153A of the Act in as much as the assessment for the concerned assessment years was not pending. Thus it is clear that where none of the assessments were pending on the date of search the AO is precluded from re-agitating issues u/s 153C of the Act which have attained finality in original assessment dehorse any incriminating material found during the course of search. In such circumstances we agree with the submissions of the ld. Counsel of the assessee that the only action left for the AO in that respect as no addition was conceived on incriminating materials is to drop the proceedings. Thus we are of the considered opinion that under the provision of Act only the proceedings which is pending shall get abated. In other words, any proceedings that has reached its finality shall not be disturbed unless there are materials found, indicating existence of income embedded in incriminating documents. No incriminating material has been proved to have been found in the course of search which belonged to the assessee warranting the re-assessment u/s 153C of the Act for the impugned assessment year.

9.2. It has been held by the ITAT, Kolkata Bench in the case of LMJ International Limited vs DCIT 119 TTJ (Kol) 214 where nothing incriminating is found in the course of search relating to any assessment years, the assessments for such assessment years cannot be disturbed u/s 153C of the Act. Thus it is clear that the provisions of section 153C of the Act cannot be invoked automatically in respect of any assessment year unless there exists incriminating documents for that previous year. The provision of section 153C of the Act cannot be invoked on routine information or on income already accounted/disclosed in the original return, the assessment of which is complete. In this regard we may gainfully refer to the decision of the Mumbai Special Bench of the ITAT in the case of Alcargo Global Logistics Ltd vs DCIT. In this case the Special Bench has held that

> *"(1) in assessment that is abated AO retains original jurisdiction as well as the jurisdiction conferred on him by section 153A of the Act for which assessments shall be made for each of the six assessment years separately.*
> *(2) In other cases any addition to the income already been assessed the assessments u/s 153A of the Act will be made on the basis of incriminating material i.e. (a) books of accounts and other documents found in the course of search but not produced in the course of original assessment and (b) undisclosed income or property disclosed in the course of search."*

9.3. We find that the above interpretation which is with respect to section 153A of the Act should also be extended to assessment u/s 153C of the Act. It will be a absurd proposition that the person who is searched u/s 153A of the Act can be assessed only on the basis of incriminating material found and the other person who is assessed u/s 153C of the Act in connection with the same search should be assessed de hors any incriminating material.

9.4. We find that the above view is supported by the amendment to section 153C of the Act w.e.f. 01.10.2014. The provision to section 153C(1) prior to the amendment and sub-section to the amendment are already reproduced in assessee's submission herein above. From the above we find that the provision of section 153C(1) was amended to obviate practical difficulties which arose in its interpretation. To put it simply this amendment to proviso to section 153C(1) of the Act debars the AO from

making any assessment dehorse any incriminating material found during the search. Thus in our view this amendment supports the view expressed by us.

9.5. From the above various discussions and precedence we are of the considered view that assessment in the impugned assessment years have been completed u/s 143(3) of the Act. Hence the assessment for the concerned assessment year does not abate. Hence dehorse any incriminating material, AO cannot made any addition in these cases. Accordingly we hold that assessment u/s 153C of the Act in these cases dehorse any incriminating material is not sustainable. Hence we set aside the orders of the authorities below and decide the issue in favor of assessee. Since we are quashing the appeals on jurisdiction we are not adjudicating the merits of the appeal as the same is now only of academic interest.

Revenue's Appeal :

10. The Revenue in IT(SS)A. 82/Kol/2010 has raised the following grounds :-

"1. That the ld. CIT(A) Ventral-I has erred in deleting the disallowance of interest made by A.O. relying on the decision of the ITAT, KOlkata in the case of LMJ International (119 TTJ 214)
2. That since there was already an Order u/s 1263 of the Ld.CIT dated 27.03.2009, partly setting aside the order u/s 143(3) of the AO on the issue and the open assessment merged in consequence of search with the assessment u/s 153A, the said case law is not applicable."

11. In this case the AO made the disallowance of interest amounting to Rs.7,53,440/- by holding that huge interest free advance has been given to the sister concern. The assessment was not made on the basis of the incriminating material found during the course of search. AO has observed that in the regular assessment the nature and purpose of advances was not examined by the AO.

12. Upon assessee's appeal the ld. CIT(A) has deleted the addition by holding that the matter has attained the finality in the regular assessment. He also noted that no incriminating materials have been found during the search. The ld. CIT(A) has also referred to the decision of ITAT, Kolkata in the case of LMJ International 119 TTJ 214.

Against the above order the Revenue is in appeal before us.

13. We have heard both the counsel and carefully perused the records. We have already held in the assessee's appeal as above that dehors incriminating material no assessment can be done u/s 153C of the Act for the assessment year for which assessments have already been completed. In these circumstances we do not find any infirmity in the order of the ld. CIT(A) and we uphold the same.

14. In the result the appeals of the assessee are allowed and the appeal filed by the Revenue stands dismissed.

. **Order pronounced in the court on 24.09.2014.**

Sd/-	**Sd/-**
[Mahavir Singh]	[Shamim Yahya]
Judicial Member	Accountant Member

Date: 24.09.2014.

R.G.(.P.S.)

Copy of the order forwarded to:

1. Trishul Hi-Tech Industries, C/o Somnath Ghosh, Advocate, 2 Garstin Place, 2nd Floor, Kolkata-700001.
2. D.C.I.T., Central-XI, Kolkata.
3. CIT(A)-Central-I, Kolkata.
4. CIT - Kolkata.
5. CIT-DR, Kolkata Benches, Kolkata

True Copy,

By order,

Deputy /Asst. Registrar, ITAT, Kolkata Benches