IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "I", MUMBAI

BEFORE SHRI N. K. BILLAIYA ACCOUNTANT MEMBER AND
SHRI AMIT SHUKLA, JUDICIAL MEMBER

ITA No. 1553 & 3173/Mum/2010
Assessment Year: 2002-03 & 2004-05

Jignesh P. Shah 10th Floor, Hiralay Building, Ashok Nagar CHS JVPD Scheme, Vile Parle (W), Mumbai 400 049 **PAN:-AELPS 9392 A**	Vs.	DCIT Cen Cir-46 Mumbai
(Appellant)		(Respondent)

Assessee by : Shri Chetan Karia
Revenue by : Shri Kishan Vyas

Date of hearing : 03.02.2015
Date of Order : 13.02.2015

O R D E R

PER AMIT SHUKLA, JM:

The aforesaid appeals have been filed by the Assessee, against order dated 02.02.2010 & 08.02.2010 for the A.Ys. 2002-03 and 2004-05 respectively, passed by Ld. CIT(A)-38, Mumbai for the quantum of assessment passed u/s 153 A r.w.s. 143(3) of the Income-tax Act. Since the facts and issues involved in both the appeals are common therefore, same are being disposed off by way of this consolidated order.

2. In various grounds of the appeal, assessee has mainly challenged the addition on account of deemed dividend u/s 2(22)(e) of Rs.1,69,68,750/- in the A.Y. 2002-03 and sum of Rs.4,62,91,123/-in the

A.Y. 2004-05. Besides this, the assessee has also filed petition for admission of following as additional ground, which is common in both the years except for variation in the figures of deemed dividend.

> *"1. The learned Commissioner of Income Tax (Appeals) erred in confirming and the learned Assessing Officer erred in passing the assessment order u/s 153A and the same is without jurisdiction and ban in law.*
>
> *2. The learned Commissioner of Income Tax (Appeals) erred in confirming and the learned Assessing Officer erred in making addition of Rs.1,69,68,750/- u/s 2(22)(e) in assessment order u/s 143(3) r.w.s. 153A and the same is without jurisdiction and bad in law.*
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> *3. The learned Commissioner of Income Tax (Appeals) and Assessing Officer erred in determining amount of deemed dividend at Rs.1,69,68,750/-*
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> *4. The appellant prays that:*
>
> *i) assessment order u/s 143(3) r.w.s. 153A may be cancelled as without jurisdiction and bad in law,*
>
> *ii) addition of s.1,69,68,750/- u/s 2(22)(e) may be deleted as being without jurisdiction and bad in law,*
>
> *iii) any other relief your honours may deem fit."*

3. Since the aforesaid additional grounds raised by the assessee are purely legal grounds arising out of facts and material on record and does not require any investigation or verification of facts therefore, in view of the decision of the Hon'ble Supreme Court in the case of National Thermal Power Company Ltd. Vs. CIT reported in (1998) 229 ITR 383, we are admitting the additional grounds.

4. The brief facts qua the issue raised in the additional ground are that, assessee is an individual having salary income and income from other sources. Return of income for the A.Y. 2002-03 was filed on 31.03.2003 u/s 139 at an income of Rs.14,69,770/- and for the A.Y. 2004-05, return was filed on 31.03.2005 u/s 139 at an income of

Rs.9,82,210/-. After the filing of the return of income, no notice u/s 143(2) was issued within the time limit prescribed under the statute, which was 31.03.2004 for the A.Y. 2002-03 and 31.03.2006 for the A.Y. 2004-05. Thus, the return of income stood assessed and had attained finality. Thereafter search and seizure action u/s 132(1) was carried out by the Investigation Wing Mumbai in the case of Commodities Exchange Group on 19.06.2007. The assessee being the member of Financial Technologies India Ltd., was also covered under the same search and seizure action. In pursuance of search action u/s 132(1), notices u/s 153A was issued to the assessee on 25.10.2007 for the six assessment years immediately preceding the assessment year of the year of the search, which included the aforesaid assessment years. In response to the said notices the assessee filed his return of income on 26.11.2007 on the same income which was declared in the original return of income filed u/s 139. In the assessment order passed u/s 153A, read with section 143(3), the addition on account of deemed dividend of Rs.1,69,68,750/- for the A.Y. 2002-03 and Rs.4,65,76,000/- for the A.Y. 2004-05 was made, vide separate order dated 31.03.2009.

5. Before us, learned counsel submitted that during the course of search and seizure action, no incriminating document, material or unaccounted assets were found from the assessee. Even for the year of search i.e. A.Y. 2008-09, no addition has been made. The assessing officer without there being any incriminating material found in the course of search relating to the deemed dividend has made the addition on the basis of information already available in the return of income. This is also evident from the copy of panchnama and statement on oath of the assessee recorded at the time of search, the copy of which have

been placed in the paper book form pages 135 to 139. Even in the assessment order there is no whisper about any material or document found at the time of search relating to the transaction of deemed dividend. The Ld. AO he has noted the facts about receiving of the payments by the assessee from M/s. Lotus investment, which was a division of M/s. La-fin Financial Services Pvt. Ltd. in which the assessee held 50% of share, from the balance sheets and records already filed along with the return of income. Since the assessment for the A.Ys. 2002-03 & 2004-05 had attained finality before the date of search and does not get abated in view of second proviso to section 153A, therefore, without there being any incriminating material found at the time of search, no addition over and above the income which already stood assessed can be made. This proposition he said, is squarely covered by the decision of All *Cargo Global Logistics Ltd. Vs. DCIT reported in (2012) 137 ITD 287 (SB) (Mum)*. Even the Hon'ble jurisdictional (Bombay) High Court in the case of *CIT Vs. M/s. Murli Agro Products Ltd. ITA No. 36 of 2009* order dated 29.10.2010, has clearly held that, once the assessment has attained finality before the date of search and no material is found in the course of proceedings u/s 132(1), then no addition can be made in the proceedings u/s 153A. This proposition has been reiterated by Hon'ble Rajasthan High Court in the case of *Jai Steel (India) Vs. ACIT reported in (2013) 259 CTR (Raj) 281*. Thus, the addition of deemed dividend made by the assessing officer is beyond the scope of assessment u/s 153A for the impugned assessment years.

6. On the other hand Ld. DR submitted that, the act does not envisages that the assessments which have attained finality cannot be disturbed or varied if no incriminating material is found qua the addition made. There is no concept of undisclosed income enshrined in section 153A. In support of his contention, he strongly placed reliance on the decision of ITAT Mumbai Bench in the case of *Satish L. Babladi Vs. DCIT passed in ITA Nos. 1732 & 2109* order dated 19.03.2013.

7. We have heard the rival submissions on the legal issue raised in the additional grounds and the material placed on record. The chronology of events relating to status of assessment of the impugned assessment years are as under:-

Event	***Dates***	
	A.Y. 2002-03	***A.Y. 2004-05***
Date of filing of return of income u/s 139	*31.03.2003*	*31.03.2005*
Time limit for issuance of notice u/s 143(2) under the statute	*31.03.2004*	*31.03.2006*
Time limit for completing assessment u/s 143(3)	*31.03.2005*	*31.03.2007*
Date of search	*19.06.2007*	*19.06.2007*

From the above, it is evident that, prior to the date of search, the assessment for both the assessment years had attained finality as the return income stood assessed before the date of search. Accordingly, the assessment for the A.Ys. 2002-03 & 2003-04 does not gets abated in view of the second *proviso* to section 153A. The relevant provisions of section 153 A reads as under:-

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

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

(b) assess or reassess the total income of six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made:

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

Provided further that assessment or reassessment, if any, relating to any assessment year falling within the period of six assessment years referred to in this sub-section pending on the date of initiation of the search under section 132 or making of requisition under section 132A, as the case may be, shall abate:……

8. From the perusal of the aforesaid provision, it is evident that, where search has been initiated u/s 132 or requisition has been made under section 132A, it is incumbent upon the assessing officer to issue notices requiring the person searched to file return of income in respect of each assessment year falling within six assessment years immediately preceding the assessment year in which search is conducted. The assessing officer has to assess or reassess the total income in respect of each assessment year falling within six assessment years. Thus, it is statutory mandate upon the assessment officer to assess or reassess the

total income on which a person can be said to be assessable under the provisions of the act. The first *proviso* covers the income which is to be assessed i.e. emanating not only, from the declared sources but also from any material found during the course of search. However if the assessment has already been made or finalized before the date of search, then the AO can reassess the total income on the basis of material found or gathered during the course of search over and above the income which already stood assessed. However, the second *proviso* carves out exception/limitation that, pending assessment or reassessment relating to any assessment year following within the period of six years on the date of search, the same gets abated. In other words, the assessments which have not attained finality and are pending on the date of search, then the same does not gets abated. The assessments which have abated, fresh determination of total income would be required which can be made on the basis of material already on record as well as material gathered during the course of search. However, the assessments which have already attained finality and does not get abated, then they have to be assessed on the same income and cannot include any time of income for which no incriminating material has been found. The reason being that the assessments which are pending and get abated, the entire income has to be determined which includes material already on record and also the material found as a result of search. However, statute has carved out the exception to those assessments which have attained finality, because those assessments does not get abated. In such a situation, the income which has already been assessed, the same cannot be disturbed unless some incriminating information or material is found suggesting that the income which

already stood assessed requires to be reassessed on the basis of new material found. This proposition has been upheld and clarified by the Hon'ble jurisdictional High Court in the case of Murli Agro Products Ltd. (supra) in the following manner:-

> *"10). Thus on a plain reading of Section 153A of the Income-tax Act, it becomes clear that on initiation of proceedings under Section 153A, it is only the assessment/reassessment proceedings that are pending on the date of conducting search under Section 132 or making requisition under Section 132A of the Act stand abated and not the assessments/reassessments already finalized for those assessment years covered' under Section 153A of the Act. By a circular No.8 of 2003 dated 18-9-2003 (See 263 ITR (St) 61 at 107) the CBDT has clarified that on / initiation of proceedings under Section 153A, the proceedings pending in appeal, revision or rectification proceedings finalized assessment/ against reassessment shall not abate. It is only because, the finalized assessments/reassessments do not abate, the appeal, revision or rectification pending against finalized assessments/reassessments would not abate. Therefore, the argument of the revenue, that on initiation of proceedings under Section 153A, the assessments/reassessments finalized for the years covered under Section 153A of the Income-tax Act stand abated cannot be accepted. Similarly on annulment of assessment made under Section 153A (1) what stands revived is the pending assessment/reassessment proceedings which stood abated as per section 153A(1).*
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> *11) In the present case, as contended by Shri Mani, learned counsel for the assessee, the assessment for the assessment year 1998-99 was finalised on 29-12-2000 and search was conducted thereafter on 3-12-2003. Therefore, in the facts of the present case initiation of proceedings under Section 153A would not affect the assessment finalised on 29-12-2000.*
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> *12) Once it is held that the assessment finalised on 29.12.2000 has attained finality, then the deduction allowed under section 80HHC of the Income-tax Act as well as the loss computed under the assessment dated 29-12-2000, would attain finality. In such a case, the AO while passing the independent assessment order under section 153A read with Section 143 (3) of the I.T. Act could not have disturbed the assessment/ reassessment order which has attained finality, unless the materials gathered in the*

course of the proceedings under Section 153A of the Income-tax Act establish that the reliefs granted under the finalised assessment/reassessment were contrary to the facts unearthed during the course of 153 A proceedings.

13) In the present case, there is nothing on record' to suggest that any material was unearthed during the search or during the 153A proceedings which would show that the relief under Section, 80HHC was erroneous. In such a case, the A.O. while passing the assessment order under Section 153A read with Section 143(3) could not have disturbed the assessment order finalized on 29.12.2000 relating to Section 80 HHC deduction and consequently the CIT could not have invoked jurisdiction under section 263 of the Act."

The principle and the ratio reiterated in para 12 of the aforesaid order makes it abundantly clear that, the assessing officer while passing the assessment order u/s 153A cannot disturb the assessments/reassessment order which had attained finality, unless material gathered in the course of search establishes that the earlier assessment finalized is contrary to the fact.

9. This principle has again been reiterated by the Hon'ble Rajasthan High Court, wherein Lordships after analyzing the entire provision of section 153A, held and concluded as under:-

"22. The underlying purpose of making assessment of total income under s. 153A of the Act is, therefore, to assess income which was not disclosed or would not have been disclosed. The purpose of second proviso is also very clear, in as much as once an assessment or reassessment is 'pending' on the date of initiation of search or requisition and in terms of s. 153A a return is filed and the AO is required to assess the same, there cannot be two assessment orders determining the total income of the assessee for the said assessment year and therefore, the proviso provides for abatement of such pending assessment and reassessment proceedings and it is only the assessment made under s. 153A of the Act that would be the assessment for the said year.

23. The necessary corollary of the above second. proviso is that the assessment or reassessment proceedings, which have already been 'completed' and assessment orders have been passed determining the assessee's total income and. such orders are subsisting at the time when the search or the requisition is made, there is no question of any abatement since no proceedings are pending. In such cases, where the assessment already stands completed, the AO can reopen the assessments or reassessments already made without following the provisions of ss. 147, 148 and 151 of the Act and determine the total income of the assessee.
24. The argument raised by the counsel for the appellant to the effect that once a notice under s. 153A of the Act is issued, the assessments for six years are at large both for the AO and assessee has no warrant in law.

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

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

(b) regarding other cases, the addition to the income that has already been assessed, the assessment will be made on the basis of incriminating material and
(c) in absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made."

Thus, respectfully following the aforesaid proposition by the Hon'ble High Courts, we hold that in this case, the assessment for the A.Ys. 2002-03 and 2004-05 had attained finality and admittedly there being no incriminating material found during the course of search relating to the addition made on account of deemed dividend, therefore, such an addition *de hors* any material found during the course of the search, cannot be roped in the assessment made u/s 153A by the assessing officer.

10. Now, coming to the decision of ITAT Mumbai Bench in the case of Satish L. Babladi, as relied upon Ld. DR, from the perusal of the said decision it is seen that the Tribunal has strongly relied upon the decision of Hon'ble Delhi High Court in the case of *CIT Vs. Anil Kumar Bhatia reported in (2013) ITR 493 (Delhi).* The Hon'ble Delhi High Court with regard to the question, as to whether any addition can be made in respect of completed assessment when no incriminating material was found has been left open to be answered. Other observations made by the Hon'ble High Court is in the form of '*Obiter dicta'* because this specific issue has been left open. Moreover the Hon'ble jurisdictional High Court in case of Murli Agro Products Ltd. (supra) has categorically clarified that the assessment which had attained finality cannot be disturbed unless incriminating material is found in the course of search. Therefore, the decision of the Tribunal in S.L. Babladi's case, cannot be relied upon as they have not considered the ratio and principle laid down by the Hon'ble jurisdictional High Court.

11. Accordingly, the addition on account of deemed dividend of Rs.1,69,68,750/- in the A.Y. 2002-03 and addition of Rs.4,62,91,123/- on account of deemed dividend u/s 2(22)(e) is deleted as same is beyond the scope of assessment u/s 153A. The additional ground thus raised by the assessee is allowed. In view of the finding given here-in-above, we are not going into the merits of the addition as discussed by the AO as well as Ld. CIT(A), as they have become purely academic.

12. In the result, appeal filed by the **assessee for both the assessment years are allowed**.

Order pronounced in the open court on this 13th day of February, 2015.

Sd/-	**Sd/-**
(N.K. BILLAIYA)	**(AMIT SHUKLA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai, Dated: 13.02.2015
*Srivastava

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT(A) Concerned, Mumbai
The DR "L" Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.