IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 523 OF 2013

Commissioner of Income-Tax II, Thane,]
6th floor, B Wing, Ashar I.T. Park Road,]
16Z, Wagle Estate, Thane 401 604] ... Appellant

Versus

Continental Warehousing Corporation]
(Nhava Sheva) Ltd., D.No.1088,]
Khopta Village, Tal. Uran, Dist. Raigad,] ... Respondent

WITH

INCOME TAX APPEAL NO. 1969 OF 2013

Commissioner of Income-Tax. Central-IV,]
Room No.663, 6th Floor, Aayakar Bhawan,]
M.K.Road, Mumbai - 400 020] ... Appellant

Versus

All Cargo Global Logistics Ltd.,]
5th floor, Diamond Square, CST Road,]
Kalina, Santacruz (East), Mumbai-400 098.] ... Respondent

Mr. Suresh Kumar for the Appellants in ITXA Nos. 523 of 2013.

Mr. Arvind Pinto for the Appellants in ITXA No. 1969/2013.

Mr. S.E. Dastur, senior counsel with Mr. B.V. Jhaveri and Mr. Madhur Agarwal for the Respondents in ITXA No. 1969/2013.

Mr. Nishit Gandhi i/b Mr. Vipul Joshi for the Respondents in ITXA No. 523 of 2013.

CORAM : S.C. DHARMADHIKARI & A.K. MENON, JJ.

TUESDAY, 21ST APRIL, 2015

ORAL JUDGMENT. : [Per S.C. Dharmadhikari, J.]

1. These appeals were heard together and are being disposed of by a common judgment. It is conceded before us by both sides that the questions of law and the issues arising therefrom are common and, therefore, they advanced similar contentions. It is in these circumstances that we dispose of these appeals by this common judgment.

2. We will refer to the facts in two representative appeals. Income Tax Appeal No.523 of 2013 filed by the Revenue challenges the order passed by the Income Tax Appellate Tribunal, Bench at Mumbai, dated 31st August, 2012, in Income Tax Appeal No.7055/Mum/2011. The assessment year is 2008-09.

3. There, the assessee filed a return of income declaring total

income at Rs. Nil. That was filed on 8th October, 2008. The gross total income is declared at Rs.21,07,13,675/-/ Upon claiming deduction under section 80 IA(4) of the Income Tax Act, 1961 (hereinafter referred to as the "IT Act") in the said sum, total income is declared at Rs. Nil.

4. During the assessment proceedings, the Assessing Officer noted that the assessee company is engaged in the operation of a Container Freight Station (CFS) and claimed that the activities therein qualify as a port. That is one of the infrastructure facilities for the purpose of section 80-IA(4) of the IT Act. The assessee produced a certificate dated 13th July, 2006, from the Jawaharlal Nehru Port Trust (JNPT) Nhava Sheva declaring that the assessee is considered as an extended arm of port related services. However, on enquiry under section 133(6) of the IT Act, it was revealed that this certificate was withdrawn by JNPT on 5th October, 2007. That is how the deduction claimed came to be disallowed. Being aggrieved by this order of the Assessing Officer, the assessee preferred an appeal before the First Appellate Authority, namely, Commissioner of Income-tax (Appeals),

Thane. He dismissed the assessee's appeal on 29th July, 2010, and confirmed the view of the Assessing Officer.

5. Being aggrieved by the order passed by the Assessing Officer and the First Appellate Authority, the assessee approached the Tribunal and by the impugned order, the Tribunal allowed its appeal.

6. The appeal by the Revenue raises the following substantial question of law :

> "Whether, on the facts and in the circumstances of the case, and in law the Hon'ble ITAT is right in holding that the assessee is entitled to deduction under Section 80-IA of the Income Tax Act, 1961 even though activities undertaken by the assessee do not fall within Clause (d) of the Explanation to 80-IA(4) defining the term infrastructure facilities?"

7. The other appeal to which our attention was invited is Income Tax Appeal No.1969 of 2013. There, the assessee is a company engaged in the business of providing logistic support. A search was

carried out on its premises on 10th July, 2009 whereupon a notice under section 153A of the IT Act was issued to the company to file a return of income. On 30th October, 2009, the company filed its return of income declaring total income of Rs.5,54,63,220/- while claiming deduction under section 80 IA(4) of Rs.1,25,77,637/-. The Assessing Officer relied upon an order passed by the Income Tax Appellate Tribunal's Bench at Delhi in the case of *Container Corporation of India Limited vs. Assistant Commissioner of Income Tax (2012) 346 ITR 140* and held that the company was not entitled to deduction under section 80-IA. Accordingly, the amount claimed was added back to the income.

8. Aggrieved with this order of the Assessing Officer, the assessee carried the matter in appeal to the Commissioner of Income-tax (Appeals) and he upheld the order of the Assessing Officer. The Commissioner's order is dated 26th April, 2010.

9. A special Bench of the Tribunal was constituted to hear the assessee's appeal and the same was proposed for purposes of deciding two questions, namely, what is the scope of assessment under section

153A of the IT Act. Whether that encompasses additions not based on any incriminating material found during the search and whether the Commissioner of Income-tax (Appeals) was justified in upholding the disallowance of deduction under section 80-IA(4) of the IT Act, 1961.

10. After reviewing the entire case law, the special Bench held that by the clear language of section 153A together with its provisos, pending assessments abate. The other question was answered by upholding that the Assessing Officer is required to make one assessment for each of the six years on the basis of the search and any other material existing or brought on record by the Assessing Officer. In other cases assessments will be made on the basis of the books of account and other documents found during the search and not produced during assessment and also on any other undisclosed income or property found during the search.

11. On the issue of deduction under section 80-IA(4) it was concluded that the CFS is a inland port and its income is entitled to deduction under section 80-IA(4) of the IT Act. The special Bench decision to the extent relevant reads as under :

"58. Thus, question No.1 before us is answered as under :

a) In assessments that are abated, the AO retains the original jurisdiction as well as jurisdiction conferred on him u/s 153A for which assessments shall be made for each of the six assessment years separately;

b) In other cases, in addition to the income that has already been assessed, the assessment u/s 153A will be made on the basis of incriminating material, which in the context of relevant provisions means - (i) books of account, other documents found in the course of search but not produced in the course of original assessment, and (ii) undisclosed income or property discovered in the course of search.

……

66. We find that the solitary decision in this case by any High Court is in the case of Container Corporation of India Ltd. In this case it has been held that an ICD is not a port but it is an inland port. The case of CFS is similar situated in the sense that both carry out similar functions, i.e. ware housing, customs clearance, and transport of goods from its location to the seaports and vice-versa by railway or by trucks in containers. Thus, the issue is no longer res-integra. Respectfully following this decision, it is held that a CFS is an inland port whose income is entitled to deduction u/s 80IA(4). Question No.2 is answered accordingly."

12. In the light of the Special Bench decision dated 6th July,2012, the Tribunal allowed the assessee's appeal in this case for assessment year 2004-05 to assessment years 2009-10.

13. Aggrieved by this Tribunal order, the Revenue has filed this appeal and it proposes the following substantial questions of law :

> "(i) Whether on the facts and in the circumstances of the case, the Hon'ble ITAT is correct in narrowing down the scope of assessment u/s 153A in respect of completed assessments by holding that only undisclosed income and undisclosed assets detected during search could be brought to tax ?
>
> (ii) Whether on the facts and in the circumstances of the case, the Hon'ble ITAT is correct in law in holding that the scope of Section 153A is limited to assessing only search related income, thereby denying Revenue the opportunity of taxing other escaped income, that comes to the notice of the AO ?

(iii) Whether on the facts and in the circumstances of the case, the Hon'ble ITAT was right in limiting the scope of Section 153A only to undisclosed income when as per the section the AO has to assess the total income of the six assessment years ?

(iv) Whether on the facts and in the circumstances of the case, the Hon'ble Tribunal erred in holding that the assessee was entitled to deduction u/s 80 IA(4) which was contrary to the Circular of the CBDT No. 10/2005 as also contrary to the fact that JNPT Port had withdrawn its certification of the company ?"

14. In the light of the fact that there are questions and of law which have been considered by the authorities under the IT Act and we are required to interpret not only the legal provisions but consider the correctness of the view taken in the special Bench decision, we proceed to admit these appeals on the above questions. By consent of

the parties we have taken up the appeals for hearing and final disposal.

15. Mr. Pinto, learned counsel appearing in support of these appeals submitted that the Tribunal has completely misread and misinterpreted section 153A of the IT Act. He would submit that the language of section 153A is clear. While the triggering point may be the search, but the notice that is contemplated by section 153A and which is mandatory requires the Assessing Officer to assess the income of six years. That is independent of the search. The mandate is to issue the notice for six assessment years. The assessment or reassessment is of the total income of the assessee disclosed or undisclosed and pertaining to these six years. Therefore, the Tribunal's view that the search will throw light on the interpretation of the legal provisions, namely, section 153A restricts its ambit and scope. That view is perverse and contrary to the plain language of the section. The assessment then is not restricted to the incriminating material and found during the search. The Tribunal has read into the provisions something which is expressly not there. There is nothing in the language of the provisions which would indicate that the assessment is

restricted to incriminating material or the basis of the assessment would be that which is discovered during the search or during the process contemplated by section 132A of the IT Act. In the circumstances, it is not proper to hold that the Special Bench decision would govern the case. The argument of the assessee, if accepted would result in restricting the powers conferred on the Assessing Officer. Therefore, Mr. Pinto would submit that the Tribunal's view cannot be sustained.

16. On the applicability of section 80-IA(4) Mr. Pinto would submit that the Tribunal once again reads something into section 80-IA(4) which is not there. There is no question of any concession by the Revenue. The Special Bench decision may be on the point, but it does not bind this Court. Equally, the decision of the Delhi High Court in the case of *Container Corporation of India* (supra) cannot be said to be concluding the issue. The finding that the issue is no longer res integra and a CFS is an inland port whose income is entitled to deduction under section 80-IA(4) of the IT Act cannot be sustained. Mr. Pinto, therefore, submits that on this aspect of the matter as well,

this Court must set aside the impugned order.

17. On the other hand, while canvassing the lead arguments, Mr. Dastur, learned senior counsel appearing for the assessee - All Cargo Global Logistics Ltd. would submit that the power under section 153A of the IT Act and its ambit and scope has rightly been interpreted in the impugned judgment. Mr. Dastur submits that the title of the section itself is indicative of the object and namely assessment in case of search or requisition. This section contains a non-obstante clause so as to not to restrict the powers which are conferred by virtue of section 153A in the Assessing Officer. However, the exercise of power under that provision is where search is initiated under section 132 or books of account or other documents or assets are requisitioned under section 132A of the Act after 31st May, 2003. Then the Assessing Officer shall 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) of sub-section (1) of section 153A and clause (b) postulates assessment or reassessment of the total

income of six years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made. The first proviso mandates that the Assessing Officer shall assess or reassess the total income in respect of each assessment year falling within such six assessment years. The second proviso, according to Mr. Dastur, is important because the assessment or reassessment, if any, relating to any assessment year falling within the period of six assessment years referred to in sub-section (1) 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. Equally, sub-section (2) of section 153A deals with a situation where any proceeding initiated or any order of assessment or reassessment is made under sub-section (1) but that has been annulled in appeal or any other legal proceeding, then, notwithstanding anything contained in sub-section (1) or section 153, the assessment or reassessment relating to any assessment year which has abated under the second proviso to sub-section (1), shall stand revived with effect from the date of receipt of the order of such annulment by the Commissioner. Further, proviso to this sub-section says that such

revival shall cease to have effect if the order of annulment is set aside.

18. Mr. Dastur would submit that the Revenue is protected completely in this case. The power is of drastic nature and has to be exercised within constitutional parameters. However, though the second proviso to sub-section (1) of section 153A would not apply in the first three years of this case, yet, as far as the second three year period is concerned, the assessments were pending. The proceedings in relation thereto abate. Now the entire assessment in relation to the second phase of three years can be made but the foundation for all this and the action under section 153A is a search under section 132 or requisition of books of account and other assets under section 132A. In the present case, the notice under section 153A is founded on search. If there is no incriminating material found during the search, then, the Special Bench was right in holding that the power under section 153A being not expected to be exercised routinely, should be exercised if the search reveals any incriminating material. If that is not found, then, in relation to the second phase of three years, there is no warrant for making an order within the meaning of this provision.

In any event, the issue stands concluded by a Division Bench judgment of this Court rendered in the case of *Commissioner of Income Tax (Central) Nagpur vs. M/s. Murli Agro Products Limited in Income Tax Appeal No.36 of 2009* decided on 29th October, 2010. It is, therefore, apparent that the law laid down by this Court is binding on the Revenue. If that is binding then the questions of law and with regard to applicability of section 153A need to be answered against the Revenue and in favour of the assessee.

19. Insofar as the next issue is concerned, namely, applicability of section 80-IA(4), Mr. Dastur would submit that in the appeals in which he is appearing, the assessees have an infrastructural facility of Inland Container Depot (ICD) which qualifies for deduction under section 80-IA(4) of the IT Act, but even the CFS clearly falls within the provisions. It is held to be an inland port. In that regard, he relies upon a circular of the Central Board of Direct Taxes (Circular No.10 of 2005 dated 16th December, 2005). He also relies upon the judgment of the Hon'ble Delhi High Court in the case of *Container Corporation of India Limited vs. Asstt. Commissioner of Income Tax* and our

attention is also invited to a judgment of the High Court of Judicature at Madras by Mr. Gandhi who adopts the arguments of Mr. Dastur. This judgment is in Income Tax Appeal No.1031 of 2014 dated 23rd December, 2014. It is in these circumstances that it is submitted by Mr. Dastur, learned senior counsel and Mr. Gandhi that the Revenue appeals on both counts deserve to be dismissed.

20. Mr. Pinto in rejoinder has submitted that the judgment of the Division Bench of this Court would not bind us simply because that was rendered in the case of exercise of powers under section 263 of the Income Tax Act, 1961, by the Commissioner. The essential controversy revolved around the exercise of that power and the validity thereof. The question as to whether section 153A can be interpreted in the manner suggested by Mr. Dastur was decided in passing and the observations, therefore, would not bind us. Similarly, where section 80-IA(4) deduction is claimed, it is apparent that the certificates having been withdrawn that deduction could not be claimed. Mr. Suresh Kumar, while adopting the arguments of Mr. Pinto and noted above, submitted that the amendments and which

have been brought into section 80-IA(4) are not noted either by the special Bench or by the Delhi High Court. Similarly, the arguments presuppose that all conditions which enable claiming the deduction are fulfilled. However, in this case, the essential condition of operation of the facility in pursuance of an agreement with the Central Government has not been fulfilled. There is no agreement brought on record. Any communication emanating from any Ministry cannot partake the character of an agreement. Any approval and may be in writing also would not suffice. For all these reasons, he would submit and while supporting Mr. Pinto, that these appeals be allowed.

21. For properly appreciating the rival contentions, a reference will have to be made to section 153A of the Income Tax Act, 1961. That 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 :*

***Provided also** that the Central Government may by rules made by it and published in the Official Gazette (except in cases where any assessment or reassessment has abated under the second proviso), specify the class or classes of cases in which the Assessing Officer shall not be required to issue notice for assessing or reassessing the total income for six assessment years immediately preceding the assessment year relevant to the previous year in which search is conducted or requisition is made.*

(2) If any proceeding initiated or any order of assessment or reassessment made under sub-section (1) has been annulled in appeal or any other legal proceeding, then, notwithstanding anything contained in sub-section (1) or section 153, the assessment or reassessment relating to any assessment year which has

abated under the second proviso to sub-section (1), shall stand revived with effect from the date of receipt of the order of such annulment by the Commissioner.

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

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

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

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

22. A bare perusal thereof would indicate as to how a non obstante clause has been inserted and with a defined intent. One would find that in section 139 of the IT Act, the return of income is contemplated. These provisions fall in Chapter XIV entitled "Procedure For Assessment". Section 139 deals with return of income whereas section 140 states that such return has to be verified. Section 147 which also falls within this Chapter deals with income escaping assessment and section 148 provides for issuance of notice where income has escaped assessment. Section 149 sets out a time limit for

notice. Then, appear sections 149, 151 and 153 which, *inter-alia*, deal with time limit, sanction for issue and time limit for completion of assessments and reassessments. All these are brought in section 153A and specifically mentioned with an intent to bring them within the non obstante clause. Notwithstanding anything contained in these provisions where search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A after 31st day of May, 2003, that the Assessing Officer is in a position to and mandated to issue notice within the meaning of sub-section (1) of section 153A. That is because the preceding Chapter, namely, Chapter XIII within which the powers of search and seizure and powers to requisition books of account are spelt out enable the Revenue to take care of cases where it effects a search and seizure. That search and seizure is effected and after the same is effected books of account, other documents, money, bullion, jewellery or other valuable article or thing is found as a result thereof that notwithstanding anything and within the meaning of the above provisions having been concluded, it is open for the Revenue to make an assessment. It is also open to the Revenue to make a reassessment

in cases where it exercises the powers to requisition books of account etc. This is because it is of the view that the books of account are required to be summoned or taken into custody. It, therefore, issues a summons in that regard. It may also requisition the books of account or other documents for that might be useful and or any assets representing withholding or part income or property which has not been or would not have been disclosed for the purpose of the Indian Income Tax Act, 1922 or the Income Tax Act of 1961 by any person from whose possession or control they have been taken into custody. This is when the authorities have reason to believe that such powers need to be exercised. Therefore, the fetters and which are to be found in other provisions are removed and a notice of assessment in such cases is then issued. That is mandated by sub-section (1) of section 153A. It is not only the issuance of the notice but assessment or reassessment of total income of six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition has to be made.

23. We are of the view that there is much substance in the

contentions of Mr. Dastur that the provisions such as section 153A enabling assessment in case of search or requisition making specific reference to the provisions which enable carrying out of search or exercise of power of requisition that the assessment in furtherance thereof is contemplated.

24. His reliance upon the Division Bench judgment of this Court in that context is, therefore, well placed.

25. In the Division Bench judgment what had been decided is the justifiability of the Tribunal interfering with the order of the Commissioner of Income Tax passed under section 263 of the Income Tax Act. That may be the sole question referred in paragraph 2 of the Division Bench order but the facts disclose that an assessment order for assessment year 1998-99 was passed under section 143(3) of the Income Tax Act determining certain loss in the case of that assessee. Thereafter, on 3rd December, 2003, there was a search action at the business / office premises of the assessee wherein incriminating documents / articles were seized. On issuance of notice under section

153A of the Act dated 13th September, 2004, a return of income was filed. That was pursuant to a notice issued under clause (a) of sub-section (1) of section 153A of the Act. That return of income declared a loss. The Assessing Officer, therefore, passed an order under section 153A read with section 143(3) of the IT Act on 30th March, 2006 determining concealed income at Rs.89,19,47/-. On appeal by the assessee, the Commissioner of Income Tax (Appeals) by his order dated 30th November, 2006, deleted the concealed income computed by the Assessing Officer. He, therefore, gave effect to the order of the Commissioner of Income Tax (Appeals) and restored the loss as originally assessed.

26. The order of the Commissioner of Income Tax (Appeals) as above attained finality. However, power under section 263 of the IT Act came to be invoked in the circumstances noted by the Division Bench and that was in relation to the assessment order dated 30th March, 2006, as modified and after giving effect to the order of the Commissioner of Income Tax (Appeals). It is that order which was challenged before the Tribunal and the Tribunal set aside the same on

the ground that there was no scope to take a different view on merits of the said order. The view taken by the Assessing Officer could not be said to be erroneous and prejudicial to the interest of the Revenue.

27. However, the Revenue's argument was that once proceedings under section 153A of the Act are initiated, then, the original assessment / reassessment order already passed in the assessment years covered under section 153A stand abated and the Assessing Officer is obliged to pass fresh assessment / reassessment orders and determine the total income afresh for those assessment years. Thus, earlier assessment orders abate as the proceedings in which they are passed have no legal consequence was the argument. Once the notice under section 153A was issued and an assessment order passed pursuant thereto, it is that order which was erroneous and prejudicial to the interest of the Revenue.

28. In dealing with those arguments, the Division Bench outlined the ambit and scope of the powers conferred by section 153A and observed thus :

"8) We find it difficult to accept the above contention raised on behalf of the revenue. The object of inserting Sections 153A, 153B and 153C by Finance Act, 2003 by discarding the existing provisions relating to search cases contained in Chapter XIV B of the Income-tax Act, as stated in the Memorandum explaining the provisions in the Finance Bill 2003 (see 260 ITR (St) 191 at 219) was that under the existing provisions relating to search cases, often disputes were raised on the question, as to whether a particular income could be treated as `undisclosed income' or whether a particular income could be said to be relatable to the material found during the course of search, etc. which led to prolonged litigation. To overcome that difficulty, the legislature by Finance Act 2003, decided to discard Chapter XIV B provisions and introduce Sections 153A, 153B and 153C in the IT Act.

9) What Section 153A contemplates is that, notwithstanding the regular provisions for assessment/reassessment contained in the IT Act, where search is conducted under Section 132 or requisition is made under Section 132A on or after 31/5/2003 in the case of any person, the Assessing Officer shall issue notice to such person requiring him to furnish return of income within the time stipulated therein, in respect of six assessment years immediately preceding the assessment year relevant to the previous year in which the search is conducted or requisition is made and thereafter assess or reassess the total income for those assessment years. The second proviso to Section 153A provides for abatement of assessment/reassessment proceedings which are pending on the date of search/requisition. Section 153A (2) provides that when the assessment made under Section 153(A)(1)is annulled, the assessment or reassessment that stood abated shall stand revived.

10) Thus on a plain reading of Section 153A of the Income-tax Act, it becomes clear that on initiation of the 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 finalised 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 against finalised assessment/reassessment shall not abate. It is only because, the finalised assessments/reassessments do not abate, the appeal revision or rectification pending against finalised assessment/reassessments would not abate. Therefore, the argument of the revenue, that on initiation of proceedings under Section 153A, the assessments/reassessments finalised for the assessment 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).

11) In the present case, as contended by Shri Mani, learned counsel for the assessee, the assessment for assessment year 1998-99 was finalised on the 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.

12) Once it is held that the assessment finalised on 29.12.2000 has attained finality, then the deduction allowed under section 80 HHC 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 A.O. 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 80 HHC was erroneous. In such a case, the A.O. while passing order under Section 153A read with Section 143(3) could not have disturbed the assessment order finalised on 29.12.2000 relating to Section 80 HHC deduction and consequently the C.I.T. could not have invoked jurisdiction under Section 263 of the Act."*

29. We are not in agreement with Mr. Pinto that these observations are made in passing or that they are not binding on us because the essential controversy before the Bench was somewhat different. He urges that was only in relation to the legality and validity of the order of the Commissioner under section 263 of the IT Act. Had that been the case, the Division Bench was not required to trace out the history of section 153A of the IT Act and the power that is conferred thereunder. When the Revenue argued before the Division Bench that the power under section 153A can be invoked and exercised even in cases where the second proviso to sub-section (1) is not applicable

that the Division Bench was required to express a specific opinion. The provision deals with those cases where assessment or reassessment, if any, relating to the assessment years falling within the period of six assessment years referred to in sub-section (1) of section 153A were pending. If they were pending on the date of the initiation of the search under section 132 or making of requisition under section 132A, as the case may be, they abate. It is only pending proceedings that would abate and not where there are orders made of assessment or reassessment and which are in force on the date of initiation of the search or making of the requisition. As that specific argument was canvassed and dealt with by the Division Bench and that is how it was called upon to interpret section 153A of the IT Act, then, each of the above conclusions rendered by the Division Bench would bind us.

30. Even otherwise, we agree with the Division Bench when it observes as above with regard to the ambit and scope of the powers conferred under section 153A of the Act. Since we are not required to trace out the history and we can do nothing better than to reproduce the observations and conclusions as above that we are not repeating

the same. Even if the exercise of power under section 153A is permissible still the provision cannot be read in the manner suggested by Mr. Pinto. Not only the finalised assessment cannot be touched by resorting to those provisions, but even while exercising the power can be exercised where a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A after 31st March, 2003. There is a mandate to issue notices under section 153(1)(a) and 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. Thus, the crucial words "search" and "requisition" appear in the substantive provision and the provisos. That would throw light on the issue of applicability of the provision. It being enacted to a search or requisition that its construction would have to be accordingly. That is the conclusion reached by the Division Bench in *Murli Agro* (supra) with which we respectfully agree. These are the conclusions which can be reached and upon reading of the legal provisions in question.

31. We, therefore, hold that the Special Bench's understanding of

the legal provision is not perverse nor does it suffer from any error of law apparent on the face of the record. The Special Bench in that regard held as under :

> *"48. The provision under section 153A is applicable where a search or requisition is initiated after 31.5.2003. In such a case the AO is obliged to issue notice u/s 153A in respect of 6 preceding years, preceding the year in which search etc. has been initiated. Thereafter he has to assess or reassess the total income of these six years. It is obligatory on the part of the AO to assess or reassess total income of the six years as provided in section 153A(1)(b) and reiterated in the 1st proviso to this section. The second proviso states that the assessment or reassessment pending on the date of initiation of the search or requisition shall abate. We find that there is no divergence of views in so far as the provision contained in section 153A till the 1st proviso. The divergence starts from the second proviso which states that pending assessment or reassessment on the date of initiation of search shall abate. This means that an assessment or reassessment pending on the date of initiation of search shall cease to exist and no further action shall be taken thereon. The assessment shall now be made u/s 153A. The case of Ld. Counsel for the assessee is that necessary corollary to this provision is that completed assessment shall not abate. These assessments become final except in so far and to the extent as undisclosed income is found in the course of search. On the other hand, it has been argued by the Ld. Standing Counsel that abatement of pending assessment is only for the purpose of avoiding two assessments for the same year, one being regular assessment and the other being assessment u/s 153A. In other words these two assessments coalesce into one assessment. The second proviso does not contain any word or words to the effect that no reassessment shall be made in respect of a*

completed assessment. The language is clear in this behalf and therefore literal interpretation should be followed. Such interpretation does not produce manifestly absurd or unjust results as section 153A (i)(b) and the first proviso clearly provide for assessment or reassessment of all six years. It may cause hardship to some assesses where one or more of such assessments has or have been completed before the date of initiation of search. This is hardly of any relevance in view of clear and unambiguous words used by the legislature. This interpretation does not cause any absurd etc. results. There is no casus omissus and supplying any would be against the legislative intent and against the very rule in this behalf that it should be supplied for the purpose of achieving legislative intent. The submissions of the Ld. Counsels are manifold, the foremost being that the provision u/s 153A should be read in conjunction with the provision contained in section 132(1), the reason being that the latter deals with search and seizure and the former deals with assessment in case of search etc, thus, the two are inextricably linked with each other.

49. Before proceeding further, we may now examine the provision contained in sub-section (2) of section 153, which has been dealt with by Ld. Counsel. It provides that if any assessment made under sub-section (1) is annulled in appeal etc., then the abated assessment revives. However, if such annulment is further nullified, the assessment again abates. The case of the Ld. Counsel is that this provision further shows that completed assessments stand on a different footing from the pending assessments because appeals etc. proceedings continue to remain in force in case of completed assessments and their fate depends upon subsequent orders in appeal. On consideration of the provision and the submissions, we find that this provision also makes it clear that the abatement of pending proceedings is not of such permanent nature that they cease to exist for all times to come. The interpretation of the Ld. Counsel, though not specifically

stated, would be that on annulment of the assessment made u/s 153(1), the AO gets the jurisdiction to assess the total income which was vested in him earlier independent of the search and which came to an end due to initiation of the search.

50. The provision contained in section 132 (1) empowers the officer to issue a warrant of search of the premises of a person where any one or more of conditions mentioned therein is or are satisfied, i.e. - a) summons or notice has been issued to produce books of account or other documents but such books of account or documents have not been produced, b) summons or notice has been or might be issued, he will not produce the books of account or other documents mentioned therein, or c) he is in possession of any money or bullion etc. which represents wholly or partly the income or property which has not been and which would not be disclosed for the purpose of assessment, called as undisclosed income or property. We find that the provision in section 132 (1) does not use the word "incriminating document". Clauses (a) and (b) of section 132(1) employ the words "books of account or other documents". For harmonious interpretation of this provision with provision contained in section 153A, all the three conditions on satisfaction of which a warrant of search can be issued will have to be taken into account.

51. Having held so, an assessment or reassessment u/s 153A arises only when a search has been initiated and conducted. Therefore, such an assessment has a vital link with the initiation and conduct of the search. We have mentioned that a search can be authorised on satisfaction of one of the three conditions enumerated earlier. Therefore, while interpreting the provision contained in section 153A, all these conditions will have to be taken into account. With this, we proceed to literally interpret to provision in 153A as it exists and

read it alongside the provision contained in section 132(1).

52. The provision comes into operation if a search or requisition is initiated after 31.5.2003. On satisfaction of this condition, the AO is under obligation to issue notice to the person requiring him to furnish the return of income of six years immediately preceding the year of search. The word used is "shall" and, thus, there is no option but to issue such a notice. Thereafter he has to assess or reassess total income of these six years. In this respect also, the word used is "shall" and, therefore, the AO has no option but to assess or reassess the total income of these six years. The pending proceedings shall abate. This means that out of six years, if any assessment or reassessment is pending on the date of initiation of the search, it shall abate. In other words pending proceedings will not be proceeded with thereafter. The assessment has now to be made u/s 153A (1)(b) and the first proviso. It also means that only one assessment will be made under the aforesaid provisions as the two proceedings i.e. assessment or reassessment proceedings and proceedings under this provision merge into one. If assessment made under sub-section (1) is annulled in appeal or other legal proceedings, then the abated assessment or reassessment shall revive. This means that the assessment or reassessment, which had abated, shall be made, for which extension of time has been provided under section 153B.

53. The question now is - what is the scope of assessment or reassessment of total income u/s 153A (1) (b) and the first proviso ? We are of the view that for answering this question, guidance will have to be sought from section 132(1). If any books of account or other documents relevant to the assessment had not been produced in the course of original assessment and found in the course of search in our humble opinion such books of account or other documents have to be taken into account while making assessment or reassessment of total income under the aforesaid provision. Similar

position will obtain in a case where undisclosed income or undisclosed property has been found as a consequence of search. In other words, harmonious interpretation will produce the following results :-

a) In so far as pending assessments are concerned, the jurisdiction to make original assessment and assessment u/s 153A merge into one and only one assessment for each assessment year shall be made separately on the basis of the findings of the search and any other material existing or brought on the record of the AO,

(b) in respect of non-abated assessments, the assessment will be made on the basis of books of account or other documents not produced in the course of original assessment but found in the course of search, and undisclosed income or undisclosed property discovered in the course of search.

54. It may be mentioned here that Ld. Counsel for All Cargo Global Logistics Ltd. was questioned about the scope of pending assessments as it was his contention that all six assessments are to be made, if necessary, on the basis of undisclosed income discovered in the course of search. He was specifically questioned about the jurisdiction of the AO to make original assessment along with assessment u/s 153A, merging into one. However he took an evasive view submitting that this question need not be decided in his case although the question of jurisdiction u/s 153A was vehemently pressed on account of which ground No.1 in the appeal for assessment year 2004-05 was admitted as additional ground. He also wanted the additional ground to be retained in case of any future contingency."

32. We would be failing in our duty if we do not note the reliance

placed by Mr. Pinto on the judgments rendered by the High Court of Delhi at New Delhi and the High Court of Karnataka. Mr. Pinto would submit that the above observations and conclusions of the Special Bench and reproduced by us are specifically disapproved in *Commissioner of Income Tax vs. Anil Kumar Bhatia* by the Delhi High Court. We do not find this argument to be accurate. In *Anil Kumar Bhatia* as well the assessment involved the years 2000-01, 2002-03 and 2005-06. One of the questions and which was termed as substantial question of law was the correctness of the Tribunal's order holding that the Assessing Officer wrongly invoked section 153A of the IT Act. The facts as noted were that in the case of an individual assessee and who was carrying on business in the name and style of M/s. A.K. Traders, there was a search of his residence and business premises on 13th December, 2005 under section 132 of the Act. Pursuant to the search, the Assessing Officer issued notice under section 153A of the IT Act and called upon the assessee to file the return of income for the six years as envisaged in that section. Notices under section 142(1) and 143(2) alongwith a detailed questionnaire were issued in response to which the assessee submitted an

explanation. After consideration thereof, the Assessing Officer made additions to the income returned in respect of the assessment years under consideration which included an amount of Rs.1,50,000/- given by the assessee as a loan to Smt. Mohini Sharma on 10th December, 2003. This information was made available but the loan was not reflected in the return of income filed by the assessee for the assessment year 2003-04. The Assessing Officer, therefore, concluded that this loan was given out of unaccounted income of the assessee. Accordingly, the same was added in the income of the assessee for the assessment year 2003-04 and an order was made to that effect. Against this addition, the appeal was preferred before the Commissioner of Income Tax contending, *inter alia*, that the seized paper on the basis of which the addition was made did not contain the signature of the assessee; that no loan was given to Mohini Sharma. There was no admission of the statement of Mohini Sharma to that effect and there was only a proposal. The Commissioner of Income Tax confirmed this addition in the Assessing Officer's order. In respect of assessment years 2004-05 and 2005-06 there were appeals before the Commissioner of Income Tax (Appeals) questioning the

additions made in the assessment orders for those years. While disposing of these appeals, the Commissioner of Income Tax directed the Assessing Officer to assess the notional interest on the loan given to Mohini Sharma which addition he confirmed in his appellate order. These two orders of the Commissioner were carried in appeal to the Tribunal and thereafter the Delhi High Court noted the Tribunal's conclusions. It noted the arguments before the Tribunal and thereupon the Tribunal having deleted these additions and the notional interest, the matter was taken in appeal to the High Court of Delhi under section 260A of the IT Act by the Revenue.

33. The arguments, therefore, have been noted and from paragraphs 16, section 153A was analysed.

34. Mr. Pinto heavily relied on paragraphs 18, 19 and 20 of the judgment of the Hon'ble High Court of Delhi. He also relied on paragraph 21 to contend that the Special Bench decision has not been approved by the High Court of Delhi.

35. The Delhi High Court's judgment must be seen in the context of the essential controversy before it. Pertinently, that controversy arose because of a search being conducted at the residence and business premises of the assessee. Foundation of the action under section 153A being the search that the High Court of Delhi was required to consider the ambit and scope of the powers. Further, pertinently the Delhi High Court did not ignore any of the provisions. Those are correctly understood by the Delhi High Court. We do not see how and where the Delhi High Court disapproves the view taken by the Tribunal that its observations can be read torn from the context. Once these observations and noted by us from the paragraphs cited by Mr. Pinto are read as a whole and in entirety, it is not possible to agree with Mr. Pinto that the High Court of Delhi reached a conclusion different than the view taken by our Division Bench.

36. Similar is the case with the Division Bench judgment of the High Court of Karnataka at Bangalore. There as well a real estate firm was the assessee. A return of income was filed and when an order under section 143(3) of the Act came to be passed on 31st

December, 2010, for assessment year 2008-09 that a search took place in the premises of the assessee on 12th April, 2011. In the course of search, incriminating material leading to undisclosed income was seized. Therefore, the proceedings under section 153A of the Act calling upon the assessee to file return of income under section 153A(1)(a) came to be initiated by a notice dated 13th January, 2012. Return of income was filed pursuant to receipt of such notice and for six years as required by the provision. When this return was under consideration on 14th March, 2013, the Commissioner of Income Tax initiated proceedings under section 263 of the Act on the ground that the order dated 31st December, 2010 in relation to the return of income for assessment year 2008-09 and holding that the same is erroneous and prejudicial to the interest of the Revenue came to be passed. The assessee filed his objection but the Commissioner maintained his action under section 263. That is how the aggrieved assessee carried the matter in appeal to the Tribunal and before the Tribunal it was contended that once section 263 of the Act has been invoked during the pendency of proceedings under section 153A of the Act, then, that was impermissible. That was impermissible for the assessments

including for the assessment year 2008-09 stand reopened. Once they are reopened, then, there is no order of assessment in force and in regard to which any action under section 263 of the IT Act can be initiated. It is in dealing with this argument and which was negatived by the Tribunal that all the observations of the High Court of Karnataka have been made. In paragraphs 5 and 6, the arguments have been noted and thereafter the provision has been reproduced. In paragraph 9, extensive reference has been made to the judgment in *Anil Kumar Bhatia* of the High Court of Delhi (supra) and then the following observations in paragraphs 10 and 11 are made :

> *"10. Section 153A of the Acts start with a non obstante clause. The fetters imposed upon the Assessing Officer by the strict procedure to assume jurisdiction to reopen the assessment under Sections 147 and 148, have been removed by the non obstante clause with which sub section (1) of Section 153A opens. The time-limit within which the notice under Section 148 can be issued, as provided in Section 149 has also been made inapplicable by the non obstante clause. Section 151 which requires sanction to be obtained by the Assessing Officer by issue of notice to reopen the assessment under Section 148 has also been excluded in a case covered by Section 153A. The time-limit prescribed for completion of an assessment or reassessment by Section 153 has also been done away with in a case covered by Section 153A. With all the stops having been pulled out, the Assessing Officer under Section 153A has been entrusted with the duty of bringing to tax the total income of an assessee whose case is covered by Section 153A, by even making*

reassessments without any fetters, if need be. Therefore, it is clear even if an assessment order is passed under Section 143(1) or 143(3) of the Act, the Assessing Officer is empowered to reopen those proceedings and reassess the total income taking note of the undisclosed income, if any, unearthed during the search. After such reopening of the assessment, the Assessing Officer is empowered to assess or reassess the total income of the aforesaid years. The condition precedent for application of Section 153A is there should be a search under Section 132. Initiation of proceedings under Section 153A is not dependent on any undisclosed income being unearthed during such search. The proviso to the aforesaid section makes it clear the assessing officer shall assess or reassess the total income in respect of each assessment year falling within such six assessment years. If any assessment proceedings are pending within the period of six assessment years referred to in the aforesaid sub-section on the date of initiation of the search under Section 132, the said proceeding shall abate. If such proceedings are already concluded by the assessing officer by initiation of proceedings under Section 153A, the legal effect is the assessment gets reopened. The block assessment roped in only the undisclosed income and the regular assessment proceedings were preserved, resulting in multiple assessments. Under Section 153A, however, the Assessing Officer has been given the power to assess or reassess the "total income" of the six assessment years in question in separate assessment orders. The Assessing Officer is empowered to reopen those proceedings and reassess the total income, taking note of the undisclosed income, if any, unearthed during the search. He has been entrusted with the duty of bringing to tax the total income of an assessee whose case is covered by Section 153A, by even making reassessments without any fetters. This means that there can be only one assessment order in respect of each of the six assessment years, in which both the disclosed and the undisclosed income would be brought to tax. When once the proceedings are initiated under Section 153A of the

Act, the legal effect is even in case where the assessment order is passed it stands reopened. In the eye of law there is no order of assessment. Re-opened means to deal with or begin with again. It means the Assessing Officer shall assess or reassess the total income of six assessment years. Once the assessment is reopened, the assessing authority can take note of the income disclosed in the earlier return, any undisclosed income found during search or and also any other income which is not disclosed in the earlier return or which is not unearthed during the search, in order to find out what is the "total income" of each year and then pass the assessment order. Therefore, the Commissioner by virtue of the power conferred under Section 263 of the Act gets no jurisdiction to initiate proceedings under the said provision because the condition precedent for initiating proceedings under Section 263 is any order passed under the Act by the Assessing Officer is erroneous insofar as it is prejudicial to the interest of the revenue. Once the order passed by the Assessing Officer gets reopened, there is no order which can be said to be erroneous insofar as it is prejudicial to the interest of the revenue which confers jurisdiction on the Commissioner to exercise the power of the jurisdiction.

11. The Tribunal has proceeded on the assumption by virtue of the judgment of the special bench of the Mumbai, the scope of enquiry under Section 153A is to be confined only to the undisclosed income unearthed during search and if there is any other income which is not the subject matter of search, the same cannot be taken into consideration. Therefore, the revisional authority can exercise the power under Section 263. In the entire scheme of 153A of the Act, there is no prohibition for the assessing authority to take note of such income. On the contrary, it is expressly provided under Section 153A of the Act the Assessing Officer shall assess or reassess the "total income" of six assessment years which means the said total income includes income which was returned in the earlier return, the income which was unearthed during search and income

which is not the subject matter of aforesaid two income. If the commissioner has come across any income that the assessing authority has not taken note of while passing the earlier order, the said material can be furnished to the assessing authority and the assessing authority shall take note of the said income also in determining the total income of the assessee when the earlier proceedings are reopened and that income also shall become the subject matter of said proceedings. In that view of the matter the reasoning given by the Tribunal is not justified. The Commissioner did not have jurisdiction to initiate any proceedings under Section 263 of the Act."

37. We do not see as to how while allowing the appeal of the assessee and setting aside the order of the Commissioner under section 263 could the judgment be said to be laying down a proposition and as canvassed by Mr. Pinto. True it is that the assessment which has to be made in pursuance of the notice is in relation to the six years. An order will have to be made in that regard. While making the order the income or the return of income filed for all these assessment years is to be taken into account. A reference will have to be made to the income disclosed therein. However, the scope of enquiry, though not confined as held by the High Court of Karnataka, it essentially revolves around the search or the requisition under section 132A as the case may be. We do not find anything in these observations and reproduced above which would enable us to conclude that the

Division Bench judgment of this Court in the case of *Murli Agro* requires reconsideration or does not lay down a correct principle of law. We cannot, therefore, accede to the submissions of Mr. Pinto and revisit any of the conclusions rendered by the Division Bench of this Court.

38. Now what remains is the deduction under section 80 IA(4). The provision reads thus :

> *"**80-IA** (1) ……*
>
> *(4) This section applies to -*
>
> *(i) any enterprise carrying on the business of (i) developing or (ii) operating and maintaining or (iii) developing, operating and maintaining any infrastructure facility which fulfills all the following conditions, namely :-*
>
> *(a) it is owned by a company registered in India or by a consortium of such companies or by an authority or a board or a corporation or any other body established or constituted under any Central or State Act;*
>
> *(b) it has entered into an agreement with the Central Government or a State Government or a local authority or any other statutory body for (i) developing or (ii) operating and maintaining or (iii) developing, operating and maintaining a new infrastructure facility;*
>
> *(c) It has started or starts operating and maintaining the infrastructure facility on or after the 1st day of April, 1995.*
>
> *Provided that where an infrastructure facility is transferred*

on or after the 1st day of April, 1999 by an enterprise which developed such infrastructure facility (hereafter referred to in this section as the transferor enterprise) to another enterprise (hereafter in this section referred to as the transferee enterprise) for the purpose of operating and maintaining the infrastructure facility on its behalf in accordance with the agreement with the Central Government, State Government, local authority or statutory body, the provisions of this section shall apply to the transferee enterprise as if it were the enterprise to which this clause applies and the deduction from profits and gains would be available to such transferee enterprise for the unexpired period during which the transferor enterprise would have been entitled to the deduction, if the transfer had not taken place.

Explanation.- For the purposes of this clause, "infrastructure facility" means-
(a) a road including toll road, a bridge or a rail system;
(b) a highway project including housing or other activities being an integral part of the highway project;
(c) a water supply project, water treatment system, irrigation project, sanitation and sewerage system or solid waste management system;
(d) a port, airport, inland waterway, inland port or navigational channel in the sea;

(ii) any undertaking which has started or starts providing telecommunication services, whether basic or cellular, including radio paging, domestic satellite service, network of trunking, broadband network and internet services on or after the 1st day of April, 1995, but on or before the 31st day of March, 2005.

Explanation – For the purposes of this clause, "domestic satellite" means a satellite owned and operated by an Indian company for providing telecommunication service;

(iii) any undertaking which develops, develops and operates or maintains and operates an industrial part or special economic zone notified by the Central Government

in accordance with the scheme framed and notified by that Government for the period beginning on the 1st day of April, 1997 and ending on the 31st day of March, 2006.

Provided that in a case where an undertaking develops an industrial park on or after the 1st day of April, 1999 or a special economic zone on or after 1st day of April, 2001 and transfers the operation and maintenance of such industrial park or such special economic zone, as the case may be, to another undertaking (hereafter in this section referred to as the transferee undertaking), the deduction under sub-section (1) shall be allowed to such transferee undertaking for the remaining period in the ten consecutive assessment years as if the operation and maintenance were not so transferred to the transferee undertaking :

Provided further that in the case of any undertaking which develops, develops and operates or maintains and operates an industrial park, the provisions of this clause shall have effect as if for the figures, letters and words "31st day of March, 2006", the figures, letters and words "31st day of March, 2011" had been substituted;

(iv) an undertaking which,-
(a) is set up in any part of India for the generation or generation and distribution of power it begins to generate power at any time during the period beginning on the 1st day of April, 1993 and ending on the 31st day of March, 2013;
(b) starts transmission or distribution by laying a network of new transmission or distribution lines at any time during the period beginning on 1st day of April, 1999 and ending on the 31st day of March, 2013.

Provided that the deduction under this section to an undertaking under sub-clause (b) shall be allowed only in relation to the profits derived from laying of such network of new lines for transmission or distribution;

(c) undertakes substantial renovation and modernisation of the existing network of transmission or distribution lines

at any time during the period beginning on the 1st day of April, 2004 and ending on the 31st day of March, 2013.

Explanation.- For the purposes of this sub-clause, "substantial renovation and modernisation" means an increase in the plant and machinery in the network of transmission or distribution lines by at least fifty per cent of the book value of such plant and machinery as on the 1st day of April, 2004;

(v) an undertaking owned by an Indian company and set up for reconstruction or revival of a power generating plant, if-

(a) such Indian company is formed before the 30th day of November, 2005 with majority equity participation by public sector companies for the purposes of enforcing the security interest of the lenders to the company owning the power generating plant and such Indian company is notified before the 31st day of December, 2005 by the Central Government for the purposes of this clause;

(b) such undertaking begins to generate or transmit or distribute power before the 31st day of March, 2011."

39. A perusal thereof would indicate as to how the Legislature had in mind deduction in respect of profits and gains from industrial undertakings or enterprises engaged in the infrastructure development etc. We are concerned with sub-section (4) and as it read at the relevant time. It says that this section applies to any enterprise carrying on the business of developing or operating and maintaining any infrastructure facility which fulfills all the conditions, namely, it is

owned by a company registered in India or by a consortium of such companies or by an authority or a board or a corporation or any other body established or constituted under any Central or State Act, it has entered into an agreement with the Central Government or a local authority or any other statutory body for developing or operating and maintaining or developing, operating and maintaining a new infrastructure facility and it has started or starts operating and maintaining the infrastructure facility on or after 1st day of April, 1995. The explanation defines the infrastructure facility to mean, *inter alia*, a port, airport, inland waterway, inland port or navigational channel in the sea. The word "inland port" was always there in clause (d). What was there prior to its substitution by Finance Act of 2007 with effect from 1st April, 2008, were the words "or inland port". Now the word "or" is deleted, but the words are "inland port or navigational channel in the sea". Thus, an "inland port" was always within the contemplation of the Legislature and it is treated specifically as a infrastructural facility. Therefore, to that extent Mr. Dastur is right in his submission.

40. Mr. Suresh Kumar would urge that when there is an agreement contemplated with the Central Government, then, a specific writing to this effect is necessary which means a document and a mere consent or approval in writing would not suffice.

41. In the present case, what the Tribunal and in Special Bench decision has held is that there may be a reference made to a Board clarification dated 6th January, 2011, and prior circulars dated 16th December, 2005 and 23rd June, 2006 were considered and which clarify that inland container depots and container freight stations are not ports located on any inland water way river or canal and, therefore, they cannot be classified as inland ports for the purpose of section 80-IA(4). Equally, the certificate issued by the JNPT having been been withdrawn, the deduction will not be permissible.

42. However, after considering these contentions, what the Special Bench observes is that the Delhi High Court's view in the case of *Container Corporation of India Ltd.* would enable it to conclude that ICD may not be a port but it is an inland port. The case of Container

Freight Station (CFS) is similarly situated in the sense that both carry out similar functions viz. warehousing, customs clearance and transport of goods from its location to the sea-ports and vice versa by rail or by trucks in containers. The issue is no longer res integra.

43. The Tribunal also in the judgment under appeal followed this view of the Special Bench and that of the *Container Corporation of India* (supra).

44. The findings to which our attention has been invited by Mr. Suresh Kumar in Appeal No.523 of 2013 arising out of the Tribunal's order dated 31st August, 2012, pertaining to assessment year 2008-09 in the case of *Continental Warehousing Corporation* indicate that the said assessee had informed the Assessing Officer that JNPT had issued a certificate dated 13th July, 2006, to it in accordance with Point No.3 of CBDT circular No.10 dated 16th December, 2005, However, this letter / certificate was withdrawn by the JNPT on 5th October, 2007. Secondly, the assessee company has not entered into an agreement with the Central Government or a State Government or a local authority or any other statutory body. Therefore, the condition was

not fulfilled. The Commissioner in the appellate order had before him the ground and while dealing with the same, he found that the approval granted by the Ministry of Commerce, Government of India would not constitute an agreement with the Central Government. Further, the Department of Revenue, Ministry of Finance, issued a Notification dated 1st January, 2006, notifying the assessee as custodian of imported and exported goods received at the container freight station. The various contentions raised in this regard have been referred to by the Commissioner, including that the Ministry of Commerce and Industries granted approval for setting up CFS facility for handling import and export cargo and that the acceptance of the terms and conditions constitute an agreement with the Central Government and all documents in relation thereto have been referred. The Commissioner in dealing with these conditions held that CFS facility of the assessee is not an infrastructure facility within the meaning of section 80-IA(4) as there is no agreement entered into with the Government and assessee. Therefore, this deduction cannot be claimed. The Tribunal noted these contentions and the findings, but relied upon the Special Bench decision in the case of All Cargo Global

Logistics Ltd. The conclusion is that CFS is an inland port as it carries out functions of warehousing, customs clearance and transport of goods from its location to sea-port and vice versa by rail or by trucks in containers and, therefore, its income is eligible to deduction under section 80-IA(4). We have before us a communication from the Government of India, Ministry of Commerce and Industry dated 28th December, 2011, which is addressed to the President of the CFS Association of India. It takes note of their grievance and states that the matter was examined in the light of the guidelines and its norms for setting up of inland container depot / container freight station in India. As per the present norms, operators of these depots and stations who were issued a letter of intent for setting up the same do not require to execute an agreement with the Central Government.

45. Even with regard to this issue we find that the circular dated 16th December, 2005, firstly clarifies that there are certain conditions, including the agreement but pertinently on and from the assessment year 2002-03 structures at the ports for storage, loading and unloading etc. will be included in the definition of port for purposes of section

10(23G) and 80-IA of the Income Tax Act, 1961, if the condition that the concerned port authority has issued a certificate that these structures form part of the port is fulfilled. However, when the Delhi High Court was considering this question it referred not only to the factual position but the specific substantial question of law and the activity of the assessee before it carried out mainly on its ICD's (Inland Container Deports), Central Freight Stations and Port Terminals. The assessee had 45 container depots spread over the country. It is in the business of transporting containerised cargo. It may be concerned with the public sector undertaking and functioning directly under the administrative control of the Ministry of Railways, but the activity of the assessee is carried out mainly on the Inland Container Depot, Central Freight Stations and Port Container Terminals spread all over the country. The assessee has a total 45 Inland Container Depots. The Division Bench of the Delhi High Court then concluded as under :

> *"10. Thus it was for the first time from the assessment year 1999-2000 that inland ports started enjoying the deduction under Section 80IA as an "infrastructure facility". The object of the Government was to strengthen and improve the country's infrastructure in general and the transport infrastructure in particular.*

Inland ports facilitate the transport infrastructure by taking care of the transport of the customs-cleared goods meant for export from the ICD to the sea-port and the imported goods directly from the sea-port to the ICD where they can be customs-cleared. When the entire Section was recast by the Finance Act, 1999 with effect from 1.4.2000 and even after several amendments were thereafter made to the Section, inland ports continued to enjoy the deduction as infrastructure facility.

11. The question before us is whether the income from ICDs qualify for the deduction under Section 80IA(4)(i) of the Act read with the Explanation (d). We may first notice that out of the total of 45 ICDs operated by the assessee, except two ICDs, all others were notified by the CBDT vide notification No. S.O.744(E) issued on 1st September, 1998 for the purpose of Section 80IA(12)(ca). It may be recalled that under this provision, the Board had the power to notify an infrastructure facility for the purpose of the Section. The notification is reported in (1999) 233 ITR 126 and is reproduced below:-

> *"Notification No. S.O.744(E), September Ist, 1998 - Income-tax Act, 1961: Notification under section 80 - IA(12) (ca) : Inland Container Depot and Central Freight Station notified as infrastructure facility.*
>
> *In exercise of the powers conferred by clause (ca) of sub-section (12) of section 80IA of the Income-tax Act, 1961 (43 of 1961), the Central Board of Direct Taxes hereby notifies Inland Container Depot (ICD) and Central Freight Station (CFS) as infrastructure facility :*
>
> *Provided that such places are notified as Inland Container Depot and Central Freight Station under section 7(aa) of the Customs Act, 1962."*

12. The power to notify infrastructure facilities for the purpose of the Section was taken away from the CBDT with effect from 1.4.2002. The first argument of the learned counsel for the assessee is that once the ICDs have been notified validly by the CBDT by virtue of the powers conferred upon them, the fact that at a later point of time the power was taken away does not put an end to the validity or effect of the notification and as per the relevant Section as it stood at the time when the notification was issued, the assessee was eligible for the deduction for a period of 10 successive assessment years which covers the assessment years 2003-04 to 2005-06 which are the years under appeal.

13. We have examined the contention. Prior to the amendment made with effect from 1.4.2002 by the Finance Act, 2001, as noticed earlier, the Board was empowered to notify any public facility of a similar nature, other than what was mentioned as infrastructure facility. But an amendment was made and the power to notify was dropped. There was no provision made in the Act saying that the notification issued earlier would cease to have effect from 1.4.2002. Since the notification continued to have effect even beyond 1.4.2002, there is merit in the contention of the learned counsel for the assessee. Circular No. 7/2002, dated 26th August, 2002, reported in (2002) 257 ITR 28 clarified as under:

> *"Such projects, for which agreements have been entered into on or after April 1, 1995, but on or before March 31, 2001, and which have been notified by the Board on or before March 31, 2001, would continue to be exempt, subject to the fulfillment of the conditions prescribed in section 80-IA(4)(i)(b), as it existed prior to its substitution by the Finance Act, 2001."*

This circular fortifies the assessee's claim.

14. The next question that arises is whether the

ICDs can be considered to be inland ports. There is no definition of an inland port in the Act. However, a "port", which also qualifies for the deduction is defined in Section 3(4) of the Indian Ports Act, 1908 (Act 15 of 1908) to include "also any part of a river or channel" in which the said Act is for the time being in force. The word "port" is defined in T. Ramanatha Aiyar's Law Lexicon, 4th Edition (2010) in a number of ways. The most general meaning which is given is that it denotes a harbour or shelter to the vessels from a storm or as a place with a harbour where ships load or unload. It has also been defined in the commercial sense as an enclosed place where vessels load and unload goods for export or import. Commercially considered, "a port is a place where vessels are in the habit of loading and unloading goods". The law lexicon also refers to a judgment of the Bombay High Court in the case of Amarship Management Pvt. Ltd. v. UOI, (1996) 86 ELT 15 (Bom).

> *"Port is a place for loading and unloading of cargoes of vessels. The word "port" must be construed in its usual and limited popular or commercial sense as a place where ships are in the habit of coming for the purpose of loading or unloading, embarking or disembarking. It does not mean the physical port. On this basis, it has been held that an oil rig stationed outside territorial waters is a port where ships call for loading or unloading the goods. Amarship Management Pvt. Ltd. v. UOI, (1996) 86 ELT 15 (Bom)."*

15. It is interesting to note that the word "port approaches" is defined as those ports of the navigable channels leading to the port in which the Indian Ports Act is in force. There are several other definitions such as port call, port charges, port mark, port of arrival, port of entry, port of departure, port of call and so on and so forth. The whole emphasis however is that whenever the word "port" is used, it carries with it a maritime connection or connotation. That is perhaps why the Section refers separately to airport. An airport does not have a maritime

connection. But an airport is also a place where customs clearance are made both for import and export. It would be difficult to put the assessee's case as falling within the word "port" having regard to the fact that the word carries with it a maritime connotation. The ICDs are land-locked and it is nobody's case that they are located in such a place where ships or vessels have direct access to them. The goods which are either removed from or brought into the ICDs are brought or taken away either by railway wagons or by container trucks, as the case may be. But it is common ground that customs clearances take place in the ICDs.

16. It is, therefore, for consideration as to whether the ICDs can be said to be "inland ports" for the purposes of the Explanation (d) below sub-section (4) of Section 80IA. We were not able to find a definition of the words "inland port" in any of the dictionaries. But the words "inland container depot" were introduced in Section 2(12) of the Customs Act, 1962, which defines "customs port". This was by way of an amendment made by the Finance Act, 1983 with effect from 13th May, 1983. Simultaneously clause (aa) was inserted in Section 7(1) of the said Act under which the CBEC was empowered to issue notification appointing the places which alone shall be considered as inland container depots for the unloading of imported goods and the loading of exported goods. On 24th April, 2007 the following clarification was issued by the Central Board of Excise and Customs apparently in response to a query raised by the assessee.

"F. No. 450/24/2007-Cus.IV
Government of India
Ministry of Finance
Department of Revenue
Central Board of Excise & Customs
New Delhi,

April 24th, 2007

To,
Ms P. Alli Rani,
Executive Director (Finance),
Container Corporation of India Limited,
CONCOR Bhawan,
C-3, Mathura Road, Opp. Appolo Hospital,
New Delhi-110076.

Subject : Clarification regarding 'Inland Port' - regarding

Kindly refer to your letter CON/FA/128/Vol-2/80IA/2003-04 dated 18.04.2007 seeking clarification regarding "Inland Port".

2. It is stated that as per Customs Act, 1962 section 2(12) defines "Customs port" as any port appointed under clause (a) of section 7 to be a customs port and includes Inland Container Depot (ICD) appointed under clause (aa) of section 7. Container Freight Stations (CFSs) are "Customs area" attached to a "port". The work related to Customs is performed at these ICDs/CFSs. Accordingly, ICDs and CFSs (i.e. Customs area of port) are "Inland Ports".

(M.M. Parthiban)
Director (Customs)
Ph-23093908

Copy to,
Shri Jagdeep Goel,
Director ITA-I,
CBDT."

46. We have found that there is a specific reference made by the Delhi High Court to the communication dated 24th April, 2007, from the Government of India, Ministry of Finance, Department of

Revenue. These are then classified as inland ports and categorised accordingly. There is a further communication from the Ministry of Commerce and Industry as well. We do not find that a view different than the one taken by the Delhi High Court is possible. Bearing in mind the facilities that are extended and for purposes of loading, unloading, storage and warehousing of the goods that the facility is a infrastructure facility. That it has easy accessibility to the port and particularly the sea-port gives it certain advantages and benefits and which clearly accrue to those using the port for import and export of cargo. Further, the location thereof is also a relevant factor as noted. In such circumstances, the reliance by the Special Bench and equally by the Bench of the Tribunal in the impugned orders on the Division Bench judgment of the Delhi High Court is thus well placed.

47. We do not find that anything other and further than this material is relied. However, even the High Court of Judicature at Madras has referred in its Division Bench decision to the view taken by the Delhi High Court. The Division Bench in paragraphs 10 and 12 of its judgment extensively referred to the Tribunal's conclusions. It also

referred to the Special Bench decision of the Tribunal. Thus, when the proposal to set up a CFS has been accepted by the Government, there is no requirement of either a specific agreement as contended by Mr. Suresh Kumar. Nor can it be said that by virtue of any certification of the JNPT and its subsequent withdrawal the position undergoes any change. Once the facility is nothing but a infrastructural facility set up and within the precincts of the port, then, considering and even otherwise having considered its proximity to the sea port and its activities that we have no doubt and it can be safely concluded that the deduction admissible under sub-section (4) of section 80-IA can be claimed by both the ICDs and CFSs.

48. We do not think that the view taken by the Tribunal is in any way perverse or runs contrary to the language of sub-section (4) of section 80-IA or the object of the Income Tax Act, 1961, as a whole. Once such a conclusion is reached, then, it is not necessary to refer to any other material, particularly any circulars of the Board or otherwise or the certificates issued by the authorities. Even their contents need not be referred to. We are of the view that the extensive reasoning in

the judgment of the Division Bench of the Delhi High Court and which finds approval even of the High Court of Madras and with which we broadly agree that the substantial questions of law on both counts need to be answered in favour of the assessee and against the Revenue.

49. We, therefore, dismiss the Revenue appeals and answer the substantial questions of law against the Revenue and in favour of the assessee. There shall be no order as to costs.

A.K. MENON, J. ***S.C. DHARMADHIKARI , J.***