आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, JAIPUR

श्री विजय पाल राव, न्यायिक सदस्य एवं श्री भागचंद, लेखा सदस्य के समक्ष
BEFORE: SHRI VIJAY PAL RAO, JM & SHRI BHAGCHAND, AM

आयकर अपील सं./ITA No. 848 to 851/JP/2015
निर्धारण वर्ष/Assessment Year : 2009-10 to 2012-13

Shri Laxmi Narain Agarwal 104, Ridhi Sidhi Apartment, Ahinsa Circle, Jaipur.	बनाम Vs.	The ACIT, Central Circle-3, Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: ABSPA 1338 G		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

आयकर अपील सं./ITA No. 1022 to 1025/JP/2015
निर्धारण वर्ष/Assessment Year : 2009-10 to 2012-13

The ACIT, Circle-4, Jaipur.	बनाम Vs.	Shri Laxmi Narain Agarwal 1/513 Vidyadhar Nagar, Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: ABSPA 1338 G		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/ Assessee by : Shri Manish Agarwal (C.A.)
राजस्व की ओर से/ Revenue by : Smt. Roli Agarwal (CIT) &
Shri R. S. Meel (D.CIT)

सुनवाई की तारीख/ Date of Hearing : 19/03/2018
उदघोषणा की तारीख/Date of Pronouncement: 23/03/2018

आदेश/ ORDER

PER BENCH:

These four sets of cross appeals are directed against four separate orders of ld. CIT(A), Jaipur arising from assessment orders passed U/s 153A r.w.s. 143(3) and U/s 143(3) 153B(b) of the I.T. Act for the assessment years 2009-10 to 2012-13 respectively. For the assessment year 2009-10 & 2010-11 the assessee has raised the common grounds except the quantum of disallowance. The grounds raised for the assessment year 2009-10 of the assessee and Revenue are as under:-

Assessee's Ground

"1.On the facts and in the circumstances of the case the Ld. CIT(A) has grossly erred in sustaining the assessment completed by the Ld. AO u/s 153A of the Income Tax Act, 1961 when no incriminating paper was found as a result of search pertaining to the year under appeal, thus the consequent order passed u/s 153A of the Income Tax Act, 1961 deserves to be quashed.

1.1 That the Ld. CIT(A) has further erred in ignoring the remand report of the AO wherein he has categorically stood that no incriminating paper was found as a result of search pertaining to the year under appeal, thus the addition made u/s 153A deserves to be deleted.

2. On the facts and in the circumstances of the case the Ld. CIT(A) has grossly erred in upholding the rejection of the books of accounts maintained in the regular course of business without appreciating the fact of consistency in maintaining accounts year

after—i year on same basis and further without appreciating the nature of business, that being so the entire additions so uphold deserves to be deleted in toto.

3. On the facts and in the circumstances of the case the Ld. CIT(A) has grossly erred in upholding the application of the net profit rate of 5.75% on the turnover of Rs. 58,80,71,121/- [subject to interest and depreciation] in M/s Laxmi Narain Agarwal without appreciating the submissions made and records produced and further without bringing on record any material to support of such a high rate of net profit (However no financial addition has been made being the income declared by the assessee is higher as compared to the income derived after application of such N.P. rate subject to interest and depreciation). This being so the trading results as declared by the appellant deserves to be accepted.

3.1 That the Ld. CIT(A) has further erred in ignoring the fact that the profit rate declared by the assessee works out to 10.46% before allowing the statutory deduction like depreciation, interest, sales tax and royalty and extraordinary item such as manpower deductions which is not only quite reasonable but also higher as compared to the net profit rate applied thus the net profit rate declared by the assessee deserves to be accepted.

<u>Without prejudice to above</u>

3.2 That the Ld. CIT(A) has further erred in ignoring the fact that the total turnover of the assessee considered at Rs. 58,80,71,121/- for the application of net profit rate @ 5.75% includes the turnover of Rs. 19,42,49,182/- given on sub-contract basis on which assessee has received 2% net profit margin which fact is never disputed by Ld. AO or by Ld. CIT(A), thus deduction for lower profit margin to the extent of the work

given on sub-contract has to be given out of the total profit computed by applying 5.75% net profit rate.

3.3 That the Ld. CIT(A) has further erred in ignoring the fact that in case of carried over contracts from preceding assessment years, the profit rate much lessor than 5.75% was applied thus higher profit rate on the remaining work executed during the year under appeal is without any basis and therefore the consequent additions deserves to be deleted.

4. That the appellant craves the right to add, delete, amend or abandon any of the grounds of appeal either before or at the time of hearing of appeal."

Revenue's Ground

"(i) Whether on the facts and in the circumstances of the case and in law, the CIT(Appeals) has erred in ignoring the fact that the AO applied N.P. rate after allowing depreciation and interest which tantamount to allowing depreciation and interest twice."
(ii) Whether on the facts and in the circumstances of the case and in law, the CIT(Appeals) has erred in relying on the case of Jain construction Co. and allowing depreciation and interest, ignoring the fact that in that case N.P. rate was much more than as specified u/s 44AD.
(iii) Whether on the facts and in the circumstances of the case and in law, the CIT(Appeals) has erred in ignoring the fact that the AO has already applied lower N.P. rate and therefore not allowed depreciation and interest.
(iv) The appellant craves its rights to add, amend or alter any of the grounds on or before the hearing."

2. Ground No. 1 of assessee appeal is regarding validity of reassessment of income without any incriminating material found or seized during the search. The ld. AR of the assessee has submitted that there was a search u/s 132 of the Act on 15.03.2012 and the assessment for the assessment years 2009-10 and 2010-11 were not pending as on the date of search and further for the assessment year 2009-10 the assessment u/s 143(3) was completed on 23.12.2011 and for the assessment year 2010-11 the limitation for issuing notice u/s 143(2) expired on 30.09.2011. Thus, he has submitted that in the absence of any incriminating material on the basis of which addition can be made the reassessment of income for the assessment years 2009-10 & 2010-11 are not valid. The AO has made trading addition by rejecting the books of accounts and no reference of any incriminating material seized or found during the search has been made for these assessment years. The ld. AR has further submitted that this fact of no incriminating material is admitted by the AO in the remand report submitted before the ld. CIT(A) as reproduced at page 8 to 10 of the impugned order as under:-

> " *Relevant details have been filed which are placed on record and considered lexamined with reference to the documents seized during the search."*

Further, after examination of the assessment order, it is seen that no any seized material/annexure have been used in thebody of assessment order. It is also submitted that no any statement of the assessee was recorded during the assessment proceedings and during finalizing the assessment order on any issue….."

Thus, in the absence of any seized material addition made by the AO for these two assessment years are not sustainable in law. In support of his contention he has relied upon the decision of Hon'ble Jurisdiction High Court in case of Jai Steel (India) vs ACIT 259 CTR 281 as well as decision of Hon'ble Delhi High Court in case of CIT vs. Kabul Chawla 380 ITR 573. The ld. AR has also relied upon the decision of Coordinate Bench of this Tribunal dated 27.12.2017 in case of M/s Gorbandh Marbles Pvt. Ltd. vs. DCIT in ITA No. 605/JP/2017. Thus, the ld. AR has submitted that when the assessments for the assessment years 2009-10 & 2010-11 were already stood completed as on the date of search and no incriminating material was brought on record or referred by the AO for reassessment framed u/s 153A then no addition could have been made to the income already assessed.

3. On the other hand, the ld. DR has submitted that during the search and seizure proceedings u/s 132 of the Act some lose papers were seized and thereafter, when the material found during the search

was confronted with the assessee in the statement recorded u/s 132(4) he admitted that the books of accounts of the assessee are not completed and supporting vouchers were not available with the assessee and the assessee himself declared the income @ 8% on the turnover. Therefore, the rejection of books of accounts for these two assessment years are based on the fact that during the course of search and seizure action several deficiencies were found in the books of accounts which has been admitted by the assessee that he has not maintained the books of accounts properly and some of the expenses entered in his books of accounts are bogus and no supporting bills or vouchers were available with him. The ld. DR has also referred to the finding of the ld. CIT(A) on this issue in para 3.1.2. of the impugned order and submitted that the ld. CIT(A) has referred the assessment order in para 7 and found certain labours vouchers etc were found, inventorised and seized and on that basis, AO rejected the books of accounts u/s 145(3) of the Act. She has relied upon the orders of the authorities below.

4. We have considered the rival submissions as well as relevant material on record. A search and seizure action u/s 132 was carried out at the premises of the assessee on 15.03.2012. During the course of

search and seizure, statement of the assessee was recorded u/s 132(4) of the Act wherein the assessee admitted that some of the expenditures are not supported by proper vouchers and bills and therefore, the assessee disclosed the income @ 8% for the assessment year 2012-13. We have gone through the statement recorded u/s 132(4) and found that the entire context of the statement of the assessee recorded u/s 132(4) of the Act is regarding the transactions and turnover for the assessment year 2012-13. The specific details of the turnover were confronted with the assessee by the investigating team for the financial year 2011-12 relevant to the assessment year 2012-13 and the assessee admitted that the supporting and proper vouchers and bills were not available with the assessee in respect of some of the expenses booked in the books of accounts. Thus, the assessee surrendered the income @ 8% of the turnover of Rs. 68 Crores. The entire details and materials which were confronted with the assessee were pertaining to the financial year 2011-12 and therefore the said statement of the assessee has no relevancy for the assessment years other than the assessment years 2012-13. We note that in the assessment order the AO has rejected the books of accounts and applied net profit rate 5.75% to estimate the income of the assessee as against the income

declared by the assessee @ 4.85%. The Assessing Officer has given the reasons for rejection of books of accounts in para 6.3 to 6.7 as under:-

> *"**6.3** On verification of books of account, it was also noticed that the assessee has debited a sum of Rs. 7,26,06,729/- on account of Labour & Supervision Charges. Most of the payments of these expenses were made in cash through self made vouchers and no supporting evidence has been maintained for labours i.e. no complete postal addresses of labours were mentioned on the vouchers. Moreover, the assessee has not maintained and produced wages register and muster roll for labour payment. In absence of proper and complete vouchers, wages shown to have been paid to labours are not fully open to verification.*
>
> ***6.4** In addition to above, the assessee has debited Rs. 11,50,393/- on account of Site Expenses, from the vouchers produced during the course of assessment proceedings, it was noticed that the payment of these expenses were made in cash through self made vouchers which are not verifiable.*
>
> ***6.5** In addition to above, the assessee has debited a sum of Rs. 27,70,397/-on account of Freight & Cartage, it was noticed that the payment of these expenses were made in cash through self made vouchers which are not verifiable.*
>
> ***6.6** The assessee has shown closing stock/work in progress at Rs. 45,68,423/-, which admittedly as valued on estimation basis as the assessee had not maintained inventory of closing stock claimed to be have taken physically as on 31.03.2009. Moreover, the assessee neither maintained day-to-day stock register nor maintained quantitative tally of*

stock consumption on each project/site. Even, the assessee has not furnished the contract wise/site wise details of dimension & specification of works. Moreover, the assessee has shown his inability in furnishing of site wise bifurcation of stock/ work in progress. In absence of day-to-day stock register as well as site wise consumption of raw material on daily basis and site wise details of WIP, the correct profits of business cannot be ascertained.

6.7 *Besides, it was also noticed that certain vouchers of Conveyance Expenses, Office Expenses, Telephone Expenses, Travelling Expenses, Vehicle Running & Maintenance Expenses and Staff Welfare Expenses are self made and not supported with evidence or supported with Kachha Bills and it was found that most of payments in respect of these expenses were made in cash. Moreover, in absences of any record personal use of telephone & Cars by the assessee and his family members cannot be ruled out. Hence, these expenses claimed by the assessee are not open to verification."*

Further, the Assessing Officer has considered the issue of rejection of books of accounts as objected by the assessee in paras 7 and 8 as under:-

"7. I have considered the submission of the A/R of the assessee carefully and found not fully convincing for the reason that the assessee did not maintain stock register and no site wise details of material consumed/labour employed were maintained properly. Besides, the various huge expenses like labour expenses, site expenses, freight & cartages expenses etc. were paid in cash and supported with self made vouchers only and

do not contain the name and complete address of the persons to whom payments were made. In view of defects pointed out and discussed as above, the correct profit can not be deduced thereof. It is sweet will of the assessee that he claims the expenses as per his suitability. Moreover, the business expediency and genuineness of these expenses remains unverifiable. Further, the facts of the case laws quoted by the AR of the assessee are different from the assessee's present case. Therefore, in view of the facts discussed above, the books of accounts of the assessee are being rejected by invoking provision of section 145(3) of the IT Act, 1961.

In view of Hon'ble Supreme Court's decision in the case of S. N. Namasivayam Chettiar V/s CIT 38 ITR 579 and reliance can be placed on the case of Ved Prakash V/s CIT 191 CTR 168/ 210 ITR 486.

8. In view of the facts mentioned above and circumstance of the case, provisions of section 145(3) are invoked and books of account are rejected. The Net Profit rate of 5.75% is applied on total contract receipts of Rs. 58,80,71,121/-, which gives net profit of Rs. 3,38,14,089/-, which is fair and reasonable, looking to the past history of the assessee own case. Hence net profit of the assessee's business comes to Rs. 3,38,14,089/-."

Thus, it is clear that in the entire assessment order the Assessing Officer has not referred any incriminating material found or seized during the search as the basis for rejection of books of accounts and consequential addition. The ld. CIT(A) though in para 3.1.2 has stated that the AO has mentioned in para 7 that certain labours, vouchers etc.

were found and inventorised however, the said statement of the ld. CIT(A) is contrary to the assessment order. For the sake of completeness and ready reference, we reproduce the observation of ld. CIT(A) in para 3.1.2. as under:-

> *"3.1.2 I have duly considered the assessee's submission and also gone through the assessment order and taken a note of factual matrix of the case as well as legal position on this issue. Original assessment was completed u/s 143(3) of the Act, however, during the search operation carried out u/s 132 of the Act, certain labour vouchers etc (Refer Assessment order para 7 pg 8) were found , inventorised and seized and on that basis , AO rejected books of accounts u/s 145(3) of the Act. In view of these facts, I do not find any reason to intervene into this issue. Assessee's appeal on this ground is dismissed.*

The above observation of the ld. CIT(A) is factually incorrect as the AO in para 7 has not mentioned any seized material as it clear from the said para reproduced in the forgoing part of this order. Further, we note that in the remand report the Assessing Officer has clearly stated that the AO has not referred any incriminating material in the assessment order and this fact is emerging from the impugned order of the ld. CIT(A) wherein the remand report is reproduced in para 2.1. Therefore, it is manifest from the record that the Assessing Officer has rejected the books of accounts on the basis of the details and

books of accounts produced by the assessee at the time of framing the original assessment year u/s 143(3). Thus, once the assessment proceedings were not pending on the date of search then, in the absence of any incriminating material the AO cannot make an addition to the income already assessed to tax but in consequence of search to reassess the total income the assessee as it was assessed in the original assessment u/s 143(3) of the Act. The Hon'ble Jurisdiction High Court in case of Jai Steel (India) ACIT (supra) as well as Hon'ble Delhi High Court in case of CIT Kabul Chawla (supra) has laid down the principal on this point that if no incriminating material was found during the course of search in respect of any issue then no addition in respect of any issue can be made in the assessment u/s 153A of the Act. The Coordinate Bench of this Tribunal in case of M/s Gorbandh Marbles Pvt. Ltd. vs. DCIT (supra) while dealing with an identical issue has held in para 5 as under:-

> *"5. We have considered the rival submissions as well as relevant material on record. The assessee filed its return of income for the year under consideration on 24.09.2010 and therefore, undisputedly the time limit for issuing the notice u/s 143(2) on the return of income filed u/s 139(1) expired on 30.09.2011. A search in the case of the assessee was conducted on 17.07.2013 and as on the date of search the assessment for the year under consideration was not pending. Thus, it is clear that the notice issued by the AO u/s 153A*

consequent to the search carried out u/s 132 is for reassessment of income of the assessee. We further note that in the course of assessment proceedings the Assessing Officer has accepted the income declared by the assessee in the original return of income except a disallowance of Rs. 26,183/- on account of employees contribution to ESI and PF. The entire assessment order is silent about any of the incriminating document found or seized during the course of search and seizure action and therefore, it is clear that the assessment framed by the Assessing Officer u/s 153A for the assessment year under consideration is not based on any document found or seized during the course of search or requisition made. This fact has not been disputed by the Revenue that the assessment for the year under consideration u/s 153A r.w.s. 143(3) is not based on any incriminating document found during the course of search. This issue has been considered in a series of decisions of the Hon'ble High Courts as relied upon by the assessee. In the latest decision in case of Pr. CIT vs. Meeta Gutgutia (supra) the Hon'ble Delhi High Court has again considered and analyzed the relevant provisions of the Act as well all the decisions on this point in para 57 to 72 as under:-

*"**57.** The question whether unearthing of incriminating material relating to any one of the AYs could justify the re-opening of the assessment for all the earlier AYs was considered both in Anil Kumar Bhatia (supra) and Chetan Das Lachman Das (supra). Incidentally, both these decisions were discussed threadbare in the decision of this Court in Kabul Chawla (supra). As far as Anil Kumar Bhatia (supra) was concerned, the Court in paragraph 24 of that decision noted that "we are not concerned with a case where no incriminating material was found during the search conducted under Section 132 of the Act. We therefore express no opinion as to whether Section 153A can be invoked even under such situation". That question was, therefore, left open. As far as Chetan Das Lachman Das (supra) is concerned, in para 11 of the decision it was observed:*

"11. Section 153A (1) (b) provides for the assessment or reassessment of the total income of the six assessment years immediately preceding the assessment year relevant to the previous year in which the search took place. To repeat, there is no condition in this Section that additions should be strictly made on the basis of evidence found in the course of the search or other post-search material or Information available with the Assessing Officer which can be related to the evidence found. This, however, does not mean that the assessment under Section 153A can be arbitrary or made without any relevance or nexus with the seized material. Obviously an assessment has to be made under this Section only on the basis of seized material."

58. *In Kabul Chawla (supra), the Court discussed the decision in Filatex India Ltd. (supra) as well as the above two decisions and observed as under:*

"31. What distinguishes the decisions both in CIT v. Chetan Das Lachman Das (supra), and Filatex India Ltd. v. CIT-IV (supra) in their application to the present case is that in both the said cases there was some material unearthed during the search, whereas in the present case there admittedly was none. Secondly, it is plain from a careful reading of the said two . decisions that they do not hold that additions can be validly made to income forming the subject matter of completed assessments prior to the search even if no incriminating material whatsoever was unearthed during the search.

32. Recently by its order dated 6th July 2015 in ITA No. 369 of 2015 (Pr. Commissioner of Income Tax v. Kurele Paper Mills P. Ltd.), this Court declined to frame a question of law in a case where, in the absence of any incriminating material being found during the search under Section 132 of the Act, the Revenue sought to justify initiation of proceedings under Section 153A of the Act and make an addition under Section 68 of the Act on bogus share

capital gain. The order of the CIT (A), affirmed by the ITAT, deleting the addition, was not interfered with."

59. *In Kabul Chawla (supra), the Court referred to the decision of the Rajasthan High Court in Jai Steel (India) v. Asstt. CIT [2013] 36 taxmann.com 523/219 Taxman 223. The said part of the decision in Kabul Chawla (supra) in paras 33 and 34 reads as under:*

'33. The decision of the Rajasthan High Court in Jai Steel (India), Jodhpur v. ACIT (supra) involved a case where certain books of accounts and other documents that had not been produced in the course of original assessment were found in the course of search. It was held where undisclosed income or undisclosed property has been found as a consequence of the search, the same would also be taken into consideration while computing the total income under Section 153A of the Act. The Court then explained as under:

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

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

(b) regarding other cases, the addition to the income that has already been assessed, the assessment will be made on the basis of incriminating material; and

(c) in absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made."

34. The argument of the Revenue that the AO was free to disturb income de hors the incriminating material while making assessment

under Section 153A of the Act was specifically rejected by the Court on the ground that it was "not borne out from the scheme of the said provision" which was in the context of search and/or requisition. The Court also explained the purport of the words "assess" and "reassess", which have been found at more than one place in Section 153A of the Act as under:

"26. The plea raised on behalf of the assessee that as the first proviso provides for assessment or reassessment of the total income in respect of each assessment year falling within the six assessment years, is merely reading the said provision in isolation and not in the context of the entire section. The words 'assess' or 'reassess'-have been used at more than one place in the Section and a harmonious construction of the entire provision would lead to an irresistible conclusion that the word assess has been used in the context of an abated proceedings and reassess has been used for completed assessment proceedings, which would not abate as they are not pending on the date of initiation of the search or making of requisition and which would also necessarily support the interpretation that for the completed assessments, the same can be tinkered only based on the incriminating material found during the course of search or requisition of documents."'

60. *In Kabul Chawla (supra), the Court also took note of the decision of the Bombay High Court in CIT v. Continental Warehousing Corpn (Nhava Sheva) Ltd. [2015] 58 taxmann.com 78/232 Taxman 270/374 ITR 645 (Bom.) which accepted the plea that if no incriminating material was found during the course of search in respect of an issue, then no additions in respect of any issue can be made to the assessment under Section 153A and 153C of the Act. The legal position was thereafter summarized in Kabul Chawla (supra) as under:*

"37. On a conspectus of Section 153A(1) of the Act, read with the provisos thereto, and in the light of the law explained in the

aforementioned decisions, the legal position that emerges is as under:

i. *Once a search takes place under Section 132 of the Act, notice under Section 153 A (1) will have to be mandatorily issued to the person searched requiring him to file returns for six AYs immediately preceding the previous year relevant to the AY in which the search takes place.*

ii. *Assessments and reassessments pending on the date of the search shall abate. The total income for such AYs will have to be computed by the AOs as a fresh exercise.*

iii. *The AO will exercise normal assessment powers in respect of the six years previous to the relevant AY in which the search takes place. The AO has the power to assess and reassess the 'total income' of the. aforementioned six years in separate assessment orders for each of the six years. In other words there will be only one assessment order in respect of each of the six AYs "in which both the disclosed and the undisclosed income would be brought to tax".*

iv. *Although Section 153 A does not say that additions should be strictly made on the basis of evidence found in the course of the search, or other post-search material or information available with the AO which can be related to the evidence found, it does not mean that the assessment "can be arbitrary or made without any relevance or nexus with the seized material. Obviously an assessment has to be made under this Section only on the basis of seized material."*

v. *In absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made. The word 'assess' in Section 153 A is*

relatable to abated proceedings (i.e. those pending on the date of search) and the word 'reassess' to completed assessment proceedings.

vi. *Insofar as pending assessments are concerned, the jurisdiction to make the original assessment and the assessment under Section 153A merges into one. Only one assessment shall be made separately for each AY on the basis of the findings of the search and any other material existing or brought on the record of the AO.*

vii. *Completed assessments can be interfered with by the AO while making the assessment under Section 153 A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment."*

61. *It appears that a number of High Courts have concurred with the decision of this Court in Kabul Chawla (supra) beginning with the Gujarat High Court in Saumya Construction (P.) Ltd. (supra). There, a search and seizure operation was carried out on 7th October, 2009 and an assessment came to be framed under Section 143(3) read with Section 153A(1)(b) in determining the total income of the Assessee of Rs. 14.5 crores against declared income of Rs. 3.44 crores. The ITAT deleted the additions on the ground that it was not based on any incriminating material found during the course of the search in respect of AYs under consideration i.e., AY 2006-07. The Gujarat High Court referred to the decision in Kabul Chawla(supra), of the Rajasthan High Court in Jai Steel (India) (supra) and one earlier decision of the Gujarat High Court itself. It explained in para 15 and 16 as under:*

'15. On a plain reading of section 153A of the Act, it is evident that the trigger point for exercise of powers thereunder is a search under section 132 or a requisition under section 132A of the Act. Once a search or requisition is made, a mandate is cast upon the Assessing Officer to issue notice under section 153A of the Act to the person, requiring him to furnish the return of income in respect of each assessment year falling within six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made and assess or reassess the same. Since the assessment under section 153A of the Act is linked with search and requisition under sections 132 and 132A of the Act, it is evident that the object of the section is to bring to tax the undisclosed income which is found during the course of or pursuant to the search or requisition. However, instead of the earlier regime of block assessment whereby, it was only the undisclosed income of the block period that was assessed, section 153A of the Act seeks to assess the total income for the assessment year, which is clear from the first proviso thereto which provides that the Assessing Officer shall assess or reassess the total income in respect of each assessment year falling within such six assessment years. The second proviso makes the intention of the Legislature clear as the same provides that assessment or reassessment, if any, relating to the six assessment years referred to in the sub-section pending on the date of initiation of search under section 132 or requisition under section 132A, as the case may be, shall abate. Sub-section (2) of section 153A of the Act provides that if any proceeding or any order of assessment or reassessment made under sub-section (1) is annulled in appeal or any other legal provision, then the assessment or reassessment relating to any assessment year which had abated under the second proviso would stand revived. The proviso thereto says that such revival shall cease to have effect if such order of annulment is set aside. Thus, any proceeding of assessment or reassessment falling within the six assessment years prior to the search or requisition stands abated and the total income of the assessee is required to

be determined under section 153A of the Act. Similarly, sub-section (2) provides for revival of any assessment or reassessment which stood abated, if any proceeding or any order of assessment or reassessment made under section 153A of the Act is annulled in appeal or any other proceeding.

16. Section 153A bears the heading "Assessment in case of search or requisition". It is "well settled as held by the Supreme Court in a catena of decisions that the heading or the Section can be regarded as a key to the interpretation of the operative portion of the section and if there is no ambiguity in the language or if it is plain and clear, then the heading used in the section strengthens that meaning. From the heading of section 153. the intention of the Legislature is clear, viz., to provide for assessment in case of search and requisition. When the very purpose of the provision is to make assessment In case of search or requisition, it goes without saying that the assessment has to have relation to the search or requisition, in other words, the assessment should connected With something round during the search or requisition viz., incriminating material which reveals undisclosed income. Thus, while in view of the mandate of sub-section (1) of section 153A of the Act, in every case where there is a search or requisition, the Assessing Officer is obliged to issue notice to such person to furnish returns of income for the six years preceding the assessment year relevant to the previous year in which the search is conducted or requisition is made, any addition' or disallowance can be made only on the basis of material collected during the search or requisition, in case no incriminating material is found, as held by the Rajasthan High Court in the case of Jai Steel (India) v. Asst. CIT (supra), the earlier assessment would have to be reiterated, in case where pending assessments have abated, the Assessing Officer can pass assessment orders for each of the six years determining the total income of the assessee which would include income declared in the returns, if any, furnished by the assessee as well as undisclosed income, if any, unearthed during the search or requisition. In case

where a pending reassessment under section 147 of the Act has abated, needless to state that the scope and ambit of the assessment would include any order which the Assessing Officer could have passed under section 147 of the Act as well as under section 153A of the Act.

** ** **

19. On behalf of the appellant, it has been contended that if any incriminating material is found, notwithstanding that in relation to the year under consideration, no incriminating material is found, it would be permissible to make additions and disallowance in respect of an the six assessment years. In the opinion of this court, the said contention does not merit acceptance, inasmuch as. the assessment in respect of each of the six assessment years is a separate and distinct assessment. Under section 153A of the Act, assessment has to be made in relation to the search or requisition, namely, in relation to material disclosed during the search or requisition. If in relation to any assessment year, no incriminating material is found, no addition or disallowance can be made in relation to that assessment year in exercise of powers under section 153A of the Act and the earlier assessment shall have to be reiterated. In this regard, this court is in complete agreement with the view adopted by the Rajasthan High Court in the case of Jai Steel (India) v. Asst. CIT (supra). Besides, as rightly pointed out by the learned counsel for the respondent, the controversy involved in the present case stands concluded by the decision of this court In the case of CIT v. Jayaben Ratilal Sorathia (supra) wherein it has been held that while it cannot be disputed that considering section 153A of the Act, the Assessing Officer can reopen and/or assess the return with respect to six preceding years ; however, there must be some incriminating material available with the Assessing Officer with respect to the sale transactions in the particular assessment year.'

62. *Subsequently, in Devangi alias Rupa (supra), another Bench of the Gujarat High Court reiterated the above legal position following*

its earlier decision in Saumya Construction (P.) Ltd. (supra) and of this Court in Kabul Chawla (supra). As far as Karnataka High Court is concerned, it has in IBC Knowledge Park (P.) Ltd. (supra) followed the decision of this Court in Kabul Chawla (supra) and held that there had to be incriminating material qua each of the AYs in which additions were sought to be made pursuant to search and seizure operation. The Calcutta High Court in Salasar Stock Broking Ltd. (supra), too, followed the decision of this Court in Kabul Chawla (supra). In Gurinder Singh Bawa (supra), the Bombay High Court held that:

"6. . . . . once an assessment has attained finality for a particular year, i.e., it is not pending then the same cannot be subject to tax in proceedings under section 153A of the Act. This of course would not apply if incriminating materials are gathered in the course of search or during proceedings under section 153A of the Act which are contrary to and/or not disclosed during the regular assessment proceedings."

63. *Even this Court has in Mahesh Kumar Gupta (supra) and Ram Avtar Verma (supra) followed the decision in Kabul Chawla (supra). The decision of this Court in Kurele Paper Mills (P.) Ltd. (supra) which was referred to in Kabul Chawla (supra) has been affirmed by the Supreme Court by the dismissal of the Revenue's SLP on 7th December, 2015.*

The decision in Dayawanti Gupta

64. *That brings us to the decision in Smt. Dayawanti Gupta (supra). As rightly pointed out by Mr. Kaushik, learned counsel appearing for the Respondent, that there are several distinguishing features in that case which makes its ratio inapplicable to the facts of the present case. In the first place, the Assessees there were engaged in the business of Pan Masala and Gutkha etc. The answers given to questions posed to the Assessee in the course of search and survey proceedings in that case bring out the points of distinction. In the first place, it was stated that the statement recorded was under*

Section 132(4) and not under Section 133A. It was a statement by the Assessee himself. In response to question no. 7 whether all the purchases made by the family firms, were entered in the regular books of account, the answer was:

"We and our family firms namely M/s. Assam Supari Traders and M/s. Balaji Perfumes generally try to record the transactions made in respect of purchase, manufacturing and sales in our regular books of accounts but it is also fact that some time due to some factors like inability of accountant, our busy schedule and some family problems, various purchases and sales of Supari, Gutka and other items dealt by our firms is not entered and shown in the regular books of accounts maintained by our firms."

65. *Therefore, there was a clear admission by the Assessees in Smt. Dayawanti Gupta (supra) there that they were not maintaining regular books of accounts and the transactions were not recorded therein.*

66. *Further, in answer to Question No. 11, the Assessee in Smt. Dayawanti Gupta (supra) was confronted with certain documents seized during the search. The answer was categorical and reads thus:*

"Ans:- I hereby admit that these papers also contend details of various transactions include purchase/sales/manufacturing trading of Gutkha, Supari made in cash outside Books of accounts and these are actually unaccounted transactions made by our two firms namely M/s. Asom Trading and M/s. Balaji Perfumes."

67. *By contrast, there is no such statement in the present case which can be said to constitute an admission by the Assessee of a failure to record any transaction in the accounts of the Assessee for the AYs in question. On the contrary, the Assessee herein stated that, he is regularly maintaining the books of accounts. The disclosure made in the sum of Rs. 1.10 crores was only for the year of search and not for the earlier years. As already noticed, the*

books of accounts maintained by the Assessee in the present case have been accepted by the AO. In response to question No. 16 posed to Mr. Pawan Gadia, he stated that there was no possibility of manipulation of the accounts. In Smt. Dayawanti Gupta (supra), by contrast, there was a chart prepared confirming that there had been a year-wise non-recording of transactions. In Smt. Dayawanti Gupta (supra), on the basis of material recovered during search, the additions which were made for all the years whereas additions in the present case were made by the AO only for AY 2004-05 and not any of the other years. Even the additions made for AYs 2004-05 were subsequently deleted by the CIT (A), which order was affirmed by the ITAT. Even the Revenue has challenged only two of such deletions in ITA No. 306/2017.

68. *In para 23 of the decision in Smt. Dayawanti Gupta (supra), it was observed as under:*

"23. This court is of opinion that the ITAT's findings do not reveal any fundamental error, calling for correction. The inferences drawn in respect of undeclared income were premised on the materials found as well as the statements recorded by the assessees. These additions therefore were not baseless. Given that the assessing authorities in such cases have to draw inferences, because of the nature of the materials - since they could be scanty (as one habitually concealing income or indulging in clandestine operations can hardly be expected to maintain meticulous books or records for long and in all probability be anxious to do away with such evidence at the shortest possibility) the element of guess work is to have some reasonable nexus with the statements recorded and documents seized. In tills case, the differences of opinion between the CIT (A) on the one hand and the AO and ITAT on the other cannot be the sole basis for disagreeing with what is essentially a factual surmise that is logical and plausible. These findings do not call for interference. The second question of law is answered again in favour of the revenue and against the assessee."

69. *What weighed with the Court in the above decision was the "habitual concealing of income and indulging in clandestine operations" and that a person indulging in such activities "can hardly be accepted to maintain meticulous books or records for long." These factors are absent in the present case. There was no justification at all for the AO to proceed on surmises and estimates without there being any incriminating material qua the AY for which he sought to make additions of franchisee commission.*

70. *The above distinguishing factors in Smt. Dayawanti Gupta (supra), therefore, do not detract from the settled legal position in Kabul Chawla(supra) which has been followed not only by this Court in its subsequent decisions but also by several other High Courts.*

71. *For all of the aforementioned reasons, the Court is of the view that the ITAT was justified in holding that the invocation of Section 153A by the Revenue for the AYs 2000-01 to 2003-04 was without any legal basis as there was no incriminating material qua each of those AYs.*

Conclusion

72. *To conclude:*

(i) Question (i) is answered in the negative i.e., in favour of the Assessee and against the Revenue. It is held that in the facts and circumstances, the Revenue was not justified in invoking Section 153A of the Act against the Assessee in relation to AYs 2000-01 to AYs 2003-04?

(ii) Question (ii) is answered in the affirmative i.e., in favour of the Assessee and against the Revenue. It is held that with reference to AY 2004-05, the ITAT was correct in confirming the orders of the CIT (A) to the extent it deleted the additions made by the AO to the taxable income of the Assessee of franchise commission in the sum of Rs. 88 lakhs and rent payment for the sum of Rs. 13.79

lakhs?"

Accordingly, in view of the facts and circumstances of the case that the assessment in question was framed u/s 153A is not based on any incriminating material found or seized and therefore, the addition made by the AO of Rs. 26,183/- on account of employees Contribution to ESI and PF is not justified and the same is deleted by following decisions of Delhi High Court in case Pr. CIT vs. Meeta Gutgutia (supra)."

Accordingly, in view of the facts and circumstances of the case as well as various decisions and binding precedent as cited above the addition of income during the assessment framed u/s 153A is not sustainable as the same is not based on any incriminating material found or seized as the entire assessment order is silent about any incriminating material and further the AO has admitted in the remand report and confirmed the fact that no incriminating material was referred or is basis of the assessment proceedings u/s 153A. Accordingly, the addition made by the AO for the assessment years 2009-10 and 2010-11 are not sustainable and liable to be deleted, we order accordingly. Since, we have deleted the addition on the issue of jurisdiction of the AO u/s 153A of the Act therefore, we do not propose to go into other issues raised by the assessee. Similarly only issue raised by the Revenue in these two

appeals for the assessment years 2009-10 & 2010-11 also becomes infructuous and consequently dismissed.

5. For the assessment year 2011-12 the assessee as well as Revenue have raised the following grounds:-

"1. On the facts and in the circumstances of the case the Ld. CIT(A) has grossly erred in sustaining the assessment completed by the Ld. AO u/s 153A of the Income Tax Act, 1961 when no incriminating paper was found as a result of search pertaining to the year under appeal, thus the consequent order passed u/s 153A of the Income Tax Act, 1961 deserves to be quashed.

2. On the facts and in the circumstances of the case the Ld. CIT(A) has grossly erred in upholding the rejection of the books of accounts maintained in the regular course of business without appreciating the fact of consistency in maintaining accounts year after year on same basis and further without appreciating the nature of business, that being so the entire additions so uphold deserves to be deleted in toto.

3. On the facts and in the circumstances of the case the Ld. CIT(A) has grossly erred in upholding the application of the net profit rate of 5.75% on the turnover of Rs. 58,89,83,394/- [subject to interest and depreciation] in M/s Laxmi Narain Agarwal without appreciating the submissions made and records produced and further without bringing on record any material to support of such a high rate of net profit (However no financial addition has been made being the income declared by the assessee is higher as compared to the income derived after application of such N.P. rate subject to interest and depreciation). This being so the trading results as declared by the appellant deserves to be accepted.

3.1 That the Ld. CIT(A) has further erred in ignoring the fact that the profit rate declared by the assessee works out to 11.37% before allowing the statutory deduction like depreciation, interest, sales tax and royalty and extraordinary item such as manpower deductions which is not only quite reasonable but also higher as compared to the net profit rate applied thus the net profit rate declared by the assessee deserves to be accepted.

Without prejudice to above

3.2 That the Ld. CIT(A) has further erred in ignoring the fact that the total turnover of the assessee considered at Rs. 58,89,83,394/- for the application of net profit rate @ 5.75% includes the turnover of Rs. 11,83,32,363/- given on sub-contract basis on which assessee has received 2% net profit margin which fact is never disputed by Ld. AO or by Ld. CIT(A), thus deduction for lower profit margin to the extent of the work given on sub-contract has to be given out of the total profit computed by applying 5.75% net profit rate.

3.3 That the Ld. CIT(A) has further erred in ignoring the fact that in case of carried over contracts from preceding assessment years, the profit rate much lessor than 5.75% was applied thus higher profit rate on the remaining work executed during the year under appeal is without any basis and therefore the consequent additions deserves to be deleted.

4. That the appellant craves the right to add, delete, amend or abandon any of the grounds of appeal either before or at the time of hearing of appeal."

Revenue's Ground

"(i) Whether on the facts and in the circumstances of the case and in law, the CIT(Appeals) has erred in ignoring the fact that the AO applied N.P. rate after allowing depreciation and interest which tantamount to allowing depreciation and interest twice."
(ii) Whether on the facts and in the circumstances of the case and in law, the CIT(Appeals) has erred in relying on the case of Jain construction Co. and allowing depreciation and interest, ignoring the fact that in that case N.P. rate was much more than as specified u/s 44AD.
(iii) Whether on the facts and in the circumstances of the case and in law, the CIT(Appeals) has erred in ignoring the fact that the AO has already applied lower N.P. rate and therefore not allowed depreciation and interest.
(iv) The appellant craves its rights to add, amend or alter any of the grounds on or before the hearing."

6. Ground No. 1 and 2 of assessee's appeal are regarding validity of the reassessment framed u/s 153A without any incriminating material and rejection of books of accounts u/s 154(3) of the Act. At the time hearing, the learned counsel for assessee stated at bar that the assessee does not press ground nos. 1 and 2 and the same may be dismissed as not pressed. The ld. DR has raised no objections if ground Nos. 1 and 2 of the assessee's appeal are dismissed as not pressed. Accordingly the ground Nos. 1 and 2 of the assessee's appeal are dismissed being not pressed.

7. Ground No. 3 is regarding the trading addition made by the AO by taking net profit @ 5.75% of turnover. Since, the ld. CIT(A) has

allowed deduction on account of depreciation and interest from the net profit @ 5.75% the Revenue is also aggrieved by the impugned order of the ld. CIT(A) and filed the cross appeal therefore, this ground is common in both appeals of assessee as well as Revenue. The ld. AR of the assessee has submitted that the AO has applied net profit rate on the entire turnover which includes a turnover of subcontract receipts on which the assessee is earning the income @ 2% therefore, applying the net profit ratio on the entire turnover is not justified. He has further submitted that the assessee is a civil contractor and engaged in this line of business for long time. The assessee earned turnover from his own execution of work of Rs. 36.83 Crores whereas the turnover of subcontract work is Rs. 14.16 crores. Thus, the ld. AR has submitted that the profit rate applied by the AO should have been restricted to the turnover of the assessee's own execution of work and not on the subcontract as the assessee is receiving only 2% income on the subcontract turnover. He has referred to the details of the turnover and submitted that if the subcontract turnover is excluded for the purpose of estimating the income then, no addition is called for in the return income of the assessee after allowing the depreciation and interest.

8. On the other hand, the ld. DR has submitted that once net profit rate is applied for estimation of income then, no further deduction is allowable. The assessee has bifurcated the turnover when income of the assessee is assessed by taking on the basis of estimation. The ld. DR has submitted that the net profit rate applied by the AO has to be computed on the entire turnover. Further, once the income is estimated by adopting the net profit rate then, no further deduction is allowable. She has referred to the provisions of section 44AD and submitted that the statute has provided estimation of income by taking the profit @ 8% of turnover without allowing further deduction. Thus, the ld. DR has submitted that the provisions of section 44AD are a proper guidance for estimation of income after rejection of books of accounts. She has relied upon the orders of the Assessing Officer.

9. We have considered the rival submissions as well as relevant material on record. The Assessing Officer has rejected the books of accounts and applied net profit @ 5.75% to estimate income of the assessee. Though the AO has not given any details as to how the net profit @ 5.75% is taken as the basis for estimation however, without going into the controversy of what would have been the proper rate of estimation we first deal with the issue of applying N.P. of total turnover

which includes the turnover from subcontract. We note that the AO has taken total turnover of Rs. 51,00,10,676/- which consists the turnover of Rs. 36,83,23,723/- from the execution of work by the assessee and the balance of Rs. 14,16,86,952/- from subcontract. The assessee has submitted that the assessee earning only 2% profit on the subcontract work and therefore, the estimation of income by applying net profit can be computed only in respect of the turnover from the execution of work by the assessee himself exclusion the turnover of subcontract. We do find merits and substance in this contention of the ld. AR that the profit from subcontract cannot be compared with the profit of assessee's own execution of work and therefore for the purpose of estimating the income from turnover of the assessee's business of civil contract has to be confined only to the turnover from assessee's own execution and not the execution through subcontract. There is reason for not comparing the turnover from the work executed through subcontract because more one party are sharing the profit in such execution of work through subcontractor. Therefore, when the assessee is earning only 2% profit on the work executed through subcontract then the turnover of the assessee from subcontract cannot be included for the purpose of estimating the profit by applying a reason able and proper rate of profit.

Hence, we direct the AO to re compute the income of the assessee on the basis of estimation only on the turnover from assessee's own execution of work and not on the turnover from the execution of work through subcontract. The Income of the assessee from subcontract is not in disputed as it is clearly event from the record that the assessee is retaining only 2% of such execution of work through subcontract and therefore, the income on the subcontract receipt @ 2% has to be taken into account.

10. As regards the dispute regarding allowing further deduction am account of interest and depreciation from the income estimated by applying net profit rate we are of the considered view that this controversy can be resolved by taking a reasonable and proper G.P. rate instead of N.P. rate for estimation of income. There is no quarrel as far as the past history of GP rate declared by the assessee is a reasonable and proper guidance from the purposes of adopting the GP for estimating of income. Accordingly we direct the AO to apply a reasonable GP rate for estimating of income instead of NP rate and then allow the allowable deductions as per law. Hence, ground No. 3 of the assessee's appeal and the ground raised in the Revenue's appeal are disposed off being set aside to the record of the Assessing Officer for

estimation of the income of the assessee by applying GP rate and further deduction only in respect of the turnover from the execution of the work by the assessee himself excluding the turnover of subcontract work.

11. For the assessment year 2012-13 the assessee as well as Revenue have raised the following grounds:-

Assessee's Ground

1. *"On the facts and in the circumstances of the case the Ld. CIT(A) has grossly erred in upholding the rejection of the books of accounts maintained in the regular course of business without appreciating the fact of consistency in maintaining accounts year after year on same basis and further without appreciating the nature of business, that being so the entire additions so uphold deserves to be deleted in toto.*

2. *On the facts and in the circumstances of the case the Ld. CIT(A) has grossly erred in upholding the additions by applying the net profit rate of 8% on the turnover of Rs. 83,79,74,457/- [subject to interest and depreciation] in M/s Laxmi Narain Agarwal without appreciating the submissions made and records produced and further without bringing on record any material to support of such a high rate of net profit solely based on the statements recorded of the assessee during the course of search which was made without referring to the books of account maintained thus the addition of Rs. 78,63,193/- so uphold deserves to be deleted.*

2.1 That the Ld. CIT(A) has further erred in ignoring the fact that the profit rate declared by the assessee works out to 9.70% before allowing the statutory deduction like depreciation, interest, sales tax and royalty and extraordinary item such as manpower

deductions which is not only quite reasonable but also higher as compared to the net profit rate applied thus the net profit rate declared by the assessee deserves to be accepted.

2.2 That the Ld. CIT(A) has further erred in ignoring the fact that except the so-called statements of the assessee recorded during the course of search no paper was found as a result of search indicating that the assessee has earned net profit from contract activity @ 8%, thus the additions so uphold by the Ld. CIT(A) by applying the net profit rate of 8% deserves to be deleted.

Without prejudice to above

2.3 That the Ld. CIT(A) has further erred in ignoring the fact that the total turnover of the assessee considered at Rs. 83,79,74,457/- for the application of net profit rate @ 8% includes the turnover of Rs. 15,38,70,232/- given on sub-contract basis on which assessee has received 2% net profit margin thus deduction for lower profit margin to the extent of the work given on sub-contract has to be given out of the total profit computed by applying 8% net profit rate.

2.4 That the Ld. CIT(A) has further erred in ignoring the fact that in case of carried over contracts from preceding assessment years, the profit rate much lessor than 8% was applied thus higher profit rate on the remaining work executed during the year under appeal is without any basis and therefore the consequent additions deserves to be deleted.

3. That the Ld. CIT(A) has erred in treating the interest income of Rs. 76,99,437/- as income from other sources without appreciating the fact that interest has been earned on the funds invested in the regular course of business as per the terms of the contracts thus the same is part of the business income and deserves to be included in the net profits declared from the business activity of the assessee.

4. On the facts and in the circumstances of the case the Ld. CIT(A) has grossly erred in upholding the addition of Rs. 17,46,402/- on account of jewellery alleged as unexplained arbitrarily, thus the addition of Rs. 17,46,402/- deserves to be deleted.

4.1 That the Ld. CIT(A) has further erred in not allowing credit of the jewellery in terms of CBDT instructions dated 11.05.1994, reliance is placed on the decision of Hon'ble Kerala High Court in the case of Pati Devi Vs. ITO reported in 240 ITR 727 and the decision of jurisdictional Jaipur Bench of ITAT which are binding in nature, thus the consequent addition without allowing such credit deserves to be deleted.

5. That the Ld. CIT(A) has grossly erred in not allowing the benefit of telescoping and set off of the additions made into each other thus the benefit of telescoping and set- off deserves to be allowed from the additions, if any, finally uphold.

6. That the appellant craves the right to add, delete, amend or abandon any of the grounds of appeal either before or at the time of hearing of appeal.

Revenue's Ground

"(i) Whether on the facts and in the circumstances of the case and in law, the CIT(Appeals) has erred in restricting the trading addition from Rs. 6,70,37,956/- to Rs. 4,17,56,924/- by allowing deprecitation and interest, ignoring the fact that the AO made addition after rejecting books of account and considering the shown statement of the assessee recorded on oath, during course of Search & Seizure operation, in which he admitted to declare 8% net profit on Gross receipts.

(ii) Whether on the facts and in the circumstances of the case and in law, the CIT(Appeals) has erred in deleting addition of Rs. 20,37,000/- made by the AO on account of unexplained cash found at the residence of assessee, ignoring the fact that during

search and seizure proceedings, the assessee admitted to surrender undisclosed cash for taxation.
(iii) The appellant craves its rights to add, amend or alter any of the grounds on or before the hearing."

12. Ground Nos. 1 and 2 are regarding the addition made by the AO by applying NP rate 8% on the turnover of Rs. 83.79 Crores. During the course of search and seizure action and statement recorded u/s 132(4) of the Act the assessee surrendered and disclosed income @ 8% on the turnover of Rs. 68 Crores. In the return of income the assessee has declared turnover of Rs. 83.79 Crores and accordingly the AO applied the NP rate 8% on the entire turnover.

13. We have heard the ld. AR as well as the ld. DR and considered the relevant material on record. As far as the income disclosed and surrendered by the assessee during the course of search and seizure action and in the statement recorded u/s 132(4) of the Act we note that the assessee has estimated turnover for the year under consideration of Rs. 68,00,47,401/- and offered income @ 8% on the said turnover which amounts to Rs. 5,44,03,792/-. In the return of income the assessee has declared turnover of Rs. 83.79 Crores which includes a turnover of Rs. 15.57 crores from the work excluded through subcontract. The controversy and dispute is regarding 8% NP on the

entire turnover where as the assessee has contended that the total turnover declared by the assessee includes a turnover of Rs. 15,38,17,232/- from subcontract and further the assessee has submitted that a turnover of Rs. 15.46 Crores is carried from earlier year and on which the net profit as applied in the earlier assessment year should be applied. The ld. DR has submitted that the assessee has admitted the profit rate 8% then, the AO has correctly applied the said rate and therefore, no further deduction is allowable from the NP applied by the AO.

14. Having considered the rival submissions as well as relevant material on record we note that the assessee has declared and admitted income of Rs. 5,44,03,792/- being 8% on the turnover of Rs. 68,00,47,401/-. Therefore, the turnover of Rs. 68 crores and income on such turnover @ 8% amounting to Rs. 5,44,03,792/- is admitted income as declared by the assessee during the search and seizure and in the statement recorded u/s 132(4) of the Act. The assessee offered the income of Rs. 2,61,94,295/- in the return of income on turnover of Rs. 83.79 crores out of this the turnover of Rs. 68 crores was admitted by the assessee as the turnover from the work executed by the assessee and thus, the said turnover if exclude from the total turnover

the remaining turnover is from subcontract which is Rs. 15.39 crores. Therefore, the income of the assessee has to be assessed by applying 8% NP on the turnover of Rs. 68 crores and then 2% on the subcontract turnover of Rs. 15.38 crores. The net profit on the turnover of Rs. 68 crores was already admitted by the assessee in the statement recorded u/s 132(4) amount to Rs. 5,44,03,792/- and further addition of Rs. 30,77,404/- has to be made on account of subcontract turnover. The ld. CIT(A) has allowed further, deduction of depreciation and interest which has been objected by the Revenue in the cross appeal. We are of the view that in the normal circumstances if the income is estimated by applying Net profit based on some past history of the assessee then further deduction as per the provisions of section 44AD is not applicable. Rather the AO in such a case shall apply G.P. rate instead of NP rate. In this case the profit @ 8% is not based on the past history of the assessee or any comparable case but it was admitted by the assessee in the statement recorded u/s 132(4) of the Act. Hence, by applying such rate 8% which is undisputedly very high in comparison to the past history of the assessee then, further deduction on account of depreciation and interest as allowed by the ld. CIT(A) is justified. Keeping in view the rate of income applied is not based on any

reasonable and proper rate but is only adopted during the search and seizure action, we do not find any error or illegality in the order of the ld. CIT(A) in allowing the depreciation and interest. Hence, the ground No. 2 of the assessee's appeal and ground No. 1 of the Revenue's appeal are partly allowed.

15. Ground No. 3 of the assessee's appeal is regarding interest income assessed as income from other sources. At the time hearing, the learned counsel for the assessee has stated at bar that the assessee does not press ground no. 3 and the same may be dismissed as not pressed. The ld. DR has raised no objection if ground no. 3 of the assessee's appeal is dismissed as not pressed. Accordingly the ground no. 3 of the assessee's appeal is dismissed being not pressed.

16. Ground No. 4 of the assessee's appeal is regarding the addition made on account of unexplained investment in jewellery of Rs. 17,46,402/- which was confirmed by the ld. CIT(A). During the course of search and seizure action gold jewellery weighting 4658.05 gms was found and value at Rs. 1,07,38,664/-. After allowing the benefit of CBDT instruction dated 11.05.1994 the jewellery of Rs. 57,33,374/- was seized. In the return of income the assessee declared the income on account of undisclosed investment of Rs. 39,86,972/- as against Rs.

57,33,374/- of jewellery seized by the Department. The AO while framing the assessment u/s 143(3) r.w.s. 153B(b) of the Act made addition of differential amount of Rs. 17,46,402/-. The assessee challenged the action of the AO before the ld. CIT(A) but could not succeed.

17. Before us, the ld. AR of the assessee has submitted that the assessee while declaring the income in return of income on account of undisclosed investment of Rs. 39,86,972/- has made adjustment on two accounts namely impurity to the extent of 30% in the jewellery and further a jewellery of 250 gms is covered by the purchase made by the assessee through cheques and duly recorded in the books of the assessee. Therefore, the assessee has offered the amount on account of undisclosed income by considering the impurity and purchases made by the assessee of 250 gms pure gold. Hence, he has submitted that if this adjustment is allowed then, no addition is called for on this account.

18. On the other hand, the ld. DR has submitted that the ld. CIT(A) has duly considered these contentions of the assessee and has given finding that the DVO has taken the net weight of the jewellery and therefore, no further adjustment is required on account of impurity in

the jewellery. She has further submitted that as regards the purchases of pure gold of 250 gms since, no pure gold was found during the search and only jewellery was found therefore, no adjustment can be given on this account. The ld. CIT(A) has considered this issue and given the finding that the coins purchased the assessee may be for the purpose of gift on the occasion of festivals and not used for making jewellery. She has further contended that when the Department has already allowed the benefit of CBDT instruction dated 11.05.1994 then, this gold of 250 gms will be part of the said quantity for which the benefit was allowed as per instruction.

19. We have considered the rival submissions as well as relevant material on record. As regards the claim of impurity in the jewellery there is no dispute that the DVO has taken the net weight of the jewellery at 3969.440 gms as against the gross rate 4658.050gms. Therefore, it appears that the DVO given around 15% reduction on account of impurity in jewellery whereas the assessee has further reduced 30% from the net weight taken by the DVO. Accordingly, we do not accept this contention of the assessee that 30% reduction be allowed in the value taken by the DVO however, the impurity has to be reduced from the gross weight and the percentage of impurity has to

be considered as per the standard applied by the various agencies and in the trade in respect of old jewellery. Accordingly, we are of the considered view that the valuation of the jewellery has to be taken after giving proper adjustment on account of the impurity.

20. As regards the credit on account of purchases of 250 gms gold we are of the view that if the purchase is not undisputed then the assessee is eligible for such credit. The ld. DR has raised an objection that the 250 gms purchases can be considered in the quantity as allowed under CBDT instruction dated 11.05.1994. However, we are of the opinion that the CBDT instructions are applied on the jewellery found during search and for which no explanation was furnished. In case if the assessee furnished the explanation and source of investment in the jewellery then there is no need of allowing the benefit under CBDT instructions dated 11.05.1994. The purpose of allowing certain quantity of jewellery as per CBDT instruction is that as per Indian customs and cultural a certain quantity of jewellery is supposed to be personal effect/istridhan of the family members of the assessee. Therefore, to the extent of the purchases made by the assessee through cheques the credit of the said amount has to be allowed from unexplained investment after giving the benefit of CBDT instruction.

Hence, this issue is set aside to the record of the AO with the direction to re-compute the valuation of the jewellery after allowing a proper deduction on account of impurity as well as on account of purchase made by the assessee which are duly explained made by the assessee. In the result, ground No. 4 is partly allowed.

21. Ground No. 5 of the assessee's appeal is regarding the benefit of telescoping.

22. We have heard the ld. AR as well as the ld. DR and considered the relevant material on record. There is no dispute that if the certain additions are sustained on account of undisclosed income then to the extent of the addition the telescoping benefit is permissible in respect of the unexplained investment made or expenditure is incurred. Accordingly, we find merits in this ground of the assessee's appeal and direct the AO to consider the benefit of telescoping to the extent of the addition made on account of undisclosed income.

23. Ground No. 2 of the Revenue's appeal is regarding addition of Rs. 20,37,000/- made by the AO on account of unexplained cash which was deleted by the ld. CIT(A).

24. We have heard the ld. DR as well as the ld. AR and considered the relevant material on record. During the course of search cash of Rs.

24,37,000/- was found from the possession of the assessee's family members out of which Rs. 20,37,000/- was seized. Further, during the course of search and seizure it was found that the books of accounts were not completed on the date of search and this fact was also admitted by the assessee in the statement recorded u/s 132(4) of the Act. The assessee has explained the balance of cash as per completed books of accounts which was accepted by the ld. CIT(A) in para 3.4.2 as under:-

> *"3.4.2 I have duly considered assessee's submission and carefully gone through assessment order passed by the AO. I have also perused the facts of the case and taken a note of factual matrix of the case. On perusal of sworn statements recorded on oath u/s 132(4) of the Act on 16/03/2012 and u/s 131 of the Act on 17/04/2012, it is seen that assessee had reiterated his stand that cash seized of Rs. 20,32,000/= during the search & seizure operation was undisclosed and he had agreed to pay taxes on that. However, while filing the return of income in pursuant to notice issued u/s 153A of the Act, assessee did not offer the same. It is contended that in case of cash inventorised and seized at the time of S & S Operation, the same was admitted on the basis of incomplete books of accounts, and when worked out on the basis of books of accounts completed after search duly incorporating all the pending entries, it is seen that there were sufficient cash balance available as per cash books, on which the same was not offered as additional income. It is also contended that no defect whatsoever was pointed by AO in the completed cash book and the addition was made for the sole reason that the assessee admitted the difference as his*

undisclosed income during the course of search. The cash balance as per the completed books of accounts as on the date of search was as under:

S. No.	Details	Amount (Rs.)
a)	Laxmi Narain Agarwal, Jaipur *Rajasthan sites*	*24,82,873.20*
b)	Laxmi Narain Agarwal, Gwalior	*2,16,450.00*
c)	Laxmi Narain Agarwal, *Jammu*	*5,123.00*
d)	Laxmi *Narain* Agarwal, *Morena*	*14,314.00*
	Total	**27,18,760.20**

The AO in para 7.3 to 7.5 of the assessment order has given his findings for the addition made on account of cash seized during the search operation. On perusal of the same, AO has not pointed out any defects in the cash book re-casted. From the above, it is also seen that available cash balance as on the day of search from Rajasthan Site office was at Rs. 24,82,873.20 which is more than the cash inventorised and seized on the day of search. In view of these facts, treating of seized cash as undisclosed cannot be sustained, hence deleted. Assessee gets a relief of Rs. 20,37,000/= on this ground.

Therefore, when the completed cash book was accepted which shows the availability of cash as on the date of search then no addition is called for on this account. The AO has not brought any contrary fact to our notice and accordingly, we do not find any error or illegality in the impugned order of the ld. CIT(A) qua this issue.

In the result, for the assessment years 2009-10 and 2010-11 the appeals of the assessee are allowed and those of Revenue are dismissed, for the assessment year 2011-12 the cross appeals are

partly allowed and for the assessment year 2012-13 the cross appeals are partly allowed.

Order pronounced in the open court on 23/03/2018.

Sd/-	Sd/-
(भागचंद)	(विजय पाल राव)
(Bhagchand)	(Vijay Pal Rao)
लेखा सदस्य / Accountant Member	न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur
दिनांक / Dated:- 23/03/2018.
*Santosh.
आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- Shri Laxmi Narain Agarwal, Jaipur.
2. प्रत्यर्थी / The Respondent- ACIT, Central Circle-3/Circle-4 Jaipur.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
6. गार्ड फाईल / Guard File {ITA No. 848 to 851 & 1022 to 1025/JP/2015}

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar