

**IN THE INCOME TAX APPELLATE TRIBUNAL  
(DELHI BENCH: 'B': NEW DELHI)****BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER  
AND  
SHRI ANADEE NATH MISSHRA, ACCOUNTANT MEMBER****ITA No:- 2046/Del/2016  
(Assessment Year: 2006-07)**

ACIT Central Circle- 30 E- 2. ARA Centre, Jhandewalan Extn. New Delhi Pin:	Vs.	Ankush Saluja 9A, Jeewan Jyoti Farm, The Green Rajkori New Delhi Pin: 110036
		<b>PAN No: AQDPS8677G</b>
<b>APPELLANT</b>		<b>RESPONDENT</b>

**ITA No:- 2045/Del/2016  
(Assessment Year: 2006-07)**

ACIT Central Circle- 30 E- 2. ARA Centre, Jhandewalan Extn. New Delhi Pin:	Vs.	Archana Saluja 9A, Jeevan Jyoti Farm, The Green Rajkori New Delhi Pin: 110036
		<b>PAN No: AANPS2300L</b>
<b>APPELLANT</b>		<b>RESPONDENT</b>

**ITA No:- 2050/Del/2016  
(Assessment Year: 2006-07)**

ACIT Central Circle- 30 E- 2. ARA Centre, Jhandewalan Extn. New Delhi Pin:	Vs.	Saluja Construction Co. Ltd. 30, Commercial Community Centre, 1 <sup>st</sup> Floor, Basant Lok, Vasant Vihar, New Delhi Pin: 110057
		<b>PAN No: AABCS3788H</b>
<b>APPELLANT</b>		<b>RESPONDENT</b>

**Assessee by** : Sh. R.S. Ahuja, CA  
**Revenue by** : Ms. Nidhi Srivastava, CIT (DR)

**ORDER**

**PER: ANADEE NATH MISSHRA, AM**

These three appeals filed by Revenue are being disposed off through this consolidated Order for the sake of convenience because similar / another related Assessments are inward in these appeals. Appeal vide ITA No. 2045/Del/2016 is against impugned Order dated 25.01.2016 in the case of Smt. Archana Saluja in Appeal No. 25/14-15/1602 for Assessment Year (AY for short) 2006-07. Appeal vide ITA No. 2046/Del/2016 is filed against Order dated 25.01.2016 in the case of Mr. Ankush Saluja in Appeal No. 21/14-15/1598 for AY 2006-07. Appeal vide ITA No. 2050/Del/2016 filed against separate Order dated 25.01.2016 of Ld. Commissioner of Income Tax (Appeals) [CIT(A) for short] in the case of M/s Saluja Construction Co. Ltd. in Appeal No. 28/14-15/1605 for AY 2006-07. The grounds of appeal in these three appeals filed by Revenue are as under:

**ITA No. 2045/Del/2016:-**

- 1. On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in law and on facts in directing the A.O to delete the addition made u/s 68 of the I T. Act on account of unexplained cash credits.*
- 2. On the facts and in the circumstances of the case, the Ld. CIT(A) had erred in law and on facts by relying on the decision in the case of Sh. Kabul Chawla by the jurisdictional High Court which has not been accepted by the department and SLP against the same has been filed before Hon'ble Supreme Court.*
- 3. On the facts and in the circumstances of the case, the Ld. CIT(A) had erred in law and on facts in arriving at the conclusion that the words 'total income' as used in Section 153A would only mean undisclosed income discovered from seized /*

- incriminating material.*
4. *On the facts and in the circumstances of the case, the Ld. CIT(A) had erred in law and on facts in adopting a restrictive and pedantic interpretation of the scope of assessment u/s 153A of the Act.*
  5. *On the facts and in the circumstances of the case, the Ld. CIT(A) had erred in law and on facts in not appreciating that the decision of Hon'ble High Court in the case of CIT(Central)-III vs Kabul Chawala is equivalent to a parallel legislation as the word 'Incriminating document' is not defined anywhere in the Act and is open to various interpretations.*
  6. *On the facts and in the circumstances of the case, the Ld. CIT(A) had erred in law and on facts in arriving at the conclusion that the words 'total income' as used in section 153A would only mean income unearthed during search when the decision of the Hon'ble High Court of Karnataka in the case of Canara Housing Development Company Vs. DCIT dated 09-08-2014 has held that total income includes income unearthed during search and any other income.*
  7. *That the order of the CIT(A) is perverse, erroneous and is not tenable on facts and in law.*
  8. *That the grounds of appeal are without prejudice to each other.*
  9. *That the appellant craves leave to add, amend, alter or forgo any ground(s) of appeal either before or at the time of hearing of the appeal.*

**ITA No. 2046/Del/2016:-**

1. *On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in law and on facts in directing the A.O. to delete the addition made u/s 68 of the I.T. Act on account of unexplained cash credits.*
2. *On the facts and in the circumstances of the case, the Ld. CIT(A) had erred in law and on facts by relying on the decision in the case of Sh. Kabul Chawla by the jurisdictional High Court which has not been accepted by the department and SLP against the same has been filed before Hon'ble Supreme Court.*
3. *On the facts and in the circumstances of the case, the Ld. CIT(A) had erred in law and on facts in arriving at the conclusion that the words 'total income' as used in Section 153A would only mean undisclosed income discovered from seized / incriminating material.*
4. *On the facts and in the circumstances of the case, the Ld. CIT(A) had erred in law and on facts in adopting a restrictive and pedantic interpretation of the scope of assessment u/s 153A of the Act.*
5. *On the facts and in the circumstances of the case, the Ld. CIT(A) had erred in law and on facts in not appreciating that the decision of Hon'ble High Court in the case of CIT(Central)-III vs Kabul Chawala is equivalent to a parallel legislation as the word 'Incriminating document' is not defined anywhere in the Act and is open to various interpretations.*
6. *On the facts and in the circumstances of the case, the Ld. CIT(A) had erred in law and on facts in arriving at the conclusion that the words 'total income' as used in section 153A would only mean income unearthed during search when the decision of the Hon'ble High Court of Karnataka in the case of Canara Housing Development Company Vs. DCIT dated 09-08-2014 has held that total income includes income unearthed during search and any other income.*
7. *That the order of the CIT(A) is perverse, erroneous and is not tenable on facts and in*

law.

8. *That the grounds of appeal are without prejudice to each other.*
9. *That the appellant craves leave to add, amend, alter or forgo any ground(s) of appeal either before or at the time of hearing of the appeal.*

**ITA No. 2050/Del/2016:-**

1. *On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in law and on facts in directing the A.O. to delete the addition made u/s 68 of the I.T. Act on account of unexplained cash credits.*
2. *On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in law and on facts in determining that no incriminating document was found during search and seizure action u/s 132 of the I.T. Act and no addition can be made u/s 153A relying on the judgment of Hon'ble Delhi High Court in the case of CIT vs. Kabul Chawla and without considering the merits of the case.*
3. *On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in law and on facts in not considering the fact that incriminating documents were found and seized from the business premises of the assessee during search and seizure action on 12.02.2012 and on the basis of these incriminating documents, the assessee itself disclosed an additional income of Rs. 1,00,00,000/- in assessment year 2012-13.*
4. *On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in law and on facts in not appreciating that the ratio laid down by Hon'ble Jurisdictional High Court of Delhi in the case of CIT vs. Kabul Chawla is distinguishable to the facts of this case.*
5. *On the facts and in the circumstances of the case, the Ld. CIT(A) had erred in law and on facts in not appreciating that the decision of Hon'ble High Court in the case of CIT(Central)-III vs Kabul Chawala is equivalent to a parallel legislation as the word 'Incriminating document' is not defined anywhere in the Act and is open to various interpretations.*
6. *That the order of the CIT(A) is perverse, erroneous and is not tenable on facts and in law.*
7. *That the grounds of appeal are without prejudice to each other.*
8. *That the appellant craves leave to add, amend, alter or forgo any ground(s) of appeal either before or at the time of hearing of the appeal.*

**(2)** A search under Section 132 of Income Tax Act ("I.T. Act" for short) was conducted on 12.01.2011 in the Saluja Group of cases. All the three Assessees are part of the aforesaid Saluja Group of cases. The premises searched U/s 132 of I.T. Act included the premises of aforesaid M/s Saluja Construction Co. Ltd. and the premises of aforesaid Smt. Archana Saluja. Assessment Order U/s 153A of I.T. Act, dated 14.3.2014, was passed in the case of M/s Saluja Construction Co. Ltd. in

which an addition of Rs. 22,17,50,000 was made U/s 68 of I.T. Act, 1962 towards unexplained cash credits. Separate Assessment Order U/s 153A, read with Section 143(3) of I.T. Act was passed on 14.03.2014 in the case of Smt. Archana Saluja wherein an addition of Rs. 24,74,32,560 was made U/s 68 of I.T. Act towards unexplained cash credits. Another separate Assessment Order was passed on 14.03.2014 in the case of Mr. Ankush Saluja U/s 153C, read with Section 153A of I.T. Act wherein an addition of Rs. 18,81,42,080 was made U/s 68 of I.T. Act towards unexplained cash credits. The three Assesseees filed separate appeals before the Ld. CIT(A). Vide separate appellate Orders as mentioned earlier (The impugned Orders) the Ld. CIT(A) deleted the aforesaid additions in the cases of all the three Assesseees; on the ground that these additions were not based on any incriminating document found during search U/s 132 of I.T. Act. The Ld. CIT(A) placed reliance on Order of Hon'ble Delhi High Court in the case of **CIT vs. Kabul Chawla 61 Taxmann.com 412 (Delhi) / 380 ITR 0573 (Del)** and another Order of Hon'ble Delhi High Court in the case of **CIT vs. Jakson Engineers Ltd. 2015-T10L-2789-HC-DEL-IT**. The three appeals filed by Revenue are against the aforesaid impugned Orders of the Ld. CIT(A).

**(3)** During appellate proceedings in ITAT the Ld. Authorized Representatives for the Assessee filed two separate Paper Books. The contents of the Paper Books are as under:

S. No.	Particulars
1	DCIT vs. Ankush Saluja {51 CCH 0509} [Del Trib] for AY 07-08
2.	CIT vs. Kabul Chawla {380 ITR 0573} [Del]
3.	Pr. CIT & Ors. vs. Meeta Gutgutia {395 ITR 0526} [Del]
4.	Excel Infotech Ltd. vs. DCIT {3492 to 3494/Del/2014} [Del Trib]
5.	Sanjay Aggarwal vs. DCIT {150 ITD 0692} [Del Trib]
6.	In DCIT vs. Saluja Construction Co. Ltd. (I.T.A 2051 /Del/2016) for AY 07-08 and DCIT vs. Vinod Saluja (I.T.A 2052 & 2053/Del/2016) for AY 06-07 & 07-08
7.	Assessment Order U/s 143(3) dated 28.12.2007 for AY 2006-07 in the matter of M/s. Saluja Construction Co. Ltd.
8.	Assessment Order U/s 143(3) dated 28.12.2017 for AY 2006-07 in the matter of Mrs. Archana Saluja.

**(4)** At the time of hearing before us the Ld. CIT(DR), while admitting that the disputed additions are covered in favour of Assessee by Order of Hon'ble Delhi High Court in the case of **CIT vs. Kabul Chawla (Supra)**; however, relied on the Assessment Orders. Ld. AR of the Assessee, on the other side, drew our attention to order of Co-ordinate Bench of ITAT, Delhi in the case of Ankush Saluja, another Assessee of this Saluja Group, vide Order dated 07.12.2017, reported at (2017) 51CCH 0509 (DelTrib) for AY 2007-08 in which on identical facts, relying on Order of Hon'ble Delhi High Court in the case of **CIT Vs. Kabul Chawla (Supra)** and on **Vijay Bhai N. Chandrani vs. ACIT 333 ITR 436 (Gujarat)**; and observing that no incriminating document was found during the course of search so as to make the addition U/s 68 of the I.T. Act on account of unexplained cash credit, Co-ordinate

Bench of ITAT, Delhi, decided the issue in favour of the Assessee. The relevant portion of the aforesaid Order dated 07.12.2017 in the case of **DCIT vs. Ankush**

**Saluja (2017) 51CCH 0509 (DelTrib)** is reproduced as under:

*“....It is also an admitted fact that during the course of search and seizure no incriminating evidence as regards the addition under section 68 of the act were found and seized during the course of search. Therefore, no assessment/re-assessment were pending as on the date of search. In the absence of any incriminating material during the course of search, the Ld. CIT(A) was justified in relying upon the decision of the Hon'ble Delhi High Court in the case of Kabul Chawla (supra) for the purpose of deleting the addition. Merely because departmental SLP is pending before the Hon'ble High Court is no ground to take a contrary decision against the decision of the jurisdictional Delhi High Court. We may also refer to judgment of Hon'ble Gujrat High Court in the case of Vijay Bhai N. Chandrani vs. ACIT 333 ITR 436 in which it was held as under.]*

*"Held, Allowing the petition, that admittedly, three loose papers recovered during the course of search proceedings did not belong to the petitioner. It was not the case of the Revenue that three documents were in hand-writing of the petitioner. In the circumstances, when the condition precedent for issuance of notice was not fulfilled, action taken under section 153C of the Act stood vitiated."*

*In the present case, even no incriminating document was found during the course of search so as to make the addition under section' 68 of the I.T. Act on account of unexplained cash credit. The Ld. CIT(A) in view of these findings did not decide the issue on merit. The above discussion clearly show that department has no case for interference The Ld. D.R. has not pointed out any infirmity in the order of the Ld. CIT(A).*

*In the result, appeal of the department stands dismissed.”*

**(5)** The Ld. AR of the Assessee also relied on the decision of Co-ordinate Bench of ITAT, Delhi in the cases of Saluja Construction Co. Ltd. for AY 2007-08 and in the case of Vinod Saluja for AYs 2006-07, 2007-08 vide consolidated Order dated 05.07.2018. The Ld. AR submitted that these Assesseees are also of the aforesaid

Saluja Group and on identical facts the Co-ordinate Bench of ITAT, Delhi decided the issue in favour of the Assessee. In particular the Ld. AR drew our attention to the following portion of the aforesaid consolidated Order dated 05.07.2018:

*“It is apparent from the assessment order itself, as has been candidly admitted by the Ld. DR as well, that there is no reference to any incriminating material in the assessment order qua these creditors/advances in respect of which addition of Rs. 24.39 crore was made. Respectfully following the judgement of the Hon’ble jurisdictional High Court in Kabul Chawla (Supra), we hold that the Ld. CIT(A) was justified in deleting the addition of Rs. 24.93 crore and odd.”*

**(6)** The Ld. AR of the Assessee also relied on the cases of **CIT vs. Kabul Chawla {380 ITR 0573}[Del]**, **Pr. CIT & Ors. vs. Meeta Gutgutia {395 ITR 0526} [Del]**, **Excel Infotech Ltd. vs. DCIT {3492 to 3494/Del/2014}[Del Trib]** and **Sanjay Aggarwal vs. DCIT {150 ITD 0692}[Del Trib]**. The Ld. AR of the Assessee also relied on consolidated Order dated 31.10.2018 of Co-ordinate Bench of ITAT, Delhi in the cases of **Sh. Brij Bhushan Singal vs. ACIT [in ITA No. 1412/Del/2018 for AY 2010-11; ITA No. 1413/Del/2018 for AY 2011-12 and ITA No. 1414/Del/2018 for AY 2012-13]**, **Smt. Ritu Singal vs. ACIT [in ITA No. 1476/Del/2018 for AY 2010-11; ITA No. 1477/Del/2018 for AY 2011-12 and ITA No. 1478/Del/2018 for AY 2012-13]**, **Smt. Uma Singal vs. ACIT [ITA No. 1482/Del/2018 for AY 2010-11]** and **Sh. Neeraj Singal vs. ACIT [in ITA No. 1485/Del/2018 for AY 2010-11; ITA No. 1486/Del/2018 for AY 2011-12 and ITA No. 1487/Del/2018 for AY 2012-13]**.

**(7)** We have heard both sides patiently. We have perused materials on record carefully. We have considered the judicial precedents mentioned in the records of these cases in ITAT and also the judicial precedents brought to our notice in the course of hearing before us. The facts of these cases are not in dispute. Both sides agree that the additions made by the AO, in the case of the three concerned Assessees, are not based on any incriminating materials found in the course of search U/s 132 of I.T. Act. Both sides agree that there was no pending assessment in the case of any of the three concerned Assessees on the date of search U/s 132 of I.T. Act i.e. on 12.01.2011. From perusal of records, we find that in the case of Saluja Construction Co. Ltd. earlier return U/s 139(1) of I.T. Act on 31.07.2006 pursuant to which Assessment Order U/s 143(3) of I.T. Act on 28.12.2007. No assessment proceeding was pending on date of search i.e. 12.01.2011. Therefore, the aforesaid Assessment Order dated 14.03.2014, was not in pursuance of an abated Assessment within the meaning of 2<sup>nd</sup> Proviso to Section 153A(1) of I.T. Act. In the case of Smt. Archana Saluja earlier return U/s 139(1) of I.T. Act on 31.07.2006 pursuant to which Assessment Order U/s 143(3) of I.T. Act on 28.12.2007. No assessment proceeding was pending on date of search i.e. 12.01.2011. Therefore, the aforesaid Assessment Order dated 14.03.2014, was not in pursuance of an abated assessment within the meaning of 2<sup>nd</sup> Proviso to Section 153A(1) of I.T. Act. In the case of Ankush Saluja, earlier return U/s 139(1) of I.T. Act was filed on 31.07.2006, however, this was not selected for scrutiny as notice U/s 143(2) of I.T. Act was not issued in respect of this return. Statutory time limit

for issue of notice U/s 143(2) of I.T. Act expired on 31.07.2007. Thus, there was no pending assessment on the date of search i.e. 12.01.2011. Therefore, the aforesaid Assessment Order dated 14.03.2004 was also not in respect of any in pursuance of an abated assessment within the meaning of 2<sup>nd</sup> Proviso to Section 153A(1) of I.T. Act.

**(8)** We find that the case of **Kabul Chawla vs. CIT (Supra), Pr. CIT & Ors. vs. Meeta Gutgutia (Supra)** relied upon by Ld. AR for Assessee; and the case of **Smt. Dayawanti Gupta vs. CIT (2016) 390 ITR 496 (Del)** were considered in the case of the **HBN Dairies & Allied Ltd. Vs. ACIT** and in accordance with the majority view of the Members of ITAT Delhi Benches, Delhi, the issue was decided in favour of the Assessee vide order dated 25.04.2018 read with order dated 24.05.2018 in ITA Nos 1393, 1394 & 1395/Del/2013 for Assessment Years 2004-05, 2005-06 & 2006-07 respectively. The relevant portion of the aforesaid order dated 25.04.2018 is reproduced as under:-

*“2. Before proceeding with the matter, it is relevant to note that both the learned Members, apart from differing on the merits of the case, also could not be in unison in making reference u/s 255(4) of the Act. The ld. JM, being the senior Member, proposed the following question for reference to the Third Member: -*

*“Whether, in the absence of recovery of any incriminating material during the course of search against the assessee, when assessments have already completed, authorities below were justified in invoking section 153A of the I.T. Act for the purpose of making additions by disallowing claim of losses and brought forward of losses qua each of assessments under appeals i.e 2004-05, 2005-06 and 2006-07?”*

*3. On the other hand, the ld. AM proposed the following two questions:-*

*“(a) Whether, when we are presented with two precedents of equal strength from higher court(s), and specially when the earlier precedent has already been considered in the later one; harmonious reading of precedents requires that both precedents are treated by us with equal respect; that the*

*distinguishable facts of the two precedents are appreciated; and that the precedent which is closer to facts of the case before us, is preferred by us for our guidance?*

*(b) Whether, additions can be made in assessments u/s 153A of I.T. Act even for those assessment years in respect of which no incriminating material was unearthed during search u/s 132 of I.T. Act even if no assessments or reassessments are pending for those assessment year(s) on the date of search u/s 132 of I.T. Act; provided some incriminating material in the case of the assessee for any assessment year(s) { referred to in clause (b) of section 153A(1) of Income Tax Act} is unearthed as a result of search u/s 132 of I.T. Act whether by way of statement u/s 132(4) of I. T. Act or by way of undisclosed investment, or by way of incriminating documents, or in any other manner?"*

4. I have gone through the relevant material on record and considered the rival submissions in so far as understanding the difference of opinion between the two Members is concerned. In my considered view, the controversy on this issue gets properly reflected through following question: -

*“Whether on the facts and in the circumstances of the case and as per law, the ld. CIT(A) was justified in upholding the additions made by the AO for the years of completed assessments, which were not based on any incriminating material found during the course of search relating to such years and consequently denying the benefit of carry forward and set off of the resultant loss in subsequent year?”*

5. Briefly stated, the facts of the case are that a search and seizure operation u/s 132 of the Act was carried out in HBN group on 20.11.2009. This group is engaged in diverse businesses ranging from dairy development and marketing of dairy products; real estate development; home loan finance and running a broadcast channel, namely, CNEB through various companies. Notice was issued u/s 153A of the Act to the assessee, inter alia, for the three years under consideration. In response, the assessee filed returns of income u/s 139 read with section 153A of the Act on 10.02.2011 declaring Nil income for such years. In the computation of income, the assessee declared loss of Rs.23,05,880/- for the assessment year 2004-05; loss of Rs.23,59,200 for the assessment year 2005-06; and as against some positive business income for the assessment year 2006-07, it claimed set off of the amount of brought forward losses for the assessment years 2003-04, 2004-05 and 2005-06. The Assessing Officer completed assessments on 29.12.2011 determining Nil income for the assessment year 2004-05; Nil income for the assessment year 2005-06; and total income of Rs.52,49,283/- for the assessment year 2006-07. In other words, he did not allow the carry forward of the losses for the assessment years 2003-04, 2004-05 and 2005-06 and as the sequitur, did not permit the set off of such brought forward losses against the positive income for the assessment year 2006-07. The assessee remained unsuccessful before the ld. CIT(A) as well. Aggrieved thereby, it came up before the Tribunal contending that such losses should be allowed to be carried over for set off against the positive income for the assessment year 2006-07. The contention of the assessee for carry forward was based on the premise that no incriminating material was found during the course of search in relation to these assessment years and, hence, the Assessing Officer was not within his power to disallow the loss claimed in

*the returns of income for these years. The ld. AM, who passed the draft order first, noticed that the Assessing Officer disallowed the loss claimed by the assessee for the assessment years 2004-05 and 2005-06 on the ground that claim of various expenses was not verifiable. In the absence of such details furnished before the ld. CIT(A) as well as the Tribunal, he approved the action of the authorities below. He, however, did not approve the view point of the Revenue in not allowing set off of loss for the assessment year 2003-04 against the income for the assessment year 2006-07 and for this limited purpose, remitted the matter to the file of Assessing Officer for fresh adjudication. The ld. JM did not concur with the view canvassed by the ld. AM in not allowing the loss for the assessment years 2004-05 and 2005-06. He opined that since no incriminating material was found during the course of search in respect of expenses claimed as deduction and, hence, the loss so determined was eligible for carry forward to be set off against the income for assessment year 2006-07. That is how, the matter has been placed before me for adjudication as third Member.*

*6. I have heard both the sides and perused the relevant material on record. The short controversy is whether the loss declared by the assessee in its returns u/s 153A of the Act for the assessment years 2004-05 and 2005-06 at Rs.23,05,880/- and Rs.23,59,200/- respectively be carried forward and set off against the positive income for the assessment year 2006-07. The ld. AM has specifically recorded on page 15 of his proposed order that: "though no incriminating material relevant for assessment years 2004-05, 2005-06 and 2006-07 against the assessee, were unearthed during the course of search u/s 132 of the IT Act; but incriminating material relevant for other years referred to in clause (b) of section 153A(1) of the IT Act were indeed unearthed." He considered the judgments of the Hon'ble Delhi High Court in the case of Kabul Chawla vs. CIT (2016) 380 ITR 573 (Delhi) and Smt. Dayawanti through Smt. Sunita Gupta & Anr. VS. CIT & Anr. (2017) 390 ITR 0496 (Delhi) and thus observed on pages 19 and 20 of his proposed order that when two precedents of equal strength from higher courts are available, 'the precedent which is closer to the facts of the case' should be preferred. Ex consequenti, he applied the judgment in the case of Smt. Dayawanti (supra) to hold that : 'even in respect of those assessment years in respect of which no incriminating materials was unearthed during search u/s 132 of the IT Act; and even if no assessments or re-assessments are pending for those assessment year (s) on the date of search u/s 132 of the IT Act; there is no obstacle in making addition u/s 153A of the IT Act provided some incriminating material in the case of the assessee for any assessment year (s) (referred to in clause (b) of section 153A(1) of the Income-tax Act) is unearthed as a result of search u/s 132 of the IT Act whether by statement u/s 132(4) of the IT Act or by way of undisclosed investment or by way of incriminating documents or in any other manner.' This is how, he held that the disallowance of loss claimed by the assessee for the assessment years 2004-05 and 2005-06 on the ground of claim of various expenses made by the assessee, not being fully verifiable, was in order. The ld. JM reiterated the fact that no incriminating material or document or evidence was found during the course of search in relation to such two assessment years and, hence, the loss so claimed for carry forward and set off should be allowed against the income for the A.Y. 2006-07.*

*7. It has been noticed above that search in this case was conducted on 20.11.2009. The assessment years under consideration are 2004-05, 2005-06 and 2006-07. The assessee filed returns for these years originally u/s 139 at the material time. Whereas the return for the assessment year 2004-05 was processed u/s 143(1) of the Act, assessments were completed u/s 143(3) in respect of the assessment years 2005-06 and*

2006-07. The assessee's Profit & Loss Account for the assessment year 2004-05 shows incurring of expenses at Rs.95.21 lac against which loss of Rs.24.30 lac was computed and claimed in the return of income. The return of the assessee was processed u/s 143(1) determining loss at the declared figure. Profit & Loss Account of the assessee for the assessment year 2005-06 shows incurring of expenses at Rs.1.31 crore and the assessee filed return at a loss of Rs.23,59,200/-. After making some disallowance, the Assessing Officer completed assessment u/s 143(3) on 30.11.2007 at a loss of Rs.18.17 lac. In so far as the assessment year 2006-07 is concerned, the assessee filed return and the assessment was completed u/s 143(3) on 02.12.2008 determining Nil income, but charging tax u/s 115JB on book profit of Rs.10,90,440/-. Thus, it is evident that the assessments for the assessment years 2004-05 to 2006-07 stood completed on the date of search on 20.11.2009.

8. At this juncture, it is significant to note that when a search is conducted, there can be two types of assessment years, namely, completed assessments and non-completed or pending assessments. Assessment years having completed assessments mean the years for which either the assessments stood completed by the AO u/s 143(3) or section 144 before the date of search or the years for which the regular assessments were not taken up after the filing of the returns by the assessee and further that the time limit for issuing notice u/s 143(2) stood expired on the date of search.

9. As per the scheme under the Act, a return filed by the assessee is first processed by the A.O. u/s 143(1)(a) of the Act in which total income is computed after making the specified adjustments. As per clause (b), tax and interest, if any, is computed on the basis of the total income computed under clause (a). Clauses (d) and (e) of section 143(1) provide that an Intimation shall be sent to the assessee specifying the sum determined to be payable by, or the amount of refund due to, the assessee and the amount of refund due to the assessee in pursuance of the determination under clause (c) shall be granted to the assessee. Processing of the return u/s 143(1) and the consequential issuing of Intimation is construed as passing of the assessment order except where a notice u/s 143(2) is issued for a scrutiny assessment u/s 143(3) of the Act. In a case, where notice u/s 143(2) is issued, the processing of return u/s 143(1) and the consequential issuance of Intimation does not amount to passing of the assessment order because the assessment order, in such circumstances, is passed after due scrutiny u/s 143(3) of the Act. There can be only one assessment order for one year. The crux of the matter is that where no notice u/s 143(2) is issued within the permissible maximum time, the issuance of Intimation on processing the return u/s 143(1) of the Act, is construed as completion of assessment. However, where such notice is issued, the intimation issued u/s 143(1)(a) loses the character of an assessment order, which in that case, is passed u/s 143(3) after thorough scrutiny. To sum up, an assessment is termed as completed on the passing of an order u/s 143(3) of the Act, but, in a case, where a return has been filed by the assessee, which is processed u/s 143(1), but no further notice u/s 143(2) is issued and the same cannot be issued because of the time limit setting in, the Intimation sent to the assessee u/s 143(1) is also treated as a completed assessment for this purpose.

10. Au contraire, the assessment years having non-completed or pending assessments mean the years for which the assessments were pending on the date of search which are abated in terms of the express provisions of the second proviso to section 153A. This will also embrace the years in respect of which the time limit for issuing notice u/s 143(2) is still available with the AO as on the date of search.

11. Adverting to the extant factual matrix, it is seen that the assessment years under consideration fall in the category of 'completed assessments' and not the 'pending assessments' abating on the date of search. Both the ld. Members have considered the judgment of the Hon'ble jurisdictional High Court in the case of *Kabul Chawla (supra)*. The facts of that case are that a search was carried out u/s 132 on 15.11.2007 on BPTP Ltd., a leading real estate developer operating all over India and some of its group companies including the premises of the assessee, who owned and controlled the group. No assessment proceedings were pending for the assessment years 2002-03, 2005-06 and 2006-07 as on the date of the search. The assessments for such assessment years had already been made u/s 143(1) of the Act. The assessee filed returns for the three assessment years declaring certain income. The assessments were completed u/s 153A for the concerned assessment years making additions, inter alia, on account of low household withdrawals and deemed deduction u/s 2(22)(e) of the Act. It was submitted before the ld. CIT(A) that no evidence was found during the course of search so as to warrant an addition u/s 2(22)(e) of the Act. The ld. CIT(A) held that the additions need not be restricted only to the seized material. The Tribunal concluded that: 'If some incriminating material is found in respect of such assessment years for which the assessment is not pending, then, the total income would be determined by considering the originally determined income plus income emanating from the incriminating material found during the course of search'. That is how, the additions made u/s 2(22)(e), which were not based on any incriminating material found during the course of search, were held to be unsustainable in law and, hence, deleted. The Hon'ble High Court approved the view taken by the Tribunal. It summarized the legal position in para 37 of its judgment as under:-

***“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.”*

12. *It is evident from the above judgment that once a search takes place u/s 132 of the Act, the assessee is obliged to file returns for the six assessment years immediately preceding the previous year relevant to the assessment year in which the search took place. In so far as the completed assessments as on the date of the search are concerned, the same are to be repeated as increased by certain additions based on incriminating material found during the course of search. In other words, if no incriminating material is found during the course of search, then, the amount of total income determined under the earlier completed assessments, is to be adopted in such fresh assessments u/s 153A without making any further addition.*

13. *The Id. AM has preferred the judgment in Dayawanti (supra) over Kabul Chawla (supra) by finding it more closer to the facts of the present case. In the case of Dayawanti (supra), a search and seizure operation was carried out on 22.03.2006. The assessee, along with other family members, surrendered Rs.3.5 crore at the time of search as additional income in respect of 'business carried on outside the books of account' in connection with production and sale of gutka. She further admitted in her statement not to have any source of income or any bank account. She still further admitted to being proprietor only on record and, in fact, Shri Anup Gupta looked after all the operations along with the help of other family members. Notice u/s 153A was issued requiring the assessee to furnish returns. In response, she filed a photo copy of the return earlier filed u/s 139(1) declaring gross profit of Rs.7.30 lac on sales of Rs.69.28 lac, yielding gross profit rate of 10.55%. Since no proper books of account were presented, the Assessing Officer rejected the book version u/s 145 and estimated the sales at Rs.1 crore. He applied GP rate of 20% and determined total income at Rs.45.90 lac as against the declared income of Rs.2.42 lac. The CIT (A) reduced the gross profit rate to be applied at 12%. Some additions were sustained and others were deleted. The Tribunal rejected the plea of the assessee that since no material was recovered during the course of search, finalized assessments for the periods covered by the block years could not be reopened. The assessee relied on the judgment in the case of Kabul Chawla (supra) and argued that since no incriminating material was found, no additions could be made in respect of the*

*completed assessments. The Hon'ble High Court dismissed the appeals on the ground that the additions were not baseless as these were based on the inferences drawn by the Assessing Officer. It further held that if the element of guess work has some reasonable nexus with the statement recorded and documents seized, then, the additions can be sustained.*

*14. It is, thus, seen that whereas the judgment in Kabul Chawla (supra) clearly lays down that in the absence of any incriminating material found during the course of search, no fresh addition can be made in respect of completed assessments, the judgment in the case of Smt. Dayawanti (supra) is peculiar to its facts inasmuch as the addition in that case was based on the assessee's statement made at the time of search admitting : 'additional income in respect of business carried on outside the books of account in connection with production and sale of gutka'. It was not a case in which no incriminating material was found. Rather the assessee's statement given at the time of search confirming the carrying on of business outside the books of account was extrapolated to the earlier years as well.*

*15. Turning to the facts of the instant case, it is seen that the Assessing Officer has not disallowed any specific amount of expenses on account of any incriminating material found at the time of search. It is pertinent to note that the assessee incurred expenses of Rs.95.21 lac for the assessment year 2004-05. What the Assessing Officer has done is to disallow loss of Rs.23.05 lac simply on the ground that the expenses incurred by the assessee were not fully verifiable. It is not even a case of disallowing any particular amount of expense for whatever reason. Thus, it is manifest that only a part of the expenses, representing loss of Rs.23.05 lac, were disallowed and that too, on the ground that complete details in respect of the expenses incurred were not furnished by the assessee during the course of proceedings u/s 153A of the Act. Similar is the position for the assessment year 2005-06 in which the assessee incurred expenses of Rs.1.31 crore and claimed loss of Rs.23.59 lac. The Assessing Officer, in the proceedings u/s 153A, reduced such loss to Rs. Nil, thereby implying that only a part of the expenses to the extent of the amount of loss, was disallowed for non-furnishing of necessary details in support of expenses. The crux of the matter is that only a part of the expenses representing loss for the assessment years 2004-05 and 2005-06 was disallowed and not allowed to be carried forward for set off against the income for assessment year 2006-07 simply on the ground that expenses were not fully verifiable since complete details were not furnished during the course of assessment proceedings.*

*16. Admittedly, assessments for the A.Ys. 2004-05 and 2005-06 stood completed on the date of search. The amount of loss finally determined for the A.Y. 2004-05 in the original assessment was Rs.23,05,880/-. Similarly, the amount of loss finally determined by the AO in the original assessment order passed u/s 143(3) on 30.11.2007 for the assessment year 2005-06 was Rs.18,17,685/-. In the fresh assessments u/s 153A, the Assessing Officer was authorized to repeat the originally assessed income (loss) plus fresh additions, if any, based on the incriminating material found at the time of search. Admittedly, no incriminating material was found in respect of the assessment years under consideration. There is no reference whatsoever to any incriminating material found during the course of search casting shadow of doubt on the genuineness of such expenses. Since these expenses were claimed as deduction in the original returns and the Assessing Officer accepted the loss so declared except for making some modification for the assessment year 2005-*

06, the AO was supposed to restrict his exercise of completing assessments u/s 153A only to the amount of income/loss determined originally. It was not open to him to venture to re-examine the details in respect of expenses in assessment proceedings u/s 153A read with section 143(3) of the Act for the patent reason that, admittedly, no incriminating material in respect of such expenses was found during the course of search.

17. The contention of the ld. DR that there was some incriminating material for subsequent years and the same should be considered to have bearing on the disallowance of loss for the two years under consideration, is incapable of acceptance for more than one reason. Firstly, the existence of an incriminating material for the relevant year is sine qua non for making any disallowance of expenses in respect of the completed assessments. The Hon'ble Supreme Court in CIT VS. Sinhgad Technical Education Society (2017) 397 ITR 344 (SC) has accentuated the relevance of the incriminating material pertaining to the relevant year alone, though in the context of section 153C of the Act. In that case, it has been held that where the incriminating material was found to be pertaining to a particular year, there was no valid satisfaction for the other years. Secondly, it is not even a case in which some incriminating material indicating recording of bogus expenses in the subsequent years was found, which could have reflection on the years in question. The ld. DR has not drawn my attention towards any part of the statement u/s 132(4) of the assessee, which suggests, even remotely, that the assessee was booking bogus expenses in its books of account for the succeeding years, so as to extrapolate the same to the years under consideration. The trump card of the Department's case is the ratio of Dayawanti (supra), which could have been applied only if the Revenue had established the recording of some bogus expenses by the assessee in later years, so as to enable it to draw an adverse inference for the current years. This is absent in the facts and circumstances of the case. Thus, it is vivid that the ratio decidendi in the case of Dayawanti (supra) does not apply to the facts of the case. In the absence of any material, the genuineness of expenses incurred by the assessee, and that too partly to the extent of losses claimed, could not have been disturbed by the Assessing Officer in the assessment u/s 153A of the Act. Be that as it may, it is further relevant to note that the operation of the judgment in the case of Dayawanti (supra) has been stayed by the Hon'ble Supreme Court vide its judgment dated 03.10.2018, a copy of which has been placed on record.

18. Thus, it is apparent that between the two judgments of Kabul Chawla (supra) and Dayawanti (supra), the facts and circumstances of the instant case are fully covered by the ratio in the case of Kabul Chawla (supra), which view has been reiterated by the Hon'ble Delhi High Court in a more recent decision in Principal CIT vs. Meeta Gutgutia (2017) 395 ITR 526 (Del). In view of the foregoing discussion, I agree with the view canvassed by the ld. JM in holding that the amount of determined loss for the assessment years 2004-05 and 2005-06 be allowed to be carried forward for set off against the income for the assessment year 2006-07. The question proposed is, therefore, answered in negative by holding that the ld. CIT(A) was not justified in upholding the additions made by the AO for the years of completed assessments, which were not based on any incriminating material found during the course of search relating to such years and consequently denying the benefit of carry forward and set off of the resultant loss in subsequent year."

**(9)** In the appeals before us, Ld. CIT (DR) failed to establish that the additions made in the case of Assesseees were based on any incriminating material found in the course of search U/s 132 of I.T. Act. On perusal of the Assessment Orders and on further perusal of impugned appellate orders of Ld. CIT(A), it is found that nowhere it is the case of Revenue that the aforesaid additions made in the Assessment Order were based on any incriminating material found in the course of search U/s 132 of I.T. Act. It is also not in dispute that no assessments were pending in the case of any of the three assesseees on the date of search u/s 132 of I.T.Act.

(10) In view of the foregoing, respectfully following the decision of ITAT Delhi Benches, Delhi in the aforesaid case of HBN Dairies & Allied Ltd. Vs. ACIT in ITA Nos. 1393, 1394 & 1395/Del/2013 for Assessment Years 2004-05, 2005-06 & 2006-07 respectively, in which, by majority of the Members of ITAT, the issue was decided in favour of Assessee; and in view of the precedents cited by Ld. AR, such as **CIT vs. Kabul Chawla (Supra)**, **Pr. CIT & Ors. vs. Meeta Gutgutia (Supra)**, **Excel Infotech Ltd. vs. DCIT (Supra)** and **Sanjay Aggarwal vs. DCIT (Supra)**; and further, in view of aforesaid decisions of Co-ordinate Benches of ITAT, Delhi in the other group cases of Saluja Group such as cases of **Mr. Ankush Saluja, M/s Saluja Construction Co. Ltd.** and **Mr. Vinod Saluja** (referred to in Paragraphs 4 and 5 of this Order); we also decide the issue in favour of the three Assesseees; as no case has been made by the Ld. CIT(DR) for us to take any different stand, or to

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interfere with the impugned Orders of the Ld. CIT(A) in the case of any of the three assesseees.

**(11)** In the result, the three Appeals filed by Revenue are dismissed for statistical purposes.

Order pronounced in the open court on 21/12/2018

**Sd/-**  
**(KULDIP SINGH)**  
**JUDICIAL MEMBER**

**Sd/-**  
**(ANADEE NATH MISSHRA)**  
**ACCOUNTANT MEMBER**

Dated : 21/12/2018  
(Bidhan)

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR  
ITAT NEW DELHI

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Date on which the typed draft is placed before the dictating Member	

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Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	