

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "F", MUMBAI**

**BEFORE SHRI RAJESH KUMAR, ACCOUNTANT MEMBER AND
SHRI AMARJIT SINGH, JUDICIAL MEMBER**

**ITA Nos.3458 & 3459/M/2019
Assessment Years: 2013-14 & 2014-15**

Mr. Jagdishkumar Madanlal Gupta, 16-A, Andheri Industrial Estate, Veera Desai Road, Andheri (W), Mumbai – 400 058 PAN: AACPG2753N	Vs.	DCIT, Central Circle-5(1), Room No.1928, Air India Building, Nariman Point, Mumbai - 400021
(Appellant)		(Respondent)

**ITA No.3455/M/2019
Assessment Year: 2012-13**

M/s. J. Kumar Developers Ltd., 16-A, Andheri Industrial Estate, Veera Desai Road, Andheri (W), Mumbai – 400 053 PAN: AACCCJ1856E	Vs.	DCIT, Central Circle-5(1), Room No.1928, Air India Building, Nariman Point, Mumbai - 400021
(Appellant)		(Respondent)

**ITA No.3456/M/2019
Assessment Year: 2013-14**

M/s. J. Kumar Software Systems (I) Pvt. Ltd., 16-A, Andheri Industrial Estate, Veera Desai Road, Andheri (W), Mumbai – 400 058 PAN: AABCJ8239J	Vs.	DCIT, Central Circle-5(1), Room No.1928, Air India Building, Nariman Point, Mumbai - 400021
(Appellant)		(Respondent)

**ITA No.3457/M/2019
Assessment Year: 2013-14**

M/s. J. Kumar Minerals & Mines (India) Pvt. Ltd., 16-A, Andheri Industrial	Vs.	DCIT, Central Circle-5(1), Room No.1928, Air India Building,
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Estate, Veera Desai Road, Andheri (W), Mumbai – 400 053 PAN: AACJ1212A		Nariman Point, Mumbai - 400021
(Appellant)		(Respondent)

ITA No.3465/M/2019
Assessment Year: 2014-15

Mr. Kamal Jagdish Gupta, 16-A, Andheri Industrial Estate, Veera Desai Road, Andheri (W), Mumbai – 400 053 PAN: AAEPG9892N	Vs.	DCIT, Central Circle-5(1), Room No.1928, Air India Building, Nariman Point, Mumbai - 400021
(Appellant)		(Respondent)

ITA No.3463/M/2019
Assessment Year: 2017-18

Mr. Kusum Jagdishkumar Gupta, 16-A, Andheri Industrial Estate, Veera Desai Road, Andheri (W), Mumbai – 400 058 PAN: AAEPG9952H	Vs.	DCIT, Central Circle-5(1), Room No.1928, Air India Building, Nariman Point, Mumbai - 400021
(Appellant)		(Respondent)

Present for:

Assessee by : Dr. K. Shivaram, A.R.
Revenue by : Shri Sunil Deshpande, D.R.

Date of Hearing : 18.06.2021

Date of Pronouncement : 26.07.2021

ORDER

Per Rajesh Kumar, Accountant Member:

The above titled appeals have been preferred by different assessees against the orders even dated 28.03.2019 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as

the CIT(A)] relevant to assessment years 2012-13, 2013-14, 2014-15, & 2017-18.

2. Since the issues involved in all the appeals are same, therefore all these appeals are decided and disposed of together for the sake of brevity and convenience. First of all we shall take ITA No.3458/Mum/2019 for AY 2013-14 and the grounds taken by the appellant are extracted below;

“1. On facts and circumstances of the case and law on the subject the learned Assessing Officer erred in making addition of Rs.2,12,87,885/- treating the unsecured loan as unexplained cash credit under section 68 of the Income Tax Act, 1961 and the learned Commissioner of Income Tax (Appeals) erred in upholding addition of unsecured loan under section 68.

2. On the facts and circumstances of the case and law on the subject, the addition made be deleted.”

The assessee has also raised some additional ground vide letter dated 30th March,2021 which are also extracted below:

“1. The Ld. CIT(A) erred in confirming the addition under section 68 of the Act, ignoring that the original proceedings were complete, therefore in absence of any incriminating evidence, the proceedings under section 153A of the Act stands abated.

2. The Ld. CIT(A) erred in confirming the addition under section 68 of the Act, ignoring that the proceedings were complete under section 143(3) of the Act on 29.02.2016, therefore in absence of any incriminating evidence during the search operation carried out on August 30, 2016 the proceedings under section 153A of the Act stands abated.”

3. We are taking up first the legal and jurisdictional issue raised by the ld. AR by raising additional ground before us. The assessee has challenged the order of ld. CIT(A) upholding the order of AO on the issue that even the addition can be made in the unabated assessment year where there is no incriminating found during the search. This ground was also raised before the ld CIT(A) and was dismissed. Therefore being admitted for

adjudication.

4. The assessee is an individual, and the promoter of J. Kumar Group which is engaged in the business of construction and development of infrastructure projects. The Assessee is also a sole proprietor of M/s Goldline Advertisers and M/s J. Kumar & Co. The assessee filed its return on 28th September, 2013 declaring an income of Rs. 2,79,37,430/-. The assessment was also framed under section 143(3) of the Act vide order dated 29.2.2016. Thereafter a search & seizure action under section 132(1) of the Act was carried out in the case of J. Kumar Group and the residential premises of the assessee on 30.8.2016. Notice under section 153A of the Act dated 24.4.2017 was issued to the assessee and the assessee filed its return on 26.5.2017 declaring a total income of Rs. 4,03,05,460/-. Notice under section 143(2) of the Act was issued on 19.6.2017 and several notices under section 142(1) of the Act were issued from time to time, calling for details/explanation from the assessee qua the money raised by way of unsecured loans. The AO discussed the modus operandi of generating cash and routing the same through the unsecured loans in para 9 of the assessment order. The ld. AO noted that shell companies in Kolkata were indulged in the scam of providing bogus entries in the form of unsecured loans, share capital and share premium without any credibility and creditworthiness. The AO noted that J. Kumar Group of Companies and family members have taken unsecured loans from 11 companies as per details below:

1. Jealous Vincom Pvt. Ltd.
2. Anchita Properties Pvt. Ltd.

3. Hingir Rampur Coal Co. Ltd.
4. Juhi Agencies Pvt. Ltd.
5. Kiran Commodities Pvt. Ltd.
6. Nirjhar Tie Up Pvt. Ltd.
7. Novelty Agencies Pvt. Ltd.
8. Parijat Tie-up Pvt. Ltd.
9. Sai Prasad Estate Venture LLP
10. Sonal Cosmetics Exports Ltd.
11. Long Life Realtors Pvt. Ltd.

The AO further noted that the assessee had received loan of Rs. 3,20,00,000 from M/s. Anchita Properties Pvt. Ltd. (hereinafter referred to as APPL) and discussed the credentials of the said company in para 9.7(i) of the assessment order. The statement of the director of APPL, Mr. Devendra M Rajput was recorded under section 132(4) of the Act on 1.9.2016 who is also account manager in J. Kumar Infraprojects Ltd for more than 18 years. The said statement of the director was retracted vide letter and affidavit dated 25.10.2016. The Ld. AO issued a Notice under section 133(6) of the Act dated 21.3.2018 to APPL. A response to the said notice under section 133(6) of the Act, was received from APPL on 7.5.2018. In compliance to the said notice APPL submitted ledger statement, copy of bank statement, Balance, sheet, Profit & Loss account and details of source of payment for unsecured loan along with bank statement. In response to the show-cause dated 2.4. 2018, the assessee furnished details/evidences to establish the identity, creditworthiness of the creditor and genuineness of the transaction. The Ld. AO observed that, during the relevant year, out of total unsecured loan of Rs. 3,20,00,000/- from APPL, Rs. 1,02,12,115/- were out of matured Fixed Deposits of APPL and

therefore their genuineness was established whereas the balance of Rs. 2,12,87,885/- was not explained and therefore, the addition to the tune of Rs. 2,12,87,885/- was made to the income of the assessee under section 68 of the Act as unexplained cash credit in the assessment framed under section 143(3) r.w.s.153A of the Act dated 21.5.2018.

5. The assessee challenged the jurisdiction of the AO before the Ld. CIT(A) on the ground that the addition made in an unabated assessment year without any incriminating materials is invalid and bad in law however ld CIT(A) upheld the Order of the Ld. CIT(A) by observing and holding as under:-

“4.17. If assessment is to be limited to incriminating material found in search, then AO already had such powers under section 148 to assess income that had escaped assessment and there was no requirement for the Legislature to enact section 153A. There cannot be any interpretation of statute which renders it otiose. The interpretation of section 153A has to be such that it remains relevant and serves a specific purpose which is not embedded in other sections.

4.18 **Without prejudice** to what has been discussed above, in the case of this appellant and J Kumar Group the main basis for mounting the search was the bogus expenses claimed, and entries taken and non-genuine managed LTCG claimed as exempt. This was the main focus of questioning in the statements recorded and investigation carried out. Statements of Shri Devendra Rajput, director of APPL was recorded regarding its transactions with JK Group entities to which huge loans were shown. That the appellant failed to explain the widespread consistent phenomenal gains claimed in itself is a part of the incriminating evidence for denying the exemption claimed in respect of such gains. Further the transaction of loans was a subject of investigation in the search. Conclusion was drawn from search investigations that loans were mere entries taken by the appellant.

4.19. Considering that there has been a search action in this case under section 132, assessment made under section 153A is valid. Further, the investigations carried out in respect of purchases, LTCG and unsecured loans coupled with the statements recorded of the appellant and others in the course of search, the assessment based on verification in line with the same can be made in the assessment under section 153A r.w.s. 143(3). The contentions made regarding validity of assessments and legality of additions made are therefore dismissed. “

6. The learned AR vehemently argued that addition as made by the AO in the assessment framed under section 143(3) r.w.s 153A of the Act dated nil was without jurisdiction as the assessment has not abated on the date of search. The learned AR submitted that in case of unabated assessment on the date of search, the addition has to be made with reference to incriminating material seized during the course of search and if no such material is seized, the addition to the income of the assessee in unabated assessment is beyond the authority and jurisdiction of the AO. The learned AR while drawing our attention to provisions of section 153A of the Act submitted that there where search is conducted under section 132 of the Act, the notice under section 153A of the Act is to be issued in respect of six assessment years falling prior to the date of search. The learned AR submitted that so far as the unabated assessment years are concerned, the AO has very limited jurisdiction so far as the scope of the assessment of the assessee's income is concerned. In other word, the addition can only be made in case of unabated assessment on the basis of incriminating material, if any, seized during the course of search whereas the power of the AO to make addition in the case of abated assessment is co-terminus to the powers of the AO under the normal assessment proceedings under section 143(3) of the Act. The ld AR submitted that the time limit for issue of notice under section 143(2) of the Act has expired on October 01, 2015 and therefore the assessment year under consideration has not abated on the date of search as it had attained finality. The ld AR submitted that no addition can be made in absence of any incriminating documents/documents found in the course of

search proceedings in respect of loan received from Anchita Properties Pvt. Ltd and hence the assessment is bad in law. The ld. AR contended that the Assessing Officer while making assessment under section 153A of the Act could make addition only on basis of some incriminating material unearthed during course of search or requisition of documents. However, no incriminating documents have been found by the Department to suggest an addition or disallowance. The ld AR also submitted that the assessee has been subject to scrutiny assessment for the AY and an order has been passed under section 143(3) of the Act dated February 29, 2016. Since, no assessment would be pending there would be no abatement of any proceedings. Accordingly, the scope of assessment under section 153A of the Act would be restricted to incriminating material found during the course of search. Further, there is no incriminating documents was seized from the assessee or from the lender which is considered as incriminating hence addition is not valid in law. In defense of his arguments and pleas the ld AR relied heavily on the following decisions:

1. All Cargo Global Logistics Ltd. v. DCIT [2012] 18 ITR(T) 106 (Mum) (SB)
2. CIT v. Continental Warehousing Corporation (Nhava Sheva) Ltd. [2015] 58 taxmann.com 78/ (2016) 374 ITR 645 (Bom)(HC)
3. PCIT v. Gahoi Foods (P.) Ltd. [2020] 117 taxmann.com 118 (SC)
4. CIT v. Deepak Kumar Agarwal [2017] 86 taxmann.com 3 (Bom)(HC)
5. CIT v. Gurinder Singh Bawa [2017] 79 taxmann.com 398 (Bom)(HC)

6. M/s. Ideal Appliances Co. Pvt. Ltd. v. DCIT ITA 173-77/M/2015
dated December 31, 2015
7. **PCIT v. Sunshine Import & Export P. Ltd. [2020] 424 ITR 195 (Bom)(HC)**

The ld AR submitted that the addition made under section 68 of the Act has been made without jurisdiction and deserved to be deleted.

7. Without prejudice to above even the alleged statement referred in the assessment order of the assessee or statement Shri Devendra Rajput Sigh dated 01.09.2016 does not refer any alleged cash transactions or alleged loan entries hence the statement of third party cannot be considered as incriminating documents. Without prejudice to above statement of the third party cannot be considered as incriminating and the ld AR relied on the decision of PCIT v. Sunshine Import & Export P. Ltd. [2020] 424 ITR 195 (Bom)(HC).

8. The ld AR finally submitted before the us that the order of ld CIT(A) affirming the order of AO may be set aside and the addition made may kindly be deleted for the want of proper and valid jurisdiction.

9. The ld DR on the other hand relied heavily on the order of ld. CIT(A) and submitted that the purpose of the search to cover six assessment year would be rendered otiose if the pleas of the assessee are accepted. The ld DR argued that if the AO comes across anything incriminating even during the assessment proceedings u/s 153A of the Act then the AO has valid jurisdiction to make the addition. The ld DR therefore

prayed that the ground of the assessee may be dismissed on this jurisdictional issue.

10. After hearing both the parties and perusing the facts on record, we observed that indisputably the assessment in the instant year has not abated on the date of search. Keeping in view the said facts and circumstances, we are of the considered view that addition to the income of the assessee can only be made on the basis of incriminating record found during the course of search. In the present case, there is no such incriminating material and therefore, the AO has no jurisdiction to make addition in the unabated assessment. The case of the assessee is squarely covered by the decisions of Hon'ble Bombay High Court and various other decisions as discussed below:

- a) In CIT v. Continental Warehousing Corporation (Nhava Sheva) Ltd. (2016) 374 ITR 645 (Bom)(HC) wherein it was held that no addition can be made in respect of assessments which have become final if no incriminating material is found during search.
- b) In CIT v. Gurinder Singh Bawa [2017] 79 taxmann.com 398 (Bom) where it was held that where no incriminating material was found during course of the search, entire proceedings under section 153A of the Act were without jurisdiction.
- c) In CIT v. Deepak Kumar Agarwal [2017] 86 taxmann.com 3 (Bom) wherein it was held that Assessment under section 153A of the Act can be made only on basis of incriminating material found in search under section 132

of the Act and only income related to incriminating documents found during search can be considered in assessment

d) The ITAT Special Bench in the case of All Cargo Global Logistics Ltd. v. DCIT [2012] 18 ITR(T) 106 (Mum) (SB) (Page 1-20 of PB - II) (Para 7 at page 16) it was held that in case of assessments which do not abate pursuant to issue of notice under section 153A, in addition to income that has already been assessed, assessment will be made on basis of incriminating material found in course of search but not produced in course of original assessment and undisclosed income or property discovered in course of search.

10.1. We also find merit in the without prejudice plea of the Ld. AR to above even the alleged statement referred in the assessment order of the assessee or statement Shri Devendra Rajput Sigh dated September 01, 2016 does not refer any alleged cash transactions or alleged loan entries hence the statement of third party cannot be considered as incriminating documents. There is merit in the another without prejudice argument of the AR that statement of the third party cannot be considered as incriminating material. The case of the assessee finds support from the decision of the Hon'ble Bombay High Court in the case of PCIT v. Sunshine Import & Export P. Ltd. [2020] 424 ITR 195 (Bom)(HC). In this case the Assessing Officer made additions to income of assessee on account of bogus purchase and sale transactions merely on basis of statement of a director of assessee that assessee had

provided only bill entries and there was no such actual transaction, since assessee discharged onus of proving its transactions of sale and purchase as genuine by furnishing relevant documents and revenue had not found any incriminating evidence that could establish stand of Assessing Officer, impugned addition was unjustified. Without prejudice to the above

11. Since, there is no incriminating material found during the course of search, we therefore respectfully following the ratio laid down by the Hon'ble Bombay High Court in the above decision, set aside the order of the CIT(A) and direct the AO to delete the addition made without jurisdiction. The issue raised in the additional grounds by the assessee on jurisdictional issue is allowed.

12. In the ground no. 1 as raised in the memorandum of appeals is against the confirmation of addition of Rs. 2,12,87,885/- as made by the AO in respect unsecured loans under section 68 of the Act.

13. Even on merits the assessee has a very strong case as the Assessee has proved source as well as source of the source and hence provisions of section 68 of the Act cannot be applied to the facts of the assessee. Besides we note that there is merit in the without prejudice contention of the assessee that when the Assessing officer has accepted the genuineness and creditworthiness in respect of part of the transaction with Anchita Properties Pvt. Ltd., the other part cannot be added as unexplained cash credits. Further no Addition can be made on account of unexplained cash

credit under section 68 of the Income tax Act, 1961 where the source of source has been established. We also note that APPL i.e., the Lender company in response to the Notice under section 133(6) of the Act, has explained the source of all its funds. APPL filed copy of Balance Sheet, Profit & Loss Account, notes of account, Loan confirmation, Bank statement of APPL, Ledger Account, Source of source of loan, ledger account showing source of income, bank statement of the assessee, company master data and affidavit of the director Mr. Nilesh Giri. Neither J. Kumar Group nor directors of the J. Kumar Group holding any shares in APPL. APPL is regularly filing the return and also before Registrar of Companies. The case of the assessee is squarely covered by the following decision in PCIT v. Ami Industries (India) (P.) Ltd. [2020] 424 ITR 219 (Bom) (HC). While dismissing the appeal of the revenue the Court held that, the identity of the investors were not in doubt. The assessee had furnished PAN, copies of the income tax returns of the investors as well as copy of the bank accounts in which the share application money was deposited in order to prove genuineness of the transactions. In so far credit worthiness of the creditors were concerned, the bank accounts of the investors showed that they had funds to make payments for share application money. The assessee was not required to prove source of the source. Nonetheless, the inquiries through the investigation wing of the department at Kolkata proved source of the source The Hon'ble High Court has distinguished the decisions in the case of PCIT v NRA Iron & Steel (2019) 412 ITR 161 (SC). Further, this decision of the apex court is not applicable to the facts of the present case, on the following points:

- a. In the case before the Supreme Court, some of the investor companies were nonexistent. Whereas in the facts of the present case the company has replied to the notices under section 133(6) of the Act.
- b. In the case before the Supreme Court, some of the investor companies did not file their bank statements to prove the source of funds. Whereas in the facts of the present case the lender has filed their bank statements and nothing adverse has been found by the AO.
- c. Thus, in the facts of the present case, as observed by the Supreme Court, assessee has discharged its onus under section 68 of the Act by providing identity of the lenders, genuineness of the transaction and creditworthiness of the lenders whereas AO has not brought on record any evidence on record to disprove the evidence filed by assessee.

14. Further, the assessee has discharged its burden by furnishing documents to establish the identity, creditworthiness of the lender, genuineness of the transaction and source of funds of the lender etc. It is a well settled proposition that with regard to burden of proof *viz.*, the claim for deduction and/or exemption is upon an assessee. However, in matters of addition and disallowance, the same is on Revenue. Subsequently, once the assessee has submitted evidences, the burden on the assessee stood discharged and the onus to disprove lies and shifts to the revenue or on the other side by way of onus of proof. Therefore, in absence of

any evidence, addition made merely on the basis of presumption and assumption cannot be sustained. The case of the assessee finds support from the decision of the Hon'ble Supreme Court in the case of Umacharan Shaw & Bros. v. CIT [1959] 37 ITR 271 (SC) wherein it was held that there was no material on which the Income-tax Officer could come to the conclusion that the firm was not genuine. There are many surmises and conjectures, and the conclusion is the result of suspicion which cannot take the place of proof in these matters. We also find merits in the without prejudice contention of the ld AR that under Section 68 of the Act the assessee has no onus to explain the source of source as the 1st *Proviso* to section 68 of the Act was introduced via the Finance Act, 2012, w.e.f. 1st April 1, 2013. The provisions are applicable where the sum so credited consists of share application money, share capital, share premium. The impugned addition is made on account of not proving source of source of the alleged bogus loan entries. Therefore, the provision doesn't apply in the case of the assessee. Hence, the assessee only has to prove the source of the funds and not the "source of source".

15. The decisions relied by the Ld. CIT(A) are distinguishable on facts. In the case of M/s Synergy Finlease Pvt. Ltd. ITA 4778/Del/2013 dated March 08, 2019, the decision of the Hon'ble Supreme Court in the case of PCIT v NRA Iron & Steel (supra) has been followed which has been distinguished above. In the case of CIT v. Anil Kumar Bhatia 352 ITR 493 (Del) (HC), evidences were found during search. Therefore, the same doesn't

factually apply. In the case of of Zuari Estate Development and Investment Co. (P.) Ltd. v. Dy. CIT (2015) 373 ITR 661 (SC) where it was held that there being no assessment under section 143(1)(a), question of change of opinion, does not arise and, reassessment can be made. Thus the same pertains to reassessment and not search cases. Besides , the issue debated is on “reasons to believe”., Therefore, the case is not applicable. Similar is the position with regards to ACIT v. Rajesh Jhaveri Stock Brokers (P.) Ltd. 161 Taxman 316 (SC) followed in Zuari Estate Development and Investment Co. (P.) Ltd. (Supra).

16. In view of the facts and decisions cited above, we hold that the addition has to be deleted even on merits.

17. The appeal of the assessee is allowed.

ITA No.3459/M/2019 A.Y 2014-15, ITA No.3455/M/2019 A.Y 2012-13, ITA No.3456/M/2019 AY 2013-14, ITA No.3457/M/2019 AY 2013-14, ITA No.3465/M/2019 AY 2014-15 & ITA No.3463/M/2019 A.Y 2017-18

18. Since the issues involved in all the above appeals ,except ITA No.3463/M/2019 A.Y. 2017-18 which is on merits only, are identical to the ones as decided above by us in ITA No.3458/M/2019 A.Y. 2013-14. Therefore our findings in ITA No.3458/M/2019 A.Y. 2013-14, would, mutatis mutandis, apply to these appeals as well. In ITA No.3463/M/2019 A.Y. 2017-18 the only issue is on merit and is identical to one as involved in ITA No.3458/M/2019 A.Y. 2013-14 and therefore covered by our decision on merit in ITA No.3458/M/2019 A.Y. 2013-14 and accordingly apply to this appeal. Accordingly all the appeals are allowed.

19. In the result, all the appeals of the assessee are allowed.

Order pronounced in the open court on 26.07.2021.

**Sd/-
(Amarjit Singh)
JUDICIAL MEMBER**

**Sd/-
(Rajesh Kumar)
ACCOUNTANT MEMBER**

Mumbai, Dated: 26.07.2021.

* Kishore, Sr. P.S.

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

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.