

**IN THE INCOME TAX APPELLATE TRIBUNAL GUWAHATI BENCH,
“VIRTUAL HEARING” AT KOLKATA**

[Before Shri P.M. Jagtap, Hon’ble V.P (KZ) & Shri A. T. Varkey, JM]

**I.T.A. No.21/Gau/2021
Assessment Year: 2011-12**

ACIT, Circle-2, Guwahati	Vs.	Fortune Vanijya Private Limited
		S.J. Road, Athgaon, Guwahati-781001. [PAN:AABCF0295Q]
Appellant		Respondent

**CO No.1/Gau/2021
(In I.T.A. No.21/Gau/2021)
Assessment Year: 2011-12**

Fortune Vanijya Private Limited	Vs.	ACIT, Circle-2, Guwahati
S.J. Road Athgaon, Guwahati-781001. [PAN:AABCF0295Q]		
Cross-Objector		Respondent

Date of Hearing	20.10.2021
Date of Pronouncement	10.12.2021
For the Revenue	Shri Nongothung Jungio, Addl. CIT, Sr. DR
For the Assessee	Shri Akkal Dudhewala, AR

ORDER

Per Shri A.T.Varkey, JM

This appeal preferred by the Revenue and the Cross Objection preferred by the assessee is against the order of the Ld. Commissioner of Income-tax (Appeals)-2, Guwahati (hereinafter referred to as the “CIT(A)”) dated 18-09-2020 for AY2011-12.

2. Briefly stated, the facts of the present case are that, search u/s 132 of the Income Tax Act, 1961 (hereinafter referred to as the “Act”) was conducted against the

‘Sagar’ Group on 22-12-2017 [i.e., Assessment Year 2018-19, herein after referred shortly as AY 2018-19]. From the copies of panchnamas available on record, it is noted that the assessee was not the ‘*searched person*’. The AO however initially issued notices u/s 153A of the Act dated 27-09-2019 for AY 2012-13 to AY 2017-18 assuming that the assessee was searched. Thereafter, he also issued notices u/s 142(1) of the Act dated 11-11-2019 calling for several details/information. Later on, the AO realized the mistake that the assessee was not the ‘*searched person*’. Thereafter the AO vide order sheet noting dated 05-12-2019, observed that a bunch of loose sheets comprising of 90 pages was seized from the premises of the Sagar Group, bearing identification mark SST-01. According to him, Pages 61 to 69 of SST-01 pertained to the assessee, which comprised of journal ledger and bank ledger of the assessee for the period 01-04-2010 to 04-07-2011. The AO was of the view that the said document seized from the office premises of M/s Sagar Steels had a bearing on the determination of total income of the assessee for seven (7th) assessment years prior to the date of search [*however according to assessee, it is the ninth (9th) AY as per law which will be discussed (infra)*]. The AO accordingly issued notices u/s 153C of the Act for six assessment years i.e. AYs 2012-13 to 2017-18 and for the seventh AY i.e., *relevant assessment year under consideration i.e., AY 2011-12*. The assessee filed return of income in response to the notice u/s 153C of the Act for AY 2011-12 on 25-12-2019. The assessee also simultaneously filed objections challenging the validity of notice issued u/s 153C of the Act for AY 2011-12. According to the assessee, the AY 2011-12 was beyond the normal period of six assessment years and objected to reopening of the seventh AY in terms of the fourth proviso to Section 153A of the Act, and requested the AO to provide the details of the ‘*unexplained asset*’ found in the course of search, based on which he chose to initiate proceedings u/s 153C for AY 2011-12. In the course of assessment, the AO required the assessee to explain as to why the proceeds of Rs.9,63,00,000/- received upon sale of investment holdings should not be added as unexplained cash credit u/s 68 of the Act. In response, the assessee furnished explanations as to why no addition was warranted and inter alia contended that the assessee had shown this sale transaction in its regular books and so by no stretch of imagination the said transaction and the receipt from it, can be

termed undisclosed sales/receipt which has escaped assessment. The AO however did not agree with the contentions put forth by the appellant. He alleged that the assessee had brought back its undisclosed monies in the guise of sale of investments and thereafter transferred the proceeds to its other group entities, namely M/s Bajrangbali Ispat Pvt Ltd and M/s Sagar Hardware & Steel Pvt Ltd. Even though the AO acknowledged that the entire arrangement/transaction was done through proper banking channels and that all formalities of ROC were fulfilled, but according to him these facts alone did not make the arrangement genuine. The AO thereafter referred to the purported statement given by Shri Hemant Kumar Agarwal, key person of Sagar Group, u/s 132(4) of the Act wherein he stated that he had acquired the assessee company to route his undisclosed monies. The AO therefore concluded that he was not satisfied with the explanations provided by the assessee regarding the proceeds of Rs.9,63,00,000/- received upon sale of investments and thus added the same by way of unexplained cash credit u/s 68 of the Act. Being aggrieved by the order of the AO, the assessee preferred an appeal before the Ld. CIT(A). During the appellate proceedings, the Ld. CIT(A) called for the assessment folder of the assessee and granted relief to the assessee on the following grounds viz., (a) the satisfaction note was recorded on factually perverse and incorrect facts and for that reason the proceedings initiated u/s 153C of the Act was bad in law and thus the consequent order passed was void so it was quashed, (b) the AO had initially issued notices u/s 153A of the Act and thereafter switched over to proceedings u/s 153C of the Act without consigning (*sic*) the earlier proceedings and therefore according to him, the assessments which were framed u/s 153C based on the returns filed u/s 153A of the Act were a nullity and (c) the AO had not issued the mandatory notice u/s 143(2) of the Act after the assessee had filed the return of income and therefore non-issuance of such notice vitiated the assessment for AY 2011-12.

3. Being aggrieved by the order of Ld. CIT(A), the Revenue is now in appeal before this Tribunal. However, according to Ld. AR Shri Dudhwewala, the assessee had also challenged the legal validity of proceedings initiated under section 153C of the Act for AY 2011-12 on other grounds as well and also the merits of the addition, which was

not adjudicated by the Ld. CIT(A), for which he has filed the Cross Objections. Shri Dudhwewala submitted that the legal issue raised in the CO, if found valid, goes to the root of the matter itself, and therefore pleaded that the CO filed by the assessee may be adjudicated first. Per contra, the Ld. Addl. CIT, DR Shri Nonguthung Jungio does not have any objection to the aforesaid plea of the Ld. AR. In our view as well, the legal issue raised by the assessee challenging the jurisdiction of the AO to reopen the assessment, goes to the root of the matter, and therefore we deem it fit to first adjudicate the same.

4. The first legal challenge of the assessee in the Cross Objection is against the usurpation of jurisdiction u/s 153C of the Act by the AO without first satisfying the essential condition precedent in the fourth proviso to Section 153A read with Explanation 2 of the Act. Referring to the fourth proviso to Section 153A of the Act, the Ld. AR Shri Dudhwewala pointed out that the notice for re-assessment of AY 2011-12 which was beyond the period of six assessment years preceding the searched AY, could have been issued only where the AO had in his possession any incriminating evidence which revealed that *income represented in the form of asset valued at Rs. 50 Lakhs or more* had escaped assessment. He pointed out that the term '*asset*' was defined in Explanation (2) to include, (a) immovable property being land or building or both, (b) shares & securities, (c) loans & advances and (d) deposits in bank account. According to the Ld. AR, therefore, the AO could not have usurped jurisdiction u/s 153A of the Act without first having in his possession the undisclosed/unaccounted asset qua the assessee qua AY 2011-12 in terms of the fourth proviso to Section 153A of the Act, which is the jurisdictional fact. According to Shri Dudhwewala, without the jurisdictional fact as discussed in his possession, the AO could not have assumed jurisdiction to assess/reassess the ninth year preceding the searched AY. And that the jurisdictional fact is sine qua non for valid assumption of jurisdiction to issue notice for AY 2011-12. Shri Dudhwewala pointed out that despite specific request, the AO never provided the details of the '*asset*' which had purportedly escaped assessment of assessee for AY 2011-12 and so according to Ld AR, the AO could not have issued notice u/s

153C of the Act for the relevant Assessment Year 2011-12, without valid assumption of jurisdiction. Further according to him, the Pages 61 to 69 of SST-01 found and seized from the premises of M/s Sagar Steels did not reveal any such 'asset' which had escaped assessment. Shri Dudhwewala contended that the scope of fourth proviso to Section 153A of the Act was restricted in the sense that the assessment for four years beyond the six assessment years could be reopened only where any income represented in form of 'asset' had escaped assessment. Meaning thereby, only if any unexplained or undisclosed asset is found in the course of search, which can be added or assessed u/s 69 or 69A or 69B of the Act, that the AO can validly initiate proceedings u/s 153C for such relevant assessment year. According to Shri Dudhwewala, when the Parliament has specified the jurisdictional fact for invoking jurisdiction u/s 153A/C of the Act for AY 2011-12 viz., the AO ought to have in his possession undisclosed assets of assessee qua the AY, then this jurisdiction u/s 153A/C cannot be invoked with the aid of any material which reveal unexplained expenditure or unexplained cash credits, even if found during search. Shri Dudhwewala submitted that it was not the AO's case that the bank account held by the assessee was unexplained or undisclosed, so as to attract the rigors of the fourth proviso to Section 153A of the Act. He submitted that, the AO had only disputed the genuineness of the proceeds received in the disclosed bank account and added it by way of unexplained cash credit u/s 68 of the Act, which according to him did not constitute income represented in the form of 'asset' escaping assessment, in terms of fourth proviso to Section 153A of the Act. Further according to Shri Dudhwewala, cash credits were not in the nature of 'asset' as defined in Explanation 2 to the fourth proviso to Section 153A of the Act. For the aforesaid reasons, the Ld. AR contended that the notice issued u/s 153C of the Act in terms of fourth proviso to Section 153A of the Act and the consequent order framed u/s 153C/143(3) was bad for want of jurisdiction and therefore he pleads that the assessment order framed by AO is null in the eyes of law.

5. The next legal challenge raised by the assessee was that the AO had invalidly usurped jurisdiction u/s 153C of the Act without satisfying the mandatory condition

precedent prescribed under Section 153C of the Act. The relevant condition precedent in Section 153C of the Act is as under:

*“153C. (1) Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, **where the Assessing Officer is satisfied that,—***
(a) any money, bullion, jewellery or other valuable article or thing, seized or requisitioned, belongs to; or
*(b) **any books of account or documents, seized or requisitioned, pertains or pertain to, or any information contained therein, relates to,***

*a person other than the person referred to in section 153A, then, **the books of account or documents or assets, seized or requisitioned shall be handed over to the Assessing Officer having jurisdiction over such other person and that Assessing Officer shall proceed against each such other person and issue notice and assess or reassess the income of the other person in accordance with the provisions of section 153A, if, that Assessing Officer is satisfied that the books of account or documents or assets seized or requisitioned have a bearing on the determination of the total income of such other person for six assessment years immediately preceding the assessment year relevant to the previous year in which search is conducted or requisition is made and for the relevant assessment year or years referred to in sub-section (1) of section 153A.”(emphasis supplied)***

6. Regarding the second legal challenge according to Shri Dudhwewala, it is not the case of the AO that the assessee’s case fell under clause (a) of Section 153C(1) of the Act in as much as there was no money, bullion or jewellery or any other valuable article or thing found in the course of search at Sagar Group which ‘belonged to’ the assessee. Inviting our attention to the satisfaction note, he submitted that the AO had tried to make out a case under Section 153C(1)(b) of the Act by stating that Pages 61 to 69 of SST-01 found and seized from the premises of M/s Sagar Steels *pertained* to the assessee and which had a bearing on the total income of the assessee. He further pointed out that the assessment for AY 2011-12 did not abate [*since it was not pending on the date of search*] and therefore the AO (*subject to validly assuming jurisdiction*) could have only made such additions in this unabated assessment which were based on any incriminating material or document found in the course of search. Taking us through the contents of these documents, which were placed at Pages 98 to 109 of the paper-book, the Ld. AR showed us that these documents comprised of bank ledger and journal ledger printed from the Tally System in which the assessee maintained its regular books of accounts and urged that none of the entries or contents therein were *incriminating* in nature, based on which the AO could have validity initiated proceedings u/s 153C of the

Act or for that matter made addition in the unabated assessment for AY 2011-12. According to him therefore, not only had the condition precedent in Section 153C of the Act not been met by the AO, but even the addition made in the unabated assessment of the relevant AY 2011-12 was not supported/corroborated/backed-up by any incriminating material and he thus urged that both the usurpation of jurisdiction u/s 153C of the Act and the additions made in the order dated 31-12-2019 was invalid and deserves to be quashed.

7. The third legal challenge raised by the assessee is against the validity of the assessment framed u/s 153C of the Act was without valid approval taken by the AO from the Ld. JCIT/Addl.CIT prior to passing of the impugned order u/s 153D of the Act and therefore it rendered the impugned order dated 31-12-2019 to be a nullity.

8. Lastly, it was contended that the satisfaction note dated 05-12-2019 was recorded by the AO in the capacity of the AO of the 'other person' and not as the AO of the 'searched person'. Inviting our attention to the CBDT Circular No. 24/2015 dated 31-12-2015, he submitted that the Board accepting the law laid down by the Hon'ble Supreme Court in the case of Calcutta Knitwears (43 taxmann.com 446) had specifically clarified that even if the AO of the searched person and the other person is one and the same, the AO of the searched person has to record the satisfaction required u/s 153C of the Act, prior to handing over of the books of accounts or documents. Shri Dudhwewala took us through the various facets of the contents of the satisfaction note dated 05-12-2019 and contended that the same was recorded by the AO by donning the hat of the AO of the 'other person' and not that of the 'searched person'. Relying on the decisions rendered by the coordinate Benches of the Tribunal in the cases of Super Malls Pvt Ltd Vs DCIT (88 taxmann.com 273) and Skylark Build vs ACIT (97 taxmann.com 682), he submitted that since the AO of assessee when in the capacity of AO of M/s Sagar Steels did not record the satisfaction which was essential condition precedent u/s 153C of the Act, the assessment framed consequent thereto was *ab inito* void.

9. Per contra, the Ld. Addl. CIT DR Shri Nongothung Jungio contended that there was no requirement in law for the AO to have pointed out the 'asset' to the assessee for which the *relevant assessment year 2011-12* was being re-assessed u/s 153C read with fourth proviso to Section 153A of the Act. According to him, any item of income escaping assessment unearthed in the course of search in relation to 7th-10th AY was amenable to the fourth proviso to Section 153A of the Act. He further contended that the Pages 61 to 69 of SST-01 revealed that the assessee had sold shares during the year to several bodies corporate, which according to him was not genuine, and therefore he urged that this material had a bearing on determination of total income of the assessee and thus, the AO had validly recorded satisfaction u/s 153C(1)(b) of the Act and made addition in the unabated assessment for AY 2011-12. He further submitted that, since the AO of the assessee and the AO of the searched person was the same, one satisfaction note dated 05-12-2019 was sufficient compliance with the CBDT Circular No. 24/2015. He thus contended that none of the legal issues raised by the assessee hold any ground and therefore deserves to be rejected.

10. We have heard both the parties and perused the material available on record. We are inclined to first adjudicate the legal issues raised by the assessee if found valid then it goes to the root of the matter [since it challenges the jurisdiction exercised by the AO u/s 153C of the Act]. In order to adjudicate the same, it would first be relevant to set out the background facts in brief.

11. The assessee is a private limited company which had filed the return of income for AY 2011-12 declaring total income of Rs.360/-. The case of the assessee was not selected for scrutiny and the time limit for issuance of notice u/s 143(2) of the Act expired on 30-09-2012. Later the case of the assessee was however reopened by issue of notice u/s 148 of the Act dated 23-03-2018 on the premise that the AO was in receipt of information that income to the tune of Rs.40,00,000/- had escaped assessment. The AO after reopening, also issued notices u/s 143(2) & 142(1) of the Act. Based on the details

submitted by the assessee, the AO noted that the assessee had received payments during FY 2010-11 (AY 2011-12) on account of sale of investments, which was test checked and verified by him. The AO accordingly completed the assessment u/s 147/143(3) on 24-12-2018 assessing the total income at the same sum as returned by the assessee. The relevant re-assessment order is found placed at Pages 21 to 24 of paper book. Meanwhile, the search had been conducted upon the Sagar Group (*searched person*) on 22-12-2017. The satisfaction note was however drawn out by the AO satisfying himself that the assets/documents found in the course of search belongs/pertains to "*the other person*" (third party i.e. the assessee in this case) only on 05-12-2019. Hence, by virtue of first proviso to section 153C of the Act, this date (05-12-2019) had to be reckoned as the date of search for the purpose of assessment u/s 153C of the Act, for determining the total income for six assessment years preceding the **AY 2020-21**. The satisfaction note recorded by the AO on 05-12-2019 is extracted below:

“Satisfaction recorded u/s. 153C of the Income Tax Act, 1961

A search operation u/s. 132 of the Income Tax Act, 1961, was conducted on 22.12.2017 at the business premise of M/s. Sagar Steels at S. J. Road, Athgaon, Guwahati. In the course of search a bunch of loose sheets were seized, having put identification mark SST-01, containing pages 1 to 90. Examination of pages 61 to 69 reveal that they are journal ledger and bank leger of M/s. Fortune Vanijya Pvt. Ltd. For the period 01.04.2010 to 04.07.2011. Further examination of the ledgers revealed that during the FY 2010-11, M/s. Fortune Vanijya Pvt. Ltd. had liquidated its investments in shares and converted it into cash held with bank. Shri Hemant Agarwal, in his statement recorded u/s. 132(4) of the Act had accepted that he had acquired the shares of M/s. Fortune Vanijya Pvt. Ltd. and is one of the Directors of the company.

In view of the observation made above, I am satisfied that the pages 61 to 69 of the bunch of loose sheets having identification mark SST-01 pertain to and the information contained therein relates to M/s. Fortune Vanijya Pvt. Ltd. AABCF0295Q. I am also satisfied that such documents seized from the office premise of M/s. Sagar Steels on 22.12.2017 have a bearing on the determination of total income of M/s. Fortune Vanijya Pvt. Ltd. for seven assessment years immediately preceding the assessment year relevant to the previous year in which search was conducted, and for the relevant assessment year 2011-12 within the meaning of section 153C of the Income Tax Act, 1961.”

12. Ordinarily, having regard to the date of search i.e. 05-12-2019, the AO was within his jurisdiction to issue notices u/s 153C of the Act in respect of only six (6)

assessment years preceding the date of search, in this case reckoned from 05-12-2019 (AY 2020-21). In terms thereof, the AO was permitted to issue notices u/s 153C of the Act only for the AYs 2014-15 to 2019-20. The relevant year in question is however AY 2011-12, which is the ninth (9th) assessment year preceding the date of search. The AO however in his satisfaction note has wrongly mentioned AY 2011-12 to be the seventh assessment year. Irrespective of this mistake, the question before us is whether the AO could have ordinarily issued notice u/s 153C of the Act for AY 2011-12 which was beyond the period of six assessment years, without first satisfying the essential condition precedent set out in the fourth proviso of Section 153A of the Act. Hence, to adjudicate this legal issue, we have to go through the fourth proviso of Section 153A of the Act which was inserted by the Finance Act, 2017 with effect from 01.04.2017, enabling an Assessing Officer of a searched person to issue notices u/s 153A of the Act for '*relevant assessment year or years*', in terms of Explanation 1 of the fourth proviso to Section 153A of the Act i.e. assessment years beyond the six assessment years till tenth assessment year preceding the searched assessment year (i.e. 7th to 10th AY's preceding the searched AY), provided the AO satisfies the essential conditions specified therein. The relevant parts of Section 153A of the Act i.e. fourth proviso to Section 153A of the Act, which has a bearing on the controversy in hand is being reproduced below:

“Provided also that no notice for assessment or reassessment shall be issued by the Assessing Officer for the relevant assessment year or years unless—

(a) the Assessing Officer has in his possession books of account or other documents or evidence which reveal that the income, represented in the form of asset, which has escaped assessment amounts to or is likely to amount to fifty lakh rupees or more in the relevant assessment year or in aggregate in the relevant assessment years;

(b) the income referred to in clause (a) or part thereof has escaped assessment for such year or years; and

(c) the search under section 132 is initiated or requisition under section 132A is made on or after the 1st day of April, 2017.”

Explanation 1.- For the purpose of this sub-section, the expression '*relevant assessment years*' shall mean an assessment year preceding the assessment year relevant to the

previous year in which search is conducted or requisition is made which falls beyond six assessment years but not later than ten assessment years from the end of the assessment year relevant to the previous year in which search is conducted or requisition is made.

Explanation 2. – For that purposes of the fourth proviso, ‘asset’ shall include immovable property being land or building or both, shares and securities, loans and advances, deposits in bank account.

13. From a reading of the aforesaid fourth proviso to Section 153A of the Act, it can be seen that the expression used by the Parliament, while enlarging the power of the AO to extend the jurisdiction u/s. 153A/153C of the Act from seventh to tenth AY is, first of all prohibiting the AO to issue the notice u/s. 153A/153C of the Act, unless the condition precedent therein is satisfied. The expression used is “*no notice for assessment or reassessment shall be issued by the AO for the relevant AY/AY’s*”; and the relevant AY/AY’s has been explained by the aid of Explanation-1 appended to it (7th-10th AY’s preceding the searched year). Therefore, it is noteworthy that the fourth proviso to Section 153A of the Act bars the AO from issuing notice u/s. 153A/153C of the Act for the assessment or reassessment of the 7th – 10th AY’s, unless he has in his possession evidence/material which revealed that income represented in the form of *asset* valued Rs. 50 lakhs or more has escaped assessment. So, the AO, in order to assume jurisdiction for the extended period (i.e. 7th to 10th AY preceding the searched year) should have in his possession income represented in the form of ‘asset’ valued Rs. 50 Lakhs or more which has escaped assessment, which ‘fact’ according to Ld. A.R. Shri Dudhwewala is the ‘jurisdictional fact’, which if present/or in possession of AO will only enable the AO to assume jurisdiction u/s. 153A/153C of the Act for these extended AYs. According to Shri Dudhwewala therefore, the *jurisdictional fact* in this case for AY 2011-12 (9th AY preceding to searched year) is the existence of fact relating to the ‘undisclosed asset’ valued Rs.50 lakh or more that has been discovered in the search qua the assessee qua the AY in question i.e. AY 2011-12. According to him, not only when the AO issued notice u/s 153C for AY 2011-12, did he not have in his possession this essential *jurisdictional fact* but even when he completed the assessment, there was no

addition in respect of any 'undisclosed asset', rather the addition was in respect of purported un-explained credit u/s 68 of the Act, which according to him, lends credence to his argument that the *jurisdictional fact* was indeed absent and hence, the action of AO is bad in law for want of jurisdiction.

14. So, first let us examine whether this legal contention of Shri Dudhwewala that existence of the undisclosed asset valued Rs. 50 lakh or more discovered during search qua the assessee qua AY 2011-12 is the jurisdictional fact or not; and if it is the jurisdictional fact, then the next question is whether the AO was in possession of this jurisdictional fact prior to issuance of notice u/s. 153C for AY 2011-12. Since determination of this legal issue in favour of assessee will go to the root of the very jurisdiction of AO to even issue notice in this case for AY 2011-12 u/s 153A/C of the Act, let us first examine the same. For this, first of all we have to understand, what is *jurisdictional fact*? For that, let us look at the ruling of the Hon'ble Supreme Court in the case of **Arun Kumar &Ors. Vs Union of India &Ors. 2006 (12) SC 121** wherein it was held/explained as to what is jurisdictional fact. The Hon'ble Supreme Court explained that, a '*jurisdictional fact*' is a fact which must exist, before a Court, Tribunal or an authority assumes jurisdiction over a particular matter. A jurisdictional fact is one, on whose existence or non-existence, depends the jurisdiction of a court, a Tribunal, or an authority. It is the fact upon which an administrative agency's power to act depends. If the jurisdictional fact does not exist, the court, authority or officer cannot act. If a court or authority wrongly assumes the existence of such fact, the order can be questioned by a writ of certiorari. The underlying principle is that, by erroneously assuming the existence of such jurisdictional fact, no authority can confer upon itself jurisdiction, which it otherwise does not possess. The Hon'ble Supreme Court further stated that if the statute prescribes the existence of a fact necessary for exercise of authority/jurisdiction, then the existence of the 'jurisdictional fact' becomes *sine qua non* for the exercise of power. If the 'jurisdictional fact' exists, the authority can proceed with the case and take an

appropriate decision in accordance with law. Once an authority has jurisdiction in the matter on existence of 'jurisdictional fact', it can decide the 'fact in issue' or 'adjudicatory fact'. A wrong decision on 'fact in issue' or on 'adjudicatory fact' would not make the decision of the authority without jurisdiction or vulnerable provided essential or fundamental fact as to existence of jurisdiction is present.

15. In the case of **Raja Anand Brahma Shah v. State of U.P. &Ors., AIR 1967 SC 1081 : (1967) 1 SCR 362**, the Hon'ble Supreme Court had an occasion to look into the jurisdiction of the District Collector to acquire land under sub-section (1) of Section 17 of the Land Acquisition Act, 1894 which enabled the State Government to empower the District Collector to take possession of 'any waste or arable land' needed for public purpose even in absence of award. The possession of the land belonged to the appellant had been taken away in the purported exercise of power under Section 17(1) of the Act. The appellant objected against the action inter alia contending that the land was mainly used for ploughing and for raising crops and was not 'waste land', unfit for cultivation or habitation. It was urged that since the jurisdiction of the authority depended upon a preliminary finding of fact that the land was 'waste land', the High Court was entitled in a proceeding for a certiorari to determine whether or not the finding of fact by the District Collector, that land was waste land, was correct or not. It is noted that the Hon'ble Supreme Court while upholding the contention and declaring the direction of the State Government to District Collector as without jurisdictions held that the District Collector had jurisdiction to acquire only if the jurisdictional fact existed i.e. if the land was waste land and if that fact is incorrect, then the District Collector does not have the jurisdiction to acquire the land. The Hon'ble Supreme Court ruled as under;

"In our opinion, the condition imposed by s. 17(1) is a condition upon which the jurisdiction of the State Government depends and it is obvious that by wrongly deciding the question as to the character of the land the State Government cannot give itself jurisdiction to give a direction to the Collector to take possession of the land under s. 17(1) of the Act. It is well-established that where

the jurisdiction of an administrative authority depends upon a preliminary finding of fact the High Court is entitled, in a proceeding of writ of certiorari to determine, upon its independent judgment, whether or not that finding of fact is correct".

16. In **State of M.P. &Ors. v. D.K. Jadav, AIR 1968 SC 1186 : (1968) 2 SCR 823**, the relevant statute abolished all jagirs including lands, forests, trees, tanks, wells etc., and vested them in the State. It, however, stated that all tanks, wells and buildings on 'occupied land' were excluded from the provisions of the statute. The Hon'ble Supreme Court held that the question whether the tanks, wells etc., were on 'occupied land' or on 'unoccupied land' was a jurisdictional fact and on ascertainment of that fact, the jurisdiction of the authority would depend. For doing so, the Hon'ble Apex Court relied upon a decision in *White & Collins v. Minister of Health (1939) 2 KB 838 : 108 LJ KB 768*, wherein a question debated was whether the court had jurisdiction to review the finding of administrative authority on a question of fact. The relevant Act enabled the local authority to acquire land compulsorily for housing of working classes. But it was expressly provided that no land could be acquired which at the date of compulsory purchase formed part of park, garden or pleasure-ground. An order of compulsory purchase was made which was challenged by the owner contending that the land was part of park. The Minister directed public enquiry and on the basis of the report submitted, confirmed the order. Interfering with the finding of the Minister and setting aside the order, the Court of Appeal stated; *"The first and the most important matter to bear in mind is that the jurisdiction to make the order is dependent on a finding of fact; for, unless the land can be held not to be part of a park or not to be required for amenity or convenience, there is no jurisdiction in the borough council to make, or in the Minister to confirm, the order. In such a case it seems almost self-evident that the Court which has to consider whether there is jurisdiction to make or confirm the order must be entitled to review the vital finding on which the existence of the jurisdiction relied upon depends. If this*

were not so, the right to apply to the Court would be illusory."[See also *Rex v. Shoredich Assessment Committee*; (1910) 2 KB 859 : 80 LJ KB 185].

17. A question under the Income Tax Act, 1922 arose in **Raza Textiles Ltd. v. Income Tax Officer, Rampur, (1973) 1 SCC 633 : AIR 1973 SC 1362**. In that case, the ITO directed X to pay certain amount of tax rejecting the contention of X that it was not a non-resident firm. The Tribunal confirmed the order. A single Judge of the High Court of Allahabad held X as non-resident firm and not liable to deduct tax at source. The Division Bench, however, set aside the order observing that "ITO had jurisdiction to decide the question either way. It cannot be said that the Officer assumed jurisdiction by a wrong decision on this question of residence". X approached the Hon'ble Supreme Court. Allowing the appeal and setting aside the order of the Division Bench of the Hon'ble High Court, the Hon'ble Apex Court held as under:

"The Appellate Bench appears to have been under the impression that the Income-tax Officer was the sole judge of the fact whether the firm in question was resident or non-resident. This conclusion, in our opinion, is wholly wrong. No authority, much less a quasi-judicial authority, can confer jurisdiction on itself by deciding a jurisdictional fact wrongly. The question whether the jurisdictional fact has been rightly decided or not is a question that is open for examination by the High Court in an application for a writ of certiorari. If the High Court comes to the conclusion, as the learned single Judge has done in this case, that the Income-tax Officer had clutched at the jurisdiction by deciding a jurisdictional fact erroneously, then the assessee was entitled for the writ of certiorari prayed for by him. It is incomprehensible to think that a quasi-judicial authority like the Income-tax Officer can erroneously decide a jurisdictional fact and thereafter proceed to impose a levy on a citizen."

18. In the light of the aforesaid case laws, in our opinion, the submission of Shri Dudhwewala is well founded and deserves to be accepted. From the ratio of the aforesaid decisions of the Apex Court, it is clear that if the statute prescribes the existence of '*jurisdictional fact*' for an authority/quasi judicial body to invoke jurisdiction, then the existence of the *jurisdictional fact* is *sine qua non* for the exercise of power. If the jurisdictional fact exists, the authority can proceed with the case and take an appropriate decision in accordance with law. Once the authority has jurisdiction in the matter upon the existence of '*jurisdictional fact*', then it can decide the '*fact in*

issue' or 'adjudicatory fact'. A wrong decision on 'fact in issue' or on 'adjudicatory fact' would not make the decision of the authority without jurisdiction or vulnerable, provided essential or fundamental fact as to existence of jurisdiction is present. Thus, we understand that *jurisdiction fact* is the fact which is required to exist, as insisted by the Parliament/Legislature, for a quasi judicial/ authority to exercise jurisdiction over a particular matter. So in this present case, we have to examine whether the Parliament has specified in the fourth proviso to Section 153A of the Act any such facts which can be termed as jurisdictional fact. On a reading of the fourth proviso to Section 153A of the Act along with Explanation 2 to it which defines 'Asset', we find considerable merit in the contention of Shri Dudhwewala that in order to invoke jurisdiction u/s 153A of the Act for the seventh to tenth AY preceding the searched year, the AO should have in his possession the jurisdictional fact i.e. *existence/possession of undisclosed/unaccounted assets valued at Rs. 50 lakhs or more as defined in Explanation 2 to fourth proviso of Section 153A qua the assessee qua the 7th to 10th AY un-earthed from search*, without which the AO cannot issue notice u/s 153A/153C of the Act for these extended AY's. It is only when there exists this *jurisdictional fact* the AO can validly reopen those extended AYs; and then only AO can validly assume jurisdiction and then only he is empowered to issue notice. In other words, unaccounted asset valued at Rs. 50 lakhs or more which were discovered during search qua the assessee qua the assessment year (7th 10th years) preceding the searched assessment year is the *jurisdictional fact*; and if the *jurisdictional fact* is in the possession of the AO, [and possession means physical possession; or personal knowledge of the existence of the undisclosed asset which need to be spelled out in clear terms (*not vaguely*) qua assessee qua AY 2011-12 discovered during search.] then he can assume jurisdiction u/s. 153C/153A of the Act and issue notice to assess the assessment of the escaped income for these assessment year's (7th to 10th year) which is the 'fact in issue' or 'adjudicatory fact'. On the other hand if the AO did not have in his possession the *jurisdictional fact*, then he is debarred from invoking/issuance of notice u/s 153C/153A of the Act for the 7th-10th AY preceding the search.

19. Having held so, let us examine the next argument of Shri Dudhwewala that, the Parliament by specifying the *jurisdictional fact* as ‘undisclosed asset’ valued Rs. 50 Lakhs or more, has impliedly excluded other items of income viz., *liabilities/credit, unexplained expenditure etc.* A reading of the fourth proviso to section 153A of the Act and Explanation (2) to fourth proviso to section 153A of the Act which defines ‘Asset’ for the purpose of fourth proviso to section 153A of the Act, clarify the intention of the Parliament to permit the AO to enlarge the assessment u/s. 153A after search u/s. 132 of the Act beyond six assessment years to ten assessment years preceding the searched assessment year, provided the AO has in his possession the essential jurisdictional fact i.e. “undisclosed/unaccounted asset” valued Rs 50 lakhs or more of the assessee discovered during search pertaining to 7th to 10th Assessment Year preceding the searched assessment year. Since the Parliament has used the expression ‘*income in the form of asset*’ and the definition of asset has been spelled out in the fourth proviso, this itself necessarily implies the liability/items falling in the left side of the Balance Sheet stands excluded. For this view of ours, we rely on the legal Maxim for interpretation “*Expressio Unius Est Exlcusio Alterius*” which principle states that, express mention of one is the exclusion of other and this maxim has been accepted by the Hon’ble Supreme Court in **GVK Industries Ltd. Vs. ITO [197 Taxman 337]** (Constitution bench of 5 Supreme Court Judges). By express mention of ‘Assets’ and definition given to it specifically, it is implied that the Parliament silently excluded the items of ‘revenue’, ‘expenditure’ & ‘liabilities’ from its jurisdictional fact for invoking/assumption/usurpation of jurisdiction u/s. 153C/153A of the Act for the seventh to tenth assessment year preceding the searched assessment year.

20. It is a rudimentary accounting concept, that “debit” denotes “asset” and “credit” denotes “liability”. An asset represents an economic resource, either immovable or movable, having value, such as immovable property viz., land or building, investment held in shares and securities, loans & advances given and deposits in bank account. On the other hand, ‘Liability’ includes items such as share capital, reserves, loans obtained (secured as well as unsecured) etc. which cannot be characterized or classified as

‘Asset’. Similarly, items of ‘expenses’ or revenues in form of ‘sales’ / ‘turnover’ does not constitute ‘asset’. (*‘Asset’ below falls within the ambit of the fourth proviso to Section 153A of the Act*):

Profit & Loss Account	
Particulars (Debit)	Particulars (Credit)
Expenses	Revenues

Balance Sheet	
Liabilities (Credit)	Assets (Debit)
Share Capital/ Reserves/ Loan/ Current Liabilities	Immoveable Property/ Loans & Advances/ Shares/ Bank Balance

21. The above view of ours get bolstered from reading of Explanation 2 appended to the fourth proviso, which defines ‘asset’, for the purpose of fourth proviso to Section 153A, to include i) immovable property, ii) shares and securities , iii) loans and advances & iv) Deposit in bank. Hence, where search action u/s 132 of the Act reveals that, (i) the assessee owns an undisclosed immovable property, or (ii) information has been gathered which shows that the assessee had given loans or advances outside the regular books or (iii) search has revealed unaccounted investments held by assessee in shares & securities, which do not form part of regular books of accounts or (iv) if undisclosed bank accounts having deposits, have been found in the course of search, pertaining to the 7th-10th AY preceding the search; then having in his possession this *jurisdictional fact*, the AO may assume jurisdiction under the fourth proviso to Section 153A of the Act for the relevant seventh to tenth assessment year preceding the searched assessment year. Hence, the most important aspect is that, these ‘assets’ must have been found to be undisclosed or unaccounted, in the regular books of account maintained by the assessee, and discovered during the course of search, which otherwise would not have seen the light of the day but for the search, resulting in escapement of income.

22. It is to be kept in mind that, the term 'investment held in shares & securities' has to be considered with the term 'asset'. The term 'investment held in shares & securities' and 'asset' are to be understood in their cognate sense, as it takes their colour from each other, i.e., the more general is restricted to a sense analogous to the less general. Hence, the term 'investment held in shares & securities' denotes discovery of an 'asset' in the form shares or securities, which is not found disclosed in the books of accounts or whose source of acquisition is unexplained and is thus found to have escaped assessment in the 7th-10th AY preceding the search. It does not suggest or include the proceeds received by an assessee upon sale of regular/disclosed investments. To say, if any credits in a regular bank account, like sale proceeds/ credit etc. is found to be unexplained, then it may be a case of discovery of undisclosed 'income' / 'cash credit' but it does not suggest discovery of an undisclosed 'asset' by the Revenue so as to bring it within the teeth of the fourth proviso to Section 153A of the Act for invoking jurisdiction u/s 153A for the extended period.

23. Hence, from the above discussion, it is thus clear that Section 153A of the Act can be invoked only if the AO comes to a positive conclusion that he has in his possession documents or information revealing an *undisclosed asset* of the assessee qua the assessment year (7th to 10th) which is valued Rs. 50 lakhs or more. This, in our judgment is a foundational, fundamental or jurisdictional fact.

24. Having clarified the position of law regarding the jurisdictional fact (supra), now let us examine whether the *jurisdictional fact* existed before the AO when he issued notice u/s 153C of the Act dated 05.12.2019 for AY 2011-12. Here, we need to remind ourselves that, the fourth proviso was inserted by the Parliament w.e.f. 1.04.2017 by Finance Act, 2017, thereby extending the jurisdiction of the AO to assess/re-assess beyond six AY's to ten AY preceding the searched year. And as discussed at para 13, the fourth proviso clearly bars the AO to issue notice for the extended period (7th – 10th AY) unless the AO is in possession of the *jurisdictional fact* of undisclosed asset

valued Rs. 50 lakh or more qua the assessee qua the extended assessment year. So the Legislative intent is very clear that the AO would be empowered to issue notice u/s 153A/153C only if he is in possession of the jurisdictional fact otherwise he cannot issue notice u/s 153A/153C of the Act. No such bar can be seen in the case of six AY's preceding the searched AY. So the Parliament while extending the jurisdiction of AO by Finance Act, 2017, for 7th – 10th AY has prescribed this particular safeguard against arbitrary exercise of power by the AO u/s 153A/153C of the Act. It is thus prescribed in the fourth proviso that, *no notice shall be issued by AO*, unless the AO is in possession of the undisclosed assets valued Rs. 50 lakh or more qua the assessee qua the AY.

25. Keeping in mind the above, we note that, the assessee had specifically objected to the AO's action of reopening the unabated assessment for AY 2011-12 u/s 153C of the Act and had requested the AO to give details of the purported 'assets' (undisclosed/unaccounted assets unearthed during search qua the assessee qua the AY 2011-12). The AO however did at no point of time provide the details of the undisclosed/unaccounted assets of assessee, which were in his possession before the issuance of notice u/s 153C of the Act for AY 2011-12. According to us, when the assessee contended before the AO that there is no jurisdictional fact (as stated supra), the AO was duty bound to decide the said question as to his jurisdiction and record a finding as to whether he had in his possession details of any 'undisclosed/unaccounted asset valued Rs 50 lakhs or more, qua the assessee qua the assessment year (7th to 10th year) preceding the searched assessment year, and thereby state clearly as to how the case of assessee was being covered by him under the 4th proviso to section 153A read with explanation (2) appended thereto. Only upon valid assumption of jurisdiction, the AO ought to have proceeded against the assessee to assess the escaped asset of the assessee. And when he does that, he first has to make addition in respect of the escaped asset and thereafter based upon the incriminating documents unearthed in the course of search, and then only he can make additions/disallowances in respect of other items of escaped income/credit/expense etc., if any.

26. We find that even the contents of the *satisfaction note* (supra) recorded by the AO prior to issuance of the notice u/s 153C dated 05-12-2019, does not reveal/point out the 'undisclosed/unaccounted asset' which escaped assessment in the relevant AY. It is to be kept in mind that the satisfaction note is to be examined on a standalone basis. Nothing can now be added to the satisfaction note, nor anything be deleted from the satisfaction note. It is for the AO to disclose and open his mind through the satisfaction note as to which seized material revealed existence of undisclosed/unaccounted asset valued Rs.50 lacs or more, so as to establish the existence of *jurisdictional fact* for assuming valid jurisdiction in terms of the fourth proviso to Section 153A read with Section 153C of the Act for reopening the assessment for 7th-10th AY. The satisfaction note cannot now be supplemented but it is to be examined only as they were recorded by the AO prior to the issue of the notice.

27. In the present case, perusal of the satisfaction note shows that, the AO had referred to Pages 61 to 69 of seized material bearing identification mark SST-01 for assuming jurisdiction u/s 153C read with the fourth proviso to Section 153A of the Act. The satisfaction note however does not reveal the 'asset' which escaped assessment, and which was discovered from the aforementioned seized material. We find that, the AO himself has observed that these pages comprise journal ledger and bank ledger which evidenced that the assessee had liquidated its investments in shares and proceeds were received in bank. The Ld. AR, Shri Dudhwewala, has shown us that these ledgers were print outs from the regular books of accounts of the assessee maintained in computerised system and all the entries mentioned therein formed part of regular books of accounts. We find ourselves in agreement with him, that the contents of these seized material were neither incriminating in nature nor did it in any manner reveal *income represented in form of 'asset' which had escaped assessment*.

28. It is also not the AO's case that these investments in shares found mentioned in the seized material, were unaccounted or their source of acquisition was unexplained so as to constitute 'asset' escaping assessment. Rather the AO stated that these documents have a bearing on the total 'income' of the assessee for assuming jurisdiction u/s 153C

of the Act, which clearly does not meet the essential condition precedent in the fourth proviso to Section 153A of the Act. From this assertion/averment/admission, it is clear that AO did not have in his possession the *jurisdictional fact* [on or prior 05.12.2019] to invoke and issue notice u/s. 153C of the Act. The extended jurisdiction to invoke/assess 7th – 10th AY is conferred on the AO by authority of law and the AO cannot confer to himself the jurisdiction in a casual manner by stating/substituting the specific *jurisdictional fact*. It is imperative that before issuance of notice u/s 153C [for the extended period], the AO sets out his objective satisfaction from the seized material, the details of the specified/undisclosed assets in his possession qua the assessee for AY 2011-12 valued Rs. 50 lakhs or more. If this essential requirement of law is not satisfied, the AO does not get the authority of law to invoke the jurisdiction u/s 153A of the Act for 7th to 10th AY. For this, we rely upon the dictum of the Privy Council in **Nazir Ahmed Vs. King Emperor AIR 1936 PC 253**(*which has since been accepted and later followed by Hon'ble Supreme Court*), that when a statute requires a thing to be done in a particular manner, it must be done in that manner or not at all. As discussed at Para 13 (supra), the language of the fourth proviso to section 153A of the Act show that issuance of notice can be resorted to by the AO only after he is in possession of the jurisdictional fact, which is found to be absent in the present case. Therefore according to us, the AO only after having in his possession the jurisdictional fact could have assumed jurisdiction and issued notice u/s. 153C of the Act or else he could not have issued notice, as done in this case. For the reasons elaborately discussed by us in the foregoing, we thus hold that the notice u/s. 153C dated 05-12-2019 was issued by the AO for AY 2011-12 without authority of law and without satisfying the essential jurisdictional fact, and hence the issuance of notice u/s. 153C of the Act is held to be bad in law.

29. The Ld. A.R Shri Dudhwewala in the alternate also pointed out that, even in the assessment order, the AO had singularly failed to identify and spell out such “asset”, as defined in Explanation 2 to the fourth proviso to Section 153A of the Act, which had escaped assessment for AY 2011-12 and did not make any addition to the income of the

assessee u/s. 69, 69A or 69B of the Act. So, therefore, according to Shri Dudhwewala, since the AO did not make any addition on account of escaped income represented in form of undisclosed/unaccounted asset, the AO could not have made any *other addition*, in respect of cash credit u/s. 68 of the Act. For this, he relied on the ratio of the decisions rendered by the case of Hon'ble High court of Bombay in the case of **Jet Airways (331 ITR 236) & Delhi High Court in the case of Ranbaxy Laboratories Ltd. vs. CIT (336 ITR 136)**, though in the context of reopening u/s. 147 of the Act. So, according to Shri Dudhwewala, the AO's action of making addition u/s. 68 of the Act, was even otherwise, legally impermissible.

30. From our discussion (supra) it is clear that, only if any of specified 'asset/s' as defined in Explanation (2) is unearthed during the course of search and the acquisition of such an 'asset' being unexplained or undisclosed, which is valued Rs. 50 Lakhs or more, that the AO can be said to be in possession of the jurisdictional fact to initiate proceedings u/s 153C/153A for 7th-10th AY (AY 2011-12, in the instant case). Now, to understand the alternate ground of argument of Shri Dudhwewala, let us for the sake of argument, assume that the AO had validly invoked the jurisdiction u/s 153C/153A for AY 2011-12. Then in such an event, it has to be borne in mind that, first the AO had to make addition in respect of the purported 'undisclosed asset' valued at Rs. 50 lakhs or more; and only thereafter the AO can venture to make any other additions/disallowance which are not in the nature & character of 'Asset' but represents undisclosed/unexplained income/expenditure/credit etc. Perusal of the assessment order impugned before us, shows that that AO did not make any addition/s in respect of escaped/undisclosed asset in the relevant AY 2011-12. Neither was the investments held in shares by the assessee found to be unaccounted/undisclosed nor was its source of acquisition disputed or held to be unexplained by the AO. We therefore find ourselves in agreement with Shri Dudhwewala that, unless the AO made addition/s of Rs. 50 Lakhs or more in relation to escaped/undisclosed asset, he could not assume jurisdiction to make addition/s on other items (viz. credit entries in bank account etc.) The reason is simple, because in such a scenario, it bellies the claim of the AO in issuing notice u/s

153C of the Act, that he is in possession of the *jurisdictional fact* i.e. undisclosed asset valued Rs. 50 lakhs or more has escaped assessment, for which he seeks to re-assess the income of the assessee for the 7th to 10th AY. So, when the AO fails to make any addition for the 'undisclosed asset', then it tantamounts to admission that there was no jurisdictional fact present before the AO in the first place, and the necessary corollary is that he has wrongly assumed jurisdiction u/s. 153C for AY 2011-12 and therefore AO cannot proceed further to make other items of additions/disallowances. In such a scenario, the AO has no other option but to drop the assessment proceedings. For this conclusion of ours, we rely on the ratio laid down in the judgments of CIT Vs Jet Airways (supra) & Ranbaxy Laboratories Ltd. vs. CIT (supra). Though these judgments were rendered in the context of reopening u/s. 147 of the Act, however the ratio decidendi will apply in the present case, because, like Section 147/148 of the Act, the AO gets the authority to assess/reassess the income of a searched person or other person u/s 153A/153C for the extended assessment years (7th to 10th AYs) only if he has in his possession the jurisdictional fact, as discussed. If the AO is found to have assumed jurisdiction erroneously on mistaken belief about the existence of jurisdictional fact or ultimately drops it (after making enquiries in the course of assessment) while framing the reassessment order; then the AO cannot legally proceed further with the assessment/reassessment and/or make any other items of additions/disallowances, for the reason that the jurisdictional fact is absent or not in existence at the first place when he usurped the jurisdiction. In the light of the aforesaid discussion, and in our considered opinion, this submission of Shri Dudhwewala is well founded and deserves to be accepted.

31. In view of the above and on perusal of the impugned re-assessment order, we note that the only addition made by the AO in AY 2011-12 was on account of unexplained cash credit represented by sale proceeds of Rs.9,63,00,000/- u/s 68 of the Act. As noted earlier, the additions on account of unexplained 'cash credit', could not have been made by the AO, unless he first made an addition of undisclosed 'asset' valued at Rs. 50 Lakhs or more. So in this case, as there was no addition made by AO

on account of undisclosed asset, we can safely infer that there was no jurisdictional fact in the AO's hand or in his possession when he assumed jurisdiction u/s 153C for AY 2011-12 in the first place itself. As, the very usurpation of jurisdiction u/s. 153C of the Act is found to be bad in law for want of jurisdiction, the AO was precluded from making any other addition in the assessment for AY 2011-12. Hence, the AO's action of making addition u/s 68 of the Act in the relevant AY 2011-12 is held to be unsustainable for want of jurisdiction and is therefore is quashed. The assessee thus succeeds on the first legal challenge raised in the cross objections. Hence, Ground No. 2 of the cross objections stands allowed.

32. As regards the second legal challenge, we have already noted that, even though the search has been conducted upon the Sagar Group (searched person) on 22-12-2017, the AO had recorded his satisfaction on 05-12-2019 and thus by virtue of first proviso to Section 153C of the Act, this date was to be reckoned as the date of search. The time limit for issuance of notice u/s 143(2) of the Act for AY 2011-12 had expired on 30-09-2012 and the subsequent re-assessment u/s 147/143(3) of the Act had already been completed on 24-12-2018 and therefore on the date of search i.e. 05-12-2019, the income tax assessment for AY 2011-12 stood unabated.

33. We note that Section 153A/153C of the Act was introduced by Finance Act, 2003 w.e.f. 1-6-2003. It replaced the provisions relating to block assessment contained in Chapter XIVB and introduced the new procedure for making assessment u/s. 153 of the Act, which is now a part of Chapter XIV of the Act, "Procedure for Assessment" and contains provisions from Section 139 - 158A of the Act. The sub-heading of Section 153A of the Act is "*Assessment in case of Search or requisition*" which is a special provision for assessment in case of an assessee against whom search u/s. 132 or requisition under section 132A of the Act is carried out by the Department. Section 153B of the Act prescribes the time limit for completion of assessment under section 153A and 153C of the Act. Section 153C of the Act bears the heading "*Assessment of income of any other person*" which is a special provision in respect of assessment of

income of "any other person" (third party) against whom no search u/s. 132 or requisition u/s. 132A of the Act was carried out, provided certain condition precedents are satisfied as envisaged under section 153C of the Act. Section 153D of the Act is the provision regarding prior approvals to be obtained by the AO for completing the assessment in case of search or requisition u/s 153A/153C of the Act.

34. From a reading of Section 153A of the Act, it is noted that where a search u/s. 132 of the Act or requisition u/s 132A of the Act is made, the AO of the searched person is ordinarily empowered to issue notice to the searched person requiring him to furnish, within such period as may be specified in the notice, 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 search is conducted or requisition is made. However, in case the AO of the searched person finds that:-

- (a) any money, bullion, jewellery or other valuable article or thing, seized or requisitioned, belongs to; or
- (b) any books of account or documents, seized or requisitioned, pertains or pertain to, or any information contained therein, relates to

a person "*other than the person*" [third party] referred to in Section 153A, then the AO of the searched person has to record his satisfaction that the money, bullion, jewellery or other valuable articles or things seized or requisitioned belongs to the other person (*third party i.e. the assessee in this case*) or any books of account or documents seized or requisitioned pertains to the other persons (*third party i.e. the assessee in this case*) or any information contained therein relates to the other person (third party i.e. the assessee in this case). The AO of the searched person thereafter has to segregate the seized material of the other person (in this case, the assessee) from that of the searched person (SagarGroup); and then the AO has to hand over the seized materials, which belongs/pertains/relates to the AO having jurisdiction over such "other person" (in this case, the assessee).By virtue of the amendment made in Section 153C by the Finance

(No. 2) Act, 2015, the Parliament has stipulated **another condition-precedent** before the Assessing Officer of the third party, (i.e, the assessee in this case) that he can resort to issue notice u/s 153C read with 153A of the Act only when he also is satisfied from a perusal of the seized assets or books of account or documents handed over to him that it has a bearing on the determination of the total income of the such other person (third party, the assessee in this case). Then only does the AO of such other person (third party, the assessee in this case) gets jurisdiction u/s. 153C of the Act to assess his income as per Section 153A of the Act. The aforesaid discussed exercise has to be carried out by the AO of the searched person as well as the AO of the assessee and the fulfilment of these conditions precedent, as discussed, are sine qua non to obtaining jurisdiction to issue notice u/s. 153C of the Act to the third party. We need to remind ourselves that Section 153C is a special provision as it empowers the Revenue to proceed against an assessee for six assessment years and relevant assessment year/s [7 to 10 AYs], who has not been searched by the department. Therefore, the safe-guard stipulated in the provisions contained in Section 153C read with Section 153A of the Act has to be strictly/scrupulously followed.

35. The rationale behind the above discussed exercise is because, ordinarily, in terms of Section 132(4A)(i) of the Act, when any document is found in the possession or control of any person in the course of a search, it may be presumed that such document belongs to such person i.e. the searched person. Section 292C(1)(i) of the Act further raises a presumption regarding the asset, books of accounts, documents etc. found in the course of search that it belongs to the person from whom the said assets/documents were found during the course of search/survey u/s. 132/133A of the Act. In other words, whenever asset/document/books of account are found from a person who is being searched, the normal presumption is that the said asset/document belongs to that person. It is for the Assessing Officer to rebut that presumption and come to a conclusion or 'satisfaction' that the asset/document in fact belongs/pertains/relates to somebody else (third party, like the assessee in this case). There must be some cogent material available with the Assessing Officer, which was

unearthed during the course of search, before he/she arrives at the satisfaction that the seized asset/document does not belong to the searched person but to somebody else. Therefore, it has to be kept in mind that the satisfaction of the AO before proceeding against the other person i.e. the assessee who was not searched, cannot be done in a casual manner. The satisfaction of the Assessing Officer should be based upon cogent material and not on conjecture or surmise.

36. It is further relevant to note that the assessment under Section 153C read with Section 153A of the Act can be broadly divided in two categories, (a) un-abated assessment and (b) abated assessments. Upon fulfilment of the conditions precedent to obtain jurisdiction under Section 153C of the Act (as discussed in Para 20 above), the AO is required to issue notices u/s 153C to assess the income of the assessee for six assessment years and/or relevant assessment year preceding the date of search. These assessment years comprise of assessments which are not abated and assessments which are pending on the date of search and therefore it is treated to be abated. In case of abated assessments, the AO is free to frame the assessment in regular manner and determine the correct taxable income for the relevant year inter alia including the undisclosed income discovered during search, of course, having regard to the provisions of the Act. However, in relation to unabated assessments, which were not pending on the date of search, there is an embargo on the powers of the AO. In case of unabated assessments, the AO can re-assess the income only to the extent and with reference to any incriminating material which the Revenue has unearthed in the course of search.

37. For determining the abated/unabated assessment u/s 153C of the Act, the date of search is required to be ascertained in terms of first proviso to Section 153C of the Act. As already discussed in Para 18 above, the assessment for AY 2011-12 did not abate on the date of search i.e. 05-12-2019. In the circumstances, the assessment u/s 153C of the Act for the relevant AY 2011-12 could have been only with reference to any incriminating material found/unearthed during search. In support of this proposition, we rely on the judgment of Hon'ble Apex Court in the case of **Singhad**

Technical Education Society (397 ITR 344), wherein the Hon'ble Apex Court has dealt specifically with the invocation of jurisdiction u/s. 153C, and while doing so their Lordships have upheld the decision of the Hon'ble Bombay High Court reported in **378 ITR 84**. The Hon'ble Supreme Court has held that, unless and until the AO can establish document-wise (or asset wise) correlation between what has been seized from the '*Searched person*' - and - how the same is incriminating in nature qua each of the assessment years in question for which jurisdiction u/s. 153C is sought to be invoked for the '*other Person*' [third party] - then the notice issued under section 153C to the assessee/third party qua the said assessment year would be without satisfying the jurisdictional fact required to invoke section 153C of the Act. We may gainfully refer to the following excerpts of the decision of the Hon'ble Supreme court in **Sinhgad Technical Education Society's case (supra)**, wherein their Lordship took note of the Hon'ble High Court's findings while confirming Tribunals view which is as under:—

"6. The tribunal has found that incriminating material seized and stated to be pertaining to all six assessment years did not establish any co-relation document-wise with the assessment year in question. In other words, the tribunal concluded that the present matter indicates that the issue of notice could be on the basis that there is specific incriminating information in possession of the Assessing Officer. It is in these circumstances that the tribunal found and as indicated in paragraph 8 of the impugned order that the revenue's assertion that the Assessing Officer is empowered under the statute to assess or reassess the total income of six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted and therefore the satisfaction which is recorded in the satisfaction note is enough, is erroneous. Therefore, the notice cannot be upheld and such stand of the revenue cannot be accepted. The reasons, therefore are to be found in paragraph 9 and 10 of the impugned order. If certain items pertain to assessment year 2004-05 or thereafter then it cannot be assumed, that the documents seized or incriminating material giving information are specific and to all assessment years. The tribunal found that they were concluded assessments. They could not have been disturbed. The documents in question are neither incriminating ones nor unaccounted transactions of the assessee. They also did not relate to the four assessment years. It is in these circumstances that the tribunal found that it will not be possible to uphold the stand of the revenue that overall approach in matters of concealment by the group assessee and all the discoveries of the search on Shri Navale and it concerns, will have to be taken into account while forming the satisfaction. The satisfaction note was very closely examined and the reasons assigned by the Assessing Officer were found to be silent about the assessment year in which specific incriminating information or unaccounted or undisclosed hidden information was discovered or seized by the revenue from the assessee. In the circumstances, the general satisfaction and as recorded in the note is not enough. The tribunal has found that with regard to cash and jewellery, the explanation of the assessee was that he had agricultural properties and derived agricultural income. That income was utilised to acquire jewellery that was belonging to him and his family. With regard to cash and stated to be recovered from the students for granting admissions, we do not find that

any inquiries were made. There is absolutely nothing to indicate as to in which educational courses, the education is imparted and institution-wise. Whether the admissions are granted to the technical courses merit-wise or on the basis of marks obtained in XIIth standard HSC exam. If any fee structure is approved and cash component is therefore collected over and above the sanctioned fees are matters which ought to have been gone into and there cannot be a general or vague satisfaction as is relied upon.

9. We are of the opinion that the tribunal's conclusion cannot be termed as perverse and given the above-noted factual background. None of these appeals raises any substantial question of law. They are accordingly dismissed. No costs."

38. And the aforesaid finding of Hon'ble High Court has been affirmed by the Hon'ble Supreme Court by observing as under:

"18. The ITAT permitted this additional ground by giving a reason that it was a jurisdictional issue taken up on the basis of facts already on the record and, therefore, could be raised. In this behalf, it was noted by the ITAT that as per the provisions of Section 153C of the Act, incriminating material which was seized had to pertain to the Assessment Years in question and it is an undisputed fact that the documents which were seized did not establish any correlation, document-wise, with these four Assessment Years. Since this requirement under section 153C of the Act is essential for assessment under that provision, it becomes a jurisdictional fact. We find this reasoning to be logical and valid, having regard to the provisions of Section 153C of the Act. Para 9 of the order of the ITAT reveals that the ITAT had scanned through the Satisfaction Note and the material which was disclosed therein was culled out and it showed that the same belongs to Assessment Year 2004-05 or thereafter. After taking note of the material in para 9 of the order, the position that emerges therefrom is discussed in para 10. It was specifically recorded that the counsel for the Department could not point out to the contrary. It is for this reason the High Court has also given its imprimatur to the aforesaid approach of the Tribunal. That apart, learned senior counsel appearing for the respondent, argued that notice in respect of Assessment Years 2000-01 and 2001-02 was even time barred.

19. We, thus, find that the ITAT rightly permitted this additional ground to be raised and correctly dealt with the same ground on merits as well. Order of the High Court affirming this view of the Tribunal is, therefore, without any blemish. Before us, it was argued by the respondent that notice in respect of the Assessment Years 2000-01 and 2001-02 was time barred. However, in view of our aforementioned findings, it is not necessary to enter into this controversy."

39. We also rely on the judgment of Hon'ble Delhi High Court in the case of **CIT v. RRJ Securities Ltd. [2015] 62 taxmann.com 391 (Delhi)**, wherein the Hon'ble Delhi High Court held as under:

"1. As discussed hereinbefore, once the AO of the searched person is satisfied that the seized assets/documents belong to another person and the said assets/documents have been transferred to the AO of such other person, the proceedings for assessment/reassessment of income of the other person has to proceed in accordance with provisions of section 153A of the Act. Section 153A requires that where a search has been initiated under section 132 of the Act, the AO is required to issue notice requiring the noticee to furnish returns of income in respect of six assessment years relevant to the six previous years preceding the previous year in which the search is conducted. As discussed hereinbefore, by virtue of second proviso to section 153A, the assessment/reassessment pending on the date of initiation of search abate. In the context of proceedings under section 153C of the Act, the reference to the date of initiation of the search in the second proviso to Section 153A has to be construed as the date on which the AO receives the documents or assets from the AO of the searched person. Thus, by virtue of second proviso to section 153A of the Act as it applies to proceedings under section 153C of the Act, the assessment/reassessment pending on the date on which the assets/documents are received by the AO would abate. In respect of such assessments which have abated, the AO would have the jurisdiction to proceed and make an assessment. However, in respect of concluded assessments, the AO would assume jurisdiction to reassess provided that the assets/documents received by the AO represent or indicate any undisclosed income or possibility of any income that may have remained undisclosed in the relevant assessment years. This Court in *CIT v. Kabul Chawla* [2015] 61 taxmann.com 412 (Delhi) has held that completed assessments could only be interfered with by the AO on the basis of any incriminating material unearthed during the course of the search or requisition of the documents. In absence of any incriminating material, the AO does not have any jurisdiction to interfere in concluded assessments. This Court had summarized the legal position in respect of section 153A of the Act as under:—

.....

22. The aforesaid principles would be equally applicable to proceedings initiated under section 153C of the Act as section 153C(1) of the Act expressly provides that once the AO has received "money, bullion, jewellery or other valuable articles or thing or books of account or documents seized" from the AO of the searched person, he would proceed to assess or reassess the income of the person to whom such assets/books belong in accordance with section 153A of the Act.

23. In the present case, the Assessee had claimed that the assessments for the concerned assessment years were not pending on the date of recording of satisfaction by the AO and, therefore, would not abate by virtue of the second proviso to section 153A of the Act. Further, the period of six years would also have to be reckoned with respect to the date of recording of satisfaction note that is, 8th September, 2010 and not the date of search. (Emphasis supplied).
"

40. In the above decision the Hon'ble Delhi High Court relied on the following findings recorded in their earlier judgment rendered in the case of **CIT v. Kabul Chawla** [2015] 61 taxmann.com 412/234 Taxman 300/[2016] 380 ITR 573

"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:

Once a search takes place under [section 132](#) of the Act, notice under [section 153A\(1\)](#) 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. 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 Ld AOs as a fresh exercise.

The Ld AO will exercise normal assessment powers in respect of the six years previous to the relevant AY in which the search takes place. The Ld 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".

Although [Section 153A](#) 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 Ld 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."

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 complete assessment proceedings.

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 Ld AO.

Completed assessments can be interfered with by the Ld AO while making the assessment under [section 153A](#) 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."

38. The present appeals concern AYs 2002-03, 2005-06 and 2006-07, on the date of the search the said assessments already stood completed. Since no incriminating material was unearthed during the search, no additions could have been made to the income already assessed."

41. We find that the Hon'ble Delhi High Court while adjudicating the appeal in the case of CIT vs Kabul Chawla (380 ITR 573) had made judicial note of host of earlier decisions in the cases of CIT vs Anil Kumar Bhatia reported in (2013) 352 ITR 493 (Del) ; CIT vs Chetan Das Lachman Das reported in (2012) 211 Taxman 61 (Del HC) ; Madugula Venu vs DIT reported in (2013) 215 Taxman 298 (Del HC) ; Canara Housing Development Co. vs DCIT reported in (2014) 49 taxmann.com 98 (Kar HC) ; Filatex

India Ltd vs CIT reported in (2014) 229 Taxman 555 (Del HC) ; Jai Steel (India) vs ACIT reported in (2013) 219 Taxman 223 (Del HC) ; CIT vs Murli Agro Products Ltd reported in (2014) 49 taxmann.com 172 (Bom HC) ; CIT vs Continental Warehousing Corporation (NhavaSheva) Ltd reported in (2015) 374 ITR 645 (Bom HC) and All Cargo Global Logistics Ltd vs DCIT reported in (2012) 137 ITD 287 (Mum ITAT) (SB). We also find that Revenue's SLP against the decision of the Hon'ble Delhi High Court in the case of Kabul Chawla (Supra) was dismissed by the Hon'ble Apex Court which is reported in 380 ITR (St.) 4 (SC).

42. The above judgments which were rendered in the context of Section 153A of the Act are *mutatis mutandis* applicable to Section 153C of the Act as well. Gainful reference may also be made to the decision of the Hon'ble Calcutta High Court in the case of **CIT v. Veerprabhu Marketing Ltd. [2016] 73 taxmann.com 149 (Cal.)** as under:

"1. The subject matter of challenge is a judgment and order dated December 28, 2007 by which the learned Income-tax Appellate Tribunal, "E" Bench, Kolkata, in CIT v. Veerprabhu Marketing Ltd. ITA Nos.2172 and 2174/Kol/2006, pertaining to the assessment years 1998-99 and 1999-2000, and I.T(SS) A. Nos.61-63/Kol/2007, pertaining to the assessment years 2001-02, 2002-03 and 2003-04, allowed the appeals preferred by the assessee.

The aggrieved revenue has come up in appeal.

** ** **

2. Mr. Jain, learned Advocate appearing for the assessee, submitted as follows:

(a) The assessment under section 153C read with section 153A read with section 144 of the Income-tax Act was altogether without jurisdiction because such assessment was made for all the five years on the basis of survey conducted under section 133A of the Income-tax Act. He submitted that the power under section 153C read with section 153A cannot be exercised on the basis of any discovery made during survey under section 133A.

(b) His next submission was that in any event, during the survey, no incriminating material was found which may have led the revenue to exercise power under section 153C read with section 153A.

4. He contended that even when assessment is made on the basis of a search under section 132 or a requisition made under section 132A, the power can only be resorted to provided any incriminating material is found. Existence of incriminating material is necessary before exercising power under the aforesaid sections. He, in support of his submission, relied upon the words "have a bearing on the determination of the total income of such other person". If the search or requisition did not unearth any incriminating material, the search or requisition was futile and can have no bearing on the determination of the total income of such other

person. There shall thus be no occasion for exercise of power under section 153C. He, however, added that the portion which he relied upon from section 153C is of a recent origin which was not there in the statute at the relevant point of time and has been introduced with effect from 1st June, 2015. He however contended that Karnataka High Court is of the opinion that even without these expressions 'incriminating material' was the sine qua non for exercise of power under section 153C read with section 153A.

5. He relied upon the following views expressed in paragraph 50 of the judgment in the case of CIT v. IBC Knowledge Park (P.) Ltd. [2016] 69 taxmann.com 108 (Kar.):—

** ** **

7. With respect to the second submission advanced by Mr. Jain, we called upon Mr. Nizamuddin in vain to show us the incriminating material, if any, found either during the search or during the requisition or even during the survey which is or may be relatable to the assessee. Mr. Nizamuddin as unable to show that any such incriminating material was unearthed at any of the three stages pertaining to the assessee.

8. We are in agreement with the views expressed by the Karnataka High Court that incriminating material is a pre-requisite before power could have been exercised under section 153C read with section 153A.

9. In the case before us, the assessing officer has made disallowances of the expenditure, which were already disclosed, for one reason or the other. But such disallowances were not contemplated by the provisions contained under section 153C read with section 153A. The disallowances made by the assessing officer were upheld by the CIT(A) but the learned Tribunal deleted those disallowances.

10. We find no infirmity in the aforesaid act of the learned Tribunal. The appeal is, therefore, dismissed. "(emphasis supplied)

43. Gainful reference may also be made to the following observations made by the Karnataka High Court in the case of **CIT vs IBC Knowledge Park (P) Ltd. [69 taxmann.com 108]**, which is as follows:

"Materials such as books of account, documents or valuable assets found during a search should belong to a third party which would lead to an inference of undisclosed income of such third party. Such an inference should be recorded by the Assessing Officer having jurisdiction over the searched persons and communicated to the Assessing Officer having jurisdiction over such third party along with the seized documents and other incriminating materials on the basis of which the Assessing Officer having jurisdiction over such third party would issue notice under section 153C. On receipt of the aforesaid material, the Assessing Officer having jurisdiction over such third party would proceed against the said third party. Thus, where no material belonging to a third party is found during a search, but only an inference of an undisclosed income is drawn during the course of enquiry, during search or during post-search enquiry, section 153C would have no application. Thus, the detection of incriminating material leading to an inference of undisclosed income is a sine qua non for invocation of Section 153C of the Act."

44. In the light of the above judicial precedents, we hold that in the case of unabated assessments of an assessee, no addition is permissible in the order u/s 153C of the Act unless it is based on any incriminating material found during the course of search. Having regard to this legal position, let us now proceed to examine whether the AO had legally usurped the jurisdiction u/s. 153C and satisfied the condition-precedent before issuance of notice u/s. 153C read with Section 153A of the Act and that whether the income which the AO assessed in the order impugned in this appeal was based on or made with reference to any incriminating document found in the course of search and therefore would justify the addition made u/s 68 of the Act.

45. In order to test the validity of the jurisdiction of the AO, we first need to examine the '*satisfaction note*' recorded by the AO dated 05.12.2019 (already reproduced at Para 11 above). It has to be kept in mind that when the challenge is to the validity of the satisfaction note which the AO has recorded to assume jurisdiction, we have to examine the satisfaction recorded as it is. Neither can the satisfaction note be supplemented with new facts or material, nor can anything be deleted from the note. On perusal of the satisfaction note, it is observed that the AO had invoke jurisdiction under Section 153C(1)(b) of the Act observing that, certain 'books of accounts' or 'documents' seized from the premises of Sagar Group viz., Pages 61 to 69 of the SST-01 pertained to the assessee which had a bearing on its total income for AY 2011-12. So, we have to examine this particular seized material pointed out by the AO in his satisfaction note dated 05-12-2019 and give our finding of fact as to whether these documents can be termed as '*incriminating material*' against the assessee qua AY 2011-12.

46. It was pointed out by the Ld. AR, Shri Dudhwewala that the documents referred at Pages 61 to 69 of the SST-01 were the journal ledger and bank ledger of the assessee forming part of the assessee's regular books for the FY 2010-11. This fact has also been acknowledged by the AO in his satisfaction note. The Ld. AR submitted that since the assessee had sold its investments; appropriate entries in its books were routed

through journal day book which was part of the assessee's books of account maintained in the course of regular business and the bank ledger reflected the payments received through banking channel upon sale of investments. Having examined the same, we also find it to be print-outs of the day books from the regular books maintained electronically by the assessee. On examination of the entries in the document, it is noted that the journal ledger inter alia contains journal entries passed during FY 2010-11 in relation to investments sold to several parties. And we find that the entries in the bank ledger tallied with the bank statement of the assessee. We thus find that these ledgers therefore formed part of the regular books of the assessee and did not have any incriminating content whatsoever. When confronted with the same, even the Ld. CIT, DR was unable to correlate or link as to how the contents of this ledgers led to unearthing of unexplained income, that too represented by an "asset" by the AO. We also note that the investments which were sold during the relevant year and which find mention in these ledgers are reflected in the Investment Schedule appearing in the assessee's balance sheet as on 31-03-2010. In this context, it has been brought to our notice that the case of the assessee for AY 2011-12 was earlier reopened u/s 147 of the Act in relation to the same sale proceeds received in the bank account. And pursuant to the re-opening, in the reassessment order passed u/s 147/143(3) dated 24-12-2018, the AO's predecessor had recorded a categorical finding that the receipts pertained to sale of investments which had been verified by him. There was no finding recorded by the AO's predecessor that the investments sold by the assessee during the relevant year were bogus or fictitious. Having regard to the foregoing facts, we thus find that the information contained in the referred document i.e. Pages 61 to 69 of the SST-01 was part of the regular books of the assessee and therefore by no stretch of imagination, it can be construed to be 'incriminating' in nature.

47. Moreover even the AO in his satisfaction note as well as the impugned order was unable to specify as to how this material was considered by him to be 'incriminating' in nature or as to how this document formed the basis for the addition made u/s 68 of the Act. Before we proceed further, it is first relevant to understand the meaning of the

expression “incriminating material” or evidence. There can be several forms of incriminating material or evidence. In order to constitute an incriminating material or evidence, it is necessary for the AO to establish that the information, document or material, whether tangible or intangible, is of such nature, which incriminates or militates against the person to whom it pertains to. Some common forms of incriminating material for instance are, where the search action u/s 132 of the Act reveals information that the assets found from the possession of the assessee in the form of land, building, jewellery, deposits or other valuable assets etc. do not corroborate with his returned income and/or there is a material difference in the actual valuation of such assets and the value declared in the books of accounts. Further, incriminating evidence may also constitute of information, tangible or intangible, which suggests or leads to an inference that the assessee is carrying out certain activities outside books of accounts which is not disclosed to the Department. Incriminating material also comprises of document or evidence found in the course of search which demonstrates or proves that what is apparent is not real or what is real is not apparent. In other words, if an assessee has recorded transactions in his books or other documents maintained in the ordinary course then in order to hold the material or evidence found in the course of search to be incriminating in nature, the seized document should lead to the conclusion that the entries made in the books of the assessee do not represent true and correct state of affairs. The evidence unearthed or found in the course of search should establish that the real transaction of the assessee was something different than what was recorded in the regular books and therefore the entries in the books did not represent true and correct state of affairs i.e. the assessee has undisclosed income/expense outside the books or that the assessee is conducting income earning activity outside the books of accounts or all the revenue earning activities are not disclosed to the tax authorities in the books regular maintained or the returns filed with the authorities from time to time etc. The nature of the evidence or information gathered during the search should be of such nature that it should not merely raise doubt or suspicion, but should be of such nature which would prima facie indicate that real and true nature of transaction between the parties is something different from the one recorded in the books or documents

maintained in ordinary course of business. In some instances, the information, document or evidence gathered in the course of search, may raise serious doubts or suspicion in relation to the transactions reflected in regular books or documents maintained in the ordinary course of business, but in such case the AO is not permitted to straightaway treat such material to be ‘incriminating’ in nature unless the AO thereafter brings on record further corroborative material or evidence to substantiate his suspicion and conclude that the transaction reflected in regular books or documents did not represent the true state of affairs. Until these conditions are satisfied, it cannot be held that every seized material or document is incriminating in nature, justifying the additions in unabated assessments.

48. Useful reference in this regard may be made to the decision of the Hon’ble Delhi High Court in the case of **PCIT Vs Index Securities Ltd (86 taxmann.com 84)** involving similar facts and circumstances as involved in the present case. In the decided case, search was conducted u/s 132 of the Act upon Jagat Group wherein documents comprising of trial balance and balance sheet of the assessee company was found & seized by the Revenue. According to AO, since these documents pertained to the assessee, he proceeded to reopen the assessments of the assessee u/s 153C of the Act and added the share application monies received by the assessee u/s 68 of the Act. On appeal, the assessee challenged the validity of jurisdiction exercised by the AO u/s 153C of the Act on several grounds inter alia including that these seized documents cannot be said to be incriminating to justify additions made u/s 68 of the Act in the unabated assessments of the assessee. The Hon’ble High Court found merit in this plea of the assessee and accordingly upheld the orders of the lower authorities deleting the impugned additions by observing as under:

“32. In the present case, the two seized documents referred to in the Satisfaction Note in the case of each Assessee are the trial balance and balance sheet for a period of five months in 2010. In the first place, they do not relate to the AYs for which the assessments were reopened in the case of both assessees. Secondly, they cannot be said to be incriminating. Even for the AY to which they related, i.e. AY 2011-12, the AO finalised the assessment at the returned income qua each Assessee without making any additions on the basis of those

documents. Consequently even the second essential requirement for assumption of jurisdiction under Section 153 C of the Act was not met in the case of the two Assesseees

33. This Court does not consider it necessary to examine the merits of the case as far as the deletions by the CIT (A) of the additions made by the AO under Section 153C of the Act are concerned. In any event, a detailed analysis has been undertaken by the CIT (A) of the materials produced by the Assessee which justified the deletion of such additions. Even on this score, no interference is warranted with the impugned order of the CIT (A).”

49. We may, in this regard, gainfully refer to the decision of this Tribunal in the case of **Daffodil VincomPvt Ltd Vs DCIT in ITA (SS) Nos. 95 & 96/Kol/2018 dated 28.06.2019**. In the decided case the AO had added the share capital raised by the assessee in AYs 2011-12 & 2012-13 by way of unexplained cash credit u/s 68 of the Act in the assessments framed u/s 153A of the Act. Before the Tribunal the assessee contended that the addition u/s 68 was not based on any incriminating material found in the course of search and therefore the additions made in unabated assessments of AYs 2011-12 & 2012-13 were unsustainable. Per contra, the Revenue contended that the additions were made with reference to documents ID Marked SFA/01 and SFA/02 which were seized in the course of search and hence urged that the AO had rightly made the impugned addition. Upon examining the contents of the seized material referred to by the Revenue, this Tribunal noted that it comprised of bank account statements which formed part of the regular books of the assessee and these accounts were disclosed to the Department prior to the search. The Tribunal observed that indeed these documents were found during the course of search and seizure operation but for such reason alone these could not be held as incriminating in nature justifying the impugned addition. It was noted that all the entries of deposits and withdrawals of the said bank account statement formed part of the regular books of account and therefore these documents did not constitute incriminating evidence which could be linked to the impugned additions. The Tribunal therefore, in absence of any incriminating material found in the course of search, deleted the additions made in the orders u/s 153A in the unabated assessments for AY 2011-12 & AY 2012-13. For arriving at this conclusion, this Tribunal relied on the following observations of the co-ordinate Bench in the case of *M/s A ONE Infra Projects Pvt. Ltd Vs DCIT in IT(SS) A No. 91/Kol/2018*.

“8. In the present case, the addition of Rs.15,00,000/- by treating the share application money as unexplained cash credit under section 68 was made by the Assessing Officer in the assessment completed under section 153A of the Act on the basis of Bank account found during the course of search and since the said Bank account as well as the transactions reflected therein were duly disclosed by the assessee in its return of income originally filed for the year under consideration, we find ourselves in agreement with the contention of the Id. Counsel for the assessee that the same cannot be treated as incriminating material found during the course of search.”

50. We note that similar issue also came up for consideration before the Delhi Bench of this Tribunal in the case of **HBN Insurance Agencies Vs ACIT in ITA No. 3783/Del/2014 dated 23.12.2019**. In this case the AO had added cash deposits made in bank account in the assessments framed u/s 153A of the Act. On appeal, the assessee contended that the additions made u/s 68 were not based on any incriminating material found in the course of search whereas the Revenue claimed that the balance sheet, bank statements etc. found and seized in the course of search constituted ‘incriminating material’ which justified the impugned addition. The Tribunal rejected the Revenue’s argument and deleted the addition by observing as under:

“In our considered opinion, the profit and loss account and balance sheet of the assessee company, by any stretch of imagination, cannot be considered as incriminating material. It is also not the case of the Revenue that the bank accounts were unearthed during the search operation. On these facts, the ratio laid down by the Hon'ble High Court of Delhi in the case of *Kabul Chawla* [supra], squarely apply wherein the Hon'ble High Court of Delhi held as under:

.....

Respectfully following the ratio laid down by the Hon'ble High Court of Delhi and Hon'ble Supreme Court [supra], we are of the considered view that the assessment framed u/s 153A of the Act for both the Assessment Years under appeal deserves to be set aside. We, accordingly direct the Assessing Officer to delete the impugned additions from both the Assessment Years.”

51. In view of the facts as discussed above and the judicial precedents (supra), we thus hold that the assertion of the AO in the 'Satisfaction Note' that Pages 61 to 69 of SST/01 having a bearing on the ‘total income’ of the assessee is perverse and erroneous. The alleged documents relied upon by the AO to usurp jurisdiction u/s 153C of the Act and justify the impugned addition did not constitute ‘incriminating material’ found in the course of search, from which any undisclosed/unexplained income could be inferred in the hands of the assessee. Hence, as there was no incriminating material against the

assessee which was unearthed/seized during the search conducted on 22-12-2017 from the premises of Sagar Group, the satisfaction note prepared by the AO did not meet the condition precedent stipulated u/s. 153C of the Act, as the 'document' referred to, did not have any bearing on the total income of the assessee for AY 2011-12. In that view of the matter, the very assumption of the jurisdiction for AY 2011-12 is held to be bad in the eyes of law as held by the Hon'ble Supreme Court in the case of **Sinhgad Technical Education Society (supra)** and, accordingly the consequent order dated 31-12-2019 is quashed.

52. Now we deal with the arguments raised by the Ld. CIT, DR by mainly stressing on the statement of Shri Hemant Agarwal to justify the usurpation of jurisdiction u/s 153C of the Act and also addition impugned before us. According to Ld. CIT, DR, Shri Hemant Agarwal had admitted the assessee to be a conduit through which he had routed his own undisclosed monies into his companies, M/s Bajrangbali Ispat Pvt. Ltd. & M/s Sagar Hardware and Steels Pvt. Ltd. and therefore claimed that the AO had rightly assumed jurisdiction u/s 153C of the Act to make addition u/s 68 of the Act. Let us examine the contention of Ld CIT DR.

53. From examination of the statement of Shri Agarwal, we have to see whether the statement does contain any material which implicates the assessee or based on which one may infer any undisclosed income in the hands of the assessee. The relevant extracts are as follows:

“Q.No.10: A computer printout has been taken from your office computer which form a part of this statement as Annexure I wherein it is clearly and explicitly mentioned that you had received cash in FY 2010-11 which was diverted to for the purchase of Jamakharchi company namely M/s Fortune VanijyaPvt Ltd. Which was further diverted to M/sBajrangbali Ispat Pvt Ltd and M/s. Sagar hardware and Steels Pvt Ltd, Please offer your comments. Also please name the parties from whom you received cash.

Ans: Yes sir, I confirm that I have taken accommodation entry in the form of Jamakharchi companies namely M/s fortune vanijyaPvt Ltd. which I further diverted to my group companies. I am disclosing the entire amount of accommodation entry taken as under:

<i>Sl.No</i>	<i>Name of the</i>	<i>Amount of</i>	<i>Amount of</i>	<i>Amount of</i>	<i>Total</i>
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	Companies	disclosure in financial year 2011-12 (in Rs.)	disclosure in financial year 2013-14 (in Rs.)	disclosure in financial year 2014-15 (in Rs.)	disclosure
01	M/s Bajrangbali Ispat Pvt Ltd	71740000	6501000	-	78240100
02	M/s. Sagar hardware and Steels Pvt Ltd	14800000	-	3900000	1870000
	Total disclosure	86540000	6501000	3900000	96940100

Sir, I do not remember all the names from whom this unaccounted cash was received.”

54. From a reading of the statement we concur with the view expressed by the Ld CIT(A). The Ld. CIT(A) at Pages 53 to 56 of his impugned order has correctly pointed out that the question put across to Shri Agarwal avers to routing of his undisclosed monies and receipt of cash by him and not that of the assessee. Even the disclosure given in his statement was in the hands of M/s Bajrangbali Ispat Pvt Ltd & M/s. Sagar Hardware and Steels Pvt Ltd and not the assessee. Thus, plain reading of the statement shows that the Revenue's reliance on this statement to justify the satisfaction note and the addition in the impugned order is mis-directed and on incorrect understanding of the facts stated therein, so the contention of Ld CIT DR is erroneous and is based on incorrect assumption of facts.

55. Moreover the Ld. AR further pointed out that this statement was not reliable for the reason that the alleged computer print-out titled 'Annexure -1' [which image was reproduced in the statement], and based on which the Investigating Officer recorded the statement of Shri Agarwal was actually non-existent. He submitted that this alleged 'Annexure -1' was neither found in the course of search nor seized from the premises of the assessee. Inviting our attention to the panchnamas which contain the inventory of books of accounts and documents seized from the premises of Sagar Group, he pointed out that the alleged computer print-out titled 'Annexure -1' does not feature anywhere therein, so according to assessee it is cooked up or planted material. We indeed find it unfathomable that, a document supposed to have been unearthed in the course of search,

based on which disclosure had been taken by the search team was neither inventorized with identification mark, like rest of the documents & books of accounts nor was the file path of the seized computer hard disk mentioned in the statement.

56. It was brought to our notice that, even the AO, despite specific requests neither gave the copy of this alleged computer print-out titled 'Annexure -1' nor the file-path of the seized hard disk was given. And even this document was traceable in the copy of hard disk obtained upon mahazernama. To bolster this fact, he invited our attention to the letter submitted before the AO [Page 69 to 70 of the Paperbook] and also the sworn affidavit of Shri Hemant Agarwal, placed at Pages 112 to 114 of the paper book, affirming the aforesaid facts. When confronted with these facts, the Ld. CIT, DR was unable to explain the same but he chose to stand by the statement taken by the Revenue from Shri Agarwal. Having regard to these peculiar facts of the case, the credibility of the purported document 'Annexure -1' is under serious doubt, therefore we are of the opinion that it is un-safe to rely on it, since the very existence of 'Annexure -1' which forms the basis of the statement given by Shri Agarwal to his reply to Q No. 10, had been challenged by the assessee & Shri Hemant Agarwal and such a serious allegation had not been rebutted by Revenue. And even if for argument sake 'Annexure -1' was seized, then if the AO was using it against the assessee (third party in this case) he was bound by law to furnish/confront the same with assessee, without which no adverse view could have been taken by the AO based on 'Annexure -1'. In short, the AO cannot assess by keeping the assessee in the dark, when the existence of 'Annexure -1' was in a conundrum as discussed (supra).

57. For the reasons as set out above, we are of the view that based on the sole statement of Shri Agarwal, the AO could not have usurped the jurisdiction u/s 153C of the Act. Even otherwise, based on the discrepancy as discussed about 'Annexure -1' it is not safe to rely on it and above all, as discussed it did not contain anything which incriminated the assessee. Hence, such statement could not be the basis for drawing adverse inference against the assessee and therefore, no addition could have been made

on the basis of such unreliable statement. We thus find that the contentions raised by the Ld. CIT DR are devoid of merits and is therefore rejected

58. For the various reasons as set above, we thus hold that the AO had invalidly usurped jurisdiction u/s 153C of the Act as there was no incriminating material pertaining to the assessee seized in the course of search. Even the addition made in the unabated assessment for AY 2011-12 was unsustainable since it was not based on any incriminating material found in the course of search. In that view of the matter, the order dated 31-12-2019 passed by the AO is held to be a nullity and is accordingly quashed. Hence, Ground No. 1 of the cross objections also stands allowed.

59. The Ld. AR had also pointed out that the impugned order was passed by the AO without seeking prior approval u/s 153D from the jurisdictional Additional Commissioner of Income-tax, Guwahati. He invited our attention to the Note Sheet of the AO, which was reproduced by the Ld. CIT(A) at Page 124 of the appellate order. It is noted that, upon examining the assessment folder, the Ld. CIT(A) had recorded a categorical finding that, apart from recording the factum of satisfaction on 05-12-2019, the AO had neither recorded any event prior to the said date nor post the said date. Hence, there was no noting regarding the date on which the AO sought for approval of the Additional Commissioner of Income-tax to pass the order impugned or the receipt of approval prior to passing of the impugned order. The Ld. AR further pointed out that, even in response to the assessee's application dated 01.09.2021 seeking photocopies of the note sheet, the AO had only provided the order sheet noting of the satisfaction recorded on 05-12-2019 and no details of the approval sought for u/s 153D and the approval granted by the Addl. CIT has been provided by the AO. The Ld. CIT, DR was unable to controvert these facts. However, since we have already held the order u/s 153C/143(3) to be unsustainable in law, for the reasons set-out above, we are not inclined to return our findings with regard to the Ground No. 4 raised in the cross objections, since it has now become academic in nature.

60. Apart from the above, the assessee had also challenged the merits of the additions in Ground No. 5 of the Cross Objections. However since we have already held the usurpation of jurisdiction u/s 153C of the Act to be invalid and also deleted the addition made u/s 68 of the Act for want of incriminating material found & seized in the course of search, there is no need for us to adjudicate the merits of the addition as it has become academic in nature.

61. Although we have allowed the legal issue raised by the assessee in the Cross Objections and accordingly quashed the order impugned before us holding it to be ab initio void and a nullity, but for the sake of completeness, we deem it fit to also adjudicate the grounds raised by the Revenue in their appeal.

62. Coming to the appeal of the Revenue. The first two grounds of the appeal relates to the Ld. CIT(A)'s action of deleting the addition made u/s 68 of the Act on the premise that the satisfaction note recorded by the AO was factually erroneous and did not satisfy the conditions precedent in Section 153C of the Act and therefore holding the order dated 31-12-2019 passed by the AO to be ab initio void. These grounds are inter-linked with the cross-objections taken by the assessee. Following our conclusions recorded in Paras 10 to 58, while deciding the assessee's cross objections, these grounds of the Revenue stands dismissed.

63. Apropos Ground No. 3 of the Revenue, which is against the Ld. CIT(A)'s action of holding the assessment order passed u/s 153C/143(3) to be ab initio void, for the AO's failure to issue notice u/s 143(2) of the Act prior to completion of assessment; we find merit in the submission of the Ld. DR that issuance of notice under section 143(2) is not mandatory for finalization of assessment under section 153A/153C of the Act. We note that the Ld. CIT(A)'s had wrongly relied on the decisions of the Hon'ble Supreme Court in the cases of **CIT v. Hotel Blue Moon (321 ITR 362)** & **CIT vs Laxman Das Khandelwal (Civil Appeal 6261-6262 of 2019)** which were distinguishable in as much as it were rendered in the context of assessments framed u/s 143(3)/158BC, where

issuance of notice u/s 143(2) of the Act to assume jurisdiction over the assessee is mandatory. However, Section 153A/153C of the Act is a special provision and we find that there is no specific provision in the Act requiring the assessment to be made under section 153A/153C after issue of notice under section 143(2) of the Act. In this regard, we may gainfully rely on the decision of the Hon'ble Delhi High Court in the case of **Ashok Chaddha Vs ITO (337 ITR 399)** wherein it was held as under:

9. There is no specific provision in the Act requiring the assessment made under s. 153A to be after issue of notice under s. 143(2) of the Act. Learned counsel for the assessee places heavy reliance on the judgment of the Hon'ble Supreme Court in *Asstt. CIT v. Hotel Blue Moon* (supra) wherein it was held that the where an assessment has to be completed under s. 143(3) r/w s. 158BC, notice under s. 143(2) must be issued and omission to do so cannot be a procedural irregularity and the same is not curable. It is to be noted that the above said judgment was in the context of s. 158BC. Clause (b) of s. 158BC expressly provides that "the AO shall proceed to determine the undisclosed income of the block period in the manner laid down in s. 158BB and the provisions of s. 142, sub-ss (2) and (3) of s. 143, s. 144 and s. 145 shall, so far as may be, apply. This is not the position under s. 153A. The law laid down in *Hotel Blue Moon*, is thus not applicable to the facts of the present case.

64. In view of the above therefore, the Revenue succeeds in Ground No. 3 of their appeal.

65. The last ground of the Revenue pertains to the Ld. CIT(A)'s action of holding the impugned order passed u/s 153C of the Act to be a nullity on the premise that it was passed consequent to the return of income filed by the assessee in response to earlier notice issued u/s 153A of the Act. The assessee has supported this finding of the Ld. CIT(A) in Ground No. 3 of his Cross Objections. We note that the Ld. DR has rightly pointed out that, the Ld. CIT(A) had erroneously observed that the AO had first issued notice u/s 153A of the Act for AY 2011-12 and thereafter without consigning/dropping the earlier notice, he had initiated fresh proceedings u/s 153C of the Act. Upon examination of the records, we note that, unlike for AYs 2012-13 to 2017-18, the AO for AY 2011-12 had issued only one notice u/s 153C of the Act dated 05-12-2019 and the assessee had also filed the return of income in response thereto, pursuant to which the assessment dated 31-12-2019 was framed u/s 153C/143(3) of the Act. We thus find merit in the Revenue's case that this finding of the Ld. CIT(A) was erroneous. Before

us, the Ld. AR was unable to controvert this fact. For the reasons aforesaid, we allow Ground No. 4 of the Revenue and dismiss Ground No. 3 of the Cross Objections.

66. In spite of our above findings, we again, for the sake of clarity, reiterate that, as the very usurpation of jurisdiction by the AO u/s 153C has been held to be bad in law and, even the seized documents referred by the AO for justifying the addition/s made u/s 68 of the Act, in the unabated assessment for the AY 2011-12, did not constitute 'incriminating material'; the order passed u/s 153C/143(3) and the AO's action of making addition u/s 68 of the Act therein, is held to be a nullity and is unsustainable for want of jurisdiction and is therefore is quashed.

67. In the result both the appeal of the Revenue and the cross objections of the assessee stands partly allowed.

Order is pronounced in the open court on 10th December, 2021.

Sd/-
(P. M. Jagtap)
Vice-President

Sd/-
(A. T. Varkey)
Judicial Member

Dated : 10.12.2021

RS

Copy of the order forwarded to:

1. Assessee - Fortune Vanijya Private Limited
2. Revenue - ACIT, Circle-2, Guwahati
3. CIT(A)-
4. CIT-
5. DR, ITAT, Guwahati.

//True Copy//

By order,
Senior Private Secretary