

**IN THE INCOME TAX APPELLATE TRIBUNAL (VIRTUAL COURT)  
"H" BENCH, MUMBAI**

**BEFORE SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER AND  
SHRI AMARJIT SINGH, HON'BLE JUDICIAL MEMBER**

**ITA.NOs. 1365, 1366, 1367, 1368, 1369, 1370 & 1371/MUM/2019  
(A.Ys: 2008-09, 2009-10, 2010-11, 2011-12, 2012-13, 2013-14 & 2014-15)**

M/s. Kamla Landmarc Enterprises Ground Floor, Shanti Vimal P.M. Road, Vile Parle (E) Mumbai - 400057  <b>PAN: AAIFK9427D</b>	v.	DCIT – Central Circle – 3(4) 19 <sup>th</sup> Floor, Air India Building Nariman Point Mumbai – 400 021
<b>(Appellant)</b>		<b>(Respondent)</b>

**ITA.NOs. 712, 713, 714, 715, 716, 717 & 718/MUM/2019  
(A.Ys: 2008-09, 2009-10, 2010-11, 2011-12, 2012-13, 2013-14 & 2014-15)**

M/s. KamlaLandmarc Developers Ground Floor, Shanti Vimal P.M. Road, Vile Parle (E) Mumbai - 400057  <b>PAN: AAHFK1107F</b>	v.	DCIT – Central Circle – 3(4) 19 <sup>th</sup> Floor, Air India Building Nariman Point Mumbai – 400 021
<b>(Appellant)</b>		<b>(Respondent)</b>

**ITA.NOs. 1375, 1376, 1377, 1378 & 1379/MUM/2019  
(A.Ys: 2008-09, 2011-12, 2012-13, 2013-14 & 2014-15)**

M/s. Kamlashmi Builders Ground Floor, Shanti Vimal P.M. Road, Vile Parle (E) Mumbai - 400057  <b>PAN: AAGFK4783Q</b>	v.	DCIT – Central Circle – 3(4) 19 <sup>th</sup> Floor, Air India Building Nariman Point Mumbai – 400 021
<b>(Appellant)</b>		<b>(Respondent)</b>

<b>Assessee by</b>	<b>:</b>	<b>Shri Rashmikant Modi &amp; Shri KetkiRajeshirke</b>
<b>Department by</b>	<b>:</b>	<b>Shri Neelam Shukla</b>
<b>Date of Hearing</b>	<b>:</b>	<b>04.01.2022</b>
<b>Date of Pronouncement</b>	<b>:</b>	<b>24.03.2022</b>

## **ORDER**

### **PER BENCH**

**1.** These appeals are filed by different assessees of same group against different orders of the Ld. Commissioner of Income Tax (Appeals)-51, Mumbai [hereinafter in short "Ld.CIT(A)"] for the Assessment Years 2008-09 to 2014-15.

**2.** Since the issues raised in all the appeals are identical, therefore, for the sake of convenience, these appeals are clubbed, heard and disposed off by this consolidated order. We are taking Appeal in the case of KamlaLandmarc Enterprises., in ITA.No. 1366/Mum/2019 for the A.Y.2009-10 as the lead case.

**3.** Brief facts of the case are, search and seizure action u/s. 132 of Income-tax Act, 1961 (in short "Act") was conducted in the case of KamlaLandmarc Group and its Directors / Partners on 10.12.2013. The

premises of the assessee also searched by virtue of the above search proceedings. Accordingly, notice was issued u/s. 153A of the Act asking the assessee to file its Income tax return for the relevant year. In response, assessee filed its Income Tax Return u/s. 153A of the Act on 18.10.2015 declaring total income of ₹.13,13,960/-. Further, notice u/s.143(2) was issued and served on the assessee, the original return for the A.Y. 2009-10 was filed on 26.09.2009 declaring same total income as declared in return of income filed u/s. 153A of the Act. The above said original return was processed u/s. 143(1) of the Act.

**4.** Kamla Landmarc Group is primarily engaged in the business of construction of residential / commercial projects in Mumbai. The Directors/Partners of various entities under Kamla Landmarc Group are Shri Ramesh Jain, Shri Jitendra Jain, Shri Jinendra Jain, Shri Ketan Shah and ShirSushi Mantri. During the course of the search, Directors/Partners of the group were confronted with the statements recorded of various persons who are indulged in the activity of providing bogus unsecured loans against payment of cash. They were also asked to prove the genuineness of the unsecured loans and to prove the creditworthiness of such entities appearing as creditors in the books of Kamla Landmarc Group concerns.

**5.** During post search proceedings u/s. 153A of the Act, notice u/s.142(1) along with specific questionnaire were issued and served on the assessee. In response assessee filed relevant information as called for along with copies of balance sheet, Profit and Loss Account, return of income and tax audit report. Assessing Officer observed that assessee has taken unsecured loans from Rose Impex of ₹.1,00,00,000/- and paid interest expenses of ₹.5,32,603/- during this Financial Year.

**6.** During search proceedings, one of the directors of the assessee company Shri Jitendra Jain whose statement was recorded on oath dated 13.12.2013 in which he has explained the reasons and procedure of obtaining unsecured loans from various parties by paying 0.25% of brokerage and explained that depending on the case, interests were paid in the range of 9% to 24% depending upon size of amount, tenure and requirement of the group companies. When he was confronted with 28 unsecured loans creditors with whom group has taken unsecured loans, he accepted that these parties are providing accommodation entries. After considering the statement on oath, Assessing Officer came to the conclusion that assessee adopted modus operandi to convert cash received by way of "on Money" into unsecured loans. He also discussed the various modus operandi and chronological arrangement of

transactions in his order (Para No. 6) and he also analyzed the parties from whom assessee has taken unsecured loans and he came to the conclusion that these parties are mere entry providers giving entries for purchase sales, unsecured loan advances, etc., and his comments on unsecured creditors are given in Para No. 6.2 of his order. During the assessment proceedings assessee was asked and show cause as to why the above unsecured loans should not be added back to the total income of the assessee and relevant interest paid should not be disallowed. Since there was no response from the assessee, the Assessing Officer proceeded to make the addition by observing that assessee has failed to prove the genuineness of the transaction as well as identity and the creditworthiness of the lenders. He also observed that it has been categorically accepted in the statement taken on oath of Shri Jitendra Jain (Director of Kamla Landmarc Group) that loans taken and interest paid thereon are bogus and mere accommodation entries. Accordingly, Assessing Officer proceeded to make the addition u/s. 68 of the Act and disallowed the interest under section 37 of the Act. Further Assessing Officer made disallowance of commission expenses to the extent of ₹.2 Lakhs and also adhoc disallowance @30% on labor charges and professions fee paid during the year.

**7.** Aggrieved assessee preferred an appeal before the Ld.CIT(A) and filed detailed submissions objecting to the above additions as well as made submissions that the statement recorded u/s 132(4) were not provided to the assessee, it was provided only during the assessment proceedings only on 25.02.2016, thereafter, Shri Jitendra Jain retracted statement on 18.03.2016. It was submitted before Ld CIT(A) that upon retraction whether the above additions can be made?

**8.** Ld.CIT(A) considered the submissions of the assessee and rejected the contention of the assessee and sustained the addition made u/s. 68 of the Act for the unsecured loans of ₹.1 Crore and also disallowance of interest by agreeing in principle. Further, he observed that assessee has debited the interest expenditure to the work-in-progress, therefore he directed the Assessing Officer to reduce the amount of interest expenditure in the work-in-progress instead of sustaining the additions.

**9.** With regard to commission payment and adhoc disallowance, he sustained the commission disallowance and with regard to adhoc disallowance since assessee has debited these expenditures to work-in-progress, he directed the Assessing Officer to verify the same and reduce the work-in-progress instead of making disallowance of expenses.

**10.** Aggrieved assessee is in appeal before us raising following grounds in its appeal: -

**"GROUND I: CONFIRMING THE ORDER OF THE ASSESSING OFFICER AO OF INITIATING PROCEEDINGS UNDER SECTION 153A OF THE ACT AS WELL AS ADDITIONS MADE PURSUANT THERETO ARE BAD IN LAW**

1. *On the facts and circumstances of the case and in law, the CIT(A) erred in confirming the initiation of proceedings under section 153A of the Act and also confirming additions made by the AO in the order passed under section 143(3) r.w.s. 153A of the Act.*
2. *The CIT(A) failed to appreciate and ought to have held that in the absence of any incriminating material found in the course of search and/ or a valid approval u/s. 153D of the Act, no addition could be made and the proceedings under section 153A of the Act cannot be initiated by the AO.*
3. *The Appellant prays that the Order of the CIT(A) confirming proceedings initiated by the AO under section 153A of the Act be set aside, quashed and be held as bad in law and/or the additions made in the order passed under section 143(3) r.w.s. 153A of the Act be deleted.*

**WITHOUT PREJUDICE TO GROUND I:**

**GROUND II: VIOLATION OF PRINCIPLES OF NATURAL JUSTICE:**

1. *On the facts and in the circumstances of the case and in law, the CIT(A) erred in confirming the action of the AO in not considering / ignoring the submissions of the Appellant and also CIT(A) himself not considering the said submissions in the proper perspective, thereby violating the principles of natural justice.*
2. *The CIT(A) further erred in confirming the actions of the AO of not providing the statement of the third parties, based on which the search was conducted and also not providing the*

*opportunity of cross examining the said parties to the appellant.*

3. *The Appellant prays that the Order of the AO, confirmed by the CIT(A) be set aside and be held as void-ab-initio and bad in law and the additions made therein be deleted for want of natural justice.*

**WITHOUT PREJUDICE TO GROUND I &II:**

**GROUND III: CONFIRMING ADDITION MADE BY THE AO OF UNSECURED LOAN OF RS. 1,00,00,000/U/S. 68 OF THE ACT**

1. *On the facts and in the circumstances of the case and in law, the CIT(A) has erred in confirming the Order of the AO making addition of unsecured loan, treating the same as bogus in nature solely on the basis of statements of a Partner of the Firm, recorded during the course of search action and third party statements and further erred in making aggregate addition far beyond the quantum purportedly offered in the said statements.*
2. *The CIT(A) has failed to correctly appreciate and ought to have held that no addition can be confirmed as;*
  - a. *The statements of the Partner of the Firm were retracted during the course of assessment proceedings immediately after the same were made available to the Appellant,*
  - b. *An addition solely based on the statements of third parties cannot be made, moreover when the said statements were never provided to the Appellant;*
  - c. *In absence of any corroborative evidence, addition cannot be made solely on the basis of some statements;*
  - d. *There was no incriminating material found during the course of search action to support the allegations of loans being bogus in nature;*

- e. *Having regard to the confirmation, statements and accounts of the loan creditors filed in the course of assessment, the additions made deserves to be deleted.*
3. *The Appellant prays that the addition of Unsecured Loan u/s.68 of the Act be deleted/appropriately reduced.*

**WITHOUT PREJUDICE TO GROUND I & II:**

**GROUND IV: CONFIRMING DISALLOWANCE MADE BY THE AO OF INTEREST ON LOANS OF RS. 5,23,603/- U/s.37 OF THE ACT ON LOANS TREATED BOGUS**

1. *On the facts and in the circumstances of the case and in law, the CIT(A) erred in confirming the disallowance of interest on loans availed on the alleged ground that since the loans were treated as bogus, the interest on such loans is also not allowable U/s. 37 of the Act.*
2. *CIT(A) failed to appreciate and ought to have held that no addition can be confirmed as*
- a. *The statements of the Partner of the Firm were retracted during the course of assessment proceedings immediately after the same were made available to the Appellant;*
- b. *An addition solely based on the statements of third parties cannot be made, moreover when the said statements were never provided to the Appellant;*
- c. *In absence of any corroborative evidence, addition cannot be made solely on the basis of some statements;*
- d. *There was no incriminating material found during the course of search action to Support the allegations of loans being bogus in nature;*

e. Having regard to the confirmation, statements and accounts of the loan creditors filed in the course of assessment, the additions made deserves to be deleted.

3. The Appellant prays that the disallowance on account of interest on loans availed treated as Bogus u/s 37 of the Act be deleted/appropriately reduced.

**WITHOUT PREJUDICE TO GROUND I & II:**

**GROUND V: CONFIRMING THE ADDITION MADE BY THE AO OF NOTIONAL COMMISSION OF RS. 2.00,000/**

1. On the facts and in the circumstances of the case and in law, the CIT(A) erred in confining an addition of notional commission on the alleged ground that the Appellant must have incurred commission expenses on the unsecured loans held to be in the nature of accommodation entries.
2. The CIT(A) failed to appreciate and ought to have held that the statements of the Partner which were relied upon for making an addition of notional commission were retracted during the course of assessment proceedings.
3. Without prejudice to 1 to 2 above, the CIT(A) has erred in confirming the actions of the AO in relying upon the general statement of the Partner at Question-21 of the statement recorded on oath on December 13, 2013 ignoring the reply given by the Partner in response to Question-6 of the statement recorded on oath on December 30, 2013 mentioning that there are no brokers involved in these transactions.
4. The Appellant prays that the addition on account of notional commission be deleted.

**WITHOUT PREJUDICE TO GROUND I & II:**

**4 GROUND VI: CONFIRMING THE DISALLOWANCE MADE BY THE AO OF PROFESSIONAL FEES OF RS.1,20,439/**

1. *On the facts and in the circumstances of the case and in law, the CIT(A) erred in confirming the adhoc addition of professional fees on the alleged ground that the Appellant has not filed any documentary evidence in support of its claim and ignoring the submissions of the Appellant in entirety.*
2. *The CIT(A) failed to correctly appreciate and ought to have held that no additions can be confirmed as;*
  - a. *The Appellant has submitted the required details in respect of the expenses during the course of assessment;*
  - b. *The expenses have been incurred wholly and exclusively for the purpose of business.*
3. *The Appellant prays that the disallowance of professional fees be deleted.*

**WITHOUT PREJUDICE TO GROUND I & II:**

**GROUND VII: CONFIRMING OF DISALLOWANCE MADE BY THE AO OF LABOUR CHARGES OF RS. 26,69,785/**

1. *On the facts and in the circumstances of the case and in law, the CIT(A) erred in confirming the adhoc addition of labour charges on the alleged ground that the Appellant has not filed any documentary evidence in support of its claim and ignoring the submissions of the Appellant in entirety.*
2. *The CIT(A) failed to appreciate and ought to have held that no additions can be made as:*
  - a. *The Appellant has submitted the required details in respect of the expenses;*
  - b. *The expenses have been incurred wholly and exclusively for the purpose of business.*
3. *The Appellant prays that the disallowance of labour charges be deleted.*

**GROUND VIII: CONFIRMING ORDER OF THE AO OF CHARGING OF INTEREST UNDER SECTION 234B AND 234C OF THE ACT:**

1. *On the facts and in the circumstances of the case and in law, the CIT(A) erred in confirming the actions of the AO in charging interest under section 234B and 234C of the Act.*
2. *The Appellant prays that the AO be directed to delete the interest charged or appropriately reduce interest under section 234B and 234C of the Act.*

*GROUND IX: GENERAL. The Appellant craves leave to add, alter, amend and/or delete, all or any of the foregoing grounds of appeal."*

**11.** Before us, assessee has filed a chart highlighting the status of the appeal whether abated or non-abated in the case of group companies which is reproduced below: -

**KamlaLandmarc Enterprises**  
**Before H Bench, ITAT Mumbai for the clarification matter heard on**  
**18.06.2021**

<b>Assessment Year</b>	<b>ITA No:</b>	<b>Return of Income filed u/s.139(1)</b>	<b>143(3) Order Passed</b>	<b>Date of issuing Notice u/s.143(2) expires on</b>	<b>Date of Search</b>	<b>Remarks</b>
2008-2009	1365/Mum/2019	29.09.2008	Yes	30.09.2009	10.12.2013	Non Abated Assessments
2009-2010	1366/Mum/2019	26.09.2009	No	30.09.2010	10.12.2013	Non Abated Assessments
2010-2011	1367/Mum/2019	13.10.2010	No	30.09.2011	10.12.2013	Non Abated Assessments
2011-2012	1368/Mum/2019	29.09.2011	No	30.09.2012	10.12.2013	Non Abated Assessments
2012-2013	1369/Mum/2019	29.09.2012	No	30.09.2013	10.12.2013	Non Abated Assessments

<b>Assessment Year</b>	<b>ITA No:</b>	<b>Return of Income filed u/s.139(1)</b>	<b>143(3) Order Passed</b>	<b>Date of issuing Notice u/s.143(2) expires on</b>	<b>Date of Search</b>	<b>Remarks</b>
2013-2014	1370/Mum/2019	Not filed	No	30.09.2014	10,12.2013	Abated Assessments
2014-2015	1371/Mum/2019	13.01.2016	No	30.09,2015	10.12.2013	Abated Assessments

**KamlaLandmarc Developers**  
**Before H Bench, ITAT Mumbai for the clarification matter heard on**  
**18.06.2021**

<b>Assessment Year</b>	<b>ITA No:</b>	<b>Return of Income filed u/s,139(I)</b>	<b>143(3) Order Passed</b>	<b>Date of issuing Notice u/s. 143(2) expires on</b>	<b>Date of Search</b>	<b>Remarks</b>
2008-2009	712/Mum/2019	30.09.2008	Yes	30.09.2009	10.12.2013	Non Abated Assessments
2009-2010	713/Mum/2019	29.09.2009	No	30.09.2010	10.12.2013	Non Abated Assessments
2010-2011	714/Mum/2019	13.10.2010	No	30.09.2011	10.12.2013	Non Abated Assessments
2011 -2012	715/Mum/2019	29.09.2011	No	30.09.2012	10.12.2013	Non Abated Assessments
2012-2013	716/Mum/2019	29.09.2012	No	30.09.2013	10.12.2013	Non Abated .Assessments
2013-2014	717/Mum/2019	30.10.2013	No	30.09.2014	10.12.2013	Abated Assessments
2014-2015	718/Mum/2019	29.01.2016	No	30.09.2015	10.12.2013	Abated Assessments

**KamlashmiBuilders**  
**Before H Bench, ITAT Mumbai for the clarification matter heard on**  
**18.06.2021**

<b>Assessment Year</b>	<b>ITANo:</b>	<b>Return of Income filed u/s. 139(1)</b>	<b>143(3) Order Passed</b>	<b>Date of issuing Notice u/s. 143(2) expires on</b>	<b>Date of Search</b>	<b>Remarks</b>
2008-09	1375/Mum/2019	28.09.2008	24.12.2010	30.09.2009	10.12.2013	Non Abated Assessments
2011-12	1376/Mum/2019	29.09.2011	No	30.09.2012	10.12.2013	Non Abated .Assessments

Assessment Year	ITANo:	Return of Income filed u/s. 139(1)	143(3) Order Passed	Date of issuing Notice u/s. 143(2) expires on	Date of Search	Remarks
2012-2013	1377/Mum/2019	19.04.2013	No	30.09.2014	10,12,2013	Abated Assessments
2013-2014	1378/Mum/2019	---	No	30.09.2014	10,12,2013	Abated Assessments
2014-2015	1379 /Mum/2019	29.01.2016	No	30.09.2016	10.12.2013	Abated Assessments

**12.** Before us, Ld. AR made the following submissions: -

**"SUMMARY OF ARGUMENTS MADE DURING HEARING:"**

1. *Search was carried out u/s. 132 on Kamla Group on 10/12/2013.*
2. *This is an entity of Kamla Group.*
3. *The assessments are completed u/s. 143(3) r.w.s.153A of the Income Tax Act,1961. A chart showing year wise details of additions enclosed.*
4. *No incriminating material was found during the search carried out on 10/12/2013.*
5. *The addition is made in Assessment Year: 2009 - 2010 in respect of loan borrowed from Rose Impex of Rs.1,00,00.000/- u/s.68 as alleged accommodation entry and disallowed interest paid thereon, and commission @ 2% added on alleged accommodation entry.*
6. *Labour charges and Professional Fees are also disallowed by the Assessing Officer on adhoc basis.*
7. *CITA has upheld the addition made by the Assessing Officer in respect of loan borrowed u/s.68.*

*However, in respect of disallowance of interest and other expenses, CITA has taken cognizance of facts that expenses are included in valuation of work - in - progress and same are set aside to file of Assessing Officer, by stating that the disallowance of interest and other expenses to be deleted, if*

*the same are included in work in progress. The order giving effect to the same is pending.*

8. *Year wise details of abated and non-abated assessment is submitted earlier before Hon. Coordinate bench. The same is available on records. A copy of which is enclosed.*

9. *The order of CITA is passed ex-parte. However, the CITA has taken cognizance of various documents filed during the course of assessment proceedings but not considered by the Assessing Officer while completing assessment proceedings.*

*The document submitted by the Appellant to prove identity, creditworthiness and genuineness of loan borrowed considered but not accepted by CITA.*

10. *The retraction of the said statement was, filed during course of assessment proceedings but the same was not considered by the Assessing Officer and considered but not accepted by Hon. CITA.*

11. *In the Assessment Order as well as CITA Order, there is no finding about any incriminating materials found during the search.*

*However, Hon. CITA has upheld the addition of loan borrowed by Assessing Officer u/s.68, despite no incriminating materials were found in case of non-abated assessment, only on the grounds that:*

*i. The statement recorded u/s.132 (4), in the absence of any incriminating materials found, is itself incriminating.*

*ii. Absence of various documents about the loan borrowed like loan agreements, terms of agreement, security offered etc. is also incriminating.*

*iii. CITA has also confirmed facts that no incriminating materials were found during the search.*

*iv. CITA has not accepted retraction of statement recorded u/s.132(4) filed during the course of assessment proceedings.*

12. *Neither Assessing Officer nor Hon. CITA has carried out any independent inquiry about the verifying the authenticity of various documents filed during the assessment proceedings to prove identity, creditworthiness and genuineness of loan*

*borrowed and made the addition merely on the basis of statement of Jitendra Jain, recorded u/s.132(4)]*

*The statement was recorded u/s.132(4) to confront the statement of alleged accommodation entry providers recorded during search carried out or survey carried out on them to prove identity, genuineness and creditworthiness of the loans taken and recorded in books of accounts from alleged accommodation entry providers.*

13. *Copies of statement recorded u/s.132(4) on 13/12/2013 and 30/12/2013 were provided by Assessing Officer on 25/02/2016 and retraction was filed on 18/03/2016 before the Assessing Officer, the same is not considered by the Assessing Officer and not accepted by Hon. CITA.*
14. *In the rejoinder, the learned D.R. relied on judgment of Hon. Madras High Court Murli Agro for the limited purpose of ascertaining validity of proceeding u/s.153A in absence of incriminating material.*

*We leave this to wisdom of Hon. Members in respect of the same.*

*The case of Murli Agro however confirms the ratio laid down by decision of Hon. Bombay High Court in case of Continetal Warehousing and All cargo Global Logistic that no addition can be made in respect of completed assessment u/s.153A without incriminating materials found during the search.*

15. *Elaborate submission is given herewith about what is incriminating materials in our submission enclosed herewith.*

*According to ratio laid down, observation made in various case laws relied upon in the submission.*

*"Statement recorded u/s.132(4) without having any incriminating materials found during search is not incriminating material itself".*

*"Absence of basic documents about the loan at the time of search cannot be treated as incriminating material found."*

16. *The case of decision of Hon. Madras High Court in case of B. Kishore Kumar relied upon by learned D.R. is distinguished because during the search action loose sheets were found, noting on telephone diaries were found during the search and statement u/s.132(4) was considered for making the addition u/s.153A and incriminating materials were found.*

17. *Without prejudice to the above, it was also submitted that the documents to prove the initial onus about identity, genuineness and credit worthiness were filed during the assessment proceedings.*

*Neither Assessing Officer nor Hon. CIT(A) made any preliminary inquiry to verify authenticity of documents filed and treated loan taken as bogus based on statements of the persons indulged in activities of providing bogus loans and statement of Jitendra Jain recorded u/s.132(4).*

*Copies of statement of the persons indulged in providing accommodation entries were not given.*

*The opportunity to cross examine those persons even though requested for was denied.*

*We rely on case of Hon. Bombay High Court in case of Gangan Deep Infrastructure Private Limited and Green Infra wherein addition u/s.68 were deleted once primary onus cast upon on assessee is discharged and also rely on case of Hon. Apex Court in case of Lovely Exports, wherein it is decided once preliminary onus discharged by the assessee, the addition u/s.68 cannot be made in the hand of borrower. If at all addition to be made, it is to be made in the hands of lender.*

18. *Our prayer is*

- i. No addition can be made in the non-abated assessment u/s. 153A, in absence of any incriminating material found during the search.*
- ii. Absence of various loan documents or the statement recorded u/s.132(4) in the absence of incriminating material found is not incriminating for making addition in non-abated assessment. The statement recorded is already retracted. Addition is made in respect of loan borrowed which are already recorded in Books of Accounts. Addition u/s. 153A cannot be made in respect of transactions already recorded in books of accounts in absence of any incriminating material found in respect of non-abated assessment.*
- iv. We rely on cases of Continental Warehousing Corporation and All Cargo Global Logistics Limited of Hon. Bombay High Court; wherein it is decided that no addition can be made in non-abated assessment if no incriminating materials found during the search.*

- v. *Without prejudice the documents filed by the Appellant during the course of assessment proceedings to prove the identity, creditworthiness and genuineness to be considered*
- vi. *Disallowance of interest and other expenses be deleted since they are included in value of closing work in progress."*

**13.** On the other hand, Ld. DR relied on the orders passed by the lower authorities and submitted that retraction made by Shri Jitendra Jain is bad in law since retraction was made after expiry of two years it can only be treated as after-thought. In this regard he relied on the case of D.Krishnakumar (62 taxman 215).

**14.** We have heard the parties and perused the details, documents and submissions alongwith case laws relied upon by the Ld. AR as well as Ld.DR. The Ld. Representative of the assessee has argued that no incriminating materials were found during the search carried out on 10.12.2013 at the various premises of the Kamla Group, therefore, the assessment is not liable to be reopened in accordance with law. It is also argued that the period for issuing the notices u/s 143(2) of The Income Tax Act, 1961 expired by the time of search for the assessment years from 2009 - 2010 to 2012 - 2013 and no notices were issued u/s 143(2) for the aforesaid assessment years. It is also argued that the assessment order for A.Y. 2008 - 2009 was passed u/s 143(3) of the Act as observed by the

Assessing Officer while passing the assessment order u/s 143(3) r.w.s 153A dated 18.03.2016 for AY 2008-09, therefore, the assessment in relation to the assessment years 2008-2009 to 2012-2013 are non-abated assessments and are not liable to be sustainable. It is specifically argued that the statement recorded u/s 132(4) of the Act itself cannot be treated as incriminating evidence. In support of these contention, the Ld. Representative of the assessee has placed reliance upon the decision in the case of Commissioner of Income Tax *v.* Harjeev Aggarwal [(2016) 290 CTR 263]. The Ld.DR raised the contention that the statement recorded u/s 132(4) in itself is an incriminating material and also argued that in the absence of supporting documentary evidences for the unsecured loans borrowed are also considered as incriminating facts and therefore, the additions are rightly made by the Assessing Officer in respect of loan borrowed from the parties who were allegedly indulged in providing accommodation entries and upheld by the Ld.CIT(A) for the aforesaid year for which the assessment is non-abated.

**15.** The Ld. AR responded to the said contention of the Ld.DR relying on various case laws wherein it is categorically observed and held that the statement recorded u/s 132(4) of the Act itself cannot be treated as incriminating material for making any additions in respect of non -abated

assessments. Considering the above said contention, it is to be seen whether the statement recorded u/s 132(4) is liable to be treated as incriminating evidence or not. In case CIT v. Harjeev Aggarwal (supra), it is held that: -

*"23. In view of the settled legal position, the first and foremost issue to be addressed is whether a statement recorded under Section 132(4) of the Act would by itself be sufficient to assess the income, as disclosed by the Assessee in its statement, under the Provisions of Chapter XIV-B of the Act."*

*24. In our view, a plain reading of Section 158BB(1) of the Act does not contemplate computing of undisclosed income solely on the basis of a statement recorded during the search. The words "evidence found as a result of search" would not take within its sweep statements recorded during search and seizure operations. However, the statements recorded would certainly constitute information and if such information is relatable to the evidence or material found during search, the same could certainly be used in evidence in any proceedings under the Act as expressly mandated by virtue of the explanation to Section 132(4) of the Act. However, such statements on a standalone basis without reference to any other material discovered during search and seizure operations would not empower the AO to make a block assessment merely because any admission was made by the Assessee during search operation*

*s. 25. (...) However, as stated earlier, a statement on oath can only be recorded of a person who is found in possession of books of accounts, documents, assets, etc. Plainly, the intention of the Parliament is to permit such examination only where the books of accounts, documents and assets possessed by a person are relevant for the purposes of the investigation being undertaken. Now, if the provisions of Section 132(4) of the Act are read in the context of Section 158BB(1) read with Section 158B(b) of the Act, it is at once clear that a statement recorded under Section 132(4) of the Act can be used in evidence for making a block assessment only if the said statement is made in the context of other evidence or material discovered during the search. A statement of a person, which is not relatable to any incriminating document or material found during search and seizure operation cannot, by itself, trigger a block*

*assessment. The undisclosed income of an Assessee has to be computed on the basis of evidence and material found during search. The statement recorded under Section 132(4) of the Act may also be used for making the assessment, but only to the extent it is relatable to the incriminating evidence/material unearthed or found during search. In other words, there must be a nexus between the statement recorded and the evidence/material found during search in order to for an assessment to be based on the statement recorded."*

**16.** We also took into notice of the CBDT Circular F No. 286/2/2003-IT(Inv) dated 10.03.2003 addressed to all the Chief Commissioners of income Tax (Cadre Contra) and Directors Generals of Income Inv, relied by the Ld. Representative of the assessee wherein the emphasis was given to collection of incriminating materials rather than obtaining confession of additional income during the course of search and seizure proceedings. No doubt, the Ld. DR placed reliance upon the case of B. Kishore Kumar (T.C.A 738 to 744 of 2014, dated 3.11.2014) of Hon'ble Madras High Court for considering the statement given by the assessee has good evidence value, does not override the contentions of the Ld. AR, as the facts of the said case of B Kishore Kumar are distinguished with the facts of the case of the Assessee mainly on the ground that the sworn statement of B Kishore Kumar was taken by showing him the three print outs of the amount of loan given found during the search and not recorded in his regular books of accounts and in response to the same he admitted in his statement that there is a separate business carried out by him the

income of which is not included in his return of income. In the case of the assessee, the statement was not recorded on the basis of any incriminating materials found during the search. The assessee relied upon the case law of the Hon'ble Bombay High Court in the case of CIT v. Continental Warehousing Corporation (NhavaSheva) Ltd. [2015] 58 taxmann.com 78 (Bom) wherein it is held that for assessment under section 153A in case of unabated assessment, if no incriminating material was found during the course of search in respect of an issue, then no additions in respect of any issue can be made to the assessment under Section 153A and 153C of the Act. The relevant extract of the order is reproduced as under:

*"On a plain reading of section 153A, it becomes clear that on initiation of the proceedings under section 153A, it is only the assessment/reassessment proceedings that are pending on the date of conducting search under section 132 or making requisition under / section 132/4 stand abated and not the assessments / reassessments already finalised for those assessment years covered under section 153A. By a Circular No. 8 of 2003, dated 18-9-2003 (See 263 ITR (St) 61 at 107) the CBDT has clarified that on initiation of proceedings under section 153A, the proceedings pending in appeal, revision or rectification proceedings against finalised assessment / reassessment shall not abate. It is only because, the finalised assessments / reassessments do not abate, the appeal revision or rectification pending against finalised assessment / reassessments would not abate. Therefore, the argument of the revenue, that on initiation of proceedings under section 153A, the assessments / reassessments finalised for the assessment years covered under section 153A stand abated cannot be accepted. Similarly on annulment of assessment made under section 153A(1) what stands revived is the pending assessment / reassessment proceedings which stood abated as per section 153A(1). "Once it is held that the assessment has attained finality, then the Assessing*

*Officer while passing the independent assessment order under section 153A read with section 143(3) could not have disturbed the assessment / reassessment order which has attained finality, unless the materials gathered in the course of the proceedings under section 153A establish that the reliefs granted under the finalised assessment / reassessment were contrary to the facts unearthed during the course of 153A proceedings. If there is nothing on record to suggest that any material was unearthed during the search or during the 153A proceedings, the Assessing Officer while passing order under section 153A read with section 143(3) cannot disturb the assessment order."*

**17.** Ld. Representative of the assessee also relied upon the case titled as All Cargo Global Logistic [374 ITR 645 (2015) (BOM)], wherein the Hon'ble Bombay High Court held that that no addition can be made in respect of completed assessment u/s.153A without incriminating materials found during the search. We are of the view that the original assessment for the Assessment Year 2008-2009 was completed u/s.143(3) and for the assessment years 2009-2010 to 2012-2013, the period for issuing the notice u/s 143(2) has elapsed on the date of search i.e. 10.12.2013 and no notices were issued u/s 143(2) for the aforesaid years. Therefore, the assessment for the assessment years 2008-2009 to 2012-2013 are non abated and no additions can be made in respect of the non abated assessment years without referring to any incriminating materials found during the search. It is apparent that no incriminating material was found during the search.

**18.** In other words, the reference is to those assessments in whose case assessment under section 143(3) cannot now be done. It is not at all the case of the revenue that in the appeals which have been claimed as unabated here there was time for assessment under section 143(3). In this view of the matter, in our considered opinion, the submission of the learned counsel of the assessee succeeds that addition in the case of unabated assessment without reference to incriminating seized material for assessment u/s.153A is not sustainable on the touchstone of above said Hon'ble Jurisdictional High Court decisions. Here, we also like to mention the decision of the Hon'ble ITAT in the case of Smt. Kalpana Mukesh Ruia Vs. DCIT, CC-2(2). The relevant finding as under:

*"39. We have carefully considered the submissions and perused the records. Firstly issue in appeal is that in assessment framed under section 153(A) in case of the unabated assessment addition without reference to incriminating material is not sustainable. This issue has been clearly spelt out and affirmed by honourable jurisdictional High Court in the Catena of case laws including that of continental warehousing (supra).*

*40. The learned departmental representative and the learned CIT appeals have tried to distinguish this decision from Hon'ble Bombay High Court by referring to Hon'ble Delhi High Court decision in the case of Kabul Chawla (supra).*

*41. In this regard we are of the considered opinion that the decision from honourable jurisdictional High Court in Continental Warehousing (supra) is clear and unambiguous. It was clearly held in that case that assessments which are not pending and which have attained finality, addition under section 153(A) cannot be done without reference to*

*incriminating seized material. We may gainfully refer to the relevant order of the honourable High Court as under:*

*"On a plain reading of section 153A, it becomes clear that on initiation of the proceedings under section 153A, it is only the assessment/reassessment proceedings that are pending on the date of conducting search under section 132 or making requisition under I section 132/4 stand abated and not the assessments/reassessments already finalised for those assessment years covered under section 153A. By a Circular No. 8 of 2003, dated 18-9-2003 (See 263 ITR (St) 61 at 107) the CBDT has clarified that on initiation of proceedings under section 153A, the proceedings pending in appeal, revision or rectification proceedings against finalised assessment/reassessment shall not abate. It is only because, the finalised assessments/reassessments do not abate, the appeal revision or rectification pending against finalised assessment/ reassessments would not abate. Therefore, the argument of the revenue, that on initiation of proceedings under section 153A, the assessments/reassessments finalised for the assessment years covered under section 153A stand abated cannot be accepted. Similarly on annulment of assessment made under section 153A(1) what stands revived is the pending assessment/reassessment proceedings which stood abated as per section 153A(1)."*

*"Once it is held that the assessment has attained finality, then the Assessing Officer while passing the independent assessment order under section 153A read with section 143(3) could not have disturbed the assessment/reassessment order which has attained finality, unless the materials gathered in the course of the proceedings under section 153A establish that the reliefs granted under the finalised assessment/reassessment were contrary to the facts unearthed during the course of 153A proceedings. If there is nothing on record to suggest that any material was unearthed during the search or during the 153A proceedings, the Assessing Officer while passing order under section 153A read with section 143(3) cannot disturb the assessment order."*

42. A reading of the above makes it clear that it was expounded that in case of assessments which have attained finality no addition under section 153(A) can be done without seized incrementing material. In this regard, the learned departmental representative and learned CIT appeals have

*tried to make out a case that in the present cases before us the earlier assessments were not under section 143 (3). Hence the ratio from honourable jurisdictional High Court decision will not apply here. The learned departmental representative has mentioned that honourable High Court has referred about assessments which have been finalized.*

*43. In our considered opinion, the honourable jurisdictional High Court has never mentioned that it is only assessment which has been completed under section 143(3) that addition under section 153(A) cannot be done without reference to incriminating seized material. Honourable jurisdictional High Court has clearly mentioned that it is those assessments which are unabated, that is not pending, to which the above said ratio will apply. Assessments which are not pending are not only those which have been completed under section 143(3) but also those for which the time for issuing notice under section 143(2) have already elapsed. In other words the references is to those assessments in whose case assessment under section 143 (3) cannot now be done. It is not at all the case of the revenue that in the appeals which have been claimed as unabated here there was time for assessment under section 143(3). In this view of the matter, in our considered opinion, the submission of the learned counsel of the assessee succeeds that addition in the case of unabated assessment without reference to incriminating seized material for assessment u/s.153(A) is not sustainable on the touchstone of above said honourable jurisdictional High Court decision. Therefore, the learned CIT appeals and the learned departmental representative plea in trying to distinguish the same by reference to Hon'ble Delhi High Court decision and honourable Supreme Court decision in the case of Rajesh Jhaveri (supra) doesn't succeed.*

*44. It may not be out of place here to mention that it is specifically provided in section 153A "that assessment or reassessment if any relating to any relevant assessment year or years referred to in this subsection pending on the date of initiation of search under section 132 or making of requisition under section 132 a as the case may be shall abate." This makes it further abundantly clear that only those assessments which are pending abate. Hence sanguine provisions of the act read with honourable jurisdictional High Court decision as above make it abundantly clear that the assessments which do not abate and assessment and addition under section 153 A without reference to incriminating seized material is not sustainable.*

45. *The jurisprudence regarding jurisdictional defect in assessment under section 153A /153C without reference to incriminating seized material has also been expounded by honourable Supreme Court in the case of Commissioner of Income Tax vs. Singhad technical education Society in civil appeal No. 11080 of 2017 and others. In this regard the honourable Supreme Court in paragraph 18 of the said order observed that:*

*In this behalf it was noted by the ITAT that as per provisions of section 153C of the Act, incriminating material which was seized had to pertain to 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 for assessment years since this requirement under section 153C of the act is essential for assessment under the provision it becomes a jurisdictional defect. We find this reasoning to be logical and valid having regard to the provisions of section 153C of the Act.”*

46. *We also note that the co-ordinate bench of ITAT in the case of Shri Vijayrattan Balkrishan Mittal (supra) in similar situation held that, dehorse incriminating Material assessment u/s.153A is not sustainable in the case of unabated assessment. We may gainfully refer to the said decision as under:*

*44. After hearing both the parties and perusing the facts on record, we observed that undisputably the assessment in the instant year has not abated on the date of search. We further find that the evidences were gathered after issuing notice under section 133(6) that assessee has carried out synchronized trades for obtaining bogus LTCG. In our opinion, the said information/data is collected after the date of search and does not constitute incriminating material found and seized during the course of search. Keeping in view the said facts and circumstances, we are of the considered view that addition to the income of the assessee can only be made on the basis of incriminating record found during the course of search. In the present case, there is no such incriminating material and therefore, the AO has no jurisdiction to make addition in the unabated assessment. The case of the assessee is squarely covered by the decision of Hon’ble Bombay High Court decision in the case of Continental Warehousing Corporation (Nhava Sheva) Ltd. (supra), wherein the Hon’ble Bombay High Court held as under: -*

"a) Whether on the facts and in the circumstances of the case and in law, the Id. CIT(A) was justified in deleting the addition of ₹.3,91,55,000/- under section 68 of the Act in respect of share application money and addition of ₹ 11,24,964/- under section 14A made by the Assessing Officer, as it was not based on incriminating material found during the course of search.

d) Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) was justified in deleting the addition of ₹.3,91,55,000/- under section 68 of the Act in respect of share application money and addition of ₹ 11,24,964/- under section 14A made by the assessing officer without appreciating the fact that the decision of continental warehousing corporation & the decision in the case of All Cargo Global Logistics have not been accepted by the department and an SLP has been filed in the Supreme Court in both the cases decided by the High court i.e. Continental Warehousing Corporation as well as all Cargo Global Logistics vide appeal civil 8546 of 2015 and SLP civil 5254-5265 of 2016 respectively."

45. Since, there is no incriminating material found during the course of search, we therefore respectfully following the ratio laid down by the Hon'ble Bombay High Court in the above decision, set aside the order of the CIT(A) and direct the AO to delete the addition. Resultantly, the appeal of the assessee on jurisdictional issue is allowed.

47. As regards the issue of seized material it is clear that in the appeals which have remained unabated the addition is without reference to any seized material. The materials referred are only the statement obtained of the assessee under section 132 (4). These have been duly retracted. Hence without corroborative material addition only based upon the retracted statement is not sustainable. For this proposition following case laws are germane:

- CIT Vs. Sunil Agarwal (379 ITR 367)
- CIT Vs. Naresh Kumar Agarwal (369 ITR 171)
- DCIT Vs. Narendra Garg & Ashok Garg (AOP) (ITA No. 1531 & 1532 of 2007 dated 28.7.2016)
- DCIT Vs. Marathon Fiscal Pvt. Ltd. (ITA no. 5783 & 5784/Mum/2017 dated 28.8.2019)
- Tribhuvandas Bhimji Zaveri (ITA 2250 & 2251/Mum/2013 dt. 4.11.2015)

48. *It may also be pertinent to note here that no seized material said to be incriminating was produced before us. In light of above said case laws the observation of learned CIT(A) that incriminating material need not be specific has no legs to stand. This very observation by the learned CIT(A) itself is an admission that no specific incriminating material has been seized and referred in the assessment order Hence, in all cases of unabated assessment the assessment fails on jurisdictional defect. Thus, ITA No. 6519/MUM/2019, 6520/MUM/2019, 6515/MUM/2019, 6516/MUM/2019, 6513/MUM/2019 & 6514/Mum/2019 are dismissed on account of jurisdictional defect.*

49. *As regards the issue of additions on merits for the bogus long-term capital gain, we note that the same is based upon the modus operandi of earning bogus long-term capital gain in general mentioned by the assessing officer. It is further more based upon the statements obtained upon survey. Furthermore it is based upon Assessing Officer's analysis of the impugned companies financials wherein the assessing officer is of the opinion that the increase in value is unjustified. Furthermore assessing officer has referred to general SEBI action in case of bogus long-term entry operators. However none of the brokers or the persons or the companies dealt in these appeals have been referred in the above said SEBI enquiry noted by the AO in his order. As regards the merits of additions based upon the statement obtained from Survey from 3<sup>rd</sup> parties the same is not at all sustainable without any corroborative material. This position was expounded by the honourable Supreme Court in the case of S. Kader Khan (supra). That there is no material incrementing available in this regard is clearly evident from the observation of the assessing officer in the order itself. The assessing officer mentions that what is real was not recorded in the books of accounts at any place. He mentions in the assessment order that no book entries to the real transactions either in the books of assessee or in the books of this entry operators are there. This clearly signifies that assessing officer is not referring to any incriminating material seized. As regards the observation of the assessing officer that the share broker has accepted that he was acting on the advice of Shri Prakash Modi on behalf of the assessee, again there is no incriminating seized record in this regard. The same remains solely statement upon survey which is not a conclusive evidence of addition of undisclosed income without corroborative material.*

50. *It is noted that assessee's claim that all necessary documentary evidences are in place have remained undisputed. The assessee has provided all the contract notes of the brokers in relation to sales and*

*purchase of the shares which are system generated and prescribed by the Stock Exchange, copies of share certificates, copy of the Demat account statement of the assessee, copies of bank statements of the assessee highlighting the payments for purchase of shares and receipts against the sale of shares. Pursuant to sale of shares the broker issued contract notes for sale of impugned shares vide various bills. There is no evidence of any privity of contract between the assessee and the buyer of the shares as the assessee does not know to whom the shares have been sold and hence the long term capital gain on sale of shares cannot be treated as non-genuine. The assessee has received entire sales proceeds through regular banking channels from the stock broker registered with SEBI which establishes the identity of the payer, sources of funds on sale of the same shares and the genuineness of the transaction. The AO has not pointed out any deficiency in the documents or inherent weakness in the explanation or doubted genuineness of the transactions for want of any evidence.*

*51. From the above, it is evident that all the documentary evidence in support of the income has been maintained and furnished. No defect in the same has been referred by the Revenue.*

*52. Further, it is undisputed that the assessee has asked for cross examination doing assessment proceeding itself. However, the same remained unresponded by the A.O. as well as Id. CIT(A). These information collected on the back of the assessee without opportunity to cross examine, cannot be a basis for addition. They have been held to be vitiating the assessment itself and rendering it a nullify. Here, the Hon'ble Supreme Court's decision in the case Andaman Timber Industries (supra) is germane and supports this proposition.*

*53. In this regard we also place reliance upon the co-ordinate bench decision in the case of Shri Vijayrattan Balkrishan Mittal (supra), wherein similar addition was deleted by following adjudication:*

*28. We also noted that as per provisions of section 68 of the Act, where any sum is found credited in the books in any previous year and assessee offers no explanation about the nature and source thereof or the explanation offered is not satisfactory to the AO, the sum credited may be charged to tax under Sec. 68 of the Act. The assessee is required to prove: (i) the identity of the creditor (ii) Source of the credit and (iii) genuineness of the transaction to the satisfaction of the AO. To prove the identity of the creditor, the*

*nature of transactions, source of payments and the genuineness of the transactions of sale of shares of PAL, the assessee has submitted following documents/ evidences: -*

*a) To prove the identity of creditor and nature of transaction the assessee submitted copy of Contract note on sale by Geojit on BSE platform. The contract notes shows the quantity, rate, time stamp, value, taxes and charges viz. STT, brokerage, SEBI and exchange turnover charges, service tax and stamp duty incurred on all the transactions done on BSE platform, a stock exchange recognized by the market regulator SEBI. The documents have been accepted by the AO.*

*b) Bank statement showing sale proceeds credited by the broker Geojit. Demat account of the assessee showing sold shares debited/transferred to broker.*

*c) The sale consideration is received by assessee from Geojit, a registered broker of SEBI/BSE, with who has been dealing with Geojit for more than 10 years as per contract note directly in the bank account after shares are delivered from demat account and received by the assessee. Copy of demat account and bank statements where sale proceeds are received are submitted as discussed above. Geojit has also been examined and interrogated by the Investigation Department during search proceedings. Geojit's source is BSE settlement system. This explains identity of the creditor and source of money paid by assessee for genuine transaction of sale of shares.*

*d) Sale is done at prevailing price quoted on the BSE. (BSE published quotations daily and rate list of the relevant dates can be produced if required)*

*e) The shares are sold by assessee's broker on BSE platform and not off market to any buyer hence source is BSE's clearing system and broker. The transactions on the BSE platform and settlement system who are responsible for the transactions of the demat account and prevailing price on public domain prove the genuineness of the transactions.*

*f) SEBI's final order dt. 19.09.2017 relating to PAL is enclosed. SEBI after detailed investigation into the transactions in the shares of these companies held that the parties to the investigation*

*including assessee and alleged exit providers are having no nexus or connection with the company, their directors, promoters etc. and there is no price or volume manipulation in these scripts. This also explains the genuineness of the transactions and discards the theory of manipulation or accommodation to take tax advantage illegally.*

*29. We have also noted the facts further that the assessee has received total amount of Rs. 14,16,80,449/- on account of sale of shares of PAL during the year, in the account with Axis Bank from Geojit, registered broker of BSE with whom the assessee is dealing from last more than 10 years. The assessee has been regular investor in shares & securities and his portfolio comprises of various shares and the aggregate value of investments for 5 years have been as under: -*

<i>AY ( as on date)</i>	<i>Total investment in shares – Amount (in Rs.)</i>
<i>31.03.2011</i>	<i>3,77,21,394</i>
<i>31.03.2012</i>	<i>3,33,40,018</i>
<i>31.03.2013</i>	<i>2,66,87,649</i>
<i>31.03.2014</i>	<i>2,91,24,876</i>
<i>31.03.2015</i>	<i>2,58,84,431</i>

*Copies of Balance Sheet of the assessee for the above mentioned years showing the investments made in shares were submitted to the AO vide submission dated 15.03.17 as well as before CIT(A) and even now before us. This adds to the bonafide of the assessee's transactions. In view of the above facts and circumstances of the case, we have to go through the expression of "nature and source" and has to understand the requirement of identification of the source and its genuineness. Sec. 68 of the Act places the burden of proof on the tax payer, to explain the nature of source of any credit but not the source of the source. Hence when an assessee gives evidences of identity of the payer, source of the credit, evidences of the transactions to prove the genuineness, the assessee is said to have discharged his initial burden. In view of the above, we are of the view that the assessee has explained and submitted evidences to prove identity, nature and source of the cash credit on account of sale proceeds credited/received in the bank account of the assessee and also furnished all evidences comprising contract notes, brokers, banking details in support of the genuineness of the transactions. The AO has not pointed out any deficiency in the*

*documents or inherent weakness in the explanation or doubted genuineness of the transactions for want of any evidence. The AO did not produce any evidence whatsoever to prove the allegation that unaccounted money changed hands between the assessee and the broker or any other person including the alleged exit provider nor proved that the assessee has taken any type of accommodation from any person or so called exit providers to introduce unaccounted money into books by way of LTCCG. With the purchase and sale transactions of shares of PAL are proved genuine by third party evidences - bank, broker; DP-demat account, and in the absence of any material to prove cash changing hands in the transaction, the addition made by the AO under section 68 of the Act, by treating the sale consideration as unexplained, sham, non-genuine is baseless. The addition under section 68 of the Act made merely of the basis of suspicion, presumptions and probability of preponderance without any direct evidence to prove the transactions as non-genuine or sham or demonstrating appellant's involvement in any kind of manipulation is illegal and cannot sustain. The findings of investigation & modus operandi in other cases narrated by the AO and also CIT(A) nowhere prove any connection with the assessee nor the assessee's involvement or connection or collusion with the brokers, exit providers, accommodation providers or companies or directions etc. For making the addition, it is necessary to bring on record evidence to establish ingenuity in transactions or any connection of the assessee or its transaction with any of the alleged parties. The assessee has discharged his onus by establishing the identity of the payer, source of the credit and genuineness of the transactions.*

*30. We noted that the learned CIT Departmental Representative also relied on the decision of the Hon'ble Bombay High Court, Nagpur Bench in the case of Sanjay Bimalchand Jain vs. Pr. CIT (2018) 89 taxmann.com 196 (Bom), wherein the decision on the impugned issue was discussed. Hon'ble High Court has considered the facts of Sanjay Bimaichand Jain supra from where we find that (i) in that case, the broker company through which the shares were sold did not respond to AO's letter regarding the names and address and bank account of the person who purchased the shares sold by the assessee (ii) Moreover, at the time of acquisition of shares of both the companies by the assessee, the payments were made in cash (iii) The address of both the companies were interestingly the same*

*(iv) The authorized signatory at both the companies were also the same person (v) The purchase of shares of both the companies was done by that assessee through broker, GSSL and the address of the said broker was incidentally the address of the two companies. Based on these crucial facts, the Hon'ble Bombay High Court rendered the decision in favour of the revenue. None of these factors were present in the facts of the assessee before us. Hence it could be safely concluded that the decision of Hon'ble Bombay High Court (supra) is factually distinguishable."*

54. *In the background of aforesaid discussion and precedents it is clear that the addition of long term capital gain as bogus is not sustainable. The case laws relied by the revenue is duly dealt with in the order of the tribunal referred above. Accordingly we set aside the orders of authorities below and delete the addition on merits in this regard. It may not be out of place to mention here that the ITAT in assessee's own case for A.Y. 2007-08 & 2008-09 has decided the issue of treatment as bogus of the long term capital gain of shares in favour of the assessee. The same has not been reversed yet. Despite learned CIT(A) erroneously distinguished the same.*

55. *We have already held that the long-term capital gain cannot be treated as undisclosed income under section 68 the addition of commission on capital gain done in these cases is consequently not sustainable. Hence we delete the same also.*

56. *As regards the addition of unsecured loan is concerned, we note that assessing officer has accepted that assessee has submitted the confirmation, ITR, bank statement of the parties. However he rejected by simply observing that investigation wing at Kolkata has reported that some of the entry operators are providing bogus loans at Kolkata. The assessing officer did not make any enquiry of his own the only referred to the date of confirmation of the unsecured loan and drew adverse inference. The learned CIT appeals also has confirmed the assessing officer's action by simply making general observations that the loan creditors are bogus in as much as they don't have much income, that the entire TDS have been claimed as refund by them, that they have same IP address of filing return and same corresponding address.*

57. *We find that by simply referring to General findings of investigations wing at Kolkata entry operators providing bogus loans the revenue authorities cannot fasten liability of undisclosed income upon the assessee, unless the assessing officer makes enquiry of his own and rebuts the*

*documentary evidences submitted by the assessee. The assessee has duly discharged its onus by submitting the loan confirmation, income tax details and bank statements and financial statement of the loan creditors. Without making enquiry of his own the Assessing Officer has rejected them which is totally unsustainable. In this regard we note that honourable Bombay High Court in the case of CIT Vs. Orchid industries p ltd in ITA No 1433 of 2014 vide order dt. 5/7/2017 has similarly held as under :-*

*"1] The Revenue has filed the appeal on following questions;*

*6.3 Whether on the facts and in the circumstances of the case and in law, orders of the Tribunal was perverse in deleting the addition of Rs.95,00,000/- made u/s. 68 of the Act, relying only on the documentary evidence produced by the Respondent Company while ignoring the key factor that these entities were not traceable at their given addresses.*

*6.4 Whether on the facts and in the circumstances of the case and in law, the Tribunal erred in not appreciating the observations made by the Delhi High Court in Nova Promoters and Finlease Pvt. Ltd. 18 Taxman.com 217 wherein the Court has observed that cases of this type cannot be decided only on the basis of documentary evidences above and there is need to take into account the surrounding circumstances.*

*6.5 The Tribunal ought to have taken note of the fact that the assessee was not able to produce even a single party before the AO despite agreeing before the CIT(A) that it will produce all parties before the AO during remand proceedings."*

*2] Mr.Pinto, the learned counsel for the Assessee submits that the Assessing Officer upon considering all the facts had added Rs.95 lakhs as income under Section 68 of the Income Tax Act. It needs to be considered that the Assessee had not discharged its onus to establish that the amount was received by the Assessee from the share holders as share application money. The Assessee could not prove the identity of the creditors, their credit worthiness and the genuineness of the transactions. The party from whom the Assessee had received the share amount never responded to the summons issued by the Assessing Officer. The Assessing Officer has considered the said aspect and thereafter has added the amount under Section 68 of the Income Tax Act. According to the*

*learned counsel, the Tribunal only on the basis that documents are available has accepted the case of the Assessee. The Tribunal has failed to consider the circumstances and the facts which are relevant.*

*3] The learned counsel for the Assessee supports the order and submits that the Assessee had discharged its onus. The Assessee had produced the PAN of all the creditors along with the confirmation, Bank Statement showing payment of share application money and relevant record is produced with regard to the allotment of shares to those parties. The share application form, allotment letter, share certificate are also produced. Even the balance-sheet, profit and loss account, the books of account of these creditors were produced on record showing that they had sufficient funds for investing in the shares of the Assessee. The learned counsel relies on the judgment of the Division Bench of this Court in case of Commissioner of Income Tax vs. Gagandeep Infrastructure (P.) Ltd., reported in [2017] 80 Taxmann 272 (Bombay) and the order of the Apex Court in case of Commissioner of Income Tax vs. Lovely Exports (P.) Ltd., reported in [2008] 216 CTR 195 (SC).*

*4] We have considered the submissions.*

*5] The Assessing Officer added Rs.95 lakhs as income under Section 68 of the Income Tax Act only on the ground that the parties to whom the share certificates were issued and who had paid the share money had not appeared before the Assessing Officer and the summons could not be served on the addresses given as they were not traced and in respect of some of the parties who had appeared, it was observed that just before issuance of cheques, the amount was deposited in their account.*

*6] The Tribunal has considered that the Assessee has produced on record the documents to establish the genuineness of the party such as PAN of all the creditors along with the confirmation, their bank statements showing payment of share application money. It was also observed by the Tribunal that the Assessee has also produced the entire record regarding issuance of shares i.e. allotment of shares to these parties, their share application forms,*

*allotment letters and share certificates, so also the books of account. The balance sheet and profit and loss account of these persons discloses that these persons had sufficient funds in their accounts for investing in the shares of the Assessee. In view of these voluminous documentary evidences, only because those persons had not appeared before the Assessing Officer would not negate the case of the Assessee. The judgment in case of Gagandeep Infrastructure (P.) Ltd, (supra) would be applicable in the facts and circumstances of the present case.*

*7] Considering the above, no substantial question of law arises. The appeal stands dismissed. However, there is no order as to costs."*

*58. It is further noted that in the present case assessee has also refunded the loan amount to the loan creditor. This aspect further supports the assessee's plea that these loans cannot be treated as undisclosed income of the assessee. Authorities below have totally ignored this aspect. In this regard case law from Hon'ble Bombay High Court referred by learned counsel of the assessee above supports the proposition that when loan amount is duly repaid the same cannot be treated as undisclosed income under section 68.*

*59. Accordingly in the background of aforesaid discussion and precedents in our considered opinion the addition of unsecured loans as undisclosed income of the assessee is not sustainable. Hence, we set aside the orders of authorities below and delete the addition.*

*60. Since we have already deleted the addition of unsecured loan as undisclosed income the addition of interest thereon is consequently also not sustainable. Hence, the same is also deleted.*

*61. Our above adjudication on various grounds applies mutatis mutandis to all the assessee's appeals in adjudication here.*

*Revenues Appeal in ITA 6962/Mum/2019 for assessment year 2012-13 in case of Kalpana Mukesh Ruia*

*62. In this appeal the ground raised is that learned CIT appeals erred in deleting the addition amounting to rupees 1,93,60,000/- made under section 69 of the IT act on account of variation in the purchase price of the property purchased by the assessee and the market value of the property. On this issue the assessing officer observed that it was found*

*that assessee has purchased 2 plots at Ambey Valley. That in order to ascertain the fair market value notice under section 133(6) was issued to the assistant sub- registrar Lonavala, to furnish the copies of sale deeds executed within the range of 3 months post and pre-of the registration made by the assessee. The assessing officer made some computation of his own and thereafter show caused the assessee as to why 90.28% more should not be added to the value already shown. In absence of any response from the assessee proceeded to add difference amount of Rs.1,93,60,000/- u/s. 69 of the IT Act .*

*63. Upon assessee's appeal learned CIT(A) observed that this addition by the assessing officer is without any basis and the assessing officer has erred both in law and fact. That addition is simply based on some comparables collected from the office of the Asst Sub-Registrar and has been applied on presumption that assessee would have paid the same market value. The addition of undisclosed investment under section 69 cannot be made purely on possibility of higher payment on the basis of comparables of higher market value. That hence the addition is without any basis. The learned CIT(A) has further noted that provisions of section 56 would have been applicable as purchase value is lower than stamp duty value. However since provisions of section 56 have come to the statute with effect from 01.04.2014. The substantive law would not be applicable for assessment year 2012-13.*

*64. Against this order revenue is in appeal before us. As we already observed the additions for assessment year in this case is without reference to any incriminating material found during search. Since the assessment has been done under section 153 A in case of an unabated assessment as we have already held hereinabove the addition is not sustainable de horse any incriminating material. Hence this addition is not at all sustainable.*

*65. Furthermore the order of learned CIT(A) is reasonable and on that count also the same deserves to be sustained.*

*66. In the result appeals by the assesseees are allowed and the appeal by the revenue is dismissed."*

**19.** In the background of aforesaid discussion and following the judgements of the jurisdictional High Court, the addition made in these

assessment orders passed by the assessing officer under section 153A without reference to any incriminating material found in search is not sustainable. Hence, we set aside the orders of authorities below and allowed the claim of the assessee and delete the addition. Since we have already directed to delete the addition of loan itself, the addition of commission and interest thereon disallowed are also directed to be deleted as the same are also without reference to any material found in search. The appeal of the assessee for the A.Ys. 2008-2009 to 2012-2013 are allowed.

**20.** As we have directed to delete the additions on the ground that no incriminating material were found during the search, in our considered opinion adjudication on merits of these additions is only for academic interest and hence not required to be adjudicated.

**21.** With regard to abated assessments for the A.Y. 2013-14 and A.Y.2014-15 are concerned, we observed that Assessing Officer has made the addition without there being any corroborative piece of evidences except relying on statement recorded u/s. 132(4) of the Act. However, these assessments are abated, we direct Assessing officer to review the issues afresh based on the material available on records and complete the

assessment on merits after providing proper opportunity of being heard to the assessee. Therefore, the assessments for the AY 2013-14 and 2014-15 are remitted back to the file of Assessing officer and allowed the appeals filed by the assessee for statistical purpose.

**22.** In the result, the appeals filed by the assessee for AYs 2008-09 to 2012-13 are hereby allowed and for AYs 2013-14 and 2014-15 are allowed for statistical purpose.

Order pronounced in the open court on 24.03.2022.

Sd/-  
**(S. RIFAUR RAHMAN)**  
**ACCOUNTANT MEMBER**  
Mumbai / Dated 24/03/2022  
Giridhar, Sr.PS

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

**Copy of the Order forwarded to:**

- 1 The Appellant
- 2 The Respondent.
- 3 The CIT(A), Mumbai.
- 4 CIT
- 5 DR, ITAT, Mumbai
- 6 Guard file.

//True Copy//

BY ORDER

(Asstt. Registrar)  
**ITAT, Mum**