

THE INCOME TAX APPELLATE TRIBUNAL
“E” Bench, Mumbai
Shri B.R. Baskaran (AM) & Shri Anikesh Banerjee (JM)

I.T.A. No. 785/Mum/2021 (A.Y. 2011-12)
I.T.A. No. 870/Mum/2021 (A.Y. 2012-13)
I.T.A. No. 509/Mum/2021 (A.Y. 2013-14)
I.T.A. No. 508/Mum/2021 (A.Y. 2014-15)
I.T.A. No. 502/Mum/2021 (A.Y. 2015-16)
I.T.A. No. 869/Mum/2021 (A.Y. 2016-17)
I.T.A. No. 786/Mum/2021 (A.Y. 2017-18)
I.T.A. No. 1029/Mum/2021 (A.Y. 2018-19)

Sangeetkumar Sawarmal Hisaria 74/80, 3 rd Floor Souri Building, Babu Genu Road, Kalbadevi Mumbai-400 002. PAN : AAAPH2931H (Appellant)	Vs.	DCIT, CC-2(4) 802, 8 th Floor Pratishtha Bhavan Old CGO Building Annexe, M.K. Road Mumbai-400 020. (Respondent)
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I.T.A. No. 1021/Mum/2021 (A.Y. 2013-14)
I.T.A. No. 1020/Mum/2021 (A.Y. 2014-15)
I.T.A. No. 1269/Mum/2021 (A.Y. 2016-17)
I.T.A. No. 1019/Mum/2021 (A.Y. 2017-18)

DCIT, CC-2(4) 802, 8 th Floor Pratishtha Bhavan Old CGO Building Annexe, M.K. Road Mumbai-400 020. (Appellant)	Vs.	Sangeetkumar Sawarmal Hisaria 74/80, 3 rd Floor Souri Building, Babu Genu Road, Kalbadevi Mumbai-400 002. PAN : AAAPH2931H (Respondent)
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Assessee by	Shri Rajiv Khandelwal
Department by	Shri Amol Jurtabe
Date of Hearing	26.07.2022
Date of Pronouncement	17.10.2022

ORDER

Per Bench:-

The assessee has filed these appeals for A.Y. 2011-12 to 2018-19 and the Revenue has filed the appeals for A.Y. 2013-14, 2014-15, 2016-17 & 2017-18. All these appeals are directed against the orders passed by the learned CIT(A)-48, Mumbai.

2. The facts relating to the case are stated in brief. The Revenue carried out search and seizure operations under section 132 of the I.T. Act in the case of Hisaria Group on 16.11.2017 and the assessee herein was also covered. Consequently, the assessments relating to A.Y. 2012-13 to 2017-18 were completed under section 143(3) read with section 153A of the Act. The assessment of A.Y. 2018-19 was completed under section 143(3) of the Act. The AO also reopened the assessment of A.Y. 2011-12 by issuing notice under section 148 of the Act. The AO completed the assessments of AY 2011-12 to 2018-19 by making various additions. Aggrieved by the additions so made, the assessee filed appeals before Ld CIT(A). Some of the appeals were dismissed and some of the appeals were partly allowed. Hence, both the parties have filed appeals before the Tribunal challenging the decision rendered by Ld CIT(A) against each of them.

ASSESSMENT YEAR : 2011-12:-

3. We shall first take up the appeal filed by the assessee for A.Y. 2011-12, wherein the assessee has challenged the validity of reopening of assessment. The learned AR submitted that the original assessment for A.Y. 2011-12 was completed under section 143(3) of the Act on 16.11.2013. The Assessing Officer has reopened the assessment by issuing notice on 31.3.2018 i.e. after expiry of four year from the end of the assessment year. He submitted that, as per the first proviso to sec. 147 of the Act, the reopening after expiry of four years from the end of the assessment year could be made by the AO only, if the AO, inter alia, could show that there was failure on the part of the

assessee to disclose fully and truly all material facts relating to the computation of income. He submitted that, in reasons for reopening of assessment, the Assessing Officer has not pointed out that there was failure on the part of the assessee to fully and truly disclose all material facts. Accordingly, the Ld A.R contended that the re-opening of assessment is not valid and hence the assessment order is liable to be quashed.

4. The learned AR further submitted that the AO has supplied “reasons for reopening” to the assessee through a letter. The AO has also extracted the “reasons for reopening” in the assessment order. He submitted that the “reasons recorded for reopening”, as stated in the assessment order is materially different from that that stated by him in the copy supplied to the assessee. He submitted that there cannot rely upon two different reasons for reopening of assessment. Hence, it is not clear that which of the two reasons are correct. In the absence of clarity on the reasons for reopening, impugned reopening of assessment is not valid and is liable to be quashed. The Ld A.R also relied on certain case laws in support of his arguments.

5. The Ld A.R submitted that the gist of the reasons given by the AO for reopening of assessment is that the assessee has availed accommodation entries in order to book bogus purchases. The said information was based on the input given by the Sales tax department. He submitted that the information so received by the AO was general information and there is no material to show that the transactions entered by the assessee were not genuine. It is in common knowledge of all that the goods could not be sold without purchasing it. Hence, the said information would utmost give rise to a suspicion only. Since the reopening has been done after expiry of four years from the end of the assessment year, the AO has to show that there was failure on the part of the assessee to disclose fully and truly all material facts. Accordingly, the Ld A.R contended that the AO has reopened the assessment on the basis of mere suspicions. The Ld A.R further relied upon

the decision rendered by Hon'ble Bombay High Court in the case of Rita Rajkumar Singh (2022)(139 taxmann.com 245)(Bom) and submitted that the AO could not have reopened the assessment after four years without showing that there was failure on the part of the assessee and the reasons did not state that the assessee was master mind or actively involved in the transactions of generating bogus purchases.

6. On the contrary, the learned DR submitted that the Assessing Officer has reopened the assessment after properly recording the reasons and hence reopening is valid.

7. We have heard the rival contention on this legal issue and perused the record. We notice that the assessee has been supplied with the reasons for reopening by the Assessing Officer, vide his letter dated 12.7.2018. It reads as under:-

“REASON FOR RE-OPENING

On appraisal of the records available, it is found that the M/s Ameet Enterprises (a proprietorship concern of the assessee) has booked purchases from the following hawala dealers:

S.No.	Name of the party	A.Y.	Amount (Rs)
1	Everite Corporation	2011-12	4,46,97,240
2	Supper Sales	2011-12	81,91,200
3	Emkay Engineers	2011-12	3,28,89,780
			8,57,75,280

Thus, the assessee SHRI SANGEETKUMAR SAWARMAL HISARIA (PROP OF M/S AMEET ENTERPRISES) (PAN: AAAPH2931H) during the AY 2011-12 has availed accommodation entries in the form of bogus purchases from hawala dealers for a sum of Rs. 8,57,78,280/-.

In the light of above facts and detailed findings, have reason to believe that Rs.8,57,75,280/- has escaped assessment within the meaning assigned in the provision of section 147 of the Income Tax Act, 1961.”

8. However, in the assessment order “reasons for reopening” is mentioned as under by the Assessing Officer:

“The reasons for reopening the case of the assessee are as under :

Brief details of the assessee: The assessee is an individual, who filed his return of income for AY 2011-12 on 26.09.2011, declaring therein the total income at 38,45,952/-. The same was processed w/s 143(1) on 13.01.2012. The case was selected for scrutiny and the order u/s 143(3) of the Act was passed on 16.12.2013, determining the total income at 739,03,940/-.

Brief details of Information collected received by the AO: Information was received from the DCIT, Central Circle-2(4), Mumbai, vide letter "No. DCIT.CC-2(4)/ Intimation/2017-18, dated 26.03.2018, that a search action u/s 132 of the I.T. Act was conducted on 16.11.2017, in the case of Hisara Group and Nickunj Group. The DCIT received the appraisal report prepared by the DDIT (Inv.), Unit-8(1), Mumbai on 23.03.2018. Upon perusal of the appraisal report the DCIT observed that M/s Ameet Enterprises (a proprietorship concern of the assessee) has booked purchases from the following hawala dealers:

S.No.	Name of the party	A.Y.	Amount
1	Everite Corporation	2011-12	4,46,97,240/-
2	Supper Sales	2011-12	81,91,260/-
3	Emkay Engineers	2011-12	3,28,89,780/-
	Total		8,57,78,280/-

That the above parties are hawala dealers, who only provide accommodation entries, without any transaction of goods, were confirmed by the investigation made by the Maharashtra Sales Tax Department. During the course of the search proceedings, the assessee failed to prove that the above transactions were genuine, as no evidence, regarding mode of transport of goods like bills/invoice raised by the transporter, could be produced. Further from the return of income of the assessee, it was observed that neither the assessee owned any godown nor any expenditure was incurred towards rent.

Analysis of information collected/received: The assessee Shri Sangeetkumar Sawarmal Hisaria, (Prop. of M/s Ameet Enterprises), (PAN: AAAPH2931H) during the FY 2010-11 relevant to AY 2011-12, has availed accommodation entries, in the form of bogus purchase, from hawala dealers.

Enquiries made by the AO: The statements and the detailed report of the investigation have been examined and the evidences vis-a vis the return of the assessee were also examined.

Findings of the AO: From the above facts it is evident that the assessee has availed accommodation entries, in the form of bogus purchase, from hawala dealers, for a sum of 8,57,78,280/-.

Basis of forming reason to believe and details of escapement of Income: In the light of above facts and detailed findings, I have Reason to believe that 28,57,78,280/- has escaped assessment within the meaning assigned in the provision of section 147 of the Act, since, the assessee clearly failed to disclose truly and fully all material facts for determination of income, hence, it is a fit case for issue of notice u/s.148 of the Income Tax Act, 1961. Accordingly, approval u/s 151(1) of the Income tax Act, 1961 is solicited for issuing notice u/s 148 of the Act.

9. Admittedly, there is huge variation in the wordings/sentences mentioned in connection with “reasons for reopening”, between that given in the letter supplied to the assessee and that mentioned in the assessment order. Further, we notice that the original assessment of the assessee was completed under section 143(3) of the Act on 16.11.2013 and the assessment has been reopened on 31.3.2018, i.e., after expiry of four years from the end of the assessment year. Hence, the assessee would be protected by the first proviso to section 147 of the Act, which reads as under:-

"Provided that where an assessment under sub-section (3) of [section 143](#) or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under [section 139](#) or in response to a notice issued under sub section (1) of [section 142](#) or [section 148](#) or to disclose fully and truly all material facts necessary for his assessment, for that assessment year."

A perusal of the above said proviso would show that it is imperative on the part of the assessing officer to show that there was failure on the part of the assessee to disclose fully and truly all material necessary for his assessment. It has been held so by Hon'ble Bombay High Court in the case of Hindustan Level (268 ITR 332).

"20. The reasons recorded by the Assessing Officer nowhere state that there was failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment of that assessment year. It is needless to mention that the reasons are required to be read as they were recorded by the Assessing Officer. No substitution or deletion is

permissible. No additions can be made to those reasons. No inference can be allowed to be drawn based on reasons not recorded. It is for the Assessing Officer to disclose and open his mind through reasons recorded by him. He has to speak through his reasons. It is for the Assessing Officer to reach to the conclusion as to whether there was failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for the concerned assessment year. It is for the Assessing Officer to form his opinion. It is for him to put his opinion on record in black and white. The reasons recorded should be clear and unambiguous and should not suffer from any vagueness. The reasons recorded must disclose his mind. Reasons are the manifestation of mind of the Assessing Officer. The reasons recorded should be self-explanatory and should not keep the assessee guessing for the reasons. Reasons provide link between conclusion and evidence. The reasons recorded must be based on evidence. The Assessing Officer, in the event of challenge to the reasons, must be able to justify the same based on material available on record. He must disclose in the reasons as to which fact or material was not disclosed by the assessee fully and truly necessary for assessment of that assessment year, so as to establish vital link between the reasons and evidence. That vital link is the safeguard against arbitrary reopening of the concluded assessment. The reasons recorded by the Assessing Officer cannot be supplemented by filing affidavit or making oral submission, otherwise, the reasons which were lacking in the material particulars would get supplemented, by the time the matter reaches to the Court, on the strength of affidavit or oral submissions advanced.”

Identical view has been expressed by Hon'ble Madras High Court in the case of Shri Shakti Textiles Ltd. Vs. JCIT (2010) 193 Taxmann 216.

10. Admittedly, in the instant case, the Assessing Officer has not stated or pointed out in the “reasons recorded for reopening” that there was such failure on the part of the assessee. Further, there are two different versions of “reasons for reopening”. Since the AO has reopened the assessment without pointing out that there was failure on the part of the assessee to disclose fully and truly all material facts, we hold that the impugned reopening is bad in law and accordingly quash the orders passed by the tax authorities for A.Y. 2011-12.

11. Since we have quashed the assessment order on the above said legal ground, there is no necessity to adjudicate the issues urged on merits.

ASSESSMENT YEARS : 2012-13 to 2016-17:-

12. We shall now take up the appeals filed by the assessee for Assessment years 2012-13 to 2016-17.

13. In the appeals filed for AY 2012-13 to 2016-17, the assessee has raised a legal issue questioning the validity of additions made in these years, in the absence of any incriminating materials found during the course of search. The legal ground urged in these years read as under:-

“The Ld CIT(A) has erred in law and in facts in confirming the additions made by the Assessing Officer without any incriminating evidence found at the time of search.”

We noticed earlier that the search has taken place in the hands of the assessee on 16.11.2017. The details of returns of income filed for AY 2012-13 to 2016-17 are given below:-

Asst. Year	Date of filing ROI
2012-2013	16-09-2012
2013-2014	27-09-2013
2014-2015	01-11-2014
2015-2016	28-09-2015
2016-2017	14.10.2016

It is submitted that the time limit for issuing notice u/s 143(2) of the Act has expired for the above said years prior to the initiation of search and hence no assessment was pending for these years as on the date of search. Accordingly, it was submitted that assessments of these five years would fall under the category of “unabated assessments”.

14. The contention of the assessee is that all these assessments under consideration shall not abate, since no assessment was pending on the date

of search. It was further contended that in the cases of unabated/finalized/completed assessments, the AO could have interfered with the issues already concluded only if the search team has found any incriminating material during the course of warranting such interference. It is the submission of Ld A.R that the search officials did not unearth any incriminating material warranting interference with the capital gains/capital loss declared by these assesseees in all the years under consideration. In support of these legal contentions, the Ld A.R placed his reliance on the decision rendered by the jurisdictional Hon'ble Bombay High Court in the cases of Continental Corporation (Nhava Sheva) Ltd (2015)(58 taxmann.com 78)(Bom) and Gurinder Singh Bawa (2017)(79 taxmann.com 398)(Bom). He also submitted that the legal proposition interpreted by the jurisdictional High Court has been followed by the Mumbai bench of Tribunal in the case of Smt Anjali Pandit vs. ACIT ITA No.3028 to 3032/Mum/2011 & others), by its order dated 17.11.2016.

15. The provisions of sec.153A of the Act provide for issuing of notice u/s 153A of the Act for six assessment years immediately preceding the year of search and thereafter, the AO shall assess or reassess the total income for the above said six years. This section further provides that all pending assessment or re-assessment pending as on the date of search shall abate. Hence the assessments of the assessment years falling within the period of above said six years which are not pending, i.e., which have attained finality shall not abate. Assessments of such assessment years are called "unabated/completed/finalized" assessments. The question as to whether the AO is entitled to interfere with such kinds of unabated/completed/finalized assessments or not without there being any incriminating material found during the course of search, was examined by the Special bench of Tribunal in the case of All Cargo Logistics Ltd vs. DCIT (2012)(137 ITD 287)(Mum), wherein it was held that the AO could interfere with the unabated/completed/finalized assessments only if the incriminating

materials found during the course of search warrant such interference, meaning thereby, if the search action did not bring out any incriminating material, then the AO cannot disturb the completed assessments and he has to simply reiterate the earlier total income in the present assessment order.

16. The above said view expressed by the Special bench has since been upheld by Hon'ble Bombay High Court in the case of Continental Warehousing Corporation (Nhava Sheva) Ltd (supra). The relevant observations made by Hon'ble Bombay High Court in the above said case are extracted below:-

“31. We, therefore, hold that the Special Bench's understanding of the legal provision is not perverse nor does it suffer from any error of law apparent on the face of the record. The Special Bench in that regard held as under :

"48. The provision under section 153A is applicable where a search or requisition is initiated after 31.5.2003. In such a case the AO is obliged to issue notice u/s 153A in respect of 6 preceding years, preceding the year in which search etc. has been initiated. Thereafter he has to assess or reassess the total income of these six years. It is obligatory on the part of the AO to assess or reassess total income of the six years as provided in section 153A(1)(b) and reiterated in the 1st proviso to this section. The second proviso states that the assessment or reassessment pending on the date of initiation of the search or requisition shall abate. We find that there is no divergence of views in so far as the provision contained in section 153A till the 1st proviso. The divergence starts from the second proviso which states that pending assessment or reassessment on the date of initiation of search shall abate. This means that an assessment or reassessment pending on the date of initiation of search shall cease to exist and no further action shall be taken thereon. The assessment shall now be made u/s 153A. The case of Ld. Counsel for the assessee is that necessary corollary to this provision is that completed assessment shall not abate. These assessments become final except in so far and to the extent as undisclosed income is found in the course of search. On the other hand, it has been argued by the Ld. Standing Counsel that abatement of pending assessment is only for the purpose of avoiding two assessments for the same year, one being regular assessment and the other being assessment u/s 153A. In other words these two assessments coalesce into one assessment. The

second proviso does not contain any word or words to the effect that no reassessment shall be made in respect of a completed assessment. The language is clear in this behalf and therefore literal interpretation should be followed. Such interpretation does not produce manifestly absurd or unjust results as section 153A (i)(b) and the first proviso clearly provide for assessment or reassessment of all six years. It may cause hardship to some assesses where one or more of such assessments has or have been completed before the date of initiation of search. This is hardly of any relevance in view of clear and unambiguous words used by the legislature. This interpretation does not cause any absurd etc. results. There is no *casus omissus* and supplying any would be against the legislative intent and against the very rule in this behalf that it should be supplied for the purpose of achieving legislative intent. The submissions of the Ld. Counsels are manifold, the foremost being that the provision u/s 153A should be read in conjunction with the provision contained in section 132(1), the reason being that the latter deals with search and seizure and the former deals with assessment in case of search etc, thus, the two are inextricably linked with each other.

49. Before proceeding further, we may now examine the provision contained in sub-section (2) of section 153, which has been dealt with by Ld. Counsel. It provides that if any assessment made under sub-section (1) is annulled in appeal etc., then the abated assessment revives. However, if such annulment is further nullified, the assessment again abates. The case of the Ld. Counsel is that this provision further shows that completed assessments stand on a different footing from the pending assessments because appeals etc. proceedings continue to remain in force in case of completed assessments and their fate depends upon subsequent orders in appeal. On consideration of the provision and the submissions, we find that this provision also makes it clear that the abatement of pending proceedings is not of such permanent nature that they cease to exist for all times to come. The interpretation of the Ld. Counsel, though not specifically stated, would be that on annulment of the assessment made u/s 153(1), the AO gets the jurisdiction to assess the total income which was vested in him earlier independent of the search and which came to an end due to initiation of the search.

50. The provision contained in section 132 (1) empowers the officer to issue a warrant of search of the premises of a person where any one or more of conditions mentioned therein is or are satisfied, i.e. - a) summons or notice has been issued to produce books of account or other documents but such books of account or documents have not been produced, b) summons or notice has been or might be issued, he will not produce the books of account or other documents mentioned therein, or c) he is in possession of any money or bullion etc. which represents wholly or partly the income

or property which has not been and which would not be disclosed for the purpose of assessment, called as undisclosed income or property. We find that the provision in section 132 (1) does not use the word "incriminating document". Clauses (a) and (b) of section 132(1) employ the words "books of account or other documents". For harmonious interpretation of this provision with provision contained in section 153A, all the three conditions on satisfaction of which a warrant of search can be issued will have to be taken into account.

51. Having held so, an assessment or reassessment u/s 153A arises only when a search has been initiated and conducted. Therefore, such an assessment has a vital link with the initiation and conduct of the search. We have mentioned that a search can be authorised on satisfaction of one of the three conditions enumerated earlier. Therefore, while interpreting the provision contained in section 153A, all these conditions will have to be taken into account. With this, we proceed to literally interpret to provision in 153A as it exists and read it alongside the provision contained in section 132(1).

52. The provision comes into operation if a search or requisition is initiated after 31.5.2003. On satisfaction of this condition, the AO is under obligation to issue notice to the person requiring him to furnish the return of income of six years immediately preceding the year of search. The word used is "shall" and, thus, there is no option but to issue such a notice. Thereafter he has to assess or reassess total income of these six years. In this respect also, the word used is "shall" and, therefore, the AO has no option but to assess or reassess the total income of these six years. The pending proceedings shall abate. This means that out of six years, if any assessment or reassessment is pending on the date of initiation of the search, it shall abate. In other words pending proceedings will not be proceeded with thereafter. The assessment has now to be made u/s 153A (1)(b) and the first proviso. It also means that only one assessment will be made under the aforesaid provisions as the two proceedings i.e. assessment or reassessment proceedings and proceedings under this provision merge into one. If assessment made under sub-section (1) is annulled in appeal or other legal proceedings, then the abated assessment or reassessment shall revive. This means that the assessment or reassessment, which had abated, shall be made, for which extension of time has been provided under section 153B.

53. The question now is - what is the scope of assessment or reassessment of total income u/s 153A (1)(b) and the first proviso ? We are of the view that for answering this question, guidance will have to be sought from section 132(1). If any books of account or other documents relevant to the assessment had not been produced in the course of original assessment and found in the course of

search in our humble opinion such books of account or other documents have to be taken into account while making assessment or reassessment of total income under the aforesaid provision. Similar position will obtain in a case where undisclosed income or undisclosed property has been found as a consequence of search. In other words, harmonious interpretation will produce the following results :-

- a) In so far as pending assessments are concerned, the jurisdiction to make original assessment and assessment u/s 153A merge into one and only one assessment for each assessment year shall be made separately on the basis of the findings of the search and any other material existing or brought on the record of the AO,
- (b) in respect of non-abated assessments, the assessment will be made on the basis of books of account or other documents not produced in the course of original assessment but found in the course of search, and undisclosed income or undisclosed property discovered in the course of search.

54. It may be mentioned here that Ld. Counsel for All Cargo Global Logistics Ltd. was questioned about the scope of pending assessments as it was his contention that all six assessments are to be made, if necessary, on the basis of undisclosed income discovered in the course of search. He was specifically questioned about the jurisdiction of the AO to make original assessment along with assessment u/s 153A, merging into one. However he took an evasive view submitting that this question need not be decided in his case although the question of jurisdiction u/s 153A was vehemently pressed on account of which ground No.1 in the appeal for assessment year 2004-05 was admitted as additional ground. He also wanted the additional ground to be retained in case of any future contingency."

17. The view expressed by Hon'ble jurisdictional Bombay High Court in the case of Continental Warehousing Corporation (Nhava Sheva) Ltd (supra) was reiterated by the Hon'ble Bombay High Court in yet another case of Gurinder Singh Bawa (2017)(70 taxmann.com 398) as under:-

"5. On further appeal before the Tribunal, the assessee inter alia challenged the validity of the assessment made under Section 153A of the Act. This on account of the fact that no assessment in respect of the six assessment years were pending so as to have abated. The impugned order accepted the aforesaid submission of the respondent-assessee by inter alia placing reliance upon the decision of the Special Bench of the Tribunal in Al-Cargo Global Logistics Ltd. rendered on 6 July 2012. The Tribunal in the impugned order further held that no incriminating material was found during the course of the search. Thus the entire proceedings under

Section 153A of the Act were without jurisdiction and therefore the addition made had to be deleted on the aforesaid ground. The impugned order also thereafter considered the issues on merits and on it also held in favour of the respondent-assessee.

6. Mr. Kotangale, the learned Counsel for the revenue very fairly states that the decision of the Special Bench of the Tribunal in Al-Cargo Global Logistics Ltd. was a subject matter of challenge before this Court as a part of the group of appeals disposed of as CIT v. Continental Warehousing Corporation (Nhava Sheva) Ltd. [2015] 374 ITR 645/58 taxmann.com 78/232 Taxman 270 (Bom.) upholding the view of the Special Bench of the Tribunal in Al- Cargo Global Logistics Ltd. Consequently, once an assessment has attained finality for a particular year i.e. it is not pending then the same cannot be subject to tax in proceedings under Section 153A of the Act. This of course would not apply if incriminating materials are gathered in the course of search or during proceedings under Section 153A of the Act which are contrary to and/or not disclosed during regular assessment proceedings.

7. In view of the above, on issue of jurisdiction itself the issue stands concluded against the revenue by the decision of this Court in Continental Warehousing Corpn. (Nhava Sheva) Ltd. (supra). In the appeal before us, the revenue has made no grievance with regard to the impugned order of the Tribunal holding that in law the proceedings under Section 153A of the Act are without jurisdiction. This in view of the fact that no assessments were pending, so as to abate nor any incriminating evidence was found. The grievance of the revenue is only with regard to finding in the impugned order on the merits of the individual claim regarding gifts and deemed dividend. However once it is not disputed by the revenue that the decision of this Court in Continental Warehousing Corporation (Nhava Sheva) Ltd. (supra) would apply to the present facts and also that there are no assessments pending on the time of the initiation of proceedings under Section 153A of the Act. The occasion to consider the issues raised on merits in the proposed questions becomes academic.

8. In the above view, the questions as framed in the present facts being academic in nature, do not give rise to any substantial question of law. Thus not be entertained.”

18. The co-ordinate bench has followed the above said binding decisions of jurisdictional High Court in the cases of Smt Anjali Pandit vs. ACIT (supra) and held as under:-

“8. From the propositions in the above mentioned decisions, we find that the case of the assessee is squarely covered by the ratio laid down in the decisions cited supra. We therefore respectfully following the same hold that the AO has not jurisdictional to assess the long term capital gain as income from other sources as the same is not based upon the seized or incriminating materials found during the search proceedings qua the long

term capital gain. Similarly the CIT(A) enhancing the assessment is also not based upon any seized or incriminating materials found during the search and therefore the enhancement is also without jurisdiction u/s 153A. Accordingly, the additional grounds no. 1A and 1B raised by the assessee stand allowed in favour of the assessee and AO is directed accordingly.”

19. We may also gainfully refer to the decision rendered by Hon’ble Delhi High Court in the case of Kabul Chawla, wherein identical view was expressed. The Hon’ble Delhi High Court has summarized the legal position with regard to the provisions of sec.153A as under:-

“Summary of the legal position

37. On a conspectus of Section 153A(1) of the Act, read with the provisos thereto, and in the light of the law explained in the aforementioned decisions, the legal position that emerges is as under:

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

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

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

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

v. In absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made. The word 'assess' in Section 153 A is relatable to abated proceedings (i.e. those pending on the date of search) and the word 'reassess' to completed assessment proceedings.

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

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

20. We notice that the Ld CIT(A) has taken support of the decision rendered by Hon'ble Karnataka High Court in the case of M/s Canara Housing Development. However, in view of the binding decision rendered by Hon'ble jurisdictional Bombay High Court, we do not find it necessary to refer to the decision rendered by Hon'ble Karnataka High Court in the above said case.

21. In the instant cases, the assessments of AY 2012-13 to 2016-17 were not pending as on the date of search and hence they would fall under the category of “unabated/finalized/completed assessments”. There is also no dispute with regard to the fact that the search officials did not unearth any incriminating material during the course of search warranting interference of the issues already stood concluded in unabated assessments. Hence the decisions rendered by the Hon'ble Jurisdictional Bombay High Court in the case of Continental warehousing Corporation (Nhava Sheva) Ltd (supra) and Gurinder Singh Bawa (supra), in our view, shall squarely apply to the facts of the present case. Accordingly we hold that the AO, in the absence of any incriminating material found during the course of search relating to the impugned additions, was not justified in assessing them in AY 2012-13 to 2016-17.

22. In view of the foregoing discussions, we set aside the orders passed by Ld CIT(A) in the hands of these assesseees in AY 2012-13 to 2016-17 and

direct the AO to delete the additions made in these years in the impugned assessment orders.

23. Since we have decided the above said legal issue in favour of the assessee, which results in deletion of all additions made by the AO in AY 2012-13 to 2016-17, we do not find it necessary to deal with the issues urged on merits of addition, as the same would be rendered academic in nature.

24. Since we have held that no addition could be made in AY 2012-13 to 2016-17 and deleted the additions made by the AO in these years, the appeals filed by the revenue for AY 2013-14, 2014-15 and 2016-17 shall become infructuous and accordingly dismissed.

ASSESSMENT YEAR 2017-18:-

25. We shall first take up the appeal filed by the assessee for AY 2017-18. Following three issues are urged in this appeal:-

- (a) Addition made u/s 68 of the Act in respect of Long term capital gains shown by the assessee.
- (b) Addition made on the basis of information found in the application filed before Income tax Settlement Commission.
- (c) Charging of Education cess.

26. The first issue relates to the addition of sale consideration of Rs.4.85 crores received on sale of shares of M/s Shantanu Sheroy Aquakult Ltd. The AO noticed that the assessee has sold shares of above company, which is now known as 52 weeks Entertainment Pvt. Ltd. The assessee had declared long term capital gain on sale of the above said shares. The investigation wing reported this share as penny stock. Accordingly, based on the report of the investigation wing, the AO held that the assessee has only taken accommodation entries in respect of these shares. Accordingly, he assessed

the sale consideration of RS.4.85 crores as income of the assessee u/s 68 of the Act. The Id CIT(A) also confirmed the same.

27. The Ld A.R submitted that the assessee has purchased these securities in the normal course of his activities. He submitted that the assessee has furnished copies of "Contract notes cum bill of sales" for purchase of shares. The purchases of shares have been made through banking channels. The shares have entered D-mat account of the assessee. He further submitted that the assessee has also furnished the audited financial statements of the above said company and also master data of the Registrar of Companies. Accordingly, he submitted that there is no reason to suspect the long term capital gains declared by the assessee. He further submitted that the AO has not established that the transactions of purchase and sale of shares are not genuine nor did he show that the assessee was part of the transactions of generating bogus capital gains. The Ld A.R placed his reliance on the decision rendered by Hon'ble Bombay High Court in the case of Shyam Pawar (54 taxmann.com 108)(Bom).

28. The Ld D.R, on the contrary, supported the order passed by Ld CIT(A).

29. We heard rival contentions and perused the record. We notice that an identical case of allegations that the assessee has availed accommodation entries by way of capital gains in order to convert unaccounted money into accounted one, was examined by the Hon'ble jurisdictional Bombay High Court in the case of Shyam Power (supra). The decision rendered by Hon'ble Bombay High Court in the above said case are extracted below:-

"3. Mr.Sureshkumar seriously complained that such finding rendered concurrently should not have been interfered with by the Tribunal. In further Appeal, the Tribunal proceeded not by analyzing this material and concluding that findings of fact concurrently rendered by the Assessing Officer and the Commissioner are perverse. The Tribunal proceeded on the footing that onus was on the Department to nail the Assessee through a

proper evidence and that there was some cash transaction through these suspected brokers, on whom there was an investigation conducted by the Department. Once the onus on the Department was discharged, according to Mr.Sureshkumr, by the Revenue-Department, then, such a finding by the Tribunal raises a substantial question of law. The Appeal, therefore, be admitted.

4. Mr.Gopal, learned Counsel appearing on behalf of the Assessee in each of these Appeals, invites our attention to the finding of the Tribunal. He submits that if this was nothing but an accommodation of cash or conversion of unaccounted money into accounted one, then, the evidence should have been complete. Change of circumstances ought to have, after the result of the investigation, connected the Assessee in some way or either with these brokers and the persons floating the two companies. It is only, after the Assessee who is supposed to dealing in shares and producing all the details including the DMAT account, the Exchange at Calcutta confirming the transaction, that the Appeal of the Assessee has been rightly allowed. The Tribunal has not merely interfered with the concurrent orders because another view was possible. It interfered because it was required to interfere with them as the Commissioner and the Assessing Officer failed to note some relevant and germane material. In these circumstances, he submits that the Appeals do not raise any substantial question of law and deserve to be dismissed.

5. We have perused the concurrent findings and on which heavy reliance is placed by Mr.Sureshkumar. While it is true that the Commissioner extensively referred to the correspondence and the contents of the report of the Investigation carried out in paras 20, 20.1, 20.2 and 21 of his order, **what was important and vital for the purpose of the present case was whether the transactions in shares were genuine or sham and bogus. If the purchase and sale of shares are reflected in the Assessee's DMAT account, yet they are termed as arranged transactions and projected to be real, then, such conclusion which has been reached by the Commissioner and the Assessing Officer required a deeper scrutiny.** It was also revealed during the course of inquiry by the Assessing Officer that the Calcutta Stock Exchange records showed that the shares were purchased for code numbers S003 and R121 of Sagar Trade Pvt Ltd. and Rockey Marketing Pvt. Ltd. respectively. Out of these two, only Rockey Marketing Pvt.Ltd. is listed in the appraisal report and it is stated to be involved in the modus-operandi. It is on this material that he holds that the transactions in sale and purchase of shares are doubtful and not genuine. In relation to Assessee's role in all this, all that the Commissioner observed is that the Assessee transacted through brokers at Calcutta, which itself raises doubt about the genuineness of the transactions and the financial result and performance of the Company was not such as would justify the increase in the share prices. Therefore, he reached the conclusion that certain operators and brokers devised the scheme to convert the unaccounted money of the Assessee to the accounted income and the present Assessee utilized the scheme.

6. It is in that regard that we find that Mr.Gopal's contentions are well founded. **The Tribunal concluded that there was something more which was required, which would connect the present Assessee to the transactions and which are attributed to the Promoters/Directors of the two companies.** The Tribunal referred to the entire material and found that the investigation stopped at a particular point and was not carried forward by the Revenue. There are 1,30,000 shares of Bolton Properties Ltd. purchased by the Assessee during the month of January 2003 and he continued to hold them till 31 March 2003. The present case related to 20,000 shares of Mantra Online Ltd for the total consideration of Rs.25,93,150/-. These shares were sold and how they were sold, on what dates and for what consideration and the sums received by cheques have been referred extensively by the Tribunal in para 10. A copy of the DMAT account, placed at pages 36 & 37 of the Appeal Paper Book before the Tribunal showed the credit of share transaction. The contract notes in Form-A with two brokers were available and which gave details of the transactions. The contract note is a system generated and prescribed by the Stock Exchange. From this material, in para 11 the Tribunal concluded that this was not mere accommodation of cash and enabling it to be converted into accounted or regular payment. The discrepancy pointed out by the Calcutta Stock Exchange regarding client Code has been referred to. But the Tribunal concluded that itself, is not enough to prove that the transactions in the impugned shares were bogus/sham. The details received from Stock Exchange have been relied upon and for the purposes of faulting the Revenue in failing to discharge the basic onus. If the Tribunal proceeds on this line and concluded that inquiry was not carried forward and with a view to discharge the initial or basic onus, then such conclusion of the Tribunal cannot be termed as perverse. The conclusions as recorded in para 12 of the Tribunal's order are not vitiated by any error of law apparent on the face of the record either.

7. As a result of the above discussion, we do not find any substance in the contention of Mr.Sureshkumar that the Tribunal misdirected itself and in law. We hold that the Appeals do not raise any substantial question of law. They are accordingly dismissed. There would no order as to costs.

8. Even the additional question cannot be said to be substantial question of law, because it arises in the context of same transactions, dealings, same investigation and same charge or allegation of accommodation of unaccounted money being converted into accounted or regular as such. The relevant details pertaining to the shares were already on record. This question is also a fall out of the issue or question dealt with by the Tribunal and pertaining to the addition of Rs.25,93,150/-. Barring the figure of loss that is stated to have been taken, no distinguishable feature can be or could be placed on record. For the same reasons, even this additional question cannot be termed as substantial question of law.”

30. In the instant case also, we noticed that the AO has simply relied upon the report of the investigation department and held that the long term capital

gains declared by the assessee are not genuine. No other material was brought on record by the AO to prove that the assessee has indeed availed only accommodation entries. We noticed that the assessee has furnished all documents relating to purchase and sale of securities. The shares have entered and exited his demat account. The purchase and sale transactions have been routed through the bank accounts of the assessee. All these documentary evidences produced by the assessee have not been disproved. Accordingly, we are of the view that the decision rendered by the jurisdictional Hon'ble Bombay High Court in the above said case of Shyam R Pawar (supra) is squarely applicable to the facts of the present case. The Ld A.R also relied upon following decisions, which support the case of the assessee:-

- (a) CIT vs. Smt Jamnadevi Agrawal (2012)(20 taxmann.com 529)(Bom)
- (b) PCIT vs. Ziauddin A Siddique (ITA No.2012 of 2017)(Bom)
- (c) PCIT vs. Smt Renu Agarwal (ITA No.44 of 2022)(Bom)
- (d) Shri Sohanraj Uttamchand vs. DCIT (ITA No.1787/Chny/2017)

31. In view of the above, in the facts and circumstances of the case, we hold that the tax authorities are not justified in disbelieving the long term capital gains declared by the assessee. Accordingly, we set aside the order passed by Ld CIT(A) on this issue and direct the AO to delete the addition relating to assessment of sale consideration of Rs.4.85 crores realised on sale of shares of Shantanu Sheorey Aqua.

32. The next issue contested by the assessee relates to the addition of Rs.25.50 lakhs made by the AO relying on the application filed before Income tax Settlement Commission. We notice that an identical issue has been examined by the co-ordinate bench in the case of A.T Trade Overseas P Ltd vs. DCIT (ITA No.325/Mum/2021 dated 23.03.2022) and it has been decided in favour of the assessee as under:-

“8. Considered the rival submissions and material placed on record, we observed that subsequent to search action assessee has disclosed additional income before ITSC and as per the information available on record assessee has agreed for adhoc disallowance relating to business expenses to the extent of ₹.50 Lakhs. We observed that assessee has agreed for adhoc addition in order to buy peace and to cover if there is any possible deficiency in any of the evidences with respect to the business expenditure incurred by the assessee. Further, assessee agreed for additional expenses of ₹.1.5 Lakhs over and above the above business expenditure. It is fact on record Assessing Officer relied on the informations submitted before ITSC which in fact is only voluntary disclosure of adhoc expenses in order to avoid unnecessary verification and cumbersome exercise of following up with the Tax Authorities. Since settlement commission has rejected the application of the assessee, now assessee retracts the submissions made before settlement commission. The Assessing Officer now relying on the adhoc disclosure before settlement commission in order to make additions, which in our considered opinion is not proper. As Assessing Officer can use all the material which is submitted before settlement commission and Assessing Officer can make the addition based on the proper evidences on concealment of income or any evidences which proves that assessee has not disclosed its proper income. In the given case, it is also fact on record that in the search, no incriminating material was found and no other material available before the Assessing Officer to sustain the addition except relying on the voluntary disclosure before ITSC. We observe that the Coordinate Bench in *Anantnadh Constructions and Farms (P.) Ltd., v. DCIT (supra)* held as under:

“15. We find that section 245HA(1) of the income Tax Act lists several circumstances in which the case before the Settlement Commission would abate; whereas in section 32L(1) non - cooperation of the petitioner is the only ground. The Central Excise Officer derives its power its power to assess such abated proceeding vide section 32L(2) of the Central Excise Act. This is identical to powers vested with an AO under section 245HA(2) and 245HA(3) under the Income Tax Act. It is therefore very clear that the provisions of Central Excise Settlement Commission and that for Income Tax settlement Commission are identical. Therefore, the judgment of Hon’ble Gujarat High Court in the case of *Maruti Fabrics* although pertaining to Central Excise should be applied to cases abated under section 245HA of the Income Tax Act also.

16. Therefore, we are of the view that the judgment of Hon’ble Gujarat High Court is applicable to the facts of the assessee’s case. We find that Hon’ble Gujarat High Court has held that if the petition filed before the Settlement Commission wherein assessee has made declaration but proves that assessee has neither earned such income nor any incriminating material was found during the search relating to undisclosed income then no addition can be made.

17. We have also gone through the judgment of ITAT, Mumbai in the case of *Dolat Investment vs. Dy. Commissioner of Income Tax* wherein the ITAT has specifically held in para 22 which reads as under:

“22. The first issue is whether the case of the assessee for assessment year 2005-06 was admitted by the Settlement Commission under section 245D(1) of the Act? On this issue, we have already seen that in the order dated 30-11-2007 under section 245D(4) of the Act, the Settlement Commission has clearly held that the assessee for assessment year 2005-06 does not satisfy the criteria of offering income on which at least an income-tax payable should exceed Rs. 1 lakh. The Settlement Commission has further held that when admitting the petition of the assessee for assessment year 2005-06, this aspect was overlooked and that they are rectifying the apparent error by excluding assessment year 2005-06 of the assessee from the process of settlement. Thus, the case of the assessee for assessment year 2005-06 cannot be considered to have been admitted for the process of settlement under section 245D(1) of the Act. Consequently, the confidential information disclosed in the Annexure to the Settlement application could not have been used by the Assessing Officer against the assessee to make the impugned addition. Therefore, the addition to the income made by the Assessing Officer in assessment year 2005-06 which is based only on the disclosure made in the Annexure to the Settlement Commission is not valid in law. Consequently, the imposition of penalty on the basis of such invalid addition cannot be sustained. In view of the above conclusion, we do not wish to go into the other alternate argument of the learned counsel for the assessee regarding abatement of proceedings before Settlement Commission and use of confidential information disclosed by the assessee in such proceedings by the Assessing Officer in making assessment.”

18. From the above decision of the Tribunal where they have discussed the section 245C(1) and section 245D(i) and 245HA by following observation:

“20. The Finance Act, 2007 made changes to the provisions for settlement of cases contained in Chapter XIX-A of the Income-tax Act 1961. One change involves introduction of a new concept of abatement of proceedings before the Settlement Commission for which provisions has been made in the newly inserted section 245HA relevant portion whereof reads thus :—

"245HA. Abatement of proceeding before Settlement Commission.—
(1) where....

(i) an application made under section 245C on or after the 1st day of June, 2007 has been rejected under sub-section (1) of section 245D;

(ii) an application made under section 245C has not been allowed to be proceeded with under sub-section (2A) or further proceeded with under sub-section (2D) of section 245D;

(iii) an application made under section 245C has been declared as invalid under sub-section (2C) of section 245D;

(iv) in respect of any other application made under section 245C, an order under sub-section (4) of section 245D has not been passed within the time or period specified under sub-section (4A) of section 245D, the proceedings before the Settlement Commission shall abate on the specified date.

Specified date would be (i) in respect of an application referred to in sub-section (2A) or sub-section (2D), on or before the 31st day of March, 2008; (ii) in respect of an application made on or after 1st day of June, 2007 within nine months from the end of the month in which the application was made.

(2) Where a proceeding before the Settlement Commission abates, the Assessing Officer or as the case may be any other income-tax authority before whom the proceeding at the time of making the application was pending, shall dispose of the case in accordance with the provisions of this Act as if no application under section 245C had been made.

(3) For the purposes of sub-section (2), the Assessing Officer or as the case may be, other income-tax authority, shall be entitled to use all the material and other information produced by the assessee before the Settlement Commission or the results of the inquiry held or evidence recorded by the Settlement Commission in the course of the proceedings before it, as if such material, information inquiry and evidence had been produced before the Assessing Officer or other income-tax authority or held or recorded by him in the course of the proceedings before him."

21. Thus, when a proceedings before the Settlement Commission abates, it reverts to the income-tax authority before whom it was pending at the time of making the application for settlement and the income-tax authority has to dispose of the case in accordance with the provisions of the Act as if no application for settlement had been made and for that purpose, it is entitled to use all the material and other information produced by the assessee before the Settlement Commission or the results of the inquiry held or evidence recorded by the Settlement Commission in the course of the proceedings before it."

19. We find from the above proposition of law by Hon'ble Gujarat High Court and Tribunal that simply relying upon the declaration made before the Settlement Commission no addition can be made. In this

group case, the search was conducted in the business premises of Lodha Group and subsequent to search action assessee company along with other companies of Lodha Group filed a petition under section 245C(1) of the Act before Settlement Commission. The assessee has offered additional income of Rs.5 lakhs towards the land brokerage income. This offer was made for maintainability of petition before Settlement Commission as stated in clause (i) and clause (ia) of section 245C(1) of the Act. We are of the view that after reopening of the assessment order no addition can be made on the basis of income offered by the assessee before Settlement Commission. We find that no incriminating material was found during the course of search action substantiating that assessee has actually earned undisclosed income. Therefore, just because assessee has offered additional income before Settlement Commission, no addition can be made without basis. Hence, the addition made by the AO and Ld. CIT(A) is deleted.”

9. Respectfully following the above said decision, we are inclined to delete the additions made by the Assessing Officer by solely relying on the information submitted before ITSC without there being any material in support of proposed addition. Accordingly, ground No. 1 and 2 are allowed.”

33. Since the facts are identical in this case, following the above said decision, we direct the AO to delete this addition.

34. The next ground urged by the assessee relates to the claim for deduction of Education Cess. In view of the retrospective amendment brought in by Finance Act, 2022 holding that the education cess is not allowable as deduction, we hold that the claim of the assessee is not tenable. Accordingly, we reject this ground of the assessee.

35. We shall now take up the appeal filed by the revenue for AY 2017-18. The revenue is challenging the decision of Ld CIT(A) in deleting the addition of Rs.6.90 crores, being cash credits in the form of unsecured loans received by the assessee and also deleting the interest paid on the above said loans.

36. The assessee had received loans from a group company named M/s Anjani Towers P Ltd. The said Anjani Towers P Ltd had borrowed loans from certain other companies. The AO proceeded to enquire the genuineness of loans taken by M/s Anjani Towers P Ltd from 31 parties, by issuing notices

u/s 133(6) of the Act. The Ld A.R submitted that 26 parties replied to the notices issued by the AO and five parties did not respond. After making certain discussions, the assessing officer concluded that a sum of Rs.6,90,00,000/- as detailed below is assessable as unexplained cash credit:-

Yashashvi Vyapar & Vitt P Ltd	-	20,00,000
Bellary Investments & Trading P Ltd	-	6,68,00,000
Running balance of M/s Anjani Towers	-	2,00,000

		6,90,00,000
		=====

37. The Ld CIT (A), during the course of appellate proceedings, issued notices u/s 133(6) of the Act to balance five parties and all of them responded. The Ld CIT(A) also deputed inspector and he gave report of his enquiry in respect of Bellary Investment & Trading P Ltd and Yashashvi Vyapar & Vitt P Ltd. Hence the Ld CIT(A) called for a remand report from the AO and the assessee also filed rejoinder to the remand report. After examining the whole issue, the Ld CIT(A) deleted the above said addition and hence the revenue is challenging his decision.

38. We heard the parties on this issue and perused the record. The decision rendered by Ld CIT(A) on this issue is extracted below:-

“7.30 From the above, it may be concluded that firstly, these companies have owned up giving loan to Anjani Towers Pvt. Ltd. as also to the assessee group, in the independent verification made by the AO u/s.133(6) of the Act, as also in the further verification made by the undersigned. Besides, the companies based in Mumbai namely, Bellary Investment & Trading Pvt. Ltd. and Yashavi Vyapar Pvt. Ltd. were found to be in existence at their new address, as per enquiries carried out by the ITI. Their financial status have been discussed in the foregoing paras. The AO has also not raised any objection about the loans given by these companies except the fact that these companies were showing losses in one or two years.

7.31 As regard AO's observation that, Arvind Sanghai director of the Anjani Towers Pvt.Ltd. had stated in his statement that, these (loans) are funds of Hisaria group itself, routed through Anjani Towers Pvt. Ltd. to avail line of credit from the bank and as regards statement of Shri Sanghai that there was no rationale of giving loans to Hisaria Group, the assessee

has clarified that, firstly Shri Arvind Sanghai was not a director in Anjani Towers Pvt.Ltd. at the time of search and had resigned from the Director's post much before. Therefore, his statement had no evidentiary value. The Assessee has further clarified that, Shri Sandeep Hisaria in his statement on oath at the time of search had very clearly and categorically stated that, Anjani Towers Pvt.Ltd. was owned by friends and thus loan from them was a friendly loan to meet urgent business needs. He further clarified that Anjani Towers Pvt. Ltd. is in the business of finance and investment and giving loan and earning interest is one of its main activities. It has also been stated that there was two way movement of funds to and from Hisaria Group and these loans were squared up within a few months and with interest. It has been stated that there was even credit balance of some of the Hisaria Group entities with Anjani Towers Pvt.Ltd., at the time of search. The assessee has thus clarified that there is nothing wrong or unusual in loans given by Anjani Towers Pvt.Ltd. to the assessee group. The assessee has also clarified that, out of 31 parties who had given loan to Anjani Towers Pvt.Ltd., replies in respect of 26 parties has already been accepted by the AO and there is no reason why replies of other parties namely Bellary Investments & Trading Pvt.Ltd., and Yashasvi Vyapar & Vitt Pvt.Ltd... should not be accepted when, they have already submitted, similar replies in response to notices u/s. 133(6) in the appellate proceedings. In view of the above, I feel that assessee has rebutted various observations made by the AO in this regard and it has produced necessary details and explanation in this respect of loan and independent verification has also been carried out in cases of these entities and in fact, even III has visited the premises of Bellary Investments & Trading Ptid, Yashasi Vyapar & Vitt Pvt.Ltd. Therefore, the assessee has discharged assessee has clarified that, it was not aware of the fact that these parties were not found at Kolkata based registered office at the time of Survey nor was confronted with this fact at the time of Search, otherwise it would have given the current addresses of these companies. It has been clarified that, Satyatej Vyapar Pvt.Ltd had its corporate office at Vishakhapatnam, while Narayani Vyapar Pvt.Ltd., and Tulsi Trimex Pvt.Ltd., had their corporate offices at Ahmedabad. Further the assessee has also clarified that, it had submitted the addresses of the corporate office of these parties to the AO way back on 06.05.2019, itself during the assessment proceedings. Subsequently, again vide letter dated 02.03.2020 addresses of the corporate office of these parties were again given to the AO. The assessee has thus clarified that it is not correct to say that it had failed to give the correct addresses of these companies. The assessee further mentioned that the AO failed to either issue notice u/s. 133(6) of the Act or issue summons u/s. 131 of the Act to these parties.

7.33 It has been clarified that Satyatej Vyapar Pvt.Ltd is part of Steel Exchange Ltd. group of Vishakhapatnam, which is engaged in Steel manufacturing and is headed by Shri B. Suresh Managing Director of the Company. Coming to the question, as to how did the assessee came to know about this company, it has been clarified that Steel Exchange Ltd group is the customer of A.T. Trade Overseas Ltd with whom assessee has got regular dealing and the assessee supplies coal to this party. Thus, it

cannot be said that assessee was not known or aware of this party. Thus, the assessee has rebutted the observation of the AO as to, how addresses were not given to him during the assessment proceedings and how did the assessee come to know about these parties. It is matter of record that their financial capacity etc., is fairly good as discussed in the foregoing paras.

7.34 Coming to other two companies, namely Tulsi Trimpex Pvt.Ltd., and Narayani Vyapar Pvt.Ltd., the assessee has clarified that, these companies belongs to Sona Alloys Ltd. group of Ahmedabad, headed by Shri Amit Jain and this group is engaged in manufacturing of iron steel and alloy steel and have considerable turnover. It has been further clarified that Sona Alloys Ltd group is also a regular customer of Hisaria Group over the last 7 years and coal is being supplied by Hisaria Group to them. Further, their financial capacity is also not in doubt as they have been doing considerable turnover and business, Thus, neither their identity nor capacity not genuineness of transaction appears to be in doubt.

7.35 In the light of above explanation I am of considered opinion that assessee has discharged its onus in respect of above mentioned two entities namely Bellary Investments & Trading Pvt.Ltd., and Yashasvi Vyapar & Vitt Pvt.Ltd. and they are treated as explained. In view, of the above facts the additions made by the AO in respect of above mentioned two companies as unexplained loans u/s.68 of the Act, becomes unsustainable in law. The same is therefore, directed to be deleted.”

7.36 It is seen that, during the current year, the appellant company had received loan of Rs. 6.90 crs. from Yashasvi Vyapar & Vitt Pvt.Ltd., and Bellary Investments & Trading Pvt Ltd, and the same is added in the computation by the AO. In view of the above discussion, the addition made by the AO u/s.68 of the Act in respect of these companies is directed to be deleted.”

39. We notice that the Id CIT(A) has deleted the addition by making due enquiries, which have also been confronted with the AO. We further notice that the AO has examined source of source, i.e., the assessee had received loans from M/s Anjani Towers P Ltd and the AO has proceeded to examine the loans, in turn, received by M/s Anjani Towers P Ltd. In any case, the enquiries made by the Ld CIT(A) has shown that the said loans are genuine. The Ld CIT(A) has also given a finding that the assessee has discharged his initial onus placed upon him u/s 68 of the Act, which could not be disproved by the AO. Accordingly, we are of the view that the decision rendered by Ld CIT(A) on this issue does not call for any interference.

40. We shall now take up the appeal filed by the assessee for AY 2018-19. Following issues are contested by the assessee in this year:-

(a) Addition u/s 69C (unexplained cash expenditure) – Rs.1,01,94,974/-

(b) Addition u/s 69C (Unexplained cash expenditure) – Rs.5,34,850/-

(c) Addition u/s 68 (cash received from Mr Sandeep) – Rs.40,75,000/-

(d) Addition made as per application made to Income tax Settlement Commission – Rs.28,50,000/-.

(e) Claim for deduction of Education cess.

41. The claim for deduction of education cess has been rejected by us in the earlier considering the amendment brought in by Finance Act, 2022. Following the same, we reject this claim of the assessee in this year also.

42. The addition made by the AO on the basis of application filed by the assessee before Income tax Settlement Commission has been deleted by us in AY 2017-18. For identical reasons, we hold that the addition of Rs.28,50,000/- made by the assessee is not sustainable. Accordingly, we set aside the order passed by Ld CIT(A) on this issue and direct the AO to delete the above said addition.

43. The first issue relates to the addition of Rs.1,01,94,974/-, being unexplained cash expenditure. During the course of search proceedings, it was noticed from the laptop of the assessee that he has spent a sum of Rs.1,28,58,221/- towards various expenses. When enquired, it was submitted that these expenses have been incurred on interior decoration of the flat of the assessee. It was noticed that a sum of Rs.26,07,978/- have been incurred by way of cheque and the said payments have been accounted for in the books of group concerns. The assessee submitted that the remaining expenses have been incurred out of savings made by all the family members. However, the AO rejected the said explanation. Accordingly, the AO held that the remaining amount is unexplained cash expenditure

assessable to tax u/s 69C of the Act. The AO computed the remaining amount as Rs.1,01,94,974/- and assessed the same. The Ld CIT(A) also confirmed the same.

44. The Ld A.R submitted that the above expenditure has been met out of the savings available with all the family members. He further submitted that these expenses have not been incurred during the year relevant to AY 2018-19. In this regard, he submitted that the expenses by way of cheque have been incurred during the year relevant to AY 2017-18. Hence, there is reason to believe that the expenses in cash were also incurred during that period only. Accordingly, he contended that the disallowance made by the AO should be deleted.

45. The Ld D.R, on the contrary, supported the order passed by Ld CIT(A) on this issue.

46. We heard rival contentions and perused the record. The Ld CIT(A) has extracted the details of expenses incurred by way of cheques in pages 10 to 12 of the order and we notice that all the cheque payments have been made on 31.3.2017 or earlier dates. The Ld CIT(A) has also scanned the seized material relevant to this addition at page 7 of the order. The said details do not contain the dates. Hence, there is some merit in the submission of Ld A.R that the expenses in cash could have also been incurred in the earlier years. The contention of the assessee was that these expenses have been incurred out of savings available with all the family members, even though the assessee could not substantiate the said claim. Hence, on a conspectus of the matter, we are of the view that it can be presumed that the major expenses would have been incurred in the earlier years and a portion might have been incurred in the year relevant to AY 2018-19. Accordingly, in order to put this issue at rest, we estimate that the assessee would have spent 10% of the cash portion of expenses during the year relevant to AY 2018-19.

Accordingly, we set aside the order passed by Ld CIT(A) on this issue and direct the AO to restrict disallowance to 10% of the addition made by the AO.

47. The next issue relates to the addition of Rs.5,34,850/- relating to unexplained expenditure. The data found in the laptop of the assessee showed that a sum of Rs. 5,34,850/- has been incurred by the assessee in cash. When questioned about the source, it was submitted that the above said expenses have been incurred out of savings of the family members. The Assessing Officer did not accept the same and accordingly assessed a sum of Rs. 5,34,850/- as unexplained expenditure and the same was also confirmed by the learned CIT(A).

48. We have heard the parties and perused the record. The details of these expenses have been scanned by the learned CIT(A) at page No. 16 of his order. A perusal of the same would show that all these expenses pertained to the period prior to 31.3.2017 and there is no evidence to show that these payments have been made after 1.4.2017. Hence, we are of the view that these addition cannot be made in A.Y. 2018-19. Accordingly, we set aside the order passed by the learned CIT(A) on this issue and direct the Assessing Officer to delete this addition.

49. The next issue relates to the addition of Rs. 40,75,000/- made by the Assessing Officer under section 68 of the Act as unexplained cash credit. The basis for making this addition is a "statement sheet" found during the course of search. The said sheet has been scanned at page No. 13 of the order passed by the learned CIT(A). The said sheet shows certain cash transaction entered in the years 2010-2014. When assessee was questioned about these transactions, he submitted that he was entitled to a commission income @ 2% on the turnover achieved by five concerns out of the parties introduced by the assessee. Accordingly, the Assessing Officer took the view that the assessee has received a sum of Rs. 40,75,000/- which is in the nature of

unexplained cash credit and assessed the same. The learned CIT(A) also confirmed the same.

50. We have heard the parties and perused the record. As noticed earlier, the cash transactions found in this impugned statement relate to the financial years 2011-2014. The case of the assessee is that the same represents commission income on the turnover canvassed by him during the financial years 2009-10 to 2012-13. In effect, none of these transactions pertained to 2018-19 and hence the Assessing Officer could not have made this addition in this year. Accordingly we set aside the order passed by the learned CIT(A) on this issue and direct the Assessing Officer to delete the addition of Rs. 40,75,000/-

51. In the result, all these appeals filed by the Revenue are dismissed. The appeals filed by the assessee for A.Y. 2011-12 to 2016-17 are allowed and appeals filed by the assessee for A.Y. 2017-18 and 2018-19 are partly allowed.

Order pronounced in the open court on 17.10.2022.

Sd/-
(ANIKESH BANERJEE)
JUDICIAL MEMBER

Sd/-
(B.R. BASKARAN)
ACCOUNTANT MEMBER

Mumbai; Dated : 17/10/2022

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai

PS