

THE INCOME TAX APPELLATE TRIBUNAL
"C" Bench, Mumbai
Shri B.R. Baskaran (AM) & Shri Rahul Chaudhary (JM)

I.T.A. No. 567/Mum/2022 (A.Y. 2012-13)
I.T.A. No. 566/Mum/2022 (A.Y. 2014-15)

Pankaj K. Shah HUF G-5, 1 st Floor Mangal Kunj Jambli Gulli Borivali West Mumbai-400 092. PAN : AAAHP4255L (Appellant)	Vs.	DCIT, CC-6(3) Mumbai (Respondent)
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I.T.A. No. 570/Mum/2022 (A.Y. 2011-12)
I.T.A. No. 569/Mum/2022 (A.Y. 2012-13)
I.T.A. No. 577/Mum/2022 (A.Y. 2014-15)

Pankaj K. Shah G-5, 1 st Floor Mangal Kunj Jambli Gulli Borivali West Mumbai-400 092. PAN : AKQPS8236A (Appellant)	Vs.	DCIT, CC-6(3) Mumbai (Respondent)
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I.T.A. No. 896/Mum/2022 (A.Y. 2014-15)

DCIT, CC-6(3) Room No. 1903 19 th Floor Air India Building Nariman Point Mumbai-400 021. (Appellant)	Vs.	Pankaj K. Shah G-5, 1 st Floor Mangal Kunj Jambli Gulli Borivali West Mumbai-400 092. PAN : AKQPS8236A (Respondent)
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I.T.A. No. 1614/Mum/2022 (A.Y. 2014-15)

DCIT, CC-6(3) Mumbai	Vs.	Pankaj K. Shah HUF G-5, 1 st Floor Mangal Kunj Jambli Gulli Borivali West Mumbai-400 092. PAN : AAAHP4255L
(Appellant)		(Respondent)

Assessee by	Shri Mani Jain, CA & Shri Prateek Jain, CA
Department by	Shri Sandeep Raj
Date of Hearing	08.09.2022
Date of Pronouncement	18.11.2022

ORDER

PER BENCH:-

All these appeals filed by the assesseees as well as revenue relate to the assessment years mentioned in the cause title and are directed against the orders passed by Ld CIT(A) in the respective hands of the assesseees herein for the relevant years.

2. Both the assesseees herein have raised following legal issue in all the above said years:-

“On the facts and circumstances of the case and in law, Learned CIT(A) erred in confirming the action of the Assessing Officer in passing the impugned assessment u/s 153A of the Act in the absence of any incriminating material found during the course of search, thereby making the assessment order illegal and without jurisdiction.”

Since the above said legal issue goes to the root of the matter, the parties were heard on the same.

3. The facts relating to the above said legal issue are stated in brief. A search and seizure action u/s 132 of the Income tax Act was conducted in the hands of Shri Pankaj K Shah on 04-02-2016. As a consequence thereto, the present assessments were completed by the assessing officer in the hands of Shri Pankaj K Shah u/s 143(3) r.w.s 153A of the Act. The proceedings u/s 153C of the Act was also initiated in the hands of Pankaj K Shah (HUF).

4. The search was conducted on the basis of information received from the Investigation Directorate of Kolkatta that the family members of the above said assesseees have availed bogus long term capital gains in the returns of income filed by them respectively for the years under consideration. The AO noticed that all the shares purchased and sold by these assesseees have been identified as "penny stocks" by the investigation wing of the Income tax department. It is the allegation of the revenue that some people have manipulated the prices of penny stocks to take it to unrealistic levels of high/low prices, so that the capital gains/capital losses are generated by certain investors to suit their requirements. Hence, the AO took the view that the capital gains/capital losses declared by the assesseees herein from sale of penny stocks are bogus in nature. Accordingly, the AO assessed the capital gains declared by these assesseees as their income in the respective years. He also took the view that these assesseees would have incurred commission expenses in procuring bogus capital gains. Accordingly, he estimated commission expenses that would have been incurred by these assesseees and assessed the same also.

5. The case of the assesseees is that the returns of income of the years under consideration have been filed by them much prior to the date of search. The said returns of income have been accepted as it is. Since the time limit for issuing notice u/s 143(2) of the Act has expired before the initiation of search operations, it was submitted that the assessments of the

years under consideration in the hands of both the assessee herein would fall under the category of “unabated assessments” as per the provisions of sec 153A of the Act. It is the submission of the assessee that the search officials did not unearth any incriminating material warranting addition of capital gains and estimated commission expenses. It was submitted that the capital gains have been declared by these assessee in the original returns of income filed much prior to the date of search.

6. Accordingly, it was contended before Ld CIT(A) in the appellate proceedings that these additions could not have been made by the AO in the assessments passed u/s 153A of the Act, without there being any incriminating material found during the course of search in the case of “unabated assessment years”. In support of these contentions, the assessee placed their reliance on the decision rendered by Hon’ble Bombay High Court in the case of CIT vs. Continental Warehousing Corporation (Nhava Sheva) Ltd (374 ITR 645)(Bom) and CIT vs. Gurinder Singh Bawa (386 ITR 483)(Bom). However, the Ld CIT(A) rejected the above said contentions of the assessee. The observations made by the Ld CIT(A) in the case of Pankaj K Shah (HUF) are extracted below:-

“Hence if the search and seizure action has resulted in identification of certain entities which have indulged in dubious or bogus transactions in general and during such search it is noted that either some of the searched parties or some other third party has engaged in similar transaction with these entities, such information would be an information of incriminating nature. The findings of search may lead to detection of money, bullion, jewellery or other valuable article or thing which has not been disclosed prior to search action. If these assets belong to the searched person, he is to be assessed under section 153A. If these belong to a person who has not been searched, he is to be assessed under section 153C of the Act. The findings of search may also lead to gathering of some information or detection of such books of account or documents, seized or requisitioned which impact the determination of total income of an assessee, meaning thereby that these evidences discovered during search action indicate suppression of income, suppression of information about the character of a receipt/suppression of tax by a person, whether searched or not. Loosely, these items are known as “incriminating material/evidence”

being information which was earlier not known prior to the search action and having come to light during the search action, has the potential of affecting determination of income/tax of the persons affected by such information. If the information pertains to searched person, he is assessed under section 153A and if the information is in respect of a party not covered by search, his case is covered under section 153C.

The appellant has relied upon the decisions in the cases of CIT-II, Thane vs. Continental Warehousing Corporation (Nhava Seva) Ltd 374 ITR 645, CIT Central Circle-II, Mumbai vs. Gurinder Singh Bawa (386 ITR 483) Bombay High Court, All Cargo Logistics Ltd vs. DCIT CC-44 (147 TTJ 513) and other case laws. The decisions relied upon by the assessee talks about 'incriminating evidence' or 'incriminating material' found during the search action and not merely 'seized material' or 'seized documents'. In the case of the assessee, during search proceedings, the AO unearthed the modus operandi followed for such dubious transactions and listed out the unusual activities. These findings were also confirmed by the Director of the investee-company, entry operators, and exit providers in their statements. The investigation Units have conducted sufficient inquiries and there is substantial material available to demonstrate the above findings. These documents /statements and the overall findings of the search action are sufficient incriminating material to proceed u/s 153C of the Act in the case of assessee. The assessee is incorrect in trying to claim that there are no incriminating materials against the assessee for the assessment year under reference.

In view of the facts and circumstances of the case of the appellant, there was incriminating material/evidences, based on which the AO has initiated and completed the assessment proceedings u/s 153C of the Act.”

Identical observations have been made by Ld CIT(A) in the hands of Pankaj K Shah in the context of sec.153A also. The Ld CIT(A) also took support of the decision rendered by Hon'ble Supreme Court in the case of P.R.Metrani vs. CIT (2006)(287 ITR 209). Accordingly, the Ld CIT(A) dismissed the above said legal ground urged by these assessees in all the years under consideration. On merits also, the Ld CIT(A) confirmed the orders so passed by the AO in the years under consideration in the hands of all these assessees. Hence, these assessees are aggrieved by the above said decision of Ld CIT(A).

7. The Ld A.R submitted that the Ld CIT(A) was not justified in not following the binding decisions rendered by Hon'ble jurisdictional Bombay High Court in the case of Continental Corporation (Nhava Sheva) Ltd (2015)(58 taxmann.com 78)(Bom) and Gurinder Singh Bawa (2017)(79 taxmann.com 398)(Bom), wherein the Hon'ble Bombay High Court held that the unabated assessments (finalized assessments) cannot be touched by resorting to the provisions of sec.153A of the Act unless some incriminating materials relating to the said assessments, which are contrary to and/or not disclosed during regular assessment proceedings, are found. The Ld A.R submitted that the capital gains/capital losses have been duly declared in the returns of income filed by the assessee herein much prior to the initiation of search action. The time limit for issuing notice u/s 143(2) of the Act has also expired prior to the date of initiation of search. Hence all the assessment years under consideration in the hands of both the assessee herein would fall under the category of "unabated assessment/ finalized assessment/completed assessment" within the meaning of sec.153A of the Act. He submitted that the search officials did not find any incriminating documents against the capital gains declared by the assessee or towards incurring of any commission expenses during the course of search action. Accordingly, by placing reliance on the above said decisions rendered by Hon'ble Bombay High Court, the Ld A.R contended that the AO could not have examined the capital gains declared by the assessee in the years under consideration nor he could have made any addition towards commission expenses. He submitted that the Ld CIT(A) has tried to expand the meaning of "incriminating materials" by making his own inferences, which is not legally correct.

8. The Ld D.R, on the contrary, submitted that the investigation wing of the Income tax department has identified large scale of rigging in the prices of penny stocks. The prices of all these penny stocks were manipulated and the rise/fall of prices was not in tune with normal market trend of movement

of prices. Further, the prices of these shares are not commensurate with the size of its operations or net worth. It was noticed that certain persons have purchased and sold these penny stocks in order to generate capital gains/capital losses to suit their requirement. In this process, the unaccounted money was brought into the books of accounts. It was identified that the assessee herein has dealt in the penny stocks and has generated capital losses/capital gains. Hence the search operations were carried out in the hands of the assessee and it was found out that these assessee have declared capital losses/capital gains on sale of penny stocks. He submitted that the Ld CIT(A) has rightly observed that the entries made in the books of account itself should be considered as incriminating in nature. Since the search has been conducted in the hands of these assessee in order to examine their dealing in penny stocks, the said state of affairs found during the course of search shall by itself constitute incriminating material. Accordingly, the Ld D.R submitted that the AO has rightly disallowed the claim of capital gains in the hands of the assessee and also added the commission expenses. Accordingly, the Ld D.R submitted that the Ld CIT(A) was justified in rejecting the above said legal ground of the assessee.

9. In the rejoinder, the Ld A.R submitted that the additions cannot be made on the basis of suspicions. He submitted that the assessee is placing reliance on the binding decision rendered by Hon'ble Bombay High Court with regard to the scope of assessment u/s 153A/153C of the Act in respect of unabated assessments. He submitted that a particular state of affairs cannot lead to any incriminating material, since the said state of affairs is a presumption entertained by the AO rather than on certain materials. He submitted that the capital gains declared by these assessee are based on actual transactions of purchase and sale of shares through stock exchanges and further these transactions are duly supported by the evidences, which were not found to be bogus. Accordingly, he submitted that the suspicion, surmises and conjectures cannot replace actual facts. The Ld A.R further

submitted that the Ld CIT(A) has not followed the above said binding decisions rendered by Hon'ble Bombay High Court and proceeded to uphold the validity of the additions made by the AO by placing his reliance on the decision rendered by Hon'ble Supreme Court in the case of P R Metrani. He submitted that the said decision has been rendered in a different contexts/different set of facts and it is not applicable to the facts of the present case. He further submitted that the Ld CIT(A) ought to have followed the binding decisions rendered by Hon'ble jurisdictional Bombay High Court.

10. We have heard rival contentions and perused the record. We noticed earlier that the revenue has carried out search and seizure operations in the hands of these assesseees on 04-02-2016. These assesseees have furnished the details relating to dates of filing of returns of income and the details of assessments in order to substantiate their claim that all the assessment years under consideration fall under the category of "unabated assessments". They have been tabulated below:-

(A) PANKAJ K SHAH:-

Assessment year	Date of filing return of income	Time limit for issuing notice u/s 143(2) expired on
2011-12	29-09-2011	30-09-2012
2012-13	25-09-2012	30-09-2013
2013-14	30-09-2013	30-09-2014

(B) PANKAJ K SHAH (HUF):-

Assessment year	Date of filing return of income	Time limit for issuing notice u/s 143(2) expired on
2012-13	06-09-2012	30-09-2013
2014-15	30-07-2014	30-09-2015

11. The contention of the assesseees 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 (supra) and Gurinder Singh Bawa (supra).

12. 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.

13. 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."

14. 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 interalia 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 interalia 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.”

15. The co-ordinate bench has followed the above said binding decisions of jurisdictional High Court in the cases of Smt Anjali Pandit vs. ACIT (ITA No.3028 to 3032/Mum/2011 & others - order dated 17.11.2016) 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.”

16. 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.”

17. We noticed that the Ld CIT(A) has placed his reliance on the decision rendered by Hon’ble Supreme Court in the case of P R Metrani (supra). However, we notice that the Hon’ble Supreme Court has interpreted the provisions of sec.132(4A) vis-à-vis then existing sec. 132(5), which provided passing of an order for the purpose of retaining the assets seized during the course of search. This is general interpretation of sec. 132(4A) vis-a-vis then existing sec. 132(5) of the Act and it does not change the interpretation given by Hon’ble Bombay High Court in respect of sec. 153A of the Act. We also noticed that the Ld CIT(A) has expanded the meaning of the expression “incriminating materials” and held that it would include information received from outside source. In the instant case, it is the case of Ld CIT(A) that the report of investigation wing on the dealing in Penny stocks would be relevant and since the assessee herein have dealt in the said penny stocks, the information so given by Investigation wing coupled with the capital gains declared by these assesseees would fall under the category of incriminating material.

18. However, we are of the view that the view so expressed by Ld CIT(A) is farfetched one. The report of the investigation wing on the penny stock may only trigger the AO to probe the matter further. The suspicion of the department is that some of the assesseees would have converted their unaccounted money into accounted money by availing bogus capital gains generated through penny stock. If, during the course of search, if the revenue has found certain materials from the assesseees, which support the above said suspicion, then those materials may be termed as “incriminating material”, because those materials would show that transactions of capital gains declared by the assessee are not true. In the absence of any such incriminating material, in our view, the very transactions of earning capital

gains cannot be considered as incriminating in nature. If any material found during the course of search goes against the interests of the assessee, then those materials may be considered as incriminating in nature. Hence, we are unable to agree with the view expressed by the Ld CIT(A) with regard to the interpretation of the term “incriminating material”. In the instant cases, no such material was found from the assessees during the course of search.

19. In the absence of any incriminating material, we have to examine the jurisdiction of the AO to make additions under the powers given to him u/s 153A of the Act. In the instant cases, there is no dispute with regard to the fact that all these assessments 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. The conclusion reached by the AO that these assesseees have obtained accommodation entries towards capital gains is on the basis of some generalized external information supplied by the investigation wing of income tax department and no material was found during the course of search validating the said information. In our view, the generalised external information cannot be considered as “incriminating material found during the course of search”. It is an admitted fact that no evidence/material was found during the course of search to come to the conclusion that these assesseees have availed accommodation entries only. 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 capital gains and also he was not justified in making additions towards estimated

commission expenses in all the years under consideration in the hands of these assesseees.

20. In view of the foregoing discussions, we set aside the orders passed by Ld CIT(A) in the hands of these assesseees in all the years under consideration and direct the AO to delete the additions made in respect of capital gains and commission expenses.

21. Since we have decided the above said legal issue in favour of the assesseees, which results in deletion of all additions made by the AO, 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.

22. In the result, all the appeals of the assessee are allowed. The appeals of the Revenue are dismissed.

Order pronounced in the open court on 18.11.2022.

Sd/-
(RAHUL CHAUDHARY)
JUDICIAL MEMBER

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

Mumbai; Dated : 18/11/2022

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

