

THE INCOME TAX APPELLATE TRIBUNAL
"B" Bench, Mumbai
Shri B.R. Baskaran (AM) & Shri Pavan Kumar Gadale (JM)

I.T.A. No. 1108/Mum/2022 (A.Y. 2011-12)
I.T.A. No. 1109/Mum/2022 (A.Y. 2012-13)
I.T.A. No. 1110/Mum/2022 (A.Y. 2013-14)

Sheetal Clothing Co. Pvt. Ltd. 493/E, Room No. 6, Thakkar Chawl, Grant Road Mumbai-400 007.	Vs.	ACIT-5(3)(1) Aayakar Bhavan M.K. Road Mumbai-400 020.
(Appellant)		(Respondent)

I.T.A. No. 1466/Mum/2022 (A.Y. 2013-14)

ACIT-5(3)(1) Aayakar Bhavan M.K. Road Mumbai-400 020.	Vs.	Sheetal Clothing Co. Pvt. Ltd. 493/E, Room No. 6, Thakkar Chawl, Grant Road Mumbai-400 007.
(Appellant)		(Respondent)

PAN : AAACS6446F

Assessee by	Shri Gaurav Bansal, CA & Shri Vishnu Agarwal, CA
Department by	Dr. Mahesh Akhade
Date of Hearing	21.09.2022
Date of Pronouncement	14.12.2022

ORDER

Per B.R.Baskaran (AM) :-

The assessee has filed these appeals for A.Y. 2011-12 to 2013-14 and the Revenue has filed the appeal for A.Y. 2013-14 and all these appeals are directed against the common order dated 31.3.2022 passed by the learned CIT(A)-49, Mumbai. All these appeals were heard together and are being disposed of by this common order.

2. The assessee is contesting the decision of the learned CIT(A) in upholding the addition made by the Assessing Officer by estimating gross profit of the assessee. The Revenue is contesting the decision of the learned

CIT(A) in deleting the addition made under section 68 of the I.T. Act in A.Y. 2013-14.

3. The facts relating to the case are stated in brief. The assessee is engaged in the business of wholesale trading of cloth and readymade garments. The Revenue carried out a survey action under section 133A of the Act in the hands of the assessee on 23.11.2016. The survey was subsequently converted into a search action under section 132 of the Act on 24.11.2016, when they found unexplained cash at the premises of the assessee. Consequent to the search operation, assessment of the year under consideration was reopened under section 153A of the Act. The Assessing Officer completed the assessment by making additions to the gross profit and also making addition of cash credit under section 68 of the Act in all the three years.

4. In the appellate proceedings, the learned CIT(A) confirmed the additions made to the gross profit in all the three years and deleted the additions made under section 68 of the Act. The assessee has filed these appeals challenging the gross profit additions confirmed by the learned CIT(A). The Revenue has filed the appeal in A.Y. 2013-14 challenging the relief granted in respect of additions made under section 68 of the Act.

5. At the time of hearing learned AR also raised a legal ground contesting that the Assessing Officer could not have made addition in these years in the absence of incriminating material since all the three years under consideration fall under the category of unabated assessments.

6. As noticed earlier search conducted in the hands of the assessee on 24.11.2016. It was submitted that the assessments of A.Y. 2011-12 and 2013-14 were completed by processing return under section 143(1) and further the time limit for issuing notice under section 143(2) of the Act has expired for these two years much prior to the initiation of search. The

assessment for A.Y. 2012-13 was completed under section 143(3) of the Act prior to the date of search. Accordingly it was submitted that all these three years will fall under the category of unabated assessments. It is the submission of the learned AR that the Revenue did not unearth any incriminating material warranting disturbance of already completed assessments. Accordingly it was contended that the additions made in all these three years are not correct as per the decision of Hon'ble Jurisdictional Bombay High Court in the case of Continental Warehousing Corporation (Nhava Sheva) Ltd.,(2015) 58 taxman.com 78 (Bom).

7. On merits, the Id A.R contended that the comparable cases selected by the AO for estimating the gross profit are not comparable with the assessee at all. Accordingly, he contended that the rate of gross profit adopted by the AO for estimating the profit of the assessee is highly unreasonable.

8. The Ld D.R, on the contrary, supported the orders passed by Ld CIT(A) on this issue. He submitted that the Ld CIT(A) has given specific finding that incriminating materials relating to the year under consideration were available and hence the addition of gross profit is justified. He further submitted that the AO has taken two comparable cases, which are in the similar line of business as that of the assessee for determining the rate of gross profit.

9. We heard the parties on this issue and perused the record. In the three years under consideration, the AO has made following additions:-

Asst. Year	Estimated amount of gross profit	Addition made u/s 68 of the Act
2011-12	5,12,16,092	1,45,25,000
2012-13	4,06,96,707	12,00,000
2013-14	2,93,01,612	3,03,25,000

10. We shall first deal with the legal issue urged by the assessee. It is the contention of the assessee that the assessing officer could not have made the

above said additions in the years under consideration in the absence of any incriminating materials, since these assessments fall under the category of unabated assessment years. We noticed earlier that the search took place in the hands of the assessee on 24.11.2016. The assessee submitted that the assessment of AY 2012-13 was completed u/s 143(3) of the Act prior to the date of search. The assessments of AY 2011-12 and 2013-14 were completed u/s 143(1) of the Act much prior to the date of initiation of search and the time limit for issuing notices u/s 143(2) of the Act has also expired prior to that date. Hence all the three assessment years under consideration would fall under the category of “unabated/completed assessment years. In the case of Continental Warehousing Corporation (Nhava Sheva) Ltd (supra), the Hon’ble Bombay High Court has held that the additions could be made in “unabated/completed assessment years” only on the basis of incriminating materials, if any, found and relatable to those years during the course of search.

11. The search action was carried out in the hands of all group companies. The Ld A.R submitted that the three concerns are operating from the same premises. They are assessee M/s Sheetal, M/s Sheetal India and the assessee herein, viz., M/s Sheetal Clothing P Ltd. There is one more concern named M/s Sheetal International. He submitted that the concern

- (a) M/s Sheetal is not carrying on any business.
- (b) M/s Sheetal India is carrying on retail business in textiles and readymade garments.
- (c) The assessee herein is a whole sale trader in cloth and readymade garments supplying goods to M/s Sheetal India and M/s Sheetal International.

During the course of survey/search operation, conducted on 23.11.2016/24.11.2016, unaccounted cash of Rs.25,19,930/- was found at the business premises of the assessee, wherein all the above said three concerns are carrying on business. At the time of search, statement of cashier was recorded u/s 132(4) of the Act, wherein he could not explain the

cash. Thereafter, the above said statement of cashier was confronted with the director Shri Damji Shah and he also could not explain the sources of cash immediately. Further, it is noticed that the assessee did not maintain day to day stock register and bill books for unaccounted cash sales have not been maintained. The Ld CIT(A) held that the above said facts would constitute "Incriminating materials" relating to the years under consideration. The observations made by Ld CIT(A) are extracted below:-

7.3.1 I have considered the facts of the case, submissions of the appellant and the findings of the AO as incorporated in the assessment order. As to the rejection of the books of accounts by the learned AO and estimation of income by estimating the gross profit for the year under reference, the argument of the assessee is two-fold. The first contention of the assessee is that for the year under reference, the assessment was not abated, and, therefore, the learned AO did not have jurisdiction to make assessment without having support of any incriminating material found during the course of search. The assessee submitted that as per the Panchnama dated 24/11/2016, the following documents were seized :

- a) Books of accounts and documents, i.e. computerized records;
- b) Cash on hand amounting to Rs.25,19,950/-.

It is, therefore, required to be considered whether the AO had sufficient material as incriminating material found during the course of the search, to proceed with further findings as to the insufficiency and correctness of the books of accounts of the assessee.

7.3.2 I find that the assessee in its submission has stated categorically that it does not make any cash sales as it is in wholesale business and all the payments are received and made through bank only. However, there is an undisputed fact that the cash amounting to Rs.25,36,698/- was found from the premises of the assessee. The assessee claimed that vide a letter to the DDIT(Inv.) dated 14/12/2016, it was explained that the cash belonged to different concerns of the group, partners and their family members. However, the assessee has not filed any evidence to support this contention. It is also required to be noted that this was not the contention made at the time of initial survey or search conducted at the premises of the assessee and it is also not the case of the assessee that this explanation given to the DDIT was supported by necessary evidences. As such, it remains only a claim at best, not supported by any evidence. The AO has noted in para 5 of the assessment order that during the course of search, statement of Cashier of the assessee was recorded u/s.132(4) on 24/11/2016, wherein he was asked to explain the source of the cash. In response to the same, he failed to explain the source of the cash. Further, this statement of the Cashier, Shri Gala, was also confronted to the

promoter, Shri Damji Shah, and he had also failed to explain the source of the cash. The learned AO has also noted multiple discrepancies in the books of the assessee. It is evident that these discrepancies are vis-a-vis the accounts which were found and seized during the course of the search, and, therefore, it cannot be said that the findings of the learned AO were not based on any incriminating material found during the course of the search, when it is an admitted fact that the aforesaid cash and computerized books of accounts were seized during the course of the search. As such, I am of the considered view that the learned AO had jurisdiction to examine the books of accounts of the assessee and come to a conclusion as to the correctness of the claim of the assessee as regards the profit disclosed in the books, and the contention of the assessee to that extent is found to be not acceptable.

12. Further, the Ld CIT(A) has also taken the view that the statements given by the Cashier and the director have not been retracted.

13. On the basis of above said facts, we shall examine as to whether the above said facts would constitute "incriminating material" for the three years under consideration, which are unabated/completed assessment years. Admittedly, all these evidences pertain to the situation/circumstances that existed as on the date of search.

14. The first evidence found during the course of search action is the availability of unaccounted cash balance of Rs.25,19,950/-. Since the above said cash balance was found on the date of search, viz., on 24.11.2016, subject to the acceptance or otherwise of explanations given by the assessee, could be assessed only in AY 2017-18. The cashier of the assessee named Shri Nemchand Gala has stated that the above said unaccounted cash may be from cash sales. Further, he has specifically stated that he collects cash from customers and he is not in charge of maintaining books of accounts. With regard to unaccounted sales, he submitted that he will furnish the details. Thus, we notice that the cashier was not aware as to whether the above said cash is accounted or unaccounted one. Further, he has not stated anything about the concern to which the above said cash belong to. We noticed earlier that three concerns are operating from the same premises. When the statement given by the cashier was confronted to

Mr. Damji Shah, he has specifically stated that he does not confirm the answers given by the cashier with regard to unaccounted cash sales. Mr Shah has further stated that he will provide the details of cash in due course. It was further submitted that the assessee herein is carrying on wholesale business of supplying cloth and readymade garments to its sister concerns. Accordingly, it was submitted that the assessee herein does not carry on any cash sales. Accordingly, it was submitted that the question of unaccounted cash sales will not arise in the case of the assessee and hence the cash balance could not be linked to the assessee. Further, it is the submission of Ld A.R that the above said cash was explained subsequently.

15. From the foregoing discussions, we are of the view that the cash balance seized during the course of search cannot be considered to be “incriminating material”.

16. The second evidence referred to by Ld CIT(A) is the statement recorded from the Cashier and the Director of the assessee company. We have discussed about the relevant portion of the answers given by both in the earlier paragraph. We noticed that the cashier was not really aware as to whether the cash sales are accounted or not. The Director has also not confirmed the statement of Cashier with regard to the unaccounted cash sales. Hence, nothing turns against the assessee on the basis of statements so given. Accordingly, there was no requirement to retract the statements. Hence, in our view, the statements given by the cashier and Director also do not constitute incriminating material.

17. The third evidence referred to by Ld CIT(A) relates to non-maintenance of stock register and defects found in the books of account. It is the submission of the Ld A.R that the assessee is following the method of ascertaining value of closing stock by inventorising the physical stock as at the year end. This system is being followed for so many years and the same has been accepted in the past. It is submitted that the assessee is,

otherwise, submitting over all quantity details in the tax audit report. It is submitted that the assessee is dealing with different types of textiles and readymade garments. In view of numerous items dealt with by the assessee, it is submitted that it would not be possible to maintain day to day stock register for each and every items. It was further submitted that the accounts of the assessee have been audited both under the Companies Act & Income tax Act and the auditors have not pointed out any discrepancy. The Ld A.R also relied upon the decision rendered by Hon'ble Delhi High Court in the case of CIT vs. Jas Jack Elegance Exports (324 ITR 95)(Delhi), wherein the Hon'ble Delhi High Court has held as under:-

“5. [Section 145\(3\)](#) of Act provides for assessment in the manner prescribed in [Section 144](#) of the Act, where the Assessing Officer is not satisfied about the correctness or completeness of the accounts of the assessee or where either the method of accounting provided in sub-Section (1) or the accounting standards as notified under sub-Section (2) have not been regularly followed by the assessee. This is not the case of the Revenue that the assessee had not followed either cash or mercantile system of accounting stipulated in sub- Section (1) of [Section 145](#) of the Act. This is also not the case of the Revenue that the Central Government had notified any particular accounting standards to be followed by manufacturers and exporters of readymade garments. Hence, the second part of sub-Section (3) of [Section 145](#) does not apply to this case. As noted by the Commissioner of Income Tax(Appeals) as well as by the Income Tax Appellate Tribunal, the Assessing Officer had not pointed out any defect in the Accounts Books maintained by the assessee, which, admittedly, were produced before the Assessing Officer for his consideration. This is also not the finding of the Assessing Officer that the account of the assessee was not complete. **No provision either in the Act or in the rules requiring an assessee carrying business of this nature, to maintain a Stock Register, as a part of its accounts has been brought to our notice. As regards non-production of Stock Register, the assessee has given an explanation which has been accepted not only by the Commissioner of Income Tax(Appeals) but also by the Tribunal and both of them have given a concurrent finding of fact that maintaining Stock Register was not feasible considering the nature of the business being run by the assessee which was engaged in the business of manufacturing readymade garments by purchasing fabric which was then subjected to embroidery, dyeing and finishing and then converted into readymade garments by stitching. [Section 145\(3\)](#) of the Act therefore could not have been applied by the Assessing Officer to the present case.”**

18. Accordingly, it was submitted that non-maintenance of day to day stock register in respect of the business carried on by the assessee cannot be called as a serious defect warranting rejection of books of accounts under sec. 145(3) of the Act. We agree with the above said submissions made by Ld A.R.. It was submitted that the readymade garments are meant for men, women and children. They come in different sizes, colours and varieties. Further, the fashion keeps changing every day. Hence the assessee is constrained to deal in numerous items. Similar is the case with textiles also. Hence the assessee has maintained stock position in broad parameters. It has followed the system of ascertaining the value of closing stock as at the year end by taking physical inventory of stock. It was submitted that the assessee has followed this system of maintenance of stock register and valuing closing stock for the past several years and the same have been accepted by the assessing officer in the past. As per the decision rendered by Hon'ble Delhi High Court in the case of Jas Jack Elegance Exports (supra), it will not constitute serious defect warranting rejection of books of account. Further, the AO has not pointed out any other serious deficiencies in the books of accounts. In view of the above, in our view, the non-maintenance of day to day stock register would not constitute incriminating material in the hands of the assessee.

19. Accordingly, we are of the view that the search officials did not unearth any incriminating material relating to the three years under consideration. 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. 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).

20. 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."

21. 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 assessment 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.”

22. 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.”

23. 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”. We also noticed earlier that the search officials did not unearth any incriminating material during the course of search warranting interference of the issues already stood concluded in these 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 making addition towards Gross Profit and unexplained cash credits in all the years under consideration in the hands of these assesseees.

24. In view of the foregoing discussions, we set aside the view expressed by the Ld CIT(A) on the above said legal issue. Since the AO could not have made the additions in all the three years, we direct the AO to delete those additions made in all the three years under consideration.

25. On merits, the assessee is contesting the estimation of gross profit @ 45%. We have noticed earlier that the assessee did not maintain day to day stock register, but maintained the quantity details on broad basis. Since the assessee is dealing with numerous varieties of items, it was submitted that it would be difficult to maintain day to day stock of all the items. Further, it is submitted that it is following the system of ascertaining closing stock value by taking physical inventory of stocks available as at the year end. With

regard to the unaccounted cash found during the course of search, the assessee has submitted that it does not indulge in carrying cash sales and a sum of around Rs.50,000/- only belong to the assessee. Further, three concerns were operating from the same address and hence it is contended that the cash found during the course of search could not be fully related to the assessee. We also noticed that these facts relate to the AY 2017-18 and not to the year under consideration. Hence, the AO could not have taken this fact for doubting the books of accounts of the assessee. Apart from these, in our view, the AO has not pointed out any major deficiency which would warrant rejection of books of accounts. The assessee also submitted that the gross profit rate disclosed by it ranged from 14% to 19% during the AY 2010-11 to 2017-18.

26. The AO has taken two textile giants, viz., M/s Aditya Birla Fashion and M/s Future Lifestyle Fashions as comparable companies. It is submitted that the assessee is a small time whole sale trader, while the above said two companies are into retail business having retail outlets all over the Country. Further, the turnover of M/s Aditya Birla Fashion is around rs.6500 crores and the turnover of M/s Future Lifestyle Fashions is around Rs.3500 crores. However, the turnover of the assessee company is ranging from 10 to 15 crores. Accordingly, it was submitted that these two companies cannot be taken as comparable companies.

27. We agree with the above said submissions made by Ld A.R. First of all, in our view, there is no reason to reject the books of account of the assessee in view of the decision rendered by Hon'ble Delhi High Court in the case of Jas Jack Elegance Exports (supra). Hence the gross profit estimated by the AO could not be sustained. Even otherwise, two comparable companies selected by the AO cannot be held to be good comparables. Further, the gross profit rate declared by the assessee is also found to be consistent. Another important factor is that the assessee is supplying goods to its sister concerns only and since the gross profit rate is consistent over the years, we

hold that the AO was not justified in rejecting books results. Accordingly, we hold that the addition on account of gross profit is also not justified.

28. The revenue has challenged the decision rendered Ld CIT(A) in AY 2013-14 in deleting the addition made u/s 68 of the Act. During the year relevant to AY 2013-14, the assessee had received loan of Rs.3.25 lakhs from M/s Samak Constructions P Ltd and Rs.3.00 crores from M/s Akay Industries P Ltd. The AO issued notices u/s 133(6) of the Act to both the above parties. According to AO, he did not receive replies from the above said parties. Hence he assessed the above said aggregate amount of Rs.3,03,25,000/- as income of the assessee u/s 68 of the Act. The Ld CIT(A) noticed that the assessee has furnished the details, such as Copy of confirmation, copy of their Income tax return, copy of Bank statement relating to both the creditors before the AO. He further noticed that M/s Samak Constructions P Ltd is a group company and replied to notice issued u/s 133(6) of the Act. The other company claimed that it did not receive the said notice. The Ld CIT(A) further noticed that the no incriminating material was found during the course of search relating to above said two loans. Accordingly, the Ld CIT(A) has deleted this addition.

29. We heard the parties on this issue and perused the record. In the earlier paragraphs, we have held that the AY 2013-14 would fall under the category of “unabated assessment” and hence the addition, if any, could be made by the AO only on the basis of incriminating material found during the course of search, as per the principle laid down by Hon’ble jurisdictional Bombay High Court in the case of Continental Warehousing Corporation (Nhava Sheva) Ltd (supra). We notice that the Ld CIT(A) has deleted this addition on the very same principle. Hence we do not find any reason to interfere with his decision rendered on this issue.

30. In the result, all the three appeals of the assessee are allowed and the appeal of the revenue is dismissed.

Order pronounced in the open court on 14.12.2022.

Sd/-
(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

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

Mumbai; Dated : 14/12/2022

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