

**IN THE INCOME TAX APPELLATE TRIBUNAL
"F" BENCH, MUMBAI**

**BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER &
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER**

**ITA Nos. 7329 to 7331/Mum/2018
(A.Ys. 2007-08 to 2009-10)**

Shri Govindbhai Tribhuvandas Patel (Prop. of M/s G.T. Exports) 4/F Raghav Wadi, Ground Floor, French Bridge, Mumbai - 400007	Vs.	DCIT, CC-5(1) Room No. 1908, 19 th Floor, Air India Building, Nariman Point, Mumbai - 400021
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: AHBPP4781D		
Appellant	..	Respondent

**ITA Nos. 7337 to 7339/Mum/2018
(A.Ys. 2007-08 to 2009-10)**

Shri Bhavesh Kumar Patel (Prop. of M/s Bhavesh Diamonds) 4/F Raghav Wadi, Ground Floor, French Bridge, Mumbai - 400007	Vs.	Income Tax Officer- 19(1)(2), Matru Mandir, Tardeo, Mumbai - 400007
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: AKWPP5740Q		
Appellant	..	Respondent

**ITA Nos. 7325 to 7327/Mum/2018
(A.Ys. 2007-08 to 2009-10)**

Shri Alkesh Patel (Prop. of M/s Umiya Gems) 4/F Raghav Wadi, Ground Floor, French Bridge, Mumbai - 400007	Vs.	DCIT, CC-5(1) Room No. 1908, 19 th Floor, Air India Building, Nariman Point,
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		Mumbai - 400021
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: AADPP3944P		
Appellant	..	Respondent

ITA No. 7289/Mum/2018
(A.Y. 2007-08)

DCIT, CC-5(1) Room No. 1926, 19 th Floor, Air India Building, Nariman Point, Mumbai - 400021	Vs.	M/s Govindbhai Tribhuvandas Patel 22, 2 nd Floor, Ranchod Bhuvan, 55, JSS Road, Mumbai - 400004
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: AHBPP4781D		
Appellant	..	Respondent

ITA No. 7341/Mum/2018
(A.Y. 2011-12)

Shri Virambhai Purshotamdas Patel, 4/F Raghav Wadi, Ground Floor, French Bridge, Mumbai - 400007	Vs.	DCIT, CC-5(1) Room No. 1908, 19 th Floor, Air India Building, Nariman Point, Mumbai - 400021
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: ADQPP0312B		
Appellant	..	Respondent

Appellant by :	Viraj Mehta
Respondent by :	Achal Sharma

Date of Hearing	10.11.2022
Date of Pronouncement	30.11.2022

आदेश / O R D E R

Per Bench:

The present 11 appeals involving 9 assessee's and 2 revenue's appeals are directed against the different order of Id. Commissioner of

Income Tax (Appeals)-53, Mumbai for different assessment years. Since, the issues involved in all the assessee's appeals are identical and based on similar fact, therefore, for the sake of convenience these appeal are adjudicated together by taking ITA No. 7326/Mum/2018 as a lead case and its finding will be applied to similar other assessee's appeals as mutatis mutandis. The assessee has raised the following grounds before us:

- “1. *A Search and Seizure operation u/s. 132(1) of the Income Tax Act, 1961 was conducted on the Alkesh V Patel & Other Groups on 03.10.2013 On the given facts, circumstances and judicial pronouncements, Hon. CIT(A) erred in confirming the action of Ld. Assessing Officer in passing the order under section 153A of the Act without appreciating the fact that there was no evidence or material found in the course of search action in respect of the year under consideration and hence, the assessment order passed invoking the provisions of section 153A of the Act is bad in law and erroneous in facts and liable to be quashed.*
2. *On the given facts, circumstances and judicial pronouncements: Hon. CIT(A) erred in confirming the action of Ld. Assessing Officer that Ld. Assessing Officer has failed to appreciate that no material or evidence was found in the course of search action and hence, the underlying purpose of making assessment under section 153A of the Act Le to assess income which is not disclosed or would not have been disclosed in terms of the provisions of section 132 of the Act failed and thus, the assessment made under section 153A of the Act as if it were a regular scrutiny assessment is without any justification and liable to be quashed.*
3. *On the given facts, circumstances and judicial pronouncements: Hon. CTT(A) erred in confirming the action of Ld. Assessing Officer in framing the assessment order without appreciating that this assessment being not pending was not abated and such framing of the assessment order is bad in law and erroneous in facts and liable to be annulled.*
4. *On the facts and circumstances and judicial pronouncements; Hon CTT(A) erred in confirming the action of Ld. Assessing Officer in framing the assessment/reassessment in pursuance of the search in violation of provisions of section 153D of Income Tax Act, 1961 and such assessment is erroneous on facts and bad in law and liable to be annulled/quashed.*
5. *Without prejudice to the above grounds, The Hon'ble Commissioner of Income Tax (Appeal) has erred in partly confirming the Order of Assessing Officer of disallowance of Rs.9,36,066/- (being 6% of Rs 1,56,01,100/-) on account of addition of profit margin on purchase on the pretext that the purchase are accommodation entry from M/s. Natasha Enterprises. Such*

addition is bad in law and erroneous in facts and hence liable to be deleted.

6. *Without prejudice to the above grounds, The Hon'ble Commissioner of Income Tax (Appeal) has erred in partly confirming the Order of Assessing Officer of disallowance of Rs.9,36,066/- (being 6% of Rs.1,56,01,100/-) on account of addition of profit margin on purchase on the pretext that the purchase are accommodation entry from M/s. Natasha Enterprises. Such Addition is excessive and liable to be reduced.*
7. *Without prejudice to the above grounds, The Hon'ble Commissioner of Income Tax (Appeal) has erred in not considering that appellant is a trader and in view of the same, if such purchases are treated as non-genuine then the corresponding sales should also be considered as non-genuine in case of goods are sold and in case of goods lying in stock, closing stock should also be reduced to the said extent and profit element with regards to such transaction is already embedded in books of accounts and no further amount can be added to the income of the appellant unless evidences to such fact has been brought on record. In view of the above, it is prayed that necessary direction should be given in this regard.*
8. *Your appellant craves to add, alter, or amend any of the grounds of appeal on or before the date of hearing of appeal.”*

2. The fact in brief is that search and seizure action u/s 132(1) of the Act was conducted on the Alkesh Patel & other group on 03.10.2013. Thereafter notice u/s 153A of the Act was issued on 04.03.2015. The notice u/s 143(2) of the Act was issued on 18.08.2015. The assessee was the proprietor of M/s Umiya Gems which was primarily engaged in the business of diamond trading. During the course of assessment the A.O noticed that proprietary firm of the assessee was entered into transaction with Kunal Gems, M/s Natasha Enterprises and M/s Avi Diamonds which was suspicious entities. The assessee was asked to furnish the detail of purchases made by the assessee from assessment year 2008-09 to A.Y. 2014-15. On perusal of the detail filed the A.O noticed that assessee had made purchases from M/s Natasha Enterprises amounting to Rs.1,56,01,100/- in assessment year 2008-09. The assessee was also asked to furnish the detail of purchases made from the aforesaid parties

and also to establish the genuineness of the purchases. After considering the detail filed by the assessee the A.O stated that other document such as delivery challan/angadiya receipt etc, were not produced during the course of assessment proceedings, therefore, the A.O has doubted the genuineness of the purchases on the basis of following observation:

“5.4 The assessee's submission and the reply of the supplier have been thoroughly considered. On the basis of these submission and reply, following are the note-worthy points required to be deliberated while framing the assessment of the assessee:

A. It is seen from the details filed on record that barring the stock register entry and proof of cheques payments, other document such as purchase order or delivery challans/angadia receipts, etc. were not produced during the course of assessment proceedings. These findings lead to infer that the purchases shown to have been made by the assessee from M/s. Natasha Enterprises are bogus. Since the assessee has provided stock statement and entries of the said purchase, the only inevitable conclusion to be drawn is that the assessee might have made these purchases from open markets either directly or through broker.

B. The bank statement of the suppliers has also been called wherein, it has been found that there has been no cash withdrawal after the credit of the cheques issued by the assessee to the supplier.

C. The assessee was a beneficiary of the accommodation bills issued by the party mentioned above. Since the sales are claimed to be genuine by the assessee, it is proved that the assessee was actually in possession of goods. This is based on the footings that there cannot be sales without corresponding purchases. At the same time, it did purchase goods from some other suppliers, may be without bills, which is commonly known as Grey Market and this be so, the assessee has been benefited by receiving margin of grey market. Such purchases in this line of business cannot be denied as per the prevailing practice of the market. Therefore, purchase rate as mentioned in the supplier's sales invoice cannot be accepted.

D. The physical delivery of the goods were obtained from the parties based grey market and to give it colour of a genuine purchase, the bogus bill/accommodation bill was obtained from the supplier.

E. Despite sufficient opportunities, the assessee could not produce any delivery challans/Angadia receipts to prove that the delivery of these goods have been actually received by them from these alleged suppliers. Further, in response to the notice issued u/s 133(6) of the Act, the alleged suppliers have furnished only the copy of the ledger account of the assessee in its books of account and the copy of the ITR, Balance sheet and Profit and Loss account for the Assessment years in which the sales

have affected. These details do not substantiate the fact that this is the genuine party. This aspect has been further discussed in succeeding paragraphs

F. There are enough evidences to prove that the assessee had obtained only the bill form M/s. Natasha Enterprises without actually getting the material. This fact is further strengthened from the following observations:

(i) The assessee group has not maintained a daily stock register as found during the search proceeding. Further, mere mention of the purchase in the stock inward/outward statement does not transpire much confidence in the claim of the assessee that the purchase was genuine.

(ii) The production of invoice is of no help to the assessee, since in the activity of accommodation entry; such documents are meticulously maintained both by the entry provider and the entry seeker.

(iii) The contention that the payment was made by account payee check is not a fool-proof method of substantiating assessee's claim, as the payment through banking channel does not give certificate to the assessee that the purchases made by him were from genuine and existing parties. Support is drawn from the decision of the Hon'ble ITAT, Jaipur in the case of M/s Kachwala Gems Vs JCIT (ITA No. 134/JP/2002 dated 10.12.2003), affirmed by the Hon'ble Supreme Court in the case of M/s Kachwala Gems Vs JCIT (2006) 206 CTR (SC) 585:288 ITR 10(SC), it has been held that even payment by account payee cheque is not sufficient to establish the genuineness of purchases.

G. The above observations clearly establish that these bills issued by M/s. Natasha Enterprises are nothing but accommodation entries. However, it is also matter of fact that the material so debited against M/s. Natasha Enterprises have entered into the stock register and the assessee has shown corresponding sales against the said purchases debited. This could only point towards the fact that the diamonds were brought by the assessee from grey market without bill, and to adjust this transaction into the books of accounts, he must have obtained bill from M/s. Natasha Enterprises. As the assessee has demonstrated corresponding sale against the purchase form M/s. Natasha Enterprises, one can only conclude that the purchases were made by the assessee from grey market and bills were obtained from M/s. Natasha Enterprises.

H. The case laws relied upon by the assessee can be differentiated on facts and hence, ratio-decidenti cannot be applied to the case under consideration.”

The A.O observed that the genuineness of purchase on a whole cannot be doubted and only the profit margin embedded in such transaction could be taxed. He observed that in such transaction the assessee procures the material from the grey market by paying cost and as the bills are not available for such transaction, obtains bills from third party, who after receipt of cheque from the assessee making him available the cash after deducting its commission. In such type of transaction the cheques are issued to bogus entities, once the sale proceeds are received by the diamond dealer. Therefore, the A.O held that the assessee has inflated the purchase price/costs of purchase price by purchasing from unaccounted sources, therefore, 8% of the purchases of Rs.1,56,01,100/- which comes to Rs.12,48,088/- was considered as non-genuine and added to the total income of the assessee.

3. Aggrieved, the assessee filed the appeal before the ld. CIT(A). The ld. CIT(A) has partly allowed the appeal of the assessee by restricting the disallowance to 6% of the purchases of Rs.1,56,01,100/- which worked out to Rs.9,36,066/-. The relevant operating part of the decision of CIT(A) is reproduced as under:

“6.1 The only ground of appeal is in respect of disallowance at rate of 8% in respect of the purchases of Rs. 1,56,01,100/- treated as bogus by the Assessing Officer. In the assessment order for AY 2007-08, the AO has narrated at length the findings in the case of search action in Praveen Kumar Jain group of concerns. It was found that the entities belonging to the Praveen Kumar Jain and group did not exist at the address mentioned at the registered address mentioned in their income tax returns, MCA website and bank documents. The Directors, Proprietors of this concern were dummy directors and had admitted to be so. These entities did not have any physical stock of goods that they claim to be dealing in. Though no activity was found at the official address mentioned on the documents relating to these entities and no such books of account were found, however, in the course of search, interestingly, at a premise located at 104, Durga Residency, Inderlok Phase III, Bhayander (E), Thane, various hard disks, pen drives and documents were found in respect of most of the entities operated by Shri Praveen Kumar Jain, statement of Shri Uttam C. Hinger was recorded on 03-10-2013 at this premise. Shri Uttam C. Hinger is the brother in law of Shri

Praveen Kumar Jain and a dummy Director in some of the concerns belonging to Praveen Kumar Jain. The statement of Shri Praveen Kumar Jain has been mentioned in the assessment order as well as the relevant part of the statement of Shri Uttam C. Hinger which is as follows:

“Q.13.Please explain the nature of business of the companies/ concerns operated by Shri Pravin Kumar Jain and modus operandi of the business activity of these companies.

Ans: Sir, only Pravin Kumar Jain may explain the exact nature of the business activities of these concerns. Since I am only a director on paper and accountant for him. I can say for sure that none of these concerns run by Shri Pravin Kumar Jain is genuine. All these concerns are used for providing accommodation entries of purchases, unsecured loans and share application money, etc.”

It is in this back drop that the AO asked the assessee to substantiate its claim of purchases from M/s.Natasha Enterprises of Rs.1,56,01,100/-. The submissions of the assessee has been reproduced in para 511 of the assessment order. The AO did not accept the contention of the assessee for the reasons mentioned in para 5.4 of the assessment order On the failure of the assessee to establish the genuineness of these purchases totalling to Rs. 1,56,01,100/-, the AO computed the disallowance at the rate of 8% as the profit margin /savings that the appellant may have made by purchasing through unrecorded sources.

6.2 In the appellate proceedings, it was submitted that the appellant had filed copy of acknowledgement of return, tax audit report, annual accounts, ledger accounts of Natasha Enterprises, bank statement, copy of confirmation of Natasha Enterprises and ledger a/c of the assessee, affidavit from M/s.Natasha Enterprises before the AO. It was contended that genuine purchases have been treated as bogus. The proprietor of M/s. Natasha Enterprises was Ms. Rose Padbidri. The statements recorded in the course of search in the case of Praveen Kumar Jain was not provided to the appellant M/s. Natasha Enterprises had filed replies against the notice issued u/s.133(6) but the copy of the same was not provided by the AO. On a without prejudice basis, it was submitted that if at all, only profit element should be disallowed in respect of these purchases. The assessee has offered GP more than 0.1% in its own case and, therefore, no addition should be made.

6.3. In the appellate proceedings, the appellant was asked to file details with regard to quantity, rate and value of opening and closing stock and the quantitative records. The appellant was also asked whether the concerned party may be produced for examination before the AO. It is noted that the Tax Audit Report states that quantitative details are not maintained. There is no quality wise details of opening and closing stock and its valuation. A mere listing of purchases and sales is claimed to be its stock register which is not acceptable. It was also noted that the party could not be produced. The movement of diamonds are through jangads but no such jangads were produced in respect of the impugned purchases. While the sales invoices show a varied quantity in terms of

carats and varied sales prices, the purchases claimed from the impugned parties are in round figures and negligible rate variance.

6.4. *It is further noted that the affidavit copy filed in respect of Natasha Enterprises is apparently dated 13 16. It is clear that this was not submitted in assessment proceedings since the copy of covering letter filed shows that it is filed before the assessing officer only on 16.3.2016 whereas the assessment order was passed on 7.3.2016 Further when a person does not appear before the assessment author, the affidavit cannot be verified. It is also noted that affidavit has a Change last sentence which reads as*

“This affidavit is also in supersession of any statement, declaration, or affirmation etc which might have been made by me before anyone else including any revenue authority The deponent does not even know what has been stated earlier and has made a convenient blanket statement.”

6.5. *For AY 2008-09, Natasha Enterprises has shown a turnover of Rs.91.11 crores with similar amount of purchases of Rs.91.16 crores and negligible profit of Rs.9.82 lakhs. It has shown debtors of Rs.22.46 cores, sundry creditors of Rs 28.34 crores and loans and advances of Rs.7.31 crores. Proprietors capital is only Rs 10.01 lakhs.*

6.6. *At the outset, it is noted that the finding that the Praveen Jain and other entities are engaged in the business of providing accommodation entries is not merely based on their statements recorded u/s 132(4) of the Act. It is pertinent to note that the various conclusions in the case of the Praveen Jain and other entities have been arrived at, on the basis of incriminating seized record, documents, recorded statements, as also the systematic and voluminous electronic data found during the course of search operation. Thus, the findings of the search operation are based not only on the confessional statements of the Praveen Jain group but also several other individuals, who are part & parcel of the entry operation business of the Praveen Jain group. Details of the same have been narrated in my appellate order for AY 2007-08 in the appellant's own case while dealing with the basis for reopening of assessment.*

6.7. *It is noted from the orders in the case of Praveen Jain that there is no dearth of third party evidence and circumstantial evidences on record, which clearly points towards the carrying on of the entry operators business by Shri Praveen Jain in an organized and systematic manner Independent searches have been conducted on few beneficiaries, based on the inputs of the search on the Praveen Jain group and such beneficiaries have admitted taking of accommodation entries from the group concerns of the Praveen Jain group.*

6.8. *The material on record reveals that there was no threat or coercion, which have been applied on the appellant or in the case of Hawala operators. It is pertinent to note that the panchas in their Panchnama has not recorded any incident of coercion, threat or duress by the Department. A perusal of the Panchanamas on record clearly reveals that all the search proceedings were conducted & completed in a peaceful manner.*

6.9. *The entities belong to the group of Praveen Jain and others. In the search action in those cases, no actual stock of diamonds were found even though the same was reflected in books. The bogus nature transactions as per books was admitted. The statements recorded were not bland statements. There was admission of modus operandi, listing of key persons, evidence of communication with beneficiaries, listing of entities indulging in bogus transactions. These statements were given in the presence of independent Panchas. This cannot be summarily disowned by merely filing a self-serving retraction later.*

6.10 *The appellant did not have any evidence for the movement or dispatch of goods purchased and sold. It is also noted that the capacity of the parties from whom the appellant had made purchases and the parties to whom the appellant made sales was not established. The impugned parties are not produced for verification. Thus their confirmations cannot be verified. The disallowance of purchases is certainly warranted. The assessing officer has not disallowed the entire purchases. He has assumed that purchases have been made in cash and bills obtained from the impugned party. The assessing officer has assumed profit element @ 8% on the impugned purchases and as made the disallowance based on this*

6.11. *The sales as contended by the appellant is not relevant. It is the claim of purchases from impugned parties that is disputed, and not the sales. In such a scenario, where on one hand the genuineness of the purchase from the party claimed is doubted, but the genuineness of purchase as a whole cannot be doubted, the Courts have taken a view that only the profit margin embedded in such a transaction could be taxed. This is a fairly accepted principle and the same would apply in this case also. Further, a dealer operating in the market is always aware of the GP which he earns in any transaction. Taking into consideration all these aspects, the issue as to what would be the margin, one can expect while buying the material from grey market instead of normal course Firstly, these diamonds in the grey market are always cheaper than the diamonds sources from the genuine dealer. Secondly, there is always an element of discount in the case of instant cash purchases.*

6.12 *In the case of Naitik Gems the issue involved purchases from entities belonging to Rajendra Jain entities and the purchases were from Sparsh Exports Pvt. Ltd. The assessing officer made a disallowance of 6% of such purchases. This was based on the Instruction no 2 of 2008 related to benign assessment in the cases of assesses in the diamond business. The Ld. CIT(A) reduced the disallowance to 3% of the purchases based on the recommendation of the Task Force group for diamond industry set up by the Government of India, Ministry of Commerce and Industry which after considering the Benign Assessment Procedure (BAP) scheme recommended a net profit of 2% for trading activity, 3% for manufacturing activity and 2.5% across the board for diamond industry. The appeal filed by the assessee in ITA No. 4760/Mum/2017 was dismissed vide order dated 2 11.2017. In the case of Renisha Impex P. Ltd. in ITA 4464/M/16 and ITA 4453/M/16 in the order dated 12.9.2017, as against 100% disallowance made by the assessing officer, the Hon'ble ITAT upheld disallowance of 4% of impugned purchases. This was a case of purchases from Praveen Jain entity. In the case of Suresh L Satyani in ITA 3452/M/16 vide order dated 8.3.2017, the*

Hon'ble ITAT upheld the order of CIT(A) who had considered the disallowance @ 9% but considered granting credit for net profit offered. This was a case where purchases were from Bhanwarlal Jain entities

6.13. In the case of the appellant, therefore the fair and reasonable margin is considered to be @ 6% of the impugned purchases. Accordingly, the addition to the total income is restricted to 6% of the purchases of Rs.1,56,01,100/-which works out to Rs.9,36,066/-. The appellant gets a relief of Rs.3,12,022/-."

4. During the course of appellate proceedings before us the ld. Counsel contended that there was no evidence or material found in the course of search in respect of the year under consideration, therefore, the assessment order passed invoking the provision of Sec. 153A is bad in law. The ld. Counsel has placed reliance on the following judicial pronouncements:

1. *CIT Vs. Continental Warehousing Corporation (2015) 374 ITR 645 (Bom)*
2. *CIT Vs Kabul Chawla (2016) 380 ITR 573 (Del HC)*
3. *PCIT Vs. Saumya Construction (P) Ltd. (2016) 387 ITR 529 (Guj HC)*
4. *PCIT vs. Meeta Gutgutia (2017) 395 ITR 526 (Del HC)*
5. *PCIT Vs Meeta Gutgutia (2019) 1 SLP CTO 43: (2018) 257 Taxman 411 (SC)*
6. *PCIT Vs. Mamta Agarwal (2022) 6 CTR 797 (Del HC) IT appeal No. 191 of 2022*
7. *PCIT Vs. Devangi Alias Rupa (2017) 394 ITR 184 (Guj HC)*
8. *Commissioner of Income-tax (Central), Nagpur Vs. Murli Agro Products Ltd. [2014] 49 taxmann.com 172 (Bombay HC)*

On the other hand the ld. D.R supported the order of lower authorities.

5. Heard both the sides and perused the material on record. A search action u/s 132(1) of the Act was conducted on the assessee on 03.10.2013 A notice u/s 153A of the Act was issued and served upon the assessee. In response to the notice u/s 153A the assessee had not offered any additional income for the year under consideration. The assessee submitted that the original return of income filed for assessment year 2008-09 be treated as compliance to notice u/s 153A of

the Act. The assessee has brought to the notice of the Id. CIT(A) that additions in the assessment order were not made on the basis of any incriminating material since no incriminating material was unearthed during the course of search action carried out u/s 132(4) of the Act in the case of the assessee. It is also noticed that in the assessment order the A.O has nowhere stated and referred to any incriminating material unearthed during the search in the case of the assessee while making the impugned addition. It is also noticed that A.O has not mentioned a single document which has been termed as incriminating. Further there was no assessment pending for the year under consideration in the case of the assessee and the same was unabated assessment. Since no assessment was pending during the course of search and therefore, the A.O was required to make the addition only on the basis of incriminating material found during the course of search. The A.O has made addition in the hands of the assessee only on the basis of findings of search action in the case of Pravin Jain Group.

The Id. CIT(A) had failed to controvert the relevant detail and judicial pronouncements referred by the assessee relating to no incriminating material found during the course of search action carried out in the case of the assessee. The assessee has categorically pointed out before the Id. CIT(A) that not a single document had been seized from the assessee which can be termed as incriminating material leading to any undisclosed income earned by the assessee. However, the Id. CIT(A) at para 5.8 of his order stated in a general manner that assessment u/s 153A is mandatory for six years immediately preceding the assessment year relevant to the previous year in which search is conducted. It is also undisputed fact that during the year under consideration no assessment was pending in the case of the assessee. On the issue that assessment

u/s 153A can only be made on the basis of some incriminating material same as held in some of judicial pronouncement are as under:

The Hon'ble Delhi High Court in the case of CIT Vs. RRJ Securities (2016) 380 ITR 612) wherein it is held that in the absence of any incriminating material the concluded assessment could not be interfered u/s 153A of the Act.

The Hon'ble Delhi Court in the case Pr.CIT Vs. Lata Jain (ITA 274 & 276 of 2016) considering the ratio laid down in the case of CIT Vs. Kabul Chawla (2016) 380 ITR 573 held that Section 153A assessment cannot be made for the assessment year in which incriminating material is not recovered even though incriminating material may be recovered for other years in the block of this years.

In the decision of Gurinder Singh Bawa Vs. DCIT (2012) 28 taxman.com 328 of the ITAT, Mumbai, held that wherein search assessment u/s 153A of assessment pertaining to six immediately preceding assessment year were completed the A.O cannot make addition therein unless there is incriminating material recovered from the search.

The jurisdictional Hon'ble High Court of Bombay in the case of CIT Vs. Continental Warehousing Corporation 374 ITR 645 and in the case of CIT Vs. V. Murli Agro Product Ltd. 49 taxmann.com 172 held that u/s 153A addition can be made only on the basis of incriminating material found and seized during the course of search.

The assessee also referred a number of decision similar to the ratio laid down in the above mentioned cases.

After perusal of the aforesaid fact and judicial findings it is clear that the assessment in the case of the assessee u/s 153A was not based on any incriminating material found during the course of search. The ld. CIT(A) has not considered the entire evidences and material placed before him by the assessee. In the light of the above facts and finding we consider that ld. CIT(A) is not justified in dismissing the appeal of the assessee since no incriminating material was found during the course of search on the basis of which the addition was made. Therefore, we direct the A.O to delete the impugned addition.

ITA Nos. 7337,7338,7329,7330,7327/Mum/2018

6. As the facts and the issue involved in these appeals are the same as supra in ITA No. 7326/Mum/2018, therefore, applying the same findings mutatis mutandis, these appeals of the assessee are also allowed.

ITA Nos. 7325,7339,7331/Mum/2018

7. These 3 appeals are based on similar facts and identical issue, therefore for the sake of convenience all these appeals are taken together by way of a consolidated order. We shall take the ITA No. 7325/Mum/2018 as lead case and its finding will be applied as mutatis mutandis to the other two appeals.

8. The fact in brief is return of income declaring total income of Rs.3,28,639/- was filed on 29.10.2007. The assessment u/s 143(3) of the Act was made by accepting the return income. Thereafter the case was reopened by issuing of notice u/s 148 of the Act on 21.03.2014. On the basis of information received from the search action carried out in the

case of Pravin Kumar Jain group on 01.10.2013. The A.O stated that assessee has obtained accommodation bill from the following concern:

Sr. No.	Name of the entry Issuer	Amount
1.	Kunal Gems	Rs.3,86,31,820/-
2.	Natasha Enterprises	Rs.3,84,81,450/-
	Total	Rs.7,71,13,270

On the basis of such information the A.O recorded reasons to believe that income chargeable to tax to the amount of Rs.7,71,13,270/- had escaped assessment for assessment year 2007-08 within the meaning of Sec. 147 of the Act. From the finding of the search action in the case of Pravin Kumar Jain and other, the A.O observed that during the course of search action they have admitted that they were indulged in issuing accommodation bills and no genuine business was carried out by those concern. On query the assessee has furnished various details of such as under:

- “1. Ledger copy of M/s Kunal Gems & M/s Natasha Enterprises
2. Bank Statement copy of the payment of M/s Kunal Gems and M/s Natasha Enterprises.
3. Statement of Stock Register.
4. Confirmation of copy of Kunal Gems and M/s Natasha Enterprises.
5. Purchase bill copy of Kunal Gems and M/s Natasha Enterprise.
6. Copy of Sales Bill.

However the A.O has not accepted the submission of the assessee stating that mere filing of evidence of purchases and payment made through account payee cheque cannot be conclusive in a case where genuineness of transaction was in doubt. Therefore, the A.O had concluded that assessee had obtained only bills from Kunal Gems & Natasha Enterprises without actually getting the material. However, the A.O observed that assessee had shown corresponding sales against the said purchases debited. Therefore, he stated that it could only mean that the

diamonds were brought by the assessee from grey market without bill and adjusted these transaction in the books of account. The A.O observed that purchasing of these diamonds in the grey market were always cheaper than the diamond sourced from the genuine dealer and observed that assessee must have earned by purchasing the diamond in the grey market than from the regular dealer. Therefore, the A.O estimated the margin of the turn over @ 8% in respect of purchases made in cash from the grey market and for which the bills were procured from the Pravin Kumar Jain group concern. Accordingly, the profit being 8% of Rs.7,71,13,270/- was worked out to the amount of Rs.61,69,062/- and added to the total income of the assessee.

9. Aggrieved, the assessee filed the appeal before the ld. CIT(A). The ld. CIT(A) partly allowed the appeal of the assessee by sustaining the addition to the extent of 6% of the impugned purchases. The relevant part of the decision of ld. CIT(A) is reproduced as under:

“5.10. The appellant did not have any evidence for the movement or dispatch of goods purchased and sold. It is also noted that the capacity of the parties from whom the appellant had made purchases and the parties to whom the appellant made sales was not established. The impugned parties are not produced for verification. Thus their confirmations cannot be verified. The disallowance of purchases is certainly warranted. The assessing officer has not disallowed the entire purchases. He has assumed that purchases have been made in cash and bills obtained from the impugned party. The assessing officer has assumed profit element @ 8% on the impugned purchases and as made the disallowance based on this.

5.11. The sales as contended by the appellant is not relevant. It is the claim of purchases from impugned parties that is disputed, and not the sales. In such a scenario, where on one hand the genuineness of the purchase from the party claimed is doubted, but the genuineness of purchase as a whole cannot be doubted, the Courts have taken a view that only the profit margin embedded in such a transaction could be taxed. This is a fairly accepted principle and the same would apply in this case also. Further, a dealer operating in the market is always aware of the GP which he earns in any transaction. Taking into consideration all these aspects, the issue as to what would be the margin, one can expect while buying the material from grey market instead of normal course. Firstly, these diamonds in the grey market are always cheaper than the

diamonds sources from the genuine dealer. Secondly, there is always an element of discount in the case of instant cash purchases.

5.12. In the case of Naitik Gems the issue involved purchases from entities belonging to Rajendra Jain entities and the purchases were from Sparsh Exports Pvt. Ltd. The assessing officer made a disallowance of 6% of such purchases. This was based on the Instruction no 2 of 2008 related to benign assessment in the cases of assesses in the diamond business. The Ld. CIT(A) reduced the disallowance to 3% of the purchases based on the recommendation of the Task Force group for diamond industry set up by the Government of India, Ministry of Commerce and Industry which after considering the Benign Assessment Procedure (BAP) scheme recommended a net profit of 2% for trading activity, 3% for manufacturing activity and 2.5% across the board for diamond industry. The appeal filed by the assessee in ITA No. 4760/Mum./2017 was dismissed vide order dated 2.11.2017 In the case of Renisha Impex P. Ltd. in ITA 4464/M/16 and ITA 4453/M/16 in the order dated 12.9.2017, as against 100% disallowance made by the assessing officer, the Hon'ble ITAT upheld disallowance of 4% of impugned purchases. This was a case of purchases from Praveen Jain entity. In the case of Suresh L Satyani in ITA 3452/M/16 vide order dated 8.3.2017, the Hon'ble ITAT upheld the order of CIT(A) who had considered the disallowance @ 9% but considered granting credit for net profit offered. This was a case where purchases were from Bhanwarlal Jain entities.

5.13. In the case of the appellant, therefore the fair and reasonable margin is considered to be @ 6% of the impugned purchases Accordingly, the addition to the total income is restricted to 6% of the purchases of Rs.7,71,13,270/-which works out to Rs.46,26,800/-. The appellant gets a relief of Rs.15,42,262/-."

10. Head both the sides and perused the material on record. Without reiterating the facts as elaborated above in this order it is undisputed fact that assessee has shown corresponding sales against the said purchases debited. Both the lower authorities had accepted this fact that this could only mean that the diamonds were brought by the assessee from the grey market and to adjust the same in the books of account the assessee has obtained bills from Pravin K. Jain group concern. The authority below have taken the view held by courts that in such circumstances only the profit margin embedded in such a transaction could be taxed. Taking all these facts that the diamonds purchased in the grey market are always cheaper than the diamond sourced from the genuine dealer, the A.O has estimated the profit margin at 8% of the

purchase cost debited against Pravin Jain group concern. However, the ld. CIT(A) held that it is fair and reasonable to restrict the said disallowance @ 6% of the impugned purchases. In this regard we have gone through the finding of the ld. CIT(A) as elaborated supra in this order wherein he has categorically held that in case of purchases from Pravin Jain entity in the case of Remisa Impex Pvt. Ltd. vide ITA No. 4464/Mum/2016 and ITA No.4453/Mum/2016 dated 12.09.2017 the ITAT upheld disallowance of 4% of impugned purchases. After considering the above facts and finding we consider it fair and reasonable to also restrict the disallowance in the case of the assessee @ 4% of the impugned purchases. Therefore, the A.O is directed to restrict the disallowance to the extent of 4% of impugned purchases. Accordingly, the grounds of appeal of the assessee 5 to 7 are partly allowed.

Ground No. 1 to 4:

11. During the course of appellate proceedings before us the assessee has not specifically discussed these ground of appeal pertaining to the issue of reopening of the assessment. We have gone through the detailed findings of the ld. CIT(A) from page No. 4 to 27 of the order of ld. CIT(A) wherein he has elaborately discussed that the case was reopened on the basis of information obtained from the search action carried out in the case of Pravin Kumar Jain on 01.10.2013 showing that assessee has obtained accommodation entries from the concern pertaining to Pravin Kumar Jain Group. Therefore, we are of the considered view that decision of the ld. CIT(A) that there was credible tangible material before the A.O on the basis of which reason to believe was recorded for

reopening the assessment is not required any interference. Accordingly, ground nos. 1 to 4 are dismissed.

ITA Nos. 7331,7339/Mum/2018

12. As the facts and the issue involved in these appeals are the same as supra in ITA No. 7325/Mum/2018, therefore, applying the same findings mutatis mutandis, these appeals of the assessee are also partly allowed.

ITA No.7289/Mum/2018

13. This appeal of the revenue also based on similar fact and identical issue as discussed and adjudicated in the appeal of the assessee vide ITA No.7325/Mum/2018 where we have restricted the disallowance to the extent of 4% of the impugned purchases as against 6% of the impugned purchases made by the CIT(A). Therefore, applying the findings of the ITA No. 7325/Mum/2018 we don't find any merit in the appeal of the revenue, therefore, this appeal of the revenue also stand dismissed.

ITA No.7341/Mum/2018

14. Fact in brief is that search action u/s 132(1) of the Act was conducted on the Alkesh B. Patel and other group on 03.10.2013. During the course of assessment u/s 153A r.w.s 143(3) of the Act. The A.O stated that assessee was the partner in M/s Ashok Diamond which in turn was the owner of immovable property of his premises being No. EW-1011, Bharat Diamond Bourse, BKC, Bandra (E), Mumbai along with the two properties located at Nagpur. The partnership deed of M/s Ashok Diamond was reconstituted on 03.03.2011 by virtue of Mr. Virambhai Patel, the assessee and Mr. Ashok Patel son of the assessee were retired and two new partner Mr. Rohit Patel & Mr. Rajesh Patel were admitted as

new partners. The new partner contributed capital of Rs. 5 lac each. M/s Ashok Diamond was having fixed asset of Rs.76,08,605/- and Shri Rohit Patel and Shri Rajesh Patel had introduced capital of Rs.10 lac by virtue of which they got right in 90% profit of M/s Ashok Diamond cumulatively. From these facts the A.O noticed that new partners invested only of Rs. 5 lac each and each of them got right of Rs.34,23,872/- in the properties (45% of Rs.76,08,605/- being value of fixed assets). The A.O observed that this amount has been received in cash by the outgoing partner Shri Virambhai Patel and the assessee and Shri Ashok Patel in proportion of their right. Therefore, an amount of [Rs.34,23,872/- (-) Rs. 5 lac] was added to the total income of the assessee.

15. The assessee filed the appeal before the ld. CIT(A). The ld. CIT(A) has dismissed the appeal of the assessee.

16. During the course of appellate proceeding before us the assessee has contended that there was no evidence on material found in the course of search action in respect of the year under consideration, therefore, the assessment order passed invoking the provision of Sec. 153A of the Act was bad in law and erroneous.

On the other hand, the ld. D.R supported the order of ld. CIT(A).

17. Heard both the sides and perused the material on record. Without reiterating the facts as elaborated above regarding the plea of the assessee that no incriminating document were found in the search the ld. CIT(A) stated that no such objection was raised in the assessment proceedings. However, on perusal of the material on record no reference has been made to the incriminating document found and seized during

the course of search action on the issue of cash received from the new partners by the assessee. In this regard the Hon'ble jurisdictional High Court in the case of Continental Warehousing Corporation Ltd. 374 ITR 6459 (Bom) held that the addition u/s 153A r.w.s 143(3) of the Act can only be made on the basis of incriminating material found and seized during the course of search. It is undisputed fact that during the course of search and seizure action no incriminating material was found and seized on the basis of which impugned addition were made by the A.O, therefore, following the decision of Hon'ble jurisdictional High Court in the case of Continental Warehousing Ltd. as supra we find that the decision of Id CIT(A) is not justified, therefore, ground of appeal of the assessee is allowed.

Since, we have adjudicated the ground nos. 1 to 4 therefore alternative grounds of appeal no. 5 to 7 are not required any adjudication and the same stand dismissed.

18. In the result, the appeal of the assessee is partly allowed.

19. In the result, the appeals of the assessee are partly allowed and the appeals of the revenue stand dismissed.

Order pronounced in the open court on 30.11.2022

Sd/-
(Amit Shukla)
Judicial Member

Sd/-
(Amarjit Singh)
Accountant Member

Place: Mumbai

Date 30.11.2022

Rohit: PS

देश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण DR, ITAT,
Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//
आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण/ ITAT, Bench, Mumbai.