

IN THE INCOME TAX APPELLATE TRIBUNAL  
"A" BENCH, MUMBAI

SHRI AMARJIT SINGH, ACCOUNTANT MEMBER  
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER

ITA No. 1136/MUM/2020  
(Assessment Year: 2011-12)

Ajmera Pharmasure Ltd.,  
4<sup>th</sup> Floor, Ajmera House,  
Pathakwadi, L.T. Marg,  
Mumbai - 400002  
[PAN: AAACA3801C]

..... Appellant

Vs

Deputy Commissioner of Income Tax,  
Central Circle – 2(2),  
Room No. 806, 8<sup>th</sup> Floor,  
Old CGO Building,  
Maharishi Karve Road,  
Mumbai - 400020

..... Respondent

Appearances

For the Appellant/Assessee : Ms. Dinkle Hariya  
For the Respondent/Department : Shri S. Srinivasu

Date of conclusion of hearing : 01.12.2022  
Date of pronouncement of order : 28.02.2023

**ORDER**

**Per Rahul Chaudhary, Judicial Member:**

1. By way of the present appeal the Appellant has challenged the order, dated 03.12.2019, passed by the Ld. Commissioner of Income Tax (Appeals)-48, Mumbai [hereinafter referred to as 'the CIT(A)'] for the Assessment Year 2011-12, whereby the Ld. CIT(A) had partly allowed the appeal filed by the Appellant against the Assessment Order, dated 28.03.2016, passed under Section 143(3) read with Section 153A of the Income Tax Act, 1961 (hereinafter referred to as 'the Act'). This appeal was disposed off vide order, dated 30.07.2021. However, vide order

dated 11.07.2022, passed in Miscellaneous Application No. 175/Mum/2021, the order dated 20.07.2021 was recalled and the appeal was directed to be listed for hearing.

2. The Appellant has raised following grounds of appeal:

"1. NATURAL JUSTICE

1.1 *The Learned Commissioner of Income-tax (Appeals) - 48, Mumbai ["Ld. CIT (A)"] erred in not granting proper, sufficient and adequate opportunity of being heard to the Appellant while framing the appellate order.*

1.2 *It is submitted that, in the facts and the circumstances of the case, and in law, the appellate order so framed be held as bad and illegal, as:*

(i) *The same is framed in breach of the principles of natural justice; and*

(ii) *The same is passed without application of mind to the facts and the submissions brought on record by the Appellant.*

WITHOUT PREJUDICE TO THE ABOVE

2. REASSESSMENT

2.1 *The Ld. CIT (A) erred in confirming the action of the A.O. in initiating assessment proceedings and framing the assessment of the Appellant by invoking the provisions of section 153A of the Income tax Act, 1961 ["the Act"].*

2.2 *While doing so, the A.O. failed to appreciate that:*

(i) *The case of the appellant did not fall within the parameters laid down by section 153A of the Act;*

(ii) *The necessary preconditions for initiating and completion thereof (11) were not satisfied.*

2.3 *It is submitted that in the facts and the*

*circumstances of the case, and in law, the reassessment framed is bad, illegal and void.*

WITHOUT FURTHER PREJUDICE TO THE ABOVE

3.1 *The Ld. CIT (A) erred in confirming the addition made by the A.O. of Rs.5,13,51,257/- u/s. 68 of the Act, on account of alleged bogus / unexplained long term capital gain.*

3.2 *While doing so, the Ld. CIT (A) erred in:*

- (i) Basing his action on wrong/ erroneous facts.*
- (ii) Basing his action only on surmises, suspicion and conjecture;*
- (iii) Taking into account irrelevant and extraneous considerations;*
- (iv) and Ignoring relevant material and considerations as submitted by the Appellant.*

3.3 *It is submitted that in the facts and the circumstances of the case, and in law, no such addition was called for.*

3.4 *Without prejudice to the above, assuming but not admitting - that some addition was called for, it is submitted that the computation of the addition made by the A.O. is arbitrary, excessive and not in accordance with the law.*

WITHOUT FURTHER PREJUDICE TO THE ABOVE

4.1 *The Ld. CIT (A) erred in making addition of Rs.26,95,941/- u/s. 69 of the Act, on account of alleged estimated unexplained expenses.*

4.2 *While doing so, the Ld. CIT (A) erred in:*

- (i) Basing his action only on surmises, suspicion and conjecture;*
- (ii) Taking into account irrelevant and extraneous considerations; and*

*(iii) Ignoring relevant material and considerations as submitted by the Appellant.*

*4.3 It is submitted that in the facts and the circumstances of the case, and in law, no such addition was called for."*

3. When the Appeal was taken up for hearing the Ld. Authorised Representative for the Appellant pressed into service Ground No. 3.1 & 3.2 raised in the Appeal and submitted that issues raised therein were covered by the two decisions of the Tribunal (place at page 427 to 453 of the paper-book). Taking us through the factual background she submitted that the Appellant herein as also the assessee's in the aforesaid decisions of the Tribunal were covered by the same search action related to Mr. Shirish M Shah. The assessments were also framed on them on the basis of same material found during the course of search aforesaid search and the statement of Mr. Jasmin K Ajmera recorded under Section 132(4) of the Act. She submitted that in identical set of facts and circumstances the Tribunal was pleased to delete the additions made by the Assessing Officer in case of un-abated/final assessment on the ground that there was no incriminating material; that the assessment order did not make reference to any incriminating material; that all information/details relied upon by the Assessing Officer were already disclosed in the books of accounts of the Appellant and that the statement made by Mr. Jasmin K Ajmera stood retracted. She also referred to the affidavit and additional affidavit of Mr. Jasmin K Ajmera sworn on 02.08.2013 and 14.08.2015 as well as the remand report dated 09.01.2017.

4. Per contra the Ld. Departmental Representative vehemently contended that it cannot be said that there was no incriminating material and submitted that during the course of search at the residence and office premises of Mr. Shirish C Shah various documents and details were found which revealed that Parneta Industries Limited (now known as Aadhar Venture India Limited) did not have any underline assets and the price of its shares was manipulated to give the benefit of tax free Long Term Capital Gains to various parties including the Appellant. He further submitted that Mr. Jasmin K. Ajmera and other family members were confronted with the aforesaid incriminating material and their statement was recorded under Section 132(4) of the Act. The retraction by way of affidavit was nothing more than an afterthought. The Ld. Departmental Representative relied upon the order passed by the lower authorities in support of his contentions.
5. We have considered the rival contention and perused the material on record including the judicial precedents cited during the course of hearing.
6. We note that appeal before us pertains to unabated/final assessment. The notice under Section 143(2) is required to be issued within the period specified in proviso to Section 143(2) of the Act. Accordingly, the notice under Section 143(2) for assumption of jurisdiction to assess the income of Assessee for AY 2011-12 could have been served upon the Appellant till the expiry of 6 months from the end of the financial year in which the return was furnished. The return for the Assessment Year 2011-12 was filed by the Appellant on 28.09.2011. Consequently, the notice under Section 143(2) of the Act was

required to be issued by 30.09.2012. Whereas the search was conducted on 25.07.2013. Thus, on the date of the search the assessment for the Assessment Year 2011-12 was unabated/final. As per the judgment of Hon'ble Bombay High Court in the case of CIT Vs. Continental Warehousing Corporation [2015 374 ITR 645], in case of unabated/final assessment no addition can be made in absence of incriminating material found during the course of the search.

7. We note that the CIT(A) had during the appellate proceeding in the case of Mr. Jasmin K. Ajmera called for a remand report from the Assessing Officer. Vide letter dated 10.01.2017, the Assessing Officer forwarded remand report dated 01.01.2017, to the CIT(A) [placed at page 176 to 179 of the paper-book] wherein it was stated as under:

*"Sir, in the present case under consideration, though no incriminating material was found, the assessee admitted undisclosed income in his statement u/s 132(4) of the Income Tax Act 1961. It is totally immaterial that the assessee later on retracted the statements recorded u/s 132(4) of the Income Tax Act 1961. Therefore assessment of AY 2011-12 and AY 2012-13 which was made on the basis of undisclosed income admitted during the course of search is totally valid assessment and does not get affected by the decision of Hon'ble Bombay High Court in the case of Continental Warehousing (Supra).*

*6. As regards AY 2011-12, the assessment was never completed u/s 143(3) or 147 prior to the issue of notice u/s 153A of the I. T. Act 1961. The processing u/s 143(1)(a) of the Income Tax Act 1961 does not amount to assessment. The assessment has been properly completed wherein addition on account of bogus accommodation entries of long term capital gain was made based on the undisclosed income admitted during the course of search as well as independent enquiry conducted during the course of assessment proceedings as detailed in assessment order." (Emphasis Supplied)*

8. During the course of hearing, the Ld. Departmental Representative vehemently contended that it cannot be said

that there is no incriminating material by placing reliance on the material found during the course of search on Mr. Shirish C Shah. In our view, the incriminating material found during the course of search conducted on Mr. Shrish C Shah cannot be treated as incriminating material found during the search conducted on the Appellant. We also note that Mr. Jasmin K. Ajmera had, vide affidavit sworn on 14.08.2015, had retracted the statement given under Section 132(4) of the Act. Further, Mr. Jasmin K Ajmera had given detailed account of events during the course of the search while reiterating the retraction of statement in the additional affidavit sworn on 14.08.2015. Having perused the decisions cited by the Ld. Authorised Representative for the Appellant we find that identical contentions raised by the Revenue were considered and rejected by the Tribunal in the case of Reena A. Ajmera while deciding appeal for the Assessment Year 2011-12 (ITA No. 982/Mum/2020, dated 09.02.2021). Similarly, by way of consolidated order, dated 02.11.2021 passed in appeals pertaining to Assessment Year in the case of Jasmin K. Ajmera (ITA No. 983/Mum/2020), Ashish K. Ajmera (ITA No. 1140/Mum/2020), Minal M. Ajmera (ITA No. 1113Mum/2020), Abni J. Amera (ITA No. 539/Mum/2020), Manish K. Ajmera (ITA No. 985/Mum/2020), Jitin K. Ajmera (ITA No. 1142/Mum/2020), International Financial Services Ltd. (ITA No. 1108Mum/2020), Essem Capital Markets Ltd. (ITA No. 1141Mum/2020) and Ajmera Associates Ltd. (ITA No. 4997/Mum/2018), the Tribunal accepted the contention of the assesseees' in that there was no incriminating material found during the course of the search for the Assessment Year 2011-12 and rejected the identical contentions raised by the Revenue holding as under:

*“8. The Ld. CIT-DR has placed on record material seized from the assessee during search proceedings. The copies of the Panchnamas (page 1 to 6 of assessee’s paper-book) have also been placed on record. Upon combined reading of all these documents, it could be gathered that none of the documents show that the share transactions carried out by the assessee were sham transactions done in collusion with tainted group of Shri Shirish C. Shah. There is no evidence of cash movement, in any manner. The documents seized from the assessee are in the nature of Share holding, holding stock summary, Ledger extracts etc. which are already part of assessee’s regular books of accounts and have not been referred to by Ld. AO while making impugned additions in the hands of the assessee. In the assessment order, the long-term capital gains earned by the assessee have been held to be bogus in nature, however the same are not corroborated, in any manner, by the seized material. The allegations of Ld. AO are primarily based on the search findings in the case of Shri Shirish C. Shah and his group entities whereas no incriminating material has been seized from the assessee. In fact, in the remand report dated 09/01/2017 (page nos. 196 to 199) filed by Ld. AO during first appellate proceedings, it has categorically been admitted by Ld. AO that there was no incriminating material in the case of the assessee. Nothing has been shown to us to controvert these findings of Ld. AO. Therefore, the ratio of cited decisions as referred to in para-6 is quite applicable to the facts of the case.”*

*9. So far as the admission in the form of assessee’s own statement is concerned, we find that this statement has been retracted by the assessee by way of an affidavit on 02/08/2013 (page nos. 7 to 10 of assessee’s paper book) and therefore, in the absence of any corroborative evidence / material supporting the admission made by the assessee, the addition would become unsustainable in the eyes of law. The additions made merely on the basis of retracted statement without there being any corroborative evidence / material, in our considered opinion, is not sustainable in law since the same run contrary to CBDT Circular F. No.286/2/2003-IT(Inv.), dated 10/03/2003 which has clearly stated that no attempt should be made to obtain confession / surrender as to the undisclosed income during search. Such confession, if not based on credible evidence, when retracted, would not serve*

*useful purpose and an therefore, the authorities should focus on collection of evidence of income which leads to information on what has not been disclosed or is not likely to be disclosed before the Income-tax department. Further, while recording statement during the course of search and seizure operation, no attempt should be made to obtain confession as to the undisclosed income and the addition should be made only on the basis of material gathered during search operations. Any action on the contrary has to be viewed adversely. The subsequent Circular F.NO.286/98/2013-IT (INV.II)] dated 18/12/2014 emphasizes upon need to focus on gathering evidences during search / survey and to strictly avoid obtaining admission of undisclosed income under coercion / undue influence. Therefore, the action of Ld. AO could not be said to be in line with these circulars issued by CBDT.*

*10. Proceeding further, it is settled legal proposition that the confession need corroboration with evidences. Though admission is an important piece of evidence but it is not conclusive and it is open to the assessee to show that it is incorrect. Therefore, retracted admission, in the absence of any incriminating material, would not be sustainable. In order to make a genuine and legally sustainable addition on the basis of surrender during search, it is sine-qua-non that some incriminating material must have been found to correlate the undisclosed income with such statement. The Hon'ble Delhi High Court in CIT V/s Harjeev Aggarwal (70 Taxmann.com 95; 10/03/2016) held that the statement recorded u/s 132(4) may also be used for making the assessment, but only to the extent it is relatable to the incriminating evidence/material unearthed or found during search. In other words, there must be a nexus between the statement recorded and the evidence/material found during search in order to sustain additions on the basis of recorded statement. Similar is the view of Hon'ble High Court in an earlier judgment of CIT V/s Sunil Aggarwal ( 379 ITR 367; 2016) and also the decision of Hon'ble Andhra Pradesh High Court in CIT v. Shri Ramdas Motor Transport (238 ITR 177) wherein Hon'ble Court refused to give any evidentiary value to the statement made by the assessee u/s 132(4) as the department could not find any unaccounted money, article or thing or incriminating document either at the premises of the company or at the*

*residence of managing director or other directors. In such circumstances, the finding of the Tribunal that the statement of managing director recorded patently u/s 132(4) did not have any evidentiary value, was upheld. The ratio of all these decisions makes it clear that the surrendered income must be correlated with some incriminating material found during the course of search action so as to justify the addition. We find that there is no such incriminating material in the case of the assessee which would show that the transactions under consideration were sham transactions and there was any connection / nexus between the assessee and the group entities of Shri Shirish C. Shah.*

*11. We also find that this legal issue stood covered in assessee's favor by the decision of SMC bench of Tribunal rendered in the case of another assessee of the group i.e. Smt. Reena A. Ajmera V/s DCIT (ITA No.982/Mum/2020 dated 09/02/2021). The relevant observations were as under:*

*"4. Coming to Ground No. 2 of grounds of appeal, Learned Counsel for the assessee submitted that the assessment made u/s. 153A is bad in law as there is no incriminating material found in the course of search and the assessment is not abated. Learned Counsel for the assessee submitted that assessee filed return of income on 20.07.2011 and return was processed u/s. 143(1) of the Act on 21.09.2011. Accordingly, the time limit to issue notice u/s. 143(2) expired on 30.09.2012 upon expiry of six months from the end of the Financial Year in which return was furnished for the relevant assessment year.*

*5. Learned Counsel for the assessee submitted that thereafter a search was conducted on 25.07.2013 almost a year after the expiry of the limitation period for issue of notice u/s. 143(2) of the Act and there was no assessment or re-assessment proceeding pending as on the date of search. Therefore, it is submitted that the present assessment year was an unabated assessment year in as much as the assessment already attained finality and such finality could not be disturbed unless incriminating material was found during the course of the search.*

*6. Referring to Panchanamas Learned Counsel for the assessee submitted that in the present case no incriminating material was found in the hands of the*

assessee during the search proceedings against the assessee. It is submitted that there is no reference to any incriminating material found from the possession and control of the assessee in the Assessment Order. Inviting our attention to Page Nos. 334 and 335 of the Paper Book, which is the remand report dated 09.01.2015 Ld. Counsel for the assessee submits that in any case in the remand report Assessing Officer has categorically accepted that there was no incriminating material found during the course of the search. Therefore, Ld. Counsel for the assessee submits that it is well settled legal position that no addition can be made while completing the assessment u/s.153A of the Act in case of unabated assessment if no incriminating material was found in the course of the search.

7. Reliance was placed on the following decisions in support of her contentions:

(i). Pr.CIT v. Meeta Gutgutia [ 82 taxmann.com 287 (Del)] SLP dismissed by Hon'ble Supreme Court which is reported in 96 taxmann.com 468 (SC).

(ii). CIT v. Gurinder Singh Bawa [386 ITR 483 (BOM)]

(iii). CIT v. Kabul Chawla [380 ITR 573 (Del)]

(iv). CIT v. Continental Warehousing Corporation [374 ITR 645 (BOM)]

(v). CIT v. Anil Kumar Bhatia [352 ITR 493 (Del)]

(vi). Brij Bhushan Singal & Ors v. ACIT in ITA.Nos. 1412 to 141/Del/18 order dated 31.10.2018

(vii). Shri Sanjay and Smt. Aarti Singal v. DCIT in ITA.Nos. 706, 707, 709/Chd/18, order dated 07.02.2020.

8. Ld. DR vehemently supported the orders of the authorities below.

9. Heard rival submissions, perused the orders of the authorities below. In this case assessee filed return on 20.07.2011 and the same was processed u/s. 143(1) of the Act on 21.09.2011 and time limit for issue of notice u/s. 143(2) lapsed on 30.09.2012 and no assessment or re-assessment proceedings were pending as on the date of search. Therefore, admittedly in this case the

*assessment is unabated on the date of search i.e. 25.07.2013 since there were no pending proceedings either u/s. 143(3) or 148 of the Act.*

10. Hon'ble Bombay High Court in the case of CIT v. Continental Warehousing Corporation (supra) held that –

*“In a case where pursuant to issue of notice under section 153A assessments are abated. Assessing Officer retains original jurisdiction as well as jurisdiction conferred on him under section 153A for which assessments shall be made for each of six assessment years separately. No addition can be made in respect of unabated assessments which have become final if no incriminating material is found during search”.*

11. Hon'ble Bombay High Court in the case of CIT v. Gurinder Singh Bawa (supra) held that

*“In the present case, the assessment had been completed under summary scheme under section 143(1) and time limit for issue of notice under section 143(2) had expired on the date of search. Therefore, there was no assessment pending in this case and in such a case there was no question of abatement. Therefore, addition could be made only on the basis of incriminating material found during search.” 6.2 In this case, the AO had made assessment on the information/material available in the return of income. The information regarding the gift was available in the return of income as capital account had been credited by the assessee by the amount of gift. Similar was the position in relation to addition under section 2(22)(e). The AO had not referred to any incriminating material found during the search based on which addition had been made. Therefore, following the decision of the Special Bench (supra), we hold that the AO had no jurisdiction to make addition under section 153A. The addition made is therefore deleted on this legal ground”.*

12. Hon'ble Delhi High Court in the case of CIT v. Anil Kumar Bhatia (supra) held that –

*“during the search of the assessee's premises, no document or incriminating material, except the one unsigned undertaking for the loan was found. There was no corroborative material seized in the*

*course of search. The income tax returns for the assessment years 2000-01 to 2005-06 (six years) were filed prior to the search and in the normal course, suo moto disclosing the particulars of the subject additions and these returns stood accepted under Section 143(1) of the Act. Since on the date of the initiation of the search, no assessment was pending as they had all abated, the Assessing Officer has wrongly invoked Section 153A of the Act. The assessment contemplated by Section 153A is not a denovo assessment and the additions made therein have to be necessarily restricted to the undisclosed income unearthed during the search. The Section has to be strictly interpreted. It is not an assessment such as a normal or regular scrutiny assessment”.*

13. The Hon'ble Delhi High Court in the case of CIT v. Kabul Chawla (supra) held that –

“completed assessments can be interfered with by Assessing Officer while making assessment under section 153A only on basis of some incriminating material unearthed during course of search which was not produced or not already disclosed or made known in course of original assessment. Pursuant to search carried out in case of the assessee, a notice under section 153A(1) was issued. In course of assessment, Assessing Officer made addition to assessee's income in respect of deemed dividend. It was undisputed that assessment for assessment years in question had already been completed on date of search. Since no incriminating material was unearthed during the search, no additions could have been made to income already assessed. Consequently, the impugned addition was to be deleted”.

*14. The Hon'ble Delhi High Court followed this decision in the case of CIT v. RRJ Securities Ltd., [380 ITR 612].*

15. The Hon'ble Delhi High Court in the case of Pr.CIT v. Meeta Gutgutia (supra) held that invocation of section 153(A) to reopen concluded assessments of assessment years earlier to year of search was not justified in absence of incriminating material found during search qua each such earlier assessment years.

16. In all the above decisions of various Hon'ble High Court's, the legal position is that no addition can be

made in case of an unabated assessment if no incriminating material is found in the course of search. On a perusal of the Assessment Order noticed that there was no reference to any of the incriminating material found and seized in the premises of the assessee in the course of the search proceedings. The Assessing Officer in the Assessment Order refers to the seized incriminating material in the case of one Shri Shirish C. shah and the post search enquiries made in his case to make an addition in the hands of the assessee denying the long term capital gain claimed by the assessee. I also noticed from the remand report dated 09.01.2017 furnished by the Dy. CIT, CC-2(2), Mumbai to the Ld.CIT(A) -48 in the course of appeal proceedings wherein the Assessing Officer stated as under: -

“Sir, in the present case under consideration, though no incriminating material was found, the assessee admitted undisclosed Income in his statement u/s.132(4) of the Income Tax Act 1961. It is totally immaterial that the assessee later on retracted the statements recorded u/s 132(4) of the Income Tax Act 1961. Therefore assessment of AY 2011-12 and AY 2012-13 which was made on the basis of undisclosed income admitted during the course of search is totally valid assessment and does not get affected by the decision of Hon'ble Bombay High Court in the case of Continental Warehousing (Supra)”.

17. In this case it appears that except the statement of the assessee u/s. 132(4) agreeing for the addition there is no seized incriminating material found in the premises of the assessee in the course of assessment proceedings. When there is no incriminating material found in the course of search in assessee's premises the addition/disallowance cannot be made merely on the statements recorded in the course of the search proceedings.

18. In the case of Brij Bhushan Singal & Ors v. ACIT (supra) the Delhi Bench of the Tribunal held as under: -

“117. From the aforesaid Circulars, it is clear that the assessments made pursuant to search operation are required to be based on incriminating materials discovered as a result of search operation in the case of the assessee and not on the recorded statement. In the instant case, the persons who gave the statements, retracted

*the same and even the opportunity to cross-examine was not afforded to the assessee. In our opinion, it cannot be said that those statements on the basis of which impugned additions were made by the AO, were incriminating material found during the course of search. As we have already noted that no incriminating material was found during the course of search and the additions were made by the AO while framing the assessments u/s 153A of the Act, the said additions need to be restricted or limited only to incriminating material found during the course of search. However, in the present case, no such incriminating material was found during the course of search from the possession of the assessee. .... 121. In the present case also, the AO made the additions on the basis of the statements of third parties recorded u/s 132(4)/133A of the Act and third parties evidences/documentation. However, no live nexus with the incriminating material found in the course of search in the case of the assessee was established. The statements of the third parties were recorded behind the-back of the assessee but the opportunity of cross-examination of such parties was not allowed to the assessee, even the statements were retracted later on. It is well settled that the presumption u/s 132(4A)/292C of the Act, is available only in the case of the person in whose possession and control, the documents are found but it is not available in respect of the third parties. In the present case, there was no independent evidence to link the seized documents found in the premises of the third party with any incriminating material found in the course of search operation at the premises of the assessee. Therefore, the entries in the documents seized from third party's premises would not be sufficient to prove that the assessee was indulged in such transactions. In the present case, the pen drive of Sh. Ankur Agarwal corroborated/substantiated, the share transactions carried out by the assessee which were duly found recorded in the regular books of the assessee and the said pen drive did not contain anything incriminating against the assessee. Therefore, merely on the basis of the statement of Sh. Ankur Agarwal, the addition made u/s 153A of the Act was also not justified, particularly when Sh. Ankur Agarwal retracted his statement later on. In the instant case, the AO also failed to establish any*

*link/nexus of the alleged cash trail. We, therefore, by considering the totality of the facts and the various judicial pronouncement discussed in the former part of this order are of the view that the additions made by the AO and sustained by the Ld. CIT(A) u/s 153A of the Act in the absence of any incriminating material found during the course of search u/s 132(1) of the Act in respect of unabated assessment years i.e. the assessment years 2010-11 to 2012-13 were not justified As could be seen from the above the Delhi Bench of the Tribunal considering various circulars of CBDT held that the assessments made pursuant to search operation are required to be based on incriminating material discovered as a result of search operation in assessee's case but not on the recorded statements.*

*19. In the facts and circumstances explained above and in view of the above judicial pronouncements since no incriminating material found in the course of search in the premises of assessee, assessment made making addition by the Assessing Officer in respect of long term capital gain is bad in law. Thus, I direct the Assessing Officer to delete the addition made in respect of long term capital gain.*

*20. As I have decided that the assessment made by the Assessing Officer is bad in law on the preliminary ground, I am not inclined to go into merits of the addition/disallowance made by the Assessing Officer at this stage as it would only become academic in nature.'*

*The facts in the above case are quite identical to the case before us since the additions permeates from same search action and similar additions were made in the case of this assessee. Therefore, the ratio of above decision is quite applicable here and we see no reason to deviate from the same. 12. Finally, on the given facts and circumstances, we concur with the submissions of Ld. AR that in the absence of any incriminating material, the additions could not be made in the hands of the assessee as per settled legal proposition. Accordingly, the impugned additions stand deleted. We order so. Since legal grounds raised by the assessee have been allowed, the adjudication on merits have been rendered merely academic in nature. The legal ground raised by the assessee stand allowed. The appeal stand allowed.*

*13. Facts as well as issues are quite identical in all the other appeals. The assessment orders as well as appellate orders are on similar lines. Aggrieved, the assessee is in further appeal before us with similar grounds of appeal. Facts being pari-materia, the same, our adjudication as above shall mutatis-mutandis apply to all these appeals. Accordingly, the legal grounds raised in all these appeals stand allowed and the impugned additions as made therein stand deleted. All these appeals stand allowed.*

Conclusion

*14. All the appeals stand allowed in terms of our above order." (Emphasis Supplied)*

9. On perusal of the above it can be seen that in the above cases the addition made by the Assessing Officer while concluding assessment under Section 153A read with Section 143(3) of the Act were deleted by the Tribunal holding that there was no incriminating material. In same facts and circumstances, addition has been made in the hands of the Appellant by relying upon the same material ceased in the case of search conducted on Mr. Shirish C Shah and statement of Mr. Jasmin K Ajmera. Therefore, respectfully following the above decisions of the Tribunal we hold that there was no incriminating material found during the course of search in case of the Appellant. Therefore, as per the judgment of the Hon'ble Bombay High Court in the case of Continental Warehousing Corporation (supra), the addition of INR 5,13,51,257/- made by the Assessing Officer under Section 68 of the Act while framing assessment under Section 153A read with Section 143(3) of the Act, vide order dated 28.03.2016, cannot be sustained as the assessment for the Assessment Year 2011-12 was unabated/finalized assessment as on which search was conducted. Accordingly, order passed by the CIT(A) is set-aside and the addition of INR 5,13,51,257/- made by the Assessing

Officer is deleted. Accordingly, Ground No. 3.1 & 3.2 raised by the Assessee in appeal are allowed.

10. Ground No. 1 & 2 are disposed off as not pressed as no arguments were advanced in respect of the same while Ground No. 4 is disposed off as being infructuous.

In the result, the present appeal is partly allowed.

Order pronounced on 28.02.2023.

*Sd/-*  
(Amarjit Singh)  
Accountant Member

*Sd/-*  
(Rahul Chaudhary)  
Judicial Member

मुंबई Mumbai; दिनांक Dated : 28.02.2023  
*Alindra, PS*

**आदेश 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, मुंबई / DR,  
ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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