

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

BEFORE SHRI PRASHANT MAHARISHI, AM
AND
SHRI KULDIP SINGH, JM

ITA Nos. 885 to 891/Mum/2019
(Assessment Years 2008-09 to 2014-15)

[7 Appeals]

Smt Pooja Jain Legal heir of Late Shri Gautam Bhanwarlal Jain RMR & Co. 425, The Summit Business Bay, Prakashwadi, Near WEH Metro Station, Andheri E, Mumbai-400 093	Vs.	DCIT Central circle 8(3) Room No.659, Aaykar Bhavan 6 th Floor, M.K.Road, Mumbai-400 020
(Appellant)		(Respondent)
PAN No. AFRPJ5886P		

ITA Nos. 853 to 859/Mum/2019
(Assessment Year 2008-09 to 2014-15)
[7 Appeals]

Karishma Diamond Private Limited
RMR & Co. 425, The Summit
Business Bay,
Prakashwadi,
Near WEH Metro Stadium,
Andheri (E),
Mumbai-400 093
(Appellant)

Vs.

DCIT
Central circle 8(3)
Room No.659, Aaykar Bhavan
6th Floor, M.K.Road,
Mumbai-400 020
(Respondent)

PAN No. AACCK5154E

ITA Nos. 860 to 866/Mum/2019
(Assessment Year 2008-09 to 2014-15)

[7 Appeals]

Parshwanath Gems Private Limited

RMR & Co. 425, The Summit
Business Bay,
Prakashwadi,
Near WEH Metro Stadium,
Andheri (E),
Mumbai-400 093
(Appellant)

Vs.

DCIT
Central circle 8(3)
Room No.659, Aaykar Bhavan
6th Floor, M.K.Road,
Mumbai-400 020
(Respondent)

PAN No. AAACP3391E

ITA Nos. 867 to 872/Mum/2019
(Assessment Year 2009-10 to 2014-15)

[6 Appeals]

Shri Sukhpal Bijaram Prajapat

RMR & Co. 425, The Summit
Business Bay,
Prakashwadi,
Near WEH Metro Stadium,
Andheri (E),
Mumbai-400 093
(Appellant)

Vs.

DCIT
Central circle 8(3)
Room No.659, Aaykar Bhavan
6th Floor, M.K.Road,
Mumbai-400 020
(Respondent)

PAN No. AOHPP4706R

ITA Nos. 873/Mum/2019
(Assessment Years 2007-08)

ITA Nos. 874 to 877/Mum/2019
(Assessment Years 2011-12 to 2014-15)

[5 Appeals]

Krishna Diam RMR & Co. 425, The Summit Business Bay, Prakashwadi, Near WEH Metro Stadium, Andheri (E), Mumbai-400 093 (Appellant)	Vs.	DCIT Central circle 8(3) Room No.659, Aaykar Bhavan 6 th Floor, M.K.Road, Mumbai-400 020 (Respondent)
PAN No. AAGFK9877P		
ITA Nos. 878 to 884/Mum/2019		

(Assessment Years 2008-09 to 2014-15)

[7 Appeals]

Shri Gyanchand Bhanwarlal Jain
RMR & Co. 425,
The Summit Business Bay,
Prakashwadi,
Near WEH Metro Station,
Andheri E, Mumbai-400 093
(Appellant)

Vs.

DCIT
Central circle 8(3)
Room No.659, Aaykar Bhavan
6th Floor, M.K.Road,
Mumbai-400 020
(Respondent)

PAN No. ACWPJ4769L

ITA No. 1396/Mum/2019 for A.Y. 2011-12

ITA No. 1397/Mum/2019 for A.Y. 2013-14

ITA No. 1398/Mum/2019 for A.Y. 2014-15

[3 Appeals]

Shri Dharmendra A. Babel. RMR & Co. 425, The Summit Business Bay, Prakashwadi, Near WEH Metro Station, Andheri E, Mumbai-400 093 (Appellant)	Vs.	DCIT Central circle 8(3) Room No.659, Aaykar Bhavan 6 th Floor, M.K.Road, Mumbai-400 020 (Respondent)
PAN No. ADVPJ5757F		

ITA No. 2269/Mum/2019 for A.Y. 2014-15

ITA No. 2270/Mum/2019 for A.Y. 2013-14

ITA No. 2271/Mum/2019 for A.Y. 2012-13

[3 Appeals]

Marine Gems Pvt. Ltd RMR & Co. 425, The Summit Business Bay, Prakashwadi, Near WEH Metro Station, Andheri E, Mumbai-400 093 (Appellant)	Vs.	DCIT Central circle 8(3) Room No.659, Aaykar Bhavan 6 th Floor, M.K.Road, Mumbai-400 020 (Respondent)
PAN No. AAHCM0797L		



ITA No. 2272/Mum/2019 for A.Y. 2014-15
ITA No. 2273/Mum/2019 for A.Y. 2012-13
ITA No. 2274/Mum/2019 for A.Y. 2013-14

[3 Appeals]

Pramod Kumar Ranka RMR & Co. 425, The Summit Business Bay, Prakashwadi, Near WEH Metro Station, Andheri E, Mumbai-400 093	Vs.	DCIT Central circle 8(3) Room No.659, Aaykar Bhavan 6 th Floor, M.K.Road, Mumbai-400 020
(Appellant)		(Respondent)
PAN No. ADEPJ3002A		

ITA Nos. 2275 & 2276/Mum/2019
(Assessment Year 2014-15 & 2013-14)

[2 Appeals]

Frontline Diamond Private Limited RMR & Co. 425, The Summit Business Bay, Prakashwadi, Near WEH Metro Stadium, Andheri (E), Mumbai-400 093	Vs.	DCIT Central circle 8(3) Room No.659, Aaykar Bhavan 6 th Floor, M.K.Road, Mumbai-400 020
(Appellant)		(Respondent)
PAN No. AABCF5034H		

Assessee by : Mr. Rajesh Shah, CA
Revenue by : Mr. K.C. Selvamani, CIT DR

Date of hearing: 21.03.2023
Date of pronouncement : 31.03.2023

ORDER

PER BENCH :

01. The facts in these cases are identical, the parties also argued them together and the learned CIT (A) has also decided this issue each of the assessee generally.

ITA Nos. 885 to 891/Mum/2019

(Assessment Years 2008-09 to 2014-15)

Shri Gautam Bhanwarlal Jain

Through legal heir Mrs. Pooja Jain

02. First, we take up appeals in case of late Shri Gautam Bhanwarlal Jain filed through legal heir Ms Pooja Jain for assessment year 2008 - 09 to assessment year 2014 - 15.
03. We take the lead appeal in ITA no.885/Mum/2019 for assessment year 2008 - 09 filed by the assessee against the order of the Commissioner of Income-tax (Appeals)-50, Mumbai [the learned CIT (A)] passed on 30th November, 2018 in a consolidated order for A.Ys. 2008-09 to 2014-15.
04. By this order, the appeal filed by the assessee against the assessment order passed by the Dy. Commissioner of Income Tax, Central Circle 8(3), Mumbai (the learned Assessing Officer) dated 18th March, 2016 and 23rd June, 2017 for different assessment years passed under Section 153A read with section 143(3) of the Income-tax Act, 1961 (the Act), wherein income was returned at ₹2,74,000/- for A.Y. 2008-09 assessed at ₹2,02,38,223/- by the learned Assessing Officer and further, the learned CIT (A) enhanced the income by further ₹20,53,87,498/- for all these years on account of various assessment years.

05. The brief fact of the case shows that assessee is an individual. Search and seizure operation under Section 132 of the Act and survey under Section 133A of the Act was conducted by the Addl. Director of Income tax, Mumbai in case of the assessee on 3 October 2013 in Surat and Mumbai. The residential premises of the assessee and many other places were also covered.
06. Accordingly, notice under Section 153A of the Act was issued on 5 November 2014. The assessment was culminated on 18th March, 2016, where the addition was made by the learned Assessing Officer on account of commission income earned on accommodation entries of sales, import purchase, loans and advances for various years.
07. The assessed income and return income of the assessee for all 7 Assessment years in appeal is tabulated as under:-

Sr. No.	A.Y.	Returned Income	Assessed Income	Addition made by the AO
1.	2008-09	2,74,000	2,05,12,220	2,02,38,223
2.	2009-10	3,79,720	3,49,33,888	3,45,54,168
3.	2010-11	5,61,580	2,79,25,630	2,73,64,051
4.	2011-12	5,87,600	3,55,84,330	3,49,96,734
5.	2012-13	5,32,810	1,90,49,300	1,85,16,494
6.	2013-14	8,21,590	2,36,25,530	2,28,03,935
7.	2014-15	7,92,310	2,31,04,110	2,23,11,796

08. In the assessment order, the learned Assessing Officer was of the view that the statement of Mr. Gautam Bhanwarlal Jain was recorded under Section 131(1A) of the Act on 16th October, 2013, where the assessee failed to give explanation with respect to purchase or sales of the material. Further, a statement under Section 132 (1A) of the Act was also recorded on 11 October 2013, during the course of search where assessee stated that these are all bogus bills. It was also reconfirmed in the statement under Section 132(4) of the Act dated 11 October 2013. Further, statement of one Shri Rakesh Manekchand Kothari

was also recorded under Section 50 of the Prevention of Money Laundering Act, 2002 by the Asst. Director, Directorate of Enforcement, Ahmadabad Zonal Unit, Ahmadabad on 6 September 2014, where loans obtained from the assessee were stated to be bogus. Thus, the learned Assessing Officer was of the view that assessee has merely provided accommodation entries and had not carried on actual business transaction. Show cause notices were issued on 22nd January, 2016 stating that why accommodation entry transactions should not be assessed on substantive basis in his hands. The assessee submitted that Mr. Gautam Bhanwarlal Jain has retracted the statement and the statement of other parties can be used against them. It was further stated that the accounts of the assessee are audited and details of purchase and sales along with the bank statements have been produced. Accordingly, the profit of 1% of the sales is estimated as accommodation entry commission in the hands of the assessee and 2.4% of the accommodation commission on loans and advances was added. Accordingly, against the return of income of ₹2,74,000/-, the income was assessed at ₹2,05,12,220/- by passing an assessment order under Section 153A of the Act read with section 143(3) of the Income-tax Act, 1961 (the Act) dated 18th March, 2016.

09. Aggrieved assessee preferred the appeal before the learned CIT (A).
010. At the time of hearing before the learned CIT (A), assessments for A.Y. 2009-10 to 2014-15, were also resulted into the similar addition for the respective years. The learned CIT (A) confirmed the above addition. Over and above, the learned CIT (A) found that there is no addition of commission income on imported purchases and local purchases and therefore, he also computed 1% accommodation entry commission on these entries. Accordingly, in case of Mihir Diamonds, he enhanced income of

₹1,36,33,352/-, in case of Parshwanath Gems Pvt. Ltd. enhanced the income of ₹77,92,999/- and no enhancement was made in case of Ganesh Gems as there is no transaction for that year. The learned CIT (A) tabulated the commission income with respect to these three proprietary concerns of the assessee from A.Ys. 2009-10 to 2014-15 and also accumulative enhancement of ₹20,53,87,487/- was made for all these years. Before the learned CIT (A), the assessee reiterated all the submissions made before the learned Assessing Officer. Thus, a consolidated order for A.Ys. 2008-09 to 2014-15 was passed on 30 November 2018.

011. Assessee is in appeal in all these years before us.
012. At the time of hearing, assessee filed an additional ground of appeal stating that the addition is made in all these years without any incriminating material as well as without discovering any undisclosed income or assets. Assessee relied on several judicial precedents and mainly in case of Smt. Kalpana Mukesh Ruia Vs DCIT of co-ordinate Bench in ITA No. 6519 to 6521/Mum/2019 dated 31st December, 2020. Assessee also filed a consolidated chart of grounds of appeal.
013. The assessee has raised additional ground as under:-
- “1. The learned Assessing Officer has erred assuming jurisdiction under Section 153A of the Act on completed assessments, particularly without any incriminating material found during the search.”*
- 2. The learned Assessing Officer further erred in making addition in search cases without any incriminating material found during the course of search or without discovery of any undisclosed income or property in course of search and learned CIT (A) has erred in enhancing it.”*

014. It is apparent that the additional ground raised by the assessee goes to the root of the matter and jurisdictional which can be raised at any time during the year and further it does not require any further investigation of facts. Accordingly, we admit the same.

015. On the earlier occasion, the bench directed the learned Assessing Officer to submit his comments on additional ground raised. The comment of the learned Assessing Officer was received on 15th March, 2023. The comments are as under:-

“2. At the outset it may be submitted that the assessment folders of the subject assessee company were transferred to the charge of undersigned on 12.02.2021 due to decentralization of the case of the assessee from DCIT central circle 8(3) Mumbai who had passed assessment orders u/s. 153A r.w.s 143(3) of the Act. On going through the assessment folder, which is the only record I have in my possession, it is seen that there is nothing available on record in respect of seizure of documents. Therefore, a letter has been written to the DCIT central circle 8(3) Mumbai for providing required documentary evidence in respect of details of seizure if any made and the premises covered, during the course of search. In response to the same, the DCIT C.C. 8(3), Mumbai vide email dated 15.11.2022 has made his reply wherein he has not stated any facts regarding seized material. Therefore, it is requested to seeks an adjournment as I am unable to offer authentic information on the subject matter in view of the above circumstances.

Without prejudice to the above, the assessment records as available with the undersigned were examined and my

comments on the contentions raised by the assessee are offered as under.

3. *In respect of assuming jurisdiction u/s 153A of the Act.*

The requirement of for issue of notice under section 153A of the Act is Initiation of search under section 132 of the Act. Ongoing through the available records, it is gathered that in this case, search was initiated u/s, 132 of the Act on the assessee company and a statement of Shri. Gautam Bhanwarlal Jain, Director of M/s. Karishma Diamond Pvt Ltd i.e. assessee company was recorded u/s. 131(1A) of the Act on 06.10.2013 and u/s 132(4) of the Act at the time of PO operation on 11.10.2013 and he categorically admitted that no actual business was being conducted by the company and the company was only paper concern engaged in providing accommodation entries. Thus, incriminating document including recording of a statement under section 132(4) itself presuppose that there is a search on the assessee and sec 132(4) being a part of search, such statement becomes a part of search. Therefore, the notice u/s. 153A of the Act was issued by AO is valid and objection of validity of issuance of notice under section 153A, is baseless and liable to be rejected.

4. *In respect of additions made without any incriminating documents found during search proceedings.*

As per information available and on verification from ITBA, it is gathered that under the PAN of the assessee company, no scrutiny assessment was completed u/s. 143(3) of the Act for any Assessment Year involved in the instant appeal, before passing of assessment order u/s. 143 (3) r.w.s 153A of the Act. Hence, the AO has rightly assumed the

jurisdiction and initiated proceedings u/s.153A of the Act and passed order u/s 143 (3) r.w.s 153A of the Act by making addition on the basis of information declared by the assessee in ROI and on the basis of statement recorded of director of the company during search proceedings.

Further, on going through the assessment order u/s.143 (3) r.w.s 153A of the Act and other details available on record, it is gathered that in the course of search and seizure and related proceedings, in the case of assessee company and its related diamond trading group, followed by Shri. Gautam Bhanwarlal Jain's statement on oath recorded under section 131(1A) on 06.10.2013 and under section 132(4) on 11.10.2013 and also in depth examination of Shri. Rakesh K. Kothari by the Directorate of enforcement department, it is revealed that Assessee Company were dealing only in accommodation entry business on commission instead of outer facade of genuine import and trading in Diamond trade. Moreover, had any stringent action like a search and seizure by investigation wing was not conducted, this most vital and shocking evidence of accommodation of entry business cum hawala business would not have come to lime light. This piece of evidence constitutes valid ground for issue of Notice under section 153A of the Act. The asset detected in the course of comprehensive search and seizure, is in the form of a concealed commission income of the assessee company. This fact further strengthens the addition made by the AO and validity of invocation of section 153A of the Act. Thus contention of the assessee is unsubstantiated and unfounded.

Without prejudice to the above, it is submitted that the assessee's contention that additions are made without

any incriminating documents found during search proceedings is not acceptable, as for the purpose of computing income u/s. 153A the Assessing Officer was not required to confine himself only to the material found during the course of search operation and the AO while computing income u/s.153A is well within his powers to compute taxable income on the basis of material on record even though such material was not found during the course of search operation in view of sec 15881 w.e.f. 01.06.2003. It is submitted that the word "incriminating" is neither used in section 153A nor defined in the statute and therefore limiting the scope of section 153A only to undisclosed income is not justifiable when as per the section, the AO has to assess or re-assess the total income of the six assessment years. It is the assessment of total income which is required to be made u/s. 153A, which is defined u/s.2(45) of the Act to be computed as per section 5 of the Act.

In support of the above the following judicial pronouncements are relied upon:

(a) Decision of Allahabad High Court in Raj Kr Arora 367DTR517 wherein it is held that there is no requirement of incriminating material for invoking provision of section 153A.

(b) Decision of Andhra Pradesh High Court in case of Gopal Lai Bhadraka 253 CTR 80 wherein it is clearly held that "by virtue of section 158B-1 the various provisions of Chapter XIV-B are made inapplicable to proceedings under section 153A/153C. The effect of this is that while the provisions of Chapter XIV-B limit the inquiry by the Assessing Officer to those

materials found during the search and seizure operation, no such limitation is found in so far as section 153A/153C is concerned. Therefore, it follows that for the purposes of section 153A/153C the Assessing Officer can take into consideration material other than what was available during the search and seizure operation for making an assessment of the undisclosed income of the assessee. (c) Further on similar issue the decision of Bombay High Court in the case of All Cargo Logistics has not been accepted by the revenue and SLP on this issue was filed before the Hon'ble Supreme Court and this issue has not been adjudicated by Hon'ble Supreme Court and decision is pending.

5. In respect of search conducted on different addresses than addresses mentioned in PAN and ROI.

In this regard, it is to submit that a search u/s. 132 of the Income Tax Act was conducted in the case of Gautam Bhanwarlal Jain and associates concerns of Surat on 03.10.2013, The Search operation had revealed that Gautam Bhanwarlal Jain Group had floated various entities and were not engaged in any genuine business activity. The instant assessee company is one of the entities controlled by Gautam Bhanwarlal Jain Group and Shri. Gautam Bhanwarlal Jain is Director in assessee company. During the course of search/survey operations, many premises, from where the business was claimed to have been carried out were found closed.

During the statement of Shri. Gautam Bhanwarlal Jain, Director M/s. Karishma Diamond Pvt. Ltd dated 06.10.2013 has stated in answer to Q.no.33 that the

business of the company is carried out solely at 5B/1108, A1167/68B, Santok Diamond Office no.204 2nd Floor, Somnath Mahadev ni Sheri, Gajar Falia, Haripura, Surat and further he stated in answer to Q.no.52 that there is no actual business of trading in diamond that is being carried by me in the M/s. Karishma Diamond Pvt Ltd and that is why during the course of search and seizure action u/.132 of the I.T. Act on 03.10.2013, the business premises were found vacant and not being in use.

Further, it can be seen from the para 20.7 of the assessment order for A.Y.2014-15 dated, 18.03.2016 that, statement of Shri. Shri Anup Tiwari, Watchman was recorded during the search in the case of M/s.Karishma Diamond Pvt Ltd at 204, Santok Diamonds, Somnath Devni Gurjar Falia, Haripura, Surat and in his statement he stated that he was working since last six to seven years in the premise as watchman and he never heard of Karishma Diamond Pvt Ltd. Further, it is submitted that on verification of regular ITR of the Assessee company for A.Y.2014-15 it is seen that the same address is mentioned in ITR. Therefore, the contention of the assessee that the search was conducted on different premises other than the address mentioned in PAN and ROI is misleading and far from the realm of the facts.

6. In view of the above, there are no merits in the contentions raised by the assessee and additional grounds raised by the assessee may kindly be dismissed.

7. Submitted for your kind consideration and further direction if any.”

016. The learned Authorized Representative submitted that search took place on 3 October 2013 in case of the assessee. Therefore,

in concluded assessments addition is required to be made only on the basis of incriminating material found during the course of search. It was submitted that there is no incriminating material found during the course of search. The whole addition is made on the basis of the statements of the assessee and other premises. There is no reference of any incriminating material in the assessment order or in the order of the learned CIT (A). Even in the report of the learned Assessing Officer, the only reference is statement of the assessee. It was further submitted that merely a statement of the assessee, which is subsequently retracted, could not be an incriminating material. He submitted his reply dated 21st march, 2023, in support of the above arguments. He further referred to the judicial precedents that the statement could not be an incriminating material. He further submitted that the decision of the Hon'ble Bombay High Court in case of Cargo Logistics has categorically held that no addition in the concluded assessment can be made without any incriminating material. He referred to the report of the learned Assessing Officer and stated that the learned Assessing Officer himself has accepted that there was no incriminating material found during the course of search, the assessment was made on the basis of other material on record but did not disclose any such material. The learned Authorized Representative further referred to the decision of co-ordinate Bench in ITA Nos. 1021 & 1023/Mum/2018 in case of M/s Essel Mining & Industries Limited Vs. DCIT dated 15th November, 2022, where in absence of any incriminating material, the additions are deleted.

017. The learned Departmental Representative in response submitted the decision of co-ordinate bench in case of DCIT Vs. M/s Skyway Infra Projects Pvt. Ltd. dated 28th February, 2023, in ITA No.2665/Mum/2022 for seven assessment years. In this case, the learned Departmental Representative specifically referred to paragraph no.8.3 to 8.7 stating that information in the form of

statement of the supplier parties, absence of evidence in support of transport and delivery of material during the course of search and evidence not found at the premises of the supplier parties by the inspector during the verification in totality stating incriminating material. He further relied upon the decision of Madras High Court in case of B Kishore Kumar Vs. DCIT 229 Taxman 614 (Madras) dated 3rd November, 2014, wherein it was held that when the assessee itself has made a statement that he has a separate business income, the learned Assessing Officer was correct in making the addition. He further relied upon the decision of the Hon'ble Supreme Court in case of V. Jaganmohan Rao Vs. CIT (1970) 75 ITR 373 (SC) dated 31st July, 1969 and decision of Delhi High Court in case of Filatex India Ltd. Vs. CIT (2014) 49 taxmann.com 465 (Del) dated 14th July, 2014 to submit that the addition need not be restricted or limited to incriminating material found. He further referred to the decision of the Indore Bench of Madras High Court in CIT vs. Tollaram Hassomal (2008) 298 ITR 22 dated 10th March, 2006, against the admission of additional ground.

018. We have carefully considered the rival contentions and perused the orders of the lower authorities. First, we determine that what are the concluded assessments before the date of search are. The date of search is 3 October 2013. Therefore, assessment proceedings up to A.Y. 2013-14 were concluded and not open on the date of search i.e. 3 October 2013. However, for A.Y. 2014-15 is a pending assessment as on the date of search and therefore, that shall abate. Therefore, in case of this assessee the addition if any to be made up to A.Y. 2013-14 shall be based on incriminating material found during the course of search. For A.Y. 2014-15, the assessment would be made under Section 143(3) read with section 153A of the Act on the basis of information contained in the return of income as well as any information available with the learned Assessing Officer during

the course of search. In nutshell, for A.Y. 2014-15, there is no requirement of any incriminating material found during the course of search.

019. The fact also clearly shows that assessee has originally made a statement during the course of search about providing accommodation entries. This statement was also recorded in case of other assessees. The statement originally made by the assessee was retracted. Therefore, issue before us is whether on the basis of statement made by the assessee any absence of any other incriminating material, addition can be made or not in concluded assessment years. The answer has been given by the Hon'ble Delhi HC in case of PCIT vs. Best Infrastructure (India) (P.) Ltd. [2017] 397 ITR 82 (Delhi), wherein the question of law framed as per paragraph no.3, the Hon'ble High Court in paragraph no.44 has categorically held that the addition made under Section 68 of the Act on account of statement made by the Assessee's Directors in the course of search under Section 132 of the Act were rightly deleted by the ITAT. Vide Para no.45, it was further held that having regard to the materials seized in the course of search under Section 132 and the statements made on behalf of the Assessee, the assumption of jurisdiction under Section 153A of the Act and the consequent additions made by the AO are not justified. In this case, the Hon'ble High Court was concerned with statement made by Mr. Tarun Goyal and further statement made by the director of the company admitting the concealed income. In these circumstances, after considering the decision of Hon'ble Delhi High Court in case of PCIT vs. Meeta Gutgutia [2017] 82 taxmann.com 287 (Delhi) and Smt. Dayawanti Gupta v. CIT [2016] 390 ITR 496 (Delhi) and further relying on the decision of CIT v. Kabul Chawla [2016] 380 ITR 573 (Delhi) and CIT v. Continental Warehousing Corpn. (Nhava Sheva) Ltd. 374 ITR 645 (Bom.), in paragraph no. 38 of the Act has

categorically held that statements under Section 132(4) of the Act do not by themselves constitute incriminating material.

020. Further, Hon'ble Delhi High Court recently in PCIT Vs. Shiv Kumar Agarwal [2022] 143 taxmann.com 55 (Delhi) has categorically held that the additions solely made relying on the disclosure made by a MD of a company the additions are not justified. Further, in case of PCIT vs.similar view was taken following the decision of Best Infrastructure (India) (P.) Ltd. (supra). Recently in the case of PCIT vs. Pilot Industries Ltd. [2023] 146 taxmann.com 233 (Delhi) dated 19th October, 2022, the addition made on the basis of the statement of the assessee under Section 132(4) of the Act was not considered as incriminating material. Further, the co-ordinate Bench in ITA No.4223/Del/2018 in ACIT vs. M/s Kuber Khadyan Pvt. Ltd. dated 26th March, 2021, deleted the addition based upon the admission under Section 132(4) of the Act, holding that mere statement is not a incriminating material. Based on which addition can be made in the hands of the assessee.
021. Similarly, the co-ordinate Bench in ITA No. 332/Del/2017 in case of Brahmputra Finlease Pvt Ltd dated 29th December, 2017, has also categorically held that the statement recorded under Section 132(4) of the Act do not constitute an incriminating material.
022. The learned Departmental Representative has relied on the decision of the co-ordinate Bench in case of M/s Skyway Infra Projects Pvt. Ltd. (supra). The leading decision of the Hon'ble Delhi High Court in case of Best Infrastructure (India) (P.) Ltd. (supra) was not at all considered. Further, in case of B Kishore Kumar (supra), there was a categorical finding that loose sheets and notings on telephone diaries pertaining to the assessee were found during the course of search. Based on this, the assessee

admitted the unaccounted income in case of Filatex India Ltd. (supra) was only the issue of incriminating material in abated assessment year. In this case, clearly assessee has retracted the statement by filing an affidavit on 3 December 2014. Further, when we look at the statement of the assessee recorded under Section 132(4) of the Act recorded on 11 October 2013, 2 December 2013, 29 October 2013 and 6 October 2013, the assessee did not admit any income. In view of this, we find that the addition has been made in the hands of the assessee from A.Y. 2008-09 to A.Y. 2013-14 which based on retracted statements. In these circumstances, merely a statement of the assessee where there is no admission of the income cannot be said to be incriminating evidence. Consequent to that the additions made by the learned Assessing Officer and by the learned CIT (A) are not sustainable. Hence, they are directed to be deleted.

023. Accordingly appeal of the assessee for assessment year 2008 - 09 to assessment year 2013 - 14 are allowed in absence of any incriminating material.
024. With respect to A.Y. 2014-15, the addition is made by the learned Assessing Officer and further enhanced by the learned CIT (A). This assessment year is open but not concluded assessment at the time of search. As the date of search is 3/10/2013 therefore, the learned assessing officer has to make an assessment of the total income of the assessee based on the material found during the course of search as well as information contained in the return of income. Thus, there is no restriction to make an addition in the hands of the assessee, irrespective of any incriminating material found during the course of search.

025. For this year the learned assessing officer has estimated the profit by invoking the provisions of section 145 (3) of the act holding that assessee has provided accommodation entries of purchased various parties which are stated in the profit and loss account as sales. The AO has made an addition of ₹ 2,31,04,106/-. The learned CIT - A has and hence to this addition by holding that the assessee has carried on the activities of accommodation entry providers and accordingly in case of his proprietary concern M/s believed diamonds the commission income was calculated at 97,89,370/- and in case of Parshwanath Gems commission income of ₹ 3,396,463 and Shri Ganesh James of ₹ 8,059,203.
026. The addition has been made in case of the assessee based on the statement of the assessee as well as several other persons. Though the books of accounts of the assessee are audited, however the learned assessing officer rejected the books of accounts for the reason that during the course of search the AO did not find any sign of any business activity at the premises, the premises were mostly locked, no physical infrastructure, no documents relating to the concern were found in those premises. Before the assessing officer, the assessee could not produce the evidence that how the material was purchased and sold, how goods have been transported/delivered etc. therefore the learned assessing officer issued notice under section 145 (3) of the act. The assessee contended that the books of accounts of the assessee are audited, the statement based on which the learned AO is relying have been retracted, assessee has furnished the details of purchases, sales and bank statements. In those books of accounts no defects have been shown. Further at the time of search also no evidences were found against the assessee. Further sum statements have been relied by the AO, cross-examination of those persons were not given to the

assessee and therefore rejection of books of accounts is unwarranted.

027. The learned AO on the basis of the modus operandi of providing accommodation entries held that assessee has not carried out any actual business transaction and no evidences of any actual business transaction was found at the time of search and none of the person could answer any of the questions which a person engaged in the business of diamond is supposed to. Based on this, the books of accounts of the assessee were rejected and profits were estimated. The learned CIT - A confirmed the same and enhanced the addition of commission income in the hence of assessee with respect to purchase and sales in various concerns of the assessee.
028. The arguments of the assessee were against the reliance on the statement and submitted that those statements have been retracted and not cross-examination of the person based on whose statement assessee is found to be an accommodation entry provider was granted. He further reiterated that the books of accounts are audited and supported by proper basis. In absence of any other material showing that the book result does not disclose the correct profit by finding out the defects in books of accounts, the learned AO could not have rejected the same.
029. The learned departmental representative supported the orders of the lower authorities.
030. We have carefully considered the rival contention and perused the orders of the lower authorities. In this case, when the search took place, there was no material found at the premises where the business of the assessee was stated to be carried on supporting the books of accounts of the assessee. No evidences, except the books of accounts, purchase and sales invoices and

bank statement was produced before the learned that lower authorities. Merely producing documentary evidences without actually supporting that in fact such transactions have taken place in ordinary course of business, the books of accounts of the assessee cannot be stated to be showing the correct picture. It is the duty of the assessee to substantiate the transactions of purchases and sales of diamond with proving the chain of the business transaction with proper evidences. The learned AO has also rejected the books of accounts merely on the basis of the statement as well as absence of evidence of carrying on of the business actually by the assessee at the time of search. In view of this facts, we set-aside the issue of determination of the fact of actually carrying on of business by the assessee of purchase and sale of diamonds to the file of the learned assessing officer with direction to the assessee to substantiate that in fact assessee is carrying on the business and not merely an accommodation entry provider. The learned assessing officer is directed to examine the purchase and sales invoices as well as other evidences of each part of the chain of the trading and then decide whether the assessee is engaged in the business or is merely an accommodation entry provider. If the learned assessing officer reaches at the conclusion that assessee is an accommodation entry provider, then necessary action may also be intimated in case of the beneficiaries of the transaction and determined the commission income in the hands of the assessee. Such action may also be explored in the hence of the beneficiaries even in case of a concluded assessment in case of this assessee. Therefore, the appeal of the assessee is for assessment year 2014 - 15 is set-aside to the file of the learned assessing officer to determine the income of the assessee afresh.

031. In the result, appeal of the assessee for assessment year 2014 - 15 is allowed for statistical purposes.

032. Accordingly, all these seven appeals in case of late Sri Gautam Bhanwarlal Jain are disposed of as above.

ITA Nos. 853 to 859/Mum/2019

(Assessment Year 2008-09 to 2014-15)

Karishma Diamond Private Limited

&

ITA Nos. 860 to 866/Mum/2019

(Assessment Year 2008-09 to 2014-15)

[7 Appeals]

Parshwanath Gems Private Limited

ITA Nos. 878 to 884/Mum/2019

(Assessment Years 2008-09 to 2014-15)

[7 Appeals]

Shri Gyanchand Bhanwarlal Jain

ITA Nos. 867 to 872/Mum/2019

(Assessment Year 2009-10 to 2014-15)

[6 Appeals]

Shri Sukhpal Bijaram Prajapat

033. In case of above captioned 4 assessee is the appeals are pertaining to various assessment years involving similar facts.

034. Therefore, for the reasons given by us in case of appeals filed by late Sri Gautam Bhanwarlal Jain, we hold that for the appeals pertaining to assessment year 2008 - 09 to 2013 - 14 are concluded assessments and therefore merely on the basis of the

statement which has been retracted no addition could have been made. On this basis, we allow the appeal of the assessee for assessment year 2008 - 09 to 2013 - 14 in case of (i) Karishma Diamond Private Limited, (ii) Parshwanath Gems Private Limited (iii) Shri Gyanchand Bhanwarlal Jain and four assessment year 2009 - 10 to 2013 - 14 in case of Shri Sukhpal Bijaram Prajapat

035. For appeal of assessment year 2014 - 15 for all the above four assesseees are set aside to the file of the learned assessing officer as per our direction given in the appeal of late Sri Gautam Bhanwarlal Jain for a by 2014 - 15.
036. Accordingly, all 27 appeals in case of these 4 assesseees are disposed of as above.

ITA Nos. 873/Mum/2019

(Assessment Years 2007-08)

ITA Nos. 874 to 877/Mum/2019

(Assessment Years 2011-12 to 2014-15)

[5 Appeals]

Krishna Diam

037. These are the five appeals of the same assessee involving the similar facts.
038. For assessment year 2007 - 08 assessee filed its return of income on 16/10/2007 declaring a total income of ₹ 309,324/-. The case was reopened for assessment year 2007 - 08 recording the reasons that assessee is engaged in the activities of providing accommodation

entries as stated in case of Shri Gautam Jain and others. In this case, while framing the assessment order, the assessing officer is estimated net commission income of 0.5% on the total sales of ₹ 1,328,154,228/-. The assessment order under section 147 read with section 143 (3) of the act was passed on 27/3/2015. Subsequently on appeal before the learned CIT - A the reopening of the assessment as well as the addition on the merits were upheld by passing a consolidated order for assessment year 2007 - 08, 2011 - 12, 2012 - 13, 2013 - 14 and 2014 - 15. The learned CIT - A further made total enhancement of ₹ 46,815,336/- estimating the commission income for all those years.

039. The assessee has challenged the reopening of the assessment as well as the addition on the merits of the case.
040. We have heard the rival contentions and find that the reopening has been made on the basis of reasons recorded by the learned assessing officer wherein the information is received from the investigation wing. Further search was carried out in case of Shri Gautam Jain and others in his group. It was found that assessee is part of that group. We find that there is a tangible material available with the learned assessing officer to reopen the assessment in case of the assessee. In view of this, we do not find any infirmity in the order of the learned assessing officer in reopening the case by issuing notice under section 148 of the act. The learned CIT - A has also confirmed the same for the reason that the learned assessing officer has tangible material. Therefore, all the grounds

challenging the reassessment proceedings are dismissed.

041. On the addition on the merits, we find that identical issue arose in case of Mr. Gautam Jain for assessment year 2014 - 15 wherein we set aside the whole issue back to the file of the learned assessing officer with a direction to the assessee to substantiate the transaction of purchase and sales. Accordingly, with similar direction, the addition on the merits set-aside to the file of the learned assessing officer.
042. In all these, five appeals similar issues are involved with respect to the merit. Therefore, all these five appeals are restored to the file of the learned assessing officer to decide the addition on the merits of the case.
043. Accordingly, all the file appeals of the assessee are partly allowed for statistical purposes.

ITA No. 1396/Mum/2019 for A.Y. 2011-12

ITA No. 1397/Mum/2019 for A.Y. 2013-14

ITA No. 1398/Mum/2019 for A.Y. 2014-15

Shri Dharmendra A Babel

[3 Appeals]

044. These three appeals of the assessee pertaining to Mr. Gautam Jain group for assessment year 2011 - 12, 2013 - 14 and 2014 - 15 are contesting the addition made by the learned assessing officer and further enhanced by ₹ 197,138,162/- by the learned CIT - A on account of alleged accommodation entry.
045. On identical facts and circumstances in case of Mr. Gautam Jain for assessment year 2014 - 15 via set-aside the issue back to the file of the learned assessing officer with a direction to determine the income of the assessee afresh, with similar direction, all these three appeals are also restored back to the file of the learned assessing officer.
046. Accordingly, all these three appeals of the assessee are allowed for statistical purposes.

ITA Nos. 2275 & 2276/Mum/2019
(Assessment Year 2014-15 & 2013-14)
[Two Appeals]
Frontline Diamond Put Ltd

047. These are the two appeals of the assessee filed against the Consolidated appellate order passed by the learned CIT - A on 31/1/2019 wherein the addition made by the learned assessing officer with respect to the commission income on by the assessee at the rate of 0.5% on total turnover and further enhanced by the addition of ₹ 3 and 67,26,374/- on account of commission income on accommodation entries.
048. Both the parties confirmed that the facts are identical to the case of these Mr. Gautam Jain for assessment year 2014 - 15.
049. We have carefully considered the rival contention and find that we in the case of Mr. Gautam the new set-aside the issue back to the file of the learned assessing officer for assessment year

2014 - 15 to decide the issue afresh, with similar direction we set-aside both these appeals to the file of the learned assessing officer.

050. In the result, both the appeals are allowed for statistical purposes.

ITA No. 2269/Mum/2019 for A.Y. 2014-15

ITA No. 2270/Mum/2019 for A.Y. 2013-14

ITA No. 2271/Mum/2019 for A.Y. 2012-13

[3 Appeals]

Marine gems Pvt Ltd

051. These are the three appeals filed by the assessee against appellate order passed by the Commissioner of income tax appeals - 50, Mumbai dated 31/1/2019 for assessment year 2012 - 13, 2013 - 14 in 2014 - 15.

052. Both the parties confirmed that identical issue of India decided in the case of Mr. Gautam Jain.

053. We find that in the present case also, the assessment year 2012 - 13 and 2013 - 14 are concluded assessment and the additions have been made merely on the basis of the statements which are been retracted by the respective parties. In case of Mr. Gautam Jain for assessment year 2008 - 09 to 2013 - 14, we have held that these are the concluded assessment, which can be disturbed only on the basis of the incriminating material found during the course of search. As the facts and circumstances in the case of the assessee are also similar for assessment year 2012 - 13 and 2013 - 14, for the similar reasons we allow the appeal of the assessee.

054. For assessment year 2014 - 15, on identical facts and circumstances in case of Mr. Gautam Jain, we have set-aside the addition to the file of the learned assessing officer with a direction to determine the total income of the assessee. With similar direction, we restore back the file for assessment year 2014 - 15 to the file of the learned assessing officer.

055. Accordingly, appeal of the assessee for assessment year 2012 - 13 and 2013 - 14 are allowed and appeal of the assessee for assessment year 2014 - 15 is allowed for statistical purposes.

ITA No. 2272/Mum/2019 for A.Y. 2014-15

ITA No. 2273/Mum/2019 for A.Y. 2012-13

ITA No. 2274/Mum/2019 for A.Y. 2013-14

[3 Appeals]

Pramod Kumar Ranka

056. These are the three appeals in case of this assessee for assessment year 2012 - 13, 2013 - 14 and 2014 - 15 against the appellate order passed by the learned Commissioner of income tax (appeals) - 50, Mumbai dated 31/1/2019 against the addition made by the learned assessing officer and further enhanced by the learned CIT - A on account of commission income earned on accommodation entries.

057. Both the parties confirmed that the facts are identical to the facts of the case of Mr. Gautam Jain. We find that in case of assessment year 2012 - 13 and 2013 - 14 the addition is made on the basis of the statements, which have been retracted, by the assessee and several other persons. Identically in case of Mr. Gautam Jain we have held that in absence of any incriminating material found during the course of search, no addition can be

made in the hence of the assessee in concluded assessment. The assessment year 2012 - 13 and 2013 - 14 are concluded assessment. Therefore, for the reasons given by us in deciding the appeal of Mr. Gautam Jain, we allow the appeal of the assessee as the addition has been made by the learned assessing officer without any incriminating material.

058. For assessment year 2014 - 15, we set-aside the whole issue back to the file of the learned assessing officer in case of Mr. Gautam Jain to decide the income of the assessee afresh. With similar direction we set-aside the appeal of the assessee back to the file of the learned assessing officer.
059. In the result appeal filed by the assessee for assessment year, 2012 - 13 and 2013 - 14 are allowed and appeal for assessment year 2014 - 15 is allowed for statistical purposes.
060. In the result, all the 50 appeals involved in this group of appeals are disposed of accordingly.

Order pronounced in the open court on 31.03.2023.

Sd/-
(KULDIP SINGH)
(JUDICIAL MEMBER)

Sd/-
(PRASHANT MAHARISHI)
(ACCOUNTANT MEMBER)

Mumbai, Dated: 31.03.2023

Sudip Sarkar, Sr.PS/ Dragon

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

BY ORDER,

True Copy//



Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai