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

BEFORE SHRI B R BASKARAN, ACCOUNTANT MEMBER &
SHIR PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA Nos. 3246/Mum/2022

(A.Y: 2015-16)

ACIT, C.Circle -2(1), Old CGO Bldg, 804, 8th Floor, M.K. Road, Mumbai – 400020.	Vs.	Rishabraj InfraPvtLtd., 212, 2nd Floor, B Wing, Bldg No. 3, Hari Om Plaza, MG Road, Boravali (E), Mumbai-400066.
PAN/GIR No. : AADCV2975P		
Appellant	..	Respondent

Appellant by :	Ms.Riddhi Mishra.DR
Revenue by :	Mr.Karan Jain.AR

Date of Hearing	18.04.2023
Date of Pronouncement	24.04.2023

आदेश / O R D E R

PER PAVAN KUMAR GADALE JM:

The revenue has filed the appeal against the order of the Commissioner of Income Tax (Appeals)-48, Mumbai passed u/sec 250 of the Act. The revenue has raised the following grounds of appeal:

> *1. Whether on the facts and circumstances of the case and in law, the Ld CIT(A)-48, Mumbai is right in holding that no incriminating material was found to sustain the addition.*

2. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A)-48, Mumbai is right in deleting the entire additions of Rs.3,10,97,950/- made in the assessment order only on the ground that no incriminating material was found to sustain the addition without appreciating the facts that the assessment order was passed after carefully analysing the seized material and evidences found during the course of search and survey proceedings and seized..

3. "Whether on the facts and circumstances of the case and in law, the LdCIT(A)-48, Mumbai is right in deleting the entire additions of Rs. 3,10,97,950/- made in the assessment order without appreciating the facts that the identity, genuineness and creditworthiness of the lenders were not established after giving ample opportunity to the assessee".

4. Whether on the facts and circumstances of the case, and in law, the Ld.CIT(A)-48; Mumbai is right in allowing the appeal filed by the assessee by relying on the decision of the Hon'ble Bombay High Court in the case of CIT VS. Continental Warehousing Corporation[2015 374 ITR 645] ignoring the fact that, appeal is pending before the Hon'ble Supreme Court of India on this issue of 'power conferred by section 153A of the Act' which was not adjudicated upon',

2. The Brief facts of the case are that, the assessee company is engaged in the business of builders, developers, contractors, designers, architects, decorators, consultants, constructors and broker of all types of building and structures. The assessee has

filed the return of income for the A.Y 2015-16 on 01.10.2015 disclosing a total income of Rs. 14,38,500/-. The search operations conducted on the GM and Gold Medal group on 13-11-2019 and the asssessee was also covered. Subsequently the assessee was issued notice u/s 153C of the Act on 31.07.2021 and incompliance to notice the assessee has filed the return of income on 02.09.2021 disclosing a total income of Rs. 14,38,500/-. Subsequently the Assessing Officer (AO) has issued notice u/s 143(2) and 142(1) of the Act, incompliance to the notice the assessee has furnished the details and submissions. The AO on perusal of the financial statements found that during the F.Y.2014-15 the assessee has received unsecured loans from(i) Aldia Gems Pvt Ltd of Rs.1,05,00,000/-(ii) Jintan Vanijya Pvt Ltd of Rs.85,00,000/- and (iii) Subhmangal Sales Pvt Ltd of Rs.1,20,00,000/-.The AO found that the assessee could not established the identity, creditworthiness and genuineness of the lenders and has issued show cause notice and incompliance the assessee has filed a letter dated 23.09.2021 with explanations and evidences of income tax returns,

bank statements, financial statements, confirmation and form no 16A. The assessee has submitted the Audited financial statements and others evidences to substantiate the creditworthiness, identity and genuineness of the loan creditors. The AO has dealt independently on the unsecured loan creditors and is of the opinion that the companies does not have proper financial status and the assessee has failed to establish the identity, creditworthiness and genuineness of the lenders. Finally the A.O was not satisfied with the evidences/information and made addition of unsecured loans and interest under section 68 of the Act and estimated commission expenditure @.25% on loans which worked out to Rs.77,500/- and assessed the total income of Rs.3,25,36,450/-and passed the order u/s 143(3) r.w.s 153C of the Act dated 24.09.2021.

3. Aggrieved by the order, the assessee has filed an appeal with the CIT(A), The CIT(A) has considered the submissions, details and relied on the various judicial decisions and finally concluded that the assessment u/s 143(3) r.w.s 153C of the Act and the additions of unsecured loans, interest and commission

expenditure cannot survive as they found in the regular books of accounts and not from any incriminating material found therefore the provisions of sec 153C of the Act does not attract and the order passed by the AO is devoid of merits and quash the assessment order and allowed these grounds of appeal and partly allowed the assessee appeal. Aggrieved by the order of the CIT(A), the revenue has filed the appeals before the Honble Tribunal.

4. Whereas, the Ld. DR submitted that the CIT(A) has erred in quashing the assessment order and not considered the findings of the AO in deleting the additions on the ground that no incriminating material was found in the course of search relying on the judicial decisions and the revenue has filed the SLP in the case of Honble Bombay High court decision and the same is pending and prayed for allowing the revenue appeal.

5. Per Contra, the Ld. AR has submitted that the additions are deleted by the CIT(A) relying the on decisions of Hon'ble Bombay High Court in the absence of incriminating material and the

assesseement is unabated. The Ld.AR substantiated the submissions with the paper book, judicial decisions and supported the order of the CIT(A).

6. We heard the rival submissions and perused the material on record. The sole grievance of the revenue that the CIT(A) has erred in holding that no incriminating material was found to sustain the additions. Further the CIT(A) has deleted the entire addition of Rs.3,10,97,950/- which includes unsecured loans, interest on loans and the estimated commission expenditure on the sole ground that no incriminating material was found and overlooked the findings of the assessing officer. Further the Ld.DR mentioned that the assessee could not substantiate before the AO on the identity, genuineness and creditworthiness of the lenders and the decision of the Honble High Court relied by the CIT(A) is challenged by the revenue before the Hon'ble Supreme Court and is pending. At this juncture, we consider it appropriate to refer to the findings of the CIT(A) in granting the relief at Page 5 Para8 to 8.16 of the order relying on the judicial decisions as under:

8. Ground of Appeal No. 5: First the ground of appeal no. 5 is taken up which is purely legal in nature. The ground reads as under-

5. On the facts and in the circumstances of the case and in law, the Learned Assessing Officer has erred in treating the corresponding loan from 3 parties as non-genuine solely on the basis of the general information received from the Mumbai Investigation Directorate, without making any independent enquiries, and confronting the Appellant with any specific incrirninating document relevant to his case;

8.1 In ground no. 5 the appellant has objected to the initiation of assessment u/s 153Cof the Act, solely on the basis of the general information received from the Mumbai Investigation Directorate, without making any independent enquiries, and confronting the appellant with any specific incriminating document relevant to his case. According to the Ld. AR of the appellant, this being completed assessment, no interference can be made in the absence of incriminating material unearthed during search as held in the case of Continental Warehousing Corporation (Nhava Sheva) Ltd. (2015) 374 ITR 645 Bombay)

Decision on Ground No. 5:

8.2 I have carefully considered the facts of the case, submissions of the Appellant, the observations of the AO contained in the assessment order and other material on record on this issue. In thesgrounds, the Ld. AR of the appellant has contended that the assessment order passed u/s 153A r.w.s 143(3) of the Act for the impugned assessment year is bad in law as -

i. the assessment is based solely on the basis of the general information received from the Mumbai Investigation Directorate

ii there were no assessment proceedings pending as on the date of search action u/s 132 of the Act which is a prerequisite for assessing the income escaped to tax u/s 153C of the Act.

(iii) there is no specific incriminating document relevant to his case and as such no nexus between the additions made in the assessment order to that of incriminating material found/seized pursuant to the search action.

8.3 The sum and substance of this ground raised by the appellant is that the additions made in the assessment order are not based on or connected with any incriminating documents found or seized during the search proceedings.It is purely based on general information received from the Mumbai Investigation Directorate. Moreover, as on the date of search action u/s 132 of the Act, there were no pending assessment proceedings for the impugned AY, which got abated.

8.4 When the AO's findings, in the assessment order, are carefully examined, it is observed that the AO has failed to point out any incriminating material found and/or seized during the search action in the case of appellant's group, based on which the impugned additions for AY 2015-16were made. The Ld. AR, on the other hand, has emphatically stated that the impugned additions made during the AY 2015-16are nowhere connected with any material found/seized during the course of search action at the premises of the appellant's group concerns. It is evident from the assessment order that the AO has not

referred to any seized (material found during the course of search to make the impugned additions AY 2018-19. The return of income, in this case was filed on 01.10.2015. The due date for issuing noti ce u/s 143(2) was 30.09.2016, which had already expired on the date of search i_e., 13.11.2019. Since, the proceedings for A.Y. 2015-16 had not abated, the contention of the Ld. AR that the AO was empowered to make additions based on the incriminating material found and seized during the course of search operation, appears to be true, as held in a no. of judicial decisions including the decisio n of jurisdictional High Court

8.5 Before proceeding further, it is necessary to apprise with the legal principles settled by Hon'ble Jurisdictional High Court and other Courts on this issue. The Hon'ble Bombay High Court in the case of CIT vs. Continental Warehousing Corporation [374 ITR 645], has held that when the assessment has attained finality, then the AO while passing the independent assessment order u/s 153A of the Act can't disturb the assessment / reassessment order which has attained finality, unless the materials gathered in the course of the proceedings u/s 13 2 of the Act establish that the reliefs granted under the finalized assessment/reassessment were contrary to the facts unearthed during the course of search operation.

8.6 The aforesaid ratio was again reiterated by the Hon'ble Bombay High Court in the case of Pr. CIT vs Vimal Kumar Rathi 115 Taxmann.com 219 (2020). In the said judgment, Hon'ble Court has relied upon it's own judgment in CIT v. Deepak Kumar Agarwal [2017] 86 taxmann.com 3 (Bom.) In the latter case, the question put before the Hon'ble Court was-

(i) Whether on the facts and in the circumstance of the case and in law, the Tribunal was justified in holding that assessment under section 153A could be made only on the basis of incriminating material found in the search and no other issue could be taken following the decision of the Special Bench of the Mumbai Tribunal rendered in the case of All Cargo Global Logistics Ltd. vDy. CIT[2012] 23 taxmann.com 103/137 ITD 287, when the said decision had been disapproved by the Karnataka High Court.

Hon'ble Jurisdictional High Court took the stand in the following manner-

30. The Tribunal concluded that the arguments relating to the validity of the notice under Section 153A and though that provision could have been invoked in the given facts and circumstances, but the additions made by the Assessing Officer were in the absence of any incriminating material. Therefore, they are not sustainable and they came to be deleted.

31. We do not think that any view other than the one taken by the Division Bench of this Court in the case of SKS Ispat& Power Ltd. (supra) or the reported judgment in Continental Warehousing Corpnand All Cargo Global Logistics Ltd. (supra) can be taken."

8.7 Furthermore, a similar view has been taken by the Hon'ble Bombay High Court (Nagpur Bench) in case of Murli Agro Products Ltd Vs. CIT [2014] 49 taxmann.com 172 (Bombay) - In this case the Bombay High Court held that no addition can be made in respect of an unabated assessment which has become final if no incriminating material is found during the search. The relevant extract of the decision is reproduced hereunder:

"Once it is held that the assessment finalized on 29.12.2000 has attained finality, then the deduction allowed u/s 80HHC would attain finality. In such a case, the AO, while passing the independent assessment order u/s 153A could not have disturbed the assessment order which has attained finality, unless the materials gathered in the course of the proceedings u/s 153A establish that the reliefs granted under the finalized assessment were contrary to the facts unearthed during the course of s. 153A proceedings. In the present case, there is nothing on record to suggest that any material was unearthed during the search or during the s153A proceedings which would show that the rellef u/s 80HHC was erroneous. In such a case, the AO, while passing the assessment order u/s 153A could not have disturbed the assessment order finalised on 29.12.2000 relating to s.. 80HHC deduction."

This view was upheld in another decision of the Hon'ble Bombay High Court in CIT v. Gurinder Singh Bawa [2016] 386 ITR 483/[2017] 79 taxmann.com 398which is mentioned in the appellant's submission and not being reproduced again for the sake of brevity.

8.8 Reliance in this regard, is also placed on the Mumbai Special Bench decision in case of All Cargo Global Logistics Ltd vs. DIT (2012] 23 taxmann.com 103 (Mum.) (SB), wherein it was held by the Hon'ble Tribunal that in case of completed assessments the assessment u/s. 153A of the Act has to be made on incriminating material only.

The relevant extract of the case is as under:

"(i) In assessments that are abated, the AO retains the original Jurisdiction as well as the jurisdiction conferred on him by s. 153A for which assessments shall be made for each of the 6 assessment years separately; In other

cases, in addition to the income that has already been assessed, the assessment u/s 153A will be made on the basis of incriminating material i.e. (a) the books of accounts and other documents found in the course of the search but not produced in the course of original assessment and (b) undisclosed income or property disclos ed in the course of search."

The said extract clearly brings out the essence of assessment to be carried out u/s. 153A of the Act, and makes it clear that only incriminating material can form the basis of assessment u/s. 153A of the Act. In the present case of the appellant too, no incriminating material has been found. Thus, the argument of the appellant that the impugned search assessment u/s. 153A of the Act is bad- in-law and void, has got merit.

The aforesaid decision in case of All Cargo Global Logistics Ltd has been upheld by the Hon'ble Bombay High Court vide its order dated 21.04.2015.

8.9 It is further observed that Hon'ble Supreme Court in the case of PCIT vs Meeta Gutgutia [2018] 96 taxmann.com 468 (SC) has dismissed the appeal filed by the Department against the decision of Hon'ble Delhi High Court [in [2017] 82 taxmann.com 287 (Delhi)]. The head note and catch note of the decision of Hon'ble Apex Court is as under-

IT: Invocation of section 153A to re-open 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 year: SLP dismissed

I. Section 153A of the Income-tax Act, 1961 - Search and seizure (General principles) - Assessment years 2001-02

to 2003-04 and 2004-05 - High Court in impugned order held that invocation of section 153A to re-open 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 year - Whether SLP against said decision was to be dismissed - Held, yes [Para 2] [In favour of assessee]

8.10 Similar judicial pronouncements have been made by the Hon'ble Delhi High Court in CIT Central-III vs. Kabul Chawla,380 ITR 573(Del). The Hon'ble Delhi High Court in the case ofPr. CIT vs. Meeta Gutgutia [supra], has affirmed the view that no addition can be made for a particular assessment year without there being an incriminating material that relates to the said assessment year which would justify such an addition. As stated above, the Hon'ble Supreme Court in the case of PCIT Vs. MeetaGutgutia(supra) has dismissed the SLP in the case and thus upheld the decision of Hon'ble Delhi High Court that invocation of section 153A to re-open 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 year. As noted by the Hon'ble Delhi High Court in the case of MeetaGutgutia (supra), several other High Courts have also come to a similar conclusion either by following Kabul Chawla (supra) or otherwise. This includes the decisions of the Hon'ble Gujarat High Court in Pr. CIT v. Soumya Construction (P) Ltd. [2016] 387 ITR 529/[2017] 81 taxmann.com 292 (Guj.); Pr. CIT vDevangi alias Rupa [Tax Appeal Nos. 54, 55 to 57 of 2017 dated 2-2-2017]; the Hon'ble Karnataka High Court in CIT vIBC Knowledge Park (P.) Ltd. [2016] 385 ITR 346/69 taxmann.com 108 (kar); the Hon'ble Kolkata High Court in

Pr. CIT vSalasar Stock Broking Ltd. [GA No. 1929 of 2016, dated 24-8- 2016], Principal CIT. Ms. Lata Jain [2016] 384 ITR 543 (Delhi)In Meeta Gutgutia (supra) the entire gamut of the case law had been analysed and the legal position was reiterated that unless there is incriminating material qua each of the AYs in which additions are sought to be made, pursuant to search and seizure operation, the assumption of jurisdiction under Section 153A of the Act would be vitiated in law.

8.11 The Hon'ble Gujarat High Court in the case of Saumya Construction Pvt. Ltd. (supra) in paragraph Nos. 15, 16 and 19 has observed and held as under: 15. On a plain reading of section 153A of the Act, it is evident that the trigger point for exercise of powers thereunder is a search under section 132 or a requisition under section 1.32A of the Act. Once a search or requisition is made, a mandate is cast upon the Assessing Officer to issue notice under section 153A of the Act to the person, requiring him to furnish the return of income in respect of each assessment year falling within six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made and assess or reassess the same. Since the assessment under section 153A of the Act is linked with search and requisition under sections 132 and 132A of the Act, it is evident that the object of the section is to bring to tax the undisclosed income which is found during the course of or pursuant to the search or requisition. However, instead of the earlier regime of block assessment whereby, it was only the undisclosed income of the block period that was assessed, section 153A of the Act seeks to assess the total income for the assessment year, which is clear from the first proviso thereto which provides that the Assessing Officer shall

assess or reassess the total income in respect of each assessment year falling within such six assessment years. The second proviso makes the intention of the legislature clear as the same provides that assessment or reassessment, if any, relating to the six assessment years referred to in the sub-section pending on the date of initiation of search under section 132 or requisition under section 132A, as the case may be, shall abate. Sub-section (2) of section 153A of the Act provides that if any proceeding or any order of assessment or reassessment made under sub-section (1) is annulled in appeal or any other legal provision, then the assessment or reassessment relating to any assessment year which had abated under the second proviso would stand revived. The proviso thereto says that such revival shall cease to have effect if such order of annulment is set aside. Thus, any proceeding of assessment or reassessment falling within the six assessment years prior to the search or requisition stands abated and the total income of the assessee is required to be determined under section 153A of the Act. Similarly, sub-section () provides for revival of any assessment or reassessment which stood abated, if any proceeding or any order of assessment or reassessment made under section 153A of the Act is annulled in appeal or any other proceeding.

16. Section 153A bears the heading Assessment in case of search or requisition. It is well settled as held by the Supreme Court in a catena of decisions that the heading of the section can be regarded as a key to the interpretation of the operative portion of the section and if there is no ambiguity in the language or if it is plain and clear, then the heading used in the section strengthens that meaningFrom the heading of section 153, the intention of the legislature is clear viz., to provide for

assessment in case of search and requisition. When the very purpose of the provision is to make assessment in case of search or requisition, it goes without saying that the assessment has to have relation to the search or requisition. In other words, the assessment should be connected with something found during the search or requisition, viz.incriminating material which reveals undisclosed income. Thus, while in view of the mandate of sub- section (1) of section 153A of the Act, in every case where there is a search or requisition, the Assessing Officer is obliged to issue notice to such person to furnish returns of income for the six years preceding the assessment year relevant to the previous year in which the search is conducted or requisition is madeany addition or disallowance can be made only on the basis of material collected during the search or requisitionIn case no incriminating material is foundas held by the Rajasthan High Court in the case of Jai Steel (India)Jodhpur vAssistant Commissioner of Income Tax (supra)the earlier assessment would have to be reiteratedIn case where pending assessments have abated, the Assessing Officer can pass assessment orders for each of the six years determining the total income of the assessee which would include income declared in the returns if any, furnished by the assessee as well as undisclosed income, if any, unearthed during the search or requisition In case where a pending reassessment under section 147 of the Act has abated, needless to state that the scope and ambit of the assessment would include any order which the Assessing Officer could have passed under section 147 of the Act as well as under section 153A of the Act.

19. On behalf of the appellant, it has been contended that if any incriminating material is found, notwithstanding

that in relation to the year under consideration, no incriminating material is found, it would be permissible to make additions and disallowance in respect of all the six assessment years. In the opinion of this court, the said contention does not merit acceptance, inasmuch as, the assessment in respect of each of the six assessment years is a separate and distinct assessment. Under section 1 53A of the Act, an assessment has to be made in relation to the search or requisition, namely, in relation to material disclosed during the search or requisition. If in relation to any assessment year, no incriminating material is found, no addition or disallowance can be made in relation to that assessment year in exercise of powers under section 153A of the Act and the earlier assessment shall have to be reiterated. In this regard, this court is in complete agreement with the view adopted by the Rajasthan High Court in the case of Jai Steel (India), Jodhpur v. Assistant Commissioner of Income Tax (supra)Besides, as rightly pointed out by the learned counsel for the respondent, the controversy involved in the present case stands concluded by the decision of this court in the case of Commissioner of Income-tax-1 v. JayabenRatilalSorathia (supra) wherein it has been held that while it cannot be disputed that considering section 153A of the Act, the Assessing Officer can reopen and/or assess the return with respect to six preceding years; however, there must be some incriminating material available with the Assess ing Officer with respect to the sale transactions in the particular assessment year."

8.12 The Hon'ble Delhi High Court in the case of PCIT, Central-3 vs Allied Perfumers (P.) Ltd. [2021] 124 taxmann.com 358 (Delhi) has reiterated the aforesaid position of law with following findings

"12. We have duly considered the contentions advance by Mr. Maratha, however, are unable to agree with him. The ITAT, after perusing the relevant records, including the orders passed by the Revenue Authorities, observed as follows:

10."... We find that the additions made by the AO are beyond the scope of section 153C of the Income-tax Act, 1961, because no incriminating material or evidence had been found during the course of search so as to doubt the transactions. It was noted that in the entire assessment order, the AO has not referred to any seized material or other material for the year under consideration having being found during the course of search in the case of assessee, leave alone the question of any incriminating material for the year under appeal We also find that the case laws cited by the Ld. CIT(DR) are not relevant to the present case Therefore, in our considered opinion, the action of the AO is based upon conjectures and surmises and hence, the additions made is not sustainable in the eyes of law, because this issue in dispute is now no more res-integra, in view of the decision dated 29-8-2017 of the Hon'ble Supreme Court of India in the case of Commissioner of Income Tax- III, Pune v. Sinhgad Technical Educational Society reported in (2017) 84 taxmann.com 290 (SC) as well as the decisions of the Hon'ble Delhi High Court passed in the case Commissioner of Income-tax v. Kabul Chawla reported (2016) 380 ITR 573 (Del.) and in the case of Principal Commissioner of Income-tax (Central) -2 v. Index Securities (P) Ltd

11. Respectfully following the precedents as aforesaid, as aforesaid, we quash the assessment made u/s.153(C)/143(3) of the IT. Act, 1961 and decide the

legal issue in favour of the Assessee and accordingly, allow the Cross Objection filed by the assessee.

12. Following the consistent view taken in the assessment year 2001-02 in the Assessee's Cross objection, as aforesaid, the another Cross objection filed by the Assessee relating to assessment years 2002-03 also stand allowed."

13. Upon reading of the aforesaid extracted portion of the impugned order, it is clearly discernible that the ITAT has given a finding of fact that the assessments make no reference to the seized material or any other material for the years under consideration that was found during the course of search, in the case of the assessee. Mr. Maratha is also unable to point out any incriminating material related to the assessee which could justify the action of the Revenue Merely because a satisfaction note has been recorded, cannot lead us to reach to this conclusion, especially when the Revenue has not laid any foundation to support their contention. In the factual background as explained above, the assumption of jurisdiction under section 153C cannot be sustained in view of the decision of this Court in the case of Kabul Chawla (supra)."

8.13 Hon'ble Mumbai Tribunal in the detailed order dated 02.11.2021 in the case of Jasmin K. Ajmera vs DCIT (ITA no. 983/Mum/2020) has extensively discussed every aspect of the issue concerned and held as under-

"Our findings and Adjudication 7. We have carefully heard the rival submissions and perused relevant material on record including the documents seized by the department from the assessee group during the course of search operations. We find that the assessee had filed

original return of income on 20/07/2011 and search operations were carried out on assessee group on 25/07/2013It is quite evident that or the date of search, no assessment proceedings were pending against the assessee and no notice u/s 143(2) was ever issued to the assessee till the date of search. The time limit for issuance of such notice had already expired on 30/09/2012 i.e., within 6 months from the end of relevant assessment year. Thus, AY 2011-12 was a non-abated year. In such a case, the additions which could be made has necessarily to be on the basis of incriminating material found by the department during the course of search operations as held by Hon'ble Bombay High Court in CIT V/S Continental Warehousing Corporation [2015 374 ITR 645]. In other words, unless any incriminating material was unearthed, no additions could be sustained in the hands of the assessee. So far as the arguments of revenue that intimation u/s 143(1) would not constitute an assessment, is concerned, we find that the factual matrix in decision rendered by Hon'ble Bombay High Court in CIT V/s Gurinder Singh Bawa (79 taxmann.com 398 05/10/2015) was similar wherein the original return was processed u/s 143(1) and the time limit for issuing notice u/s 143(2) had already expired. The Hon'ble Court chose to follow its own decision rendered in CIT Vs. Continental Warehousing 11 Corporation [2015 374 ITR 645]Therefore, this argument would not hold much water which is also fortified by 8mar Agarwal (398 ITR 586 11/09/2017) which held as under: -

20. At the outset, and since heavy reliance is placed by the Revenue on the Supreme Court judgment in Rajesh Jhaveri Stock Brokers (P.) Ltd. (supra), it would be proper to note the facts in the same. 21. There, the Assistant Commissioner of Income Tax challenged the correctness of

the decision rendered by a Division Bench of the Gujarat High CourtThat Division Bench judgment allowed the Writ Petition/Special Civil Application of the assessee. 22The respondent-assessee, a private limited company, filed its return of income for the assessment year 2001-2002 on October 30, 2001, declaring total loss of Rs.2,70,85,105/-. That return was proposed under Section 143(1) of the IT Act accepting the loss returned by the respondent. A notice was issued under Section 148 of the IT Act on the ground that the claim of bad debts as expenditure was not acceptable. On 12th May, 2004, a return of income declaring the loss at the same figure as declared in the original return was filed by the respondent-assessee under protestA copy of the reasons recorded was furnished by the Revenue on the request of the assessee sometime in November, 2004. The assessee raised various objections, both on jurisdiction and the merits of the subject matter recorded in the reasons. The Revenue disposed of these objections on 4th February, 2005 holding that the initiation of reassessment proceedings was valid and it had jurisdiction to undertake such an exercise. The notice under Section 148 of the IT Act dated 12th May, 2004 was challenged by the respondent-assessee. 23. That Writ Petition was allowed and hence, the Revenue was in Appeal. 24. Mr. Ahuja's argument overlooks this factual aspect and when he relies upon the observations of the Hon'ble Supreme Court, and particularly in paragraph 13, he forgets that they were made in the context of a challenge to the notice under Section 148 of the IT Act. The Supreme Court, in paragraph 13 of this judgment, noted that intimation under Section 143(1)(a) was given without prejudice to the provisions of Section 143(2). Though technically this intimation issued was deemed to be a demand notice issued under Section 156, that did not per se preclude the

Assessing Officer to proceed under Section 143(2). The right preserved was not taken away. The Hon'ble Supreme Court referred to the period between April 1, 1989 and March 31, 1998, and the second proviso to Sub-section (1) Clause (a) of Section 143 and its substitution with effect from 1st April, 1998The sending of intimation between 1st April, 1998 and 31st May, 1999 under Section 143(1)(a) was mandatory. That requirement continued until the second proviso was substituted by the Finance Act, 1997, which was operative till 1st June, 199925. The Hon'ble Supreme Court therefore, relied upon these amendments and, tracing their history, held that the intimation under Section 143(1)(a) cannot be treated to be an order of assessment. That is how it referred to the Division Bench Judgment of the High Court at Delhi and explained the legal position There was thus no assessment under Section 143(1)(a) and therefore, the question of change 12 of opinion did not arise. A reference to Section 147 therefore, was made in the context of the Assessing Officer being authorized and permitted to assess or reassess income chargeable to tax if he has reason to believe that income for any assessment year has escaped assessment. Before us, such is not the position, and even if this judgment of the High Court had been brought to the notice of the Division Bench deciding the Continental Warehousing Corpan. and All Cargo Global Logistics (supra), there would not have been any difference. Similar view has been expressed by Hon'ble Delhi High Court in CIT Vs. Kabul Chawla (380 ITR 573).

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 materialThe 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 as-sessee. Nothing has been 13 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 on 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 retractedwould 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 / 14 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 15 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 CShah. 11We 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. SmtReena 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. 14.3(1) of the Act on 21 .09.2011. Accordingly, the time limit to issue notice u/s. 143(2) expired or 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 reassessment proceeding pending as on the date of searchTherefore, 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: - 16 (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 searchTherefore, 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 17 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.

8. The Hon'ble Delhi High Court followed this decision in the case of CIT RRJ Securities Ltd., [380 ITR 612]15. The Hon'ble Delhi High Court in the case of Pr.CIT v. MeetaGutgutia (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 I 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 18 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 assesse 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 assesseeIn our opinion, it cannot be said that those statements on the basis of which impugrzed 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 retract ed 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."

19 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."

11. 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."(emphasis supplied)

8.14 In yet another recent judgment Hon'ble ITAT, Mumbai Bench in the case of Mr. Jay Ketan Parikh in ITA Nos. 1955 & 1956/M/2020 dated 07.04.2021 has held as under-

14. We have heard the rival submissions of both the parties and perused the material on record including the orders of authorities below and various decisions cited by both the sides. We note that the department has received information in the form of base note from French government under DTAA containing information that assessee is beneficiary of foreign bank accounts in HSBC Bank (Suisse) SA Geneva Switzerland It is undisputed that during the course of search proceedings on the assessee no incriminating materials in respect of assessee being a beneficial owner of bank accounts in HSBC Bank (Suisse) SA Geneva Switzerland were found The assessee also denied in the statement recorded under section 132(4) of the Act that he was beneficial owner of the foreign bank accounts held in HSBC Bank by 4 companies as mentioned elsewhere in this orderIn the instant case, the assessee filed the return of income

under section 139(1) of the Act on 16.10.2006 whereas the search was conducted under section 132(1) of the Act on 08.08.2011. Thus the time limit for issue of notice under section 143(2) of the Act expired on 31.10.2007 meaning thereby that no assessment was pending for the instant year on the date of search and therefore the present assessment year has not abated. It is also a settled position of law that any addition in a non abated assessment year can only be made on the basis of incriminating material found during the course of search and not otherwise. We find that during the course of search no such incriminating material was found by the search team. We have also perused the order of La. CIT(A) wherein Ld. CIT(A) has noted that the addition made by the AO was based upon incriminating documents in the form of base note as received from French authorities under DTAA, statement of assessee recorded under section 132(4) of the Act during search and material gathered in post search proceedings like HSBC Bank (Suisse) SA Geneva letter and Additional DIT(Inv.) Mumbai's letter to HSBC Bank (Suisse) SA Geneva etc. Now the issue before us whether the base note or statement recorded during search u/s 132(4) of the Act or material gathered during post search proceedings constitute incriminating materials found during search or not. We have perused the facts on records and after analyzing them in the light of various decisions of tribunal and Hon'ble High Courts we opine that such materials/evidences cannot be said to found during the course of search. We further find merits in the contentions of the assessee that materials has to be found during search and it has to be incriminating which was not the case before us. Therefore, we are not in agreement with the conclusion drawn by the Ld. CIT(A) on this issue. We note that base note was available with the revenue

authorities before the date of search and search was, in fact, carried out on the basis of said base note and therefore same cannot be construed or considered as incriminating evidence found during the course of search in order to make the addition in an unabated assessment year. The case of the assessee is supported by the following three decisions of the coordinate benches of the tribunal:

In the case of DCIT vs. Arunkumar Mehta (supra) wherein the co- ordinate bench of the Tribunal has held as under:

"6. We have heard both the parties perused the material available on record and gone through orders of the authorities below We have also carefully considered case laws relied upon by both the parties. We find that an identical issue had been considered by the co-ordinate bench of ITAT, Mumbai 'A' Bench in assessee own case for AY 2006-07 in ITA No. 3712/Mum/2017, where the Co-ordinate Bench, after considering relevant facts and also by following the decision of Hon'ble Bombay High Court, in the case of CIT vs Murali Agro Product. Ltd, deleted additions made by the AO. The relevant findings of the Tribunal are as under:

"16. We have heard both the parties perused the material available on record and gone through the orders of authorities below. The facts born out from the record clearly established that assessment for the impugned assessment year is unabated as on the date of search i.e. 25/08/2011, because the assessment for the impugned assessment year was completed u/s 143(1) of the Act, and the time limit for issue of notice u/s 143(2) of the Act, had been expired on 30/09/2007. It is an admitted fact that during the course of search in the case of the assessee, no incriminating material was found in respect

of undisclosed bank account maintained at HSBC Bank, at Geneva in the name of Ruby Enterprises Inc. and White Cedar Investment Ltd. Although, certain incriminating material and undisclosed asset was four ad during the course of search in respect of silver articles and gold jewellery received from various people on the occasion of engagement of grandson of the assessee and the assessee has accepted undisclosed income in respect of silver articles and gold jewellery for AY 2012-13 but it is true that nothing was found in respect of HSBC Bank account. From this, it is abundantly clear that nothing was found and seized during the course of search in respect of HSBC Bank account under the name of Ruby Enterprises Inc and White Cedar. Investment Ltd. This fact has been admitted by the AO in assessment order at para 7.1 on pages 12 and 13. Further, the assessee has denied having any bank account with HSBC Bank (Suisse) SA Geneva. In fact, the assessee clairns to have not aware of facts and contents in Base Note received from the French Government under DTAA between two countries........

18. In the above legal background, if you examine the facts of the present case, we found that the assessment for the impugned assessment year is unabated as on the date of search, which is because the assessment for the impugned year has been completed u/s 143 (1)of the Act, and the time limit for issue of notice u/s 143(2) was expired much before the date of search i.e. 25/08/2011. It is also an admitted fact that the addition made by the AO is not supported by any incriminating material found as a result of search. In fact, the AO made additions on the basis of 'Base Note' received by the government of India under exchange of information between French Government and Indian Government under the provisions

of DTAA, and said Base Note was received prior to search. The sole reason for conducting search in the case of the assessee is information received from French Government in the form of Base Note with regard to undisclosed bank account in HSBC Bank Geneva. Therefore, we are of the considered view that the additions made by the AO is merely based on Base Note which is not found as a result of search or requisition and consequently the additions made by the AO in assessment order passed u/s 153A of the Actconsequent to searchin absence of any incriminating material found as a result of search is bad in law and liable to be deleted. This legal proposition is supported by the decision of the jurisdictional High Court of Bombay in the case of Continental Warehousing Corporation (Nhava Sheva) Ltd vs CIT (supra), where the court held that no additions can be made in respect of assessments which have become final if no incriminating material is found during the course of search. This legal proposition is further supported by the decision of division bench of the Hon'ble Bombay High Court in the case of Murali Agro Products Ltd vs CIT (2014) 49 taxman.com 72, wherein it was held that no additions can be made in respect of unabated assessment which have become final, if no incriminating material is found during the course of searchThis legal proposition is further reiterated by various High Courts, including the jurisdictional High Court in the case of CIT vs Gurinder Singh Bawa 386 ITR 483(Bom), where it was held that once an assessment has attained finality for a particular year i.e. it is not pending, then the same cannot be subject to tax in proceedings under section 153A of the Act."

• *Similar ratio has been laid down in the case of Shri BiswanathGarodia vs. DCIT (supra)The operative part whereof is reproduced as under:*

"2.......... During the course of search, books of account, jewellery, etc. were found besides some cash. The statement of the assessee was recorded under section 131 of the Act, wherein he admitted of having maintained a Bank Account in HSBC Bank (Suisse) SA Geneva, Switzerland. He also admitted that the said Bank Account was opened on 07.06.1999 and his wife Smt. UshaGarodia was an authorized person to operate the said account maintained in his name. He further accepted that the money deposited in the said account represented the proceeds of his export business and agreed to pay income-tax, if any, due thereon. He also pointed out that the said Bank Account was closed sometime ago and there was no balance in the said account on the date of recording of his statement.......... 8 We have considered the rival submissions and also perused the relevant material available on record......

11. Keeping in view the discussion made above, we hold that the additions as finally made to the total income of the assessee on account of transactions reflected the Bank account of the assessee with HSBC Bank (Suisse) SA Geneva, Switzerland and income relating thereto for both the years under consideration are beyond the scope of section 153A as the assessments for the said years had become final prior to the date of search and there was no incriminating material found during the course of search to support and substantiate the said addition. The said additions made for both the years under consideration are, therefore, deleted allowing the relevant grounds of the assessee's appeals"

In the case of Yamini Agarwal vs. DCIT (supra) the coordinate bench of the Tribunal has also held that specific information received from HSBC from French Government with regard to HSBC account at Geneva, Switzerland can not be considered incriminating material found at the time of search. The operative part is as under:

"23. It is not in dispute before us that with respect to the additions made during the course of assessment proceedings u/s.153A of the Act, there was no incrir inating material found at the time of search and that the AO while concluding the assessment u/s.153A of the Act dealt with the HSBC Bank Account at Geneva, Switzerland on receipt of specific information from sources, which are not disclosed but admittedly not found or discovered as a result of search conducted u/s.132 of the Act on the Assessee.

24. We are of the view that the proposition canvassed by the learned counsel for the Assessee finds support from the various decisions cited by .We are of the view that the view expressed by the Hon'ble Bombay High Court and the Hon'ble Delhi High Court has to be followed being views in favour of the Assesseein the facts and circumstances of the present case.

25We therefore hold that the scope of the proceedings u/s.153A in respect of assess ment year for which assessment have already been concluded and which do not abate u/s.153A of the Act, that the assessment will have to be confined to only incriminating material found as a result of search..........

After taking into account the facts of the instant case and the decisions of the coordinate benches as discussed above, we are inclined to set aside the findings of the Ld. CIT(A) on this issue and hold that base note as received from the French authorities is not an incriminating material and therefore addition made on the basis of base note cannot be sustained.

15. We also note that Ld. CIT(A) has held that the statement recorded of the assessee under section 132(4) of the Act during the search on 08.08.2011 constituted the incriminating material. In our considered opinion, the findings of the ld CIT(A) that statement recorded during search constitutes incriminating material is also not correct as the same can not be said to be found during the course of search but is recorded to elicit more information/explanation of the searched person on the incriminating documents/gold/jewellery found during search. Therefore after perusing the material on record and considering rival contentions and also the decisions cited before us, we are of the considered view that a statement recorded during the course of search cannot be considered an incriminating material in order to make addition in an unabated assessment year. The case of the assessee is supported by the decision of the co-ordinate bench of the Tribunal in the case of DCIT vs. Shivali Mahajan & others (supra). The relevant paras are reproduced below:

"3……. During the course of search, statement of Shri Lalit Mahajan i.e., the assessee in appeal No.5590/Del/2015 was recorded, in which, he admitted of cash investment by him and other family members in respect of booking of space in Indirapuram Habitat Centre……

7. Learned DR, on the other hand, stated that during the course of search of Aerens Group who is the builder and developer of Indirapuram Habitat Centre.. That the statement under Section 132(4) has a legal Page 31 of 36 M/s Rishbraj Infra Pvt.Ltd.AY:2015-16 CIT(A)-48, Mumbai/10638/2014-15 sanctity and that by itself constitutes an evidenceand addition can be made on the basis of assessee's statement............

9. We have carefully considered the arguments of both the sides and perused the materia placed before usAfter considering the facts of the case and the rival submissions, we find that in these appeals, following two questions arise for our consideration:

(i) Whether any material found in the search of any other person than the assessee in appeal can be considered in the assessment under Section 153A of the assessee.

(ii) Whether the addition can be made only on the basis of statement given by the assessee during the course of search.

16 Now, coming to question No.2, we find that this issue is also covered by the decision of Hon'ble Jurisdictional High Court in the case of Harjeev Aggarwal (supra) and Best Infrastructure (India) (P.) Ltd. (supra). In the case of Harjeev Aggarwal (supra)Hon'ble Jurisdictional High Court considered the evidentiary value of the statement recorded during the course of searchThe relevant portion is paragraph 19, 20 & 24, which are reproduced below for ready reference :-..

17. Thus, Hon'ble Jurisdictional High Court has held "The words "evidence found as a result of search" would not

take within its sweep statements recorded during search and seizure operations". Their Lordships further observed "However, such statements on a standalone basis without reference to any other material discovered during search and seizure operations would not empower the AO to make a block assessment merely because any admission was made by the assessee during search operation"In paragraph 24, their Lordships have mentioned about the prevailing practice of extracting statement by exerting undue influence or coercion by the search party. Though the above decision in the case of Harjeev Aggarwal is with reference to the meaning of undisclosed income u/s 158BB of the Income-tax Act, however, in our opinion, the above observation of Hon'ble Jurisdictional High Court would be squarely applicable while considering the evidentiary value of the statement while making the assessment u/s 153A

18. In the case of Best Infrastructure (India) (P.) Ltd. (supra), Hon'ble Jurisdictional High Court reiterated in paragraph 38 "Fifthlystatements recorded under Section 132(4) of the Act do not by themselves constitute incriminating material as has been explained by this Court in Harjeev Aggarwal".

16. Therefore, on this count also, we are not in agreement with the conclusion drawn by the Ld. CIT(A). In our considered view the statement recorded under section 132(4) of the Act cannot be considered as incriminating material found in the course of search

17. We also note that Ld. CIT(A) has also held that material gathered in post search proceedings such as HSBC Bank (Suisse) SA Geneva letter and Additional DIT(Inv.) Mumbai's letter to HSBC Bank (Suisse) SA Geneva also constitute incriminating materialIn this case,

we note that the assessee has suo-motto furnished before the revenue authorities in post search proceedings the HSBC Bank (Suisse) SA Geneva letter. Besides, the Additional DIT (Inv.) Mumbai wrote a letter to HSBC Bank (Suisse) SA Geneva seeking clarification during post such investigation whether such letter as furnished by the assessee was issued by HSBC Bank Geneva or not. This view of the Ld. CIT(A) also appears to be totally contrary to law and cannot be accepted. The case of the assessee finds support from the decision of Hon'ble Madras High Court in the case of CIT vs. PK Ganeswar (supra) wherein the Hon'ble High Court has held that no addition can be made on the basis of material gathered during post search investigation in an unabated assessment year. In this case, the assessee has furnished a letter from HSBC Bank (Suisse) SA Geneva on his own before the tax authorities which certainly, in our view, does not constitute an incriminating material on the basis of which addition could be made in the hands of the assessee. Therefore, this is an undisputed position of law that in case of unabated assessment year, no addition can be made in absence of any incriminating material found during the course of search. The viewv is supported by the decision of Hon'ble Jurisdictional High Court in the case of CIT vAll Cargo Global Logistics Ltd (supra) wherein it has been held that no addition can be made if no incriminating material was found during the course of search in an unabated assessment year which has attained fin ality on the date of search. The decisions cited by the ld DR were also perused carefully and find them not applicable to the facts before us.

In view of the above facts and circumstances of the case and various decisions as discussed above, we are inclined to set aside the order of Ld. CIT(A) on this issue

and direct the AO to delete the addition. The ground No.1 is allowed.

8.15 Conclusion-The aforesaid detailed discussion with respect to various judicial decisions cle arly laid down the following principles -

(i) the assessments which have been concluded u/s 143(3) of the Act and not pending at the time of search proceedings, do not abate.

(ii) for this purpose, intimation u/s 143(1) would constitute an assessment, relying on the decision of Hon'ble Bombay High Court in CIT V/S Gurinder Singh Bawa (79 taxmann.com 398)

(iii) the proceedings u/s 153A/153C of the Act do not empower the Assessing officer to re-adjudicate the settled issues again, unless fresh incriminating material for the relevant year is found during the course of search proceedings. the Assessing officer does not have jurisdiction to make additions/disallowances which are not based on relevant incriminating material found during the course of search proceedings. vin the case of completed/un-abetted assessments, where no incriminating material is found during the course of search, the assessment u/s 153A/153C of the Act is to be made on originally assessed/returned income and no addition or disallowance can be made de hors the incriminating evidences for the relevant yearare recovered during the course of search.

(vi) Any admission or confession needs corroboration with evidences. In order to make a genuine and legally sustainable addition on the basis of admission or

confession during search action, it is necessary that some incriminating material must have been found to correlate the undisclosed income with such statement.

(vii) Any statement recorded under section 132(4) cannot be considered as incriminating material found in the course of search as these are recorded to elicit more information/explanation of the search person on the incriminating documents/gold/jewellery found during search

8.16In the present case, additions have been made on account of Addition u/s.68 amounting to Rs 3,10,00,000/-, interest on the abovementioned loans amounting to Rs. 20,449/-u/s 69C and unexplained expenditure of Rs. 77,500/- u/s 69C on account of commission for arranging accommodation entries As stated above, the AO has not brought on record either through the assessment order or through remand report any incriminating document or material found or seized during the Search and Seizure action u/s 132 of the Act, which can be linked/correlated with the impugned additions made. Hence, only conclusion that can be drawn is that these figures germinate from the regular books of accounts and not from any incriminating material found during the search action which can be relevant to AY 2015-16. Considering the totality of the facts and circumstances, I am of the considered view that these additions cannot survive de hors the incriminating evidences as held in the above binding judicial decisions. The AO is accordingly directed to delete the impugned additions made in the assessment order. Thus, the ground of appeal no. 5 is allowed.

7. We considering the facts, circumstances, submissions and the ratio of judicial decisions

discussed find the that CIT(A) has dealt on the provisions of law, and catena judicial decisions and quashed the assessment order and the submissions of the Ld.AR are realistic and duly supported with the judicial decisions. We find that no incriminating material was found during the search in respect of undisclosed income where the A.O has made the addition u/s 68 of the Act. We follow the ratio of decision of the Hon'ble High Court and are of the opinion that in the absence of any incriminating material found on record, the invocation of powers under Sec. 153C of the Act is not justified. The AO could not have made addition in the year in the absence of incriminating material and the assessment year falls under the category of unabated year. We find that the CIT(A) has considered the fact that the search has taken place on 13.11.2019 and the return of income for A.Y.2015-16 was filed on 01.10.2015 and the assessment order u/s 143(3) of the Act was passed on 10.10.2017, the time limit for issue of notice u/s 143(2) of the Act is 30-09-2016 and was considered. Whereas in respect of A.Y.2015-16, the time limit for issue notice u/s 143(2) of the

Act has expired much prior to date of search i.e. 13-11-2019 and the Assessment year will come under the category of unabated assessment and further the revenue could not unearth any incriminating material warranting disturbance of already completed /concluded assessment. We considering the facts and judicial decisions as discussed above are of the view that the CIT(A) has passed a reasoned and conclusive order and the assesseement has been completed U/sec143(3) of the Act and is unabated. Accordingly, we do not find any infirmity in the order of the CIT(A) in quashing the assessment order and uphold the same and dismiss the grounds of appeal of the revenue.

8. In the result, the appeal filed by the revenue is dismissed.

Order pronounced in the open court on 24.04.2023.

Sd/-	Sd/-
(BR BASKARAN)	(PAVAN KUMAR GADALE)
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai, Dated 24.04.2023

KRK, PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT (Judicial)
4. The PCIT
5. DR, ITAT, Mumbai
6. Guard File

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//()

1.

(Asst. Registrar)
ITAT, Mumbai