

आयकर अपीलीय अधिकरण, चण्डीगढ़ न्यायपीठ "बी", चण्डीगढ़
IN THE INCOME TAX APPELLATE TRIBUNAL, CHANDIGARH BENCH "B", CHANDIGARH
HEARING THROUGH: PHYSICAL MODE

श्री संजय गर्ग, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य
BEFORE: SHRI. SANJAY GARG, JM & SHRI. VIKRAM SINGH YADAV, AM

आयकर अपील सं. / ITA NO. 355/Chd/2023
निर्धारण वर्ष / Assessment Year : 2013-14

Shri Vibhav Jain 992/1, Pipal Building, Chawal Bazar Ludhiana-141008	बनाम	The DCIT CC-III, Ludhiana
स्थायी लेखा सं. / PAN NO: AESPJ2221C		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri Sudhir Sehgal, Advocate
राजस्व की ओर से / Revenue by : Smt. Kusum Bansal, CIT DR

सुनवाई की तारीख / Date of Hearing : 14/02/2024
उद्घोषणा की तारीख / Date of Pronouncement : 16/02/2024

आदेश / Order

PER VIKRAM SINGH YADAV, A.M. :

The present appeal has been filed by the Assessee against the order of the Ld. CIT(A)-5, Ludhiana dt. 08/05/2023 pertaining to Assessment Year 2013-14.

2. In the present appeal, Assessee has raised the following grounds of appeal:

"1. That the Ld. CIT(A) has erred in confirming the order of Assessing Officer in making the addition of Rs. 99,16,874/- on account of long term capital gain on sale of shares, which was claimed to be exempt u/s 10(38), amounting to Rs. 99,16,874/-.

2. That the Ld.CIT(A) has failed to appreciate that during the course of search of the assessee, no incriminating evidence in respect of dealing on such shares have been found and the recent judgment of Hon'ble Apex Court in the case of 'PCIT-III Vs. Abhisar Buildwell Pvt. Ltd.' in Civil Appeal No.6580/2022 delivered on 24.04.2023 have not been considered properly by the Ld. CIT(A) and, as such, since no incriminating evidence was found during the course of search of the assessee and hence the addition of Rs.99,16,874/-was not called for.

3. That the Ld. CIT(A) has confirmed the order of Assessing Officer by relying upon the statement of one Sh. Sunil Kumar Kayan and Sh. S.K. Khemka, which

was recorded by the Investigation Wing, Kolkata on 13.03.2015 and not during the course of search of the assessee and, thus, the same could not be said to be the 'incriminating evidence' as found during search.

4. That the finding of the Ld. CIT(A) about the meaning of 'incriminating material' by relying upon certain article is without any basis and substance and it has been held in various judgments of Hon'ble High Courts/ Tribunals that the mere statement cannot be held to be incriminating material found during search and further, the assessee concerned had never conceded during the course of search, that such claim of long term capital gain was bogus.

5. That the reliance by the Ld. CIT(A) on the statement of S.K. Khemka, recorded at the back of the assessee and without providing any opportunity for 'cross examination of such persons' despite specific request, hence the said addition is totally uncalled for and against the judgment of Hon'ble Apex Court in the case of M/s Andaman Timber Industries as reported in 127 DTR 241 and other similar judgments.

6. That the Ld.CIT(A) has failed to appreciate the number of judgments as having been cited before him for the above preposition and particularly the said long term capital gain having been disclosed in the original return filed much before the date of search and hence no addition could be made in the hands of assessee in respect of assessment completed u/s 153A.

7. Notwithstanding the above said grounds of appeal, the Ld.CIT(A) has failed to appreciate that there is documentary evidence of investment in shares and purchase and sale of shares through banking channels and each and every transaction is supported by 'contract notes' and no defect have been pointed out in respect of such documentary evidences and all the transactions being through normal banking channel and, thus, there was no basis of making the uncalled for addition.

8. That the Ld. CIT(A) has failed to appreciate the judgment of Jurisdictional ITAT in the case of Sh. Jatinder Kumar Jain and bearing ITA No.338/Chd/2018 and Sh. Sunny Jain in ITA No.1167/Chd/2019, in which, under similar facts and circumstances, the addition on account of long term capital gain on merits have been deleted.

9. That the confirmation of addition on the basis of human probability/surrounding circumstances was uncalled for and against the documentary evidences furnished by the assessee and, as such, the very basis of making the addition is uncalled for.

10. That the appellant craves leave to add or amend the grounds of appeal before the appeal is finally heard or disposed off."

3. Briefly the facts of the case are that the assessee filed his original return of income declaring total income of Rs. 40,93,498/- on 26/07/2013 and in the return

of income so filed, the assessee has claimed exemption towards Long Term Capital Gain (LTCG) under section 10(36) amounting to Rs. 99,16,874/-. The return of income was thereafter processed under section 143(1) and thereafter, no notice under section 143(2) was issued within the statutory time period.

3.1 Subsequently, search and seizure operation under section 132(1) were carried out at the residential and business premises of M/s Jain Amar Clothing Pvt. Ltd. Group of cases on 26/02/2016 and the assessee premises were also searched on the said date. Thereafter, the case of the assessee was centralized and notice under section 153(A) dt. 28/09/2016 was issued to the assessee. In response to the notice, the assessee filed his return of income on 31/12/2016 declaring total income of Rs. 40,93,500/- as originally declared under section 139(1) of the Act.

3.2 During the course of assessment proceedings, the AO stated that the assessee has claimed exemption of LTCG of Rs. 99,16,874/- during the A.Y. 2013-14 in respect of sale of shares of M/s Access Global Limited and in order to verify the genuineness of the assessee's claim of exemption, he has examined the seized records, appraisal report of the documents as furnished by the DDIT, conducted independent field enquiries and investigation during the assessment proceedings which led to the fact that the claim of LTCG on equity shares has been found to be bogus and the gist of the inquiry so conducted were confronted to the assessee in terms of show cause notice dt. 14/09/2017.

3.3 In the show cause dated 14/09/2017, the AO referred to page no. 35 to 51 and 177,179 &180 of Annexure-A seized from locker no. 194, HDFC Bank, Kidwai Nagar, Ludhiana which belongs jointly to Shri Sunil Kumar Jain, the father of the assessee and Smt. Kamla Jain, the grandmother of the assessee and stated that the document so seized relates to purchase of shares on different dates by the assessee in terms of share certificate of M/s Maple Goods (P) Ltd. which were

purchased by the assessee through Shr S.K. Khemka and the copy of the contract cum bill notes issued by Shri S.K. Khemka.

3.4 As per AO, the assessee had purchased 850 equity share of M/s Maple Goods Pvt. Ltd on 25/11/2010, thereafter M/s Maple Goods (P) Ltd. was amalgamated with M/s Access Global Ltd. which was duly approved by the Hon'ble Calcutta High Court and pursuant to the Hon'ble High Court direction, M/s Access Global Ltd. allotted 47 shares in lieu of each shares held in M/s Maple Goods (P) Ltd. and accordingly, the assessee received 39950 shares of M/s Access Global Ltd. pursuant to the scheme of amalgamation. Thereafter the AO referred to the report of the Directorate of Income Tax (Inv.), Kolkata dt. 27/04/2015 on accommodation entries of LTCG and stated that the share of M/s Access Global Ltd. and M/s Maple Goods (P) Ltd. resembled the character of Penny Stocks which have been investigated at length by Investigation Wing, Kolkata.

3.5 The AO further referred to the statement of Shri Suresh Khemka, the broker through which the share of M/s Maple Goods (P) Ltd. were purchased by the assessee which was recorded on oath on 13/03/2015 by Investigation wing, Kolkata wherein he has admitted that he has issued kachha panna (purchase contract notes) of M/s Maple Goods (P) Ltd. and the name of the assessee found mentioned in the list of the client to whom said contract notes have been issued.

3.6 The AO thereafter referred to the financial data of M/s Maple Goods (P) Ltd. and stated that the credentials of M/s Mapple Goods Pvt. Ltd. were not satisfactory as it has no fixed assets, no turnover, no profitability and accordingly, a show cause was issued to the assessee stating that from the aforesaid discussion, it is clear that M/s Mapple Goods Pvt. Ltd. and M/s Access Global Ltd. are penny stocks and identity and credentials of both are suspicious

in nature and why the LTCG claimed of Rs. 99,16,874/- should not be treated as bogus and added under Section 68 of the Act.

3.7 In response to show cause notice, the assessee submitted as under:

- That he has purchased 850 equity shares of M/s Maple Goods (P) Ltd. in F.Y. 2010-11 through share broker S.K. Khemka.
- That M/s Maple Goods (P) Ltd. was later on amalgamated with M/s Access Global Ltd. in November 2011 and as per the amalgamation scheme approved by the Hon'ble Calcutta High Court, against 1 share of M/s Maple Goods (P) Ltd., 47 equity shares of M/s Access Global Ltd. were allotted.
- That the shares of M/s Access Global Ltd. were received in D-MAT account of the assessee.
- That the shares of M/s Access Global Ltd. were sold during the F.Y. 2012-13 through broker Shri Sunil Kumar Kayan.
- That the statement of Shri Suresh Kumar Khemka, Shri Sunil Kumar Kayan, Shri Ashish Kumar Aggarwal, Shri Naval Jalan, Shri Ashok Kumar Kayan, Shri Harshvardhan Kayan relates to F.Y. 2014-15 whereas assessee has earned capital gain in F.Y. 2012-13.
- That there is no incriminating material which was found during the course of search in case of the assessee with respect to the LTCG claimed.

3.8 Regarding first four points raised by the assessee, the AO did not dispute the same and stated that the same is a matter of fact. However as far as the assessee's contention that the statement of the various persons relates to F.Y. 2014-15 whereas the assessee has earned capital in F.Y. 2012-13, the same was not found acceptable. As per the AO, although these statements were

recorded in search proceedings and post search proceedings related to Kolkata based Penny Stock Companies which have provided accommodation entries in the form of bonus LTCGs but these statements were highly relevant to assessee's case as these statements were recorded of the stock brokers and directors of the company whose shares the assessee had transacted. In fact these statements were held by the AO as more relevant as these were recorded after the assessee has materialized the LTCG using the accommodation entry provided by these brokers and companies, both having dubious credentials. The timing of the recording of the statements after the transaction as well as the content of statements were found important by the AO as the same shows that both M/s Maple Goods (P) Ltd. and M/s Access Global Ltd. were penny Stocks and LTCG earned thereon were bogus in nature.

3.9 Regarding assessee's contention that no incriminating material was found during the course of search, the AO stated that the said contention is not tenable as the perusal of the contents mentioned at page no. 1 to 182 of Annexure - A seized from Locker no. 194, HDFC Bank shows that the character of certificate is itself incriminating as it has been issued by unauthorized brokers indulging into illegal trading. The AO accordingly held that the LTCG income of Rs. 99,16,874/- disclosed in the return of income by Shri Vibhav Jain in reality represented introduction of assessee's unaccounted money, that the assessee's alleged transaction of purchase and sale of shares were not real, that the assessee has only attempted to present as fact that the amount received from the stock broker represented sale proceeds of shares, however, in reality, there was no genuine or bonafide purchase and sale of shares and the assessee's claim of LTCG with respect of trading of shares in M/s Maple Goods (P) Ltd. and M/s Access Global Ltd. amounting to Rs. 99,16,874/- was treated as bogus and added to the total income of the assessee treating the same as unexplained cash credit under Section 68 of the Act.

4. Being aggrieved, the assessee carried the matter in appeal before the Ld. CIT(A).

4.1 During the course of appellate proceedings, it was submitted that the assessee has made investment in shares of M/s Maple Goods (P) Ltd. in A.Y. 2011-12 and the shares were purchased through Shri S.K. Khemka and the copy of the account with Shri S.K. Khemka was placed on record. It was submitted that payment against the purchase of shares was made to Shri S.K Khemka through saving bank account maintained with HDFC Bank and copy of the bank statement was also placed on record.

4.2 It was further submitted that after gap of a year, there was amalgamation of M/s Maple Goods (P) Ltd. with M/s Access Global Limited which was approved by the Hon'ble Calcutta High Court and in terms of the record date of 30/11/2011, the share holder of M/s Maple Goods (P) Ltd. were given 47 shares of M/s Access Global Limited against 1 share of M/s Maple Goods (P) Ltd. and copy of the order of the Hon'ble Court approving the scheme of amalgamation was also placed on record.

4.3 It was further submitted that the shares of M/s Access Global Limited were traded on Calcutta Stock Exchange and the assessee sold part of his shares holding through Sunil Kumar Kayan & Co. who was also a member of Calcutta Stock Exchange Association and Registered broker with SEBI with registration No. INB030668917 and the copy of the contract notes issued by the broker were also placed on record.

4.4 It was further submitted that in response to the show cause notice, the assessee had written a letter to the AO on 18/09/2017 in which it was clearly stated that the material seized and given by the AO to the assessee is duly recorded in the record/books of the assessee and the same is reflected in the return of income already filed under section 139(1) of the Act. It was also stated

in the said letter that where the official/AO keeps silent on the issue, it would be presumed that the Income Tax Department does not have any incriminating material and a copy of the letter dt. 18/09/2017 was also placed on record.

4.5 It was further submitted that since there was no response to the said letter, it can be safely held that there was no incriminating material that was found and seized by the Income Tax Department during the search in case of the assessee. Therefore, in view of the fact that there was no abated assessment as on the date of search for the impugned assessment year, the assessment completed under section 153A r.w. 143(3) is illegal and bad in law in absence of any incriminating material found during the course of search.

4.6 It was further submitted that the completed assessment can be interfered with by the AO while making the assessment under section 153A only on the basis of some incriminating material unearthed during the course of search which is clearly absent in the present case. Regarding finding of the AO that the character of certificate as found in the locker is itself incriminating material as it has been issued by the unauthorized broker indulging into an illegal trading, it was submitted that it is only an allegation and that the AO has not brought any material on record to prove this contention.

4.7 It was further submitted that the AO has not uttered a single word that all the relevant documents from page no. 35-51 and page 177, 179 & 180 of Annexure A represent the transactions which were duly recorded in the records / books of the assessee. All these transactions are routed through banking channels. All these transactions are reflected in the computation chart and the return of income which has been duly filed in accordance with law. It was submitted that the said broker was an authorized broker of Calcutta Stock Exchange and duly registered with SEBI and all these facts are on record. The AO has not denied these facts. It was submitted that all the transactions have

been transacted through Calcutta Stock Exchange for the sale of shares. Hence the contention of the AO is purely an allegation on assumption basis which is not permitted in the eyes of law. It was further submitted that the copies of share certificates which have been seized from the locker are issued by M/s Maple Goods (P) Ltd. against the purchases made through banking channels and through the broker. Even on the backside of these certificates, it can be seen that these shares have been transferred in the name of the assessee and relates to the assessee. It was submitted that the AO has not uttered a single word regarding purchases of shares of M/s Maple Goods (P) Ltd. which were purchased in the A.Y. 2011-12 whereas the AO is dealing and considering the same in the A.Y. 2013-14. It was submitted that the same is clearly illegal and bad in the eyes of law, since no addition was made by the AO during the A.Y. 2011-12 in the case of the assessee as evident from the assessment order alongwith the demand notice dt 29/12/2017 pertaining to A.Y. 2011-12, which was also placed on record.

4.8 It was further submitted that the AO in the assessment order has tried to demonstrate that the character of the certificate as incriminating material as it was issued by an unauthorized broker indulging into illegal trading. In this regard it was submitted that the AO has tried to indulge himself with wrong findings while stating that M/s Sunil Kumar Kayan & Co. was restrained from buying and selling of securities vide orders dated 20/08/2003 whereas the fact of the matter is that the same was not final verdict and in any case, it related to trading on NSE and not on Calcutta Stock Exchange. It was accordingly submitted that the same shows that the AO was bent upon to make the additions with illogical methods which are not permitted in the eyes of law and treating the genuine LTCCG as bogus.

4.9 It was further submitted that the assessee has given the complete details and documentary evidences on the issue of long term capital gains. Even the

information has been obtained from Calcutta Stock Exchange's Website Portal. These evidences have been ignored by the AO and the reasons are best known to him. It shows that the AO has made the additions for the sake of additions which are not permitted in the eyes of law. Even the correct facts of the case have not been given in the assessment order; rather distorting facts have been mentioned in the assessment order. The arguments given to the AO during the proceedings have also not been considered. The AO has also tried to distort the facts by making allegations, which are simply allegations and no documentary evidences have been placed on records.

4.10 It was further submitted that the following facts are to be considered while calculating the long term capital gains:

a) The shares of Maple Goods Private Limited Company were purchased in the assessment year 2011-12 through banking channels and the same has not been doubted by the AO. This clearly shows that the purchase of shares is genuine.

b) There was complete amalgamation of the Maple Goods Pvt. Ltd. made through Calcutta High Court and the AO has not uttered a single word on this issue.

c) The shares of Access Global Limited were allotted to the assessee as per the Calcutta High Court orders. The shares were received by the assessee in Demat Account. This fact has been admitted by the AO.

d) The shares were sold through the broker by the assessee through Calcutta Stock Exchange. This fact has been admitted by the AO.

e) The payments against the sale of shares were received from the broker and this fact has not been contradicted by the AO.

f) The complete details of saving bank account number xxxxxx along bank statement with HDFC Bank for purchase of shares has been verified by the

AO. Similarly, the complete details of payments received in this saving account against the sale of shares have not been doubted and were also verified during the proceedings.

g) There is no contradiction made by the AO on the all the above issues in point no (a) to (f) in the assessment order, hence additions have been made u/s 68 arbitrarily. These are actual long term capital gains earned by the assessee.

h) All the documents in the shape of share certificates issued by Maple Goods Pvt. Ltd. which are part of annexure A containing 1 to 182 pages have been doubted under the words Character of Certificates, inspite of the fact that the AO has not doubted the purchase of shares of Maple Goods Pvt. Ltd. in the assessment year 2011-12. The certificates were received by the assessee from the company and transfer certificate is mentioned on the back of these certificates, which is in the name of assessee.

i) The AO has not seized any incriminating material during search and making additions on account of sale of shares is against the Principles of Income Tax Laws.

4.11 It was submitted that the above facts clearly show that the A.O. has not doubted the purchase of shares and the payment has been made through the banking channels. The shares were held for more than 12 months by the assessee in physical/Demat account. The STT has been paid on the sale of the shares and the sale proceeds have been received through banking channels. The sale and purchase of shares have been made through Recognized Stock Exchange which is regulated by SEBI on real time basis. It is not possible to sale/purchase the shares of any company on the stock exchange in variance to the prevailing market price at any point of time. Further, the share price is always determined by the market mechanism which is transparent. Therefore, the Long Term Capital Gain raised from such sale of shares is exempt under

section 10(38) of the Income Tax Act, 1961. It was accordingly requested to accept the contention of the assessee and delete the addition made under the wrong notion of Law.

5. The submissions so filed by the assessee alongwith the documents placed on record, were thereafter sent by the Id CIT(A) to the AO for seeking his comments.

5.1 Regarding the assessee's contention that in absence of any incriminating material, the assessment completed under section 153A r.w.s 143(3) was illegal, the AO in his remand report submitted that the same cannot be accepted and pointed out that at pages no. 35-51 and 177, 178 &179 of Annexure-A seized from locker no. 194, HDFC Bank, Ludhiana, contains details of share for which bogus LTCG has been claimed by the assessee and which were confronted to the assessee in detailed show cause dt. 14/09/2017. It was stated by the AO that the above documents reflect that the assessee was in possession of the shares which has later on been utilized for bogus LTCG claim on sale of share under section 10(38) of the Act. It was stated that the share of M/s Maple Goods (P) Ltd. were purchased through broker Shri S.K. Khemka is clear from the seized record. It was stated that given the nature of the whole scheme being managed, these documents are of incriminating nature as these were issued by broker to make the scheme appearing to be falling within the four corners of law and these documents are incriminating in nature as they have direct bearing on the assessment of correct income of the assessee. Moreover as per the case of Sumati Dayal Vs. CIT 214 ITR 801(SC) even the circumstantial evidence based on pre-ponderance of probability constitute incriminating material enough to make an assessment of income.

5.2 It was further stated by the AO in his remand report that the statement of Shri Suresh Khemka through which the assessee purchased the shares was

recorded on oath on 13/03/2015 by the Investigation wing, Kolkata and in his statement, he has admitted that he has issued kachha panna (purchase contract notes) of M/s Maple Goods (P) Ltd. which later on got amalgamated with M/s Access Global Ltd. and for which many persons claimed LTCG and the list of such persons including the name of the assessee. It was stated by the AO that it is therefore a case of pre-arranged accommodation entry for LTCG which the assessee has taken, the figures of bills are matching from the bills found by the Department during the locker operations and this only proves that the documents found during the course of search were of incriminating nature as they were part of the pre-managed arrangement for obtaining bogus LTCG but also links the assessee's direct involvement and knowledge of the fact to deliberately enter into such arrangements. Moreover the brokers in his statement have confessed the scheme of proving bogus LTCG with details of modus operandi which tallies with the actual transaction done in case of the assessee. This clearly shows that introducing capital through bogus LTCG was one of the methods used by the assessee to introduce its unaccounted income. It was accordingly submitted that the contention so raised by the assessee is without merits and deserves to be rejected.

6. The assessee in his rejoinder submitted that LTCG stood disclosed in the A.Y. 2013-14 for which the computation of income had already been submitted as part of the paper book and even in the original return of income. LTCG on the shares of M/s Access Global Ltd. stood disclosed and in the computation also the date of the purchase is in F.Y 2011-12 and purchase and sale price have already been mentioned therein and the assessment was duly framed under section 143(1) of the Act and thus it was a case of an unabated assessment.

6.1 It was submitted that the said disclosed income / documents cannot be treated as incriminating material. It was further submitted that there is no

evidence or document which was found or noticed to suggest any receipt outside the books of accounts and the said capital gain has been duly reflected in the computation of income and the purchase of the shares were made through banking transactions as per copy of the HDFC Bank duly submitted and placed on record. It was further submitted that even the copy of account duly confirmed from the books of Shri S.K. Khemka was furnished to the AO for the A.Y. 2011-12 where the said payment of cheque for the purchase of shares have duly been recorded. It was accordingly submitted that the assumption that there is an incriminating material deducted as a result of search on the applicant is entirely misconceived, misplaced and wholly untenable.

6.2 It was submitted that the assessment for A.Y 2011-12 stood completed wherein no adverse inference has been drawn in this respect and therefore no material much less any incriminating material has been found to allege that any consideration has been passed on or received outside books of accounts. It was accordingly submitted that being a case of unabated assessment in absence of any incriminating material found as a result of search in the case of the assessee the whole of the proceedings under section 153A r.w.s 143(3) is bad in law.

6.3 It was submitted that it is a trite law that incriminating material must be detected as a result of search on the applicant and such incriminating material should be qua the addition proposed to be made against the applicant and in the present case there is no such incriminating material unearthed during the search and therefore the contention of the AO that the share certificate are of the incriminating material as found during the course of search is devoid of any valid consideration.

6.4 It was further submitted that the contention of the AO that the purchase and the sale of the shares are a managed affair and therefore these documents are incriminating in nature and relied on the decision in case of

Sumiti Dayal Vs. CIT is not of any consequence because for the documentary evidence are pitted against the oral evidence then the cause of the documentary evidence shall prevail.

6.5 It was further submitted that the Hon'ble High Court has approved the scheme of amalgamation and therefore doubt and suspicion raised by the AO are clearly misconceived. Further reliance on the submission of Shri Suresh Kumar Khemka at the back of the assessee is also not reliable since despite request no cross examination was allowed and it is a settled law no adverse view can be taken in respect of the statement at the back of the assessee without cross examination as per the decision of the Hon'ble Supreme Court in case of Andaman Timbers and others have followed on the subject.

7. The assessment record, the submissions so filed by the assessee, the remand report and comments of the AO and the rejoinder so submitted by the assessee were considered by the Ld. CIT(A) and he passed the impugned order dated 08/05/2023.

7.1 As per the Ld. CIT(A), on perusal of the assessment order and remand report of the AO dt. 05/02/2020, it clearly brings out on record that the share certificates and the contract bills were seized from the bank locker no. 194, HDFC Bank on the basis of which bogus LTCG have been claimed by the assessee. It was held by the Ld. CIT(A) that the said documents are incriminating in nature as they have a direct bearing on the estimation of correct income of the assessee.

7.2 It was further stated by the Ld. CIT(A) that statement of the broker, Shri Suresh Kumar Khemka was recorded on oath on 13/03/2015 by Investigation Wing, Kolkata in which the said broker admitted providing bogus LTCG entries to the assessee. The said statement was corroborated by the evidence in nature of shares seized during the course of search. Thereafter the Ld. CIT(A) referred to

an article published in Taxman and stated that the documents seized from the assessee i.e, share certificates and contract bills have been used to understate the income and were only a device based on misrepresented facts, hence they fall in the definition of incriminating material. Thereafter referring to the decision of Hon'ble Supreme Court in the case of PCIT Vs. Abhisar Buildwell Pvt. Ltd. in Civil Appeal No. 6580 of 2021 dt. 24/04/2023, it was stated by the Ld. CIT(A) that in case any incriminating material is found during the course of search, the AO can assess the total income of the assessee on the basis of incriminating material as well as any other material in knowledge or possession of the AO including the total income declared in the returns. Hence the contention of the assessee that no incriminating material was found on the basis of which the said assessment has been framed was held without basis and rejected. Further, on merits as well, various contentions raised by the assessee were rejected and the findings and order of the AO was confirmed.

8. Against the said findings and the directions of the Ld. CIT(A), the assessee is in appeal before us.

9. During the course of hearing, the Ld. AR referred to the grounds of appeal taken by the assessee namely Ground No. 2, 3 and 4 and it was stated that the Ld. CIT(A) has failed to appreciate that it is a case of unabated assessment, and during the course of search on the assessee, no incriminating material/evidence has been found in respect of long term capital gains on shares which have been duly offered in the original return of income and the decision of Hon'ble Supreme Court in case of PCIT-III Vs. Abhisar Buildwell Pvt. Ltd. (*Supra*) has not been appreciated and considered properly by the Ld. CIT(A) and therefore in absence of any incriminating evidence found during the course of search on the assessee, there is no basis for addition of Rs. 87,04,733/- so confirmed by the Ld CIT(A).

9.1 It was further stated by the Id AR that the Ld. CIT(A) has confirmed the order of the AO by relying upon the statement of Shri S.K. Khemka which was recorded by the Investigation Wing, Kolkata on 13/03/2015 and not during the course of search of the assessee and thus the same could not be said to be the incriminating evidence as found during the course of search in case of the assessee.

9.2 It was further submitted that the findings of the Ld. CIT(A) about the meaning of the "incriminating material" by relying upon certain article reported in a tax journal is without any basis and substance as it has been held in various judgments of Hon'ble High Courts / Tribunal that the mere statement cannot be held to be incriminating material found during the search and further the assessee had never conceded during the course of search that such claim of LTCG was bogus.

9.3 Elaborating his arguments further, the Ld. AR submitted that the AO has stated that share certificates and contract notes on account of purchase of shares of M/s Maple Goods (P) Ltd. which was found from the locker of Shri Sunil Kumar Jain, father of the assessee is in the nature of incriminating material. It was submitted that firstly, the said share certificates and contract notes were not found from the possession of the assessee. Secondly, the share certificates and the contract notes relating to purchase of shares cannot be anyway an incriminating material. Rather the said documents support the case of the assessee that the purchase of shares is genuine and is backed by proper documents. Further regarding the various statements of Shri S.K. Khemka and Shri Sunil Kumar Kayan, and other persons referred to by AO as well as by the Ld. CIT(A), it was submitted that the said statements have nothing to do with the search proceedings of the assessee as these were recorded during their respective investigation proceedings way back in the year 2015 and the

statements were any way recorded at the back of the assessee and no opportunity to cross examine was ever given to the assessee.

9.4 It was further submitted that the statement recorded during the course of search has no evidentiary value and cannot be said to be incriminating evidence by itself as found during the course of search as held in various decisions and in this regard, reliance was placed on the decisions of Hon'ble Delhi High Court in case of Pr. CIT Vs. Best Infrastructure India Pvt. Ltd. 397 ITR 82 (Del), CIT Vs. Harjeev Aggarwal 290 CTR 263 (Del), Jaipur Benches of the Tribunal in case of DCIT Vs. A M Exports 69 ITR (Trib)16 (Jaipur Trib), and Delhi Benches in case of Brahmaputra Finlease P. Ltd. Vs. DCIT 51 CCH 796(Del Trib) and Rathi Steel Ltd. Vs. ACIT 56 CCH 102 (Del Trib).

9.5 Regarding the findings of the Ld. CIT(A), it was submitted that the purchased documents of the share cannot be considered as incriminating documents, rather these documents would support the stand of the assessee that the share purchase are genuine and are backed by proper documents. And the assessee has already taken the effect of the same at the time of sale of shares in the computation of income while filing the return of income much prior to the date of search and therefore it cannot be said that the assessee has not disclosed the relevant facts. It was submitted that the assessee has purchased these shares through a broker, those shares would definitely with the assessee and in no case those share certificates can be termed as incriminating in nature.

9.6 It was further submitted that the decision of the Hon'ble Supreme Court in case of PCIT Vs. Abhisar Buildwell (supra) infact supports the case of the assessee that where there is no incriminating material found during the course of search, the AO cannot proceed and reassess the income for the year in which the assessment also stood completed and not abated as on the date of search.

9.7 It was further submitted that the decision of Hon'ble Supreme Court has since been followed by the Department and CBDT has also issued instruction dt. 23/08/2023 wherein it has been directed that the said judgment must be followed and implemented. Further reliance was placed on the decisions Pr. CIT Vs. S.S. Con build Pvt. Ltd. 455 ITR 506 (SC), Pr. CIT Vs. King Buildcon Pvt. Ltd. in Civil Appeal No. 4326/2023 dt. 10/07/2023 (SC), DCIT Vs. U K Paints Overseas Ltd. reported in [2023]150 taxmann.com 108 (SC) wherein the legal proposition so laid down in Abhisar Buildwell has been subsequently followed and reiterated by the Hon'ble Supreme Court. Further, our particular reference was drawn to decisions in case of Pr. CIT Vs. Shardaben Arvindbhai Patel [2023] 152 Taxmann.com 535 (Guj HC) and Pr. CIT Vs. Ms. Kavita Agarwal [2022] 143 Taxmann.com 404 (Del HC) wherein the said principle has been followed by the Hon'ble Gujarat and Delhi High Court in context of long term capital gains on sale of shares.

9.8 It was further submitted that under identical set of facts and circumstances, in case of group cases, namely Shri Ashish Jain, Shri Akhil Jain and Shri Bipin Jain (*ITA no. 352/CHD/2023 & others dated 23/01/2024*), wherein similar additions were made by the AO by denial of claim of LTCG basis identical nature of material found from the bank locker of the father of the assessee, the addition were deleted in absence of any incriminating material found during the course of search. It was accordingly submitted that given the identical facts of the case, the findings contained therein shall apply with equal force in the instant case and the said decision may therefore be followed.

10. In his submissions, the Id CIT/DR submitted that it is a clear case where incriminating material has been found during the course of search in terms of share certificates and the contract notes. It was submitted that both the AO as well as the Ld. CIT(A) have recorded a categorical finding that the incriminating material has been found and seized during the course of search. In this regard

our reference was drawn to the show cause issued by the AO wherein he has specifically referred to pages no. 35 to 51 and 177,178 &179 of Annexure-A sized from Locker No. 194, HDFC Bank, Ludhiana. It was submitted that the contents of the documents so found and seized from the Locker clearly shows that the assessee has purchased the shares of M/s Maple Goods (P) Ltd. through the broker Shri S.K. Khemka. It was further submitted that Shri Suresh Kumar Khemka in his statement recorded on oath by the investigation wing, Kolkata has admitted that he has issued Katcha Panna (Purchase Contract Note) of M/s Maple Goods (P) Ltd. which later on got amalgamated with M/s Access Global and for which many persons claimed LTCG and list of such persons includes the name of the assessee. It was accordingly submitted that these documents so found and seized are of incriminating nature as these were issued by the broker Shri Suresh Kumar Khemka to make the scheme appearing to be falling within the four corners of law but in reality reflected the device based on misrepresented fact and therefore these documents are clearly incriminating in nature as they have the direct bearing on the assessment of correct income of the assessee.

10.1 It was submitted that the statement of Shri Suresh Kumar where read in the context of the share certificates and the contract notes found from the locker clearly makes the documents so found during the search as incriminating in nature.

10.2 It was submitted that there is no dispute that the Hon'ble Supreme Court in case of Pr. CIT Vs. Abhisar Buildwell (P) Ltd. has held that where no incriminating material has been found during the course of search, no addition can be made in the hands of the assessee in case of unabated assessment as on the date of search. It was submitted that in the instant case even though it is a case of unabated assessment as on the date of search, the fact remains that incriminating documents in the form of share certificates and the contract notes

has been found during the course of search and where read alongwith the statement of Shri Suresh Kumar Khemka, the same are clearly incriminating in nature.

10.3 It was submitted that once the AO was seized of the said statement and the documents have been physically seized and found during the course of search, the AO was well within his jurisdiction to reassess the income and making the addition as has been done in the instant case.

10.4 Further Id CIT/DR relied on the findings of the AO as well as the Ld. CIT(A).

10.5 It was accordingly submitted that there is no basis in the contentions so advanced by the Ld. AR that no incriminating material has been found and seized during the course of search in the case of the assessee and the addition so made by the AO therefore has been rightly sustained by the Id CIT(A) and the same should be confirmed.

10.6 At the same time, it was fairly submitted by the Id CIT/DR that under identical set of facts and circumstances, in case of Shri Ashish Jain, Shri Akhil Jain and Shri Bipin Jain (*supra*) wherein similar additions were made by the AO by denial of claim of LTCG basis identical nature of material found from the bank locker of the father of the assessee and upheld by the Id CIT(A), the addition were deleted by the Coordinate Bench in absence of any incriminating material found during the course of search.

11. We have heard the rival contentions and perused the material available on the record. Admittedly and undisputedly, the facts and circumstances of the case are identical and the matter is thus squarely covered by the decision of Coordinate Bench in case of **Shri Ashish Jain & Others Vs. DCIT** (*Supra*) wherein it was held as under:

"12. We have heard the rival contentions and perused the material available on the record. In case of **Pr. CIT Vs. Abhisar Buildwell (P) Ltd.** (supra), the question for consideration before the **Hon'ble Supreme Court** was whether in respect of completed / unabated assessment, any addition can be made by the AO in absence of any incriminating material found during the course of search under section 132 or requisition under section 132A or not. The relevant discussions and the legal proposition so laid down by the Hon'ble Supreme Court are contained in para 5 to 14 of its judgment which read as under:

"5. We have heard learned counsel for the respective parties at length.

The question which is posed for consideration in the present set of appeals is, as to whether in respect of completed assessments/unabated assessments, whether the jurisdiction of AO to make assessment is confined to incriminating material found during the course of search under section 132 or requisition under section 132A or not, i.e., whether any addition can be made by the AO in absence of any incriminating material found during the course of search under section 132 or requisition under section 132 A of the Act, 1961 or not.

6. It is the case on behalf of the Revenue that once upon the search under section 132 or requisition under section 132A, the assessment has to be done under section 153A of the Act, 1961 and the AO thereafter has the jurisdiction to pass assessment orders and to assess the 'total income' taking into consideration other material, though no incriminating material is found during the search even in respect of completed/unabated assessments.

7. At the outset, it is required to be noted that as such various High Courts, namely, Delhi High Court, Gujarat High Court, Bombay High Court, Karnataka High Court, Orissa High Court, Calcutta High Court, Rajasthan High Court and the Kerala High Court have taken the view that no addition can be made in respect of completed/unabated assessments in absence of any incriminating material. The lead judgment is by the Delhi High Court in the case of *Kabul Chawla* (supra), which has been subsequently followed and approved by the other High Courts, referred to hereinabove. One another lead judgment on the issue is the decision of the Gujarat High Court in the case of *Saumya Construction* (supra), which has been followed by the Gujarat High Court in the subsequent decisions, referred to hereinabove. Only the Allahabad High Court in the case of *Pr. CIT v. Mehndipur Balaji* [2022] 447 ITR 517 has taken a contrary view.

7.1 In the case of *Kabul Chawla* (supra), the Delhi High Court, while considering the very issue and on interpretation of section 153A of the Act, 1961, has summarised the legal position as under:

Summary of the legal position

38. On a conspectus of section 153A(1) of the Act, read with the provisos thereto, and in the light of the law explained in the aforementioned decisions, the legal position that emerges is as under:

i. Once a search takes place under section 132 of the Act, notice under section 153A(1) will have to be mandatorily issued to the person searched requiring him to file returns for six AYs immediately preceding the previous year relevant to the AY in which the search takes place.

ii. Assessments and reassessments pending on the date of the search shall abate. The total income for such AYs will have to be computed by the AOs as a fresh exercise.

iii. The AO will exercise normal assessment powers in respect of the six years previous to the relevant AY in which the search takes place. The AO has the power to assess and reassess the 'total income' of the aforementioned six years in separate assessment orders for each of the six years. In other words, there will be only one assessment order in respect of each of the six AYs "in which both the disclosed and the undisclosed income would be brought to tax".

iv. Although Section 153 A does not say that additions should be strictly made on the basis of evidence found in the course of the search, or other post-search material or information available with the AO which can be related to the evidence found, it does not mean that the assessment "can be arbitrary or made without any relevance or nexus with the seized material. Obviously an assessment has to be made under this Section only on the basis of seized material."

v. In absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made. The word 'assess' in Section 153 A is relatable to abated proceedings (i.e., those pending on the date of search) and the word 'reassess' to completed assessment proceedings.

vi. Insofar as pending assessments are concerned, the jurisdiction to make the original assessment and the assessment under section 153A merges into one. Only one assessment shall be made separately for each AY on the basis of the findings of the search and any other material existing or brought on the record of the AO.

vii. Completed assessments can be interfered with by the AO while making the assessment under section 153 A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment."

7.2 Thereafter in the case of Saumya Construction (supra), the Gujarat High Court, while referring the decision of the Delhi High Court in the case of Kabul Chawla (supra) and after considering the entire scheme of block assessment under section 153A of the Act, 1961, had held that in case of completed assessment/unabated assessment, in absence of any incriminating material, no additional can be made by the AO and the AO has no jurisdiction to re-open the completed assessment. In paragraphs 15 & 16, it is 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 132A 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 (2) 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 meaning. From 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 made, any addition or disallowance can be made only on the basis of material collected during the search or requisition. In case no incriminating material is found, as held by the Rajasthan High Court in the case of *Jai Steel (India) v. Asst. CIT (supra)*, the earlier assessment would have to be reiterated. In 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."

8. For the reasons stated hereinbelow, we are in complete agreement with the view taken by the Delhi High Court in the case of *Kabul Chawla (supra)* and the Gujarat High Court in the case of *Saumya Construction (supra)*, taking the view that no addition can be made in respect of completed assessment in absence of any incriminating material.

9. While considering the issue involved, one has to consider the object and purpose of insertion of Section 153A in the Act, 1961 and when there shall be a block assessment under section 153A of the Act, 1961.

9.1 That prior to insertion of Section 153A in the statute, the relevant provision for block assessment was under section 158BA of the Act, 1961. The erstwhile scheme of block assessment under section 158BA envisaged assessment of 'undisclosed income' for two reasons, firstly that there were two parallel assessments envisaged under the erstwhile regime, i.e., (i) block assessment under section 158BA to assess the 'undisclosed income' and (ii) regular assessment in accordance with the provisions of the Act to make assessment qua income other than undisclosed income. Secondly, that the 'undisclosed income' was chargeable to tax at a special rate of 60% under section 113 whereas income other than 'undisclosed income' was required to be assessed under regular assessment procedure and was taxable at normal rate. Therefore, section 153A came to be inserted and brought on the statute. Under Section 153A regime, the intention of the legislation was to do away with the scheme of two parallel assessments and tax the 'undisclosed' income too at the normal rate of tax as against any special rate. Thus, after introduction of Section 153A and in case of search, there shall be block assessment for six years. Search assessments/block assessments under section 153A are triggered by conducting of a valid search under section 132 of the Act, 1961. The very purpose of search, which is a prerequisite/trigger for invoking the provisions of sections 153A/153C is detection of undisclosed income by undertaking extraordinary power of search and seizure, i.e., the income which cannot be detected in ordinary course of regular assessment. Thus, the foundation for making search assessments under sections 153A/153C can be said to be the existence of incriminating material showing undisclosed income detected as a result of search.

10. On a plain reading of Section 153A of the Act, 1961, it is evident that once search or requisition is made, a mandate is cast upon the AO to issue notice under section 153 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. Section 153A of the Act reads as under:

"153A. Assessment in case of search or requisition - (1) Notwithstanding anything contained in Section 139, Section 147, Section 148, Section 149, Section 151 and Section 153, in the case of a person where a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132-A after the 31st day of May, 2003, the Assessing Officer shall—

(a) issue notice to such person requiring him to furnish within such period, as may be specified in the notice, the return of income in respect of each assessment year falling within six assessment years referred to in clause (b), in the prescribed form and verified in the prescribed manner and setting forth such other

particulars as may be prescribed and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139;

b) assess or reassess the total income of six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made:

Provided that the Assessing Officer shall assess or reassess the total income in respect of each assessment year falling within such six assessment years:

Provided further that assessment or reassessment, if any, relating to any assessment year falling within the period of six assessment years referred to in this sub-section pending on the date of initiation of the search under section 132 or making of requisition under section 132-A, as the case may be, shall abate.

(2) If any proceeding initiated or any order of assessment or reassessment made under sub-section (1) has been annulled in appeal or any other legal proceeding, then, notwithstanding anything contained in sub-section (1) or Section 153, the assessment or reassessment relating to any assessment year which has abated under the second proviso to sub-section (1), shall stand revived with effect from the date of receipt of the order of such annulment by the Commissioner:

Provided that such revival shall cease to have effect, if such order of annulment is set aside

Explanation.—For the removal of doubts, it is hereby declared that,—

(i) save as otherwise provided in this section, section 153-B and section 153-C, all other provisions of this Act shall apply to the assessment made under this section;

(ii) in an assessment or reassessment made in respect of an assessment year under this section, the tax shall be chargeable at the rate or rates as applicable to such assessment year.

11. As per the provisions of Section 153A, in case of a search under section 132 or requisition under section 132A, the AO gets the jurisdiction to assess or reassess the 'total income' in respect of each assessment year falling within six assessment years. However, it is required to be noted that as per the second proviso to Section 153A, the assessment or re-assessment, if any, relating to any assessment year falling within the period of six assessment years pending on the date of initiation of the search under section 132 or making of requisition under section 132A, as the case may be, shall abate. As per sub-section (2) of Section 153A, if any proceeding initiated or any order of assessment or reassessment made under sub-section (1) has been annulled in appeal or any other legal proceeding, then, notwithstanding anything contained in sub-section (1) or section 153, the assessment or reassessment relating to any assessment year which has abated under the second proviso to sub-section (1), shall stand revived with effect from the date of receipt of the order of such annulment by the Commissioner. Therefore, the intention of the legislation seems to be that in case of search only the pending assessment/reassessment proceedings shall abate and the AO would assume the jurisdiction to assess or reassess the 'total income' for the entire six years period/block assessment period. The intention does not seem to be to re-

open the completed/unabated assessments, unless any incriminating material is found with respect to concerned assessment year falling within last six years preceding the search. Therefore, on true interpretation of Section 153A of the Act, 1961, in case of a search under section 132 or requisition under section 132A and during the search any incriminating material is found, even in case of unabated/completed assessment, the AO would have the jurisdiction to assess or reassess the 'total income' taking into consideration the incriminating material collected during the search and other material which would include income declared in the returns, if any, furnished by the assessee as well as the undisclosed income. However, in case during the search no incriminating material is found, in case of completed/unabated assessment, the only remedy available to the Revenue would be to initiate the reassessment proceedings under sections 147/48 of the Act, subject to fulfillment of the conditions mentioned in sections 147/148, as in such a situation, the Revenue cannot be left with no remedy. Therefore, even in case of block assessment under section 153A and in case of unabated/completed assessment and in case no incriminating material is found during the search, the power of the Revenue to have the reassessment under sections 147/148 of the Act has to be saved, otherwise the Revenue would be left without remedy.

12. If the submission on behalf of the Revenue that in case of search even where no incriminating material is found during the course of search, even in case of unabated/completed assessment, the AO can assess or reassess the income/total income taking into consideration the other material is accepted, in that case, there will be two assessment orders, which shall not be permissible under the law. At the cost of repetition, it is observed that the assessment under section 153A of the Act is linked with the search and requisition under sections 132 and 132A of the Act. The object of Section 153A is to bring under tax the undisclosed income which is found during the course of search or pursuant to search or requisition. Therefore, only in a case where the undisclosed income is found on the basis of incriminating material, the AO would assume the jurisdiction to assess or reassess the total income for the entire six years block assessment period even in case of completed/unabated assessment. As per the second proviso to Section 153A, only pending assessment/reassessment shall stand abated and the AO would assume the jurisdiction with respect to such abated assessments. It does not provide that all completed/unabated assessments shall abate. If the submission on behalf of the Revenue is accepted, in that case, second proviso to section 153A and sub-section (2) of Section 153A would be redundant and/or rewriting the said provisions, which is not permissible under the law.

13. For the reasons stated hereinabove, we are in complete agreement with the view taken by the Delhi High Court in the case of *Kabul Chawla (supra)* and the Gujarat High Court in the case of *Saumya Construction (supra)* and the decisions of the other High Courts taking the view that no addition can be made in respect of the completed assessments in absence of any incriminating material.

14. In view of the above and for the reasons stated above, it is concluded as under:

(i) that in case of search under section 132 or requisition under section 132A, the AO assumes the jurisdiction for block assessment under section 153A;

(ii) all pending assessments/reassessments shall stand abated;

(iii) in case any incriminating material is found/unearthed, even, in case of unabated/completed assessments, the AO would assume the jurisdiction to assess or reassess the 'total income' taking into consideration the incriminating material unearthed during the search and the other material available with the AO including the income declared in the returns; and

(iv) in case no incriminating material is unearthed during the search, the AO cannot assess or reassess taking into consideration the other material in respect of completed assessments/unabated assessments. Meaning thereby, in respect of completed/unabated assessments, no addition can be made by the AO in absence of any incriminating material found during the course of search under section 132 or requisition under section 132A of the Act, 1961. However, the completed/unabated assessments can be re-opened by the AO in exercise of powers under sections 147/148 of the Act, subject to fulfilment of the conditions as envisaged/mentioned under sections 147/148 of the Act and those powers are saved.

The question involved in the present set of appeals and review petition is answered accordingly in terms of the above and the appeals and review petition preferred by the Revenue are hereby dismissed. No costs."

13. The Hon'ble Supreme Court in the aforesaid decision has held that the assessment under Section 153A of the Act is linked with the search and requisition under Sections 132 and 132A of the Act and thus, the object of Section 153A is to bring under tax the undisclosed income which is found during the course of search or pursuant to search or requisition. Therefore, only in a case where the undisclosed income is found on the basis of incriminating material unearthed during the course of search, the AO would assume the jurisdiction to assess or reassess the total income in case of completed/unabated assessment taking into consideration the incriminating material unearthed during the search and the other material available with the AO including the income declared in the return. In case, no incriminating material is unearthed during the search, the AO cannot assess or reassess taking into consideration the other material in respect of completed assessments/unabated assessments and has upheld the decisions of Hon'ble Delhi High Court in case of CIT Vs. Kabul Chawla [2016] 380 ITR 573 and Hon'ble Gujarat High Court in case of Pr. CIT Vs. Saumya Construction (P.) Ltd. [2016] 387 ITR 529.

14. As to what constitute incriminating material found/unearthed during the course of search, the **Hon'ble Delhi High Court** in case of **Kabul Chawla** (Supra) held that completed assessment can be interfered with by the AO while making the assessment under section 153A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment. The Hon'ble Delhi High Court in the said decision referred to the decision of **Hon'ble Bombay High Court** in case of **CIT Vs. Continental**

Warehousing Corporation (Nhava Sheva) Ltd. [2015] 374 ITR 645 wherein the question for consideration was whether the scope of assessment under section 153A encompasses addition not based on any incriminating material found during the course of search. It was held by the Bombay High Court that no addition can be made in respect of the assessment that has become final in the absence of incriminating material found during the course of search. The Bombay High Court referred to its earlier decision in case of **CIT Vs. Murli Agro Products Ltd.** (ITA No. 36 of 2009 dated 29/10/2010) and expressed its agreement with the earlier decision holding that the crucial words "search" and "requisition" appear in substantive provisions of section 153A and that would throw light on the applicability of the provisions which is being enacted to a search or requisition and that its construction has to be read and understood accordingly. The Hon'ble Bombay High Court further affirmed the decision of the **Special Bench of the Tribunal in All Cargo Global Logistics Ltd. Vs. DCIT** [2012] 18 ITR (Trib) 106 (Mumbai) wherein it was held that the "incriminating material" in the context of the relevant provision means books of account, other documents found in the course of search but not produced in the course of original proceedings and secondly, the undisclosed income or property discovered in the course of search.

15. We deem it appropriate to reproduce the findings of the **Hon'ble Bombay High Court** in case of **Continental Warehousing Corporation** (*supra*) and the same read as under:

"30. Even otherwise, we agree with the Division Bench when it observes as above with regard to the ambit and scope of the powers conferred under section 153A of the Act. Since we are not required to trace out the history and we can do nothing better than to reproduce the observations and conclusions as above that we are not repeating the same. Even if the exercise of power under section 153A is permissible still the provision cannot be read in the manner suggested by Mr. Pinto. Not only the finalised assessment cannot be touched by resorting to those provisions, but even while exercising the power can be exercised where a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A after 31st March, 2003. There is a mandate to issue notices under section 153(1)(a) and assess or reassess the total income of six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made. Thus, the crucial words "search" and "requisition" appear in the substantive provision and the provisos. That would throw light on the issue of applicability of the provision. It being enacted to a search or requisition that its construction would have to be accordingly. That is the conclusion reached by the Division Bench in *Murli Agro Products Ltd.* (*supra*) with which we respectfully agree. These are the conclusions which can be reached and upon reading of the legal provisions in question.

31. We, therefore, hold that the Special Bench's understanding of the legal provision is not perverse nor does it suffer from any error of law apparent on the face of the record. The Special Bench in that regard held as under :

"48. The provision under section 153A is applicable where a search or requisition is initiated after 31.5.2003. In such a case the AO is obliged to issue notice u/s 153A in respect of 6 preceding years, preceding the year in which search etc. has been initiated. Thereafter he has to assess or reassess the total income of these six

years. It is obligatory on the part of the AO to assess or reassess total income of the six years as provided in section 153A(1)(b) and reiterated in the 1st proviso to this section. The second proviso states that the assessment or reassessment pending on the date of initiation of the search or requisition shall abate. We find that there is no divergence of views in so far as the provision contained in section 153A till the 1st proviso. The divergence starts from the second proviso which states that pending assessment or reassessment on the date of initiation of search shall abate. This means that an assessment or reassessment pending on the date of initiation of search shall cease to exist and no further action shall be taken thereon. The assessment shall now be made u/s 153A. The case of Ld. Counsel for the assessee is that necessary corollary to this provision is that completed assessment shall not abate. These assessments become final except in so far and to the extent as undisclosed income is found in the course of search. On the other hand, it has been argued by the Ld. Standing Counsel that abatement of pending assessment is only for the purpose of avoiding two assessments for the same year, one being regular assessment and the other being assessment u/s 153A. In other words these two assessments coalesce into one assessment. The second proviso does not contain any word or words to the effect that no reassessment shall be made in respect of a completed assessment. The language is clear in this behalf and therefore literal interpretation should be followed. Such interpretation does not produce manifestly absurd or unjust results as section 153A (i)(b) and the first proviso clearly provide for assessment or reassessment of all six years. It may cause hardship to some assesses where one or more of such assessments has or have been completed before the date of initiation of search. This is hardly of any relevance in view of clear and unambiguous words used by the legislature. This interpretation does not cause any absurd etc. results. There is no casus omissus and supplying any would be against the legislative intent and against the very rule in this behalf that it should be supplied for the purpose of achieving legislative intent. The submissions of the Ld. Counsels are manifold, the foremost being that the provision u/s 153A should be read in conjunction with the provision contained in section 132(1), the reason being that the latter deals with search and seizure and the former deals with assessment in case of search etc, thus, the two are inextricably linked with each other.

49. Before proceeding further, we may now examine the provision contained in sub-section (2) of section 153, which has been dealt with by Ld. Counsel. It provides that if any assessment made under sub-section (1) is annulled in appeal etc., then the abated assessment revives. However, if such annulment is further nullified, the assessment again abates. The case of the Ld. Counsel is that this provision further shows that completed assessments stand on a different footing from the pending assessments because appeals etc. proceedings continue to remain in force in case of completed assessments and their fate depends upon subsequent orders in appeal. On consideration of the provision and the submissions, we find that this provision also makes it clear that the abatement of pending proceedings is not of such permanent nature that they cease to exist for all times to come. The interpretation of the Ld. Counsel, though not specifically stated, would be that on annulment of the assessment made u/s 153(1), the AO gets the jurisdiction to assess the total income which was vested in him earlier independent of the search and which came to an end due to initiation of the search.

50. The provision contained in section 132 (1) empowers the officer to issue a warrant of search of the premises of a person where any one or more of conditions mentioned therein is or are satisfied, i.e. - (a) summons or notice has been issued to produce books of account or other documents but such books of account or documents have not been produced, (b) summons or notice has been or might be issued, he will not produce the books of account or other documents mentioned therein, or (c) he is in possession of any money or bullion etc. which represents wholly or partly the income or property which has not been and which would not be disclosed for the purpose of assessment, called as undisclosed income or property. We find that the provision in section 132 (1) does not use the word "incriminating document". Clauses (a) and (b) of section 132(1) employ the words "books of account or other documents". For harmonious interpretation of this provision with provision contained in section 153A, all the three conditions on satisfaction of which a warrant of search can be issued will have to be taken into account.

51. Having held so, an assessment or reassessment u/s 153A arises only when a search has been initiated and conducted. Therefore, such an assessment has a vital link with the initiation and conduct of the search. We have mentioned that a search can be authorised on satisfaction of one of the three conditions enumerated earlier. Therefore, while interpreting the provision contained in section 153A, all these conditions will have to be taken into account. With this, we proceed to literally interpret to provision in 153A as it exists and read it alongside the provision contained in section 132(1).

52. The provision comes into operation if a search or requisition is initiated after 31.5.2003. On satisfaction of this condition, the AO is under obligation to issue notice to the person requiring him to furnish the return of income of six years immediately preceding the year of search. The word used is "shall" and, thus, there is no option but to issue such a notice. Thereafter he has to assess or reassess total income of these six years. In this respect also, the word used is "shall" and, therefore, the AO has no option but to assess or reassess the total income of these six years. The pending proceedings shall abate. This means that out of six years, if any assessment or reassessment is pending on the date of initiation of the search, it shall abate. In other words pending proceedings will not be proceeded with thereafter. The assessment has now to be made u/s 153A (1)(b) and the first proviso. It also means that only one assessment will be made under the aforesaid provisions as the two proceedings i.e. assessment or reassessment proceedings and proceedings under this provision merge into one. If assessment made under sub-section (1) is annulled in appeal or other legal proceedings, then the abated assessment or reassessment shall revive. This means that the assessment or reassessment, which had abated, shall be made, for which extension of time has been provided under section 153B.

53. The question now is - what is the scope of assessment or reassessment of total income u/s 153A (1) (b) and the first proviso ? We are of the view that for answering this question, guidance will have to be sought from section 132(1). If any books of account or other documents relevant to the assessment had not been produced in the course of original assessment and found in the course of search in our humble opinion such books of account or other documents have to be taken into account while making assessment or reassessment of total income under the aforesaid provision. Similar position will obtain in a case where

undisclosed income or undisclosed property has been found as a consequence of search. In other words, harmonious interpretation will produce the following results:-

(a) In so far as pending assessments are concerned, the jurisdiction to make original assessment and assessment u/s 153A merge into one and only one assessment for each assessment year shall be made separately on the basis of the findings of the search and any other material existing or brought on the record of the AO,

(b) in respect of non-abated assessments, the assessment will be made on the basis of books of account or other documents not produced in the course of original assessment but found in the course of search, and undisclosed income or undisclosed property discovered in the course of search.

54. It may be mentioned here that Ld. Counsel for All Cargo Global Logistics Ltd. was questioned about the scope of pending assessments as it was his contention that all six assessments are to be made, if necessary, on the basis of undisclosed income discovered in the course of search. He was specifically questioned about the jurisdiction of the AO to make original assessment along with assessment u/s 153A, merging into one. However he took an evasive view submitting that this question need not be decided in his case although the question of jurisdiction u/s 153A was vehemently pressed on account of which ground No.1 in the appeal for assessment year 2004-05 was admitted as additional ground. He also wanted the additional ground to be retained in case of any future contingency."

16. The matter relating to incriminating material coupled with various other issues again came up for consideration before the Hon'ble Bombay High Court recently in case of **Ashok Commercial Enterprises vs Assistant Commissioner of Income tax** (Writ petition no 2595 and others dated 04/09/2023). Referring to the decision of Hon'ble Supreme Court in case of Pr. CIT Vs. Abhisar Buildwell (P) Ltd. (supra), it was held that no addition can be made by the AO in absence of any incriminating material found during the course of search under section 132 or requisition under section 132A of the Act. Referring to the decision of Hon'ble Supreme Court in case of CIT Vs. Sinhgad Technical Education Society 397 ITR 344 (SC), it was held that the incriminating material seized must pertain to assessment year in question and notice issued under section 153C for other assessment years are not sustainable. It was further held by the Hon'ble Bombay High Court that the question whether any material found during the course of proceedings under section 132 is incriminating or otherwise has to be tested based only on the satisfaction note recorded by the AO. It was held that the contents of the said satisfaction note are the only statement/material to be looked at and the Revenue cannot seek the augment, supplement or add to the material recorded to support the claim that the incriminating material has been found and the Revenue cannot refer to any other document or material to establish such a claim and the relevant findings are contained at para 15 (d) page 40 of the judgment which we deem it appropriate to reproduce as under:

"(d) The question of whether any material found during the course of proceedings under Section 132 of the Act in the case of Hubtown Limited is incriminating or otherwise has to be tested based only on the satisfaction note recorded by the Assessing Officer/s. The contents of the said satisfaction note are

the only item/material to be looked at in this regard and respondent cannot seek to augment, supplement or add to materials recorded to support the claim that incriminating material has been found. Further respondent cannot refer to any other documents or material to establish such a claim. We find support in (i) Ananta Landmark Pvt. Ltd. (Supra) and (ii) Jainam Investments (Supra), where the Courts have held that the question of the Assessing Officer's jurisdiction to undertake proceedings has to be tested/examined only on the basis of reasons recorded at the time of issuing a notice under Section 148 of the Act seeking to reopen an assessment. These reasons cannot be improved upon and/or supplemented much less substituted by affidavit and/or oral submission;

(e) In the instant case, the satisfaction note dated 13th July 2021 (common for all Assessment Years) insofar it relates to Assessment Year 2017-2018 only records that:

(i) an account of petitioner in the books of Hubtown Limited was found.

It is important to note that the said account agreed exactly to the account of Hubtown Limited in the books of petitioner, a fact verified during the course of the survey on the day after the search, i.e., 31st July 2019.

(ii) petitioner had entered into transactions of purchase and sale of shares of Hubtown Limited which have been recorded in petitioner's books of accounts and tax paid on the resulting gain.

(iii) reference is made to an alleged re-cast of loan from petitioner to Hubtown Limited into an advance against property during year ended 31st March 2019 and the same is not relevant to Assessment Year 2017-2018.

(f) Accordingly, it is irrefutable that no incriminating material relating to petitioner has been found during proceedings under Section 132 of the Act in the case of Hubtown Limited;"

17. We therefore find that the term "incriminating material" have to be read and understood in the context of one or more of the conditions stipulated in section 132(1) and on satisfaction of which, a search can be authorised and search warrant can be issued. That is, there is information in possession of the competent authority and basis which he has reasons to believe that (a) summons or notice has been issued to produce books of account or other documents but such books of account or documents have not been produced under the erstwhile 1922 Act or under section 142(1) of the present Act, (b) summons or notice has been or might be issued, he will not produce the books of account or other documents mentioned therein, or (c) he is in possession of any money or bullion etc. which represents wholly or partly the income or property which has not been and which would not be disclosed for the purpose of assessment, called as undisclosed income or property. Therefore the information in possession of the competent authority at the time of authorization of search becomes relevant and basis the same, his satisfaction that search action is warranted coupled with material actually found and seized during the course of search which has not been disclosed or produced or submitted in the course of original assessment. More specifically, it refers to the books of account or other documents not produced in the course of original assessment but found in the

course of search. It also refers to any money or bullion etc. which represents wholly or partly the income or property which has not been disclosed for the purpose of assessment and discovered in the course of search. It can thus be stated that in case of unabated assessment, the reassessment can be made on the basis of the satisfaction note pursuant to which the search has been initiated and books of account or other documents not produced in the course of original assessment but found in the course of search which indicate undisclosed income or undisclosed property, and secondly, the reassessment can be made on the basis of the undisclosed income or undisclosed property which is physically found and discovered in the course of search.

18. Applying the aforesaid legal proposition in the instant case, we find that it is a case of completed/unabated assessment wherein the original return of income filed on 29/09/2012 stood processed under section 143(1) and accepted in absence of any notice under section 143(2) and statutory period of issuance of such notice stood expired well before the date of search which was conducted on 26/02/2016.

19. As per section 153A of the Act, once a search and seizure action is carried out, the AO has to assess or reassess the total income of the assessee in respect of six years immediately preceding the assessment year relevant to the previous year in which a search is conducted or requisition is made. In case the assessment is pending on the date of search the same shall be abated as per proviso to section 153A(1) of the Act and the AO is free to assess the income of the assessee as regular assessment. However, in case of completed assessment and not abated as on the date of search, as in the instant case, the AO has to reassess the total income of the assessee and the assessment already completed can be tinkered with or distrusted where some incriminating material is found and seized during the course of search indicating undisclosed income of the assessee. Therefore, the AO would assume the jurisdiction to reassess the 'total income' taking into consideration the incriminating material unearthed during the search and the other material available with the AO including the income declared in the return. In case no incriminating material is unearthed during the search, the AO cannot reassess taking into consideration the other material in respect of completed assessments/unabated assessments.

20. In the instant case, search and seizure operations were carried at the business and residential premises of M/s Jain Amar Clothing Pvt. Ltd. Group of cases on 26/02/2016 and the assessee, being part of the said group were also searched on the said date along with other family members. What has been found and seized are certain documents from a bank locker maintained with HDFC Bank, Kidwai Nagar, Ludhiana which admittedly doesn't belong to the assessee but is in the name of and belongs jointly to Shri Sunil Kumar Jain, the father of the assessee and Smt. Kamla Jain, the grandmother of the assessee. Therefore, the documents so found and seized are from a bank locker, which is neither in the name of the assessee nor it's the case of the Revenue that the locker is operated by the assessee. The assessee has not been found in possession of the keys of the locker and thus, the assessee is not having the effective possession of the said locker and it's again not the case of the Revenue either. Thus, where the documents have been found from a locker of family members of the assessee maintained with a bank located at a premises other than residential premises and in respect of which the assessee doesn't have any

access or possession thereof, it can be safely concluded that no documents or material has been found during the course of search either from the premises or the possession of the assessee and what to talk about any incriminating nature of such material found and seized. What has been found and seized is from the possession of third persons, who no doubt are part of the assessee's family and covered as part of the same search proceedings, but the same cannot be held as found during the course of search in case of the assessee.

21. Where the documents have been found from the locker of third persons during the course of search but belongs to the assessee, the satisfaction note of the Assessing officer of the third persons so searched assumes significance as the same alone will indicate the incriminating nature of such material so found belonging to the assessee during the course of search as held by the Bombay High Court in case of Ashok Commercial (supra) wherein it was held that the contents of the said satisfaction note are the only statement/material to be looked at and the Revenue cannot seek to augment, supplement or add to the material recorded to support the claim that the incriminating material has been found and the Revenue cannot refer to any other document or material to establish such a claim. In the instant case, we find that there is nothing on record and/or brought to our notice during the course of hearing which demonstrates that any satisfaction note has been prepared and recorded by the Assessing officer of family members whose locker has been searched and from where the documents belonging to the assessee has been found and seized. The fact that the assessee's premises were also searched and he was covered as part of the same search operations and action is initiated u/s 153A in his case, the same doesn't take away the statutory requirement of recording of satisfaction note by the Assessing officer of family members whose locker has been searched and from where the documents belonging to the assessee has been found and seized.

22. Moving further, we look at the show cause dated 14/09/2017 issued during the reassessment proceedings in case of the assessee wherein the AO referred to page no. 1 to 34 and 180 to 182 of Annexure-A seized from aforesaid bank locker and stated that the document so seized relates to purchase of shares on different dates by the assessee in terms of share certificate of M/s Maple Goods (P) Ltd. and the copy of the contract cum bill notes issued by the share broker, Shri S.K. Khemka and which has been termed as incriminating in nature.

23. In this regard, it is an admitted and undisputed position that the assessee had purchased the shares of M/s Maple Goods (P) Ltd. during the financial year 2010-11 relevant to assessment year 2011-12 and thus, the said transaction doesn't pertain to impugned assessment year 2012-13 and cannot be held as incriminating in nature for the impugned assessment year. The Hon'ble Supreme Court in case of Singhad Technical Education Society (supra) considering the issue under section 153C held that the incriminating material which was seized had to pertain to assessment years in question. The Hon'ble Supreme Court in case of Abhisar Buildwell (P) Ltd (supra) considering the issue under section 153A reiterated the said principle wherein it was held that the intention does not seem to re-open the completed/unabated assessments, unless any incriminating material is found with respect to concerned assessment year falling within last six years preceding the search.

24. Further, it is noted that during the financial year 2010-11 relevant to assessment year 2011-12, the assessee had purchased the shares wherein the payment had been made through normal banking channel and the transaction is duly reflected and disclosed in the bank statement of the assessee. The proceedings for Assessment Year 2011-12 were also reopened u/s 153A pursuant to search action and the reassessment proceedings have been completed u/s 153A r/w 143(3) vide order dated 29/12/2017 where the AO has not recorded any adverse findings regarding the aforesaid purchase of shares of M/s Maple Goods (P) Ltd even though the documents found and seized from the locker were in the knowledge of the Assessing officer and a specific show-cause notice dated 14/09/2017 regarding bogus LTCG has been issued by the AO and considering the submissions of the assessee, the transaction of purchase of the shares of M/s Maple Good (P) Ltd through the broker Shri S.K Khemka has been duly accepted by the AO. Therefore, where for assessment year 2011-12, the documents so found and seized from the locker have not been found as incriminating in nature by the Assessing officer and in that scenario, it is difficult to understand and appreciate how the same documents can be treated as incriminating in nature for the impugned assessment year 2012-13 vide the order passed u/s 153A r/w 143(3) of the even date i.e, 29/12/2017 by the same Assessing officer.

25. Moving further, it is noted that pursuant to scheme of amalgamation approved by the Hon'ble Calcutta High Court, the assessee had received shares of Access Global in lieu of shares held in Maple Goods (P) Ltd. and the shares of Access Global were received and credited in the demat account of the assessee. Therefore, once the scheme of amalgamation has been implemented, Maple Goods (P) Ltd loses its legal existence and identity and merges into Access Global and the fresh shares of Access Global have been issued and credited in the D-mat account of the assessee against the shares held in Maple Goods (P) Ltd. In the impugned assessment year 2012-13, we find that the assessee has sold certain shares of Access Global and disclosed long term capital gains on sale of shares of Access Global as part of the original return of income filed on 29/02/2012 well before the date of search on 26/02/2016. While calculating the long term capital gains, the assessee has disclosed sale consideration on sale of shares of Access Global and has claimed cost of acquisition of original shares of M/s Maple Goods (P) Ltd which matches with particulars as per the share certificates initially purchased and transferred in the name of the assessee and contract notes issued by the broker Shri S.K Khemka which were found from the locker of the family members. Thus, the transaction of sale and purchase of shares have been duly disclosed as part of the original return of income and the assessment thereof stood completed/unabated as on the date of search. Therefore, the share certificates and contract notes represent and corroborate a disclosed transaction of purchase and sale of shares as part of the original return of income and cannot be termed as incriminating material so found and seized during the course of search in case of the assessee for the impugned assessment year. Further, there is nothing found during the course of search in case of the assessee that Shri S.K Khemka was an unauthorized broker indulging in illegal trading. Therefore, the findings of the AO that the share certificates and contract notes are incriminating in nature are not borne out of record and infact, the said documents corroborate and confirm the disclosed transaction of purchase of shares of Maple Good (P) Ltd by the assessee. Further, the fact that these

documents have a direct bearing on the estimation of correct income of the assessee doesn't make them incriminating in nature as so held by the Id CIT(A).

26. Now, coming to statement of Shri S.K Khemka from whom assessee had purchased shares of Maple Good (P) Ltd, admittedly, the said statement was recorded on 13/03/2015 by the Investigation Wing, Calcutta in context of some other proceedings well before the date of search in case of the assessee which happened on 26/02/2016. As per the AO, the statement of Shri S.K Khemka is highly relevant to assessee's case as the assessee has purchased shares through the said broker. There is a difference between relevancy of material and incriminating nature of material found during the course of search. The material which could be relevant doesn't necessarily be held as incriminating in nature. In case of unabated assessment, what is required to be seen is whether there is any incriminating material unearthed during the course of search. Only in a case where the undisclosed income is found on the basis of incriminating material, the AO would assume the jurisdiction to assess or reassess the total income in case of completed/unabated assessment taking into consideration the incriminating material unearthed during the search and the other material available with the AO including the income declared in the return.

27. As we have noted above, the share certificates corroborate and confirm the disclosed transaction of purchase of shares of Maple Good (P) Ltd by the assessee and cannot be termed as incriminating in nature. Therefore, where there is no incriminating material found during the course of search, the statement of Shri S.K Khemka (and what has been stated therein) which is recorded well before the date of search in case of the assessee and in the context of some other proceedings, independent of the impugned search proceedings, is availability of certain "other material/documentation" with the AO during the course of reassessment proceedings but not material/documentation which is incriminating in nature found during the course of search in case of assessee for the impugned assessment year.

28. As per Id CIT/DR, the statement of Shri S.K Khemka is corroborated by evidence in nature of share certificates and contract notes seized during the course of search and basis the same, it was contended that documents so seized would fall within the definition of incriminating material. In other words, the statement of Shri S.K Khemka has formed the basis for forming the belief that share certificates and contract notes are incriminating in nature. As we have noted above, the question whether any material found during the course of proceedings under section 132 is incriminating or otherwise has to be tested based only on the satisfaction note recorded by the AO. It has been held by the Courts that the contents of the said satisfaction note are the only statement/material to be looked at and the Revenue cannot seek to augment, supplement or add to the material recorded to support the claim that the incriminating material has been found and the Revenue cannot refer to any other document or material to establish such a claim. In the instant case, there is nothing on record and/or brought to our notice during the course of hearing that the Competent authority was seized of the aforesaid statement of Shri S. K Khemka at the time of recording of the satisfaction whereby the authorization has been issued and the search warrant was issued whereby the search has been initiated in case of the assessee. Therefore, the statement of Shri S.K Khemka is availability of other material/documentation which has come in the knowledge

and possession of the AO for the first time during the course of reassessment proceedings and therefore can't be referred to and relied upon by the AO to augment, supplement and add to the material found during the course of search in terms of the share certificates and contract notes and in terming the same as incriminating material found during the course of search in case of the assessee. The contents advanced by the Id CIT/DR therefore cannot be accepted.

29. In view of the aforesaid discussion and in the entirety of facts and circumstances of the case and respectfully following the dicta laid down by the Hon'ble Supreme Court, Hon'ble Delhi and Bombay High Court as well as Special Bench of the Tribunal, we are of the considered view that the addition of Rs 87,04,733/- made by the AO during the reassessment proceedings completed u/s 153A is not based on any incriminating material found or seized during the course of search and seizure action u/s 132 of the Act in case of the assessee. Being a case of completed/unabated assessment, in absence of any incriminating material found during the course of search, the addition so made cannot be sustained and is hereby directed to be deleted. In the result, the ground no. 2, 3 & 4 of the assessee's appeal is allowed.

30. In view of the aforesaid discussions where we have deleted the addition in absence of any incriminating material, other grounds of appeal on merits of the case, lack of opportunity for cross-examination, etc have become academic in nature and we don't deem it necessary to adjudicate the same. These grounds of appeal are thus left open, to be decided at appropriate time should the need for the same arise in future and for the present, dismissed as infructious."

12. Following the aforesaid decision, in the instant case as well, the copy of share certificates found from the locker of family members and not that of the assessee, corroborate and confirm the disclosed transaction of purchase of shares and cannot be termed as incriminating in nature. The statement of Shri S K. Khemka is availability of other material/documentation which has come in the knowledge and possession of the AO for the first time during the course of reassessment proceedings and the said statement cannot augment/supplement the material found during the course of search in terms of share certificates and therefore cannot be used to turn the share certificates as incriminating in nature. Being a case of completed/unabated assessment, in absence of any incriminating material found during the course of search in case of the assessee, the addition so made cannot be sustained and is hereby

directed to be deleted. In the result, the ground no. 2, 3 & 4 of the assessee's appeal is allowed.

13. In view of the aforesaid discussions, where we have deleted the addition in absence of any incriminating material, other grounds of appeal on merits of the case, lack of opportunity for cross-examination, etc have become academic in nature and we don't deem it necessary to adjudicate the same. These grounds of appeal are thus left open, to be decided at appropriate time should the need for the same arise in future and for the present, dismissed as infructuous.

14. In the result, the appeal filed by the assessee is partly allowed.

Order pronounced in the open Court on 16/02/2024

Sd/-

संजय गर्ग
(SANJAY GARG)
न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-

विक्रम सिंह यादव
(VIKRAM SINGH YADAV)
लेखा सदस्य/ ACCOUNTANT MEMBER

AG

Date: 16/02/2024

आदेश की प्रतिलिपि अग्रेषित/ Copy of the order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकर आयुक्त/ CIT
4. आयकर आयुक्त (अपील) / The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय आधिकरण, चण्डीगढ़/ DR, ITAT, CHANDIGARH
6. गार्ड फाईल/ Guard File

आदेशानुसार/ By order,
सहायक पंजीकार/ Assistant Registrar