

IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH KOLKATA

**BEFORE SHRI SANJAY GARG, JUDICIAL MEMBER
AND SHRI RAKESH MISHRA, ACCOUNTANT MEMBER**

**ITA Nos.896 & 897/Kol/2024
Assessment Years: 2014-15 & 2015-16**

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**ITA No.898/Kol/2024
Assessment Year: 2017-18**

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**ITA No. 899/Kol/2024
Assessment Year: 2019-20**

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**ITA No. 1281/Kol/2024
Assessment Years: 2018-19**

DCIT, Central Circle-1(3), Kolkata.	Vs.	Samriddhi Metals Pvt. Ltd. 4 th Floor, 318, lake Town, Block-A, Kolkata-700089. (PAN: AAPCS1201F)
(Appellant)		(Respondent)

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**ITA No. 1282/Kol/2024
Assessment Year: 2018-19**

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**ITA No. 886/Kol/2024
Assessment Year: 2014-15**

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**ITA No. 887/Kol/2024
Assessment Year: 2015-16**

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**ITA No. 890/Kol/2024
Assessment Year: 2016-17**

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**ITA No. 891/Kol/2024
Assessment Year: 2017-18**

DCIT, Central Circle-1(3), Kolkata.	Vs.	Sumangal Dealmark Pvt. Ltd. 318, Lake Town, Block-A, Kolkata-700089
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	(PAN: AAPCS1198B)
(Appellant)	(Respondent)

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ITA No. 900/Kol/2024
Assessment Year: 2014-15

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ITA No. 1279/Kol/2024
Assessment Year: 2015-16

DCIT, Central Circle-1(3), Kolkata.	Vs.	Disha Realcon Pvt. Ltd. 2, Room No. 216, 1st Bazar Street, Kolkata-700001. (PAN: AADCD6724A)
(Appellant)		(Respondent)

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ITA No. 894/Kol/2024
Assessment Year: 2013-14

DCIT, Central Circle-1(3), Kolkata.	Vs.	Praful Enterprises Pvt. Ltd. 403, Sagar Trade Cube, 104, S P. Mukherjee Road, Kalighat, Kolkata-700026. (PAN: AABCP8497L)
(Appellant)		(Respondent)

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Cross Objection No. 18/Kol/2024
In ITA No. 894/Kol/2024
Assessment Year: 2013-14

Praful Enterprises Pvt. Ltd.	Vs.	DCIT, Central Circle-1(3), Kolkata.
(Cross Objector)		(Respondent)

Present for:

Assessee by : Shri A. K. Tulsiyan, FCA
Revenue by : Shri A. Kundu, CIT, DR

Date of Hearing : 12.09.2024
Date of Pronouncement : 18.10.2024

ORDER

PER BENCH :

All the captioned appeals except C.O. No. 18/Kol/2024 have been preferred by the revenue against the separate orders of Ld. CIT(A), Kolkata-20 of even date 02.02.2024. C.O. No. 18/Kol/2024 has been preferred by the assessee Praful Enterprises Pvt. Ltd.

1.1 All the revenue appeals are more or less time barred by 16 days and condonation petitions have been filed. Considering the condonation petitions, we note that there is reasonable cause for delay in filing the appeals, hence, we condone the delay and admit all the appeals for hearing on merits.

2. At the outset, Ld. Counsel for the assessee has submitted that the tax effect involved in three appeals of the revenue i.e. **ITA No. 1279/Kol/2024, ITA No. 1281/Kol/2024 and ITA No. 1282/Kol/2024** is less than the prescribed monetary limit of Rs. 60 lakh for filing appeal by the revenue before this Tribunal. The calculation made by the Ld. AR of the assessee is reproduced below:

Sl. No	Assessee Name	AY	Appeal Number	Addition amount (Rs.) (as per Form 36 of Departmental Appeal)	Tax Effect (Rs/) (As per form 36 of Departmental appeal)	Actual Tax effect (Rs.)
1.	Disha Realcon Pvt. ltd.	2015-16	1279/Kol/2024	20,00,000	20,00,000	6,48,900
2.	Samriddhi Metals Pvt. Ltd.	2018-19	1281/Kol/2024	40,00,000	40,00,000	31,20,000
3.	Sumangal Dealmark Pvt. ltd.	2018-19	1282/Kol/2024	40,00,000	40,00,000	31,20,000

2.1. It is seen, at the outset, that the tax effect on the disputed additions before us is less than Rs. 60 lakh as prescribed in the CBDT's latest Circular No. 09/2024 dated 17.09.2024 for filing appeals by the Revenue before this Tribunal.

2.2. This circular prescribes that the revised monetary limits shall apply retrospectively to pending appeals as well.

2.3. The ld. DR has also fairly stated that tax effect involved in the aforesaid three appeals is less than the prescribed limit.

2.4. In view of above stated position, the above noted three appeals of the Revenue are dismissed u/s 268A of the Income Tax Act, 1961 (hereinafter referred to as "the Act") because of low tax effect than the prescribed limits as per CBDT Circular No. 09/2024 (*supra*).

3. Even on merits, since common facts are involved in all the appeals, hence, our decision arrived at on remaining appeals will also apply to these three appeals also.

4. The assessee companies belonged to SM Group of Companies and in all the cases assessment orders which are subject matter of appeal, have been passed in pursuance of search and seizure operation carried out u/s. 132 of the Act in the S M Group of Companies conducted on 17.12.2020. In all the cases, identical assessment orders have been passed, except the concluding para of the orders wherein, the amount of addition/determination of total income has been mentioned separately in each case. Ld. Counsel for the assessee had moved an application for clubbing all these appeals, hence, these were clubbed together vide order dated 11.09.2024 of

this Tribunal. These appals were heard together and are being disposed of by this common order.

5. Revenue's appeal in ITA No. 886/Kol/2024 is taken as the lead case for the purpose of narration of facts.

6. Brief facts of the case are that the assessee belongs to S M Niryat Group of Companies and is engaged in the business of road and rail transportation along with trading of iron ore, fines and pallets and export of minerals. The assessee filed its original return of income on 28.09.2014 declaring nil income. Thereafter, a search and seizure action was carried out u/s. 132 of the Act on 07.12.2020 in S M Group of cases and the assessee was also covered in the said search action. Pursuant to the said search action, the assessee filed its return of income u/s. 153A of the Act on 09.03.2022. The assessment was carried out u/s. 153A of the Act. The Assessing officer (in short "AO") observed that S M Niryat Group (in short "SMNG") had taken over/acquired many companies with pre-raised huge amount of share capital and premium. These investments in the said acquired companies were sold by these companies during the year under consideration. The AO observed that the said sale of investments was in fact, bogus sales and that the assessee had introduced its unaccounted income in the garb of sale of investments, raising huge liquidated capital. The AO, therefore, treated the sale consideration/sale of investments as bogus and added the amount of sale consideration of investments as unaccounted income of the assessee u/s. 68 of the Act. The addition for the year under consideration in the case of assessee was made of Rs.15,90,00,000/-.

7. Being aggrieved by the said order of the AO, the assessee preferred appeal before the Ld. CIT(A). The Ld. CIT(A), however,

deleted the addition so made by the AO, observing that no incriminating material, whatsoever, was found during the course of search action in the case of the assessee relating to the aforesaid transaction of sale of investments. He observed that since in this case, the original assessment already stood completed/unabated, therefore, in the absence of any incriminating material found during the course of search action, no addition could have been made. He, in this respect has relied on various decisions of the Hon'ble High Courts including the decision of the Hon'ble Delhi High Court in the case of *CIT VS. Kabul Chawla (2016), 380 ITR 573(Delhi)* and the decision of Hon'ble Gujart High Court in the case of *Pr. CIT Vs. Soumya Construction (P) Ltd. (2016) 387 ITR 529* and the decision of Hon'ble Delhi High Court in the case of *Pr. CIT Vs. Best Infrastructure (I) Pvt. Ltd. 397 ITR 182 (Del)* and various decisions of other High Courts and lastly, on the recent decision of the Hon'ble Supreme Court in the case of *Pr. CIT Vs. Abhishek Buildwell Pvt. Ltd. [2013] 454 ITR 212 (SC)*, wherein, it has been held that no addition can be made in respect of completed/unabated assessment in the absence of any incriminating material unearthed during the course of search action.

7.1. The Ld. CIT(A) also observed on merits of the case that all the investments made by the assessee were shown in the Balance Sheet of the preceding years and a part of investments, which were carried forward, were sold during the year under consideration. That the AO had issued notices to many parties u/s. 133(6) of the Act and most of such parties had responded and accepted the transaction as genuine. That no evidence was found during the search proceedings which would indicate that

sale of shares was bogus. The Ld. CIT(A) has also observed that there is no evidence of any cash trail which may support AO's allegation that the assessee had introduced its unaccounted income in the garb of sale of investment. The Ld. CIT(A) has further observed that the AO has focused on the low income declared by the purchasers, but he has overlooked the high net worth shown by them in their Balance Sheet. That keeping in mind, the high net worth of such parties, it was possible that they had purchased the shares. He further observed that even otherwise, no adverse evidence has been gathered against these transactions. That these parties were active as per MCA site, they have PAN for filing their return of income. All the payments made through banking channels and the transactions were confirmed by these parties in response to notices issued u/s. 133(6) of the Act. The relevant part of the order of Ld CIT(A) is reproduced as under:

"5.3(a) I have carefully considered the facts of the case and submission of the appellant. Current year is an unabated/completed assessment year. Although AO. has mentioned that the additions are supported by incriminating evidences found during the search, but appellant has strongly refuted the allegation of the AO. In the assessment order, most serious allegation is regarding inflation of transportation bills and generation of unaccounted cash. Entries contained in seized documents, computer hard disk and pen drive, point out towards generation of cash to the tune of Rs.34.28 crores. Same documents also contained information regarding various payments out of the cash generated, for business purposes. In this regard, appellant has explained that M/s. S.M. Niryat Pvt. Ltd. is the flagship company of the assessee group. This company is mainly engaged in mining and transportation of minerals to Rail sites Ports etc. For supervising the mining activities and transportation of minerals, group is maintaining the office at Barbil, Orissa. For smoothly carrying out the mining activities and transportation of minerals from remote mining sites, various types of expenses are incurred. Considering the nature of activities at these remote areas, several expenses are incurred in cash. It appears that the assessee group did not want to get involved directly in cash payments. For this purpose, they have made arrangements that the transporters engaged for transporting of minerals were paid in excess of the

actual freight/transport charges with instructions to pay certain expenses on behalf of M/s. S.M. Niryat Pvt. Ltd. These expenses include payments to local truck owners, advance to truck drivers, for purchase of fuel and other local payments some of which are not allowable as per LT. Act. Besides, some components of local expenditure are also in the nature of capital expenditure. All these payments were made from the accounts of various transporters but it was monitored by the company's staff posted at Barbil office. These notings about cash generation and various expenses are in respect of cash contributed by various transporters for incurring local business expenditure of the assessee group. All these information relating to cash generation and the expenses made have been owned up by M/s. S.M. Niryat Pvt. Ltd. The said company has also worked out the non allowable expenses (certain illegal expenses and capital expenses) and offered the same for taxation. A total amount of Rs.7,36,32,740/- has been worked out as such non allowable expenses and these have been offered for taxation while filing returns in response to notice u/s.153A, 139(5) and 139(1) for AYrs. 2014-15 to AYrs. 2020-21. Besides, explanation for all the seized documents and data contained on hard disk and pen drive have also been furnished during the assessment proceedings. After considering all these explanations, additional income worked out by M/s. S.M. Niryat Pvt. Ltd. has been accepted. This implies that the information regarding cash generation of RS.34.28 crores related only to M/s. S.M. Niryat Pvt. Ltd. Further, evidences regarding generation of cash in the case of M/s. S.M. Niryat Pvt. Ltd. is only in respect of inflation of transportation bill. There are no evidences of any other way of generating cash, either by M/s. S.M. Niryat Pvt. Ltd. and/or any other concern.

5.3(b) There is no findings that any of these cash was diverted for any other purposes other than meeting business expenses (some of which are not allowable) at mining site. Neither there are any findings that cash generation is of higher amount and other group companies are also indulging in such activities. In the case of the appellant, addition has been made in respect of amount received on sale of investments. Appellant had raised huge share capital (including premium) in the preceding years and these were invested in unlisted shares of various companies. The investment made in unquoted shares were shown in the balance sheet of the preceding years and out of these carried forward investment in unlisted shares, in the current year, appellant has sold part of these investments. AO has made some enquiry during assessment proceedings and alleged that sale of shares by the appellant company has been held to be bogus, implying that assessee has routed its unaccounted income in the guise of sale of shares. However, no evidence was found during the search proceedings which may indicate that sale of share was bogus. There is no evidence of any cash trail which may support AO's allegation. Neither is there any adverse evidence regarding the sale of shares by the appellant. All payments have been made through banking channel. There are no evidences that transaction relating to purchase of shares is bogus.

5.3(c) In the assessment order, AO has alleged that Nilachal Ispat Pvt. Ltd. was generating cash by selling some of its low quality products in cash. AO has further alleged that proof of cash generation for the period 01-01-2016 to 30-09-2016 was found in the seized documents. However, appellant has

clarified that the company, M/s. Nilachal Iron and Power Ltd. was taken over by the assessee group w.e.f. 28-03-2018. Hence, there cannot be any instance of cash generation prior to 28-03-2018. It is further clarified that the information regarding cash payments have already been considered in the hands of M/s. S.M. Niryat Pvt. Ltd. It is further alleged that M/s. S.M. Niryat Pvt. Ltd. is involved in the practice of inflating expenses and receiving back the inflated amount in the form of cash from various parties. In this regard, appellant has clarified that the only evidence regarding cash generation/payments in cash is in respect of the payments through transporters at Barbil office. All the seized documents and data contained in hard disk and pen drive in this regard, have been considered and additional income of Rs.7.36 crores have been offered for taxation in the hands of M/s. S.M. Niryat Pvt. Ltd. After considering appellant's replies I am satisfied that except for evidences regarding cash payments/cash generation at Barbil office by inflating transportation bills, no other evidences have been found during search which may indicate that the assessee group indulged in inflation of expenses to generate cash. Whatever cash was generated with the help of transporters, has been duly accounted for while filing returns of M/s. S.M. Niryat Pvt. Ltd. in response to notices u/s.153A of the I.T. Act. AO has accepted the working furnished by the assessee. Thus, there is no proof of any additional generation of cash, which may be linked to sale of share by the appellant.

5.3(d) To support the addition, AO has referred to the statement of Sri Duniram Taterwal, Subhash Chandra Berdia, Shri Bipin Kejriwal and Shri Manish Khemka, director. Extracts of their statement have been given in the assessment order. In the first place, perusal of these statements, as copied in the assessment order, shows that none of these persons have given any adverse statement regarding sale of shares. Rather, they have mentioned that cash was used for regular business expenditure. It is mentioned that cash is being used to make various payments against cash vouchers. These persons have not spoken anything about sale of shares. In any case, even these statements have been retracted immediately after search by filing Affidavit in the Investigation Wing. These Affidavits have been sworn before the First Class Magistrate, Kolkata. No further action has been taken by the department after retraction of these statements. Hence, the statements of the said persons do not have any evidentiary value, in respect of sale of shares.

Now, let us examine whether statement u/s.132(4) in itself can be considered as incriminating evidence in the light of several judicial pronouncements. This matter was considered by the Hon'ble Delhi High Court in the case of CIT vs. Harjeev Agarwal 241 taxman.com 199 (Delhi). Hon'ble High court had held that the statement recorded u/s. 132(4) do not themselves become incriminating material if these are not based upon any seized/incriminating material. The operating part of the judgement is as under:

“19. In view of the settled legal position, the first and foremost issue to be addressed is whether a statement recorded under Section 132 (4) of the Act would by itself be sufficient to assess the income, as disclosed by the Assessee in its statement, under the Provisions of Chapter XIV-8 of the Act.”

20. *In our view, a plain reading of Section 158BB(1) of the Act does not contemplate computing of undisclosed income solely on the basis of a statement recorded during the search. The words "evidence found as a result of search" would not take within its sweep statements recorded during search and seizure operations. However, the statements recorded would certainly constitute information and if such information is relatable to the evidence or material found during search, the same could certainly be used in evidence in any proceedings under the Act as expressly mandated by virtue of the explanation to Section 132(4) of the Act. However, such statements on a standalone basis without reference to any other material discovered during search and seizure operations would not empower the AO to make a block assessment merely because any admission was made by the Assessee during search operation.*

21. *A plain reading of Section 132 (4) of the Act indicates that the authorized officer is empowered to examine on oath any person who is found in possession or control of any books of accounts, documents, money, bullion, jewellery or any other valuable article or thing. The explanation to Section 132 (4), which was inserted by the Direct Tax Laws (Amendment) Act, 1987 w.e.f. 1st April, 1989, further clarifies that a person may be examined not only in respect of the books of accounts or other documents found as a result of search but also in respect of all matters relevant for the purposes of any investigation connected with any proceeding under the Act. However, as stated earlier, a statement on oath can only be recorded of a person who is found in possession of books of accounts, documents, assets, etc. Plainly, the intention of the Parliament is to permit such examination only where the books of accounts, documents and assets possessed by a person are relevant for the purposes of the investigation being undertaken. Now, if the provisions of Section 132(4) of the Act are read in the context of Section 158BB(1) read with Section 158B(b) of the Act, it is at once clear that a statement recorded under Section 132(4) of the Act can be used in evidence for making a block assessment only if the said statement is made in the context of other evidence or material discovered during the search. A statement of a person, which is not relatable to any incriminating document or material found during search and seizure operation cannot, by itself, trigger a block assessment. The undisclosed income of an Assessee has to be computed on the basis of evidence and material found during search. The statement recorded under Section 132(4) of the Act may also be used for making the assessment, but only to the extent it is relatable to the incriminating evidence/material unearthed or found during search. In other words, there must be a nexus between the statement recorded and the evidence/material found during search in order to for an assessment to be based on the statement recorded.*

22. *In CIT v. Shri Ramdas Motor Transport [1999] 238 ITR 177/102 Taxman 300, a Division Bench of Andhra Pradesh High Court, reading the provision of Section 132(4) of the Act in the context of discovering undisclosed income, explained that in cases where no unaccounted documents or incriminating material is found, the powers under Section*

132(4) of the Act cannot be invoked. The relevant passage from the aforesaid judgment is quoted below:-

“A plain reading of sub-section (4) shows that the authorised officer during the course of raid is empowered to examine any person if he is found to be in possession or control of any undisclosed books of account, documents, money or other valuable articles or things, elicit information from such person with regard to such account books or money which are in his possession and can record a statement to that effect. Under this provision, such statements can be used in evidence in any subsequent proceeding initiated against such person under the Act. Thus, the question of examining any person by the authorised officer arises only when he found such person to be in possession of any undisclosed money or books of account. But, in this case, it is admitted by the Revenue that on the dates of search, the Department was not able to find any unaccounted money, unaccounted bullion nor any other valuable articles or things, nor any unaccounted documents nor any such incriminating material either from the premises of the company or from the residential houses of the managing director and other directors. In such a case, when the managing director or any other persons were found to be not in possession of any incriminating material, the question of examining them by the authorised officer during the course of search and recording any statement from them by invoking the powers under section 132(4) of the Act, does not arise. Therefore, the statement of the managing director of the assessee, recorded patently under section 132(4) of the Act, does not have any evidentiary value. This provision embedded in sub-section (4) is obviously based on the well established rule of evidence that mere confessional statement without there being any documentary proof shall not be used in evidence against the person who made such statement. The finding of the Tribunal was based on the above well settled principle.”

23. It is also necessary to mention that the aforesaid interpretation of Section 132(4) of the Act must be read with the explanation to Section 132(4) of the Act which expressly provides that the scope of examination under Section 132(4) of the Act is not limited only to the books of accounts or other assets or material found during the search. However, in the context of Section 158BB(1) of the Act which expressly restricts the computation of undisclosed income to the evidence found during search, the statement recorded under Section 132(4) of the Act can form a basis for a block assessment only if such statement relates to any incriminating evidence of undisclosed income unearthed during search and cannot be the sole basis for making a block assessment.

24. If the Revenue's contention that the block assessment can be framed only on the basis of a statement recorded under Section 132(4) is accepted, it would result in ignoring an important check on the power of the AO and would expose assesseees to arbitrary assessments based only on the statements, which we are conscious are sometimes

extracted by exerting undue influence or by coercion. Sometimes statements are recorded by officers in circumstances which can most charitably be described as oppressive and in most such cases, are subsequently retracted. Therefore, it is necessary to ensure that such statements, which are retracted subsequently, do not form the sole basis for computing undisclosed income of an assessee.

25. In *CIT v. Naresh Kumar Agarwal* [2014] 369 ITR 171/[2015] 53 taxmann.com 306, a Division Bench of Telangana and Andhra Pradesh High Court held that a statement recorded under Section 132(4) of the Act which is retracted cannot constitute a basis for an order under Section 158BC of the Act. The relevant extract from the said judgement is quoted below:

"17. The circumstances under which a statement is recorded from an assessee, in the course of search and seizure, are not difficult to imagine. He is virtually put under pressure and is denied of access to external advice or opportunity to think independently. A battalion of officers, who hardly feel any limits on their power, pounce upon the assessee, as though he is a hardcore criminal. The nature of steps, taken during the course of search are sometimes frightening. Locks are broken, seats of sofas are mercilessly cut and opened. Every possible item is forcibly dissected. Even the pillows are not spared and their acts are backed by the powers of an investigating officer under section 94 of the Code of Criminal Procedure by operation of sub-section (13) of section 132 of the Act. The objective may be genuine, and the exercise may be legal. However, the freedom of a citizen that transcends, even the Constitution cannot be treated as non-existent."

"18. It is not without reason that Parliament insisted that the recording of statement must be in relation to the seized and recovered material, which is in the form of documents, cash, gold, etc. It is, obviously to know the source thereof, on the spot. Beyond that, it is not a limited licence, to' an authority, to script the financial obituary of an assessee."

"19. At the cost of repetition, we observe that if the statement made during the course of search remains the same, it can constitute the basis for proceeding further under the Act even if there is no other material. If, on the other hand, the statement is retracted, the Assessing Officer has to establish his own case. The statement that too, which is retracted from the assessee cannot constitute the basis for an order under section 158BC of the Act."

This decision was reiterated by the Hon'ble Delhi High Court in the case of *Pr. CIT vs. Best Infrastructure (I) Pvt. Ltd.* 397 ITR 182 (Delhi). The relevant findings of the Hon'ble High Court mis reproduced as under:

"35. As noted in Meeta Gutgutia (supra), several other High Courts have also come to a similar conclusion either by following Kabul Chawla (supra) or otherwise. This includes the decisions

of the Gujarat High Court in *Pro CIT v. Soumya Construction (P.) Ltd.* [2016J 387 ITR 529/[2017] 81 taxmann.com 292 (Guj.); *Pr. CIT v. Devangi alias Rupa* [Tax Appeal Nos. 54, 55 to 57 of 2017, dated 2-2-2017]; the Karnataka High Court in *CIT v. IBC Knowledge Park (P.) Ltd.* [2016] 385 ITR 346/69 taxmann.com 108 (kar.); the Kolkata High Court in *Pr. CIT v. Salasar Stock Broking Ltd.* [GA No. 1929 of 2016, dated 24-8-2016] and the Bombay High Court in *CIT v. Gurinder Singh Bawa* [2016] 386 ITR 483/[2017] 79 taxmann.com 398. In *Meeta Gutgutia* (supra) the entire gamut of the case law had been analysed and the legal position was reiterated that unless there is incriminating material qua each of the A Ys in which additions are sought to be made, pursuant to search and seizure operation, the assumption of jurisdiction under Section 153A of the Act would be vitiated in law. This is one more occasion for the Court to reiterate that legal position.

36. Turning to the facts of the present case, it requires to be noted that the statements of Mr. Anu Aggarwal, portions of which have been extracted hereinbefore, make it plain that the surrender of the sum of Rs. 8 crores was only for the A Y in question and not for each of the six AYs preceding the year of search. Secondly, when Mr. Anu Aggarwal was confronted with A- 1, A-4 and A-11 he explained that these documents did not pertain to any undisclosed income and had, in fact been accounted for. Even these, therefore, could not be said to be incriminating material qua each of the preceding A Ys.

37. Fourthly, a copy of the statement of Mr. Tarun Goyal, recorded under Section 132 (4) of the Act, was not provided to the Assessees. Mr. Tarun Goyal was also not offered for the cross-examination. The remand report of the AO before the CIT(A) unmistakably showed that the attempts by the AO, in ensuring the presence of Mr. Tarun Goyal for cross-examination by the Assessees, did not succeed. The onus of ensuring the presence of Mr. Tarun Goyal, whom the Assessees clearly stated that they did not know, could not have been shifted to the Assessees. The onus was on the Revenue to ensure his presence. Apart from the fact that Mr. Tarun Goyal has retracted his statement, the fact that he was not produced for cross- examination is sufficient to discard his statement.

38. Fifthly, statements recorded under Section 132 (4) of the Act do not by themselves constitute incriminating material as has been explained by this Court in *Harjeev Aggarwal* (supra). Lastly, as already pointed out hereinbefore, the facts in the present case are different from the facts in *Smt. Oayawanti Gupta* (supra) where the admission by the Assessees themselves on critical aspects, of failure to maintain accounts and admission that the seized documents reflected transactions of unaccounted sales and purchases, is non-existent in the present case. In the said case, there was a factual finding to the effect that the Assessees were habitual offenders, indulging in clandestine

operations whereas there is nothing in the present case, whatsoever, to suggest that any statement made by Mr. Anu Aggarwal or Mr. Harjeet Singh contained any such admission.

39. For all the aforementioned reasons, the Court is of the view that the ITAT was fully justified in concluding that the assumption of jurisdiction under Section 153A of the Act qua the Assessee herein was not justified in law."

5.3(e) In view of the discussions made in the preceding paras, I am in agreement with assessee's contentions that additions in search assessment in the current assessment year, which happens to be an unabated/complete assessment year, are not supported by any incriminating evidences found during search. Now let us examine some of the leading cases where the Courts have held that additions in search assessment, without incriminating evidences found during search, are not sustainable.

In the case of CIT vs. Kabul Chawla (2016), 380 ITR 573(Delhi) the Hon'ble Delhi High Court has held that once a search takes place, notice u/s. 153A (1) has to be mandatorily issued. Assessment and re-assessment pending on the date of search shall abate. But, an assessment under the section 153A has to be made only on the basis of seized materials. In absence of any incriminating materials, the completed assessment can be only reiterated and assessment can be made only in respect of abated assessment or re-assessment. Completed assessment can be only interfered with by the AO while making the assessment u/s.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 course of search which were not produced or not already disclosed or made known in the course of original assessment. While delivering the judgment; the Hon'ble Delhi High Court followed the judgment of the Bombay High Court in CIT vs Continental Warehousing Corporation (Nhava Sheva) Ltd. (2015) 374 ITR 645. These two judgments have been followed by various High Courts and Tribunals on this issue. The position as on today is that in respect of completed assessment any addition can be made under proceedings u/s.153A only if any incriminating documents are found.

Issue relating to additions being based on incriminating evidences found during search, has been recently examined by the Hon'ble Supreme Court. Several SLPs pending in the Hon'ble Supreme Court were heard together with the lead case in Pr. CIT, Central-3 vs. Abhisar Buildwell Pvt. Ltd., Civil Appeal NO.6580 of 2021, order dated 24-04-2023. While deciding this appeal several judgements of various High Courts were discussed. Lead judgements by Delhi High Court in the case of Kabul Chawla and judgement of Gujarat High Court in the case of Saumya Construction were specifically discussed elaborately. After considering the arguments of the Department and the Assessee's Advocates, the Hon'ble Supreme Court has upheld the judgement of the Hon'ble Delhi High Court in the case of Kabul Chawla and the judgement of Gujarat High Court in the case of Saumya Construction.

Thus, the Hon'ble Supreme Court has held that no addition can be made in respect of completed assessment in absence of any incriminating material found during search. The operative part of the judgement is as under:

"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."

As mentioned above, no incriminating documents have been found during search against the assessee relevant to this particular assessment year and the issue on which addition has been made. Hence, respectfully following the judgments/decisions of various High Courts and the Tribunals, including those of the jurisdictional High Court and ITAT and the judgement of the Hon'ble Supreme Court in PCIT, Central-3 vs. Abhisar Buildwell Pvt. Ltd., Civil Appeal No.6580 of 2021, order dated 24-04-2023, it is held that the disallowances/additions made are not sustainable.

In view of the facts narrated and the discussion above, the disallowances/additions made by the AO vide order u/s.153A read with section 143(3) in this particular assessment year are not sustainable, as these are not linked to any incriminating material found at the time of search. Hence, addition of Rs.12,17,12,000/- is deleted.

No observations are being made on the merits of the issue involved, as on technical ground it has been held that the additions made in proceedings u/s. 153A are not sustainable, in the absence of incriminating material found during search."

8. Before us, Ld. DR has been fair enough to admit the fact that in this appeal, the original assessment stood completed/unabated on the date of search. The Ld. DR could not point out any incriminating material on record, either found during the course of search action or during the post search inquiries. No document, whatsoever, has been referred to by the AO, which may be said to be incriminating document for drawing any adverse inference. Though the Ld. CIT(A) has held that even on merits no adverse evidence has been found or referred to by the AO, nonetheless, the issue is squarely covered by the decision of the Hon'ble Supreme Court in the case of Abhishek Buildwell Pvt. Ltd. (supra) where in the Hon'ble Supreme Court has held that no addition can be made in the case of already concluded/unabated assessment, in the absence of any incriminating material found during the course of search action. The operating part of the order of the Hon'ble Supreme Court is reproduced as under:

"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."*

9. In view of this, Ld. CIT(A) rightly deleted the addition so made by the AO. We do not find any infirmity in the order of the Ld. CIT(A) and the same is accordingly upheld.

10. As observed in the opening paras of this order, the facts and issue in all the appeals are identical. All the appeals are offshot of the same search action carried out in the case of S M Niryat Group of companies on 07.12.2020. There is a common allegation/issue involved in all the appeals of 'sale of bogus investments'. Even the identical assessment orders have been passed in all the cases except that the amount of addition/determination of total income in each of the assessment years has been mentioned repeatedly in each assessment order. In all the cases, the original assessment stood completed/unabated on the date of search and the issue in all the cases are duly covered by the decision of the Hon'ble Supreme Court in the case of Abhishek Building Pvt. Ltd. (supra). Our findings given above, thus, will *mutatis mutandis* apply to all the appeals of the revenue. Therefore, all the appeals of the revenue are, hereby, dismissed.

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11. The assessee in this Cross Objection has pleaded that the assessment year involved in this case is AY 2013-14, which is beyond six years from the date of search and, therefore, this assessment year could not have been taken for carrying out assessment u/s.153A of the Act in view of the 4th proviso to section 153A of the Act.

12. Since as observed above, no incriminating material, whatsoever, was found during the course of search pertaining to the assessment year under consideration, therefore, this assessment year, otherwise, cannot be covered for making assessment u/s.153A of the Act as the

same is beyond six years preceding the assessment year relevant to the previous year in which search was conducted. In view of this, the Cross Objection of the assessee stands allowed.

13. In the result, all the captioned appeals of the revenue are dismissed and the Cross Objection of the assessee is allowed.

Order pronounced in the open court on 18th October, 2024.

Sd/-
(Rakesh Mishra)
Accountant Member

Sd/-
(Sanjay Garg)
Judicial Member

Dated:18th October, 2024

JD, Sr. P.S.

Copy to:

1. The Appellant:
 2. The Respondent.
 3. CIT(A), Kolkata-20.
 4. The Pr. CIT, .
 5. DR, ITAT, Kolkata Bench, Kolkata
- //True Copy//

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata