

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

**BEFORESHRI B.R. BASKARAN, ACCOUNTANT MEMBER AND
SHRI ANIKESH BANERJEE, JUDICIAL MEMBER**

ITA No.	C.O. No.	A.Y.	Appellant /Cross Objector	Respondent
1484/M/2019	-	2013-14	D.C.I.T.-CC-7(3) Mumbai Room No.655, 6 th Floor, Aayakar Bhavan, M.K. Road, Mumbai	M/s Lotus Buildspace LLP, 419, Laxmi Plaza, Laxmi Industrial Estate, New Link Road, Andheri, Mumbai-400 053 PAN : AAEFL2464P
-	43/Mum/2021	-do-	M/s Lotus Buildspace LLP,	D.C.I.T.-CC-7(3) Mumbai
1482/M/2019	-	2012-13	D.C.I.T.-CC-7(3) Mumbai	M/s Lotus Engicon Pvt Ltd PAN : AABCL4505H
-	109/Mum/2021	-do-	M/s Lotus Engicon Pvt Ltd	DCI-CC-7(3), Mumbai
2340/M/2019	-	2011-12	D.C.I.T.-CC-7(3) Mumbai	M/s Lotus Spaces Pvt Ltd, 204, Rajshree Accord, TelliGali X Lane Andheri (E), Mumbai- 400 069 PAN: AADCP5843J
-	112/Mum/2021	2011-12	M/s Lotus Spaces Pvt Ltd	D.C.I.T.-CC-7(3) Mumbai
2341/M/2019	-	2012-13	D.C.I.T.-CC-7(3) Mumbai	M/s Lotus Realtors PAN : AADFL8838J
-	111/Mum/2021	2012-13	M/s Lotus Realtors PAN : AADFL8838J	D.C.I.T.-CC-7(3) Mumbai
4044/M/2019	-	2010-11	D.C.I.T.-CC-7(3) Mumbai	M/s Lotus Logistics & Developers Pvt Ltd PAN : AABCL1198G
-	44/Mum/2021	2010-11	M/s Lotus Logistics & Developers Pvt Ltd PAN : AABCL1198G	D.C.I.T.-CC-7(3) Mumbai

Assessee by : Shri Rushabh Mehta
Respondent by : Dr. K.R. Subhash (CIT-DR)

Date of hearing : 13/02/2025
Date of pronouncement : 14/02/2025

ORDER

PER BENCH:

This group of appeals were filed by the revenue and the cross objections by the different assessee against the order of the Learned Commissioner of Income-tax (Appeals)-49, Mumbai (in short, 'Ld.CIT(A)') passed under section 250 of the Income-tax Act, 1961 (in short, 'the Act'), date of order 24/12/2018 for A.Ys. 2012-13 & 2013-14, 31/01/2019 for A.Y. 2011-12, 29/01/2019 for A.Y. 2012-13 and dated 23/03/2019 for A.Y. 2010-11. The impugned orders were emanated from the orders of the Learned Deputy Commissioner of Income-tax, Central Circle 7(3), Mumbai (in short the "Ld. AO"), order passed under section 153A read with section 143(3) of the Act, date of order 23/12/2016 for A.Y. 2012-13, 19/12/2016 for A.Y 2011-12, 2012-13& 2013-14 and 30/12/2016 for A.Y. 2010-11.

2. All the appeals have same nature of facts and common issue. Therefore, all the appeals of the revenue and the cross objections of the assessee are taken together, heard together and are disposed of by this common order. **ITA No.1484/Mum/2019&CO No.43/Mum/2021** are taken as lead case. The ground taken by the revenue and the assessee in its cross objection are as follows:-

No.1484/Mum/2019 (revenue)

"1. On the fact and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition us. 68 of Rs. 17,60,50,000/- with respect to the unsecured loans received by it, without appreciating that the retraction of statement is

only an afterthought, and the AO was correct in the treatment of the unsecured loans considering the preponderance of probability."

C.O. No.43/Mum/2019 (assessee)

1. (a) The Id. CIT(A) erred in facts and law in dismissing the jurisdictional validity of assessment u/s 143(3) r.w.s. 153A of the Act.

(b) The Id. CIT(A) erred in facts and law in not appreciating the fact that assessment had attained finality and no incriminating material was found during the course of search.

2. The respondent craves leave to add, alter or modify any ground of cross objection.

3. The brief facts of the case are that a search action was carried out under section 132 of the Act on 09/10/2014 at the premises of Lotus group and their associates and at the residences of their directors. The search was concluded on 09/12/2014 and notices under section 153A(1)(a) of the Act was issued on 21/03/2016 and served on the assessee. In response to the notice, the assessee filed the return under section 153A and accordingly, the assessment was completed with an addition amount to Rs.17,60,500/- related to the unsecured loan from M/s Satyam Projects Ltd which was treated as non-genuine and bogus. So the addition was made under section 68 of the Act. The assessment order was assailed before the Ld. CIT(A). The assessee challenged the jurisdiction of the Ld.AO related to assessment under section 153A of the Act in absence of the incriminating material. The Ld.CIT(A) passed a speaking order and rejected the legal grounds of the assessee. But related to merit the ground of the appeal was allowed. Being aggrieved on the impugned appeal order, the revenue filed appeal and the assessee filed cross objection before the Tribunal.

3.1. Related to search proceeding and the appeal filed by the department, the assessee submitted a statement related determination of unabated years. The said chart is reproduced as below:-

Sr.No.	Name of the assessee	Assessment Year	Section of Assessment order	Date of filing of Return	Time Limit for issue of notice u/s 143(2)	Date of search
1	Lotus Logistics and Developers Pvt Ltd	2010-11	153A r.w.s. 143(3)	29/09/2010	30/09/2011	09/10/2014
2	Lotus Spaces Pvt Ltd	2011-12	153A r.w.s. 143(3)	23/09/2011	30/09/2012	09/10/2014
3	Lotus Realtors	2012-13	153A r.w.s. 143(3)	28/09/2012	30/09/2013	09/10/2014
4	Lotus Engicon Pvt Ltd	2012-13	153A r.w.s. 143(3)	28/09/2012	30/09/2013	09/10/2014
5	Lotus Buildspace LLP	2013-14	153A r.w.s. 143(3)	28/09/2013	30/09/2014	09/10/2014

4. During the argument, the issue was challenged related to the legal ground which was filed by the assessee through cross objection. The assessee agitated that all the alleged assessment years are under category of the unabated assessment or completed assessment. The alleged assessment under section 153A read with section 143(3) of the Act is unjustified and beyond jurisdiction as there is no incriminating material found during the course of search in unabated assessment year and the assessment was completed without any incriminating material which is contrary to the ruling of the Hon'ble Supreme Court in the case of **Abhisar Buildwell Pvt Ltd (2023) 149 taxmann.com 399 (SC)** which categorically held that no addition can be made by the Assessing Officer in respect of completed or unabated assessments unless incriminating material is found during a search conducted under section 132 of the Act or a requisition under section 132A of the Act.

Related to the merit of the case, the Ld.CIT(A) has considered that the addition itself is non genuine and the identity, creditworthiness of the transactions through bank was duly submitted by the assessee during the assessment proceedings. The observation of the Ld.CIT(A) is reproduced as below: -

*"7.6. In light of above, it is now important to examine the validity of addition based on the aforesaid statement which have been retracted by the respective parties. I find that the assessee group was covered under search action and no document or other assets were found in the course of search which could indicate that the assessee had obtained accommodation entry. It is stated by the AR that a search is a strict measure under the Act which invades the privacy of the assessee and even in these proceedings no concrete evidence was found except for mere oral confirmation of certain parties which also stand retracted later. My attention in this regard was invited to the **CBDT Instruction F.No.286/98/2013-IT (INV.II) dated 18/12/2014 and letter dated 10/03/2003 issued by the Ministry of Finance & Company Affairs wherein it is stated that the search party must focus on collection of evidences and not merely admission/confession of additional income.**The Hon'ble Gujarat High Court has relying on the aforesaid instructions upheld the view that addition should not be made based on oral confession in the case of CIT v. Ramanbhai Patel (ITA no. 207 of 2008) and Chetnaben J Shah v. ITO [ITA No. 1437 of 2007]. Thus, respectfully following the CBDT circular as well as the decision cited by the assessee (supra), I find that the addition cannot be sustained merely on the basis of the statements taken during the search devoid of any evidence/material to incriminate the assessee.*

Section 68 is not a charging section but a deeming fiction dealing with the burden of proof. The section casts initial onus u/s. 68 of the Act on the assessee to prove identity, genuineness and creditworthiness of the transaction to the satisfaction of the AO. If the assessee fails to do so or the explanation offered by him is not satisfactory to the AO, the AO is empowered to add the same to the total income of the assessee. The said power is to be exercised judiciously by the AO. Thus, once the initial onus is discharged by the assessee, the onus shifts on the AO to bring out fallacies in evidence brought by the assessee or by bringing new evidence that indicate the

transactions undertaken by the assessee are non-genuine. Thus, the section deals with an equilibrium of onus of proof and must be viewed to evaluate as to whether the evidences brought by the assessee or AO weigh more and accordingly in whose favour the equilibrium bends. In the present case, on one hand, the assessee has placed evidence in the form of voluminous documents in relation to RBI compliances, ROC compliances, audit compliances and merger sanctioned by the Hon'ble Calcutta High Court. Further, the assessee has also placed on record the assessment orders of 6 merged companies for the A.Y 2010-11 and also that of the alleged investor – M/s. Satyam Projects Ltd for A.Y. 2010-11. I have also gone through the confirmation, ITR Acknowledgement, financial statements of the investor company and bank statements relating to the alleged transaction of partner's contribution received of Rs.17,60,50,000/- by the assessee during the year under consideration. It is observed that the investor company is formed in 1981 and is registered NBFC since 1998 and is engaged into the business of finance and investment and has also engaged into trading in cloth in the year under consideration. The investor company has shown substantial turnover of Rs. 9.15 crores with an income of Rs.51,81,018/- offered in its return of income. The transaction are also carried out through account payee cheques. Even, in the subsequent years, it is seen that the lender company has earned substantial income as under:

A.Y.	Returned Income
2014-15	1,61,13,093
2015-16	1,16,80,862

Accordingly, the assessee has discharged its onus u/s 68 of the Act by substantiating even the source of source of alleged lender company.

On the contrary, the Assessing Officer has solely placed reliance on the statement of Hitesh Thakkar, Jignesh Mavadia and Uday Shankar Mahawar which has been retracted by all of them. Further, the AO has made allegation that M/s. Satyam Projects Ltd is a company run by various entry operators but have failed to bring anything concrete on record. In fact, during the course of assessment proceedings, enquiries were made by the AO in form of issue of notice u/s. 133(6) which was duly complied by the investor. Even the evidences referred above were not disputed

by the Assessing Officer. It is informed that Uday Shankar Mahawar was appointed as a director in M/s. Satyam Projects Ltd on 30.10.2010 and Hitesh Thakkar and Jignesh Mavadia had been appointed as a director on 04.03.2014. Also, Shri. Uday Shankar Mahawar was produced before the Assessing Officer who had affirmed his retraction thereby confirming that the transaction of Satyam Projects Ltd were genuine and that it is not a paper company.”

(Emphasis supplied)

5. The Ld. DR vehemently argued and filed a written note and confirmation letter of the Ld. ACIT CC-7(3)/Mumbai. The Ld. DR argued that addition made was related to accommodation entry received by assessee from paper companies. The argument only focused on activities of accommodation entry providers. The Ld. DR respectfully relied on the order of the Hon'ble Apex Court in NRA Iron & Steel Pvt Ltd 103 taxmann.com 43 (SC) and order of Hon'ble Calcutta High Court in PCIT vs. Swati Bajaj, 139 taxmann.com 352 (Cal). The relevant paragraphs of the submission of the Ld. ACIT CC-7(3)/Mumbai are reproduced as below:-

“While the term incriminating material or evidence has neither been used u/s 153A nor has been defined in any section of the act. However, it may be appreciated that such incriminating material or evidence could be any books of accounts or document or information discovered during the course of search action having bearing on the determination of total income of person. Clearly, such incriminating material has to be either the books of accounts or document seized or requisition or any information gathered during the course of search action or in the form of statement recorded during the course of search action and it has a potential of affecting the determination of total income of the person.

During the search proceedings, Incriminating evidences/information was unearthed wherein various Kolkata based companies, paper companies, are in the business of providing accommodation entries. During the search proceedings, Incriminating evidences and information were unearthed, revealing the involvement of paper companies in dubious transactions. Statement from various operators and Directors were recorded and a detailed post search analysis of financial trails indicated that transactions were made with various Jamakharchi entities. The Assessing Officer noted that while statements recorded u/s 132(4) or those made during the search without corroborative evidence may not independently qualify as conclusive incriminating material. Hence, Post search the transactions were analysed. On the

analysis of the transactions, it was found that fund trail lead to transactions being made with various Jamakharchi entities. The overall findings suggested a pattern of financial misrepresentation. The A.O further observed that the operators themselves admitted to their role in facilitating accommodation entries, strengthening the Departments case that these transactions were designed to evade taxes and manipulate financial records,

The additions were made based on substantial incriminating evidences and information gathered during the search and post search investigations. The AO emphasized that these additions were not solely reliant on the statements of operators/Directors but were supported by corroborative financial data, fund trail and transactional linkage with Jamakharchi entities. Given the depth of analysis sand nature of evidence collected, the A.O concluded that the additions were justified and in line with established assessment principle. Therefore, the question of validity of these additions does not arise, as they are routed in concrete findings rather than mere statements.

The question of validity of unabated assessment does not arise in these cases as assessments were completed on the basis of incriminating evidences/information gathered during the course of search/post search proceedings.”

6. The Ld. AR, however, restricted his arguments to the legal issue, relying upon the judgment of the Hon’ble Supreme Court in **PCIT vs. Abhisar Buildwell (P) Ltd, (2023) 149 taxmann.com 399 (SC)**, which categorically held that no addition can be made by the Assessing Officer in respect of completed or unabated assessments unless incriminating material is found during a search conducted under section 132 of the Act or a requisition under section 132A of the Act. This view was reiterated when the Hon’ble Supreme Court dismissed the Revenue’s review petition in **PCIT vs. Abhisar Buildwell (P.) Ltd. [(2023) 150 taxmann.com 257 (SC)]**.

7. The Ld. AR also placed reliance on the following judicial precedents:

i. Hon'ble Delhi High Court in **PCIT vs. Meeta Gutgutia, (2017) 82 taxmann.com 287 (Delhi)**: It was held that invoking section 153A to reopen concluded assessments for years preceding the year of search was unjustified in the absence

of incriminating material found during the search. The Hon'ble Supreme Court dismissed the Revenue's SLP in PCIT vs. Meeta Gutgutia [(2018) 96 taxmann.com 468 (SC)].

ii. Jurisdictional High Court in **CIT vs. Gurinder Singh Bawa**, (2017) 79 taxmann.com 398 (Bom): The court held that where no incriminating material was found during a search, proceedings under section 153A were without jurisdiction.

iii. Jurisdictional High Court in **CIT vs. Deepak Kumar Agarwal**, (2017) 86 taxmann.com 3 (Bom): It was held that an assessment under section 153A could only be made based on incriminating material found during a search.

iv. Jurisdictional High Court in **CIT vs. Continental Warehousing Corporation (Nhava Sheva) Ltd**, (2015) 58 taxmann.com 78 (Bom): The court ruled that in the absence of incriminating material, no additions could be made in respect of finalized assessments. The department accepted this proposition, as the Supreme Court's SLP in CIT vs. Continental Warehousing Corporation, [(2018) 93 taxmann.com 31 (SC)] did not raise this issue.

8. **Abhisar Buildwell (P.) Ltd.** (supra), which held as follows:

"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.”

Thus, as held by the Hon'ble Apex Court, incriminating evidence/material must necessarily be found during the course of a search conducted on the concerned assessee. In the present case, the material relied upon forms part of the assessee's regular books of accounts. Documents and schedules related to regular books of accounts cannot be treated as corroborating evidence for the purposes of incriminating material.

9. We heard the rival submission and considered the documents available in record. We note the argument of the Ld. DR cited the judgments which are relied by him are factually distinguishable and not related to assessment U/s 153A of the Act. In the instant case the search team did not unearth any incriminating material to show that loans taken by respective assessees are accommodation entries. Third party information, if not supported any cogent material, if any found during the course of search conducted in the hands of the assessee cannot be considered as incriminating material U/s 153A of the Act. We respectfully follow the ruling of **Abhisar Buildwell (P.) Ltd.** (supra) where the Hon'ble Apex Court emphasized the word “incriminating material”. The Ld. DR & the Ld. ACIT both were unable to produce any incriminating material that support the addition was made U/s 153A. Observing the impugned appellate order, the Ld. CIT(A) categorically has taken note that the addition cannot be sustained merely on the

basis of the statements taken during the search devoid of any evidence/material to incriminate the assessee.

We respectfully follow the binding precedents of the Hon'ble Supreme Court, the Hon'ble Jurisdictional High Court, and the Hon'ble Delhi High Court. Consequently, the impugned assessment order passed under Section 153A of the Act, in the absence of incriminating material, is held to be beyond jurisdiction, and the additions made therein are quashed.

10. Accordingly, the legal ground raised by the assessee is upheld.

11. Since the legal issue is adjudicated in favour of the assessee, the factual issues remain academic and do not require adjudication.

ITAs No.1482, 2340, 2341 & 4044/Mum/2019 & Cos 109, 112/Mum/2021 & Cos 111 & 44/Mum/2019

12. The facts and circumstances in all these appeals and cross objections are identical to the appeal in **ITA No.1484/Mum/2021 & CO No.43/Mum/2021**. Therefore, the decision arrived at above, shall apply *mutatis mutandis* to these appeals and cross objections also.

13. In the result, all the appeals filed by the revenue are dismissed and the cross objections filed by the assessee are allowed.

Order pronounced in the open court on 14th day of February 2025.

Sd/-

(B R BASKARAN)
ACCOUNTANT MEMBER

Mumbai, दिनांक/Dated: 14/02/2025

Pavanan

sd/-

(ANIKESH BANERJEE)
JUDICIAL MEMBER

Copy of the Order forwarded to:

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकरआयुक्त CIT
4. विभागीयप्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT,
Mumbai
5. गार्डफाइल/Guard file.

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BY ORDER,
(Asstt. Registrar), **ITAT, Mumbai**