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

BEFORE SHRI ABY T. VARKEY, JM AND SHRI GAGAN GOYAL, AM

आयकरअपीलसं/ I.T.A. No.1046/Mum/2019
(**निर्धारणवर्ष /** Assessment Year: 2010-11)
&
आयकरअपीलसं/ I.T.A. No.1047/Mum/2019
(**निर्धारणवर्ष /** Assessment Year: 2011-12)
&
आयकरअपीलसं/ I.T.A. No.1048/Mum/2019
(**निर्धारणवर्ष /** Assessment Year: 2012-13)
&
आयकरअपीलसं/ I.T.A. No.1049/Mum/2019
(**निर्धारणवर्ष /** Assessment Year: 2013-14)
&
आयकरअपीलसं/ I.T.A. No.1050/Mum/2019
(**निर्धारणवर्ष /** Assessment Year: 2014-15)

Micro Ankur Developers C/o Rajendra & Associates 317, Prasad Chamber, Opera House, Charni Road, Mumbai-400004.	**बनाम**/ Vs.	DCIT-CC, 3(4) 19th Floor, Air India Building, Nariman Point, Mumbai-400021.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. : AANFM4634P		
(अपीलार्थी **/Appellant**)	..	(प्रत्यर्थी / **Respondent**)

Assessee by:	Shri Bharat Kumar
Revenue by**:**	Dr. Mahesh Akhade (DR)

सुनवाईकीतारीख / Date of Hearing: 26/07/2022
घोषणाकीतारीख /Date of Pronouncement: 02/09/2022

आदेश / O R D E R

PER ABY T. VARKEY, JM:

These appeals preferred by the assessee are against the common order of the Ld. Commissioner of Income Tax (Appeals)-51, Mumbai [hereinafter in short "Ld. CIT(A)"] dated 24.12.2018 for A.Y. 2010-11 to AY. 2014-15. Since issues involved are common, all the appeals for all the assessment year/years (hereinafter referred to as "AY") were heard together. Both the parties also argued them

together raising similar arguments on these issues. Accordingly, for the sake of convenience and brevity, we dispose all the appeals by this consolidated order.

2. Before we advert to the grounds taken in the cross appeals, it would first be relevant to cull out the basic facts of the case and effect of law in brief in respect of certain AY′s. The assessee firm was formed on 02-08-2006 and was primarily engaged in the business of construction of building/property/development in Mumbai. Shri Naresh Jain and Shri Sunil Shah were originally equal partners in the assessee firm. Vide supplementary deed dated 05-02-2008, four other partners were admitted into the firm inter alia including Shri Jitendra Jain whose share of profit was 25%. Shri Naresh Jain however continued to be the main promoter-partner with share of profit of 50% and the bank account of the assessee was to be operated by Shri Naresh Jain jointly with any of other five partners. Search under section (hereinafter referred to as ″u/s.″) 132 of the Income Tax Act, 1961 (hereinafter referred to as ″the Act″) was conducted against the Kamla Landmarc Group, on 10-12-2013 which triggered section 153A of the Act. Prior to the date of search, since the returns of income for these assessment years (hereinafter in short ′AYs′) AYs 2010-11, 2011-12 & 2012-13 were filed on 11-10-2010, 28-09-2011 & 28-09-2012 respectively, and undisputedly the time limit for issuance of notices u/s 143(2) of the Act for all these years had expired as on the date of search on 10-12-2013 and not pending before the AO on the date of search, these AYs i.e. 2010-11, 2011-12 & 2012-13 were unabated assessments. With regard to AY 2013-14, it was pointed out that, the return of income was not filed u/s 139 of the Act. Further, AY 2014-15 was the year of search. Hence, AYs2013-14 & 2014-15 were pending before the AO on the date of search and consequently, AYs 2013-14

& 2014-15were abated assessment years. Therefore, we hold that except AYs2013-14 & 2014-15, the other AYs 2011-12 & 2012-13 were unabated assessments as per second proviso to section 153A of the Act.

3. Since the issues raised and the additions involved in all the appeals are similar, we first take up the appeal filed by the assessee for AY 2010-11 in ITA No.1046/Mum/2019 as the lead case. It is noted that, the assessee is engaged in the business of real estate development. During the course of the search, on 10-12-2013, according to AO, one of the partners of the assessee, Shri Jitendra Jain was confronted with the statements recorded of various persons who were purportedly engaged in the business of providing accommodation entries in the form of unsecured loans in lieu of cash, to which Shri Jitendra Jain in his statement recorded u/s 132(4) of the act on 13-12-2013 explained the manner in which they got unsecured loans from various parties by paying 0.25% brokerage and that they paid interest in the range of 9% to 24% of interest to the lenders, depending upon the amount, tenure and requirement of group companies. The Investigating authorities had put forth names of twenty eight (28) unsecured loans creditors from whom the Kamla Group has taken unsecured loans, to which Shri Jain admitted in his statement that these parties were providing accommodation entries. The AO taking note of the statement recorded u/s 132(4) of the Act, came to the conclusion that the assessee had adopted the aforesaid modus operandi to convert cash received by way of ″on monies″ into unsecured loans. The AO thereafter discussed general various modus operandi and chronology arrangement of the transactions in his order and based on it, the AO concluded that all the parties from whom assessee had taken unsecured loans are mere entry operators who are giving

accommodation entries for purchases/sale, unsecured loans advances etc. The AO accordingly show caused the assessee as to why the unsecured loans procured/shown to have been taken from the twenty eight (28) lenders/accommodation entry providers should not be assessed as undisclosed income of the assessee u/s 68 of the Act and the interest paid on such bogus loans claimed as expenditure u/s 37 of the Act, be disallowed. In response, the assessee had sought for the copies of the statements of the key persons including Shri Jitendra Jain, which according to the AO, was provided to the assessee on 25-02-2016. However since the AO did not receive any explanation on or before the specified due date i.e. 01-03-2016, he proceeded to make the addition u/s 68 of the Act in the relevant AY 2010-11, since according to him, the assessee failed to prove the nature and the source of the credit entries in the books of account of the assessee. The AO also disallowed the interest paid on such unsecured loans u/s 37 of the Act, across all the AYs. The AO further made addition on account of notional commission expense which the assessee would have incurred for obtaining such accommodation entries in the relevant AY 2010-11. Further, the AO is also noted to have made adhoc disallowances out of several items of expenses viz., brokerage, professional fees, labour charges etc. across all the AYs. The AO has further partially disallowed the interest paid on partner′s capital u/s 36(1)(iii) of the Act.

4. Aggrieved the assessee preferred an appeal before the Ld. CIT(A) and brought to the notice of the Ld. CIT(A) that, admittedly the statement recorded from Shri Jitendra Jain u/s 132(4) of the Act, was provided to the assessee by the AO only on 25-02-2016 and until then the assessee was in complete dark as to basis of the allegation regarding it obtaining accommodation entries in the form of

loans. The Ld. AR of the assessee pointed out to us that, when the statement was provided to it ultimately on 25-02-2016, then only it came to their notice that certain admission was extracted from Shri Jitendra Jain under duress /coercion, and that purported admission made by Shri Jitendra Jain has been retracted by him, and the same was filed before the AO, along with the relevant details/documents for proving the identity, creditworthiness and genuineness of the lenders from whom the assessee had taken unsecured loans and paid interest thereon, vide letters dated 07-03-2016 18-03-2016. In the said letters the assessee had also sought cross examination of the so-called entry operators based on whose statements, admission was extracted under duress from Shri Jitendra Jain. Taking note of the submissions put forth by the assessee, the Ld. CIT(A) held that, the AO had indeed not considered the letters dated 07-03-2016 & 18-03-2016 before passing the assessment order. Exercising the co-terminus powers vested in him u/s 250 of the Act, the Ld. CIT(A) observed that these submissions of the assessee would be duly considered in the appellate proceedings and accordingly admitted the same. The relevant findings of the Ld. CIT(A) are as follows:

> "6.1 I have considered the submissions/contention of the assessee. The assessee submits that its letters dated 07.03.2016 & 18.03.2016 have not been considered by the AO, whereby it had enclosed the retraction statement of Shri Jitendra Jain confirmations along with financials of the said alleged bogus lenders,details of expenses, etc. It was further submitted that in the said 2 letters it had / requested the AO to provide the statements of the 3 parties relied upon by the AO to draw adverse inference and had also requested for cross-examination of the said parties, Accordingly, the assessee contended that there has been a violation of principles of natural justice. On the said submissions of the assessee, it is noted that the powers of the First Appellate Authority (FAA) are co-terminus with that of the AO and

> therefore, in the present appellate proceedings, the submissions made by the assessee vide the said letters dated 07.03.2016 & 18.03.2016 which were allegedly not considered by the AO will be duly considered while dealing with the specific grounds of appeal in respect of the various specific additions made by the AO. Accordingly, Ground No II of the appeal of the assessee is partly allowed."

5. After examining the contentions set out by the assessee in these letters, the Ld. CIT(A) rejected the same and sustained the addition made u/s 68 of the Act on account of unsecured loans of Rs.6,60,00,000/-. The Ld. CIT(A) accordingly also confirmed the disallowance of interest incurred on such loan of Rs.17,753/- and the addition on account of notional commission of Rs.13,20,000/- paid for obtaining such loan.

6. The Ld. CIT(A) also rejected plea of the assessee (legal ground) that these additions were not based on any incriminating material found in the course of search. According to Ld. CIT(A), the statement of Shri Jitendra Jain was enough evidence to incriminate the assessee and therefore upheld the validity of the above additions made in the unabated AYs.

7. In respect of the disallowances made out of several items of expenses viz., brokerage, professional fees, labour charges, etc., the Ld. CIT(A) after examining the merits of claim, partially allowed the grounds raised by the assessee inter alia directing the AO to verify the claim of the assessee that, whether these expenses formed part of WIP or was it debited to P&L A/c and to the extent such expenses were capitalized to WIP, the disallowance ought to be reduced. The Ld. CIT(A) also confirmed the AO's action disallowing portion of the interest paid on partner's capital on the ground that the purpose of excess withdrawal from the capital

account had not been justified by the partners. Aggrieved by the order of the Ld. CIT(A), the assessee in now in appeal before us.

8. Assailing the action of Ld. CIT(A), the Ld. AR of the assessee, in the first instance, pointed out that, the statement of Shri Jitendra Jain did not have any relevance to the case of the assessee in as much as the assessee did not belong to the Kamla Group as alleged by the lower authorities. Taking us through the original partnership agreement dated 02-08-2006 and supplementary deed dated 05-02-2008, the Ld. AR pointed out that the key person of the assessee firm was always Shri Naresh Jain and not Shri Jitendra Jain. He submitted that Shri Jitendra Jain was admitted as a partner much later after the formation of the partnership and that the bank account of the assessee was controlled by Shri Naresh Jain along with any of the other partners. These contemporaneous facts, according to him, showed that Shri Jitendra Jain was never in-charge or control of the affairs of the assessee and therefore his statement recorded u/s 132(4) of the Act in relation to the entities/concerns belonging to his controlled Kamla Group could not be extrapolated and adversely inferred against the assessee as well. Referring to the warrant no. 10710 dated 09-12-2013 [Page 1 to 2 of paper book] which was executed upon the assessee by the Director-General of Income-tax, Investigation, Mumbai and the panchnama dated 11-12-2013 which was drawn upon conclusion of the search conducted on the assessee, the Ld. AR pointed out that no incriminating material was found in relation to the assessee in the course of search conducted at their premises. He further pointed out that the partner, Shri C. Shah, who was present at the premises at the time of search, was examined u/s 132(4) of the Act. Taking us through the statement of Shri C. Shah which was placed at

Pages 12-21 of the paper book, the Ld. AR submitted that no questions were posed to him regarding the assessee, particularly doubting the genuineness of the unsecured loans obtained by the assessee. The Ld. AR thereafter invited our attention to warrant no. 9397 dated 09-12-2013 which was executed in relation to the Kamla Landmarc Group and particularly the names of the twenty one (21) concerns belonging to the said Group, to show that the assessee did not feature therein. Taking us through his statements, placed at Pages 35-66 of paper book, the Ld. AR showed us that nowhere, Shri Jitendra Jain had named the assessee firm as a beneficiary of purported accommodation entries in the form of unsecured loans. These aforesaid facts considered cumulatively, according to him, supported their case that the statement given by Shri Jitendra Jain u/s 132(4) of the Act in the course of search conducted upon the Kamla Landmarc Group did not pertain to the assessee. He further took us through the impugned assessment order, and submitted that, apart from relying on the statement of Shri Jitendra Jain, the AO had not referred to any incriminating material found in the course of search to justify the impugned addition/s. According to him, the addition/s solely based on unsubstantiated and uncorroborated statements was unsustainable. He thus vehemently urged that the order of the lower authorities confirming the additions made u/s 68 of the Act and the consequent disallowance of interest paid on loans and notional commission etc. was factually perverse.

9. Taking cognizance of the above contentions, vide order sheet entry dated 17.05.2022, this Tribunal had directed the Ld. CIT, DR to verify and furnish a report as to whether the statement of Shri Jitendra Jain was in connection with any document found during the course of search of the assessee. Vide letter dated 21-06-2022, the Dy.CIT, CC-3(4), Mumbai (′AO′) has furnished relevant clarification

along with details, which has been perused and taken on record. The Ld. CIT, DR pointed out that Shri Jitendra Jain had inter alia provided the details of the bank account of the assessee, in response to his Answer to Q No.4, which were being run from his premises. He further showed us that Shri Jitendra Jain had also named the assessee as one of the concerns which were running from his premises in Annexure -B provided in response to Q No. 10. He also brought to our notice that, Shri Jitendra Jain in his Answer to Q No. 23, had also furnished the ledger of the assessee as a part of his statement marked as Annexure – F. These facts, according to the Ld. CIT, DR, negated the contention of the assessee that the statement of Shri Jitendra Jain, who was admittedly one of the partners of the assessee, was irrelevant. As regards the query of this Bench as to whether addition/s made based on the statement of Shri Jitendra Jain was recorded in connection with any seized incriminating material, the AO has now stated that the statement was recorded in connection with the regular books of accounts maintained in the tally software by the assessee.

10. In his rejoinder, the Ld. AR, at the first instance, submitted that the books of accounts which were regularly maintained in tally software was not in the nature of ′incriminating material′. According to him, these accounts formed part of the returns filed with the authorities and such regular books of accounts maintained in the ordinary course of business did not suggest anything of incriminating nature. He contended that, the report of the AO showed that the addition/s made were not supported or backed by any incriminating material unearthed during the course of search and for that reason the Revenue is now trying to make out a new case that the regular accounts maintained by the assessee was in the nature of ′incriminating material′, which according to him, was untenable both on facts and in law. He

further pointed out that based on the same statement of Shri Jitendra Jain, the AO had passed similar assessment orders in the cases of the concerns belonging to Kamala Landmarc Group i.e. M/s Kamla Landmarc Enterprises Vs DCIT & Others, in which similar additions u/s 68 on account of unsecured loans, disallowance of interest u/s 37, addition of notional commission, disallowance of other expenses etc. were made by the AO. He brought to our notice that, similar orders were passed by the Ld. CIT(A) on the same line of reasoning confirming the action of the AO. Taking us through the appellate orders passed by the coordinate Bench of this Tribunal in the cases of their sister concerns, M/s Kamla Landmarc Enterprises Vs DCIT & Others in ITA Nos. 1365 to 1371/Mum/2019 dated 24.03.2022, he submitted that this Tribunal had held that, the statement of Shri Jitendra Jain recorded u/s 132(4) of the Act alone did not constitute incriminating evidence to justify the additions made in the unabated AYs, particularly when the statement was not recorded on the basis of any incriminating material found in the course of search. For this, the Tribunal had relied on the decision of another coordinate Bench in the case of Smt. Kalpana M. Ruia Vs DCIT, CC 2(2) and the CBDT Circular F No. 286/2/2003-IT(Inv) dated 10-03-2003.After holding so, following the judgment of the Hon′ble Bombay High Court in the case of CIT Vs Continental Warehousing Corporation (Nhava Sheva) Ltd (374 ITR 645), this Tribunal deleted the additions made in the unabated AYs holding that they were made without referring to any incriminating material found in the course of search. The Ld. AR accordingly contended that this Tribunal was bound by judicial discipline to follow the ratio laid down in the second appellate order passed by the coordinate Bench of this Tribunal (supra) in their Group′s case and thus urged that

all the additions made in the unabated AYs of the assessee be deleted, since they were not based on any incriminating material found during the course of search.

11. Per contra, the Ld. CIT, DR appearing on behalf of the Revenue supported the order of the lower authorities. He urged that, the contention of the assessee that unabated assessments can be interfered with only if incriminating material was found in the course of search was untenable and deserves to be rejected and the Revenue has tried to distinguish the judgments rendered by the Hon′ble Bombay High Court in the cases of Continental Warehousing Corporation (Nhava Sheva) Ltd (supra), CIT vs Murli Agro Products Ltd (49 taxmann.com 172) and the Special Bench of this Tribunal in the case of All Cargo Global Logistics Ltd vs DCIT (137 ITD 287). The Ld. CIT, DR alternatively contended that, the statements recorded u/s 132(4) carries sufficient evidentiary value and therefore any admission by the partner of the assessee to any wrong doing itself constitutes incriminating material to justify additions in unabated assessments. The Ld. CIT, DR further contended that, the decisions relied upon by the assessee in the cases of Pr. CIT Vs Anand Kr. Jain HUF (133 taxmann.com 288), Pr.CIT Vs Best Infrastructure (I) Pvt Ltd (397 ITR 82), CIT Vs Harjeev Aggarwal (241 Taxmann 199), PKSS Infrastructure Pvt Ltd Vs DCIT (ITA No. 5680 & 5681/Mum/2019), amongst others, wherein it was held that statements recorded u/s 132(4) cannot alone constitute incriminating material to justify addition in unabated assessments, were distinguishable on facts from the present case. According to him, since the statement of one of the Partner, Shri Jitendra Jain was also corroborated by the statements of entry operators, it was indeed incriminating enough to justify the additions made by the AO.

12. We have heard both the parties, perused the details, documents and submissions along with the judicial precedents relied upon by both sides**.** The first ground raised in the appeal is, whether in absence of any incriminating material found in the course of search at the premises of the assessee, the additions/disallowances made in the assessment of the assessee which were unabated on the date of search, could be held to be sustainable on facts and in law. As noted earlier, on the date of search i.e. 10-12-2013, income tax assessment for AY 2010-11 was unabated. We note that the provisions of Section 153A of the Act, forms part of Chapter XIV of the Act contains special provisions for completing assessments in case of search conducted u/s 132 of the Act or requisition made u/s 132A of the Act. These provisions can be invoked only in cases where the Income-tax Department has exercised its extra ordinary powers of conducting search and seizure operations after complying with stringent pre-conditions prescribed in Section 132 of the Act. We do not deny the Revenue′s contention that, once a search u/s 132 is conducted against a person, then irrespective whether any incriminating material is found, the AO is required to proceed against such person for completing the assessments u/s 153A of the Act for the specified six assessment years. To this extent, there is no quarrel. However, we find that Section 153A itself creates the fine distinction/differentiation amongst specified six assessment years depending whether prior to the date of search, the assessment proceedings are pending or not before the AO. We note that the relevant section itself (second proviso to section 153A of the Act) clarifies that where an assessment was already completed against an assessee and any appeals or further proceedings are pending, then such appeals or other proceedings do not abate. We should keep in mind that merely because an assessee is subjected to

search u/s 132 of the Act, such action by itself does not give carte blanche to the Department to subject such an assessee to the rigors of the assessment afresh for all the six years. It is for this reason that the Parliament in its wisdom has categorically created two classes among the six years, (a) un-abated assessment and (b) abated assessments. Consequent to a search conducted u/s 132 of the Act, the AO is required to issue notices u/s 153A of the Act to assess the income of the assessee for six assessment years preceding the date of search. These six assessment years comprise of assessments which are not abated (non-pending assessment before AO on the date of search); and assessments which are pending before the AO on the date of search, which would be treated as abated. In the case of abated assessments, the AO is free to frame the assessment in regular manner and determine the correct taxable income for the relevant year inter alia including the undisclosed income un-earthed during search, having regard to the provisions of the Act. However, in relation to unabated assessments (AYs), which were not pending on the date of search, there is a restriction on the powers of the AO. In case of unabated assessments, the AO can re-assess the income only to the extent and with reference to any incriminating material which the Revenue has unearthed in the course of search. Merely because an assessee is subjected to search, he cannot be placed on a different pedestal or put in a more disadvantageous position than an assessee who is not subjected to search unless in the course of search some incriminating documents or evidence or information or material is gathered by the Investigating authorities so as to vest the AO with the necessary powers to make additions to the total income in relation to assessments which did not abate on account of search. This view finds support from the judgment of the Hon'ble

Jurisdictional High Court in the case of **CIT Vs Gurinder Singh Bawa (386 ITR 483)** wherein it was held as follows:

"3**.** For the Assessment Year 2005-06, the respondent-assessee had filed his return of income declaring an income of Rs.9.61 lakhs. The return of income as filed by the respondent- assessee was processed under Section 143(1) of the Act. Admittedly, no notice under Section 143(2) of the Act has been issued. Thereafter on 5 January 2007, a search was conducted on the respondent-assessee under Section 132 of the Act. Consequent thereto, proceedings under Section 153A of the Act were initiated. During the assessment proceedings for A.Y. 2005-06, the Assessing Officer added an amount of Rs.93.72 lakhs (declared as gifts) as being covered by Section 68 of the Act and an amount of Rs.43.67 lakhs (accumulated profits of the lendor) out of Rs.1.5 crores received as loan from one K.P. Developers Pvt. Ltd. as deemed dividend under Section 2(22)(e) of the Act. Undisputedly, respondent-assessee was a shareholder in M/s K.P. Developers (P) Ltd. The aforesaid additions are reflected in an assessment order dated 31 December 2008 passed under Section 143(3) r/w 153A of the Act determining the respondent-assessee's total income at Rs.1.47 crores.

4**.** In appeal, the CIT(A) held that the addition of an amount of Rs.43.67 lakhs as deemed dividend has to be deleted. This on the ground that there were no accumulated profits available with M/s K.P. Developers (P) Ltd. to distribute amongst it's shareholders. However, so far as the addition in respect of the unexplained gifts aggregating to Rs. 93.70 lakhs is concerned, the CIT(A) did not disturb the finding of the Assessing Officer.

5**.** On further appeal before the Tribunal, the assessee interalia challenged the validity of the assessment made under Section 153A of the Act. This on account of the fact that no assessment in respect of the six assessment years were pending so as to have abated. The impugned order accepted the aforesaid submission of the respondent-assessee by interalia placing reliance upon the decision of the Special Bench of the Tribunal in Al-Cargo Global Logistics Ltd. rendered on 6 July 2012. The Tribunal in the impugned order further held that no incriminating material was found during the course of the search. Thus the entire proceedings under Section 153A of the Act were without jurisdiction and therefore the addition made had to be deleted on the aforesaid ground. The impugned order also thereafter considered the issues on merits and on it also held in favour of the respondent-assessee.

6. Mr. Kotangale, the learned Counsel for the revenue very fairly states that the decision of the Special Bench of the Tribunal in Al-Cargo Global Logistics Ltd. was a subject matter of challenge before this Court as a part of the group of appeals disposed of as *CIT* v. *Continental Warehousing Corporation (Nhava Sheva) Ltd.* [2015] 374 ITR 645/58 taxmann.com 78/232 Taxman 270 (Bom.) upholding the view of the Special Bench of the Tribunal in Al- Cargo Global Logistics Ltd. Consequently, once an assessment has attained finality for a particular year *i.e.* it is not pending then the same cannot be subject to tax in proceedings under Section 153A of the Act. This of course would not apply if incriminating materials are gathered in the course of search or during proceedings under Section 153A of the Act which are contrary to and/or not disclosed during regular assessment proceedings.

7. In view of the above, on issue of jurisdiction itself the issue stands concluded against the revenue by the decision of this Court in *Continental Warehousing Corpn. (Nhava Sheva) Ltd.* (*supra*). In the appeal before us, the revenue has made no grievance with regard to the impugned order of the Tribunal holding that in law the proceedings under Section 153A of the Act are without jurisdiction. This in view of the fact that no assessment were pending, so as to abate nor any incriminating evidence was found. The grievance of the revenue is only with regard to finding in the impugned order on the merits of the individual claim regarding gifts and deemed dividend. However once it is not disputed by the revenue that the decision of this Court in *Continental Warehousing Corporation (Nhava Sheva) Ltd.* (*supra*) would apply to the present facts and also that there are no assessments pending on the time of the initiation of proceedings under Section 153A of the Act. The occasion to consider the issues raised on merits in the proposed questions becomes academic.

13. Identical view was expressed by the Hon'ble jurisdictional Bombay High Court in the case of **CIT Vs SKS Ispat & Power Ltd (398 ITR 584)** wherein it was held as follows:

"5. We have considered the arguments canvassed by the learned counsel for the respective parties. On perusal of section 153A of the Act, it is manifest that it does not make any distinction between assessment conducted under section 143(1) and 143(3). This court had occasion to consider the scope of section 153A of the Act in the case of *Gurinder Singh Bawa* and in the case of *Continental Warehousing Corpn. (Nhava Sheva) Ltd.* (referred to *supra*). It has been observed that section 153A cannot

be a tool to have a second inning of assessment either to the Revenue or the assessee. Even in the case of *Gurinder Singh Bawa* (referred to *supra*) the assessment was under section 143(1) of the Act and the court held that the scope of assessment after search under section 153A would be limited to the incriminating evidence found during the search and no further. In the said judgment, the judgment of this court in *Continental Warehousing Corpn. (Nhava Sheva) Ltd.* (referred to *supra*) has been followed.

6**.** Considering the authoritative pronouncements of this court in the above referred cases one of which is also with regard to assessment under section 143(1), the issue is no longer *res integra* and stands concluded in the above referred judgments.″

14. In light of the above judicial precedents, and particularly the judgment of the Hon′ble Bombay High Court (supra) which is binding upon this Tribunal, we hold that in the case of unabated assessments of an assessee, no addition is permissible in the order u/s 153A of the Act unless it is based on any relevant incriminating material found during the course of search qua the assessee and qua the AY.

15. In view of the above legal position, the issue which now requires our consideration is whether the additions/disallowances which the AO made in the order impugned in this appeal was based on or made with reference to any incriminating material/document found in the course of search. The only material now being referred to by the lower authorities in their submissions dated 21-06-2022 was the regular books of accounts maintained in the Tally Accounting Software. We find merit in the submissions of the Ld. AR that the regular books of accounts cannot be treated as ′incriminating material′ unless the Revenue makes out a case with corroborative evidence that the transaction reflected in the books of accounts did not represent the true state of affairs. Otherwise, going by the logic propounded by the Revenue, each and every seized material would be said to be incriminating in nature, which according to us, is not tenable in the eyes of law.

This view of ours find support from the judgment of the Hon′ble Delhi High Court in the case of Pr.CIT Vs Param Dairy Ltd in ITA No. 37/2021 dated 15-02-2021 on somewhat similar facts, had held as follows:

> 5. We have considered the aforesaid contentions and are of the view that no substantial question of law arises, as the matter is squarely covered by Kabul Chawla supra, which has been correctly applied to the facts of the case by the ITAT. The ITAT, in the impugned order has held that in the audited report filed by the assessee along with the report, cash book, ledger, bank book etc. were mentioned; that the respondent assessee was maintaining books on TALLY Accounting Software which was seized during the search and was being treated as incriminating material; however, regular books of account of the assessee, by no stretch of imagination, could be treated as incriminating material to form basis of framing assessment under Section 153A read with Section 143(3) of the Act.″ (emphasis supplied by us)

16. In view of the above, we are of the considered view that the regular books of accounts maintained by the assessee in tally software, now being referred by the Revenue, to justify the impugned addition did not constitute incriminating material unearthed during the search.

17. As far as the reliance placed by the lower authorities and Ld. CIT, DR, on the statement of Shri Jitendra Jain which was recorded u/s 132(4) of the Act to justify the impugned addition/s, is concerned; we find that the coordinate Bench of this Tribunal in the batch of cases decided in the matters of M/s Kamla Landmarc Enterprises Vs DCIT & Others (supra) of the Kamla Group, has already held that the statement of Shri Jitendra Jain recorded u/s 132(4) of the Act alone did not constitute incriminating evidence to justify the additions made in the unabated AYs, particularly when the statement was not recorded on the basis of any incriminating material found in the course of search. The Tribunal accordingly in

absence of any incriminating material found in the course of search, deleted similar additions made by the same AO. The relevant findings of this Tribunal are as follows:

> ″14. We have heard the parties and perused the details, documents and submissions alongwith case laws relied upon by the Ld. AR as well as Ld.DR. The Ld. Representative of the assessee has argued that no incriminating materials were found during the search carried out on 10.12.2013 at the various premises of the Kamla Group, therefore, the assessment is not liable to be reopened in accordance with law. It is also argued that the period for issuing the notices u/s 143(2) of The Income Tax Act, 1961 expired by the time of search for the assessment years from 2009 - 2010 to 2012 - 2013 and no notices were issued u/s 143(2) for the aforesaid assessment years. It is also argued that the assessment order for A.Y. 2008 - 2009 was passed u/s 143(3) of the Act as observed by the Assessing Officer while passing the assessment order u/s 143(3) r.w.s 153A dated 18.03.2016 for AY 2008-09, therefore, the assessment in relation to the assessment years 2008-2009 to 2012-2013 are non-abated assessments and are not liable to be sustainable. It is specifically argued that the statement recorded u/s 132(4) of the Act itself cannot be treated as incriminating evidence. In support of these contention, the Ld. Representative of the assessee has placed reliance upon the decision in the case of Commissioner of Income Tax v. Harjeev Aggarwal [(2016) 290 CTR 263]. The Ld.DR raised the contention that the statement recorded u/s 132(4) in itself is an incriminating material and also argued that in the absence of supporting documentary evidences for the unsecured loans borrowed are also considered as incriminating facts and therefore, the additions are rightly made by the Assessing Officer in respect of loan borrowed from the parties who were allegedly indulged in providing accommodation entries and upheld by the Ld.CIT(A) for the aforesaid year for which the assessment is non-abated.
>
> 15. The Ld. AR responded to the said contention of the Ld.DR relying on various case laws wherein it is categorically observed and held that the statement recorded u/s 132(4) of the Act itself cannot be treated as incriminating material for making any additions in respect of non -abated assessments. Considering the above said contention, it is to be seen whether the statement recorded u/s 132(4) is liable to be treated as incriminating evidence or not. In case CIT v. Harjeev Aggarwal (supra), it is held that: -
>
> > ″23. 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-B of the Act."

24.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

25. (...) 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."

16. We also took into notice of the CBDT Circular F No. 286/2/2003-IT(Inv) dated 10.03.2003 addressed to all the Chief Commissioners of income Tax (Cadre Contra) and Directors Generals of Income Inv, relied by the Ld. Representative of the assessee wherein the emphasis was given to collection of incriminating materials rather than obtaining confession of additional income during the course of search and seizure

proceedings. No doubt, the Ld. DR placed reliance upon the case of B. Kishore Kumar (T.C.A 738 to 744 of 2014, dated 3.11.2014) of Hon'ble Madras High Court for considering the statement given by the assessee has good evidence value, does not override the contentions of the Ld. AR, as the facts of the said case of B Kishore Kumar are distinguished with the facts of the case of the Assessee mainly on the ground that the sworn statement of B Kishore Kumar was taken by showing him the three print outs of the amount of loan given found during the search and not recorded in his regular books of accounts and in response to the same he admitted in his statement that there is a separate business carried out by him the income of which is not included in his return of income. In the case of the assessee, the statement was not recorded on the basis of any incriminating materials found during the search. The assessee relied upon the case law of the Hon′ble Bombay High Court in the case of CIT v. Continental Warehousing Corporation (NhavaSheva) Ltd. [2015] 58 taxmann.com 78 (Bom) wherein it is held that for assessment under section 153A in case of unabated assessment, if no incriminating material was found during the course of search in respect of an issue, then no additions in respect of any issue can be made to the assessment under Section 153A and 153C of the Act. The relevant extract of the order is reproduced as under:

> "On a plain reading of section 153A, it becomes clear that on initiation of the proceedings under section 153A, it is only the assessment/reassessment proceedings that are pending on the date of conducting search under section 132 or making requisition under | section 132/4 stand abated and not the assessments / reassessments already finalised for those assessment years covered under section 153A. By a Circular No. 8 of 2003, dated 18-9-2003 (See 263 ITR (St) 61 at 107) the CBDT has clarified that on initiation of proceedings under section 153A, the proceedings pending in appeal, revision or rectification proceedings against finalised assessment / reassessment shall not abate. It is only because, the finalised assessments / reassessments do not abate, the appeal revision or rectification pending against finalised assessment / reassessments would not abate. Therefore, the argument of the revenue, that on initiation of proceedings under section 153A, the assessments / reassessments finalised for the assessment years covered under section 153A stand abated cannot be accepted. Similarly on annulment of assessment made under section 153A(1) what stands revived is the pending assessment / reassessment proceedings which stood abated as per section 153A(1). "Once it is held that the assessment has attained finality, then the Assessing Officer while passing the independent assessment order under section 153A read with section 143(3) could not have disturbed the assessment / reassessment order which has attained finality, unless the materials gathered in the course of the proceedings under section 153A establish that the reliefs granted under the finalised assessment / reassessment were

contrary to the facts unearthed during the course of 153A proceedings. If there is nothing on record to suggest that any material was unearthed during the search or during the 153A proceedings, the Assessing Officer while passing order under section 153A read with section 143(3) cannot disturb the assessment order."

17. Ld. Representative of the assessee also relied upon the case titled as All Cargo Global Logistic [374 ITR 645 (2015) (BOM)], wherein the Hon'ble Bombay High Court held that that no addition can be made in respect of completed assessment u/s.153A without incriminating materials found during the search. We are of the view that the original assessment for the Assessment Year 2008-2009 was completed u/s.143(3) and for the assessment years 2009-2010 to 2012-2013, the period for issuing the notice u/s 143(2) has elapsed on the date of search i.e. 10.12.2013 and no notices were issued u/s 143(2) for the aforesaid years. Therefore, the assessment for the assessment years 2008-2009 to 2012-2013 are non abated and no additions can be made in respect of the non abated assessment years without referring to any incriminating materials found during the search. It is apparent that no incriminating material was found during the search.

18. In other words, the reference is to those assessments in whose case assessment under section 143(3) cannot now be done. It is not at all the case of the revenue that in the appeals which have been claimed as unabated here there was time for assessment under section 143(3). In this view of the matter, in our considered opinion, the submission of the learned counsel of the assessee succeeds that addition in the case of unabated assessment without reference to incriminating seized material for assessment u/s.153A is not sustainable on the touchstone of above said Hon'ble Jurisdictional High Court decisions. Here, we also like to mention the decision of the Hon'ble ITAT in the case of Smt. Kalpana Mukesh Ruia Vs. DCIT, CC-2(2). The relevant finding as under:

"39. We have carefully considered the submissions and perused the records. Firstly issue in appeal is that in assessment framed under section 153(A) in case of the unabated assessment addition without reference to incriminating material is not sustainable. This issue has been clearly spelt out and affirmed by honourable jurisdictional High Court in the Catena of case laws including that of continental warehousing (supra).

40. The learned departmental representative and the learned CIT appeals have tried to distinguish this decision from Hon'ble Bombay High Court by referring to Hon'ble Delhi High Court decision in the case of Kabul Chawla (supra).

41. In this regard we are of the considered opinion that the decision from honourable jurisdictional High Court in Continental Warehousing (supra) is clear and unambiguous. It was clearly held in that case that assessments which are not pending and which have attained finality, addition under section 153(A) cannot be done without reference to incriminating seized material. We may gainfully refer to the relevant order of the honourable High Court as under:

.....

47. As regards the issue of seized material it is clear that in the appeals which have remained unabated the addition is without reference to any seized material. The materials referred are only the statement obtained of the assessee under section 132 (4). These have been duly retracted. Hence without corroborative material addition only based upon the retracted statement is not sustainable. For this proposition following case laws are germane:

- CIT Vs. Sunil Agarwal (379 ITR 367)
- CIT Vs. Naresh Kumar Agarwal (369 ITR 171)
- DCIT Vs. Narendra Garg & Ashok Garg (AOP) (ITA No. 1531 & 1532 of 2007 dated 28.7.2016)
- DCIT Vs. Marathon Fiscal Pvt. Ltd. (ITA no. 5783 & 5784/Mum/2017 dated 28.8.2019)
- Tribhuvandas Bhimji Zaveri (ITA 2250 & 2251/Mum/2013 dt. 4.11.2015)

48. It may also be pertinent to note here that no seized material said to be incriminating was produced before us. In light of above said case laws the observation of learned CIT(A) that incriminating material need not be specific has no legs to stand. This very observation by the learned CIT(A) itself is an admission that no specific incriminating material has been seized and referred in the assessment order Hence, in all cases of unabated assessment the assessment fails on jurisdictional defect. Thus, ITA No. 6519/MUM/2019, 6520/MUM/2019, 6515/MUM/2019, 6516/MUM/2019, 6513/MUM/2019 & 6514/Mum/2019 are dismissed on account of jurisdictional defect.

19. In the background of aforesaid discussion and following the judgements of the jurisdictional High Court, the addition made in these assessment orders passed by the assessing officer under section 153A without reference to any incriminating material found in search is not sustainable. Hence, we set aside the orders of authorities below and

allowed the claim of the assessee and delete the addition. Since we have already directed to delete the addition of loan itself, the addition of commission and interest thereon disallowed are also directed to be deleted as the same are also without reference to any material foundering search. The appeal of the assessee for the A.Ys. 2008-2009 to 2012-2013 are allowed."

18. We note that, the Ld. CIT, DR was unable to point out any change of fact or any change in the position of law. Having regard to the foregoing, the judicial discipline demands that we follow the decision rendered by this Tribunal (supra) on same set of facts and circumstances in the cases belonging to the Kamla Landmarc Group. Respectfully following the same, we are of the considered view that, the additions / disallowances made in the unabated AYs by the AO u/s 68 of the Act on account of unsecured loans, interest incurred thereon, and the alleged notional commission expense incurred for procurement of such loan, were not backed by any incriminating material found as a result of search, and therefore the AO is directed to delete the same.

19. Even in respect of the disallowances made out of several expenses viz., labour charges, professional fees, brokerage, compensation expenses etc., it is noted that the same was disallowed only on the premise that the details were not submitted before the AO or they were insufficient. It is therefore noted that, none of these additions/disallowances were based on any incriminating material or evidence found in the course of search. The Ld. CIT, DR was also not able to point out the relevant incriminating material or evidence based on which the impugned additions were made by the AO.

20. Having regard to the above facts, in our considered opinion therefore, the additions impugned before us in the assessment order passed u/s 153A/143(3) of

the Act by the AO were not supported or backed by any incriminating material found or seized in the course of search and therefore these additions made in the unabated AY 2010-11 was legally impermissible. Hence, we set aside the order of the lower authorities below and allow this ground of the assessee and direct the AO to delete the additions made in the assessment order.

21. Since we have deleted the additions impugned before us on the ground that it was not based any incriminating material found in the course of search, all other grounds raised in the appeal on the merits of these additions have become academic in nature and is therefore dismissed as infructuous.

22. Since the facts and circumstances in the lead case under consideration, being ITA No. 1046/Mum/2019, for A.Y. 2010-11 is identical to the other unabated AYs 2011-12 & 2012-13 in ITA Nos. 1047/Mum/2019 & 1048/Mum/2019, our decision in the case of ITA No. 1046/Mum/2019, for A.Y. 2010-11 of the assessee′s appeal shall apply mutatis mutandis to the assessee`s appeals in ITA Nos. 1047/Mum/2019 & 1048/Mum/2019. Hence, the appeals for the AYs 2011-12 & 2012-13 also stands allowed.

23. Now we take up the appeals of the assessee for the abated assessments for AYs 2013-14 & 2014-15. Having heard both the parties, we find that on similar facts and circumstances, this Tribunal in the batch of cases decided in the matters of M/s Kamla Landmarc Enterprises Vs DCIT & Others (supra) of the Kamla Group, had set aside the addition/s back to the file of the AO to review and decide the issue afresh, by holding as under:

> "21. With regard to abated assessments for the A.Y. 2013-14 and A.Y.2014-15 are concerned, we observed that Assessing Officer has made the addition without there being any corroborative piece of evidences except relying on statement recorded u/s. 132(4) of the Act. However, these assessments are abated, we direct Assessing officer to review the issues afresh based on the material available on records and complete the assessment on merits after providing proper opportunity of being heard to the assessee. Therefore, the assessments for the AY 2013-14 and 2014-15 are remitted back to the file of Assessing officer and allowed the appeals filed by the assessee for statistical purpose.

24. Respectfully following the same, and in the fitness of matters, we set aside the addition/s made in AYs 2013-14 & 2014-15 back to the file of the AO for fresh examination. The appellant is directed to file the relevant details / explanation before the AO in this regard. The AO shall also allow sufficient opportunity of hearing to the appellant and shall pass fresh order in accordance to law after giving due consideration to the submissions put forth by the appellant. These appeals in ITA Nos.1049/Mum/2019 & 1050/Mum/2019 for AY 2013-14 & 2014-15 are therefore allowed for statistical purposes.

25. In the result, the appeals of the assessee for AYs 2010-11, 2011-12 & 2012-13 are allowed and the appeals of the assessee for AYs 2013-14 and 2014-15 are allowed for statistical purposes.

Order pronounced in the open court on 02.09.2022.

Sd/-	Sd/-
(GAGAN GOYAL)	(ABY T VARKEY)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Mumbai, दिनांक/Dated: 02.09.2022.
Vijay Pal Singh, (Sr. PS)

Copy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकरआयुक्त(अ)/ The CIT(A)-
4. आयकरआयुक्त CIT
5. विभागीयप्रतिनिधि, आय.अपी.अधि., मुबंई/DR, ITAT, Mumbai
6. गार्डफाइल/Guard file.

BY ORDER,

//True Copy**//**

(Dy**./**Asstt**.** Registrar**)**
ITAT, Mumbai