

आयकर अपीलीय अधिकरण “ए” न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
“A” BENCH, MUMBAI

माननीय श्री छल्ला नागेन्द्र प्रसाद, न्यायिक सदस्य एवं
माननीय श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।
BEFORE HON’BLE SHRI C.N. PRASAD, JM AND
HON’BLE SHRI MANOJ KUMAR AGGARWAL, AM
 (Hearing through Video Conferencing Mode)

1. आयकरअपील सं./ I.T.A. No. 983/Mum/2020
 (निर्धारण वर्ष / Assessment Year: 2011-12)

Jasmin K. Ajmera 4 th floor, Ajmera House Pathakwadi, L. T. Marg, Mumbai-400 002	बनाम/ Vs.	DCIT-2(2), R. No. 806, 8 th floor Old CGO Building, M.K.Road, Mumbai-400 020
स्थायीलेखासं ./जीआइआरसं ./PAN/GIR No. AABPA-7827-Q		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

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2. आयकरअपील सं./ I.T.A. No.1140/Mum/2020
 (निर्धारण वर्ष / Assessment Year: 2011-12)

Shri Ashish K. Ajmera Ajmera House, 4 th Floor Pathakwadi, L.T.Marg Mumbai – 400 002	बनाम / Vs.	DCIT-2(2), R. No. 806, 8 th floor Old CGO Building, M.K.Road, Mumbai-400 020
स्थायीलेखासं ./जीआइआरसं ./PAN/GIR No. AABPA-9075-G		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

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3. आयकरअपील सं./ I.T.A. No.1113/Mum/2020
 (निर्धारण वर्ष / Assessment Year: 2011-12)

Minal M. Ajmera 4 th floor, Ajmera House, Pathakwadi, L. T. Marg, Mumbai-400 002	बनाम/ Vs.	DCIT-2(2), R. No. 806, 8 th floor Old CGO Building, M.K.Road, Mumbai-400020
स्थायीलेखासं ./जीआइआरसं ./PAN/GIR No. ADEPA-9661-N		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

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4. आयकरअपील सं./ I.T.A. No. 539/Mum/2020
 (निर्धारण वर्ष / Assessment Year: 2011-12)

Avani J. Ajmera 4 th floor, Ajmera House, Pathakwadi, L. T. Marg, Mumbai-400 002	बनाम/ Vs.	DCIT-2(2), R. No. 806, 8 th floor Old CGO Building, M.K.Road, Mumbai-400020
स्थायीलेखासं ./जीआइआरसं ./PAN/GIR No. ADDPA-9331-J		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

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5. आयकरअपील सं./ I.T.A. No. 985/Mum/2020
(निर्धारण वर्ष / Assessment Year: 2011-12)

Manish K. Ajmera 4 th floor, Ajmera House, Pathakwadi, L. T. Marg, Mumbai-400 002	बनाम/ Vs.	DCIT-2(2), R. No. 806, 8 th floor Old CGO Building, M.K.Road, Mumbai-400020
स्थायीलेखासं ./जीआइआरसं ./PAN/GIR No. AABPA-7898-P		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

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6. आयकरअपील सं./ I.T.A. No.1142/Mum/2020
(निर्धारण वर्ष / Assessment Year: 2011-12)

Jiten K. Ajmera (Legal Heir of Sh. Kishore H. Ajmera) 4 th floor, Ajmera House Pathakwadi, L. T. Marg, Mumbai-400 002	बनाम/ Vs.	DCIT-2(2), R. No. 806, 8 th floor Old CGO Building M. K. Road Mumbai-400 020
स्थायीलेखासं ./जीआइआरसं ./PAN/GIR No. AGPPA-2452-B		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

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7. आयकरअपील सं./ I.T.A. No.1108/Mum/2020
(निर्धारण वर्ष / Assessment Year: 2011-12)

International Financial Services Ltd. 3 rd floor, Ajmera House Pathakwadi, L. T. Marg, Mumbai-400 002	बनाम/ Vs.	DCIT-2(2), R. No. 806, 8 th floor Old CGO Building M. K. Road, Mumbai-20
स्थायीलेखासं ./जीआइआरसं ./PAN/GIR No. AABCI-4685-H		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

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8. आयकरअपील सं./ I.T.A. No.1141/Mum/2020
(निर्धारण वर्ष / Assessment Year: 2011-12)

Essem Capital Markets Ltd. 4 th floor, Ajmera House, Pathakwadi, L. T. Marg, Mumbai-400 002	बनाम/ Vs.	DCIT-2(2), R. No. 806, 8 th floor Old CGO Building M. K. Road, Mumbai-20
स्थायीलेखासं ./जीआइआरसं ./PAN/GIR No. AAACE-3045-Q		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

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9. आयकरअपील सं./ I.T.A. No.4997/Mum/2018
(निर्धारण वर्ष / Assessment Year: 2011-12)

Ajmera Associates Ltd. 4 th floor, Ajmera House, Pathakwadi, L. T. Marg, Mumbai-400 002	बनाम/ Vs.	DCIT-2(2), R. No. 806, 8 th floor Old CGO Building M. K. Road, Mumbai-20
स्थायीलेखासं ./जीआइआरसं ./PAN/GIR No. AADCA-7062-J		

(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)
Assessee by	:	Ms. Dinkle Hariya – Ld. AR
Revenue by	:	Shri Rajeev Harit– Ld. CIT-DR
सुनवाई की तारीख/ Date of Hearing	:	17/09/2021
घोषणा की तारीख / Date of Pronouncement	:	02/11/2021

आदेश / O R D E R

Manoj Kumar Aggarwal (Accountant Member)

1. The facts as well as issues in aforesaid appeals for Assessment Year (AY) 2011-12 by different assessees belonging to same group are quite identical and it is admitted position that adjudication in any one appeal shall equally apply to the other appeals also. Therefore, the appeals were heard together and are now being disposed-off by way of this common order for the sake of convenience & brevity. For the purpose of adjudication, the appeal of Shri Jasmin K. Ajmera, ITA No. 983/Mum/2020 is taken as the lead case.
2. This appeal by assessee for Assessment Year (AY) 2011-12 arises out of the order of learned Commissioner of Income Tax (Appeals)-48, Mumbai [CIT(A)] dated 29/11/2019 in the matter of assessment framed by learned Assessing Officer (AO) u/s 143(3) r.w.s. 153A on 16/03/2016 on certain grounds of appeal. In Ground No.2, the assessee has challenged the validity of assessment framed u/s 153A on the ground that the assessee's case do not fall within the parameters laid down by Section 153A and necessary preconditions for completing the assessment were not satisfied. The ground read as under: -

2. REASSESSMENT

2.1 The Ld. CIT (A) erred in confirming the action of the A.O. in initiating assessment proceedings and framing the assessment of the Appellant by invoking the provisions of section 153A of the Income tax Act, 1961 ["the Act"]

2.2 While doing so, the A.O. failed to appreciate that:

(i) The case of the appellant did not fall within the parameters laid down by section 153A of the Act;

(ii) The necessary preconditions for initiating and completion thereof were not satisfied.

2.3 It is submitted that in the facts and the-circumstances of the case, and in law, the reassessment framed is bad, illegal and void.

3. The Ld. AR for assessee, at the outset, raised a pertinent legal ground to submit that the impugned additions as made in the assessment order are not based on any incriminating material found during the course of search operations and this being non-abated year, the additions are not sustainable in law as per the binding decision of Hon'ble Bombay High Court in **CIT V/s Continental Warehousing Corporation [2015 374 ITR 645]**. The Ld. AR also submitted that the similar legal issue has been allowed by the SMC bench of the Tribunal in group case of **Smt. Reena A. Ajmera V/s DCIT (ITA No.982/Mum/2020 dated 09/02/2021)**. The copy of the order has been placed on record. The Ld. CIT-DR, on the other hand, referring to the documents found during the course of search operations, controverted the submissions of Ld. AR. The written submissions have been filed by both the sides in due course of hearing which have been duly considered. Reliance has been placed on various judicial pronouncements, the copies of which have been placed on record. The Ld. AR submitted that Ld. AO, in the remand report, has categorically accepted that no incriminating material was found during the course of the search on the assessee.

4. We have carefully heard the rival submissions and perused relevant material on record. We have also deliberated on judicial

pronouncements as cited during the course of hearing including the cited decision of SMC bench of Tribunal rendered in the case of similarly placed assessee. Our adjudication to the subject matter of appeal would be as given in succeeding paragraphs.

Assessment Proceedings

5.1 The material facts are that pursuant to search action u/s 132 on 25/07/2013 on Ajmera Group, notice u/s 153A was issued to the assessee on 03/11/2014. The original return of income for the year was filed by the assessee on 20/07/2011 declaring income of Rs.12.16 Lacs and no assessment proceedings were pending against the assessee on the date of search. Undisputedly, no notice u/s 143(2) was ever issued to the assessee and the time limit for issue of such notice had already expired on 30/09/2012 (within 6 months from the end of relevant assessment year).

5.2 In response to notice u/s 153A, the assessee filed return of income on 07/10/2015 reflecting original income of Rs.12.16 Lacs. During the course of assessment proceedings, it was alleged by Ld. AO that Long-term capital gains (LTCG) earned by the assessee on sale of shares of an entity namely Prraneta Industries Ltd. (now known as Aadhar Venture India Ltd.) were bogus in nature. The same would stem from another search action carried out by the department on one Shri Shirish C. Shah on 09/04/2013 who allegedly provided bogus accommodation entries of Long-Term Capital Gain in these shares. The same triggered search action on the assessee group. On the basis of data obtained during search action of Shri Shirish C. Shah, it was seen that the assessee and his other family members / concerns declared exempt LTCG in their

respective income tax returns. These details have been extracted in para 5.1 of the assessment order.

5.3 During the course of search action on assessee group, Shri Jasmin Ajmera offered the amount of LTCG for taxation. However, the said income was not offered to tax in the return of income on the ground that the transactions were genuine in nature. On the basis of data obtained from BSE Ltd. for the period from 01/04/2009 to 31/12/2011, it was observed by Ld. AO that the shares sold by the assessee group were purchased by various group concerns / entities of Shri Shirish C. Shah. During the course of search action on Shri Shirish C. Shah, blank signed cheque books, bank statements, books of accounts etc. were found and the directors of these entities denied having any involvement as director in these entities. The search action on the premises of Prraneta Industries Ltd. revealed that this entity was not carrying out any business activities and had no underlying assets. Accordingly, it was concluded that the share prices of this entity were manipulated to provide benefit of tax free long-term capital gains to various parties. The data as well as ledger account maintained by Shri Shirish C. Shah of the assessee group was confronted to the assessee. It was alleged by Ld. AO that the ledger account showed movement of cash from assessee and its family members / concerns to Shri Shirish C. Shah.

5.4 The assessee refuted the allegations of Ld. AO, inter-alia, by submitting that except for statement, there was no evidence in support of the allegation. No incriminating document / evidence were found from the possession of the assessee during the course of search action. The sole reliance on the statement was contrary to specific directions of CBDT and there was no corroborative evidence to support the addition.

No additions could be made merely on the basis of statement without there being any corroborative evidence on record. Further, the statement of the assessee was taken under coercion, pressure and undue influence and given under stress, Therefore, the statement was not a valid statement in the eyes of law. The entire statement stood fully retracted vide affidavits dated 02/08/2013 and 14/08/2015 explaining the entire chain of events. Therefore, the recorded statement would have no evidentiary value.

5.5 Regarding search findings in the case of Shri Shirish C. Shah, the assessee submitted that he had absolutely no connection with Shri Shirish C. Shah or any of his entities and that material thus obtained could not be used against the assessee. The data obtained from BSE would show that the transactions were executed through stock exchanges at prevailing market prices as evidenced by bill-cum-contract notes issued by the brokers. Pertinently, the shares were sold under screen based trading where the identity of the seller or the purchaser would not be known. None of the authorities like SEBI, BSE, RBI had held the transactions to be bogus in nature. It was also submitted that the aforesaid entity came out with preferential issue of shares which was possible only after getting clearance of regulatory authorities. Further, this entity was registered as NBFC with RBI. The family members were regular investor in share market. On the basis of these submissions, the assessee refuted the allegations of Ld.AO.

5.6 Though the material / data obtained from Shri Shirish C. Shah was confronted to the assessee, however, the assessee maintained that the names of the assessee as well as other family members do not appear in any of the documents and the material was not relevant to assessee's

case. Few of family member's names were scribbled at few of the places without any correlations and therefore the documents were otherwise mere dumb documents. The assessee denied having carried out any transaction with Shri Shirish C. Shah group.

5.7 However, in the background of material gathered during search operation on Shri Shirish C. Shah group, it was alleged that the assessee indulged in systematic transactions in the shares of Prraneta Industries Ltd. to earn huge tax free gains which would defy all possible human probabilities. The Ld. AO, in the assessment order, tabulated the dummy entities floated by Shri Shirish C. Shah along with affidavits of directors etc. of all these companies. These directors were held to be dummy directors of various entities being controlled by Shirish C. Shah. Out of this web of companies, certain companies purchased and sold the shares of Prraneta Industries Ltd. Accordingly, these transactions were held to be influenced / manipulated transaction in exchange of cash to Shri Shirish C. Shah. The cash so paid to Shri Shirish C. Shah was unexplained cash and therefore, the same was added to the income of the assessee. To procure such gains, the assessee must have paid certain commission which was estimated @5.25%. Finally, the assessee was saddled with additions of Rs.188.57 Lacs while framing the assessment.

Appellate Proceedings

6.1 The assessee assailed the action of Ld. AO on legal ground as well as on merits. In its submissions, the assessee, inter-alia, reiterated that in the absence of any incriminating material unearthed during the course of search operations, the impugned additions would not be sustainable in the eyes of law. The fact that there was no incriminating material was

accepted by Ld. AO in the remand report dated 10/01/2017. Since the original assessment had attained finality, the additions could be made solely on the basis of incriminating material only. The assessee also assailed the additions on the merits.

6.2 However, Ld. CIT(A), primarily going by the statement of the assessee u/s 132(4), noted that the details collected / found during the course of search operations on Shri Shirish C. Shah was duly confronted to the assessee. The assessee on behalf of himself and entire group admitted the fact of bogus LTCG. In reply to question nos.15, 17 & 18, the assessee explained the modus operandi and therefore, the statement was incriminating in nature which was sufficient to make the additions. Further, the mandate of Sec. 153A requires AO to assess / reassess total income of preceding six years. The incriminating material would include a statement made by the assessee during search. Further, books of accounts which were not produced earlier were to be considered while making an assessment u/s 153A. More so, the intimation u/s 143(1) would not amount to assessment at all. Hence, Ld. AO had wide power to make assessment / reassessment for the six years. The subsequent retraction made by the assessee was devoid of any merits as there was nothing to prove that the statement was taken under pressure, coercion or undue influence. In the retraction dated 02/08/2013, the retraction was general in nature. The said retraction as filed before DDIT (inv.) was rejected being frivolous and contrary to the facts. The allegation of harassment and use of forces by search team was not true as there was no reporting of any such incident to senior officers of the department. Therefore, the action of Ld. AO in making the

additions u/s 68 was upheld. Aggrieved, the assessee is in further appeal before us.

Our findings and Adjudication

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

Corporation [2015 374 ITR 645]. Therefore this argument would not hold much water which is also fortified by subsequent decision of Hon'ble Bombay High Court in **CIT V/s Deepak Kumar Agarwal (398 ITR 586 11/09/2017)** which held as under: -

20. At the outset, and since heavy reliance is placed by the Revenue on the Supreme Court judgment in *Rajesh Jhaveri Stock Brokers (P.) Ltd. (supra)*, it would be proper to note the facts in the same.

21. There, the Assistant Commissioner of Income Tax challenged the correctness of the decision rendered by a Division Bench of the Gujarat High Court. That Division Bench judgment allowed the Writ Petition/Special Civil Application of the assessee.

22. The respondent-assessee, a private limited company, filed its return of income for the assessment year 2001-2002 on October 30, 2001, declaring total loss of Rs.2,70,85,105/-. That return was proposed under Section 143(1) of the IT Act accepting the loss returned by the respondent. A notice was issued under Section 148 of the IT Act on the ground that the claim of bad debts as expenditure was not acceptable. On 12th May, 2004, a return of income declaring the loss at the same figure as declared in the original return was filed by the respondent-assessee under protest. A copy of the reasons recorded was furnished by the Revenue on the request of the assessee sometime in November, 2004. The assessee raised various objections, both on jurisdiction and the merits of the subject matter recorded in the reasons. The Revenue disposed of these objections on 4th February, 2005 holding that the initiation of reassessment proceedings was valid and it had jurisdiction to undertake such an exercise. The notice under Section 148 of the IT Act dated 12th May, 2004 was challenged by the respondent-assessee.

23. That Writ Petition was allowed and hence, the Revenue was in Appeal.

24. Mr. Ahuja's argument overlooks this factual aspect and when he relies upon the observations of the Hon'ble Supreme Court, and particularly in paragraph 13, he forgets that they were made in the context of a challenge to the notice under Section 148 of the IT Act. The Supreme Court, in paragraph 13 of this judgment, noted that intimation under Section 143(1)(a) was given without prejudice to the provisions of Section 143(2). Though technically this intimation issued was deemed to be a demand notice issued under Section 156, that did not *per se* preclude the Assessing Officer to proceed under Section 143(2). The right preserved was not taken away. The Hon'ble Supreme Court referred to the period between April 1, 1989 and March 31, 1998, and the second proviso to Sub-section (1) Clause (a) of Section 143 and its substitution with effect from 1st April, 1998. The sending of intimation between 1st April, 1998 and 31st May, 1999 under Section 143(1)(a) was mandatory. That requirement continued until the second proviso was substituted by the Finance Act, 1997, which was operative till 1st June, 1999.

25. The Hon'ble Supreme Court therefore, relied upon these amendments and, tracing their history, held that the intimation under Section 143(1)(a) cannot be treated to be an order of assessment. That is how it referred to the Division Bench Judgment of the High Court at Delhi and explained the legal position. There was thus no assessment under Section 143(1)(a) and therefore, the question of change

of opinion did not arise. A reference to Section 147 therefore, was made in the context of the Assessing Officer being authorized and permitted to assess or re-assess income chargeable to tax if he has reason to believe that income for any assessment year has escaped assessment. Before us, such is not the position, and even if this judgment of the High Court had been brought to the notice of the Division Bench deciding the *Continental Warehousing Corpn. and All Cargo Global Logistics (supra)*, there would not have been any difference.

Similar view has been expressed by Hon'ble Delhi High Court in **CIT Vs. Kabul Chawla (380 ITR 573)**.

8. The Ld. CIT-DR has placed on record material seized from the assessee during search proceedings. The copies of the Panchnamas (page 1 to 6 of assessee's paper-book) have also been placed on record. Upon combined reading of all these documents, it could be gathered that none of the documents show that the share transactions carried out by the assessee were sham transactions done in collusion with tainted group of Shri Shirish C. Shah. There is no evidence of cash movement, in any manner. The documents seized from the assessee are in the nature of Share holding, holding stock summary, Ledger extracts etc. which are already part of assessee's regular books of accounts and have not been referred to by Ld. AO while making impugned additions in the hands of the assessee. In the assessment order, the long-term capital gains earned by the assessee have been held to be bogus in nature, however the same are not corroborated, in any manner, by the seized material. The allegations of Ld. AO are primarily based on the search findings in the case of Shri Shirish C. Shah and his group entities whereas no incriminating material has been seized from the assessee. In fact, in the remand report dated 09/01/2017 (page nos. 196 to 199) filed by Ld. AO during first appellate proceedings, it has categorically been admitted by Ld. AO that there was no incriminating material in the case of the assessee. Nothing has been

shown to us to controvert these findings of Ld. AO. Therefore, the ratio of cited decisions as referred to in para-6 is quite applicable to the facts of the case.

9. So far as the admission in the form of assessee's own statement is concerned, we find that this statement has been retracted by the assessee by way of an affidavit on 02/08/2013 (page nos. 7 to 10 of assessee's paper book) and therefore, in the absence of any corroborative evidence / material supporting the admission made by the assessee, the addition would become unsustainable in the eyes of law. The additions made merely on the basis of retracted statement without there being any corroborative evidence / material, in our considered opinion, is not sustainable in law since the same runs contrary to CBDT Circular F. No.286/2/2003-IT(Inv.), dated 10/03/2003 which has clearly stated that no attempt should be made to obtain confession / surrender as to the undisclosed income during search. Such confession, if not based on credible evidence, when retracted, would not serve useful purpose and therefore, the authorities should focus on collection of evidence of income which leads to information on what has not been disclosed or is not likely to be disclosed before the Income-tax department. Further, while recording statement during the course of search and seizure operation, no attempt should be made to obtain confession as to the undisclosed income and the addition should be made only on the basis of material gathered during search operations. Any action on the contrary has to be viewed adversely. The subsequent Circular F.NO.286/98/2013-IT (INV.II)] dated 18/12/2014 emphasizes upon need to focus on gathering evidences during search / survey and to strictly avoid obtaining admission of undisclosed income under coercion /

undue influence. Therefore, the action of Ld. AO could not be said to be in line with these circulars issued by CBDT.

10. Proceeding further, it is settled legal proposition that the confession need corroboration with evidences. Though admission is an important piece of evidence but it is not conclusive and it is open to the assessee to show that it is incorrect. Therefore, retracted admission, in the absence of any incriminating material, would not be sustainable. In order to make a genuine and legally sustainable addition on the basis of surrender during search, it is sine-qua-non that some incriminating material must have been found to correlate the undisclosed income with such statement. The Hon'ble Delhi High Court in **CIT V/s Harjeev Aggarwal (70 Taxmann.com 95; 10/03/2016)** held that the statement recorded u/s 132(4) may also be used for making the assessment, but only to the extent it is relatable to the incriminating evidence/material unearthed or found during search. In other words, there must be a nexus between the statement recorded and the evidence/material found during search in order to sustain additions on the basis of recorded statement. Similar is the view of Hon'ble High Court in an earlier judgment of **CIT V/s Sunil Aggarwal (379 ITR 367; 2016)** and also the decision of Hon'ble Andhra Pradesh High Court in **CIT v. Shri Ramdas Motor Transport (238 ITR 177)** wherein Hon'ble Court refused to give any evidentiary value to the statement made by the assessee u/s 132(4) as the department could not find any unaccounted money, article or thing or incriminating document either at the premises of the company or at the residence of managing director or other directors. In such circumstances, the finding of the Tribunal that the statement of managing director recorded patently u/s 132(4) did not have any evidentiary value, was

upheld. The ratio of all these decisions makes it clear that the surrendered income must be correlated with some incriminating material found during the course of search action so as to justify the addition. We find that there is no such incriminating material in the case of the assessee which would show that the transactions under consideration were sham transactions and there was any connection / nexus between the assessee and the group entities of Shri Shirish C. Shah.

11. We also find that this legal issue stood covered in assessee's favor by the decision of SMC bench of Tribunal rendered in the case of another assessee of the group i.e. **Smt. Reena A. Ajmera V/s DCIT (ITA No.982/Mum/2020 dated 09/02/2021)**. The relevant observations were as under: -

4. Coming to Ground No. 2 of grounds of appeal, Learned Counsel for the assessee submitted that the assessment made u/s. 153A is bad in law as there is no incriminating material found in the course of search and the assessment is not abated. Learned Counsel for the assessee submitted that assessee filed return of income on 20.07.2011 and return was processed u/s. 143(1) of the Act on 21.09.2011. Accordingly, the time limit to issue notice u/s. 143(2) expired on 30.09.2012 upon expiry of six months from the end of the Financial Year in which return was furnished for the relevant assessment year.

5. Learned Counsel for the assessee submitted that thereafter a search was conducted on 25.07.2013 almost a year after the expiry of the limitation period for issue of notice u/s. 143(2) of the Act and there was no assessment or re-assessment proceeding pending as on the date of search. Therefore, it is submitted that the present assessment year was an unabated assessment year in as much as the assessment already attained finality and such finality could not be disturbed unless incriminating material was found during the course of the search. 6. Referring to Panchanamas Learned Counsel for the assessee submitted that in the present case no incriminating material was found in the hands of the assessee during the search proceedings against the assessee. It is submitted that there is no reference to any incriminating material found from the possession and control of the assessee in the Assessment Order. Inviting our attention to Page Nos. 334 and 335 of the Paper Book, which is the remand report dated 09.01.2015 Ld. Counsel for the assessee submits that in any case in the remand report Assessing Officer has categorically accepted that there was no incriminating material found during the course of the search. Therefore, Ld. Counsel for the assessee submits that it is well settled legal position that no addition can be made while completing the assessment u/s.153A of the Act in case of unabated assessment if no incriminating material was found in the course of the search.

7. Reliance was placed on the following decisions in support of her contentions: -

- (i). Pr.CIT v. Meeta Gutgutia [82 taxmann.com 287 (Del)] SLP dismissed by Hon'ble Supreme Court which is reported in 96 taxmann.com 468 (SC).
- (ii). CIT v. Gurinder Singh Bawa [386 ITR 483 (BOM)]
- (iii). CIT v. Kabul Chawla [380 ITR 573 (Del)]
- (iv). CIT v. Continental Warehousing Corporation [374 ITR 645 (BOM)]
- (v). CIT v. Anil Kumar Bhatia [352 ITR 493 (Del)]
- (vi). Brij Bhushan Singal & Ors v. ACIT in ITA.Nos. 1412 to 141/Del/18 order dated 31.10.2018
- (vii). Shri Sanjay and Smt. Aarti Singal v. DCIT in ITA.Nos. 706, 707, 709/Chd/18, order dated 07.02.2020.

8. Ld. DR vehemently supported the orders of the authorities below.

9. Heard rival submissions, perused the orders of the authorities below. In this case assessee filed return on 20.07.2011 and the same was processed u/s. 143(1) of the Act on 21.09.2011 and time limit for issue of notice u/s. 143(2) lapsed on 30.09.2012 and no assessment or re-assessment proceedings were pending as on the date of search. Therefore, admittedly in this case the assessment is unabated on the date of search i.e. 25.07.2013 since there were no pending proceedings either u/s. 143(3) or 148 of the Act.

10. Hon'ble Bombay High Court in the case of CIT v. Continental Warehousing Corporation (supra) held that –

“In a case where pursuant to issue of notice under section 153A assessments are abated. Assessing Officer retains original jurisdiction as well as jurisdiction conferred on him under section 153A for which assessments shall be made for each of six assessment years separately. No addition can be made in respect of unabated assessments which have become final if no incriminating material is found during search”.

11. Hon'ble Bombay High Court in the case of CIT v. Gurinder Singh Bawa (supra) held that–

“In the present case, the assessment had been completed under summary scheme under section 143(1) and time limit for issue of notice under section 143(2) had expired on the date of search. Therefore, there was no assessment pending in this case and in such a case there was no question of abatement. Therefore, addition could be made only on the basis of incriminating material found during search.”

6.2 In this case, the AO had made assessment on the information/material available in the return of income. The information regarding the gift was available in the return of income as capital account had been credited by the assessee by the amount of gift. Similar was the position in relation to addition under section 2(22)(e). The AO had not referred to any incriminating material found during the search based on which addition had been made. Therefore, following the decision of the Special Bench (supra), we hold that the AO had no jurisdiction to make addition under section 153A. The addition made is therefore deleted on this legal ground”.

12. Hon'ble Delhi High Court in the case of CIT v. Anil Kumar Bhatia (supra) held that –

“during the search of the assessee's premises, no document or incriminating material, except the one unsigned undertaking for the loan was found. There was no corroborative material seized in the course of search. The income tax returns for the assessment years 2000-01 to 2005-06 (six years) were filed prior to the search and in the normal course, suo moto disclosing the

particulars of the subject additions and these returns stood accepted under Section 143(1) of the Act. Since on the date of the initiation of the search, no assessment was pending as they had all abated, the Assessing Officer has wrongly invoked Section 153A of the Act. The assessment contemplated by Section 153A is not a denovo assessment and the additions made therein have to be necessarily restricted to the undisclosed income unearthed during the search. The Section has to be strictly interpreted. It is not an assessment such as a normal or regular scrutiny assessment”.

13. The Hon'ble Delhi High Court in the case of CIT v. Kabul Chawla (supra) held that –

“completed assessments can be interfered with by Assessing Officer while making assessment under section 153A only on basis of some incriminating material unearthed during course of search which was not produced or not already disclosed or made known in course of original assessment. Pursuant to search carried out in case of the assessee, a notice under section 153A(1) was issued. In course of assessment, Assessing Officer made addition to assessee's income in respect of deemed dividend. It was undisputed that assessment for assessment years in question had already been completed on date of search. Since no incriminating material was unearthed during the search, no additions could have been made to income already assessed. Consequently, the impugned addition was to be deleted”.

14. The Hon'ble Delhi High Court followed this decision in the case of CIT v. RRJ Securities Ltd., [380 ITR 612].

15. The Hon'ble Delhi High Court in the case of Pr.CIT v. Meeta Gutgutia (supra) held that invocation of section 153(A) to reopen concluded assessments of assessment years earlier to year of search was not justified in absence of incriminating material found during search qua each such earlier assessment years.

16. In all the above decisions of various Hon'ble High Court's, the legal position is that no addition can be made in case of an unabated assessment if no incriminating material is found in the course of search. On a perusal of the Assessment Order I noticed that there was no reference to any of the incriminating material found and seized in the premises of the assessee in the course of the search proceedings. The Assessing Officer in the Assessment Order refers to the seized incriminating material in the case of one Shri Shirish C. Shah and the post search enquiries made in his case to make an addition in the hands of the assessee denying the long term capital gain claimed by the assessee. I also noticed from the remand report dated 09.01.2017 furnished by the Dy. CIT, CC-2(2), Mumbai to the Ld.CIT(A) -48 in the course of appeal proceedings wherein the Assessing Officer stated as under: -

“Sir, in the present case under consideration, though no incriminating material was found, the assessee admitted undisclosed Income in his statement u/s.132(4) of the Income Tax Act 1961. It is totally immaterial that the assessee later on retracted the statements recorded u/s 132(4) of the Income Tax Act 1961. Therefore assessment of AY 2011-12 and AY 2012-13 which was made on the basis of undisclosed income admitted during the course of search is totally valid assessment and does not get affected by the decision of Hon'ble Bombay High Court in the case of Continental Warehousing (Supra)”.

17. In this case it appears that except the statement of the assessee u/s. 132(4) agreeing for the addition there is no seized incriminating material found in the premises of the assessee in the course of assessment proceedings. When there is

no incriminating material found in the course of search in assessee's premises the addition/disallowance cannot be made merely on the statements recorded in the course of the search proceedings.

18. In the case of Brij Bhushan Singal & Ors v. ACIT (supra) the Delhi Bench of the Tribunal held as under: -

"117. From the aforesaid Circulars, it is clear that the assessments made pursuant to search operation are required to be based on incriminating materials discovered as a result of search operation in the case of the assessee and not on the recorded statement. In the instant case, the persons who gave the statements, retracted the same and even the opportunity to cross-examine was not afforded to the assessee. In our opinion, it cannot be said that those statements on the basis of which impugned additions were made by the AO, were incriminating material found during the course of search. As we have already noted that no incriminating material was found during the course of search and the additions were made by the AO while framing the assessments u/s 153A of the Act, the said additions need to be restricted or limited only to incriminating material found during the course of search. However, in the present case, no such incriminating material was found during the course of search from the possession of the assessee.

....

121. In the present case also, the AO made the additions on the basis of the statements of third parties recorded u/s 132(4)/133A of the Act and third parties evidences/documentation. However, no live nexus with the incriminating material found in the course of search in the case of the assessee was established. The statements of the third parties were recorded behind the-back of the assessee but the opportunity of cross-examination of such parties was not allowed to the assessee, even the statements were retracted later on. It is well settled that the presumption u/s 132(4A)/292C of the Act, is available only in the case of the person in whose possession and control, the documents are found but it is not available in respect of the third parties. In the present case, there was no independent evidence to link the seized documents found in the premises of the third party with any incriminating material found in the course of search operation at the premises of the assessee. Therefore, the entries in the documents seized from third party's premises would not be sufficient to prove that the assessee was indulged in such transactions. In the present case, the pen drive of Sh. Ankur Agarwal corroborated/substantiated, the share transactions carried out by the assessee which were duly found recorded in the regular books of the assessee and the said pen drive did not contain anything incriminating against the assessee. Therefore, merely on the basis of the statement of Sh. Ankur Agarwal, the addition made u/s 153A of the Act was also not justified, particularly when Sh. Ankur Agarwal retracted his statement later on. In the instant case, the AO also failed to establish any link/nexus of the alleged cash trail. We, therefore, by considering the totality of the facts and the various judicial pronouncement discussed in the former part of this order are of the view that the additions made by the AO and sustained by the Ld. CIT(A) u/s 153A of the Act in the absence of any incriminating material found during the course of search u/s 132(1) of the Act in respect of unabated assessment years i.e. the assessment years 2010-11 to 2012-13 were not justified."

As could be seen from the above the Delhi Bench of the Tribunal considering various circulars of CBDT held that the assessments made pursuant to search operation are required to be based on incriminating material discovered as a result of search operation in assessee's case but not on the recorded statements.

19. In the facts and circumstances explained above and in view of the above judicial pronouncements since no incriminating material found in the course of search in the premises of assessee, assessment made making addition by the Assessing Officer in respect of long term capital gain is bad in law. Thus, I direct the Assessing Officer to delete the addition made in respect of long term capital gain.

20. As I have decided that the assessment made by the Assessing Officer is bad in law on the preliminary ground, I am not inclined to go into merits of the addition/disallowance made by the Assessing Officer at this stage as it would only become academic in nature.

The facts in the above case are quite identical to the case before us since the additions permeates from same search action and similar additions were made in the case of this assessee. Therefore, the ratio of above decision is quite applicable here and we see no reason to deviate from the same.

12. Finally, on the given facts and circumstances, we concur with the submissions of Ld. AR that in the absence of any incriminating material, the additions could not be made in the hands of the assessee as per settled legal proposition. Accordingly, the impugned additions stand deleted. We order so. Since legal grounds raised by the assessee have been allowed, the adjudication on merits have been rendered merely academic in nature. The legal ground raised by the assessee stand allowed. The appeal stand allowed.

13. Facts as well as issues are quite identical in all the other appeals. The assessment orders as well as appellate orders are on similar lines. Aggrieved, the assessee is in further appeal before us with similar grounds of appeal. Facts being *pari-materia*, the same, our adjudication as above shall *mutatis-mutandis* apply to all these appeals. Accordingly, the legal grounds raised in all these appeals stand allowed and the

impugned additions as made therein stand deleted. All these appeals stand allowed.

Conclusion

14. All the appeals stand allowed in terms of our above order.

Order pronounced on 02ND November 2021

Sd/-

(C. N. Prasad)

न्यायिक सदस्य / **Judicial Member**

Sd/-

(Manoj Kumar Aggarwal)

लेखा सदस्य / **Accountant Member**

मुंबई Mumbai; दिनांक Dated : 02/11/2021
Sr.PS, Dhananjay

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT- concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

**उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai.**

Sr. No.	Details	Date	Initials	Designation
1	Draft dictation sheets are attached	Directly Typed on Computer / Laptop		Sr.PS/PS
2	Draft dictated on	Not Applicable/		Sr.PS/PS
3	Draft Placed before author	Not Applicable		Sr.PS/PS
4	Draft proposed & placed before the Second Member			JM/AM
5	Draft discussed/approved by Second Member			JM/AM
6	Approved Draft comes to the Sr.PS/PS			Sr.PS/PS
7	Order pronouncement on	02.11.2021		Sr.PS/PS
8	File sent to the Bench Clerk	02.11.2021		Sr.PS/PS
9	Date on which the file goes to the Head clerk	02.11.2021		
10	Date on which file goes to the AR			
11	Date of Dispatch of order			