IN THE INCOME TAX APPELLATE TRIBUNAL
LUCKNOW BENCH 'B', LUCKNOW

(THROUGH VIRTUAL HEARING)

BEFORE SHRI A. D. JAIN, VICE PRESIDENT AND
SHRI T. S. KAPOOR, ACCOUNTANT MEMBER

I.T.(SS)A. No.253/Lkw/2020
Assessment Year:2014-15

A.C.I.T., Central Circle-1, Lucknow.	Vs.	Shri Arun Agarwal, 3/3 Gulmohar Enclave, Gokhle Marg, Lucknow. PAN:ABMPA2676D
(Appellant)		(Respondent)

I.T.(SS)A. No.254/Lkw/2020
Assessment Years:2014-15

A.C.I.T., Central Circle-1, Lucknow.	Vs.	Shri Arun Agarwal HUF, 3/3 Gulmohar Enclave, Gokhle Marg, Lucknow. PAN:AACHA1811P
(Appellant)		(Respondent)

Appellant by	Smt. Sheela Chopra, CIT, D.R.
Respondent by	Shri Rakesh Garg, Advocate
Date of hearing	02/09/2021
Date of pronouncement	20/10/2021

O R D E R

PER T. S. KAPOOR, A.M.

These two appeals have been filed by the Revenue against the separate orders of learned CIT(A), dated 03/06/2020 and 17/06/2020 respectively pertaining to assessment year 2014-15. The grounds of appeal taken by the Revenue are similar in both the appeals. Both the appeals were

heard together therefore, for the sake of convenience a common and consolidated order is being passed. For the sake of completeness, the grounds taken by the Revenue in I.T.A. No.253/Lkw/2020 are reproduced below:

> *"1. On facts and circumstances of the case and in law, the Ld. CIT(A) while annulling the asstt order on grounds that in absence of any incriminating material being found during search, the conditions for issue of notice u/s 153A were not satisfied, erred and misread the relevant facts and circumstance as well as legal provisions under 153A/153C of the I.T. Act, 1961.*
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> *2. On facts and circumstances of the case and in law, the Ld. CIT(A), erred in relying upon the dismissal of revenue's SLP in case of Meeta Gutgutia to conclude that the binding jurisdictional Allahabad high court in Raj Kumar Arora stands overruled without appreciating that it was already held by a 3-Judge bench of SC itself in its decision in case of Khoday Distilleries Ltd in civil appeal no 2432 of 2019 affirming the earlier 3- Judge bench decision in case of Kunhayammed & Ors Vs State of kerala & Anr 245 ITR 360 (SC) that in limine dismissal of SLP at threshold itself neither constitutes declaration of law nor a binding precedent. Hence, the reliance by CIT(A) on dismissal of SLP in Meeta Gutgutia to override the binding jurisdictional high court decision in Raj Kumar Arora was an apparent and patent mistake.*
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> *3. On facts and circumstances of the case and in law, the Ld. CIT(A) erred in importing & applying the ratio of Delhi High court decision in case of Kabul Chawla, as well as other decisions, ignoring the judicial discipline and law of binding precedent as the jurisdictional high court in the case of Raj Kumar Arora 367 ITR 517(Alld.) has already held that there is was no requirement of asstt u/s 153A being based only on the basis of 'incriminating material' found during search.*
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> *4. Without prejudice to above grounds, on facts and circumstances of the case and in law, the Ld. CIT(A) erred in annulling the asstt order on grounds of absence of*

incriminating material without appreciating that the term incriminating used by Courts has not been defined under 153A and therefore its meaning is required to be inferred harmoniously with other provisions of the Act dealing with search assessment or levy of penalty in cases of search assessments such as 153C, clause (ii) of 271AAB(c) , etc.

5. On facts and circumstances of the case and in law, the Ld. CIT(A) failed to appreciate that in absence of specific use of term 'incriminating' u/s 153A, the meaning of the term 'incriminating' needs to be inferred as akin to the expression 'bearing on the assessment of income' as appearing u/s 153C for asstt of other person based on material found during search. This expression has very wide connotation and envisages that such material should be in the nature of prima facie material only having live nexus to the belief of it having bearing on assessment of income and not in the nature of absolute incriminating evidence, which by itself could suggest/divulge the undisclosed income without any further act of investigation/examination. The detailed examination of such material for different asstt years finally representing undisclosed material or not, was the step envisaged only after the issue of notice u/s 153A for six asstt years.

6. On facts and circumstances of the case and in law, the Ld. CIT(A) failed to appreciate that after amendment u/s 153C w.e.f. 01.04.2005, it is the test of 'bearing on the assessment of income' only which needs to be applied in place of the test of 'presence of incriminating material' u/s 153A and the decision of apex court in Sinhgad Technical education society which was rendered for period prior to amendment w.e.f. 1/4/2005 is therefore distinguishable in law.

7. On facts and circumstances of the case and in law, the Ld. CIT(A) while evaluating as to what can be 'incriminating', failed to take a note of clause (ii) of 271AAB(c) which defines undisclosed income as "any income based on entry in books of accounts wholly or partly false and would not have been found to be so, had the search not been conducted implying thereby that unsupported entries appearing in books of accounts can also fall within the sweep of being incriminating under the other provisions of the Act and hence the meaning

of term 'incriminating' was required to be inferred harmoniously w.r.t such statutory provisions.

8. On facts and circumstances of the case and in law, the Ld. CIT(A) while evaluating as to what can be 'incriminating', again failed to take a note that even the penalty is attracted u/s 270A(10) when there is misreporting based on recorded entries in books of accounts, once again implying that entries recorded in books of accounts may still represent undisclosed income having bearing on the assessment of income or being 'incriminating', if they are partly recorded or camaflouged or shown to be from a source which is not the real source and hence the meaning of term 'incriminating' was required to be inferred harmoniously w.r.t such statutory provisions.

9. On facts and circumstances of the case and in law, the Ld. CIT(A) erred in referring only to the statement of Shri Santosh Kumar Chaudhary whose statement was recorded u/s 133A admitting to have provided with bogus LTCG from penny stocks and Security premium through Shell Cos not exiting at given addresses, while ignoring the statement of some other persons recorded was on oath u/s 131(1 A) such as Shri Virendra Keshri ex director of the Shell Cos who admitted that M/s Anirudh motor and general finance Pvt Ltd, M/s Fantastic Merchandise P Ltd etc was a paper Co wherein the individuals of fortuna group became directors and also confirmed the statement of Santosh Chaudhary and another person Shailendra Gupta CA, auditor of Techmech Developer Pvt Ltd also admitted on oath u/s 131(1 A) that Co did not have any business activity and that its accounts were partially certified on the basis of bills, vouchers and bank statements, which did satisfy the condition of 'incriminating' as well as having bearing on the asstt of income as provided u/s 153A/153C w.r.t bogus loans taken by assessee from such shell co.

10. On facts and circumstances of the case and in law, the Ld. CIT(A) erred in holding that the statement of Santosh Choudhary recorded by DD1T Kolkata could not be termed as 'incriminating' on ground that statement recorded u/s 133A was not on oath without appreciating that in the asstt order it was clearly mentioned that the statements of other two persons i.e. Shri Virendra Keshri and Shri Shailendra Gupta CA

were recorded on oath by the DDIT(Inv) u/s 131(1 A) in the capacity of the authorised officer u/s 132(1) in connection with the search in the fortuna group wherein they had admitted that M/s Anirudh Motor Finance P Ltd and M/s Techmech Developer P Ltd were merely paper Cos without actual economic activities, even though the no survey could be done as these Cos were found non-existent at the given addresses. In C/T Chennai vs Ajit S Kumar 93 Taxman.com 294(SC), the court in the context of section 158BB has also upheld the use of information collected in a survey in case of connected person carried along with search in other person for the purpose of making asstt. u/s 158BB.

11. On facts and circumstances of the case and in law, the Ld. CIT(A) also erred in not appreciating that the plea that there was no incriminating material for the relevant AY for issue of notice u/s 153A was raised for the first time before CIT(A) only and therefore CIT(A) ought to have given opportunity to the AO also by calling for the remand report in view of the ratio of decision in case of CIT Vs British India corporation Ltd 337 ITR 64 (Alld.).

12. On facts and circumstances of the case and in law, the Ld. CIT(A) also erred in not appreciating that the mere fact that the bogus credit entries are found to be recorded in books of accounts cannot by itself take such entries out of the sweep of being incriminating or having a bearing on the asstt of income. Accordingly, when it was already admitted by Ex director and CAs of shell Cos that they provided accommodation entry, the burden u/s 68 could not be said to have been discharged by assessee and this fact itself not only had a bearing on asstt of correct income even if recorded in books of accounts but also was incriminating in itself as the lender entities admittedly lacked economic substance also, more so when the CIT(A) having himself confirmed the addition on account of bogus LTCG credit entries in the cases of some individual assessees of the same searched group in the asstt u/s 143(3) r/w 153A in AY 2017-18.

13. On facts and circumstances of the case and in law, the Ld. CIT(A) in law while deleting the addition made by AO u/s 68 without considering the merits that in view of the amended

provisions w.e.f 1/4/2013, the burden u/s 68 could not have been said to be discharged by assessee just by filing confirmations/financial statement of shell Cos which did not have any economic substance nor found existing at given addresses, in view of the ratio of decision in case of N R Portfolio Pvt Ltd 264 CTR 258(Delhi), Nova promoters & fin lease Pvt Ltd 252 CTR 187(Delhi), Seema Jain 406 ITR 411 (Delhi), Chetan das Lachman Das 294 ITR 497(Delhi).

14. On the facts and circumstances of the case and in law, the CIT(A) failed to allude to the relevant facts & circumstances and misread the legal provisions to arrive at the conclusion."

2. The assessees have also filed petitions under Rule 27 whereby it has taken a ground that approval given by Jt. CIT u/s 153D of the Act to the order passed u/s 153A is without application of mind and hence the order passed u/s 153A is nonest and void ab initio and same may be quashed. However, during the course of hearing, Learned counsel for the assessee did not press the same and therefore, learned CIT, D.R. was asked to proceed with her arguments on the grounds of appeal.

3. Learned CIT, D.R. submitted that a search had taken place on 21/04/2016 on the Fortuna Group and whereby the cases of these assessees along with cases of other assessees were reopened u/s 153A and the Assessing Officer had made certain additions which the learned CIT(A) has deleted by holding that the assessments in these cases stood completed and therefore, the additions, if any, could have been made only on the basis of incriminating material. Learned CIT, D.R. in this respect submitted that while holding so, learned CIT(A) has not taken into account the judgment of Hon'ble jurisdiction High Court in the case of Raj Kumar Arora wherein the Hon'ble court has held that during proceedings u/s 153A, the Assessing Officer is all empowered to make addition or make reassessment, even

without the incriminating material. It was submitted that such judgment of Hon'ble Allahabad High Court was a binding judgment as it was delivered by jurisdictional High Court. Learned CIT, D.R. further submitted that learned CIT(A) has annulled the assessment without appreciating that the term incriminating has not been defined u/s 153A of the Act and therefore, its meaning is required to be inferred harmoniously with other provisions of the Act. It was argued that unsupported entries appearing in the books of account can also fall under the term 'incriminating documents' and hence, the meaning of term 'incriminating' was required to be inferred harmoniously with respect to the such statutory provisions. Learned CIT, D.R. argued that the assessee had earned bogus Long Term Capital Gain from penny stock through shell companies and the Director of shell companies had admitted to be engaged in providing accommodation entries. It was further argued that the assessee had taken the issue of notice u/s 153A before the learned CIT(A) for the first time and the learned CIT(A) should have given opportunity to the Assessing Officer by calling a remand report from him in view of ratio of decision in the case of Hon'ble Allahabad High Court CIT vs. British Corporation Ltd. [2011] 337 ITR 64 (All). It was submitted that learned CIT(A) has not appreciated that the bogus entries even recorded in the books of account cannot by itself take such entries out of the sweep of being incriminating and the burden u/s 68 of the Act could not said to have been discharged by the assessee in view of the fact that Directors of these companies had admitted that they were engaged in providing accommodation entries. It was submitted that learned CIT(A) had himself confirmed the addition on account of Long Term Capital Gain in the case of some individual assessees in the same group and therefore, it was argued that the order passed by learned CIT(A) be reversed and that of the Assessing Officer be restored.

4. Learned counsel for the assessee, on the other hand, submitted that learned CIT(A) has passed a very elaborate order wherein the judgment of Hon'ble Allahabad High Court in the case of Raj Kumar Arora has been fully discussed. It was submitted that learned CIT(A) has held that since the judgment in the case of Raj Kumar Arora was based on the judgment of Anil Kumar Bhatia of Hon'ble Delhi High Court and relying on the same judgment of Anil Kumar Bhatia, Hon'ble Delhi High Court in the case of Kabul Chawla has clearly held that in the case of completed assessments, the additions can only be based on incriminating documents. It was further argued that Hon'ble Supreme Court in the case of Meeta Gutgutia has upheld the decision of Hon'ble Delhi High Court in the case of Meeta Gutgutia. Therefore, it was argued that there is no perverse finding in the order of learned CIT(A). As regards the ground, taken by the Revenue regarding non application of decision of Apex Court in the case of Singhad Technical Educational, it was submitted that the assessment in the present case has not been completed u/s 153C of the Act but has been completed u/s 153A therefore, such decision has no application to the facts of the present cases. As regards the argument of learned CIT, D.R. that unsupported entries appearing in the books of account can also fall into being incriminating, Learned counsel for the assessee submitted that the entries, which are recorded in the books of account, cannot be said to be incriminating. It was submitted that though the word 'incriminating' has not been defined in the I.T. Act but in general terms, it can be inferred that the word 'incriminating' is something which has a bearing on the total income of the assessee and which has not been recorded in the books of account. As regards the arguments of learned CIT, D.R. regarding onus u/s 68 of the Act, Learned counsel for the assessee submitted that learned CIT(A) has allowed relief to the assessee only on a legal issue that the addition in the case of completed

assessment can only be made on the basis of some incriminating material found during search and therefore, it was prayed that the order of learned CIT(A) be upheld.

5. We have heard the rival parties and have gone through the material placed on record. We find that a search took place on the Fortuna Group of cases on 21/04/2016 and six assessment years, preceding assessment year in which search took place, were reopened for various assessees and the present assessee is one of the group cases. The original return of income for assessment year 2014-15 were filed on 31/03/2015 & 26/03/2015 respectively, the evidence of which has been filed in the form of filing of acknowledgement of returns. The time limit for issue of notice u/s 143(2) on 30/09/2015 for these assessee, which is much before the date of search i.e. on 21/04/2016. It is also an undisputed fact that addition has not been made on the basis of any incriminating material but has been made on the basis of entries in the books of account. The Lucknow Bench of the Tribunal, in a number of cases, has held that for completed assessments, the additions u/s 153A can only be made on the basis of some incriminating material. The argument of learned CIT, D.R. that unsupported entries, recorded in the books of account, also comes under the definition of incriminating material, is of no force as these entries cannot be called incriminating as the assessee had recorded such transactions in the books of account. They are also not 'unsupported', but are duly and properly supported by documentary evidences, such as bank statements, Demat statements and real time transactions through screen based trading on recognized stock exchanges. Simply because certain persons have admitted to have provided these entries as accommodation entries, cannot make these entries incriminating unless such persons are subjected to cross examination by the assessee. Apropos the argument of learned CIT, D.R. that Singhad Technical Education Society's case by Hon'ble Apex Court is applicable to the period prior to amendment in section 153C, we find that learned CIT(A) has not relied on the order of Apex Court

in the case of 'Singhad Technical Education Society' and this order relates to section 153C of the Act whereas the assessment, in these cases, has been made u/s 153A of the Act. As regards the argument of learned CIT, D.R. that the assessee had not discharged its onus under section 68, we find that learned CIT(A) has allowed relief to the assessee on the basis of a legal issue and has not gone into the merits of the case. As regards the arguments of learned CIT, D.R. that the decision in the case of Raj Kumar Arora, rendered by Hon'ble Allahabad High Court, was applicable, we find that such decision was based on the judgment in the case of Anil Kumar Bhatia, rendered by Hon'ble Delhi High Court and Hon'ble Delhi High Court in the case of Kabul Chawla has followed the judgment of Hon'ble Delhi High Court in the case of Anil Kumar Bhatia and has decided the issue in favour of assessee by holding that in case of completed assessments, the additions can only be made on the basis of incriminating material and Kabul Chawla has been upheld by Hon'ble Supreme Court and further Hon'ble Delhi High Court's decision in the case of Meeta Gutgutia has also been upheld by Hon'ble Supreme Court and moreover, these decisions have been rendered after the decision of Raj Kumar Arora by Hon'ble Allahabad High Court. Therefore, learned CIT(A) has rightly not followed the decision of Hon'ble Allahabad High Court in the case of Raj Kumar Arora. The learned CIT(A) has clearly held that there is a difference between a statement recorded under section 133A and that recorded u/s 132(4) of the Act. The statements which have been relied by Assessing Officer have been recorded u/s 133A of the Act and not u/s 132(4) of the Act. The statement recorded u/s 133A has been held to be not conclusive piece of evidence by itself by various Hon'ble High Courts as has been noted by learned CIT(A). In the present cases, the only material in the possession of the Department is the statements of Shri Santosh Choudhary and Shri Virender Kumar which have

been recorded post search on the assessee and during the survey u/s 133A of the Act. The learned CIT(A) has passed an elaborate order discussing all the aspects relating to grounds of appeals and similar findings have been made in both the cases. The relevant findings of learned CIT(A) are contained in para 11.1 to 11.12, which for the sake of completeness have been made part of this order and are reproduced below:

> *"11.1 The appellant has basically submitted vide submission (reproduced above) that no addition could be made in a Search assessment in absence of any incriminating evidences found during Search and Seizure operation u/s 132 of the Income Tax Act.*
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> *11.2 It is evident that above addition is not based on any evidence found or gathered during the search and seizure operation conducted on 21.04.2016. The above addition u/s 68 has been made on the basis of the Statement of Sh. Santosh Kumar Chaudhary recorded on 28.04.2016 during the Survey operation u/s 133A carried out on the premises situated at Site no. 3, 6th Floor, Commerce House, 2- Ganesh Chand Avenue, Kolkata.which according to the assessment order of the AO, was the registered office of M/s Techmech Developers PvtJLtd. At the time of survey proceedings it was found that the premises was occupied by Shri Santosh Chaudhary, whose statement was recorded during the survey proceedings. However Sliri Chaudhary denied having any role with regards to the maintenance of the Books of M/s Techmech Developers PvtLtd. The AO formed his belief on the basis of statement given in respect of the other two group companies which had no relation to M/s Techmech Developers Pvt Ltd. It is also pertinent to mention here that the statement was retracted subsequently.*
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> ***11.3** The issue whether the AO can make addition on issued not based on the seized documents during the Search and Seizure operation u/s 132 in case of an assessment made u/s 153A has been a subject of plethora of litigations. This issue has been finally settled by the Hon'ble Apex Court in case of Principal Commissioner of Income-tax, Central IT, New Delhi*

v. Meeta Gutgutia, [2018] 96 taxmann.com 468 (SC). The Hon'ble Supreme Court has dismissed the SLP filed by the Revenue, against the judgement given by the Hon'ble Delhi High Court in case of Principal Commissioner of Income-tax, Central -2, New Delhi vs. Meeta Gutgutia [2017] 82 taxmann.com 287 (Delhi) with the following directions/Order:-

1. *Delay condoned*
2. *We do not find any merit in this petition. The special leave petition is accordingly dismissed.*
3. *Pending application stands disposed of.*

11.4 *The operating part of the judgement of the Hon'ble Delhi High Court which has been affirmed by the Hon'ble Apex Court is reproduced below:-*

55. On the legal aspect of invocation of Section 153A in relation to AYs 2000-01 to 2003-04, the central plank of the Revenue's submission is the decision of this Court in Dayawanti Gupta (supra). Before beginning to examine the said decision, it is necessary to revisit the legal landscape in light of the elaborate arguments advanced by the Revenue.

56. Section 153A of the Act is titled "Assessment in case of search or requisition". It is connected to Section 132 which deals with 'search and seizure'. Both these provisions, therefore, have to be read together. Section 153A is indeed an extremely potent power which enables the Revenue to re-open at least six years of assessments earlier to the year of search. It is not to be exercised lightly. It is only if during the course of search under Section 132 incriminating material justifying the re-opening of the assessments for six previous years is found that the invocation of Section 153A qua each of the AYs would be justified.

57. The question whether unearthing of incriminating material relating to any one of the AYs could justify the re-opening of the assessment for all the earlier AYs was considered both in CIT v. Anil Kumar Bhatia (supra) and CIT v. Chetan Das Lachman Das (supra). Incidentally, both these decisions were discussed threadbare in the decision of this Court in Kabul

Chawla (supra). As far as CIT v. Anil Kumar Bhatia (supra) was concerned, the Court in paragraph 24 of that decision noted that "we are not concerned with a case where no incriminating material was found during the search conducted under Section 132 of the Act. We therefore express no opinion as to whether Section 153A can be invoked even under such situation". That question was, therefore, left open. As far as CIT v Chetan Das Lachman Das (supra) is concerned, in para 11 of the decision it was observed:

> *"11. Section 153A (1) (b) provides for the assessment or reassessment of the total income of the six assessment years immediately preceding the assessment year relevant to the previous year in which the search took place. To repeat, there is no condition in this Section that additions should be strictly made on the basis of evidence found in the course of the search or other post-search material or Information available with the Assessing Officer which can be related to the evidence found. This, however, does not mean that the assessment under Section 153A can be arbitrary or made without any relevance or nexus with the seized material. Obviously an assessment has to be made under this Section only on the basis of seized material."*

58. In Kabul Chawla (supra), the Court discussed the decision in Filatex India Ltd. v. CIT (supra) as well as the above two decisions and observed as under:

> *"31. What distinguishes the decisions both in CIT v. Chetan Das Lachman Das (supra), and Filatex India Ltd. v. CIT-IV (supra) in their application to the present case is that in both the said cases there was some material unearthed during the search, whereas in the present case there admittedly was none. Secondly, it is plain from a careful reading of the said two . decisions that they do not hold that additions can be validly made to income forming the subject matter of completed assessments prior to the search even if no incriminating material whatsoever was unearthed during the search.*

32. Recently by its order dated 6th July 2015 in ITA No. 369 of 2015 (Pr. Commissioner of Income Tax v. Kurele Paper Mills P. Ltd.), this Court declined to frame a question of law in a case where, in the absence of any incriminating material being found during the search under Section 132 of the Act, the Revenue sought to justify initiation of proceedings under Section 153A of the Act and make an addition under Section 68 of the Act on bogus share capital gain. The order of the CIT(A), affirmed by the ITAT, deleting the addition, was not interfered with."

59. In Kabul Chawla (supra), the Court referred to the decision of the Rajasthan High Court in Jai Steel (India), Jodhpur v. ACIT (2013) 36 Taxman 523 (Raj). The said part of the decision in Kabul Chawla (supra) in paras 33 and 34 reads as under:

"33. The decision of the Rajasthan High Court in Jai Steel (India), Jodhpur v. ACIT (supra) involved a case where certain books of accounts and other documents that had not been produced in the course of original assessment were found in the course of search. It was held where undisclosed income or undisclosed property has been found as a consequence of the search, the same would also be taken into consideration while computing the total income under Section 153A of the Act. The Court then explained as under:

"22. In the firm opinion of this Court from a plain reading of the provision along with the purpose and purport of the said provision, which is intricately linked with search and requisition under Sections 132 and 132A of the Act, it is apparent that:

(a) the assessments or reassessments, which stand abated in terms of II proviso to Section 153A of the Act, the AO acts under his original jurisdiction, for which, assessments have to be made;

(b) regarding other cases, the addition to the income that has already been assessed, the assessment will be made on the basis of incriminating material; and
(c) in absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made."

34. The argument of the Revenue that the AO was free to disturb income de hors the incriminating material while making assessment under Section 153A of the Act was specifically rejected by the Court on the ground that it was "not borne out from the scheme of the said provision" which was in the context of search and/or requisition. The Court also explained the purport of the words "assess" and "reassess", which have been found at more than one place in Section 153A of the Act as under:

"26. The plea raised on behalf of the assessee that as the first proviso provides for assessment or reassessment of the total income in respect of each assessment year falling within the six assessment years, is merely reading the said provision in isolation and not in the context of the entire section. The words 'assess' or 'reassess'-have been used at more than one place in the Section and a harmonious construction of the entire provision would lead to an irresistible conclusion that the word assess has been used in the context of an abated proceedings and reassess has been used for completed assessment proceedings, which would not abate as they are not pending on the date of initiation of the search or making of requisition and which would also necessarily support the interpretation that for the completed assessments, the same can be tinkered only based on the incriminating material found during the course of search or requisition of documents."

60. In Kabul Chawla (supra), the Court also took note of the decision of the Bombay High Court in Commissioner of Income Tax v. Continental Warehousing Corporation (Nhava Sheva) Ltd.

[2015] 58 taxmann.com 78 (Bom) which accepted the plea that 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 legal position was thereafter summarized in Kabul Chawla (supra) as under:

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

i. Once a search takes place under Section 132 of the Act, notice under Section 153 A (1) will have to be mandatorily issued to the person searched requiring him to file returns for six AYs immediately preceding the previous year relevant to the AY in which the search takes place.
ii. Assessments and reassessments pending on the date of the search shall abate. The total income for such AYs will have to be computed by the AOs as a fresh exercise.
iii. The AO will exercise normal assessment powers in respect of the six years previous to the relevant AY in which the search takes place. The AO has the power to assess and reassess the 'total income' of the. aforementioned six years in separate assessment orders for each of the six years. In other words there will be only one assessment order in respect of each of the six AYs "in which both the disclosed and the undisclosed income would be brought to tax".
iv. Although Section 153 A does not say that additions should be strictly made on the basis of evidence found in the course of the search, or other post-search material or information available with the AO which can be related to the evidence found, it does not mean that the assessment "can be arbitrary or made without any relevance or nexus with the seized material. Obviously an assessment has to be made under this Section only on the basis of seized material."

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

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

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

61. It appears that a number of High Courts have concurred with the decision of this Court in Kabul Chawla (supra) beginning with the Gujarat High Court in Principal Commissioner of Income Tax v. Saumya Construction Pvt. Ltd. (supra). There, a search and seizure operation was carried out on 7th October, 2009 and an assessment came to be framed under Section 143(3) read with Section 153A(1)(b) in determining the total income of the Assessee of Rs. 14.5 crores against declared income of Rs. 3.44 crores. The ITAT deleted the additions on the ground that it was not based on any incriminating material found during the course of the search in respect of AYs under consideration i.e., AY 2006-07. The Gujarat High Court referred to the decision in Kabul Chawla (supra), of the Rajasthan High Court in Jai Steel (India), Jodhpur v. ACIT (supra) and one earlier decision of the Gujarat High Court itself. It explained in para 15 and 16 as under:

"15. On a plain reading of section 153A of the Act, it is evident that the trigger point for exercise of powers

thereunder is a search under section 132 or a requisition under section 132A of the Act. Once a search or requisition is made, a mandate is cast upon the Assessing Officer to issue notice under section 153A of the Act to the person, requiring him to furnish the return of income in respect of each assessment year falling within six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made and assess or reassess the same. Since the assessment under section 153A of the Act is linked with search and requisition under sections 132 and 132A of the Act, it is evident that the object of the section is to bring to tax the undisclosed income which is found during the course of or pursuant to the search or requisition. However, instead of the earlier regime of block assessment whereby, it was only the undisclosed income of the block period that was assessed, section 153A of the Act seeks to assess the total income for the assessment year, which is clear from the first proviso thereto which provides that the Assessing Officer shall assess or reassess the total income in respect of each assessment year falling within such six assessment years. The second proviso makes the intention of the Legislature clear as the same provides that assessment or reassessment, if any, relating to the six assessment years referred to in the sub-section pending on the date of initiation of search under section 132 or requisition under section 132A, as the case may be, shall abate. Sub- section (2) of section 153A of the Act provides that if any proceeding or any order of assessment or reassessment made under sub-section (1) is annulled in appeal or any other legal provision, then the assessment or reassessment relating to any assessment year which had abated under the second proviso would stand revived. The proviso thereto says that such revival shall cease to have effect if such order of annulment is set aside. Thus, any proceeding of assessment or reassessment falling within the six assessment years prior to the search or requisition stands abated and the total income of the assessee is required to be determined under section 153A of the

Act. Similarly, sub- section (2) provides for revival of any assessment or reassessment which stood abated, if any proceeding or any order of assessment or reassessment made under section 153A of the Act is annulled in appeal or any other proceeding.

16. Section 153A bears the heading "Assessment in case of search or requisition". It is "well settled as held by the Supreme Court in a catena of decisions that the heading or the Section can be regarded as a key to the interpretation of the operative portion of the section and if there is no ambiguity in the language or if it is plain and clear, then the heading used in the section strengthens that meaning. From the heading of section 153. the intention of the Legislature is clear, viz., to provide for assessment in case of search and requisition. When the very purpose of the provision is to make assessment In case of search or requisition, it goes without saying that the assessment has to have relation to the search or requisition, in other words, the assessment should connected With something round during the search or requisition viz., incriminating material which reveals undisclosed income. Thus, while in view of the mandate of sub-section (1) of section 153A of the Act, in every case where there is a search or requisition, the Assessing Officer is obliged to issue notice to such person to furnish returns of income for the six years preceding the assessment year relevant to the previous year in which the search is conducted or requisition is made, any addition' or disallowance can be made only on the basis of material collected during the search or requisition, in case no incriminating material is found, as held by the Rajasthan High Court in the case of Jai Steel (India) v. Asst. CIT (supra), the earlier assessment would have to be reiterated, in case where pending assessments have abated, the Assessing Officer can pass assessment orders for each of the six years determining the total income of the assessee which would include income declared in the returns, if any, furnished by the assessee as well as undisclosed income, if any, unearthed during the search or requisition. In case where a pending reassessment

under section 147 of the Act has abated, needless to state that the scope and ambit of the assessment would include any order which the Assessing Officer could have passed under section 147 of the Act as well as under section 153A of the Act.

*** *** ***

19. On behalf of the appellant, it has been contended that if any incriminating material is found, notwithstanding that in relation to the year under consideration, no incriminating material is found, it would be permissible to make additions and disallowance in respect of an the six assessment years. In the opinion of this court, the said contention does not merit acceptance, inasmuch as. the assessment in respect of each of the six assessment years is a separate and distinct assessment. Under section 153A of the Act, assessment has to be made in relation to the search or requisition, namely, in relation to material disclosed during the search or requisition. If in relation to any assessment year, no incriminating material is found, no addition or disallowance can be made in relation to that assessment year in exercise of powers under section 153A of the Act and the earlier assessment shall have to be reiterated. In this regard, this court is in complete agreement with the view adopted by the Rajasthan High Court in the case of Jai Steel (India) v. Asst. CIT (supra). Besides, as rightly pointed out by the learned counsel for the respondent, the controversy involved in the present case stands concluded by the decision of this court In the case of CIT v. Jayaben Ratilal Sorathia (supra) wherein it has been held that while it cannot be disputed that considering section 153A of the Act, the Assessing Officer can reopen and/or assess the return with respect to six preceding years ; however, there must be some incriminating material available with the Assessing Officer with respect to the sale transactions in the particular assessment year."

62. Subsequently, in Principal Commissioner of Income Tax- 1 v. Devangi alias Rupa (supra), another Bench of the Gujarat High Court reiterated the above legal position following its earlier decision in Principal Commissioner of Income Tax v. Saumya Construction P. Ltd. (supra) and of this Court in Kabul Chawla (supra). As far as Karnataka High Court is concerned, it has in CIT v. IBC Knowledge Park P. Ltd. (supra) followed the decision of this Court in Kabul Chawla (supra) and held that there had to be incriminating material qua each of the AYs in which additions were sought to be made pursuant to search and seizure operation. The Calcutta High Court in CIT-2 v. Salasar Stock Broking Ltd. (supra), too, followed the decision of this Court in Kabul Chawla (supra). In CIT v. Gurinder Singh Bawa (supra), the Bombay High Court held that:

> *"6...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 the regular assessment proceedings."*

63. Even this Court has in CIT v Mahesh Kumar Gupta (supra) and The Pr. Commissioner of Income Tax-9 v. Ram Avtar Verma (supra) followed the decision in Kabul Chawla (supra). The decision of this Court in Pr. Commissioner of Income Tax v. Kurele Paper Mills P. Ltd. (supra) which was referred to in Kabul Chawla (supra) has been affirmed by the Supreme Court by the dismissal of the Revenue's SLP on 7th December, 2015.

The decision in Dayawanti Gupta

64. That brings us to the decision in Dayawanti Gupta (supra). As rightly pointed out by Mr. Kaushik, learned counsel appearing for the Respondent, that there are several distinguishing features in that case which makes its ratio inapplicable to the facts of the present case. In the first place, the Assessees there were engaged in the business of Pan

Masala and Gutkha etc. The answers given to questions posed to the Assessee in the course of search and survey proceedings in that case bring out the points of distinction. In the first place, it was stated that the statement recorded was under Section 132(4) and not under Section 133A. It was a statement by the Assessee himself. In response to question no. 7 whether all the purchases made by the family firms, were entered in the regular books of account, the answer was:

> *"We and our family firms namely M/s Assam Supari Traders and M/s Balaji Perfumes generally try to record the transactions made in respect of purchase, manufacturing and sales in our regular books of accounts but it is also fact that some time due to some factors like inability of accountant, our busy schedule and some family problems, various purchases and sales of Supari, Gutka and other items dealt by our firms is not entered and shown in the regular books of accounts maintained by our firms."*

65. Therefore, there was a clear admission by the Assessees in Dayawanti Gupta (supra) there that they were not maintaining regular books of accounts and the transactions were not recorded therein.

66. Further, in answer to Question No. 11, the Assessee in Dayawanti Gupta (supra) was confronted with certain documents seized during the search. The answer was categorical and reads thus:

"Ans:- I hereby admit that these papers also contend details of various transactions include purchase/ sales/ manufacturing trading of Gutkha, Supari made in cash outside Books of accounts and these are actually unaccounted transactions made by our two firms namely M/s Asom Trading and M/s. Balaji Perfumes."

67. By contrast, there is no such statement in the present case which can be said to constitute an admission by the Assessee of a failure to record any transaction in the accounts of the Assessee for the AYs in question. On the contrary, the Assessee herein stated that, he is regularly maintaining the

books of accounts. The disclosure made in the sum of Rs. 1.10 crores was only for the year of search and not for the earlier years. As already noticed, the books of accounts maintained by the Assessee in the present case have been accepted by the AO. In response to question No. 16 posed to Mr. Pawan Gadia, he stated that there was no possibility of manipulation of the accounts. In Dayawanti Gupta (supra), by contrast, there was a chart prepared confirming that there had been a year-wise non-recording of transactions. In Dayawanti Gupta (supra), on the basis of material recovered during search, the additions which were made for all the years whereas additions in the present case were made by the AO only for AY 2004-05 and not any of the other years. Even the additions made for AYs 2004-05 were subsequently deleted by the CIT(A), which order was affirmed by the ITAT. Even the Revenue has challenged only two of such deletions in ITA No. 306/2017.

68. In para 23 of the decision in Dayawanti Gupta (supra), it was observed as under:

> *"23. This court is of opinion that the ITAT's findings do not reveal any fundamental error, calling for correction. The inferences drawn in respect of undeclared income were premised on the materials found as well as the statements recorded by the assessees. These additions therefore were not baseless. Given that the assessing authorities in such cases have to draw inferences, because of the nature of the materials - since they could be scanty (as one habitually concealing income or indulging in clandestine operations can hardly be expected to maintain meticulous books or records for long and in all probability be anxious to do away with such evidence at the shortest possibility) the element of guess work is to have some reasonable nexus with the statements recorded and documents seized. In tills case, the differences of opinion between the CIT (A) on the one hand and the AO and ITAT on the other cannot be the sole basis for disagreeing with what is essentially a factual surmise that is logical and plausible. These findings do not call for interference. The second*

question of law is answered again in favour of the revenue and against the assessee."

69. What weighed with the Court in the above decision was the "habitual concealing of income and indulging in clandestine operations" and that a person indulging in such activities "can hardly be accepted to maintain meticulous books or records for long." These factors are absent in the present case. There was no justification at all for the AO to proceed on surmises and estimates without there being any incriminating material qua the AY for which he sought to make additions of franchisee commission.

70. The above distinguishing factors in Dayawanti Gupta (supra), therefore, do not detract from the settled legal position in Kabul Chawla (supra) which has been followed not only by this Court in its subsequent decisions but also by several other High Courts.

71. For all of the aforementioned reasons, the Court is of the view that the ITAT was justified in holding that the invocation of Section 153A by the Revenue for the AYs 2000-01 to 2003-04 was without any legal basis as there was no incriminating material qua each of those AYs.

Conclusion

72. To conclude:

(i) Question (i) is answered in the negative i.e., in favour of the Assessee and against the Revenue. It is held that in the facts and circumstances, the Revenue was not justified in invoking Section 153A of the Act against the Assessee in relation to AYs 2000-01 to AYs 2003-04.

(ii) Question (ii) is answered in the affirmative i.e., in favour of the Assessee and against the Revenue. It is held that with reference to AY 2004-05, the ITAT was correct in confirming the orders of the CIT(A) to the extent it deleted the additions made by the AO to the taxable income of the Assessee of franchise commission in the sum of Rs. 88 lakhs and rent payment for the sum of Rs. 13.79 lakhs.

73. The appeals are accordingly dismissed but in the circumstances, no orders as to costs.

11.5 *The Hon'ble High Court in the above judgment has relied on the landmark judgment given by the Hon'bie Delhi High Court in case of Kabul Chawla (Supra). The Hon'ble Delhi High Court in case of Kabul Chawla has summarized the legal position as under:-*

> *"37. On a conspectus of Section 153A(1) of the Act, read with the provisos thereto, and in the light of the law explained in the aforementioned decisions, the legal position that emerges is as under:*
>
> *i. Once a search takes place under Section 132 of the Act, notice under Section 153 A (1) will have to be mandatorily issued to the person searched requiring him to file returns for six AYs immediately preceding the previous year relevant to the AY in which the search takes place.*
>
> *ii. Assessments and reassessments pending on the date of the search shall abate. The total income for such AYs will have to be computed by the AOs as a fresh exercise.*
>
> *iii. The AO will exercise normal assessment powers in respect of the six years previous to the relevant AY in which the search takes place. The AO has the power to assess and reassess the 'total income' of the aforementioned six years in separate assessment orders for each of the six years. In other words there will be only one assessment order in respect of each of the six AYs "in which both the disclosed and the undisclosed income would be brought to tax".*
>
> *iv. Although Section 153 A does not say that additions should be strictly made on the basis of evidence found in the course of the search, or other post-search material or information available with the AO which can be related to the evidence found, it does not mean that*

the assessment "can be arbitrary or made without any relevance or nexus with the seized material. Obviously an assessment has to be made under this Section only on the basis of seized material."

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

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

11.6 *It is evident from the above judicial pronouncements that any Search assessment u/s 153 A can be made only on the basis of materials found during Search and Seizure operation. Various High Courts have concurred with the above findings given in case of Kabul Chawla as clearly mentioned in the above order of Hon'ble Delhi High Court in case of Meeta Gutgutia.*

11.7 *Hon'ble Delhi High Court in case of Meeta Gutgutia has further held that statement recorded u/s 133A of the Income Tax Act is not an incriminating material for the purpose of making search assessment u/s 153 A. The relevant extract of the above judgment is reproduced below:-*

Distinction between statements under Sections 132 (4) and 133 A

40. The main plank of Mr. Manchanda"s submission was that the disclosure made by Mr. Pawan Gadia in his statement under Section 133A was sufficient to be construed as incriminating material qua all the

aforementioned AYs, the assessment for which could be re-opened by invoking Section 153A of the Act. It is significant that while in the written submission dated 26th April, 2017, Mr. Manchanda termed the statement of Mr. Pawan Gadia as "the statement dated 23rd December, 2005 recorded under Section 132(4) of the Act", he was careful to describe it as such in the subsequent written submission dated 2nd May, 2017. This was for a good reason. The statement was in fact not under Section 132(4) of the Act but under Section 133A of the Act. There is a difference between a statement made during a survey under Section 133A of the Act and that made during the course of search under Section 132 (4) of the Act. Section 132(4) of the Act states that the authorized officer may, during the course of search and seizure, "examine on oath any person who is found to be in possession or control of any books of account, documents, monies, bullion, jewellery..."and that any statement made during such examination may be used thereafter in evidence in any proceeding under the Act. On the other hand, Section 133A does not talk of the recording of any statement on oath. Under Section 133A (3) (iii), the Income Tax Authority acting under the said provision could "record the statement of any person which may be useful for, or relevant to, any proceeding under this Act." Therefore, there is a considerable difference in the nature of the statement recorded under Section 132(4) and that recorded under Section 133A(3)(iii) of the Act.

41. This distinction was noticed by this Court in CIT v. Dhingra Metal Works (supra). The Court there referred to the decision of the Kerala High Court in Paul Mathews & Sons v. Commissioner of Income Tax (2003) 263 ITR 101 (Ker) and of the Madras High Court in CIT v. S. Khader Khan Son (supra) and observed that the word „may" occurring in Section 133A(3)(iii) of the Act "clarifies beyond doubt that the material collected and the statement recorded during the survey is not a conclusive piece of evidence by itself." Incidentally, the decision of the Madras High Court in CIT v. S. Khader

Khan Son (supra) has been affirmed by the Supreme Court by the dismissal on 20th September, 2012 of SLP (Civil) No. 13224/2008 filed by the Revenue against the said decision after granting leave. To the same effect is the decision of this Court in CIT v. Sunrise Tooling System Pvt. Ltd (supra) and of the Jharkhand High Court in Shree Ganesh Trading Co. v. Commissioner of Income-Tax (supra). The CBDT"s instructions dated 10th March, 2003 and 18th December, 2014 have also emphasized that there should be no recording of statement during "search/seizure/other proceeding" under the Act under "undue pressure or coercion".

42. Therefore, in the present case, it would be wrong on the part of the Revenue to characterize the statement of Mr. Pawan Gadia as by itself an incriminating material that could be used for making additions in all the AYs in question apart from the year of search.

***11.8** With dismissal of Revenue's SLP against the above judgment of the Hon'ble Delhi High Court on merit the above legal position has attained finality. In the case of DCIT Vs M/s Chandigarh Developers Pvt. Ltd. (ITAT Chandigarh)ITA No. 994/Chd/2017 wherein the addition of Rs.50 lakhs was made u/s 68 on account of bogus Share Application Money received from M/s RSM Metals Ltd. and M/s Octomac Softwares Pvt. Ltd. in the Search assessment order u/s 133 A of the I.T. Act, 1961 on the basis of the Statement of Shri Bhavnesh Gupta recorded on 04.10.2012 during Survey u/s 133A wherein he admitted that he is a director in M/s RSM Metals Ltd. and M/s Octomac Softwares Pvt. Ltd. and these companies are suitcase companies with dummy directors and dummy registered office and it is also controlled by promoter director of the Steel Strips Group through their trusted aide. The Hon'ble deleted the above addition relying on the judgment of Hon'ble Delhi High Court given in case of CIT Vs. Kabul Chawla, 234 Taxman 300 (Delhi) in which the Hon'ble High Court had unanimously held that in the absence of any incriminating material found during the course of search action, when there was no pending assessment which could be said to have abated on the date of search, the addition*

could not have been made and also relying on the above judgement of Meeta Gutgutia.

11.9 *From the perusal of the factual matrix it is evident that as on the date; of Search , i.e. 21.04.2016, the assessment of the appellant for the above assessment year was not pending and no incriminating evidence pertaining to the above unsecured loans taken by the appellant during the relevant assessment year was found during the Search and Seizure operation. The incriminating material, if any, was unearthed during the Survey operation u/s 133A of the Income tax Act in case of M/s Fantastic Merchandise Pvt. Ltd. and M/s Anirudha Motor and General Finance Ltd carried out on 28.04.20 i.e. subsequent to Search Operation.*

11.10 *It is pertinent to mention that the jurisdictional Hon'ble Allahabad High Court in case of CIT vs Raj Kumar Arora 367 ITR 517 (Allahabad), has held that the AO has power to reassess returns of assessee not only for undisclosed income found during search operation but also with regard to material available at the time of original assessment by relying on the judgment of the Hon'ble Delhi High Court given in case of CIT v Anil Kumar Bhatia 211 Taxman 453. The above judgment given by the Hon'ble Delhi High Court in case of Anil Kumar Bhatia was considered in the landmark judgment given by the Hon'ble Delhi High Court in case of Commissioner of Income-tax (Central)-III v. Kabul Chawla, [2015] 61 taxmann.com 412 (Delhi) with the following observations:*

The decision in Anil Kumar Bhatia

> *15. At the outset this Court would like to observe that an analysis of the provisions of Section 153A of the Act has been undertaken by this Court in the decision in Anil Kumar Bhatia (supra), which decision was given on the same date that the Court rendered another decision in Chetan Das Lachman Das (supra). However, in neither case was the Court considering a situation where there was absolutely no material unearthed during the search, much less any incriminating material.*

16. In Anil Kumar Bhatia (supra), pursuant to the search conducted in the Assessee's residence and business premises on 13th December 2005 under Section 132 of the Act, the AO issued notices under Section 153A calling upon the Assessee to file returns for the six assessment years prior to the year in which the search took place. Notices were also sent under Section 142(1) and 143(2) of the Act to the Assessee on 20th November, 2007 along with detailed questionnaire. In response thereto the Assessee on 29th November, 2007 submitted explanation. Thereafter the AO made additions to the income including a sum of Rs1.50 lakh given by the Assessee as loan to one Mrs. Mohini Sharma on 10th February, 2003. The information regarding giving of the loan was available from a document seized from the premises during search and found undisclosed in the return filed for AY 2003-2004. Concluding that the loan was given out of unaccounted income, the AO added it to the income for AY 2003-2004. After the CIT (A) confirmed the addition, the Assessee appealed to the ITAT. The ITAT agreed with the Assessee that since no material was found in the search pertaining to the addition made, it was not sustainable in law. The ITAT noted that the document recovered in the search during the search did not bear the signature of the assessee or Mrs. Mohini Sharma, the alleged borrower who was also not examined by the Department. The question before the Court, therefore, was whether the AO had wrongly invoked Section 153A of the Act since no material had been found during the search to justify the addition made?

17. This Court in Anil Kumar Bhatia (supra) then analysed Section 153Aofthe Act and explained that with the introduction of the group of sections, viz., Sections 153A to 153C, the concept of a single block assessment was given a go-by. It was explained that where a search was made after 31st May, 2003 the AO was obliged to issue notices calling upon the searched person to furnish returns for the six AYs immediately preceding the AYs relevant to the previous year in which the search was conducted. Under Section 153A,

the Assessing Officer was required to exercise normal assessment powers in respect of the previous year in which the search took place. Another significant feature was that the AO had power to assess and reassess the 'total income' of the aforementioned six years in separate assessment orders for each of the six years. This meant that there could be only one Assessment Order in respect of each of the six AYs "in which both the disclosed and the undisclosed income would be brought to tax".

18. This Court in Anil Kumar Bhatia (supra) posed the question as under:

> *21. A question may arise as to how this is sought to be achieved where an assessment order had already been passed in respect of all or any of those six assessment years, either under Section 143(l)(a) or Section 143(3) of the Act. If such an order is already in existence, having obviously been passed prior to the initiation of the search/requisition, the Assessing Officer is empowered to reopen those proceedings and reassess the total income, taking note of the undisclosed income, if any, unearthed during the search. For this purpose, the fetters imposed upon the Assessing Officer by the strict procedure to assume jurisdiction to reopen the assessment under Sections 147 and 148, have been removed by the non obstante clause with which sub section (1) of Section 153A opens."*

19. The Court then explained that the concept of time-limit for completion of assessment or reassessment under Section 153 had been done away with in a case covered by Section 153A and "with all the stops having been pulled out, the Assessing Officer under Section 153A has been entrusted with the duty of bringing to tax the total income of an Assessee whose case is covered by Section 153A, by even making reassessments without any fetters, if need be." The Court then dealt with the second proviso to Section

153A, which states that pending assessment or reassessment proceedings in relation to any AY falling out of the period of six AYs previous to the search shall abate. In such cases all pending assessments, the Court explained that once those proceedings abate, the decks were cleared, for the AO to pass assessment orders for each of those six years determining the total income of the Assessee. Such 'total income' would include "both the income declared in the returns, if any, furnished by the Assessee as well as the undisclosed income, if any, unearthed during the search or requisition." Therefore, merely because the returns of income filed by the Assessee for the AYs previous to the date of the search already stood processed under Section 153A(l)(a) of the Act it could not be held that the provisions of Section 153A could not be invoked.

20. As regards the material unearthed during the search the Court in Anil Kumar Bhatia (supra) that "if it is not in dispute that the document was found in the course of the search of the Assessee, then Section 153A is triggered. Once the Section is triggered, it appears mandatory for the Assessing Officer to issue notices under Section 153A calling upon the Assessee to file returns for the six assessment years prior to the year in which the search took place." The Court clarified in para 24 as under:

"24. We are not concerned with a case where no incriminating material was found during the search conducted under Section 132 of the Act. We, therefore, express no opinion as to whether Section 153A can be invoked even in such a situation. That question is therefore left open. "

> *21. Therefore it is clear that the decision in Anil Kumar Bhatia (supra) does not deal with a situation where, as in the present case, no incriminating material was found during the search conducted under Section 132 of the Act."*

11.11 *Thus, the above judgment given in case of Anil Kumar Bhatia (supra) is not applicable when there is no incriminating material. The above judgment given in case of Kabul Chawla (supra) has been followed subsequently by various Hon'ble High Courts of the Country and all of them have come to me conclusion that in case of unabated assessment, i.e. the assessment which was not pending as on the day of Search, no addition can be made in Search assessment without any incriminating materials found during Search. The other incriminating materials found subsequently or earlier but not during the Search and Seizure operation cannot be used in the Search assessment. Finally the Hon'ble Supreme Court has affirmed the above decisions of various Hon'ble High Courts in case of Meeta Gutgutia (supra), which relied heavily on the judgement given in case of Kabul Chawla(supra), by dismissing the SLP of the Revenue against the judgment given by the Hon'ble Delhi High Court in case of Meeta Gutgutia (supra) on merit. Thus, the judgment given by the Hon'ble Altahahad High Court in case of Raj Kumar Arora has now been overruled by the above judgement of the Hon'ble Apex Court.*

11.12 *Since the only incriminating material in possession of the AO is the statements recorded u/s 133A of Sh. Santosh Chaudhary and Sh. Virendra Kumar Keshri on 28.04.2016, i.e. subsequent to Search operation and during a Survey u/s 133 A operation conducted on the premise of M/s Aniruddh Motor & General Finance Pvt. Ltd., and M/s fantastic Merchandise Pvt. Ltd. it is also an undisputed fact that the assessment for the above assessment year was not pending as on the day of Search. The AO should have reopened the assessment u/s 147 of the Income Tax Act in view of the above statements after recording reasons instead of considering these statements in the Search assessment made u/s 153 A. Hence, following the judgement of the Hon'ble Apex Court given in case of Meeta Gutgutia and plethora of judgements of various Hon'ble High Courts of the Country, it is held that no addition u/s 68 can be made by the Assessing Officer in the case of the appellant in a Search assessment made u/s 153 A of the Income Tax Act."*

6. The Lucknow Bench of the Tribunal, has also taken similar view, in the following cases:

(i) Shri Balaji Betal Nuts Pvt. Ltd. vs. DCIT & Ors. in I.T.(SS)A. Nos.105 to 108/Lkw/2019 & Ors.
(ii) Shri Navin Jain vs. DCIT & Ors. in I.T.(SS)A. Noss 639 to 641/Lkw/2019 & Ors.
(iii) Kundan Castings Pvt. Ltd. vs. DCIT & Ors. in I.T.A. Nos. 630 & 631/Lkw/2019 & Ors.
(iv) Shri Surendra Kumar Gupta vs. DCIT in I.T.(SS)A. No.125/Lkw/2019

7. Respectfully following the judgment of Hon'ble Supreme Court in the case of Meeta Gutgutia and Kabul Chawla and the judgments of Lucknow Benches in the above cases, we do not find any infirmity in the order of learned CIT(A). Therefore, the appeals filed by the Revenue are dismissed.

8. In the result, both the appeals of the Revenue stand dismissed and the petitions filed by the assessees under Rule 27 are also dismissed as not pressed.

(Order pronounced in the open court on 20/10/2021)

Sd/.
(A. D. JAIN)
Vice President

Sd/.
(T. S. KAPOOR)
Accountant Member

Dated:20/10/2021
*Singh

Copy of the order forwarded to :
1. The Appellant
2. The Respondent.
3. Concerned CIT
4. The CIT(A)
5. D.R., I.T.A.T., Lucknow

Assistant Registrar