

**AFR**

(Judgment reserved on 08.03.2022)

(Judgment delivered on 04.07.2022)

Court No. - 03

**First Set:-**

**1. Case :- INCOME TAX APPEAL No. - 51 of 2021**

**Appellant :-** Pr Commissioner Of Income Tax

**Respondent :-** M/S Shri Mehndipur Balaji

**Counsel for Appellant :-** Praveen Kumar

**Counsel for Respondent :-** Ashish Bansal,Ashish Bansal

**2. Case :- INCOME TAX APPEAL No. - 45 of 2021**

**Appellant :-** Principal Commissioner Of Income Tax - 1

**Respondent :-** Smt Divya Agrawal

**Counsel for Appellant :-** Shubham Agrawal

**Counsel for Respondent :-** Ashish Bansal,Shalini Goel

**3. Case :- INCOME TAX APPEAL No. - 46 of 2021**

**Appellant :-** Principal Commissioner Of Income Tax 1

**Respondent :-** M/S Ghata Mehandipur Balaji Grinding Works Pvt Ltd.

**Counsel for Appellant :-** Shubham Agrawal

**Counsel for Respondent :-** Ashish Bansal,Ashish Bansal,Shalini Goel

**4. Case :- INCOME TAX APPEAL DEFECTIVE No. - 29 of 2021**

**Appellant :-** Principal Commissioner Of Income Tax- 1

**Respondent :-** Smt Divya Agrawal

**Counsel for Appellant :-** Shubham Agrawal

**Counsel for Respondent :-** Ashish Bansal,Ashish Bansal,Shalini Goel

**5. Case :- INCOME TAX APPEAL DEFECTIVE No. - 30 of 2021**

**Appellant :-** Principal Commissioner Of Income Tax -1

**Respondent :-** M/S Ghata Mehandipur Balaji Grinding Works Pvt Ltd.

**Counsel for Appellant :-** Shubham Agrawal

**Counsel for Respondent :-** Ashish Bansal,Ashish Bansal,Shalini Goel

**6. Case :- INCOME TAX APPEAL DEFECTIVE No. - 31 of 2021**

**Appellant :-** Principal Commissioner Of Income Tax -1

**Respondent :-** M/S Ghata Mehandipur Balaji Grinding Works Pvt. Ltd.

**Counsel for Appellant :-** Shubham Agrawal

**Counsel for Respondent :-** Ashish Bansal,Ashish Bansal,Shalini Goel

**7. Case :- INCOME TAX APPEAL DEFECTIVE No. - 32 of 2021**

**Appellant :-** Principal Commissioner Of Income Tax -1

**Respondent :-** Smt Divya Agrawal

**Counsel for Appellant :-** Shubham Agrawal

**Counsel for Respondent :-** Ashish Bansal,Ashish Bansal,Shalini Goel

## **Second Set:**

### **8. Case :- INCOME TAX APPEAL No. - 2 of 2022**

**Appellant :-** The Pr. Commissioner Of Income Tax And Another

**Respondent :-** M/S Accumen Poly Pack Pvt Ltd

**Counsel for Appellant :-** Gaurav Mahajan

**Counsel for Respondent :-** Ashish Bansal

### **9. Case :- INCOME TAX APPEAL No. - 11 of 2022**

**Appellant :-** The Pr Commissioner Of Income Tax And Another

**Respondent :-** M/S Accumen Poly Pack Pvt Ltd

**Counsel for Appellant :-** Gaurav Mahajan,Ashish Bansal

**Counsel for Respondent :-** Ashish Bansal

### **10. Case :- INCOME TAX APPEAL No. - 12 of 2022**

**Appellant :-** The Pr. Commissioner Of Income Tax And Another

**Respondent :-** Sapna Gupta

**Counsel for Appellant :-** Gaurav Mahajan,Ashish Bansal

### **11. Case :- INCOME TAX APPEAL DEFECTIVE No. - 13 of 2022**

**Appellant :-** The Pr. Commissioner Of Income Tax And Another

**Respondent :-** Manish Kumar Agarwal

**Counsel for Appellant :-** Gaurav Mahajan,Ashish Bansal

### **12. Case :- INCOME TAX APPEAL No. - 17 of 2022**

**Appellant :-** The Pr. Commissioner Of Income Tax And Another

**Respondent :-** Siddarth Gupta

**Counsel for Appellant :-** Gaurav Mahajan,Ashish Bansal

### **13. Case :- INCOME TAX APPEAL No. - 18 of 2022**

**Appellant :-** The Pr. Commissioner Of Income Tax And Another

**Respondent :-** Santosh Kumar Agarwal

**Counsel for Appellant :-** Gaurav Mahajan

**Counsel for Respondent :-** Ashish Bansal

**Hon'ble Surya Prakash Kesarwani,J.**

**Hon'ble Jayant Banerji,J.**

**(Per: Surya Prakash Kesarwani,J.)**

1. All these appeals are admitted on the **following substantial questions of law :-**

**(i) Whether assessment or re-assessment under Section 153-A of the**

Income Tax Act 1961, can be framed only on the basis of incriminating material found during course of search under section 132 of the Act.

(ii) Whether assessment or re-assessment under Section 153-A of the Income Tax Act 1961 can be framed where no incriminating material has been found in the search under Section 132 of the Act.

2. Since substantial questions of law involved in all these appeals are similar, therefore, all these appeals have been heard together.

**Facts:-**

3. The facts with regard to disclosed and assessed income of the assesseees involved in the 'First Set' of appeals are briefly described as under:-

Sl.No	First Set of Income Tax Appeal Nos.	Assessment Year	Income as per return (in Rs.)	Accommodation entries in the form of unsecured loan shown from/ entry provider/ bogus LTCG	Bogus LTCG/ STCG/ Commission added under Sections 68/69
1	51 of 2021	2012-13	Rs.1,06,500/-	Subodh Agarwal, Success Vyapar Ltd and Neil Industries Ltd.	Rs.3,67,59,615/- (bogus unsecured loan and interest) + Rs.42,05,902/- (bogus unsecured loan and interest)
2	45 of 2021	2011-12	Rs.9,18,941/-	Success Vyapar Ltd and Neil Industries Ltd.	Rs.63,35,927/- (bogus LTCG and commission) + Rs.46,79,384/- (bogus unsecured loan and interest)
3	46 of 2021	2011-12	Rs.86,500/-	Success Vyapar Ltd and Neil Industries Ltd.	Rs.2,69,43,868/- (bogus unsecured loan and interest) + Rs.56,68,482/- (bogus unsecured loan and interest)
4	29 of 2021 (defective)	2014-15	Rs.38,37,442/-	Success Vyapar Ltd and Neil Industries Ltd.	Rs.5,28,78,477/- (bogus LTCG and commission) + Rs.73,50,000/- (bogus unsecured loan and interest)
5	30 of 2021 (defective)	2012-13	Rs.6,15,440/-	Success Vyapar Ltd and Neil Industries Ltd.	Rs.21,02,540/- (Disallowed interest, accommodation entry amount already added)

6	31 of 2021 (defective)	2013-14	Rs.2,02,890/-	Success Vyapar Ltd and Neil Industries Ltd.	Rs.6,78,969/- (Disallowed interest, accommodation entry amount already added)
7	32 of 2021 (defective)	2013-14	Rs.15,45,170/-	Success Vyapar Ltd and Neil Industries Ltd.	Rs.2,29,56,388/- (bogus LTCG and commission) + commission

4. All these appeals arise out of assessment orders passed by the competent Assessing Officer under Section 153A of the Income Tax Act, 1961 (hereinafter referred to as 'Act, 1961'). Common facts in all these appeals are that **a search and seizure operation under Section 132(1) of the Act, 1961** was carried out in **Chaurasiya Group** on 27.11.2015. Simultaneously, search was also conducted at the premises No.B-2, Surya Nagar, Ghaziabad in the case of Ashish Kumar Chaurasia, Atul Kumar Chaurasia, Shree Mehendi Balaji Enterprises (P) Ltd., M/s Ghata Mehendipur Balaji Agri Extraction (P) Ltd., M/s Tejas Food (P) Ltd., Ashish Kumar Chaurasia HUF and Kanishk Iron (P) Ltd. Warrant of Authorisation was also issued and executed. Punchnama was also drawn. **A survey under Section 133A of the Act, 1961** was also carried out in the case of M/s Mehndipur Balaji Enterprises (P) Ltd. at Kila No.202, Village Hasangarh, District Rohtak. Various incriminating documents were found and impounded. The cases were centralized to the office of the Deputy Commissioner of Income Tax, Central Circle-II, Kanpur vide order dated 14.09.2016 under Section 127 of the Act, 1961 passed by the Principal, CIT-18, Delhi. Thus, search operations were conducted in respect of the assesseees who are respondents in the above noted income tax appeals. Notices under Section 153A of the Act, 1961 were issued to the assesseees requiring them to furnish return of the Income for the Assessment Years and the assesseees filed return of income. Thereafter, notices under Section 143(2)/142(1) of the Act, 1961 were also issued and served upon the assesseees. Show cause notices were also issued to the assesseees requiring them to explain as to why the L.T.C.G. or unsecured loans shown **from Success Vyapar Ltd. and Neil Industries Ltd.** or payment of interest or commission be not added in the

income. The explanation submitted by the assesseees were not accepted by the Assessing Officer and certain amounts shown as unsecured loan from the aforesaid two companies or L.T.C.G. and interest/ commission shown were added to the income of the assesseees under Section 68 of the Act, 1961. Similarly, interest payment shown and commission shown were disallowed and added under Section 69 of the Act, 1961 on account of accommodation entries.

5. Against the Assessment Orders, the assesseees filed appeals before the CIT (Appeals), Kanpur which were dismissed. The aforesaid appellate orders were challenged by the assesseees before the Income Tax Appellate Tribunal, Lucknow Bench “B”, Lucknow who vide consolidated order dated 27.05.2021 **allowed the appeal of the assesseees by holding that the assessment for the assessment years under consideration stood concluded and the Assessing Officer has not made additions on the basis of any incriminating material, therefore, additions sustained by the CIT (A) are not sustainable. In the said order the Tribunal has relied its own order dated 16.12.2020 in the case of M/s. Sigma Casting Ltd. Vs. DCIT in ITA No.510 to 512 / LKW/ 2019.**

6. The facts with regard to disclosed and assessed income of the assesseees involved in the ‘**Second Set**’ of appeals are briefly described as under:-

Sl.No	Second Set of Income Tax Appeal Nos.	Assessment Year	Income as per return	Bogus LTCG/ STCG/ Commission added under Sections 68/69
1	12 of 2022	2012-13	Rs.13,21,870/-	Rs.23,16,765/- (bogus LTCG) Rs.1,15,838/- (commission) Rs.13,00,000/- (bogus unsecured loans)
2	2 of 2022	2011-12	Rs.40,38,840/-	Rs.9,66,00,000/- (bogus unsecured loans) Rs.72,97,989/- (interest disallowed)
3	11 of 2022	2012-13	Rs.3,91,20,210/-	Rs.6,01,00,000/- (bogus unsecured loans) Rs.1,82,27,831/- (interest disallowed)
4	13 of 2022 (defective)	2012-13	Rs.21,32,660/-	Rs.6,28,961/- (bogus LTCG) Rs.31,448/- (commission) Rs.2,00,000/- (bogus unsecured loans)
5	17 of 2022	2011-12	Rs.12,38,250/-	Rs.21,252/- (bogus LTCG) Rs.1,060/- (commission) Rs.25,00,000/- (bogus unsecured loans)

6	18 of 2022	2011-12	Rs.8,95,140/-	Rs.4,03,656/- (bogus LTCG) Rs.20,180/- (commission) Rs,17,00,000/- (bogus unsecured loans)
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7. All these appeals of ‘**Second Set**’ relate to M/s Goldie Masale and Shree Santosh Kumar Agarwal group of cases. Common fact in all these appeals are that a **search and seizure operation under Section 132 of the Act, 1961** was conducted in **M/s Goldie Masale and Shree Santosh Kumar Agarwal Group** at the residential/ business premises on 31.08.2015. Simultaneously, search and seizure operations were also carried out at the residential premises of Smt. Sapna Gupta wife of Sri Siddharth Gupta. During the course of proceedings, cash, jewellery and various incriminating documents were also found and seized. The cases were centralized to the Central Circle-I, Deputy Commissioner of Income Tax, vide Order No.02 of 2016-17, F.No.Pr.CIT-I/KNP/12-02/Cent./Goldie Masale Gr./2016-17/684 dated 27.05.2016 passed by the Principal CIT-I, Kanpur. Notices under Section 153A of the Act, 1961 were issued requiring the assesseees to file return of income. The notices were duly served upon the assesseees. Thereafter, notices under Section 142(1) along with questionnaire were issued which were also duly served upon the assesseees. Notices under Section 143(2) along with specific questionnaire were also issued which were also well served. The assesseees filed their return of income in response to the aforesaid notice. After following due procedure of law, the assessment orders under Section 153A of the Act, 1961 were passed making certain additions. Aggrieved with the assessment orders, the assesseees filed appeals before the CIT (Appeals), Kanpur, which were dismissed by common order. Aggrieved with the appellate orders, the assesseees filed Income Tax Appeals before the Income Tax Appellate Tribunal, Lucknow which were allowed by the impugned common order dated 14.09.2021.

8. Aggrieved with the orders of the Income Tax Appellate Tribunal, Income Tax Department has filed the present appeals which have been admitted on the

substantial questions of law aforementioned.

9. Thus, these appeals are in two sets. The **'First Set'** of appeals relates to **'Chaurasia Group'** and the **'Second Set'** of appeals relates to **'Goldie Masale Group.'** Facts have already been noted above. For deciding the controversy involved in these appeals in **'First Set' of appeals**, the Income Tax Appeal No.51 of 2021 is being treated as the leading appeal and in **'Second Set' of appeals**, the Income Tax Appeal No.12 of 2022 is being treated as the leading appeal.

**Submissions on behalf of the appellants :-**

10. Learned counsels for the appellants submits as under :

(i) Subsequent to completion of assessment of the respondent assessee, a search under Section 132 of the Income Tax Act, 1961 was carried on his premises in November, 2015. Another search was conducted on 28.04.2015 on Nikki Global Finance Ltd. Searches were also conducted on premises of certain other companies on 24.04.2014 and statement of one Sri Subodh Agrawal was recorded on 28.10.2015 who appeared to be the real operator of Success Vyapar Ltd. through his employee Sri Rishi Kant Awasthy as a nominal Director. Several companies including one M/s. Neil Industries Ltd. were also found being run from the same premises at Kanpur. On the basis of certain incriminating material found regarding accommodation entries, the proceedings under Section 153 A of the Income Tax Act, 1961 was initiated by the Assessing Officer and unsecured loans as unexplained income were assessed to tax in the hands of the respondent assessee under Section 68 and 69 of the Act, 1961. The Assessment Orders passed by the assessing authority were affirmed by the CIT (Appeal) but it was upset by the impugned order passed by the Income Tax Appellate Tribunal.

**(ii)** The finding of the Tribunal that there was no incriminating material or that in the absence of any incriminating material found in search, no reassessment under Section 153 A can be made, is not only incorrect but also perverse and against the provisions of Section 153 A of the Act.

**(iii)** Reliance is placed upon the judgment of this Court i.e. the jurisdiction of High Court in Commissioner of **Income Tax VS. Raj Kumar Arora**, (2014) 367 ITR 517 (All.) and Commissioner of **Income Tax Vs. Kesarwani Zarda Bhandar** in ITA No. 270 of 2014 decided on 06.09.2016, and the judgments in Assistant Controller of Estate Duty Vs. Devaki Ammal (1995) 2012 ITR 395 SC, Taylor Instrument Co.(India) Ltd. Vs. Commissioner of Income Tax (1998) 99 Taxman 155 (Delhi) = (1998) 232 ITR 771(Delhi) and State of U.P. Vs. Aman Mittal and another 2019 (19) SCC 740 (para 24 and in ITA No.31 of 2016 E.N. Gopakumar Vs. Commissioner of Income Tax, decided on 3.10.2016 by Kerala High court (para 8).

**Submissions on behalf of the respondents/Assessees:-**

11. Sri Tarun Gulati, learned Senior Advocate, assisted by Sri Ashish Bansal learned counsel for the respondent Assessee, has referred to the provisions of Section 153A and 153 C of the Act 1961 and certain judgments of Delhi High Court and submitted as under :-

**(i)** No incriminating material was found in the search on the assessee conducted by the Officers under Section 132 of the Act, 1961.

**(ii)** Since no incriminating material was found, therefore, provisions of Section 153-A of the Act, 1961 could not be invoked inasmuch as

assessment of all the assesseees for all the assessment years in question were already completed and finalised.

(iii) The original assessment proceeding of the assessee were completed by the Assessing Officer under Section 143 (3) of the Act. Therefore, on the pretext of proceedings under Section 153-A of the Act 1961 the assessing authority does not get jurisdiction for reappraisal or reappraisal of the assessment. Consequently, the Assessment Orders passed by the Assessing Officer under Section 153 A of the Act, 1961 were lawfully annulled by the Income Tax Appellate Tribunal.

(iv) There is distinction between proceedings “**abated**” and the proceedings which are “**concluded**”, as evident from bare reading of Section 153-A of the Act, 1961. Since assessment proceedings of the respondent assesseees fall under the category “concluded”, therefore, provisions of Section 153-A could not have been invoked unless some specific incriminating material was found in the search. Since no incriminating material was found in the search conducted on the assessee, therefore, reassessment proceedings under Section 153-A of the Act could not have been initiated by the Assessing Officer and such initiation of proceedings was wholly without jurisdiction.

(v) Reliance is placed upon the judgments of Delhi High Court in **Commissioner of Income Tax Vs. Sinhgad Technical Education Society reported in (2017) 397 ITR 344 (SC) (paras 4,13,18); Commissioner of Income Tax Vs. Kabul Chawla reported in (2015) 380 ITR 573 (Delhi) (paras 2,14,15,17) and Principal Commissioner of Income Tax Vs. Ram Avtar Verma reported in (2017) 395 ITR 252 (Delhi) ( para 4).**

(vi) No incriminating material against the assessee was found during the course of search conducted under Section 132 of the Act, for the

Assessment Years in question. Therefore, no reassessment under Section 153 A of the Act 1961 could have been made. Consequently, the Income Tax Appellate Authority has lawfully and correctly set aside the order passed by the Assessing Authority.

### **Discussion and Findings**

12. We have carefully considered the submission of learned counsel for the parties.

13. Before we proceed to decide the aforequoted substantial questions of law, it would be appropriate to reproduce the provisions of **Section 153A and Section 153 C of the Act, 1961**, as under :-

***“153A. (1) Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, in the case of a person where a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A after the 31st day of May, 2003, but on or before the 31st day of March, 2021, the Assessing Officer shall-***

***(a) issue notice to such person requiring him to furnish within such period, as may be specified in the notice, the return of income in respect of each assessment year falling within six assessment years and for the relevant assessment year or years referred to in clause (b), in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139;***

***(b) assess or reassess the total income of six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made and for the relevant assessment year or years :***

***Provided that the Assessing Officer shall assess or reassess the total income in respect of each assessment year falling within such six assessment years and for the relevant assessment year or years :***

***Provided further that assessment or reassessment, if any, relating to any assessment year falling within the period of six assessment years and for the relevant assessment year or years referred to in this sub-section pending on the date of initiation of the search under section 132 or making of requisition under section 132A, as the case may be, shall abate :***

***Provided also that the Central Government may by rules made by it and***

published in the Official Gazette (except in cases where any assessment or reassessment has abated under the second proviso), specify the class or classes of cases in which the Assessing Officer shall not be required to issue notice for assessing or reassessing the total income for six assessment years immediately preceding the assessment year relevant to the previous year in which search is conducted or requisition is made and for the relevant assessment year or years:

**Provided also that no notice for assessment or reassessment shall be issued by the Assessing Officer for the relevant assessment year or years unless-**

(a) the Assessing Officer has in his possession books of account or other documents or evidence which reveal that the income, represented in the form of asset, which has escaped assessment amounts to or is likely to amount to fifty lakh rupees or more in the relevant assessment year or in aggregate in the relevant assessment years;

(b) the income referred to in clause (a) or part thereof has escaped assessment for such year or years; and

(c) the search under section 132 is initiated or requisition under section 132A is made on or after the 1st day of April, 2017.

*Explanation 1.*-For the purposes of this sub-section, the expression "**relevant assessment year**" shall mean an assessment year preceding the assessment year relevant to the previous year in which search is conducted or requisition is made which falls beyond six assessment years but not later than ten assessment years from the end of the assessment year relevant to the previous year in which search is conducted or requisition is made.

*Explanation 2.*-For the purposes of the fourth proviso, "asset" shall include immovable property being land or building or both, shares and securities, loans and advances, deposits in bank account.

**(2) If any proceeding initiated or any order of assessment or reassessment made under sub-section (1) has been annulled in appeal or any other legal proceeding, then, notwithstanding anything contained in sub-section (1) or section 153, the assessment or reassessment relating to any assessment year which has abated under the second proviso to sub-section (1), shall stand revived with effect from the date of receipt of the order of such annulment by the Principal Commissioner or Commissioner:**

**Provided that such revival shall cease to have effect, if such order of annulment is set aside.**

**Explanation.**-For the removal of doubts, it is hereby declared that,-

(i) save as otherwise provided in this section, section 153B and section 153C, all other provisions of this Act shall apply to the assessment made under this section;

(ii) in an assessment or reassessment made in respect of an assessment year under this section, the tax shall be chargeable at the rate or rates as applicable to such assessment year.

**153C. (1) Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, where the Assessing Officer is satisfied that,-**

(a) any money, bullion, jewellery or other valuable article or thing, seized or requisitioned, **belongs to;** or

(b) any books of account or documents, seized or requisitioned, pertains or pertain to, or any information contained therein, **relates to,**

**a person other than the person referred to in section 153A,** then, the books of account or documents or assets, seized or requisitioned shall be handed over to the Assessing Officer having jurisdiction over such other person and that Assessing Officer shall proceed against each such other person and issue notice and assess or reassess the income of the other person in accordance with the provisions of section 153A, if, that Assessing Officer is satisfied that the books of account or documents or assets seized or requisitioned have a bearing on the determination of the total income of such other person for six assessment years immediately preceding the assessment year relevant to the previous year in which search is conducted or requisition is made and for the relevant assessment year or years referred to in sub-section (1) of section 153A :

**Provided** that in case of such other person, the reference to the date of initiation of the search under section 132 or making of requisition under section 132A in the second proviso to sub-section (1) of section 153A shall be construed as reference to the date of receiving the books of account or documents or assets seized or requisitioned by the Assessing Officer having jurisdiction over such other person :

**Provided further** that the Central Government may by rules made by it and published in the Official Gazette, specify the class or classes of cases in respect of such other person, in which the Assessing Officer shall not be required to issue notice for assessing or reassessing the total income for six assessment years immediately preceding the assessment year relevant to the previous year in which search is conducted or requisition is made and for the relevant assessment year or years as referred to in sub-section (1) of section 153A except in cases where any assessment or reassessment has abated.

(2) Where books of account or documents or assets seized or requisitioned as referred to in sub-section (1) has or have been received by the Assessing Officer having jurisdiction over such other person after the due date for furnishing the return of income for the assessment year relevant to the previous year in which search is conducted under section 132 or requisition is made under section 132A and in respect of such assessment year-

(a) no return of income has been furnished by such other person and no notice under sub-section (1) of section 142 has been issued to him, or

(b) a return of income has been furnished by such other person but no notice under sub-section (2) of section 143 has been served and limitation of serving the notice under sub-section (2) of section 143 has expired, or

(c) assessment or reassessment, if any, has been made,

before the date of receiving the books of account or documents or assets seized or requisitioned by the Assessing Officer having jurisdiction over such other person, **such Assessing Officer shall issue the notice and assess or reassess total income of such other person of such assessment year in the manner provided in section 153A.**

(3) Nothing contained in this section shall apply in relation to a search initiated under section 132 or books of account, other documents or any assets requisitioned under section 132A on or after the 1st day of April, 2021.”

14. In the ‘**First Set**’ of appeals (leading Income Tax Appeal No.51 of

2021) relating to Chaurasia Group of cases, we find that in assesment order passed under Section 153A of the Act, 1961 the Assessing Officer and in the Appellate order, the CIT(A) have very exhaustively dealt with evidences including incriminating materials found at the time of search/ survey and have recorded detailed findings of fact based on consideration of relevant evidences on the point of bogus unsecured loan and bogus LTCG/ STCG. It would be appropriate to reproduce the relevant portion of the order of the CIT(A) dated 29.11.2018 in Appeal No.CIT(A)-IV/10363, 10351, 10354, 10355 & 10358/DCIT-CC-II/KNP/2017-18/697 to 701. The relevant portion of the aforesaid order of the CIT(A) containing findings of fact are reproduced below:-

**“Discussion & decision on legal grounds of these cases:  
A.Y 2012-13 to A.Y. 2015-16:**

*5.1 Ground no. 1 to 3 for all the assessment years pertain to legal challenge to notice u/s 153A of the Act. It is also submitted by the Id. A.R. of the appellant that order u/s 153A of the Act is invalid in absence of incriminating material found as a result of search for these relevant assessment years in appeals.*

*5.2 Undersigned has carefully considered the submission and the case laws cited by the appellant. However, considering the express provisions of section 153A of the Act, undersigned would like to differ with the submission of the appellant, because section 153A of the Act clearly provides the power to AO to assess/reassess the cases of person searched u/s 132(1) of the Act for immediately six preceding years. **Section 153A of the Act does not provide existence of incriminating material as essential requirement.** In the opinion of the undersigned, the action u/s 132/132A of the Act would automatically trigger the provisions of section 153A of the Act for computation of total income of the appellant. **This provision does not restrict the Assessing Officer to take action in those cases where assessment has already been completed.** Since, the AO has rightly exercised his powers to assess/reassess the case u/s 153A of the Act.*

*5.3 The contention of the Id. A.R. is also not acceptable after placing reliance on following Judicial pronouncement.*

**In the case of E.N. Gopakumar Vs CIT [(2016) 75 taxmann.com 215 (Kerala)]-Hon’ble Kerala High Court held that assessment proceedings generated by issuance of a notice under section 153A(1)(a) can be concluded against interest of assessee including making additions even without any incriminating material being available against assessee in search under section 132 on basis of which notice was issued under section 153A(1) (a).**

*The above order has been passed after considering cases of:*

**(i) CIT v Kabul Chawla [2016] 380 ITR 573/(2015) 234 Taxman**

300/61 taxmann.com 412 (Delhi).

(ii) *CIT v Continental Warehousing Corpn. (Nhava Sheva) Ltd. [2015] 374 ITR 645/232 Taxman 270/58 taxmann.com 78 (Bom.),*

(iii) *Principal CIT v. Kurele Paper Mills (P.) Ltd. [2016] 380 ITR 571 (Delhi).*

(iv) *CIT v Lancy Constructions [2016] 383 ITR 168/237 Taxman 728/66 taxmann.com 264 (Kar.),*

(v) *CIT v ST. Francies Clay Decor Tiles [2016] 240 Taxman 168/70 taxmann.com 234 (Ker.) and*

(vi) *CIT v Promy Kuriakose [2016] 386 ITR 597 (Ker.).*

Further, in the case of CIT Vs Rai Kumar Arora [2014] 52 taxmann.com 172 (Allahabad)/(2014) 367 ITR 517 (Allahabad)- Hon'ble Allahabad High Court held that **Assessing Officer has power to reassess returns of assessee not only for undisclosed income found during search operation but also with regard to material available at time of original assessment.**

Similarly, in the case of CIT Vs Kesarwani Zarda Bhandar Sahson Aild. HTA No. 270 of 20141 (Allahabad)- Hon'ble Allahabad High Court held that **Assessing Officer has power to reassess returns of assessee not only for undisclosed income found during search operation but also with regard to material available at time of original assessment.**

Also, in the case of CIT Vs St. Francis Clay Decor Tiles (385 ITR 624)- Hon'ble Delhi Kerala Court held that notice issued under section 153A- **return must be filed even if no incriminating documents discovered during search.**

In the case of CIT Vs Anil Kumar Bhatia (24 taxmann.com 98. 211 Taxman 453. 352 ITR 493)- Hon'ble Delhi High Court held that jurisdiction of AO under 153A is to assess total income for the year and not restricted to seized material. Post search reassessment in respect of all 6 years can be made even if original returns are already processed u/s 143(1)(a) - Assessing Officer has power u/s 153A to make assessment for all six years and compute total income of assessee, including undisclosed income, notwithstanding that returns for these years have already been processed u/s 143(1)(a). Even if assessment order had already been passed in respect of all or any of those six assessment years, either under section 143(1)(a) or section 143(3) prior to initiation of search/requisition, still Assessing Officer is empowered to reopen those proceedings under section 153A without any fetters and reassess total income taking note of undisclosed income, if any, unearthed during search.

In the case of Filatex India Ltd Vs CIT (49 taxmann.com 465)- Hon'ble Delhi High Court held that during assessment under section 153A, additions need not be restricted or limited to incriminating material, found during course of search.

7.5 The undersigned has carefully gone through the assessment order, grounds of appeal, written submission of the Id. A.R. of the appellant submitted during these appeals proceedings. AO has noted, the following uncontroverted finding

of fact in his assessment orders. **The relevant observation of AO is extracted from the assessment order as follows:**

i) An incriminating dairy was seized during the course of Shri Subodh Agarwal, which was hand written by him and relevant incriminating entries and its explanation as follows,

a. At page number 45 “ VMM-Sulabh+ Neil mein loss+ MKU mein. Profit”

b. At page number 43 "Gravity--> merger order

c. At page number 31, 32 and 33 names of Manoj Agrawal,... i.e.. family members has been written in multiple places along with details of transactions where money has been received and given to them. The nature of entries are self-evident.

This clearly establishes that you have very close nexus with Sh. Subodh Agrawal who also has been one of the directors of your company M/s Sulabh Engineering & Services Limited along with Sh. Manoj Agrawal.

The above entries at page number 45 also clearly explain the nature of transactions in Neil industries limited is that of providing ‘accommodation entries’ as in the case of Success Vyapar Limited.

**Sh. Subodh Agrawal has already accepted that he has provided bogus LTCG in Oasis Cine Communication Limited, apart from Sulabh Engineering & Services Limited and Nikki Global Finance Limited** The above entries at page number 43 further clearly establishes that Sh. Subodh Agrawal has provided the bogus LTCG in Oasis Cine Communication Limited through merger/ amalgamation of Gravity Barter Limited and Makeover Vintrade Limited. All the three companies are registered at the same premise In Kolkata at Bijan Theatre, 5A, Raja RaJ Kissan Street, Kolkata- 700006.SO, it further cements the basic allegation that the LTCG/STCG/unsecured loans accrued to you through is nothing but your own cash routed as such.”

ii) “It is also observed that search u/s 132 was conducted by Investigation Directorate, Kanpur in Rich Udyog Group of Kanpur on 28.04.2015. Nikki Global Finance Limited is one of the companies of this group which was subjected to search u/s 132. This company has Sh. Subodh Agrawal as one of its directors, apart from Sh. Sashwat Agrawal and his family and friends. Nikki Global Finance Limited is also covered in total 84 scrips investigated by Investigation Directorate, Kolkata.

After Search, two of the group companies subjected to search u/s 132 challenged the same before the **Hon'ble Allahabad High Court in WT No.458/459 of 2015. Hon'ble Allahabad High Court after perusing the satisfaction note and all the seized material dismissed the writ petitions and observed that this group is involved in ‘clandestine activity of taking cash and making dubious transactions in cheque, thereby ‘laundering the money’. This group is also centralized with the Central Circle and you are hereby shown the page number 8, 9 and 11 of BK-8 of the seized material which mentions bogus transactions with Success Yapar Limited. The similar findings have been made by the AOs in Kolkata of Success Vyapar Limited and Neil Industries Limited where they have disallowed losses claimed by these two companies in sale of Nikki Golabl Finance Limited as being held bogus and Part of racket of LTCG/ STCG/unsecured loan. The above evidence and findings further makes your loans from these two companies non-genuine”.**

iii) "Careful Study of the assessment orders reveal that, there are three directors in M/s. Success Vyapar Ltd. i.e. "Shri Rishikant Awasthy, Shri Abhiset Basu and Shri Pradeep Dey" AO has scanned and reproduced the statements of Shri Abhiset Basu and Shri Pradeep Dey. From the perusal of these statements, it is evident that, **actual business activity of their concerns is to provide the accommodation entries in the form of capital gains/share capital/share premium and unsecured loans. It is also accepted by them that, they are the dummy directors and they were acting on the behest and behalf of Raj Kumar Tharad and Anil Kumar - Khemka respectively.** The statement of Raj Kumar Tharad and Shri Anil Kumar Khemka, which were recorded on oath reveals that, their concerns were engaged in providing the accommodation entries in various forms through their paper companies, which included the alleged creditors. As per statement of Mr. Subodh Agarwal related to the search of Godiee group by investigation wing of Kanpur, has accepted on oath that, Mr. Rishi Kant Awasthi was an employee in the office of Mr. Subodh Agarwal. Since, all the dummy directors and the details found at the office premises of the Mr. Subodh Agarwal, **it is concluded that, creditor company M/s. Success Vyapar Ltd. is controlled by Mr. Subodh Agarwal. As discussed earlier, it is established that, Mr. Subodh Agrarwal is an entry provider through various paper companies including the M/s. Success Vyapar Ltd. and M/s. Neil Industries Ltd., which advanced unexplained unsecured loans to various group companies of this appellant group in the different financial years in the form of accommodation entry. The facts of another creditor M/s. Neil Industries Limited is no different. In fact hard evidence of payment of cash for providing the accommodation entries were found in the search of Shri Subodh Agarwal, Rich capital and Goldiee group.**

7.6 It is a settled preposition of law u/s 68 of the Act that, the initial burden of proof lies on the appellant to prove three vital ingredients u/s 68 of the act i.e. the identity, credit capacity of the creditor and genuineness of the transactions. In the present factual matrix of these cases, let us first, examine whether appellant has discharged the initial onus casted u/s 68 of the Act. Admittedly, appellant has filed the confirmation letters, ITRs and Bank statements of the creditors. However, mere filing of confirmation or ITRs or Bank statements is not sufficient to prove the credit capacity of creditors and genuineness of the transaction. On the other hand, AO has brought out the incriminating seized documents and statements of Directors of the alleged creditors i.e. M/s. Success Vyapar Ltd. and M/s. Neil Industries Ltd., who accepted on oath that, their companies are involved in providing the accommodation entries of LTCG/share capital/share premium and unsecured loans. All the incriminating evidence including statements of Directors of alleged creditors i.e. M/s. Success Vyapar Ltd. and M/s. Neil Industries Ltd. have been confronted to the appellant, who could not submit any satisfactory explanation regarding the genuineness of the transaction and credit capacity of the creditors. The income and the Bank Statements of the creditors as disclosed and furnished for these relevant assessment years are summarized in the following tables;

S. No.	Name of the creditor	Creditors Income disclosed in ITR				
		A.Y. 2012-13	A.Y. 2013-14	A.Y. 2014-15	A.Y. 2015-16	A.Y. 2016-17

1	<b>M/s Success Vyapar Ltd.</b>	Rs.1586458	Rs.4781213	Rs.5032366	Rs.6429097	Not submitted
2	<b>M/s Neil Industries Ltd</b>	Not Submitted	Rs.8125011	Rs.9662615	Not submitted	Rs.12045007

Thus, from the above table, it is evident that, creditors companies have furnished very meager income to inspire the confidence of credit of huge amount of unsecured loans. Also, there is no agreement or the co-lateral security arrangements between the appellant and creditors companies. A careful, perusal of **Bank statements of these two lenders reveal the astonishing similarity in the pattern of fund flow. It is invariably noted that the creditors account were deposited with cheque of equivalent or more amount of credit on the same date or prior to advancing the loan to the appellant company. Thus, the evidence submitted by the appellant does not inspire the confidence regarding credit capacity of the creditors and genuineness of the transactions, especially considering the fact that, lenders have disclosed meager income in their returns and each credit of unsecured loans to the appellant company is preceded by the equivalent or more amount of deposits of credit on the same date or on the prior dates. Also, AO has recorded the finding of fact that, most of the lenders do not exist on the given address and are paper companies providing the accommodation entries of unsecured loans. Also, AO has dealt at length on the seized documents and the statements of directors of M/s. Success Vyapar Ltd. and M/s. Neil Industries Ltd., evidencing the non-genuine nature of transactions. Finding of Hon'ble Allahabad High Court in WT No. 458/459 of 2015, wherein, it is held that, the creditor companies are dubious entities laundering the money in the garb of LTCG/share capital/share premium/unsecured loans. Thus, it is concluded that genuineness of the transaction and credit capacity of the creditors are unsubstantiated and transaction of unsecured loans are non-genuine. Appellant, on the other hand has not placed any material before the undersigned to dislodge the finding recorded by the AO. Therefore, considering the totality of facts and Circumstances of the case, it is concluded that, appellant has miserably failed to prove the credit capacity and genuineness of the transaction.**

**7.7 Thus, from the above detailed discussion, it is concluded that, the Creditor's entities M/s. Success Vyapar Ltd. and M/s. Neil Industries Ltd. are paper companies, providing the accommodation entries in the form of capital gains/share capital/share premium and unsecured loans and according transactions of unsecured loans are non-genuine and unsubstantiated.**

**7.8 On the issue of cross examination, undersigned is of the view that, the incriminating dairy/documents found from the search of Shri Subodh Agarwal and the statement of dummy directors of the alleged creditors companies M/s. Success Vyapar Ltd. and M/s. Neil Industries Ltd. were shown and confronted to the appellant. It is also seen from the assessment orders that, AO has tried his best to call the persons, copies of whose statements in favour of the revenue were given to the appellant. Further, Hon'ble ITAT Mumbai in the case of **GTC industries Ltd Vs. ACIT (1998] 65 ITD 380 [Bom.]** has observed and noted that, **where statements of witness were only secondary and subordinate material use to buttress main matter connected with the amount of addition, it had to be held that, there was no denial of principal of natural Justice, if witness were not allowed to cross examined by the appellant.**" Therefore it is concluded that, AO has followed the principal of natural justice by producing and confronting all the incriminating seized documents and statements recorded in favour of**

revenue to the appellant.

**7.9** It is a settled preposition of law u/s. 68 of the IT Act that the initial burden of proof rest upon the appellant to establish the identity, credit capacity of the creditor and to establish the genuineness of transaction. For the sake of clarity provision of section 68 of the Act as amended read as under:

“68. Where any sum is found credited in the books an assessee maintained- for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax- as the income of the assessee of that previous year:

"Provided that where the assessee is a company (not being a company in which the public are substantially interested), and the sum so credited consists of share application money, share capital, share premium or any such amount by whatever name called, any explanation offered by Such assessee-company shall be deemed to be not satisfactory, unless-

(a) the person, being a resident in whose name such credit is recorded in the books of such company also offers an explanation about the nature and source of such sum so credited; and

(b) such explanation in the opinion of the Assessing Officer aforesaid has been found to be satisfactory:

Provided further that nothing contained in the first proviso shall apply if the person, in whose name the sum referred to therein is recorded, is a venture capital fund or a venture capital company as referred to in clause (23FB) of section 10."

The present facts of the case are squarely covered by the provisions or law mentioned here-in-above, wherein it was imperative for the appellant to prove the identity and creditworthiness of the creditors along with the genuineness of transaction. **In the instant case, appellant has miserably failed to prove genuineness of the transaction and creditworthiness of the creditors. Hence, addition made by Assessing Officer is perfectly justified.**

**7.10** It is also an established law that mere filing of confirmation letter and the ITR copies are not enough to prove the credit capacity of the creditor. Hon'ble Kolkata High Court in the case of **CIT Vs Korlav Trading Company Ltd.(Cal) 232 ITR 280 and CIT Vs Precision Finance P. Ltd. (Cal) 208 ITR 465** have observed and held that mere filing of confirmation and transaction through the banking channel is not enough to prove the genuineness of cash credit and it can be assessed. Further, Hon'ble Apex Court in the case of **Shri Roshan D.Hatti Vs CIT (SC) 107 ITR 938** held that in the case of credits in the name of third party, it is the duty of the appellant to prove the identity or credit capacity of the creditors to advance money and genuineness of transaction. In the instant case, the undersigned is of the view that the credit capacity of the creditor and genuineness of the transaction is not proved by the appellant company.

**7.11** Further, Delhi High Court in the case of **PCIT Vs Vikram Singh (2017)85 taxmann.com 104** has observed and held that even if transaction of loan is made through cheque, it cannot be presumed to be genuine in absence of any agreement, security and interest payment. Mere submission of the PAN and bank statements of the creditor does not establish the authenticity and

*genuineness of huge loan transaction particularly when the ITR of the lender does not inspire such confidence. Mere submission of ID proof and the fact that the loan transaction were through banking channel does not establish the authenticity of transaction. The loan entries are generally masked to pump the black money into the banking channel and such practices continued to plague Indian Economy. Further, in the case of CIT Vs. N.R. Portfolio Pvt. Ltd. (ITA No. 1018,1019/2100 dated 22.11.2013) Hon'ble Delhi High Court has observed and held that*

***"mere production of incorporation details, PAN Nos. or the fact that third persons or company had filed income tax details in case of a private limited company may not be sufficient when surrounding and attending facts predicate a cover up. These facts indicate and reflect proper paper work or documentation but genuineness, creditworthiness, identity are deeper and obtrusive companies no doubt are artificial or juristic person but they are soulless and are dependent upon the individuals behind them who run and manage the said companies. It is the person behind the company who take the decisions, controls and manage them."***

*The cases relied upon by the Ld. AR are on their own footings and distinguishable on facts and are not applicable to the present case. Further, Hon'ble Calcutta High Court has observed and held in the case of Pragati Financial Management Pvt. Ltd. Vs. CIT in C.A.887 & 998 of 2016 and others dated 07.03.2017, that, AO is entitled to make enquiry u/s. 68 of the Act regarding genuineness of the transaction. Further, it is held that, in the following Judicial pronouncements of the Honble High Courts that unsecured loans received from the entities involved in providing accommodation entries are liable to be taxed u/s 68 of the Act.*

- i) CIT vs. Nova Promoters & Finlese (P) Ltd. 342 ITR 169 [Delhi] 2013.*
- ii) CIT vs. D.K. Garg [2017] 84 taxmann.com 257 [Delhi]*

***7.12 In view of the above detailed discussion of the factual matrix of the case and considering the enumerated judicial pronouncements, it is concluded that appellant company has miserably failed to prove the vital ingredients of creditworthiness of the creditors' and genuineness of the transaction. Therefore, undersigned find no reason to interfere with the addition made by Assessing Officer, u/s 68 of the Act. The same is therefore, confirmed and ground of appeal of the appellant is dismissed for each assessment year i.e. A.Y. 2012-13 for A.Y. 2016-17."***

15. In the 'Second Set' of appeals (leading Income Tax Appeal No.12 of 2022), relating to Goldie Masale Group of cases, we find that in assesment order passed under Section 153A of the Act, 1961, the Assessing Officer and in appeal, the CIT(A) have very exhaustively dealt with evidences including incriminating materials found at the time of search/ survey and have recorded detailed findings of fact based on consideration of relevant evidences on the

point of bogus unsecured loan and bogus LTCG/ STCG. It would be appropriate to reproduce the relevant portion of the order of the CIT(A), dated 29.03.2019 in Appeal No.CIT(A)-IV/10334, 10335, 10375/DCIT-CC-I/KNP/2017-18/957 to 959 containing findings of fact are reproduced below:-

*“6.3 The undersigned has carefully gone through the assessment order, grounds of appeal, written submission of the Id. A.R. of the appellant submitted during these appeals proceedings. AO has noted, the following uncontroverted finding of fact in his assessment orders. The relevant observation of AO is extracted from the assessment order as follows:*

*i) “An incriminating dairy was seized during the course of search of Shri Subodh Agarwal, which was hand written by him and relevant incriminating entries and its explanation as follows:*

*a. At page number 45 “VMM- Sulabh + Neil mein loss + MKU mein profit”*

*b. At page number 43 “Gravity -- > merger order*

*c. At page number 31, 32 and 33 names of, Manoj Agarwal,... i.e. family members has been written in multiple places along with details of transactions where money has been received and given to them. The nature of entries are self-evident.*

*The above entries at page number 45 also clearly explain the nature of transactions in Neil industries limited is that of providing ‘accommodation entries’ as in the case of Success Vyapar Limited.*

*Sh. Subodh Agrawal has already accepted that he has provided bogus LTCG in Oasis Cine Communication Limited, apart from Sulabh Engineering & Services Limited and Nikki Global Finance Limited. The above entries at page number 43 further clearly establishes that Sh. Subodh Agrawal has provided the bogus LTCG in Oasis Cine Communication Limited through merger/amalgamation of Gravity Barter Limited and Makeover Vintrade Limited. All the three companies are registered at the same premise In Kolkata at Bijan Theatre, 5A, Raja Raj Kissan Street, Kolkata-700006. SO, it further cements the basic allegation that the LTCG/STCG/unsecured loans accrued to you through is nothing but your own cash routed as such.”*

*ii) “It is also observed that search u/s 132 was conducted by Investigation Directorate, Kanpur in Rich Udyog Group of Kanpur on 28.04.2015. Nikki Global Finance Limited is one of the companies of this group which was subjected to search u/s 132. This company has Sh. Subodh Agrawal as one of its directors, apart from Sh. Sashwat Agrawal and his family and friends. Nikki Global Finance Limited is also covered in total 84 scrips investigated by Investigation Directorate, Kolkata.*

*After search, two of the group companies subjected to search u/s 132 challenged the same before the Hon’ble Allahabad High Court in WP No. 458/459 of 2015. Hon’ble Allahabad High Court after perusing the satisfaction note and all the seized material dismissed the writ petitions and concluded that “this group is involved in ‘clandestine activity of taking cash and making*

**dubious transactions in cheque, thereby 'laundering the money'.**

*This group is also centralized with the Central Circle and at page number 8, 9 and 11 of BK-8 of the seized material which mentions bogus transactions with Success Vyapar Limited. The similar findings have been made by the AOs in Kolkata of Success Vyapar Limited and Neil Industries Limited where they have disallowed losses claimed by these two companies in sale of Nikki Global Finance Limited as being held bogus and part of racket of LTCG/STCG/unsecured loan. The above evidence and findings further makes your loans from these two companies non-genuine."*

iii) *"Careful study of the assessment orders reveal that there are three directors in M/s. Success Vyapar Ltd. i.e. "Shri Rishikant Awasthi, Shri Abhishekh Basu and Shri Pradeep Dey" AO has scanned and reproduced the statements of Shri Abhishekh Basu and Shri Pradeep Dey. From the perusal of these statements, it is evident that, actual business activity of their concerns is to provide the accommodation entries in the form of capital gains/share capital/share premium and unsecured loans. It is also accepted by them that, they are the dummy directors and they were acting on the behest and behalf of Raj Kumar Tharad and Anil Kumar Khemka respectively. The statement of Raj Kumar Tharad and Shri Anil Kumar Khemka, which were recorded on oath reveals that, their concerns were engaged in providing the accommodation entries in various forms through their paper companies, which included the alleged creditors. As per statement of Mr. Subodh Agarwal related to the search of Godiee group by investigation wing of Kanpur, has accepted on oath that, Mr. Rishi Kant Awasthi was an employee in the office of Mr. Subodh Agarwal. Since, all the dummy directors and the details found at the office premises of the Mr. Subodh Agarwal, it is concluded that, creditor company M/s. Success Vyapar Ltd. is controlled by Mr. Subodh Agarwal. As discussed earlier, it is established that Mr. Subodh Agrarwal is an entry provider through various paper companies including the M/s. Success Vyapar Ltd. and M/s. Neil Industries Ltd., which advanced unexplained unsecured loans to various group companies of this appellant group in the different financial years in the form of accommodation entry. The facts of another creditor M/s. Neil Industries Limited is no different. In fact hard evidence of payment of cash for providing the accommodation entries were found in the search of Shri Subodh Agarwal, Rich capital and Goldiee group.*

6.4 *It is a settled preposition of law u/s 68 of the Act that, the initial burden of proof lies on the appellant to prove three vital ingredients u/s 68 of the act i.e. the identity, credit capacity of the creditor and genuineness of the transactions. In the present factual matrix of these cases, let us first, examine whether appellant has discharged the initial onus casted u/s 68 of the Act. Admittedly, appellant has filed the confirmation letters, ITRs and Bank statements of the creditors. However, mere filing of confirmation of ITRs or Bank statements is not sufficient to prove the credit capacity of creditors and genuineness of the transaction. On the other hand, AO has brought out the incriminating seized documents and statements of Directors of the alleged creditors i.e. M/s. Success Vyapar Ltd. and M/s. Neil Industries Ltd. who accepted on oath that, their companies are involved in providing the accommodation entries of LTCG/share capital/share premium and unsecured loans. All the incriminating evidence including statements of Directors of alleged creditors i.e. M/s Success Vyapar Ltd. and M/s. Neil Industries Ltd. have been confronted to the appellant, who could not submit any satisfactory explanation regarding the genuineness of the transaction and credit capacity of the creditors. Also, there is no agreement or*

*the co-lateral security arrangements between the appellant and creditors companies. A careful, perusal of Bank statements of these two lenders reveal the astonishing similarity in the pattern of fund flow. It is invariably noted that the creditors account were deposited with cheque of equivalent or more amount of credit on the same date or prior to advancing the loan to the appellant company. Thus, the evidence submitted by the appellant does not inspire the confidence regarding credit capacity of the creditors and genuineness of the transactions, especially considering the fact that, lenders have disclosed meager income in their returns and each credit of unsecured loans to the appellant company is preceded by the equivalent or more amount of deposits of credit on the same date or on the prior dates. Also, AO has recorded the finding of fact that, most of the lenders do not exist on the given address and are paper companies providing the accommodation entries of unsecured loan. Also, AO has dealt at length on the seized documents and the statements of directors of M/s. Success Vyapar Ltd. and M/s. Neil Industries Ltd. evidencing the non-genuine nature of transactions. Finding of Hon'ble Allahabad High Court in WT No. 458/459 of 2015, wherein, it is held that, **“the creditor companies are dubious entities laundering the money in the garb of LTCG/share capital/share premium/unsecured loans.”** Thus, it is concluded that, genuineness of the transaction and credit capacity of the creditors are unsubstantiated and transaction of unsecured loans are non-genuine. Appellant, on the other hand has not placed any material before the undersigned to dislodge the finding recorded by the AO. Therefore, considering the totality of facts and circumstances of the case, it is concluded that, appellant has miserably failed to prove the credit capacity and genuineness of the transaction.*

**6.5** *It is a settled preposition of law u/s. 68 of the IT Act that the initial burden of proof rest upon the appellant to establish the identity, credit capacity of the creditor and to establish the genuineness of transaction. For the sake of clarity provision of section 68 of the Act as amended read as under:*

*“68. Where any sum is found credited in the books of an assessee maintained for any previous year and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year:*

*“Provided that where the assessee is a company (not being a company in which the public are substantially interested), and the sum so credited consists of share application money, share capital, share premium or any such amount by whatever name called, any explanation offered by such assessee-company shall be deemed to be not satisfactory, unless-*

*(a) the person, being a resident in whose name such credit is recorded in the books of such company also offers an explanation about the nature and source of such sum so credited; and*

*(b) such explanation in the opinion of the Assessing Officer aforesaid has been found to be satisfactory.*

*Provided further that nothing contained in the first proviso shall apply if the person in whose name the sum referred to therein is recorded, is a venture capital fund or a venture capital company as referred in clause (23 FB) of section 10.”*

*The present facts of the case are squarely covered by the provisions of*

law mentioned here-in-above, wherein it was imperative for the appellant to prove the identity and creditworthiness of the creditors along with the genuineness of transaction. Examination of financial statements like balance sheet & Profit & loss account, as reproduced by AO in assessment order reveal that this alleged company is not carrying any genuine business activities and are disclosing meager profits for last 5 assessment years including the relevant assessment year under appeal. This fact is apparent from discussion in para-4, page 24 to 31 of the assessment order. In the instant case, appellant has miserably failed to prove genuineness of the transaction and creditworthiness of the creditors. Hence, addition made by Assessing Officer is perfectly justified.

**6.9** On the issue of cross examination, undersigned is of the view that, the incriminating dairy/documents found from the search of Shri Subodh Agarwal and the statement of dummy directors of the alleged creditors companies M/s. Success Vyapar Ltd. were shown and confronted to the appellant. Hence, the principal of natural justice is followed by the AO. It is also seen from the assessment orders that, AO has tried his best to call the persons, copies of whose statements in favour of the revenue were given to the appellant. Further, **Hon'ble Supreme Court, in the well-known Dhakeswari Cotton Mills (26 ITR 775 at 782)** case, ruled that the Evidence Act may have no application to tax assessment proceedings. However, the court also clarified later, in **Chuharmal vs CIT (172 ITR 250 at 255 SC)**, that when the taxing authorities are desirous of invoking the principles of the Evidence Act in proceedings before them, they are not prevented from doing so. All that is required is that whatever material they collect will have to be placed before the tax paying assessee if adverse inference is going to be drawn - audi alteram partem is a well-known principle of natural Justice. This principle is established by the judgment of the Supreme Court in **Dhakeswari Cotton Mills Ltd. v. C.I.T. (26 ITR 775, 783)**, and applied by that court in **Kishinchand Chellaram v. C.I.T. (125 I.T.R. 713)**, where an assessment based on the result of private inquiries conducted behind the back of the assessee was set aside because the evidence so gathered was not placed before the assessee. In **Gunda Subbayya v. C.I.T. (7 I.T.R. 21, 28)**, Leach CJ said:

*“Information which the Income-Tax Officer has received may not always be accurate and it is only fair when he proposes to act on material which he has obtained from an outside source that he should give the assessee an opportunity of showing, if he can, that the Income-Tax Officer has been misinformed, but the Income-Tax obviously not bound to disclose the source of his information.”*

In the case of **P. S. Barkathali v. Directorate of Enforcement, New Delhi AIR KER 81**, the Hon'ble High Court observed as under:

*“Even though the statement was subsequently retracted, the significance of admission in the first place cannot be under-mined. It is well established that mere bald retraction cannot take away the importance and evidentiary value of the original confession, specially in view of the fact that in this case, the deponent of the statement had provided the minute details relating to the transactions, It appears that the retraction statement was made purely to avoid clutches of law which had caught up with him and laid bare his nefarious activities.”*

Further, jurisdictional **Hon'ble Allahabad High Court in the case of Moti**

***Lal Padampat Udyog Ltd. Vs. CIT 293 ITR 656*** has laid down the correct proposition of law of cross examination and held as follows:

*“Right of cross-examination of persons from whom the Assessing Officer has collected the evidence is not required by law. The requirement of the statute for a valid assessment would be met if all the evidence collected which is to be used against the assessee while framing the assessment order is placed before the assessee and he is given opportunity to rebut the evidence.”*

*Therefore it is concluded that, AO has followed the principle of natural justice by producing and confronting all the incriminating seized documents and statements recorded in favour of revenue to the appellant.*

**For A Y. 2012-13 & AY 2014-15 on account of Long/Short Term Capital Gain (LTCG/STCG):-**

*7.1 Ground no. 6 to 13 for A. Y. 2012-13 & ground no. 4 to 17 for A. Y. 2014-15 pertain to addition on account of Long/Short Term Capital Gain (LTCG/STCG). The details of various addition made by AO are depicted in tabular form mentioned here-in-under:*

<i>S.No</i>	<i>NAME &amp; CODE OF THE SCRIP</i>	<i>A.Y</i>	<i>LTCG/LTCL (In Rs.)</i>	<i>STCG/STCL</i>	<i>Commission on LTCG (In Rs.)</i>
<i>1.</i>	<i>M/s. Nikki Global Finance Limited (531272)</i>	<i>2012-13</i>	<i>23,16,765/-</i>		<i>1,15,838/-</i>
<i>2.</i>	<i>M/s. Nikki Global Finance Ltd. (531272)</i>	<i>2014-15</i>	<i>1,71,08,122/-</i>		<i>8,55,406/-</i>

*It is seen that, the A.O. has recorded very elaborate finding about the scam of laundering money in the Garb of Long/Short Term Capital Gain (LTCG/STCG). It is noted by the A.O. that, the Pr. DIT (Inv.), Kolkata has conducted the elaborate investigation and enquiries in case of 84 Penny Stock's cases to conclude that the unaccounted money of the beneficiary were routed through certain stock brokers/ entry operators in the scrip of penny stock, to generate the illusionary facade of exempted income in the form of LTCG/STCG. Further, a search was conducted on M/s. Rich Udyog Group of Kanpur on 28.04.2015, which reveals that, Shri. Subodh Agarwal is acting as the entry provider in the scrip of M/s. Nikki Global Finance Ltd. It is also investigated that, the purchasers or the exit provider of such Penny Stock's do not have the credit capacity to purchase the shares. Thus, it was concluded by the A.O. that, the appellant has miserably failed to prove the genuineness of the transaction LTCG/STCG. Therefore, the credit entries in the form of LTCG are nothing but the unexplained credits u/s 68 of the Act.*

*7.2 On the other hand, Id. A.R. of the appellant has submitted detailed written submissions, which revolves around two points. Firstly, the sales of shares are supported by the contract notes issued by the brokers, hence, appellant has*

correctly claimed the exemption u/s 10(38) of the Act or paid lesser tax as STCG and secondly, opportunity of cross examination of the persons, whose statements were relied by AO, were not provided. Various case laws were also cited by the appellant in his favour. Therefore, it was submitted that, the addition made by the A.O. is unjustified and liable to be deleted.

**7.3** The undersigned has carefully gone through the assessment order, written submission as well as verbal argument of the Id. A.R. of the appellant. Appellant is one of the entities belonging to Shri Santosh Agrawal & Goldiee group, who has obtained bogus entries of LTCG/STCG amounting to Rs 1,94,24,887/-. It is seen that share of M/s. Nikki Global Finance Ltd. was sold by appellant gaining astronomical LTCG of Rs.23,16,765/- & Rs.1,71,08,122/- for A.Y. 2012-13 & A.Y. 2014-15 respectively. Examination of financial statements like balance sheet & Profit & loss account, as reproduced by AO in assessment order reveal that this alleged company is not carrying any genuine business activities and are disclosing meager profits for last 5 assessment years including the relevant assessment year under appeal. This fact is apparent from discussion in para-4, page 24 to 31 of the assessment order. Astronomical increase in share price without any economic or financial prudence, shows, share price of alleged companies are rigged, manipulated and non-genuine. Thus, it is concluded that alleged shares are "penny stock."

**7.4** Considering the totality the factual matrix of the case, as mentioned by A.O., following uncontroverted factual picture emerges:

(i) Investigation wing of Kolkata has carried out investigation in 84 scrips of Penny Stocks, which included scrips of M/s. Nikki Global Finance Ltd. from which, appellant and his group company has taken the entries of LTCG/STCG.

(ii) Investigation wing of the revenue at Kolkata had recorded statements of various share brokers, operators & beneficiaries, who has dealt with the scrip of **M/s. Nikki Global Finance Ltd.**, as per below details:

Sl. No.	Name	Q. NO. IN WHICH THE CO. NAME IS MENTIONED	STATEMENT UNDER SECTION	STATEMENT DATE
<b>SHARE BROKER</b>				
1	Soumen Sen	19	131	10.02.2015
2	Anil Kedia	15	131	15.06.2015
3	Nikhil Jain	23	131	02.06.2015
<b>OPERATOR</b>				
1	Anil Kedia	15	131	15.06.2015
2	Nikhil Jain	23	131	02.06.2015
<b>BENEFICIARY</b>				
1.	DEEPAK KUMAR AGARWAL	4,5,6,7,10,11,15, 17,19	131	05.06.2015

*in which, it was admitted by them that, in connivance with the promoters/broker of some listed companies, we trade in scrips of shares of these listed companies of promoters which are manipulated to artificially create either gain or loss to beneficiaries to whom entry of either long term capital gain or loss has to be provided. After holding these shares for some time, the clients sell such shares at either higher rates or very low rates. Such shares are bought from beneficiary clients. When party/beneficiary, come to us for having accommodation entry, we used to get/give cash from/to them which is collected from the promoters/brokers. For doing so, we get a commission income in cash from party.*

*iii) Appellant has not substantiated purchase of shares with cogent evidences including bank statement.*

*iv) Further, during the assessment proceeding, the AO very specifically analyzed the price movement of shares of these companies and found that contrary to the market trends (BSE, Sensex), rates of above said companies moved at unexpectedly high end. The AO in his assessment order has mentioned it elaborately. AO also analyzed the basis and frequency of rising share price in market trend but she found that there was no change in the basic fundamentals of the company's balance sheet nor any new business opportunities were with these companies and even no any new step towards any business expansion or any other idea was there, which may attract the public to purchase of shares of these companies. Further, the volume of shares traded for these companies was found very low. Apart from the above, AO also found that trading of this company was questioned by the BSE for the reason that SEBI found that these companies were indulged in manipulation of share market for providing accommodation entries of bogus LTCG/STCG. The same is elaborated by AO in his assessment order.*

*v) Hon'ble Allahabad High Court in WP No. 458/459 of 2015. Hon'ble Allahabad High Court after perusing the satisfaction note and all the seized material dismissed the writ petitions and concluded that **"this group is involved in 'clandestine activity of taking cash and making dubious transactions in cheque thereby 'laundering the money.'"***

*vi) AO has elaborately discussed and demonstrated that, the higher quoted price of the Penny Stock's was the result of rigging of scrip through circular trading without any intrinsic value of the shares of such Penny stock's.*

*vii) Independent enquires of Stock Exchange of Board of India (SEBI) has confirmed that, such scheme of Penny Stock's is prevalent for converting black money into white.*

*viii. Numerous statements of the brokers/operators/ Directors of the papers companies/directors of penny stock companies have confessed and accepted in statements recorded on oath regarding the modus operandi adopted in the scam of bogus LTCG/STCG. The same is elaborated and reproduced by the AO in his assessment order.*

*ix) The exit provider or the entities, who has purchased the alleged shares are entities with unsubstantiated creditworthiness of genuineness of business activities. The same is elaborated by AO in his assessment order.*

*x) Many individuals/entities have admitted the bogus claim of LTCG/STCG without any enquiry by any authority and also withdrawn their claim by filing the revised returns there by accepting there wrong claim of exemption u/s 10(38) of the Act for LTCG or payment of lesser tax for STCG. This strengthens the case of revenue.*

*7.5 Thus, from the above detailed observations, it is evident that appellant was one of the beneficiary of such bogus Penny Stocks Scheme for converting his black money into white without the payment of taxes in the garb of bogus claim of exemption u/s 10(38) of the Act for LTCG or payment of lesser tax for STCG. Appellant purchased shares through off market trade and could not substantiate the purchases of shares. Appellant has nothing except the paper work of contract note to explain his case. It is settled preposition of law that, if an, exemption is claimed by the appellant then it is for the appellant to prove that, such claim is genuine. AO has dealt with at length to successfully establish that, the cheque received for the sale of penny stocks shares are part and parcel of scam of bogus Penny Stock. Also, AO. has discussed at length the methodology adopted by the appellant to artificially rigged the share price of Penny Stock through circular trading. The astronomical increase in share prices of the Penny Stock is against the proportional increase in share market and against the intrinsic value of the share at that relevant time. Various share broker/operator/director of paper entities/exit operator have accepted their wrong doing in the sworn statement recorded before statutory authorities, which is very relevant evidence against the appellant. Independent investigation conducted by investigation directorate, Kolkata and SEBI have corroborated the findings of A.O, regarding the scam of bogus claim of LTCG/STCG. A.O. has recorded the finding of fact that exit provider or the purchasers of Penny Stock at such astronomical prices are person without established credit capacity or creditworthiness. A.O. has also established the fact that exceptionally high share prices of Penny Stock are without any economic and financial basis. Therefore, in the present fact of the case, undersigned is of the view that, the claim of appellant is non-genuine, concocted bogus and fabricated.....”*

16. In ‘**First Set**’ of appeals, the Income Tax Appellate Tribunal (ITAT), by common order dated 27.05.2021, has set aside the orders of the CIT(A) and allowed the appeals of the assesseees, observing as under:-

*“11. It is seen that assessment in these years stood concluded and Assessing Officer has not made additions on the basis of any incriminating material and therefore the additions sustained by the Id. CIT(A) are not sustainable and therefore, Ground No.2 in all these appeals is allowed.*

*12. We have allowed the appeals of the assesseees on Ground No.2 only. The other grounds of appeal taken by the assessee were neither argued nor*

*adjudicated and hence they are dismissed as infructuous.”*

17. On similar grounds, the ITAT allowed the appeals of the assesseees in the ‘Second Set’ of appeals.

18. The findings recorded by the Assessing Officer and the CIT(A) as evident from the relevant portion of the orders aforequoted, it is evident that findings on the point of incriminating materials and all other materials available on record were recorded by the Assessing Officer and the CIT(A) after due consideration of evidences on record and principles of natural justice were well followed. The findings of fact recorded by the Assessing Officer and the CIT(A) have not been set aside by the ITAT and merely following its earlier decision in another case, the appeals have been allowed assuming that there was no incriminating materials found in the search.

19. So far as the provisions of Section 153A of the Act, 1961 are concerned, we find that sub-Section (1) of Section 153A starts with the non-obstante clause providing for assessment or reassessment. Clause (a) of sub-Section (1) empowers the Assessing Officer to issue notice to such person requiring him to furnish the return of income within such period, as may be specified in the notice, in respect of each assessment year falling within six assessment years and for the relevant assessment year or years in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed and the provisions of this Act shall, so far as may be, apply accordingly **as if** such return were a return required to be furnished under Section 139. Clause (b) of sub-Section (1), empowers the Assessing Officer to **assess or reassess the total income of six assessment years** immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made and for the relevant assessment year or years, **provided** that the Assessing Officer shall assess or reassess the total income in respect of each assessment year falling within such six assessment years and for the relevant assessment year or years. The

second proviso to clause (b) provides that assessment or reassessment or proceedings for any assessment year falling within the period of six assessment years or for the relevant assessment year or years pending on the date of initiation of the search under section 132 or making of requisition under section 132A, as the case may be, shall abate.

20. Undisputedly, the respondents-assessee filed return of income in response to the notice issued by the Assessing Officer under Section 153A(1) of the Act, 1961. Section 153A provides for assessment or reassessment. To avoid double proceedings, it has been provided by the second proviso to clause (b) of sub-Section (1) that assessment or reassessment proceedings relating to any assessment year falling within the period of six assessment years or for the relevant assessment year or years pending on the date of initiation of the search under section 132 or making of requisition under section 132A, as the case may be, shall abate. Section 153A(1) of the Act, 1961 does not require that assessment or reassessment under this section can be made only on the basis of incriminating materials found in the search.

21. Facts of the present case show that incriminating materials were available on record, which have been used to make assessment/ reassessment of the respondents-assessee. In the absence of any bar under Section 153A of the Act, 1961, it cannot be said that assessment or reassessment under Section 153A cannot be made if incriminating material itself has not been found in the search but is otherwise available on record or it has been brought on record during the course of investigation. Findings of fact recorded in the assessment order and in the order of the CIT(A) clearly reveal voluminous incriminating materials were not available in the hands of the Assessing Officer and on the basis of such incriminating materials, the Assessing Officer assessed the respondents-assessee under Section 153A of the Act, 1961. The incriminating materials found have been well discussed by the Assessing Officer in the assessment order and by the CIT(A) in the appellate order. Relevant portion of the order of CIT (A) has already been reproduced above and are not being

referred here again so as to avoid repetition.

22. Findings of fact recorded in the assessment order and order of CIT (A), also clearly show that the incriminating materials relating to the respondents- assesseees were available on record and were also found in the search/ investigation relating to certain other person.

23. Bare reading of Section 153A of the Act, 1961 reveals that it provides for assessment or reassessment of the total income and not merely computation of undisclosed income on the basis of evidence found as a result of search. Thus, for assessment or reassessment under Section 153A, it is not the mandatory requirement that assessment or reassessment has to be made only on the basis of incriminating materials found in the search. If Section 153A is interpreted in the matter that the assessment or reassessment can be made only on the basis of incriminating materials found in the search, it would mean that it is not assessment or reassessment of total income but it would be assessment or reassessment of merely undisclosed income on the basis of incriminating materials found in the search. Section 153A does not exclude assessment or reassessment on consideration of other incriminating materials including incriminating materials available on record. Therefore, when the language of Section 153A is plain and unambiguous, it cannot be given a restricted meaning. To do so, it would amount to legislation by court or authority under the Act, which is not permissible.

24. It is admitted case of the respondents – assesseees that search under Section 132 of the Act, 1961 was conducted in their premises in November, 2015. Another search was conducted on 28.04.2015 on Nikki Global Finance Ltd. Searches were conducted on premises of certain other persons on 24.04.2014 and statement of one Sri Subodh Agarwal was also recorded who appeared to be the real operator of the Success Vyapar Ltd. through his employee Sri Rishikant Awasthi, a nominal Director. Neil Industries Ltd. was also found being run from the same premises at Kanpur. On the basis of

certain incriminating materials found regarding accommodation entries, the proceedings under Section 153A of the Act, 1961 was initiated by the Assessing Officer. Bogus unsecured loans and bogus LTCG/ STCG were assessed in the hands of the respondents-assesseees. Thus, it cannot be said that either no incriminating material was found or that no incriminating material was available on record against the respondents – assesseees on the basis of which assessment orders under Section 153A of the Act, 1961 have been passed. Thus, findings recorded and conclusion drawn by the ITAT, cannot be sustained.

25. In the case of **Commissioner of Income Tax vs. Raj Kumar Arora, (2014) 367 ITR 517 (Alld.)**, a Division Bench of this Court considered the question as to whether Assessing Officer has power to reassess income of an assessee not only for undisclosed income, which was found during the search operation but also with regard to the material that was available at the time of the original assessment and held as under:-

*"8. Section 153A of the Act along with Section 153B and 153C replaced the "Post Search Block Assessment Scheme" in respect of any search under Section 132A or requisition under Section 132A made after 31.05.2003. CBDT explained these provisions through circular dated 5.9.2003, which is reported in (2003) 263 ITR (St) 62. The said circular is as under:*

*"65. The special procedure for assessment of search cases under Chapter XIV-B be abolished:*

*65.1 The existing provisions of the Chapter XIV-B provide for a single assessment of undisclosed income of a block period, which means the period comprising previous years relevant to six assessment years preceding the previous year in which the search was conducted and also includes the period up to the date of the commencement of such search, and lay down the manner in which such income is to be computed.*

*65.2 The Finance Act, 2003, has provided that the provisions of this Chapter shall not apply where a search is initiated under section 132, or books of account, other documents or any assets are requisitioned under section 132A after May 31, 2003, by inserting a new section 158BI in the Income-tax Act.*

*65.3 Further three new sections 153A, 153B and 153C have been inserted in the Income-tax Act to provide for assessment in case of search or making requisition.*

*65.4 The new section 153A provides the procedure for completion of assessment where a search is initiated under section 132 or books of account, or*

*other documents or any assets are requisitioned under section 132A after May 31, 2003. In such cases, the Assessing Officer shall issue notice to such person requiring him to furnish, within such period as may be specified in the notice, return of income in respect of six assessment years immediately preceding the assessment year relevant to the previous year in which the search was conducted under section 132 or requisition was made under section 132A.*

*65.5 The Assessing Officer shall assess or reassess the total income of each of these six assessment years. Assessment or reassessment, if any, relating to any assessment year falling within the period of six assessment years pending on the date of initiation of the search under section 132 or requisition under section 132A, as the case may be, shall abate. It is clarified that the appeal, revision or rectification proceedings pending on the date of initiation of search under section 132 or requisition shall not abate. Save as otherwise provided in the proposed section 153A, section 153B and section 153C, all other provisions of this Act shall apply to the assessment or reassessment made under section 153A. It is also clarified that assessment or reassessment made under section 153A shall be subject to interest, penalty and prosecution, if applicable. In the assessment or reassessment made in respect of an assessment year under this section, the tax shall be chargeable at the rate or rates as applicable to such assessment year.*

*65.6 The new section 153B provides for the time limit for completion of search assessments. It provides that the Assessing Officer shall make an order of assessment or reassessment in respect of each assessment year, falling within six assessment years under section 153A within a period of two years from the end of the financial year in which the last of the authorisations for search under section 132 or for requisition under section 132A was executed.*

*65.7 This section also provides that assessment in respect of the assessment year relevant to the previous year in which the search is conducted under section 132 or requisition is made under section 132A shall be completed within a period of two years from the end of the financial year in which the last of the authorisations for search under section 132 or for requisition under section 132A, as the case may be, was executed.*

*65.8 It also provides that in computing the period of limitation for completion of such assessment or reassessment, the period during which the assessment proceeding is stayed by an order or injunction of any court ; or the period commencing from the day on which the Assessing Officer directs the assessee to get his accounts audited under sub-section (2A) of section 142 and ending on the day on which the assessee is required to furnish a report of such audit under that sub-section, or the time taken in reopening the whole or any part of the proceeding or giving an opportunity to the assessee of being re-heard under the proviso to section 129, or in a case where an application made before the Settlement Commission under section 245C is rejected by it or is not allowed to be proceeded with by it, the period commencing on the date on which such application is made and ending with the date on which the order under sub-section (1) of section 245D is received by the Commissioner under sub-section (2) of that section, shall be excluded. If, after the exclusion of the aforesaid period, the period of limitation available to the Assessing Officer for making an order of assessment or reassessment, as the case may be, is less than sixty days, such remaining period shall be extended to sixty days and the period of limitation shall be deemed to be extended accordingly.*

*65.9 The new section 153C provides that where an Assessing Officer is satisfied*

*that any money, bullion, jewellery or other valuable article or thing or books of account or documents seized or requisitioned belong or belongs to a person other than the person referred to in section 153A, then the books of account, or documents or assets seized or requisitioned shall be handed over to the Assessing Officer having jurisdiction over such other person and that Assessing Officer shall proceed against such other person and issue such other person notice and assess or reassess income of such other person in accordance with the provisions of section 153A.*

*65.10 An appeal against the order of assessment or reassessment under section 153A shall lie with the Commissioner of Income-tax (Appeals).*

*65.11 Consequential amendments have also been made in sections 132, 132B, 140A, 234A, 234B, 246A and 276CC to give reference to section 153A in these sections.*

*65.12 These amendments will take effect from June 1, 2003."*

***Earlier, Chapter XIV-B provided for assessment to be made in cases of search and seizure, which was known as Post Search Block Assessment Scheme because this Chapter provided for single assessment to be made in respect of a block period of 10 assessment years prior to the assessment in which the search was made. With the introduction of Section 153A to Section 153C of the Act, the single block assessment concept was given a go-by. Under Section 153A of the Act, in case where a search was initiated under Section 132 of the Act or requisition of books of account, documents or assets was made under Section 132A after 31.5.2003, the Assessing Officer was required to exercise the normal assessment powers in respect of the previous year in which the search took place. A perusal of Section 153A of the Act clearly indicates that it starts with a non obstante clause relating to normal assessment procedure which is covered by Sections 139, 147, 148, 149, 151 and 153 in respect of searches made after 31.5.2003.***

*9. Under Section 153A of the Act, the Assessing Officer is bound to issue notice to the assessee to furnish return for 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. The Assessing Officer is required to assess or reassess the total income of the aforesaid years.*

*10. Under the block assessment proceeding under Chapter XIV-B only the undisclosed income found during the search and seizure operation were required to be assessed and the regular assessment proceedings were preserved. The introduction of Section 153A of the Act provides a departure from this proceeding. Under Section 153A of the Act, the Assessing Officer has been given the power to assess or reassess the total income of the assessment years in question in separate assessment orders. Consequently, there would be only one assessment order in respect of six assessment years in which total disclosed or undisclosed income would be brought to tax. Consequently, even though an assessment order has been passed under Section 143(1) (a) or under Section 143(3) of the Act, the Assessing Officer would be required to reopen these proceedings and reassess the total income taking notice of undisclosed income even found during the search and seizure operation. The fetter imposed upon the Assessing Officer under Sections 147 and 148 of the Act have been removed by the non obstante clause under Section 153A of the Act.*

***Consequently, we are of the opinion that in cases where the assessment or***

*reassessment proceedings have already been completed and assessment orders have been passed, which were subsisting when the search was made, the Assessing Officer would be competent to reopen the assessment proceeding already made and determine the total income of the assessee. The Assessing Officer, while exercising the power under Section 153A of the Act, would make assessment and compute the total income of the assessee including the undisclosed income, notwithstanding the assessee had filed the return before the date of search which stood processed under Section 143(1)(a) of the Act.*

*11. In the light of the aforesaid, the reasons given by the Tribunal that no material was found during the search cannot be sustained, since we have held that the Assessing Officer has the power to reassess the returns of the assessee not only for the undisclosed income, which was found during the search operation but also with regard to the material that was available at the time of the original assessment. We find that the Tribunal dismissed the appeal while relying upon the decision of a Coordinate Bench of the Tribunal in the case of Anil Kumar Bhatia Vs. ACIT (2010) 1 ITR (Trib.) 484 (Delhi). We find that the said decision of the Coordinate Bench of the Tribunal was set aside by the Delhi High Court in Commissioner of Income Tax Vs. Anil Kumar Bhatia (2012) 24 taxmann.com 98 (Delhi). We find that the Tribunal only dismissed the appeal on this legal issue and had not considered the matter on merits.”*

26. In **Income Tax Appeal No.270 of 2014 (Commissioner of Income Tax Central Kanpur vs. Kesarwani Zarda Bhandar Sahson Aild.)** and other connected appeals, decided by Division of this Court on 06.09.2016, the substantial question of law involved was similar to those as involved in the present appeal and the Division Bench answered the questions as under:

*“8. Appeal was admitted on following substantial questions of law:*

*(1) Whether the Hon'ble Income Tax Appellate Tribunal had erred in law and on facts in setting aside the assessment completed under Section 153A of the Income Tax Act, 1961 and not following the decision of Hon'ble Jurisdictional High Court in the case of CIT Vs. Raj Kumar in ITA No. 56 of 2011 wherein it is held that the Assessing Officer has the power to re-assess the returns of the assessee not only for the undisclosed income, which was found during the search operation but also with regard to the material that was available at the time of original assessment.*

*(2) Whether in view of the law laid down by this Hon'ble Court in the case of CIT Vs. Raj Kumar ( supra), the Assessing Officer would be competent to reopen the assessment proceedings already made and determine the total income of the assessee ; the Assessing Officer, while exercising the power under Section 153A of the Act, would make assessment and compute the total income of the assessee including the undisclosed income, notwithstanding the assessee had filed the return before the date of search which stood processed under Section 143(1)(a) of the Act ?*

*10. As is evident Section commenced with the words notwithstanding anything*

contained in Section 139, 147, 148, 149, 151 and 153, meaning thereby whatever has been provided in the aforesaid provisions that will not bar Assessing Officer in proceeding with the assessment or reassessment of total income for six assessment years, immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made. The word 'assess' or 'reassess' not only suggest but show that power under Section 153A includes reassessment and that would be done only when assessment has already been finalized. There is inherent hint in Section 153A and there is no reason to restrict its scope. Tribunal has relied on the decision of Special Bench of Mumbai Tribunal in **All Cargo Global Logistics Ltd. Vs. DCIT, 147 TTJ 513** wherein it was held that no addition can be made for any assessment year under Section 153A, the assessment which, is not pending on the date of search, unless any incriminating material is found in the course of search. Tribunal has decided the issue in favour of Assessee and deleted all the additions made in assessment orders up for consideration in various appeal for Assessment Years 2004-05 to Assessment Year 2007-08.

11. We find that this issue has now been finalized by a Division Bench of this Court in **Commissioner of Income Tax Vs. Raj Kumar Arora, (2014) 367 ITR 517 (All)** wherein it has been held as under :-

"Consequently, even though an assessment order has been passed under Section 143(1) (a) or under Section 143(3) of the Act, the Assessing Officer would be required to reopen these proceedings and reassess the total income taking notice of undisclosed income even found during the search and seizure operation. The fetter imposed upon the Assessing Officer under Sections 147 and 148 of the Act have been removed by the non obstante clause under Section 153A of the Act.

Consequently, we are of the opinion that in cases where the assessment or reassessment proceedings have already been completed and assessment orders have been passed, which were subsisting when the search was made, the Assessing Officer would be competent to reopen the assessment proceeding already made and determine the total income of the assessee. The Assessing Officer, while exercising the power under Section 153A of the Act, would make assessment and compute the total income of the assessee including the undisclosed income, notwithstanding the assessee had filed the return before the date of search which stood processed under Section 143(1)(a) of the Act.

*In the light of the aforesaid, the reasons given by the Tribunal that no material was found during the search cannot be sustained, since we have held that the **Assessing Officer has the power to reassess the returns of the assessee not only for the undisclosed income, which was found during the search operation but also with regard to the material that was available at the time of the original assessment.***"

12. In view of above decision which squarely clinches both the substantial questions of law pressed in these appeals, we find no reason to take a different view and hence answer the above questions in favour of Revenue and against Assessee."

27. The aforesaid two Division Bench judgments in the case of **Raj Kumar Arora (supra)** and **Kesarwani Zarda Bhandar (supra)** being judgments of

coordinate bench, are binding on this bench. That apart, on consideration of the provisions of Section 153A of the Act, 1961 and the findings of fact recorded by the Assessing Officer and the CIT (A), we find that the impugned orders of the Tribunal cannot be sustained and are, therefore, liable to be set aside.

28. For all the reasons aforesaid, we answer the substantial question of law No.(i) in negative and the substantial question of law No.(ii) in affirmative, i.e. in favour of the Revenue and against the assessee.

29. For all the reasons aforesaid, **all the appeals filed by the Revenue are allowed** following the law laid down by this Court in the case of **Raj Kumar Arora (supra) and Kesarwani Zarda Bhandar (supra)**. The impugned orders of the Income Tax Appellate Tribunal are hereby set aside and all the appeals before the ITAT are restored to its original numbers. The ITAT is directed to decide the appeals afresh on merit in accordance with law, after affording reasonable opportunity of hearing to the parties, without being influenced by any of the observations made in the body of this order on merit.

**Order Date :- 04.07.2022**

vkg/ NLY