

INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "G": NEW DELHI
BEFORE MS SUCHITRA KAMBLE, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
(Through Video Conferencing)

ITA No. 3257 to 3261/Del/2016
(Assessment Year: 2005-06 to 2009-10)

DCIT, Central Circle-19, New Delhi	Vs.	Pilot Industries Ltd, F-29/30, Gokhle Market, Near Tis Hazari Court, Mori Gate, New Delhi PAN: AAACP0655R
(Appellant)		(Respondent)

Revenue by :	Shri H. K. Choudhary, CIT DR
Assessee by:	Shri Amit Goel, CA Shri Nippun Mittal, CA
Date of Hearing	14/07/2021
Date of pronouncement	19/08/2021

O R D E R

PER PRASHANT MAHARISHI, A. M.

1. These are the five appeals filed by the learned Deputy Commissioner of income tax, central circle – 19, New Delhi (the learned AO) against the order of the learned CIT – A – 27, New Delhi dated 29th of March 2016 for all these years. In all these appeals the learned CIT – A has passed similar orders and the additions because of the enhanced gross profit made by the learned assessing officer for all these years are deleted.
2. The learned AO is aggrieved and has raised the following grounds of appeal:-
 - "1. *That the Ld. Commissioner of Income Tax (Appeals) has erred in law and on facts in deciding the appeal of the assessee without appreciating the fact that the assessment order passed in the case was not to be given effect to because of the order of the Hon'ble Delhi High Court dated 14.05.2013. Thus the order of the Ld. CIT(A) is against the order of the Hon'ble Delhi High Court.*
 2. *That the Ld. Commissioner of Income Tax (Appeals) has erred in law and on facts in wrongly stating that the high Court has held that the AO will not enforce the demand before the final order of*

the Court whereas the Hon'ble Delhi High court has stated in the order dated 14.05.2013 that "the assessment proceeding may go on and the order may also be passed, however, the same would not be given effect to in further order".

- 3. That the Ld. Commissioner of Income Tax (Appeals) has erred in law and on facts in deciding the appeal of the assessee on the assessment order which was rendered ineffective and not enforceable by the Hon'ble Delhi High Court.*
- 4. That the Ld. Commissioner of Income Tax (Appeals) has erred in law and on facts in wrongly interpreting the judgment of Hon'ble Delhi High Court which allowed only the assessment proceedings to go on and not any subsequent appellant proceedings and the Ld. CIT(A) has wrongly decided the appeal on the assessment order, which was still sub-judice before the Hon'ble High Court.*
- 5. That the Ld. Commissioner of Income Tax (Appeals) has erred in law and on facts in holding that the AO was not justified to make the addition of GP as no incriminating material was found during search without appreciating that the AO has made addition based on seized/incriminating documents in respect of cash transfers/bogus purchases.*
- 6. That the Ld. Commissioner of Income Tax (Appeals) has erred in law and on facts in deleting the addition of Rs. 1,58,08,552/- made by AO by enhancing gross profit rate 24.38% as against 9.53% declared by the assessee without appreciating the fact that the addition made by AO was duly based on documents found during the search which reflected bogus purchases/cash transactions.*
- 7. That the Ld. Commissioner of Income Tax (Appeals) has erred in law and on facts in holding that there was no justification on the part of the assessing officer in rejecting the trading result of the appellant and making the addition by increasing the gross profit rate 24.38% without appreciating the facts that the addition was based on incriminating documents relating to bogus purchases/cash transactions found during the search and also on the statement given by entry operators.*
- 8. That the Ld. Commissioner of Income Tax (Appeals) has erred in law and on facts in ignoring the fact that assessee is engaged in inflating its purchases through bogus purchases bills taken from the accommodation entry providers.*
- 9. That the Ld. Commissioner of Income Tax (Appeals) has erred in law and on facts in ignoring the facts that during the course of search and seizure operation u/s 132 in the case of Sh. Rakesh Gupta Sh. Vishesh Gupta Sh. Vaibhav Jain and Sh. Navneet Jain, it was found that these persons are engaged in the business of providing accommodation entries through bogus purchases bills from the firms owned and controlled by them to the assessee company and also stated on oath that no material has ever been supplied to M/s Pilot Industries Ltd.*

10. (a) *The order of the CIT(Appeals) is erroneous and not tenable in law and on facts.*”

3. We first take up lead appeal for assessment year 2005 – 06 which is the first year and note facts from relevant orders of assessment noted by the learned AO and appeal order by the learned CIT – A.
4. Fact shows that assessee is a company engaged in the business of manufacturing and trading of lead, lead alloy bars/ingots, battery battery plates that are used in automobile and inverter industries.
5. Search and seizure operation u/s 132 of The Income Tax Act 1961 [The Act] was conducted by the investigation wing of the Department on 26th of April 2010 in ‘pilot group of cases’. The assessee company’s business premise at New Delhi was also covered under the provisions of Section 132 (1) of the act.
6. For A Y 2005-06, assessee has filed return of income declaring an income of ₹ 1,244,410/- on 30/10/2005 u/s 139 (1) of the Act. Therefore, notice u/s 153A of the income tax act was issued to the assessee on 13/4/2011. In response to that notice assessee filed a same return on 9/9/2011 which was filed u/s 139 (1) of the act.
7. It is also important to note that during the course of assessment proceedings, assessee filed an application u/s 245C before the settlement commission on 15/2/2012, which was found by order dated 17/4/2013 as not valid. Therefore, the learned assessing officer preceded with the assessment proceedings. The assessee filed a writ petition before the honourable Delhi High Court for stopping the assessment proceedings, which was later on withdrawn, therefore assessment proceedings continued.
8. During the course of search, it was found that assessee is engaged in inflating its purchases through bogus purchase bills taken from the accommodation entry providers. During the financial year 2006 – 07 and 2007 – 08 assessee has shown purchases of scrap from the various firms owned and controlled by Mr. Rakesh Gupta, and three others [accommodation entry providers]. The AO noted that there are seven firms from which the assessee has obtained bogus purchase bills. During the course of search and seizure operation u/s 132 in the case of Mr.

Rakesh Gupta and three others, it was found that these persons are engaged in the business of providing accommodation entries through bogus purchase bill from firms owned and controlled by them. They have admitted in the statements recorded u/s 132 that they used to provide accommodation entry through bogus purchase bills to assessee. They also admitted that no material has been supplied to the assessee. Learned assessing officer further recorded the modus operandi of the entry operators. Learned assessing officer further analyzed statement made by these accommodation entry providers. He also analyzed statement of Accommodation entry providers dated 26th of April 2010 wherein in answer to question number five that whether during the last six years has he provided accommodation sale purchase bills to the parties. The answer given by that the accommodation entry provider was that he has been providing accommodation entry of sale and purchase bills to various parties since the year 2005 in particular he named three parties and assessee is one of them. He also explained in answer to question number six narrating modus operandi. He submitted that interested beneficiary parties approach them for accommodation sale bills and payment made against those bills through cheques. These cheques are deposited in the bank account and the cash is withdrawn from the respective accounts and after deducting the commission balance cash is returned back to the parties. Learned assessing officer further verified affidavit of proprietors of the concerns controlled by Mr. Rakesh Gupta and others that they do not deal in actual purchase and sale of goods and merely paper transactions are carried out. Learned assessing officer further during post search proceedings conducted enquiries of vehicles mentioned in the bogus purchase bills on test check basis. He found that these vehicles do not have capacity nor they have transported any goods to assessee. Further, on verification of seized documents AO noted that Shriram enterprises and S S traders have provided accommodation entries to assessee. Therefore, learned assessing officer reached at a conclusion that assessee is engaged in bogus transaction of purchase and sales and therefore he carried out the verification of purchases. The

learned AO further noted that as assessee is not furnishing the requisite details and has failed to produce the requisite details in time, its complete books of accounts and purchase vouchers, therefore he held that the book results of the assessee are not reliable and cannot be accepted. He further noted that neither stock register nor purchase vouchers were produced for verification. Therefore, he rejected books of accounts of the assessee applying the provisions of Section 144 of the income tax act. He further noted the gross profit ratio of the assessee for the respective years. He noted that instances of purchases and sales is found recorded in the tally software and documents seized during search shows much higher gross profit rate compared to the gross profit rate shown by assessee. He noted that gross profit ratio shown from instances of sales and purchases is between 11% – 37% whereas the assessee is showing gross profit rate of 9.53% during the assessment year 2005 – 06 as per its books of accounts. He further looked at the account of Mr. Sanjay Gupta wherein the cash transactions are recorded. Based on the above findings he found that the purchase from M/s SS traders of ₹ 52,103,871 and ₹ 68,485,845 respectively during financial year 2009 – 10 and financial year 2008 – 09 and from Shriram enterprises is of ₹ 162,785,970/- during the financial year 2009 – 10 are bogus purchases and these are merely accommodation entry in the form of bogus purchases. He noted that assessee has also failed to furnish details regarding the correspondence address of both these parties for verification of the bogus purchases. It was also noted that documents seized from the premises of pilot industries Ltd clearly indicate that cash has been returned to the assessee in respect to cheques received against the bogus purchase bills. Further assessee could not produce the proprietor of the firm from whom bills were allegedly procured. Ld AO noted that assessee has declared total turnover of Rs 150.79 crores and declared a gross profit rate of 6.37% in assessment year 2010 – 11. The suppression of the gross profit because of bogus purchases of ₹ 214,889,841/- from Shriram enterprises and S S traders for assessment year 2010 – 11 will work out to 14.24 percentage of the

gross profit. Thus, the gross profit rate for assessment year 2010 – 11 after taking account into the identified bogus purchases and the declared Percentages comes to 20.61%. Thus, the learned assessing officer concluded that it is abundantly clear that the assessee has been suppressing its gross profit rate by booking bogus purchases. As for assessment year 2010 – 11, revenue has evidence in form of seized documents, that assessee has booked bogus purchases from Shriram enterprises and S S traders of ₹ 21.48 crores, assessee has a turnover of Rs. 150.79 crores thus the GP rate for assessment year 2010-11 after taking into account the bogus purchases and the declared gross profit rate was determined at 20.61%.

9. Ld AO As for the current assessment year i.e. assessment year 2005 – 06 noted that assessee has furnished address of purchases on the last date of hearing so as to avoid scrutiny of third party verification and stock registers, purchase ledger, purchase vouchers etc were also not produced for verification, therefore the conduct of the assessee confirms that there are purchases also which are bogus in nature in assessment year 2005 – 06 also. In view of this discussion, learned assessing officer noted that he is clear that the gross profit should be higher than 9.53% in assessment year 2005 – 06 also. Accordingly, he computed the mean of the gross profit rate found in the seized material, which comes to 24.38% in this year also. Therefore the learned assessing officer found that there is a turnover of Rs 10,64,54,900 and at differential gross profit rate of 14.85% the addition on account of the suppressed gross profit comes to Rs. 1 58,08,552. Accordingly, this addition was made in the hands of the assessee for AY 2005-06. He also made an addition u/s 14 A of the act of ₹ 23,419. Accordingly, the return of income filed by the assessee of ₹ 1,244,410 was assessed at Rs. 1 70,76,300/- by order passed u/s 153A read with Section 143 (3) read with Section 144 of the Act on 21st of June 2013.
10. The assessee aggrieved with this order preferred an appeal before the learned CIT – A. The assessee challenge before the learned CIT – A that during the search no incriminating material was found which was rejected

by the learned CIT – A holding that once the search has been conducted u/s 132 of the income tax act 1961, AO is mandatorily required to issue notice u/s 153A of the act for the specified 6 years. Therefore, this ground of appeal was dismissed. Assessee also challenged that the assessee has not been issued valid notice u/s 143 (2) of the act, this ground was also dismissed. The assessee also challenged the assessment arguing that the same is barred by limitation. This argument was also rejected. The assessee also contested that the addition made by the learned assessing officer by increasing the gross profit rate is also not sustainable in absence of any incriminating material. The learned CIT – A held that during the course of search no incriminating material was found to doubt the gross profit rate declared by the assessee. He further noted that the original assessment in the case was completed u/s 143 (3) of the act wherein the income declared by the assessee was accepted without any addition. He further held that as on the date of search on 26/4/2010, no assessment for the year under consideration was pending. Therefore following the decision of the honourable Delhi High Court in case of CIT versus Kabul Chawla 61 taxmann.com 412 according to him the AO was not justified in making the addition of gross profit as has been made by him.

11. Even otherwise, on the merit he also did not found any justification for making any addition to the gross profit by applying the gross profit rate of 24.38%. He held that:-
 - i. Sale and purchases compared by the AO are not comparable, as AO has compared the purchase of scrap with the sale of finished goods.
 - ii. Assessee is dealing in different items and there is no justification in applying uniform gross profit rate to all products.
 - iii. AO's action of applying uniform gross profit rate of 24.38% for seven years i.e. from assessment year 2005 – 06 to assessment year 2011 – 12 on the basis of some selected

sales bills of financial year 2009 – 10 cannot be held to be justified.

- iv. Quantities of purchase and sales compared are different where the AO has compared the sale of approximately ₹ 40 lakhs to the purchase of ₹ 8 lakhs and quantity of sale of around 34,000 Kgs with the purchase of quantity of 7600 kgs
- v. AO has ignored the instances at lower prices and purchases made at higher prices
- vi. AO is not justified in taking sales instances to be unaccounted sales, it is wrong as all the sales bills quoted by him in the assessment order are recorded in the books of accounts of the company.
- vii. Assessee is maintaining books of accounts audited Under the Companies act as well as under the income tax act.
- viii. Assessee is maintaining proper quantitative details of opening stock, purchases, sales and closing stock shown in the audited statement of accounts
- ix. AO himself in paragraph number 2 of the assessment order admitted that all the information, details and documents required by him were furnished by the assessee
- x. In the subsequent assessment made u/s 143 (3) for assessment year 2012 – 13 and 2013 – 14 the gross profit rate of 11.82% and 9.42% have been accepted.

Accordingly, he deleted the addition of Rs. 1,58,08,552 made by the assessing officer.

12. With respect to the disallowance u/s 14A of the income tax act made by the learned assessing officer of ₹ 23,419/–, the CIT – A observed that the assessee has earned tax-free dividend income of only ₹ 23,419. He noted that in the original assessment proceedings the AO has accepted the suo motu disallowance made by assessee of ₹ 1587 and during the course of search no incriminating document was found, therefore, following the decision of the honourable High Court in CIT versus Kabul Chawla (61 taxmann.com 412) he deleted the disallowance.

13. Therefore, the LD learned assessing officer is aggrieved with the order of the learned CIT – A has preferred this appeal as per the grounds of appeal.
14. The learned CIT DR for explained the facts of the case stating that the search in case of the assessee took place on 26/4/2010 and the date of filing of the return of income by the assessee is 30 October 2005. Admittedly, the assessment is concluded and not pending as on the date of search. However, he submitted that there are statements of entry operators who have confessed that the assessee is engaged in purchasing the bogus purchase bills in the form of accommodation entries. He further referred paragraph number 3.3 of the order of the learned assessing officer in stating that these entry operators has stated that they are providing bogus accommodation entries to the assessee and the period stated by them also which also includes Assessment year 2006 – 07 and 2007 – 08. It was further stated that though assessment year 2005 – 06 is not mentioned therein but that does not mean that the assessee has not been obtaining such accommodation entries for that year. He further submitted that for assessment year 2006 – 07 and 2007 – 08 there are specific instances quoted by the learned assessing officer. He further referred paragraph number 3.4 of the assessment order that there are certain seized documents found at premises of the assessee. He further referred page number 20 of the assessment order where the account of Mr. Sanjay Gupta is mentioned by the learned assessing officer. He further relied upon the paragraph number 4.3.3 of the assessment order, which shows that the assessee has obtained bogus accommodation entries from these entry operators and has received cash back from them. He therefore submitted that the learned assessing officer has conclusively proved that the assessee is obtaining bogus accommodation entries from these parties in the form of purchase bills of material without being material received by them. He further referred to the order of the learned CIT – A wherein it has been held that there are no incriminating material. He submitted that when the assessing officer has clearly mentioned that assessee is obtaining the bogus

accommodation entry for purchase of material from the accommodation entry providers when the statements are also available on record, these are the incriminating materials. He therefore submitted that the learned CIT – A erred in holding that there are no incriminating documents for these assessment years. He further submitted that even assessee admits that there are incriminating material and their unaccounted income earned by the assessee during this year otherwise the assessee would not have gone to the settlement commission for settlement of the dispute by offering additional income. He further referred to the paper book stating that at t page number 8 in paragraph number 12 of the paper book it is clearly shown that entries are given for the period in 2005 also. He also referred to the various questions and answers given by the accommodation entry providers in their statements. He further stated that simultaneously searches were conducted at the premises of the assessee and accommodation entry provider. Therefore the decision relied upon by the learned CIT – A for holding that there is no incriminating material found during the course of the search relying on the decision of the honourable Delhi High Court is not applicable to the facts of the present case he therefore submitted that there are incriminating material is in the statement given by the accommodation entry providers and therefore it is improper for the learned CIT – A to hold that there is no incriminating material found during the course of search. He relied on the decision of the honourable Delhi High Court in case of Anil Bhatia, and Dayawanti wherein the estimation of gross profit was upheld.

15. Coming to the merits of the addition, he submitted that the assessee has not furnished the complete information before the assessing officer and therefore the assessing officer was compelled to make an addition on account of gross profit only. He submitted that nowhere the assessing officer has accepted that the assessee has submitted the entire information. He further stated that the books of accounts are not produced before the AO, purchase details are also not given to the assessing officer during the assessment proceedings but at the fag end of

the assessment. He therefore submitted that the learned CIT – A has erroneously deleted the addition.

16. The learned authorised representative referred to his synopsis of 24 pages filed. He submitted that in assessment order there is not a single reference to the material, which can be said to be an incriminating material. He submitted that all the materials that were found pertaining to the financial year 11 – 12 and 2012 – 13 and not to the assessment year 2005 – 06 to 2009 – 10. He submitted that in all these years the addition has been made because of suppressed gross profit by the assessee. He referred to the chart wherein he gave the details of the dates of filing of the return of income by the assessee and submitted that all the returns for assessment year 2005 – 06 to 2008 – 09. He submitted those Assessments were not pending at the time of search. Therefore any disturbance to the total income determined by the learned assessing officer either u/s 143 (3) of the act or as per the return of income filed by assessee can only be disturbed based on incriminating material found during the course of search. He submitted that if there is no incriminating documents found during the course of search related to the each of the assessment year, no addition could be made to the total income of the assessee u/s 153A of the income tax act. He further stated that in the entire assessment order, LD AO has not referred to any seized material or other material for the year's assessment year 2005 – 06 to assessment year 2008 – 09 found in search in the case of the assessee. Therefore, the addition made by the learned assessing officer because of alleged suppression of gross profit is not also sustainable. He further relied upon the decision of the honourable Delhi High Court in case of CIT versus Kabul Chawla 61 taxmann.com 412. He also pressed into service the decision of the honourable Delhi High Court in case of Principal Commissioner of Income Tax Versus Mita Gutgutia 82 taxmann.com 287 as well as Principal Commissioner Of Income Tax Versus Best Infrastructure India Private Limited 84 taxmann.com 287. He further relied upon the decision of the honourable Supreme Court in case of CIT versus Sinhgad technical education society 84 taxmann.com

290. He further referred to the decision of the coordinate bench in case of Dharampal Premchand Ltd versus DCIT 2016 (2) TMI 197 also on the same principle. Therefore he submitted that so far as the assessment years 2005 – 06 to assessment year 2008 – 09 are concerned they are being beyond the scope of the jurisdiction of Section 153A and therefore the addition of gross profit made by the learned assessing officer is deserves to be deleted. He further referred to the several judicial precedents of the coordinate benches for this proposition. He further relied upon the decision of the coordinate bench in 219 TMI 1393 SMC power generation. With respect to the statement, he referred to the decision of the honourable Delhi High Court in principal Commissioner of income tax versus Anand Kumar Jain 432 ITR 384[Delhi].

17. He further submitted that this issue is squarely covered in favour of the assessee in case of Tegh international versus Asst Commissioner of income tax (2016 (6) TMI 450 (Delhi) and the decision of Angad Exports versus Asst Commissioner of Income Tax (12) TMI 359 of the coordinate benches. He submitted that these are the orders, which squarely covers the issue in favour of the assessee as those have been decided on identical facts and binds us.
18. Coming onto the issue of the merit of the addition, he submitted that the learned CIT – A has correctly considered all the issues on the merits of the addition. He referred to all the points raised before the learned CIT – A by the assessee and on which he deleted the addition on the merits of the case. He further referred to the fact that subsequent to completion of the assessment for seven years from assessment year 2005 – 06 to assessment year 2011 – 12, learned assessing officer has completed the assessment for the subsequent years in which the respective gross profit rates are accepted ranging between 8.22% to 11.85%. He further submitted that the learned assessing officer has doubted the purchase of the assessee but he has accepted sales and disturbed only resultant gross profit only.
19. In rejoinder, learned CIT DR vehemently stated that the decision in case of Mr. Anand Kumar Jain does not apply to the facts of the case, as the

facts are different. In that particular case sole basis of the long-term capital gain was a statement of Mr. Pradeep Kumar Jindal whereas in the case of assessee it is an admitted fact that assessee has obtained bogus entries from accommodation entry provider in the form of purchase of material which is coupled with the statement as well as the incriminating documents found during the course of search. He further stated that the decision of Tegg international and Angad exports also do not apply to the facts of the case and further the facts in those cases are not available correctly as the orders in those cases of the learned AO and CIT – appeal are not available on record. Thus, Assessee cannot take benefits of those decisions.

20. On the merits of the case, he submitted that the assessee has not shown the books of accounts either before the assessing officer or before the learned CIT (A) and there is no merit in the argument of the assessee with respect to the declared gross profit. He submitted that comparative details are compared by the AO as alleged by the learned CIT – A is devoid of any merit as the learned CIT – A did not have any information before him. He further submitted that the learned assessing officer has taken for the working out of the gross profit nearby dates. With respect to the argument of the learned authorised representative that in subsequent years the learned assessing officer has accepted the gross profit of the assessee, he submitted that subsequent years are not search years and therefore it does not make any difference that in those years the learned assessing officer has accepted the book results of the assessee. He submitted each assessment year is separate. He submitted that there is no evidence against the assessee of obtaining accommodation entries by bogus purchases in those years and therefore AO has not disturbed those results.
21. We have carefully considered the rival contention and perused the orders of the lower authorities as well as the paper book furnished by the assessee. We also considered several decisions relied upon by both the parties.

22. The facts clearly shows before us that assessee company is engaged in the business of manufacturing and trading of lead and battery which are used in automobile and inverter industries. The search took place on 26 April 2010. During the course of search, certain materials were found to suggest that the company has also carried out some trading activities outside the books of accounts during the financial year 2009 – 10 and 2010 – 11. After search, assessee disclosed an additional income of ₹ 182,237,295/- which was utilized for obtaining share application money, investment in stock, unexplained expenditure, and investment in other properties. The above disclosure was made in assessment year 2010 – 11 and 2011 – 12.
23. However based on the material found during the course of search, which pertained to AY 2011-12 , learned assessing officer has made an addition on account of suppressed gross profit for assessment year 2005 – 06 to assessment year 2009 – 10 as Under:-

Assessment year	Addition in Rupees	Status
2005 – 06	1,58,08,552	In all these years the learned assessing officer has made the addition on the basis of documents found during the course of search on 26 April 2010 pertaining to financial year 2010 – 11
2006 – 07	4,03,28,467	
2007 – 08	10,64,43,561	
2008 – 09	29,35,52,943	
2009 – 10	20,34,48,416	

24. It is important to note that the date of search in the present case is 26th of April 2010. Therefore, it is necessary to note that which are the assessment years concluded before the date of search and which are pending. The assessee has filed the return of income for all these years as Under:-

serial number	assessment year	date of filing of the return of income	Due date for issue of notice u/s 143 (2)	Whether any assessment u/s 143 (3)
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				of the act has been framed
1	2005 – 06	30/10/2005	30/9/2006	6/12/2007
2	2006 – 07	13/11/2006	30/9/2007	No assessment is made u/s 143 (3)
3	2007 – 08	30/10/2007	30/9/2008	
4	2008 – 09	29/9/2008	30/9/2009	

25. Based on the above information, it is apparent that for all these above years, if there is an addition required to be made by the learned assessing officer, that should be based on the incriminating material found during the course of search, pertaining to the impugned assessment year, otherwise, any addition made in the above four years deserves to be deleted as those assessment years do not abate.
26. We have also carefully perused the assessment order and find that the learned assessing officer has not referred to in the seized material for the assessment years 2005 – 06 to assessment year 2008 – 09, which are found during the course of search.
27. Ld AO has merely relied upon the documents seized during the course of search for financial year 2010 – 11 and 2011 – 12. Based on this information the addition has been made. Ld AO took the gross profit of the respective years, compared with the gross profit as per seized material for FY 201-11 and 2011-12, and made the addition of the differential gross profit for respective years.
28. Honourable Delhi High Court in case of CIT versus Kabul Chawla 61 taxmann.com 412 (Delhi) has categorically held that only assessments and reassessments pending on the date of the search shall abate and the computation of the total income for those assessment years will have to be computed afresh by making fresh assessment. However, where the assessment is completed those can be only interfered with by the learned assessing officer while making the assessment u/s 153A only on the basis

of some incriminating material unearthed during the course of search or requisition of documents or unrecorded income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment.

29. Further the honourable Delhi High Court in Principle Commissioner Of Income tax versus Mita Gutgutia (2017) 82 taxmann.com 287 (Delhi) has also held that in case of concluded assessments the addition is also required to be made only on the basis of incriminating material found during the search, each such earlier assessment years. Such is the also mandate of the honourable Supreme Court in case of CIT versus sinhgad technical education society (2017) 84 taxmann.com 290 (SC).
30. The Id CIT (A) has decided this issue as under :-

Finding

11. I have carefully considered the observation of the assessing officer made in the assessment order and also the submission of the appellant. It is an admitted fact that during the course of search no incriminating material was found to doubt the G.P. Rate declared by the appellant. The original assessment in this case was completed u/s 143(3) of Income Tax Act, wherein the income declared by the assessee was accepted without any addition. As on the date of search, no assessment for the year under consideration was pending. In view of the judgment of various tribunals and High court as discussed in the appellant's submission particularly the judgment of jurisdictional Delhi High Court in the case of CIT V Kabul Chawla (61 Taxmann.com 412) (Delhi), the A.O. was not justified in making the addition of gross profit as has been made by him.

31. Before us, no incriminating material was shown by revenue. Of the accommodation entry providers who have stated in the statement that the assessee has been provided accommodation entries during the financial year 2005 – 06 also. We have carefully considered this aspect and find that the learned assessing officer has recorded the statement of Mr. Vishesh Gupta on 26th of April 2010. The question number five was asked to the gentleman that whether during the last six years he has also provided accommodation sale/purchase bills to parties and if yes to provide complete details of such transactions. In response to this, he answered that the various entities and proprietorship concerns are

providing accommodation entries in the form of sale/purchase bills to various parties since the year 2005 in particular he mentioned the name of three parties, which included the name of the assessee also. Based on this the revenue contends that the statement itself is an incriminating material. However, no corroborative material with respect to the statement of Mr. Vishesh Gupta was shown. Therefore, now the only issue is that there is a statement of an accommodation entry provider to prove who stated that he is providing an accommodation entry to the assessee since 2005. The question arises whether it is an incriminating evidence found during the course of search based on which the addition can be made in the hands of the assessee. Honourable Delhi High Court in case of Anand Kumar Jain HUF [ITA No 23,26,27,28,29,30 &31 /2021 dated 12/02/2021] has laid down the following principles:-

- (i) A statement-recorded u/s 132(4) has evidentiary value but cannot justify the additions in the absence of corroborative material.
- (ii) The statement also cannot, on a standalone basis, constitute 'incriminating material' so as to empower the AO to frame a block assessment u/s 153A
- (iii) If the statement was recorded in the course of search conducted in the case of a third party, and assuming the statement is construed as 'incriminating material belonging to or pertaining to a person other than person searched', the only legal recourse available to the department is to proceed in terms of S. 153C of the Act by handing over the same to the AO who has jurisdiction over such person. An assessment framed u/s 153A on the basis of alleged incriminating material (being the statement recorded under 132(4) of the Act) is not valid.

32. In the present case also for the assessment year 2005 – 06 to assessment year 2008 – 09, there is no evidence available with respect to

suppression of the gross profit by obtaining bogus purchase bills by the assessee.

33. The revenue has relied upon the decision of honourable Delhi High Court in case of Anil Bhatia and Dayawanti has no application to the facts of the case as no incriminating material was found during the course of search on the assessee. Even in case of simultaneous search, the honourable Delhi High Court in case of Anand Jain HUF has held that on the basis of the statement of third party on search at the premises of third party cannot result into any addition in the hands of the assessee in absence of corroborative material.
34. Further the coordinate bench in case of M/s Tegh International Versus Asstt. Commissioner of Income Tax - 2016 (6) TMI 450 - ITAT DELHI AS WELL as in case of ANGAD EXPORTS VERSUS ACIT, CENTRAL CIRCLE-10, NEW DELHI 2017 (12) TMI 359 - ITAT DELHI on identical facts and circumstances have deleted the addition where the searches have been carried out on the same date i.e. on 26/4/2010. These two decisions of the coordinate benches bind us.
35. Thus, it is apparent that there is no incriminating material based on which the income of the assessee can be disturbed or enhanced for these assessment years found during the course of search. Accordingly, the orders of the learned CIT - A deleting the addition is on account of suppressed gross profit for all these years are upheld.
36. Coming to the merits of the addition, of suppressed gross profit the learned CIT - A has deleted the addition for all these years from assessment year 2005 - 06 to assessment year 2009 - 10 holding as Under:-

"11.1 Even otherwise on merit, I find no justification in the methodology of assessing officer in applying the G.P. Rate of 24.38%. The sales and purchases being compared by the A.O. are not comparable. The A.O. has compared the purchases of scrap (Desi Lead) with sale of finished good (Refined). The appellant is dealing in different items and there is no justification in applying uniform G.P. Rate to all products. In my opinion, the A.O.'s action of applying uniform G.P. Rate of 24.38% for seven years (from A.Y. 2005-06 to A.Y. 2011- 12) on the basis of some selected sales bills of F.Y. 2009-10 cannot be held to be justified. Even the quantities of purchase and sales being compared are different. The

A.O. has compared the sale of approx. Rs.40 lacs to purchase of Rs.8 lacs and quantity of sales of around 34000 Kgs have been compared with purchase quantity of approx. 7600 Kgs. The A.O. has ignored the sales taken at lower prices and purchases made at higher prices. The A.O. has tried to take highest sale price and lowest purchase price without even appreciating that the items being compared were different. The A.O.'s assumption of the sales instances quoted by him to be unaccounted sales is itself wrong as all the sales bills quoted by him in the assessment order are recorded in the books of accounts. The assessee company is maintaining books of accounts which have been audited both under the Companies Act, 1956 as well as under the Income Tax Act, 1961. The assessee is maintaining proper quantitative details of opening stock, purchases, sales and closing stock which are even disclosed in the audited statement of accounts. In para 2 of the assessment order, the A.O. has himself admitted that all the information, details and documents required by him were furnished by the assessee. Even in the subsequent assessments made u/s 143(3) for A.Y. 2012-13 & A.Y. 2013-14 the G.P. Rate of 11.82% and 9.42% have been accepted in spite of the fact as submitted in appellant's submission, the G.P. Rate from A.Y. 2011-12 is comparatively higher as compared to earlier years due to the fact that the assessee had set-up a new unit at Uttaranchal during A.Y. 2011-12 where due to excise duty exemption, the profitability is better. Therefore, in my opinion, there was no justification on the part of the assessing officer in rejecting the trading results of the appellant and making the addition by increasing the gross profit rate to 24.38%.

11.2 In view of the aforesaid factual and legal position, the addition of Rs. 1,58,08,552/- made by the assessing officer deserves to be deleted, therefore, the same is directed to be deleted. These grounds of appeal are allowed."

37. The assessee has earned the gross profit for assessment year 2005-06 at 9.53%, 2006 – 07 at the rate 7.30%, 2007 – 08 at the rate 6.81%, 2008 – 09 at the rate of 6.5% and assessment year 2009 – 10 at the rate of 6.66%. These gross profit rates are excluding the additional income offered by the assessee. The facts also placed before us shows that for assessment year 2011 – 12 onwards the gross profit rate of the company is better than earlier years. The learned assessing officer has enhanced the gross profit rate for all these years to 24.38% and made the addition. The allegations of the learned assessing officer is that as per the seized documents the gross profit rate of the assessee is much higher than what has been disclosed by the assessee. The seized materials pertain to assessment year 2010 – 11. The learned assessing officer has recorded

the instances of purchase and sales are found in the tally software and documents seized during the search. The learned assessing officer computed the average of the gross profit rate of the several instances which are also stated in the chart reproduced by the learned CIT – A in his order. The learned AO computed the gross profit rate at 24.38%, which is derived on the basis of two gross profit rates of 11% and 37.76%, calculated by the AO on the basis of instances of sales and worked out an average of 24.38%. Assessee has submitted that the learned assessing officer has compared the purchase of scrap of Desi lead with the sale of finished goods i.e. refined lead. It is undisputed that the company is dealing in different types of items such as lead, tin, selenium, arsenic et cetera. Naturally even under each of these items there are so many qualities having wide price fluctuation therefore, naturally the cannot be any justification of adopting a uniform gross profit rate. Further, in case of large quantities the gross profit earned therein is naturally less compared to smaller quantity sold. This is also demonstrated by assessee before CIT – A and therefore the learned CIT – A has held that the assessing officer has made a comparison between two incomparable products and of different lots of trading. The fact also shows that in subsequent to the completion of assessment for assessment year 2005 – 06 to assessment year 2011 – 12 the learned assessing officer has accepted the gross profit ratio of the assessee ranging between 8.22% to 11.85%.

38. The claim of the learned departmental representative that when the assessee has not produced the books of accounts before the assessing officer as well as before the learned CIT – A, the learned CIT – A could not have deleted the addition, we find that the only addition made by the learned assessing officer is with respect to the gross profit rates of the assessee as per books of accounts and the gross profit rates derived on the basis of instances found from tally software during the course of search. The learned assessing officer has not disturbed the book results but has made an addition of the gross profit, which the assessee should have earned according to him based on the incriminating documents

found for subsequent years for the impugned years. The learned CIT – A as also not deleted the addition on that basis but for the reason that the comparison made by the learned assessing officer of different material of different lots sold at different time. The learned DR has agreed that that the learned assessing officer has computed the gross profit by taking transactions of the nearby dates. However, it is not denied that the learned assessing officer has taken the highest rate of sales as well as lowest rates of purchases for computing the additional gross profit that should have been earned by the assessee. The assessee has produced the copies of the paper book, which are placed before the learned CIT – A wherein he has verified the details of the material sold, quantity sold with respect to the various bills placed in those paper books and found that the comparison of the gross profit made by the learned assessing officer is not comparable.

39. Another argument of the learned departmental representative is that the subsequent year's acceptance of the book results by the learned assessing officer cannot help the case of the assessee in deleting the addition in those years, which are in appeal. We find that the subsequent years assessments are also completed u/s 143 (3) of the act and no addition has been made by the learned assessing officer. Admittedly in subsequent years there was no seized material available and the learned assessing officer has not extrapolated the gross profit in subsequent years, which he did for the impugned years in the appeal, however the acceptance of the subsequent years gross profit shows that the books of accounts prepared by the assessee are acceptable. The gross profit ratio of the subsequent years is also not of much difference compared to the years in this appeal. In view of this we do not find any infirmity in the order of the learned CIT – A in deleting the addition on account of suppressed gross profit, which was not based on any incriminating material found during the course of search for the respective years and because of erroneous comparison made by the learned assessing officer.
40. There is no change in the facts and circumstances of the case for assessment year 2005 – 06 so far as issue of suppressed gross profit is

concerned in subsequent assessment years and therefore our decision for assessment year 2005 – 06 also applies to those assessment years.

41. In the result, all the five appeals filed by the learned assessing officer are dismissed.

Order pronounced in the open court on 19/08/2021.

Sd/-
(SUCHITRA KAMBLE)
JUDICIAL MEMBER

Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated : 19/08/2021
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi

Date of dictation	19.08.2021
Date on which the typed draft is placed before the dictating member	19.08.2021
Date on which the typed draft is placed before the other member	19.08.2021
Date on which the approved draft comes to the Sr. PS/ PS	19.08.2021
Date on which the fair order is placed before the dictating member for pronouncement	19.08.2021
Date on which the fair order comes back to the Sr. PS/ PS	19.08.2021
Date on which the final order is uploaded on the website of ITAT	19.08.2021
date on which the file goes to the Bench Clerk	19.08.2021
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the order	