

IN THE INCOME TAX APPELLATE TRIBUNAL “B”, BENCH KOLKATA

BEFORE SHRI P.M. JAGTAP, V.P & SHRI S. S. GODARA, JM

आयकरअपीलसं./IT(SS)A No.58/Kol/2018

(निर्धारण वर्ष / Assessment Year: 2011-12)

M/s. Grade Traders Pvt. Ltd. Flat 2C, Trinity Building, 226/1, A.J.C Bose Road, Kolkata – 700020.	Vs.	DCIT, Central Circle-3(3), Kolkata. 110, Shantipally, E.M. Bye Pass, Near Ruby Hospital, Income Tax Building, Poorva, Kolkata.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: AADCG 9129 G		
(Appellant)	..	(Respondent)

&

आयकरअपीलसं./IT(SS)A No.67/Kol/2018

(निर्धारण वर्ष / Assessment Year: 2010-11)

M/s. Loyalka Farms Pvt. Ltd. Flat 2C, Trinity Building, 226/1, A.J.C Bose Road, Kolkata – 700020.	Vs.	DCIT, Central Circle-3(3), Kolkata. 110, Shantipally, E.M. Bye Pass, Near Ruby Hospital, Income Tax Building, Poorva, Kolkata.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: AADCG 9129 G		
(Appellant)	..	(Respondent)

Appellant by : S.M. Surana, Advocate
Respondent by : Shri P.K. Srihari, CIT-DR

सुनवाईकीतारीख/ Date of Hearing : 29/10/2018

घोषणाकीतारीख/Date of Pronouncement : 14/11/2018

आदेश / O R D E R

Per Shri S. S. Godara:

These two assessees have filed their instant appeals for Assessment Years 2011-12 & 2010-11 against Commissioner of Income Tax(A)-21, Kolkata's separate orders, both dated 02.07.2018, in case Nos.10771/DCIT,CC-3(3)/CIT(A)-21/KOL/2017-18 & 10769/DCIT,CC-3(3)/CIT(A)-21/KOL/2017-18 respectively

involving proceedings u/s 153A/143(3) of the Income Tax Act, 1961 (in short ‘the Act’).

2. It is noticed at the outset that both these two appeals arise from the very search in question carried out in M/s. Patni Group of cases dated 08.03.2016. We have heard these two appeals together. The same are disposed of by the instant common adjudication.

3. A combined perusal of these files indicates that we do not need to dig much into the relevant issues raised herein. These two assessees’ identical grievance challenges correctness of both the lower authorities’ identical action treating their share capital sum(s) of Rs.96,00,000/- and Rs.28,08,500/- respectively to be unexplained cash credits u/s 68 of the Act in assessments in question framed on 30.12.2017 u/s 153A/143(3) of the Act.

4. Mr. Surana first of all takes to Paper Book Page no.1 containing Panchanama of the joint search in M/s. Patni Financial Services Pvt. Ltd, Bhansali Fincom Pvt. Ltd., Vijaypath Management Pvt. Ltd, Amar Dealcom Pvt. Ltd, Grade Traders Pvt. Ltd. [IT (SS) No.58/Kol/2018 herein), Consistent Vyapaar Pvt. Ltd, Patni Capital Market Pvt. Ltd, Surbhi Agri Products Pvt. Ltd, Loyalka Farms Pvt. Ltd [IT (SS) No.67/Kol/2018 herein), Sure Vincom Pvt. Ltd, Vista Merchandise Pvt. Ltd. respectively. The assessees former identical argument raised during the course of hearing is that the said search nowhere found or seized any incriminating evidence forming precondition for initiating section 153A assessment proceedings. Our attention is invited to Annexure-A in Paper Book containing the alleged incriminating material, identical in all these cases marked as PG/1 to PG/8, PG/HD/1, AMJ/PD/1, SKJ/P/1, DKJ/1, DKJ/2 and DKJ/PD-1 along with PG/1 to PG/8 in the relevant assessment order dated 30.12.2017. It is stated that the said incriminating material was nothing but their regular books of account maintained by all searched assessees containing details of their respective share capital. Mr. Surana thereafter contends that no regular assessment stipulated u/s 153A second

proviso was pending qua these two Assessment Year as on the date of search. Learned coordinate bench's decisions in M/s Consistent Vyapaar Pvt. Ltd. in ITA No.65 & 66/Kol/2018 dated 14.09.2018 and ITA No.59&60/Kol/2018 in M/s. Bhansali Fincom Pvt. Ltd. dated 10.10.2018 (supra) are also quoted during the course of hearing that the impugned proceedings in the absence of any incriminating material found or seized during the course of search deserved to be quashed.

5. Ld. CIT-DR has filed written submissions in support of both the lower authorities' action taking recourse to section 153A proceedings. His case is that the search in question conducted in M/s. Patni Group of cases led to the department finding these two assessees to have bogus share capital entries added as unexplained cash credit in issue. Hon'ble apex court's decision in CIT vs. S. Ajit Kumar in Civil Appeal No.10164 of 2010 upholding block assessment in light of section 158BB of the Act on the basis of evidence found in search or other documents and such materials available to Assessing Officer relatable thereto, as sustainable as well as E.N. Gopa Kumar vs. CIT [2016] 75 taxmann.com 215(Kerala), PCIT Delhi-2 vs. Best Infrastructure India Pvt. Ltd. (2018) 94 taxmann.com 115(SC) and M/s. Priyanka Chopra vs. DCIT (2018) 89 taxmann.com 288 (Mum. Trib.) are quoted in support. Mr. Shrihari accordingly seeks to validate the impugned assessment in these two assessees case.

6. We find that all these arguments already stand declined in the coordinate bench order in M/s. Bhansali Fincom (supra) as follows:

"3. The brief facts of this issue is that the assessee is a company carrying on business of dealing in shares and loan transactions. The assessee filed its return of income for the Asst Year 2010-11 on 23.9.2010 declaring total income of Rs 81,676/-. There was a search and seizure operation conducted u/s 132 of the Act at the residential, office premises, bank lockers etc of the Patni Group of cases on 8.3.2016. A search warrant was executed in the name of the assessee. Consequent to the search, notice u/s 153A of the Act was issued on the assessee for the Asst Year 2010-11. In response to the said notice, the assessee filed its return of income on 24.10.2016 declaring total income of Rs 81,676/- . The assessee stated that the time limit for issuance of notice u/s 143(2) of the Act for the Asst Year 2010-11 in respect of the original return filed on 23.9.2010 had expired on

30.9.2011 and hence as on the date of search, the year under consideration (i.e Asst Year 2010-11) would fall under the category of unabated assessment and hence the income assessed originally thereon could not be disturbed unless there is any incriminating material found in the course of search relatable to such assessment year. Infact the assessee had specifically objected before the ld AO that there is absolutely no incriminating materials found during the course of search for the Asst Year 2010-11 and hence the concluded assessment could not be disturbed in the assessment proposed to be completed u/s 153A of the Act. After making this preliminary objection, the assessee however co-operated with filing of requisite details before the ld AO.

3.1. The assessee company received the following payments against share application during the financial year 2009-10 relevant to Asst Year 2010-11 as under:-

M/s Shreyans Vyapar P Ltd	- Rs 25,00,000/-
M/s Nucore Exports P Ltd	- Rs 40,00,000/-
M/s Raj Kavira Mercantile P Ltd	- Rs 10,00,000/-
M/s Rup Tradecom P Ltd	- Rs 25,00,000/-
M/s Corbel Supplier P Ltd	- Rs 50,00,000/-
M/s Cube Trafan P Ltd	- Rs 25,00,000/-
M/s Bakliwal Finvest P Ltd	- Rs 25,00,000/-
M/s Aakansha Advisory Services P Ltd	- Rs 40,00,000/-
M/s Lucky Dealers P Ltd	- Rs 10,00,000/-
M/s RNG Finlease P Ltd	- Rs 25,00,000/-
M/s Rose Securities P Ltd	- Rs 25,00,000/-
M/s Amazing Vinimay P Ltd	- Rs 50,00,000/-
	----- Rs 3,50,00,000/-

3.2. It was argued that admittedly no incriminating materials were found for Asst year 2010-11 in the course of search with regard to share capital and accordingly pleaded not to disturb the originally assessed income, which is same as the returned income. The ld AO however did not heed to the contentions of the assessee and proceeded to frame the assessments u/s 153A of the Act by making an addition towards share capital u/s 68 of the Act in the sum of Rs 3,50,00,000/- on the plea that the assessments to be framed u/s 153A of the Act clears all the decks and would enable the ld AO to assess or reassess the total income as per the provisions of the Act irrespective of incriminating materials found in the search. The ld AO completed the assessment u/s 153A / 143(3) of the Act on 29.12.2017 determining the total income at Rs 3,50,81,680/- after making an addition of Rs. 3,50,00,000/- u/s 68 of the Act on account of share capital.

4. The assessee stated no incriminating materials relating to the share capital or share premium were found during the course of search. The assessee filed all the details with regard to the share capital before the ld AO. It was pleaded that the assessee company had duly proved the necessary three ingredients i.e identity of the share subscribers, genuineness of transactions and creditworthiness of transactions within the meaning of section 68 of the Act and prayed for deletion of the addition made in the sum of Rs 3,50,00,000/-.

5. The ld CITA however confirmed the addition on the validity of addition made towards share capital in the proceedings u/s 153A of the Act for the Asst Year 2010-11 by observing that the addition has been made on the basis of search proceedings by observing as under:-

05. FINDING & DECISION :

1.

The ld AO has very carefully analysed the information received from the investigation wing, and also the various statements given by the directors / main persons of the different companies who have purportedly purchased the shares of the appellant company and also paid huge premium. I also agree with the Ld.AO that the findings of the assessment were based on incriminating documents as the entire modus operandi of the activities of the assessee company was located on the basis of the search action, and therefore the findings of the Ld. AO are also based on incriminating details found during the course of the search operation. Therefore none of the judicial precedents relied upon by the appellant in so far as stating that no incriminating documents were found during the course of the search to warrant any additions come to the assistance of the appellant. These arguments are accordingly rejected. (Underlining provided by us)

2. The Ld. AO has relied on the statements issued by the Directors of the Companies with which the assessee-company had transactions during the relevant assessment year. The Ld. AO has also afforded adequate chance to the appellant to cross-examine these persons. I am not inclined to give any credence to the retraction of the statements by the parties, as these have been made by a well thought out strategy, so that the proceedings can be nullified. It is to be observed that these statements were given voluntarily and had been recorded independently before the Officers of the Wing. In my considered view, mere retraction before any Magistrate would not be binding on the Taxing Authority. Hon'ble Courts have held that any addition based on the statement or admission by the assessee / related party is quite justified (Hara Singh & Co. vs CIT (HP) 230 ITR 169) . It has to be mentioned herein that where a petitioner enters into a voluntary settlement with any Government Agency and the liability to pay tax arises from such settlement, he cannot question the settlement unless and until he can establish that his consent was improperly procured. (Dewan Bahadur Seth Gopal Das Mohta vs The Union of India & Ors (SC) 26 ITR 722). Similarly, and more significantly, in the following judicial precedents, the ratio emerges that for retractions to be valid, the burden has been cast upon the person who is retracting from his statement or admission that coercion, threat or incentive was the reason for such statement which is being retracted.

a.

3.

By making these observations, he upheld the action of the ld AO on merits of the addition towards share capital u/s 68 of the Act as well. Aggrieved, the assessee is in appeal before us.

6. With regard to the preliminary argument of the ld AR that there was no incriminating material found during the course of search with regard to the issue of share capital and share premium, the ld DR argued that the expression 'incriminating material' is not found in the provisions of the Act and it is only the Hon'ble Courts which had imported those words while rendering the decisions. He stated that the Hon'ble Courts are divided on this issue and placed reliance on the decision of the Hon'ble Karnataka High Court in the case of Canara Housing Development Co vs DCIT reported in (2014) 49 taxmann.com 98 (Kar HC) wherein it was held that search assessments could be framed even without the existence of incriminating materials found in the course of search. He argued that the basic foundation for conducting the search is governed by the provisions of section 132 of the Act which has to be read harmoniously with section 153A of the Act. There are three conditions based on which a search action could be initiated u/s 132 of the Act on an assessee. They are :-

Section 132(1) - If the concerned authority has in consequence of information in his possession, has reason to believe that -

- (a) where a person fails to produce the books of accounts and other documents in response to notice u/s 142(1) or summons issued u/s 131(1) of the Act ; or
- (b) where a person fails to comply with the requirements of summons issued u/s 131(1) of the Act ; or
- (c) where a person is in possession of any money, bullion, jewellery or other valuable article or thing and such assets represents either wholly or partly income or property which has not been , or would not be, disclosed for the purposes of the Act (hereinafter referred to as the undisclosed income or property) ;
then the officer , so authorized could conduct a search and proceed as per the requirements laid down in the said section. He argued that the aforesaid three primary conditions for invoking search proceedings cannot be given a go by while framing section 153A assessments and the instant case falls under section 132(1)(c) of the Act.

The provisions of section 153A of the Act use the expression 'assess or reassess total income' and hence the search assessment could be framed u/s 153A of the Act irrespective of any incriminating materials.

6.1. Apart from the above, the ld DR vehemently argued that the Hon'ble Supreme Court had admitted the Special Leave Petition filed by the revenue in the case of Dayawanthi Gupta against the decision rendered by the Hon'ble Delhi High Court in the case of Dayawanthi Gupta reported in 390 ITR 486 (Del). He also submitted that SLP is admitted by the Hon'ble Supreme Court against the decision rendered by the Hon'ble Bombay High Court in the case of Continental Warehousing. Both these SLPs were admitted on the main question as to whether the existence of an incriminating material is relevant for making an addition in section 153A assessment in respect of concluded assessments as on the date of search . Accordingly, he prayed for keeping the appeals in abeyance till matter attains finality from the Hon'ble Supreme Court in this regard.

7. In response to this, the ld AR stated that the assessment for the Asst Year 2010-11 was originally completed u/s 143(1) of the Act as the case was not selected for scrutiny by issuance of notice u/s 143(2) of the Act on or before 30.9.2011. He reiterated the submissions made before the lower authorities with regard to framing of additions in section 153A assessments without any incriminating material found thereon. Reliance was placed on the following decisions in support of his contentions:-

- (a) CIT vs Veerprabhu Marketing Ltd reported in (2016) 73 taxmann.com 149 (Cal HC)
- (b) Decision of this tribunal in the case of ACIT vs Kanchan Oil Industries Ltd in ITA No. 725/Kol/2011 dated 9.12.2015
- (c) CIT vs Kabul Chawla reported in (2016) 380 ITR 573 (Delhi HC)
- (d) CIT vs Continental Warehousing Corporation (Nhava Sheva) Ltd and All Cargo Global Logistics Ltd reported in (2015) 374 ITR 645 (Bom)
- (e) Decision of Hon'ble Apex Court in the case of Kabul Chawla reported in 380 ITR (St.) 64 (SC) wherein SLP of the revenue was dismissed.

8. We have heard the rival submissions. We find it would be necessary to address the preliminary issue of whether the addition could be framed u/s 153A of the Act in respect of a concluded proceeding without the existence of any incriminating materials found in the course of search. At the outset, it is evident from the categorical findings of the ld CITA that there is absolutely no incriminating materials found during the course of search regarding the share capital and share premium received by the assessee company during the year under appeal except the fact that the modus operandi of raising of such capital was discovered in the search action. We find that the ld CITA was only harping on the admission made by certain parties at the time of search without corroborating the same with material evidences found during the course of search. In this regard, the instructions issued by the Central Board of Direct Taxes (CBDT in short) in F.No.

286/2/2003-IT(Inv) dated 10.3.2003 would be relevant to be looked into wherein it is mentioned that while recording statement during the course of search and seizure and survey operations, no attempt should be made to obtain confession as to the undisclosed income. For the sake of convenience and clarity, the relevant instructions dated 10.3.2003 issued by CBDT is reproduced hereunder:-

To
All Chief Commissioners of Income tax (Cadre Contra) &
All Directors General of Income Tax Inv.

Sir,

Sub:- Confession of additional Income during the course of search & seizure and survey operation – regarding

Instances have come to the notice of the Board where assesseees have claimed that they have been forced to confess the undisclosed income during the course of the search & seizure and survey operations. Such confessions, if not based upon credible evidence, are later retracted by the concerned assesseees while filing returns of income. In these circumstances, on confessions during the course of search & seizure and survey operations do not serve any useful purpose. It is, therefore, advised that there should be focus and concentration on collection of evidence of income which leads to information on what has not been disclosed or is not likely to be disclosed before the Income Tax Departments. Similarly, while recording statement during the course of search & seizures and survey operations no attempt should be made to obtain confession as to the undisclosed income. Any action on the contrary shall be viewed adversely.

Further, in respect of pending assessment proceedings also, assessing officers should rely upon the evidences/materials gathered during the course of search/survey operations or thereafter while framing the relevant assessment orders Yours faithfully,

Sd/-

(S. R. Mahapatra]
Under Secretary (Inv. II)

We find that there is absolutely no corroborative evidence found in the course of search by the search team or material evidence brought on record by the ld AO or by the ld CITA in order to give credence to the statement recorded during search. Hence we hold that no addition could be made merely by placing reliance on the statement recorded during search.

The scheme of the act provides for abatement of pending proceedings as on the date of search. It is not in dispute that the assessment for the Asst Year 2010-11 was originally completed u/s 143(1) of the Act and the time limit for issuance of notice u/s 143(2) of the Act had expired and hence it falls under concluded proceeding, as on the date of search. We hold that the legislature does not differentiate whether the assessments originally were framed u/s 143(1) or 143(3) or 147 of the Act. Hence unless there is any incriminating material found during the course of search relating to such concluded year, the statute does not confer any power on the ld AO to disturb the findings given thereon and income determined thereon, as finality had already been reached thereon, and such proceeding was not pending on the date of search to get itself abated. The

provisions of section 153A of the Act are reproduced hereunder for the sake of convenience :-

"[Assessment in case of search or requisition

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, the Assessing Officer shall—

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 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;

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 :

Provided that the Assessing Officer shall assess or reassess the total income in respect of each assessment year falling within such six assessment years."

8.1. We find that the Co-ordinate Bench of Delhi Tribunal in the case of Dy. CIT v. Aggarwal Entertainment (P.) Ltd reported in [\[2016\] 72 taxmann.com 340 \(Delhi - Trib.\)](#) had addressed this aspect. The relevant headnotes is reproduced below:—

"Section 153A, read with section 143, of the Income-tax Act, 1961-Search and seizure - Assessment in case of (in case of section 143(1) assessment)-Assessment year 2004-05-Whether assessment in respect of which return has been processed under section 143(1), cannot be regarded as pending for purpose of section 153A as Assessing Officer is not required to do anything further about such a return and, thus, said assessment cannot be reopened in exercise of power of section 153A-Held yes (Paras 10 and 12) (In favour of assessee)."

8.2. We find that the Co-ordinate Bench of this tribunal in the case of ACIT vs Kanchan Oil Industries Ltd in ITA No. 725/Kol/2011 dated 9.12.2015 reported in 2016-TIOL-167-ITAT-KOL had explained the aforesaid provisions as below:-

"6.4 In our opinion, the scheme of assessment proceedings should be understood in the following manner pursuant to the search conducted u/s. 132 of the Act :-

Notice u/s. 153A of the Act would be issued on the person on whom the warrant of authorization u/s. 132 of the Act was issued for the six assessment years preceding the year of search and assessments thereon would be completed u/s. 153A of the Act for those six assessment years.

In respect of the year of search, notice u/s. 143(2) of the Act would be issued and assessment thereon would be completed u/s. 143(3) of the Act.

In respect of concluded assessments prior to the year of search, no addition could be made in the relevant assessment year unless any incriminating material is found

during the course of search with respect to the relevant assessment year.

Pursuant to the search u/s. 132 of the Act, the pending proceedings would get abated. In respect of abated assessments, the total income needs to be determined afresh in accordance with the provisions of section 153A and other provisions of the Act.

6.4.1 The concluded assessments for the purpose of section 153A of the Act shall be -

assessment years where assessments are already completed u/s. 143(1) and time limit for issuance of notice u/s. 143(2) of the Act has expired or;

assessment years where assessments are already completed u/s. 143(3) of the Act ;

unless they are reopened u/s. 147 of the Act for some other purpose in both the scenarios stated above.

6.4.2 The scheme of assessment proceedings contemplated u/s. 153A of the Act are totally different and distinct from the proceedings contemplated u/s. 147 of the Act and these procedures of assessment operate in different fields and have different purposes to be fulfilled altogether.

6.4.3 The expression 'assess or reassess' stated in section 153A(1)(b) has to be understood as below:-

'assess' means assessments to be framed in respect of abated assessment years irrespective of the fact whether there are any incriminating materials found during the course of search with respect to relevant assessment years ;

'reassess' means assessments to be framed in respect of concluded assessment years where incriminating materials were found during the course of search in respect of the relevant assessment year."

8.3. We also find that recently the Hon'ble Delhi High Court in the case of CIT vs Kabul Chawla reported in (2016) 380 ITR 573 (Del) held as under:-

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

Once a search takes place under section 132 of the Act, notice under section 153A(1) will have to be mandatorily issued to the person searched requiring him to file returns for six AYs immediately preceding the previous year relevant to the AY in which the search takes place.

Assessments and reassessments pending on the date of the search shall abate. The total income for such AYs will have to be computed by the Ld AOs as a fresh exercise.

The Ld AO will exercise normal assessment powers in respect of the six years previous to the relevant AY in which the search takes place. The Ld AO has the power to assess and reassess the 'total income' of the aforementioned six years in

separate assessment orders for each of the six years. In other words there will be only one assessment order in respect of each of the six AYs "in which both the disclosed and the undisclosed income would be brought to tax".

Although Section 153A does not say that additions should be strictly made on the basis of evidence found in the course of the search, or other post-search material or information available with the Ld AO which can be related to the evidence found, it does not mean that the assessment "can be arbitrary or made without any relevance or nexus with the seized material. Obviously an assessment has to be made under this Section only on the basis of seized material."

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

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

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

38. The present appeals concern AYs 2002-03, 2005-06 and 2006-07, on the date of the search the said assessments already stood completed. Since no incriminating material was unearthed during the search, no additions could have been made to the income already assessed.

8.4. We find that the decision relied upon by the ld DR in the case of CIT vs Anil Kumar Bhatia reported in (2013) 352 ITR 493 (Del) does not in any manner advance the case of the revenue as admittedly the Hon'ble Delhi High Court in para 24 of its order had held as under:-

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

Hence the heavy reliance placed by the Ld CITA in his order on the decision and by the ld DR before us does not advance the case of the revenue.

8.5. The ld DR also relied on the recent decision of the Hon'ble Kerala High Court in the case of E.N.Gopakumar vs CIT reported in (2016) 75 taxmann.com 215 (Kerala) in support of his contentions. We find that the decision of Hon'ble Delhi High Court in the case of CIT vs Kabul Chawla reported in (2016) 380 ITR 573 (Del) had duly considered the decisions of CIT vs Anil Kumar Bhatia reported in (2013) 352 ITR 493 (Del) ; CIT vs Chetan Das Lachman Das reported in (2012) 211 Taxman 61 (Del HC) ; Madugula Venu vs DIT reported in (2013) 215 Taxman 298 (Del HC) ; Canara Housing Development Co. vs DCIT reported in (2014) 49 taxmann.com 98 (Kar HC) ; Filatex India Ltd vs CIT reported in (2014) 229 Taxman 555 (Del HC) ; Jai Steel (India) vs ACIT reported in (2013) 219 Taxman 223 (Del HC) ; CIT vs Murli Agro Products Ltd reported in (2014) 49 taxmann.com 172 (Bom HC) ; CIT vs Continental Warehousing Corporation (Nhava

Sheva) Ltd reported in (2015) 374 ITR 645 (Bom HC) and All Cargo Global Logistics Ltd vs DCIT reported in (2012) 137 ITD 287 (Mum ITAT) (SB).

We also find that against the decision of the Hon'ble Delhi High Court in the case of Kabul Chawla reported 380 ITR 573 (Del) , the revenue preferred Special Leave Petition before the Hon'ble Supreme Court and the same was dismissed by the Hon'ble Apex Court which is reported in 380 ITR (St.) 4 (SC). Hence it could be safely concluded that the decision of Hon'ble Delhi HC in the case of Kabul Chawla supra would have to be considered on the impugned issue and in any case, the Hon'ble Supreme Court in the case of CIT vs Vegetable Products Ltd reported in 88 ITR 192 (SC) had held that if two reasonable constructions of a taxing provision are possible, that construction which favours the assessee must be adopted.

8.6. We also find that the Hon'ble Jurisdictional High Court recently in the case of Principal CIT vs M/s Salasar Stock Broking Ltd in G.A.No. 1929 of 2016 ITAT No. 264 of 2016 dated 24.8.2016 had endorsed the aforesaid view of Hon'ble Delhi High Court in Kabul Chawla's case and also placed reliance on its own decision in the case of CIT vs Veerprabhu Marketing Ltd reported in (2016) 73 taxmann.com 149 (Cal HC). Infact the decision rendered by the Hon'ble Jurisdictional High Court was in the context of Section 153A assessment and the decision of Veerprabhu Marketing supra was in the context of section 153C proceedings. In view of the decision of the Hon'ble Jurisdictional High Court , we are not inclined to accept the argument of the ld DR to keep these appeals in abeyance till the finality is reached from the Hon'ble Supreme Court.

8.7. We find that the provisions of section 132 of the Act relied upon by the ld DR would be relevant only for the purpose of conducting the search action and initiating proceedings u/s 153A of the Act. Once the proceedings u/s 153A of the Act are initiated, which are special proceedings, the legislature in its wisdom bifurcates differential treatments for abated assessments and unabated assessments. At the cost of repetition, we state that in respect of abated assessments (i.e pending proceedings on the date of search) , fresh assessments are to be framed by the ld AO u/s 153A of the Act which would have a bearing on the determination of total income by considering all the aspects, wherein the existence of incriminating materials does not have any relevance. However, in respect of unabated assessments, the legislature had conferred powers on the ld AO to just follow the assessments already concluded unless there is an incriminating material found in the search to disturb the said concluded assessment. In our considered opinion, this would be the correct understanding of the provisions of section 153A of the Act , as otherwise, the necessity of bifurcation of abated and unabated assessments in section 153A of the Act would become redundant and would lose its relevance. Hence the arguments advanced by the ld DR in this regard deserves to be dismissed.

8.8. In view of the aforesaid findings and respectfully following the judicial precedents relied upon hereinabove, we hold that the assessment framed u/s 143(1) of the Act for the Asst Year 2010-11, which was unabated / concluded assessment, on the date of search, deserves to be undisturbed in the absence of any incriminating material found in the course of search and accordingly the addition made on account of share capital and share premium u/s 68 of the Act is hereby directed to be deleted. It is not in dispute that there was absolutely no incriminating material found during the course of search in the instant case with regard to the issue of share capital, share premium except understanding the discovery of modus operandi of raising bogus share capital based on the certain statements recorded from entry operators in some cases in West Bengal. Since the issue is addressed on preliminary ground of absence of incriminating materials, we refrain to give our findings on the merits of the addition u/s 68 of the Act for the Asst Year 2010-11. Accordingly the grounds raised by the assessee in this regard are allowed for the Asst Year 2010-11.

9. The preliminary issue involved in this appeal is as to whether in the facts and circumstances of the case, the ld CITA was justified in confirming the disallowance of trading loss on sale of shares of M/s Blue Circle in the sum of Rs 38,45,844/- for the Asst Year 2013-14 in the assessment framed u/s 153A of the Act without having any incriminating material in that regard.

10. The brief facts of this issue is that the assessee is a company carrying on business of dealing in shares and loan transactions. The assessee filed its return of income for the Asst Year 2013-14 on 19.9.2013 declaring total income of Rs 8,05,764/-. This return was processed u/s 143(1) of the Act on 31.10.2013 determining refund of Rs 2,38,073/- including interest u/s 244A of the Act to the tune of Rs 25,500/-. There was a search and seizure operation conducted u/s 132 of the Act at the residential, office premises, bank lockers etc of the Patni Group of cases on 8.3.2016. A search warrant was executed in the name of the assessee. Consequent to the search, notice u/s 153A of the Act was issued on the assessee for the Asst Year 2013-14. In response to the said notice, the assessee filed its return of income on 24.10.2016 declaring total income of Rs 8,05,764/-. The assessee stated that the time limit for issuance of notice u/s 143(2) of the Act for the Asst Year 2013-14 in respect of the original return filed on 19.9.2013 had expired on 30.9.2014 and hence as on the date of search, the year under consideration (i.e Asst Year 2013-14) would fall under the category of unabated assessment and hence the income assessed originally thereon could not be disturbed unless there is any incriminating material found in the course of search relatable to such assessment year. Infact the assessee had specifically objected before the ld AO that there is absolutely no incriminating materials found during the course of search for the Asst Year 2013-14 and hence the concluded assessment could not be disturbed in the assessment proposed to be completed u/s 153A of the Act. After making this preliminary objection, the assessee however co-operated with filing of requisite details before the ld AO.

11. The break up of computation of total income of the assessee is as under:-

Income from Business or Profession	- Rs 5,31,144/-
Income from Short Term Capital Gains without STT	- Rs 2,74,620/-
Income from Other sources (exempt dividend- Rs 21,000)- Rs	0/-

Total income under normal provisions of the Act	Rs 8,05,764/-

<u>Computation of book profits u/s 115JB of the Act</u>	
Net Profit as per Profit and Loss Account	- Rs 7,84,421/-
Add: Contingent Provision against standard assets – 12,195	
Expenses disallowed u/s 14A	- 26,622

	- Rs 38,817/-

	Rs 8,23,238/-
Less: Dividend exempt u/s 10(34)	Rs 21,000/-

Book Profits u/s 115JB of the Act	Rs 8,02,238/-

11.1. The details of income and expenditure of the assessee are as under:-

Income

Revenue from Operations	
Sale of Equity Shares	43,89,516

<i>Other Income</i>	
<i>Interest income on Non-Current Investment</i>	4,03,210
<i>Interest income on Others</i>	49,21,406

	53,24,616
<i>Net Gain / Loss on sale of Non Current Investment</i>	
<i>Investment</i>	2,74,620
<i>Dividend Received</i>	21,000
	----- 56,20,236

<i>Total Revenue (A)</i>	1,00,09,752

<u><i>Expenses</i></u>	
<i>Purchase of Equity Shares (Stock in Trade)</i>	82,35,360
<i>Salary and Bonus</i>	6,38,457
<i>Interest on Loan</i>	1,18,356
<i>Depreciation and amortization expenses</i>	13,834
<i>Other Expenses</i>	
<i>Rates & Taxes</i>	4,400
<i>Audit Fees</i>	12,361
<i>Internal Audit Fees</i>	5,618
<i>Travelling Expenses</i>	29,127
<i>Miscellaneous Expenses</i>	1,55,623
<i>Contingent Provision against standard assets</i>	12,195
	----- 2,19,324

<i>Total Expenses (B)</i>	92,25,331

<i>Net Profit (A) – (B)</i>	7,84,421

11.2. The assessee purchased 200000 equity shares of M/s Blue Circle Services Ltd during the year for Rs 82,35,360/- and sold the same during the year for Rs 43,89,516/-. Since the primary business of the assessee is dealing in shares, the loss incurred on sale of such shares of Rs 38,45,844/- was claimed as business loss and the same was set off with other income of the assessee in the return of income. The assessee submitted that the transactions are evidenced by documents including copy of purchase and sale bills issued by the registered and recognized share broker, demat account statements, bank statements, etc and all these transactions had duly suffered levies and duties like brokerage, service tax, securities transaction tax (STT) etc. The assessee specifically objected that the statements recorded from third parties cannot be relied upon in the proceedings u/s 153A of the Act. Moreover, it was pointed out that the said statements have been subsequently retracted. However, the ld AO observed that the statement in question has evidentiary value and held that the assessee could not submit any explanation and the modus operandi of the assessee company to prove that the bogus loss is booked for reducing the taxable income with sole motive to avoid tax. He further held that on analysis of the transactions reveal that they were made in a pre-arranged manner. The ld AO sought to treat the shares of M/s Blue Circle Services Ltd as a penny stock and accordingly the loss on sale of shares of Rs 38,45,844/- was a pre-arranged one and hence disallowed the same in the assessment framed u/s 153A of the Act on 31.12.2017 for the Asst Year 2013-14. This action of the ld AO was upheld by the ld CITA. Aggrieved, the assessee is in appeal before us for the Asst Year 2013-14.

12. We have heard the rival submissions. At the outset, there is absolutely no incriminating material found during the course of search with regard to the impugned issue of trading loss on sale of shares of M/s Blue Circle Services Ltd. Admittedly, Asst Year 2013-14 was a concluded assessment on the date of search. Hence respectfully following the aforesaid observations given for the Asst Year 2010-11 with regard to disturbing the concluded assessments in the absence of incriminating materials found during search, we hold that the disallowance of trading loss on sale of shares of Rs 38,45,844/- made by the Id CITA in the assessment framed u/s 153A of the Act cannot be made as per law. Hence the disallowance made thereon in the impugned assessment is hereby directed to be deleted for want of incriminating materials. Since the relief is granted to the assessee on the preliminary ground of want of incriminating materials, we refrain to give our finding on merits of the addition for the Asst Year 2013-14 and hence the adjudication of other grounds on merits does not arise. Accordingly, the grounds raised by the assessee are allowed for Asst Year 2013-14."

7. We adopt the above detailed reasoning mutatis mutandis to hold that both the lower authorities have heard in law in initiating section 153A proceedings against these two assessees since no regular assessment was pending against them u/s 153A(1) 2nd Proviso of the Act. Their returns filed within due date(s) already form part of record before us whereas the search took place on 08.03.2016. We make it clear that section 158BB of the Act does not apply since it formed part of the block assessment proceedings no more applicable after 01.06.2003. We therefore quash these two impugned assessments to be not sustainable in the eyes of law. The assessees' other identical substantive grounds challenging correctness of section 68 addition of unexplained share capital on merits are rendered infructuous. These two appeals are allowed.

Order is pronounced in the open court on 14.11.2018.

Sd/-
(P. M. JAGTAP)
VICE PRESIDENT

Sd/-
(S. S. GODARA)
JUDICIAL MEMBER

कोलकाता /Kolkata;

दिनांक/ Date: 14/11/2018

(RS, Sr.PS)

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/The Appellant- (i) M/s. Grade Traders Pvt. Ltd.
(ii) M/s. Loyalka Farms Pvt. Ltd.
2. प्रत्यर्थी/ The Respondent- DCIT, Central Circle-3(3), Kolkata.
3. आयकरआयुक्त(अपील) / The CIT(A),
4. आयकरआयुक्त/ CIT
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, कोलकाता/ DR, ITAT,
Kolkata
6. गार्डफाईल / Guard file.
सत्यापितप्रति

True Copy

By Order

Senior Private Secretary,
Head of Office/D.D.O,
I.T.A.T, Kolkata Benches,
Kolkata.