आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL,
JAIPUR BENCHES , JAIPUR

श्री भागचन्द, लेखा सदस्य एव श्री कुल भारत, न्यायिक सदस्य के समक्ष
BEFORE: SHRI BHAGCHAND, AM & SHRI KUL BHARAT, JM

आयकर अपील सं./ITA No. 388 & 389/JP/2017
निर्धारण वर्ष/Assessment Year: 2012-13 & 2013-14

M/s. Motisons Global Pvt. Ltd 7th Floor, SB-110, Motisons Tower Lal Kothi, Tonk Road, Jaipur	बनाम Vs.	The ACIT Central Circle-2 Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AAFCM 1708 B		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

आयकर अपील सं./ITA No. 486, 487, 488, & 489/JP/2017
निर्धारण वर्ष/Assessment Year: **2009-10, 2011-12 2012-13 & 2013-14**

The DCIT Central Circle-2 Jaipur	बनाम Vs.	M/s. Motisons Global Pvt. Ltd 7th Floor, SB-110, Motisons Tower Lal Kothi, Tonk Road, Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AAFCM 1708 B		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/Assessee by: Shri Vijay Goyal, CA and
Shri Gulshan Agarwal, CA
राजस्व की ओर से/ Revenue by:Smt. Rolee Agarwal, CIT - DR
Shri Praveen Kumar Mittal, DCIT
Shri Kamlesh Kumar Meena, DCIT

सुनवाई की तारीख/ Date of Hearing : 11/10/2017
घोषणा की तारीख/ Date of Pronouncement : 02 /11/2017

आदेश/ ORDER

PER BENCH

The Assessee has filed appeal for the A.Y. 2012-13 and 2013-14 and the Revenue have filed the four appeals for the A.Y. 2009-10, 2011-

12 to 2013-14 against four separate orders of the ld. CIT(A)-4, Jaipur dated 31-03-2017.

2.1 First of all, we take up the appeal of the Revenue in ITA No. 486/JP/2017 for the Assessment Year 2009-10 wherein the Revenue has raised the solitary ground as under:-

> ''Whether on the facts and in the circumstances of the case the ld. CIT(A) was right in deleting the addition of Rs. 2,75,00,000/- made u/s 56(1) of the Act ignoring the fact that assets of the assessee company don't commensurate to premium charged and further ignoring the fact that neither any business activity was performed nor any business income has been shown by the assessee.

2.2 Apropos solitary ground of the Revenue, the AO made the addition of Rs.2,75,00,000/- u/s 56(1) of the Act in the hands of the assessee company by observing as under:-

> ''16. Having dealt with each of the contention of the assessee and having found the same to be untenable it is important to place on record certain aspects which have a bearing on the issue at hand. It is true that the apparent must be considered real until it is shown that there are reasons to believe that the apparent is not the real. In a case of the present kind a party who relies on a recital in a deed has to establish the truth of those recitals, otherwise it will be very easy to make self-serving statements in documents either executed or taken by a party and rely on those recitals. If all that an assessee who wants to evade tax has to have some recitals made in a document either executed by him or executed in his favour then the door will be left wide open to evade tax. A little probing was sufficient in the present case to show that the apparent was not the real. The taxing authorities were not required to put on blinkers while looking at the documents produced before them. They were not entitled to look into the

surrounding circumstances to find out the reality of the recitals made in those documents.

17. In the above back ground of the facts and circumstances surrounding this case, it is hereby held that the receipt of share capital and share premium was part of a colourful transaction by way of which a sum of Rs. 2,75,00,000/- was introduced into the books of the assessee company in the form of share premium attached to the share capital. As discussion above, the premium of Rs. 190/- per share was not justified at all on the basis of absolutely no assets, no business activity, no income, no net worth nor any promise for creation of any assets, business activity, income or net worth in the future

Accordingly, the charging and receipt of share premium/ share capital to the tune of Rs. 2,75,00,000/- is held to be income of the assessee company in the nature of income envisaged u/s 56(1) of the Income Tax Act, 1961. The same is added back to the total income of the assessee.''

2.3 In first appeal, the ld. CIT(A) has deleted the addition of Rs. 2,75,00,000/- made by the AO by observing at pages 96 & 97 of his order as under:-

''3.2.2 I have considered assessee's submission and carefully gone through assessment order. I have also take a note of factual matrix of the case as well as applicable case laws relied upon. I have already given a detailed findings in para 2.1.4.7 wherein total of Rs. 8,71,97,727/- has been sustained in the hands of M/s. . Motisons Global Pvt. Ltd, M/s. Motisons Entertainment Pvt. Ltd, M/s. Motisons Buildtech Pvt. Ltd and M/s. Shivansh Buildtech Pvt. Ltd, details of which are as under:-

Name of Appellant Company	ITA No.	A.Y.	Addition made by AO	Addition sustained	Addition deleted/Relief given
Motisons Global Pvt Ltd	753/14-15	2009-10	2,75,00,000	-	2,75,00,000
Motisons Global Pvt Ltd	754/14-15	2011-12	6,96,50,000	-	6,96,50,000
Motisons Global Pvt Ltd	767/14-15	2012-13	42,07,29,600	5,94,47,727	36,12,81,873
Motisons	755/14-15	2013-14	4,41,00,000	50,50,000	3,90,50,000

Global Pvt Ltd					
Motisons Entertainment (I) Pvt. Ltd	760/14-15	2009-10	3,40,00,000	-	3,40,00,000
Motisons Entertainment (I) Pvt. Ltd	766/14-15	2011-12	1,95,00,000	-	1,95,00,000
Motisons Entertainment (I) Pvt. Ltd	756/14-15	2012-13	7,78,00,000	1,41,50,000	6,36,50,000
Motisons Buildtech Pvt. Ltd	758/14-15	2009-10	3,03,00,000	-	3,03,00,000
Motisons Buildtech Pvt. Ltd	759/14-15	2012-13	3,68,27,500	82,00,000	2,86,27,500
Godawari Estates Pvt. Ltd	769/14-15	2010-11	2,00,00,000	-	2,00,00,000
Godawari Estates Pvt. Ltd	768/14-15	2012-13	10,30,00,000	-	10,30,00,000
Bholenath Real Estates Pvt. Ltd.	770/14-15	2009-10	2,90,00,000	-	2,90,00,000
Rainbow Buildcon Pvt. Ltd	757/14-15	2009-10	2,00,00,000	-	2,00,00,000
Shivansh Buildcon Pvt. Ltd	771/14-15	2012-13	90,00,000	3,50,000	86,50,000
			94,14,07,100	8,71,97,727	85,42,09,373

In view of the above facts and circumstances of the case as discussed above, addition of Rs. 2,75,,00,000/- made on a/c of bogus share capital in the hands of M/s. Motisons Global Pvt. Ltd is hereby deleted. Assessee gets relief in Gr No. 2 & 3.''

Para 2.1.4.7 reads of ld. CIT(A)'s order as under:-

''2.1.4.7 In view of the above findings, it is also seen that this cash /DD was deposited at 4th Channel of source/ stage. This money came to the hands of some of appellant companies through the six companies assessed in Jaipur. However, on perusal of written submissions and compliance to show cause letter, it is also seen that the assessee has not controverted the facts narrated by Shri Santosh Choube, Shri Rajesh Kr Singh and Shri Ajit Sharma and also could not

satisfactorily explain the reasons of cash deposits made to those accounts. Therefore, duly considering those facts as evidences (both documentary & oral) gathered during search and & Post-search operation, addition to the extent of Rs. 8,71,97,727/- is sustained and balance is deleted, details given as under:-

Name of Appellant Company	ITA No.	A.Y.	Addition made by AO	Addition sustained	Addition deleted/Relief given
Motisons Global Pvt Ltd	753/14-15	2009-10	2,75,00,000	-	2,75,00,000
Motisons Global Pvt Ltd	754/14-15	2011-12	6,96,50,000	-	6,96,50,000
Motisons Global Pvt Ltd	767/14-15	2012-13	42,07,29,600	5,94,47,727	36,12,81,873
Motisons Global Pvt Ltd	755/14-15	2013-14	4,41,00,000	50,50,000	3,90,50,000
Motisons Entertainment (I) Pvt. Ltd	760/14-15	2009-10	3,40,00,000	-	3,40,00,000
Motisons Entertainment (I) Pvt. Ltd	766/14-15	2011-12	1,95,00,000	-	1,95,00,000
Motisons Entertainment (I) Pvt. Ltd	756/14-15	2012-13	7,78,00,000	1,41,50,000	6,36,50,000
Motisons Buildtech Pvt. Ltd	758/14-15	2009-10	3,03,00,000	-	3,03,00,000
Motisons Buildtech Pvt. Ltd	759/14-15	2012-13	3,68,27,500	82,00,000	2,86,27,500
Godawari Estates Pvt. Ltd	769/14-15	2010-11	2,00,00,000	-	2,00,00,000
Godawari Estates Pvt. Ltd	768/14-15	2012-13	10,30,00,000	-	10,30,00,000
Bholenath Real Estates Pvt. Ltd.	770/14-15	2009-10	2,90,00,000	-	2,90,00,000
Rainbow Buildcon Pvt. Ltd	757/14-15	2009-10	2,00,00,000	-	2,00,00,000
Shivansh Buildcon Pvt. Ltd	771/14-15	2012-13	90,00,000	3,50,000	86,50,000
			94,14,07,100	8,71,97,727	85,42,09,373

It is pertinent to mention here that M/s. Mayukh Vinimay Pvt.Ltd received share application of Rs. 10,54,95,000/- in AY 2009-10 which was added as income of M/s.Mayukh Vinimay Pvt. Ltd ind A.Y. 2009-10. Thereafter in subsequent years the part of the funds owned by this company was invested in the companies under appeal as under:-

S.N.	Name of company (under your appeal)	Assessment Year	Amount
1.	Motisons Global Pvt. Ltd	2012-13	6,93,49,800
2.	Motisons Global Pvt. Ltd	2013-14	2,24,50,000
3.	Motisons Entertainment (India)Pvt ltd.	2012-13	1,55,00,000
	TOTAL		10,72,29,800

Further it is also submitted that addition made by the AO tantamount to double addition. It is also mentioned here that as per Ld. ARs request, appellate proceedings in case of M/s. MayukhVinimay Pvt. Ltd have been kept in abeyance till the disposal of appeal by Hon'ble ITAT.

In view of aforementioned findings, now additions made by the AO are being discussed with respect to grounds of appeal raised by the respective assessee in para below.''

2.4 During the course of hearing, the ld. DR supported the order of the AO and submitted that the order of the ld. CIT(A) may be set aside .

2.5 On the other hand, the ld.AR supported the order of the ld. CIT(A) for which the ld.AR of the assessee filed the following written submission praying therein to dismiss the appeal of the department.

''2.01.2 Submission of assessee:-

a) During the year under consideration the assessee allotted 69,650 equity shares of Rs. 10 each to various companies at a premium of Rs. 990/- per share detail of which is as under: -

Sr. No.	Name	No. of Shares alloted/ applied during the year	Amount Adjusted against share capital	Rate per share	Amount adjusted against share premium	Rate of premium per share	Issue price of the share	Total Consideration Received
1	Sanjay Chhabra	200000	20,00,000	10	80,00,000	40	50	1,00,00,000
2	Sandeep Chhabra	200000	20,00,000	10	80,00,000	40	50	1,00,00,000
3	Bholenath Traders Pvt. Ltd	12500	1,25,000	10	23,75,000	190	200	25,00,000
4	Debraj Vincom Pvt. Ltd	7500	75,000	10	14,25,000	190	200	15,00,000
5	Kingfisher Vinimay Pvt. Ltd	10000	1,00,000	10	19,00,000	190	200	20,00,000
6	Nawab Vyapar Pvt. Ltd	25000	2,50,000	10	47,50,000	190	200	50,00,000
7	Reality Merchant Pvt. Ltd	23500	2,35,000	10	44,65,000	190	200	47,00,000
8	Sanmukh Vincom Pvt. Ltd	7500	75,000	10	14,25,000	190	200	15,00,000
9	Shreya Tie Up Pvt. Ltd	26500	2,65,000	10	50,35,000	190	200	53,00,000
10	Victor Tradcom Pvt. Ltd	25000	2,50,000	10	47,50,000	190	200	50,00,000
	Total	**5,37,500**	**53,75,000**		**4,21,25,000**			**4,75,00,000**

b) Initially vide show cause notice dated 06.02.2015 **(Copy at PB Page 93-96)** the ld. AO opined that entire share capital/share premium of Rs. 4,75,00,000/- should be added in total income of the assessee but after considering the submission and details of the assessee the share capital/share premium if Rs. 2,00,00,000/- received from Shri Sanjay Chhabra and Shri Sandeep Chhabra was treated as explained and the amount of Rs. 2,75,00,000/- received from various companies was added as income of the assessee.

c). The ld. AO has not made the addition under the deeming provisions of section 68 of Income Tax Act. The ld AO made the addition by applying the provisions of section 56(1) of Income Tax Act on the ground that the assets of the assessee company don't commensurate to premium charged and any business activity was not performed or any business income has not been shown by the assessee. The ld CIT(A) has not confirmed the addition made by ld AO by applying the provisions of section 56(1) of Income Tax Act, on the basis of his detailed findings at **page 38-42 of his order. The assessee relies on the findings of ld CIT(A).**

d) **Justification of Charging share premium**

The assessee has submitted the justification for charging the share premium which is summarized as under: -

Name of Company	**Reason for Charging Share Premium**
Motisons Global Pvt. Ltd	1. Owing a big and valuable land in the heart of city at Lal Kothi, Tonk Road, Jaipur and constructing one of the most beautiful building of Jaipur city thereon. 2. Goodwill of Motisons Group.

e) Share premium/Capital is capital receipt:

If shares are issued at premium then capital receipt aggregate amount of premium is to be transferred to an account called the share premium account. This share premium account is not distributable as income just like as any other capital assets. On winding up, the surplus monies in the share premium account is to be returned to the share holders as capital. So long as the company is a going concern, the monies in share premium account can never be returned to the shareholders except through the medium of a reduction petition, or, in other words, except under exactly the same conditions as those under which any other capital asset can reach the shareholders hands. Distribution of share premium amount is not permitted through dividend. It is taken out of the category of divisible profits. The provisions in respect of issue of shares at premium are the same in the old company Act as well as in

the new company Act. Hence Companies Act clearly mentions that amount received as premium is capital receipt and not a revenue receipt. The share premium is also verifiable from returns of allotment submitted in ROC. As per departmental circular (MCA) No. 3/77 dated 15.04.1977 the monies in the share premium account cannot be treated as free reserves, as they are in the nature of capital reserves.

f) On the issue of shares at premium, the ld. ITAT, Mumbai Bench in the case of **ACIT V/s Gagandeep Infrastructure Pvt. Ltd. 2014-T10L-656-ITAT-Mum (PB pg 354-359 of case laws)** observed that issue of shares at premium is always a commercial decision which does not require any justification. **The finding of the ITAT was confirmed by Mumbai High Court in its decision dated 20.03.2017 in appeal No. 1613 of 2014. PB page 306-366 /Case Laws)** Further the premium is a capital receipt which has to be dealt with in accordance with section 78 of companies Act 1956. Further the company is not required to prove the genuineness, purpose or justification for charging premium of shares, share premium by its very nature is a capital receipts and is not income for its ordinary sense. In the case before Mumbai bench has to consider a case where premium of Rs.190 per share was charged. The Tribunal observed as under (**pg 358 to 359/Case laws)**:

> *"11. We have carefully perused the orders of the lower authorities. In our considered view, the issue of shares at premium is always a commercial decision which does not require any justification. Further the premium is a capital receipt which has to be dealt with in accordance with Sec. 78 of the Companies Act, 1956. Further, the company is not required to prove the genuineness, purpose or justification for charging premium of shares, share premium by its very nature in a capital receipts and is not income for its ordinary sense. It is not in dispute that the assessee had filed all the requisite details/documents which are required to explain credits in the books of accounts by the provisions of Sec. 68 of the Act. The assessee has successfully established the identity of the companies who have purchased shares at a premium. The assessee has also filed bank details to explain the source of the share holders and the genuineness of the transaction was also established by filing copies of share application forms and Form No. 2 filed with the Registrar of Companies. The entire dispute revolves around the fact that the assessee has charged a premium of 190/- per share. No doubt a non-est company or a zero balance sheet company asking for 190/- per share defies all commercial prudence but at the same time we*

cannot ignore the fact that it is a prerogative of the Board of Directors of the company to decide the premium amount and it is the wisdom of the share holders whether they want to subscribe to such a heavy premium. The Revenue authorities cannot question the charging of such huge premium without any bar from any legislated law of the land. The amendment has been brought in the Income Tax Act under the head "Income from other sources" by inserting Clause (viib) to Sec. 56 of the Act wherein it has been provided that any consideration for issue of shares, that exceeds the fair value of such shares, the aggregate consideration received for such shares as exceeds the fair market value of the shares shall be treated as the income of the assessee but the legislature in its wisdom has made this provision applicable w.e.f 1.4.2013 i.e. on and from A.Y. 2013-14. In so far as the year under consideration is concerned, the transaction has to be considered in the light of the provisions of Sec. 68 of the Act. There is no dispute that the assessee has given details of names and addresses of the share holders, their PAN Nos, the bank details and the confirmatory letters.

11.1. Considering all these undisputed facts, it can be safely concluded that the initial burden of proof as rested upon the assessee has been successfully discharged by the assessee . Even if it is held that excess premium has been charged, it does not become income as it is a capital receipt. The receipt is not in the revenue field. What is to be probed by the AO is whether the identity of the assessee is proved or not. In the case of share capital, if the identity is proved, no addition can be made u/s. 68 of the Act. We draw support from the decision of the Hon'ble Supreme Court in the case of Loevely Exports Pvt. Ltd. 317 ITR 218. We, therefore do not find any error or infirmity in the findings of the Ld. CIT(A). Ground No. 1 is accordingly dismissed."

g) As per provisions of section 56(1) of Income Tax Act, 1961 *"Income of every kind which is not to be excluded from the total income under this Act shall be chargeable to income-tax under the head "Income from other sources", if it is not chargeable to income-tax under any of the heads specified in section 14, items A to E."* In the case of the assessee company, the amount was received from investors were against share application and the same is capital receipt which was adjusted against share capital and share premium. The money so received to assessee company was capital receipt and was not revenue receipt, therefore the same cannot be taxed in the hands of assessee company under section 56(1) of Income Tax Act, 1961 because this section deal with income and not with capital receipts. The investors who subscribed the share

capital of assessee company is also showing the amount paid to assessee as their investment in shares of assessee company and necessary documents in this regard was submitted to ld. AO. Therefore the assessee has proved with documentary evidences that the amount was received against share application i.e. capital receipt, therefore the same cannot be treated as income of the assessee. Further for treating the share capital/share premium as income of the assessee company no cogent reason has been given by ld. AO. Further, there is no deeming fiction has been given in section 56(1) of Income Tax Act, 1961 wherein the income can be taxed under deeming provision.

h) By Finance Act 2012 a new clause (viib) was inserted in 56(2). **Memorandum explaining the provisions in Finance Bill 2012 stated as under:-**

Share premium in excess of the fair market value is to be treated as income.

"Section 56(2) provides for the specific category of incomes that shall be chargeable to income tax under the head "income from other sources". It is proposed to insert a new clause in 56(2). The new clause will apply where, accompany, not being a company in which the public are substantially interested, receives, in any previous year, from any person being a resident, any consideration for issue of shares. In such a case if the consideration received for issue of shares exceeds the face value of shares, the aggregate consideration received for such shares as exceeds the fair market value of the shares shall be chargeable to income Tax, under the head "income from other sources".

This amendment effective from 1st April 2013 and will accordingly apply in relation to assessment year 2013-14 and subsequent Assessment years. In the memorandum it is mentioned that premium in excess of fair market value is to be treated as income. This suggests that premium in excess of fair market value was not an income but is to be treated as income due to amended provision. Before the amendment, consideration received as premium was not income. The legislature in its wisdom required the share premium in excess of fair market value to be income from Assessment year 2013-14 and not the

entire premium to be treated as income. **CBDT vide circular No.3 of 2012 dated 12.06.2012 has also mentioned that provisions of 56(2)(vii b) will be applicable for Assessment year 2013-14 onward**. Therefore, amendment in section 56(2)(viib) of Income Tax Act, 1961 effective from 1st April 2013 and will accordingly apply in relation to assessment year 2013-14 and subsequent assessment years and the provisions of this section cannot be made applicable in previous years. In this regard the ratio has been laid down in following judgments: -

a) By Finance Act 1994, section 55(2) was amended to provide that cost of acquisition of a tenancy right will be taken as Nil. **The Hon'ble Apex Court in the case of D.P. Sandu Bros. Chembur (P) Ltd (supra),** held that amendment took effect from 1st April, 1995 and therefore will not be applicable for A.Y. 1987-88. Similar finding has been recorded by Hon'ble Raj, High Court in the case of Gotan Lime Stone Khanij Udhyog.

The ratio of law in respect of amendment in 55(2) being held as prospective is applicable for 56(2)(vibe) and hence share premium in excess of fair market value can not be held taxable for A.Y. 2011-12.

b) Recently the **Hon'ble Apex Court in the case of M.G. Pictures (Madras) Ltd V/s ACIT 373 ITR 39** held that amendment in section 40A(3) w.e.f. from 1.4.1996 is prospective and cannot be applied to previous years of Block period prior to F.Y. 1995-96.

c) The figure of 10,000 was changed to 20,000 u/s 40A(3) of Income Tax Act, 1961 and 269SS of Income Tax Act, 1961 by Direct Tax Laws (Amendment) Act 1987 w.e.f. 1.4.1989. The **CBDT vide circular No.522 dated 18.08.1988 stated that amendment in section 40A(3)** is applicable for A.Y. 1989-90 as it is a substantive provision and since 269SS is a procedural provision, the effective date will be 1.4.89 i.e. previous year relevant to A.Y. 89-90.

d) The five Judge Constitution Bench in the case of **CIT V Vatika Township (P) Ltd. 367 ITR 466** had an occasion to consider as to whether Proviso added to section 113 of the I.T. Act, is prospective or retrospective. The Hon'ble Apex Court while considering the various decisions held (as per page 469 Of ITR 367).

That surcharge levied by assessing Officer for the block assessment pertaining to the period from June 1, 2002 was liable to be deleted.

An amendment made to a taxing statute can be said to be intended to remove hardships only of the assessee, not of the department. Imposing a retrospective levy on the assessee would have caused undue hardship and for that reason parliament specifically chose to make the proviso effective from June 1, 2002.

Where a benefit is conferred by a legislation, the rule against a retrospective construction is different. In a legislation confers a benefit on some persons but without inflicting a corresponding detriment on some other person or on the public generally, and where to confer such benefit appears to have been the legislators objects, then presumption would be that such a legislation, giving it a purposive construction, would warrant it to be given a retrospective effect. This exactly is the justification to treat procedural provision as retrospective. Where a law is enacted for the benefit of community as a whole, even in the absence of a provision the statute may be held to be retrospective in nature.

The Hon'ble Apex Court further noticed that CBDT circular mentioned that proviso is applicable from 1.6.2002. In respect of 56(2)(vii b), **CBDT vide circular No.3 of 2012 dated 12.06.2012 has also**

mentioned that provisions of 56(2)(vii b) will be applicable for assessment year 2013-14 onward. Hence Share premium even if in excess of Fair market value is not taxable u/s 56(1) for the A.Y. 2011-12.

i) Section 56 is not a charging section. This section starts with the following sentence.

"Income of every kind which is not to be excluded from the total income under the Act shall be chargeable to income tax under the head." Income from other sources if it is not chargeable to income tax. Under any of the heads specified in section 14, items A to E.

For an income to be taxed u/s 56, it has to satisfy three conditions.

(a) It shall be classifiable as income as per the charging section of the Act.

(b) It shall not be excluded from the total income (e.g. section10).

(c) It is not chargeable to tax under any of the specified Heads in section 14, items A to E.

The finance Bill 2012 as presented on 16th March 2012 included a new clause (viib) u/s 56(2) of I.T. Act [342 ITR1(st)]. No proposal in the original bill to insert a new clause u/s 2(24). Subsequently Notice of amendments to Finance Bill was given [See 343 ITR 37(st)] and amendments also made in charging section 2(24) in inserting **clause (xvi) in 2(24) of I.T. Act w.e.f. 1.4.2013** reads as under:

(xvi) Any consideration received for issue of shares as exceeds the fair market value of the shares referred to in clause (viib) of subsection (2) of 56.

The amendment made in 2(24) is also applicable w.e.f. 01.04.2013 and it cannot be applied earlier to 01-04-2013.

j) The Income for the purpose of the Income Tax Act is defined in section 2(24) of the Income Tax Act 1961. Section 2(24) of the Income Act

1961 gives inclusive definition of income but the income should be look into its normal meaning. The income will not include capital receipts unless it is specified in Income Tax Act. This argument finds supports from the amendment made by Finance Act 2012 w.e.f. 1.4.2013 in section 56(viib) and clause (xvi) of section 2(24) of Income Tax Act, 1961 wherein certain share premiums were made taxable w.e.f. 01.04.2013. If the same were already taxable u/s 56(1)/ 2(24) of Income Tax Act, 1961 then there was no need to make these amendments in the Act. In case there is no charging provision for specific receipt, then it cannot be taxed. **The five member Bench of the Apex Court in CIT V Vatika Township P Ltd 367 ITR 466 (PB pg 19/case Laws)**.

> *"Tax Laws are clearly in derogation of personal rights and property interests and are, therefore, subject to strict construction and any ambiguity must be resolved against imposition of the tax. In Billings V U.S 232 U.S.261 at page 265, 34 S.Ct 421 (1914), the Supreme Court clearly acknowledged this basic and long standing rule of statutory construction.*
>
> *Tax Statutes should be strictly construed, and, if any ambiguity be found to exist, it must be resolved in favour of citizen..."*
>
> *"…If a person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the crown seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the sprit of the law the case might otherwise appear to be" As observed in Partington V Attomey General LR4HL100.*
>
> Since for the year under consideration there was no provision in Income Tax Act, 1961 wherein the fair value of share could be computed and the excess share premium could be taxed, therefore in absence of computation provision the same cannot be taxed. The reliance is also placed on following cases: -

i) The Hon'ble Bombay High Court in the case of **Cadell Wvg. Mills Co.(p) Ltd. V CIT 249 ITR 265 (PB 22-41/Case Laws)** had an occasion to consider the taxability of a sum received in respect of consideration of tenancy Right. Hon'ble High Court held that surrender of tenancy right which was not chargable to tax as capital gain under section 45 could not be taxed as casual and non recurring receipt under section 10(3) r.w. s. 56 under the head "Income from other sources".

ii) The Hon'ble Apex Court in the case of **CIT V D.P. Sandu Bros. Chembur (P) Ltd 273 ITR 1 (PB 42-49/Case Laws)** also hold that as per 2(24)(vi) only income which is chargeable u/s 45 is to be included in income and if computation provision u/s 45 fails then charging provisions will fail. **Ref. to CIT V B.C. Srinivasa Setty 128 ITR 294.**

iii) The Hon'ble Rajasthan High Court in the Case of CIT V Gotan Lime Stone Khanij Udyog 269 ITR 399 (PB 56-65/Case Laws) also held that in case computation provision u/s 48 could not be applied for want of ascertainable cost of acquisition, then capital gain does not arise to be included in total income on account of failure of applicability of computation provision. The Hon'ble High Court referred to decision of Bombay High Court in the case of Cadell Wvg. Mills Co (P) Ltd. (Supra).

iv) The **Hon'ble Rajasthan High Court in the case of S. Zoraster and Co. V/s CIT 322 ITR 35 (PB 66-68/Case Laws)** had on occasion to consider the taxability of receipt of Rs.20,000 received by vendee on default of the purchaser as per agreement for sell of Prem Prakash Talkies. The Hon'ble High Court after referring to the decision of Apex Court in the case of **Travancore Rubber and Tea Co Ltd. V CIT 243 ITR 158** held that such receipt is capital receipt. Such

Capital receipt is not taxable in view of judgment of Apex Court in D.P. Sandu Bros. Chembur (P) Ltd (Supra). Hence capital receipt is not taxable unless there is charging provision for a capital receipt and computation provisions are also applicable.

v) The Hon'ble Bombay High Court in the case of **Vodafone India Services P. Ltd. V/s UOI 368 ITR 1 (PB 76-107/Case Laws)** had an occasion to consider the difference between the share premium determined by revenue and the share premium charged as deemed loan and taxing of national interest on deemed loan. The Hon'ble Bombay High Court has referred to the decision of Apex Court in the case of **Mathuram Aggarwal V/s State of MP (1999) 8 SCC 667** for the test to interpret a taxing statue which reads as under:

" The intention of the legislature is a taxation statute is to be gathered from the language of the provisions particularly where the language is plain and unambiguous. In a taxing Act it is not possible to assume any intention or governing purpose of the statute more than what is stated in the plain language. It is not the economic results sought to be obtained by making the provision which is relevant in interpreting a fiscal statute. Equally impermissible is an interpretation which does not flow from the plain, unambiguous language of the statute. Words cannot be added to or substituted so as to give a meaning to the statute which will serve the spent and intention of the legislature. The statute should clearly and unambiguously convey the three components of the tax law i.e. subject of the tax, the person who is liable to pay the tax and the rate at which the tax is to be paid. If there is any ambiguity regarding any of these ingredients in a taxation statute then there is no tax in law. Then it is for the legislature to do the needful in the matter."

Hon'ble Bombay High Court in this case (Vodafone case) observed that issue of shares at a premium is on capital account and gives rise to no income. 56(1) provides the income of every kind which is not excluded from the total income is chargeable under the head income from other sources. However before section 56 of the Act can be applied there must be income which arises. If the receipt is capital then it is not income. Hence share premium is not an income.

i) **The CBDT vide circular/instruction No.2 dated 29.01.2015 has stated as under [371 ITR 6(st)].**

"In reference to the above cited subject, I am directed to draw your attention to decision of the High Court of Bombay in the case of Vodafone India Services Pvt. Ltd V UOI for the Assessment year 2009-10 (WP No.871 of 2014) wherein the court has held interalia, that the premium on share issue was on account of a capital account transaction and does not give rise to income and hence, not liable to transfer pricing adjustment.

It is hereby informed that the Board has accepted the decision of the High Court of Bombay in the above mentioned writ petition. In view of the acceptance of the above judgment, it is directed that the ratio decidendi of the judgment must be adhered to by the field officers in all cases where the issue is involved. This may also be brought to the notice of the ITAT, DRP's and CIT (Appeals)."

In view of above instruction, it is clear that ratio deciding of treating of share premium as capital receipt is binding on revenue authorities.

j. In view of the above submissions, it is clear that share premium received is a capital receipt and consideration received cannot be considered as income for the year under consideration by applying the provisions of section 56(1) of Income Tax Act.

k. The ld CIT(A) issued show cause notice to assessee to tax the share capital under section 68 of ITax Act as against 56(1) applied by ld AO but he satisfied about the ingredients of section 68 of I.Tax Act and no addition was sustained for AY 2009-10 even u/s 68 of I.Tax Act.

The ld AO issued several notices to assessee to explain the share capital. The assessee submitted detailed reply and documents from time to time as under:-

S.No	Particulars	Copy at PB pg No
1	Copy of query letter of AO dated 05.01.2015.	86-87
2	Copy of reply of assessee dated 13.01.2015 filed in response to query letter dated 05.01.2015.	88-92
3	Copy of show cause notice of AO dated 06.02.2015.	93-96
4	Copy of reply of assessee dated 13.02.2015 filed in response to show cause notice dated 06.02.2015.	97-100
5	Copy of reply of assessee dated 03.03.2015.	101
6	Copies of documents filed before AO along with various submission in respect of identity, creditworthiness of shareholder and genuineness of transactions	103-258

The assessee has submitted sufficient documents before the ld AO to prove identity, creditworthiness and genuineness of share capital and ld AO satisfied that addition under section 68 cannot be made, so he applied section 56(1) of ITax Act to make the addition.

The assessee submitted detailed reply before ld CIT(A) vide letter dated 12/07/2016 **(copy at PB pg 259-312).** Ld CIT(A) when satisfied that the addition u/s 56(1) can't be made, he tried to sustain the addition by applying the provisions of section 68 of Income Tax Act. He issued a show cause notice vide letter dated 09/03/2017 **(Copy at PB pg 313-359).** The assessee submitted detailed reply on the show cause notice of ld CIT(A) vide letter dated 24-03-2017 & 28/03/2017 alongwith documents **(Copy at Pb pg 360-451)**. To support that shareholders were genuine and creditworthiness is proved, the assessee has filed all details, in respect of incorporation/existence of investors

and details of cheques vide which amounts were received. The capacity of shareholders is verifiable from the copy of the balance sheet of the shareholders. The shareholders have funds on a prior date from the allotment of shares given by the assessee company and such funds were more than the amount of share application.

l) During the course of assessment proceedings the assessee submitted the following documents to prove their identity of shareholders, creditworthiness of shareholders and genuineness of transaction with them: -

Name of Shareholder	**Particulars of Documents submitted**	**Copy at PB Page**
Bholenath Traders Pvt. Ltd	➢ Share application containing the name/address/PAN of party, detail of payment received etc. ➢ Copy of board resolution. ➢ Copy of PAN card of party. ➢ Copy of bank statement showing the entry of payment made to assessee. ➢ Declaration of source of funds with party. ➢ Copy of Ack. of ITR of AY 2009-10. ➢ Copy of audit report and audited balance sheet along with annexure of 31.03.09. ➢ Copy of registration certificate issued by ROC.	103-105 106 107 108-109 110-111 112 113-122 123
Debraj Vincom Pvt. Ltd	➢ Share application containing the name/address/PAN of party, detail of payment received etc. ➢ Copy of board resolution. ➢ Copy of PAN card of party. ➢ Copy of bank statement showing the entry of payment made to assessee. ➢ Declaration of source of funds with party. ➢ Copy of Ack. of ITR of AY 2009-10. ➢ Copy of audit report and audited balance sheet along with annexure of 31.03.09. ➢ Copy of registration certificate issued by ROC.	124-125 126 127 128-129 130 131 132-141 142

Kingfisher Vinimay Pvt. Ltd	➢ Share application containing the name/address/PAN of party, detail of payment received etc. ➢ Copy of board resolution. ➢ Copy of PAN card of party. ➢ Copy of bank statement showing the entry of payment made to assessee. ➢ Declaration of source of funds with party. ➢ Copy of Ack. of ITR of AY 2009-10. ➢ Copy of audit report and audited balance sheet along with annexure of 31.03.09. ➢ Copy of registration certificate issued by ROC.	143-144 145 146 147-148 149 150 151-160 161
Nawab Vyapaar Pvt. Ltd	➢ Share application containing the name/address/PAN of party, detail of payment received etc. ➢ Copy of board resolution. ➢ Copy of PAN card of party. ➢ Declaration of source of funds with party. ➢ Copy of Ack. of ITR of AY 2009-10. ➢ Copy of audit report and audited balance sheet along with annexure of 31.03.09. ➢ Copy of registration certificate issued by ROC.	162-165 166 167 168 169 170-179 180
Reality Merchant Pvt. Ltd	➢ Share application containing the name/address/PAN of party, detail of payment received etc. ➢ Copy of board resolution. ➢ Copy of PAN card of party. ➢ Copy of bank statement showing the entry of payment made to assessee. ➢ Declaration of source of funds with party. ➢ Copy of Ack. of ITR of AY 2009-10. ➢ Copy of audit report and audited balance sheet along with annexure of 31.03.09. ➢ Copy of registration certificate issued by ROC.	181-182 183 184 185 186-187 188 189-199 200
Sanmukh Vincom Pvt. Ltd	➢ Share application containing the name/address/PAN of party, detail of payment received etc. ➢ Copy of board resolution. ➢ Copy of PAN card of party. ➢ Copy of bank statement showing the entry of payment made to assessee. ➢ Declaration of source of funds with party. ➢ Copy of Ack. of ITR of AY 2009-10. ➢ Copy of audit report and audited balance sheet along with annexure of 31.03.09. ➢ Copy of registration certificate issued by ROC.	201-202 203 204 205-207 208 209 210-219 220

Shreya Tie Up Pvt. Ltd	➢ Share application containing the name/address/PAN of party, detail of payment received etc. ➢ Copy of board resolution. ➢ Copy of PAN card of party. ➢ Copy of bank statement showing the entry of payment made to assessee. ➢ Declaration of source of funds with party. ➢ Copy of Ack. of ITR of AY 2009-10. ➢ Copy of audit report and audited balance sheet along with annexure of 31.03.09. ➢ Copy of registration certificate issued by ROC.	221 222 223 224 225 226-227 228-239 240
Victor Tracom Pvt. Ltd	➢ Share application containing the name/address/PAN of party, detail of payment received etc. ➢ Copy of board resolution. ➢ Copy of PAN card of party. ➢ Copy of bank statement showing the entry of payment made to assessee. ➢ Declaration of source of funds with party. ➢ Copy of Ack. of ITR of AY 2009-10. ➢ Copy of audit report and audited balance sheet along with annexure of 31.03.09. ➢ Copy of registration certificate issued by ROC.	241-242 243 244 245-246 247 248 249-257 258

m) All the share capital/share application was received through a/c payee cheques and verifiable from bank statement of assessee as well as bank statement of the party. The onus u/s 68 of the assessee is to prove the identity, capacity and genuineness of the transactions has been discharged which may be seen from the followings:-

i) Identity:-

The assessee proved the identity of all the companies by filing the share application received from the parties and the parties are duly in existence and the existence of the parties can be verified from the official website of MCA. The ld. AO also not doubted the identity of the above named companies. Further the notice issued u/s 133(6) of Income Tax Act, 1961 was duly served on all the companies which also prove the identity of the parties.

ii) Creditworthiness

All the companies are Income Tax assessee and duly filing the Income Tax return and Balance sheets. There is sufficient source of funds with all the companies to investment share capital/share application in the assessee company. The assessee

submitted the copies of bank account/declaration of source of funds with them of investor companies. The bank statement shows the huge transaction of high value in the accounts of the companies. The chart showing the amount invested by the above named companies in assessee company viz a viz own funds with the investor company are as under: -

Name of the Investor company	**Amount invested in assessee company**	**Share capital and reserve & surplus with Investor companies as on 31.03.2009**	**Share capital and reserve & surplus with Investor companies as on 31.03.2008**
Bholenath Traders Pvt. Ltd	25,00,000	5,44,50,000	1,00,000
Debraj Vincom Pvt. Ltd	15,00,000	17,34,29,151	NA
Kingfisher Vinimay Pvt. Ltd	20,00,000	19,97,71,977	NA
Nawab Vyapar Pvt. Ltd	50,00,000	9,28,53,047	9,28,25,000
Reality Merchant Pvt. Ltd	47,00,000	6,06,50,773	1,00,000
Sanmukh Vincom Pvt. Ltd	15,00,000	10,67,61,846	NA
Shreya Tie Up Pvt. Ltd	53,00,000	9,60,60,000	9,60,60,000
Victor Tradcom Pvt. Ltd	50,00,000	15,45,13,835	NA

From the above chart it is clear that all the Investor companies were having their own share capital and Reserve & surplus which were much more than to the amount invested in the assessee company. From the audited P & L Account of these companies it is apparent that these companies had trading activities of large amount. The above chart shows that the investor companies were having their own independent funds and having their independent source to invest in the shares of the assessee company. Apart from the investment made in the shares of assessee companies, the investor companies were also having investments in shares of other companies or loans & advances to parties which is much more than to the amount invested in the assessee company, therefore from the bank statement as well as financials statements of the investor companies their creditworthiness is duly proved.

iii) Genuineness

The assessee submitted the Share Application Form received from above companies against the share application received from the companies. The share application is supported by Board Resolution passed in the investor companies. The assessee company has allotted the shares to the investor companies. The proper returns were filed before the ROC against allotment of the shares to these companies. Furthermore, the department has carried out intensive search operations over the assessee and no any incriminating material was found to show that the money against the share allotment was own money of the company. Shares certificates were issued against the allotment of the shares to these companies were not found from the possession of the assessee company or its director or employees. This fact shows that after allotment of shares by the appellant company share certificates were dispatched to the subscriber companies. No any entry in books of account or document was found showing payment of cash to these investor companies against receipt of cheques from these companies against allotment of shares. Therefore the genuineness of the transactions cannot be doubted.

n) Onus to prove source of source

From the show cause notice given by ld CIT(A) and excel sheet provided to the assessee showing chain of source it is apparent that even there is no cash deposit till 3rd stage of channel source **(Copy at Pb pg 526 to 557/ AY 2013-14)**. If there is any cash deposited at 4th channel or beyond to that stage then the inquiry should have been made from the concerns in whose bank a/c such funds floated and necessary action should have been taken in the cases of such concern but the assessee cannot be hold responsible for cash deposit in some account at 4th Channel. **Under section 68 of Income Tax Act, 1961 the onus of the assessee is to prove the source of credit entry and there is no onus of assessee to prove the source of source or source of all channel sources. The amendment in section 68 of I. Tax was made by inserting the following proviso to section 68 w.e.f. 01/04/2013 which require to prove source of finds in the hands of shareholder company.** Though not required by law but still the assessee has proved source of finds in the hands of shareholder

company. The amended section even does not require to prove source of funds in the hands of 3rd or 4th stage.

Further the amendment in section 68 of I.Tax was made by inserting the following proviso to section 68 w.e.f. 01/04/2013

*"**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:

The above proviso was inserted with effect from the **1st day of April, 2013** so it cannot be applied retrospectively. Therefore as per law the assessee has no onus to prove source of source. Hon'ble Mumbai High Court in the case of **Commissioner of Income Tax 1 *Vs* M/s. Gagandeep Infrastructure Pvt.Ltd held as under:-**

> *"(e) We find that the proviso to Section 68 of the Act has been introduced by the Finance Act 2012 with effect from 1st April, 2013. Thus it would be effective only from the Assessment Year 201314 onwards and not for the subject Assessment Year. In fact, before the Tribunal, it was not even the case of the Revenue that Section 68 of the Act as in force during the subject years has to be read/understood as though the proviso added subsequently effective only from 1st April, 2013 was its normal meaning. The Parliament did not introduce to proviso to Section 68 of the Act with retrospective effect nor does the proviso so introduced states that it was introduced "for removal of doubts" or that it is "declaratory". Therefore it is not open to give it retrospective effect, by proceeding on the basis that the addition of the proviso to Section 68 of the Act is immaterial and does not change the interpretation of Section 68 of the Act both before and after the adding of the proviso. In any view of the matter the three essential tests while confirming the pre proviso Section 68*

of the Act laid down by the Courts namely the genuineness of the transaction, identity and the capacity of the investor have all been examined by the impugned order of the Tribunal and on facts it was found satisfied. Further it was a submission on behalf of the Revenue that such large amount of share premium gives rise to suspicion on the genuineness (identity) of the shareholders i.e. they are bogus. The Apex Court in Lovely Exports (P) Ltd. (supra) in the context to the pre amended Section 68 of the Act has held that where the Revenue urges that the amount of share application money has been received from bogus shareholders then it is for the Income Tax Officer to proceed by reopening the assessment of such shareholders and assessing them to tax in accordance with law. It does not entitle the Revenue to add the same to the assessee's income as unexplained cash credit.

(f) In the above circumstances and particularly in view of the concurrent finding of fact arrived at by the CIT(A) and the Tribunal, the proposed question of law does not give rise to any substantial question of law. Thus not entertained.

But in the case of the assessee the fact remains that the assessee has also proved source of source by submitting the copy of bank statement of the share applicant company wherein no cash deposit was made against the share application money.

Therefore, the addition on share application received by the assessee can neither be made u/s 56(1) of Income Tax Act, 1961 nor u/s 68 of Income Tax Act, 1961. The various judgments and arguments regarding addition made u/s 56(1) of Income Tax Act, 1961 has been submitted in forgoing paras. The various judgments regarding addition cannot be made u/s 68 of Income Tax Act, 1961 has been cited in the submission made for AY 2012-13 in assessee's appeal **ITA No 388/JP/17**.

In view of the above submission, the humble assessee prays your honor kindly to dismiss the appeal filed by the department.''

2.6 We have heard the rival contentions and perused the materials available on record. It is pertinent to mention that the similar issue has been dealt with and decided by this Bench of ITAT vide its order dated 30-10-2017 in the case of ACIT, Central Circle-2, Jaipur vs Motisons Buildtech Pvt. Ltd in ITA No. 481/JP/2017 (Revenue's appeal) for the Assessment Year 2009-10 by observing as under:-

''4.6 We have heard the rival contentions and perused the materials available on record. Brief facts of the case are that the Department carried out search over Motisons Group on 31-10-2012. The AO during the course of assessment proceeding observed that in the course of search and seizure action u/s 132 of the Act, cash, jewellery, valuables, stock-in-trade, documents, books of account and / or loose papers were found and / or seized from the premises of the members of the Motisons Group of which one such member happens to be the assessee. The AO also noted that the Group is involved in introducing large share capital on high premium in accounts of various group companies through the Kolkata based companies. The AO has mentioned these details at page 3 and 4 of his assessment order. The AO further noted that the receipt of share capital is Rs. 3,03,000/- and the premium is to the tune of Rs. 2,99,97,000/- during the year under consideration which is not only abnormal but also appeared to be part of a well planned exercise of tax evasion. Accordingly, the AO issued the show cause notice dated 6-02-2015 to the assessee company requiring the assessee to show cause as to why the amount of Rs. 3,03,00,000/- should not be treated as income of the assessee u/s 56(1) of the Act. The assessee submitted the reply before the AO who rejected the assessee's contention and made the addition of Rs. 3,03,00,000/- u/s 56(1) of the Act in the hands of the assessee company. In first appeal, the ld. CIT(A) has deleted the addition of Rs. 3,03,00,000/- made by the AO. The relevant portion of ld. CIT(A)'s order from para 2.1.4.2 to 2.1.47 is reproduced hereunder:-

''**2.1.4.2 Final observation :**

2.1.4.2.1 I have considered assessee's submission and also taken a note of judicial pronouncements relied upon by the appellant as well as the factual matrix of the case. The brief facts of the case are that "Motisons Group" has several companies. These Companies issued share capital on premium to various other companies. The AO held that the receipts on account of share capital on premium is taxable income u/s 56(1) of I. Tax Act, accordingly he made the additions in the hands of various companies as under:-

S. No.	Name of Company	AY	Detail of Share Capital issued

			Name of allottee	**Total Amount of Share capital and Premium.**
1	Motisons Global Pvt. Ltd	2009-10	Bholenath Traders Pvt. Ltd	25,00,000
			Debraj Vincom Pvt. Ltd	15,00,000
			Kingfisher Vinimay Pvt. Ltd	20,00,000
			Nawab Vyapar Pvt. Ltd	50,00,000
			Reality Merchant Pvt. Ltd	47,00,000
			Sanmukh Vincom Pvt. Ltd	15,00,000
			Shreya Tie Up Pvt. Ltd	53,00,000
			Victor Tradcom Pvt. Ltd	50,00,000
			Total	**2,75,00,000**
2	Motisons Global Pvt. Ltd	2011-12	Adarsh Deal Trade Pvt. Ltd	5,00,000
			Adhunik Dealmark Pvt. ltd	42,00,000
			Axion Commodeal Pvt. ltd	36,00,000
			Bholenath Traders Pvt. Ltd	1,03,00,000
			Bhusan Distributors Pvt. Ltd	25,00,000
			Contra Vanijya Pvt. Ltd	78,00,000
			Debdaru Vinimay Pvt. Ltd	21,00,000
			Deep Commosales Pvt. Ltd	50,00,000
			Dhanlabh Tradelinks Pvt. Ltd	27,00,000
			Puspa Dealers Pvt. Ltd	60,00,000
			Puspa Trading Pvt. Ltd	12,50,000
			Rupa Tracom Pvt. Ltd	60,00,000
			Spangle Dealtrade Pvt. Ltd	70,00,000
			Surya Deal Trade Pvt. Ltd	14,00,000
			Swabhiman Dealers Pvt. Ltd	68,00,000
			Vikash Tradecom Pvt. Ltd	25,00,000
			Total	**6,96,50,000**

S. No.	Name of Company	AY	Detail of Share Capital issued	
			Name of allottee	Total Amount of Share capital and Premium.
3	Motisons Global Pvt. Ltd	2012-13	Alliance Tradecom Pvt. Ltd	3,05,00,000
			Evershine Suppliers Pvt. Ltd	1,60,00,000
			Alliance Tradecom Pvt. Ltd	3,95,58,900
			Evershine Suppliers Pvt. Ltd	4,86,99,600
			Mayukh Vinimay Pvt. Ltd	6,93,49,800
			Mayukh Vintrade Pvt. Ltd	13,99,800
			Regent Barter Pvt. Ltd	4,04,71,800
			Regent Dealers Pvt. Ltd	7,59,99,900
			Rose Suppliers Pvt. Ltd	9,87,49,800
			Total	**42,07,29,600**
4	Motisons Global Pvt. Ltd	13-14	Alliance Tradecom Pvt. Ltd	50,50,000
			Evershine Suppliers Pvt. Ltd	1,45,00,000
			Mayukh Vinimay Pvt. Ltd	2,24,50,000
			Regent Dealers Pvt. Ltd	16,00,000
			Rose Suppliers Pvt. Ltd	5,00,000
			Total	**4,41,00,000**
5	Motisons Entertainment (I) Pvt. Ltd	2009-10	Bholenath Traders Pvt. Ltd	35,00,000
			Debdaru Vinimay Pvt. Ltd	50,00,000
			Indigo Vinimay Pvt. Ltd	50,00,000
			Kingfisher Vinimay Pvt. Ltd	20,00,000
			Reality Merchant Pvt. Ltd	25,00,000
			Shreya Tie Up Pvt. Ltd	75,00,000
			Sumeru Vincom Pvt. Ltd	35,00,000
			Victor Tradcom Pvt. Ltd	50,00,000
			Total	**3,40,00,000**

S. No.	Name of Company	AY	Detail of Share Capital issued	
			Name of allottee	Total Amount of Share capital and Premium.
6	Motisons Entertainment (I) Pvt. Ltd	2011-12	Access Tradelink Pvt. Ltd	20,00,000
			Bholenath Traders Pvt. Ltd	40,00,000
			Chakra Deal Trade Pvt. Ltd	15,00,000
			Debdaru Vinimay Pvt. Ltd	15,00,000
			Interlink Saving and Finance P Ltd	25,00,000
			Puja Tie Up Pvt. Ltd	15,00,000
			Sanmukh Vincom Pvt. Ltd	45,00,000
			Tara Vinimay Pvt. Ltd	20,00,000
			Total	**1,95,00,000**
7	Motisons Entertainment (I) Pvt. Ltd	2012-13	Alliance Tradecom Pvt. Ltd	1,59,00,000
			Evershine Suppliers Pvt. Ltd	93,00,000
			Evershine Suppliers Pvt. Ltd	17,00,000
			Mayukh Vinimay Pvt. Ltd	1,55,00,000
			Regent Barter Pvt. Ltd	1,79,00,000
			Regent Dealers Pvt. Ltd	1,40,00,000
			Rose Suppliers Pvt. Ltd	35,00,000
			Total	**7,78,00,000**
8	Motisons Buildtech Pvt. Ltd	2009-10	Arcade Dealcom Pvt. Ltd	30,00,000
			Debdaru Vinimay Pvt. Ltd	25,00,000
			Debdoot Vinimay Pvt. Ltd	35,00,000
			Matrabhumi Dealers Pvt. Ltd	44,00,000
			Puja Tie-Up Pvt. Ltd	50,00,000
			Pushpa Dealers Pvt. Ltd	25,00,000
			Pushpa Trading Pvt. Ltd	40,00,000

S. No.	Name of Company	AY	Detail of Share Capital issued	
			Name of allottee	Total Amount of Share capital and Premium.
			Shreya Tie Up Pvt. Ltd	10,00,000
			Taranh Suppliers Pvt. Ltd	34,00,000
			Vandana Dealers Pvt. Ltd	10,00,000
			Total	**3,03,00,000**
9	Motisons Buildtech Pvt. Ltd	2012-13	Alliance Tradecom Pvt. Ltd	1,80,00,000
			Evershine Suppliers Pvt. Ltd	28,00,000
			Regent Barter Pvt. Ltd	1,60,27,500
			Total	**3,68,27,500**
10	Godawari Estates Pvt. Ltd	2010-11	Debdaru Vinimay Pvt. Ltd	25,00,000
			Jai Pitreshwar Vyapaar Pvt. Ltd	15,00,000
			Mainak Vincom Pvt. Ltd	50,00,000
			Puspa Dealers Pvt. Ltd	50,00,000
			Snowfall Commercial Pvt. Ltd	25,00,000
			Vignesh Info Services Pvt. Ltd	35,00,000
			Total	**2,00,00,000**
11	Godawari Estates Pvt. Ltd	2012-13	Bakliwal Vyapaar Pvt. Ltd.	1,23,00,000
			Jasmine Commodities Pvt. Ltd	65,00,000
			Buniyad Vanijya Pvt Ltd	50,00,000
			Puja Barter Pvt. Ltd.	60,00,000
			Dhanlabh Tradelinks Pvt. Ltd	25,00,000
			Devang Commercial Pvt. Ltd	50,00,000
			Extent Vinimay Pvt. Ltd	25,00,000
			Neha Deal Trade Pvt Ltd	20,00,000
			Spring SalesPvt Ltd	67,00,000
			Manali Tradecom Pvt Ltd.	50,00,000

S. No.	Name of Company	AY	Detail of Share Capital issued	
			Name of allottee	Total Amount of Share capital and Premium.
			Target Vincom Pvt Ltd	50,00,000
			Bernstain Marketing Pvt Ltd	15,00,000
			Kesarinandan Vanijya Pvt Ltd	5,00,000
			Deep Commosale Pvt Ltd	50,00,000
			Apollo Vintrade Pvt Ltd	25,00,000
			Innova Commercial Pvt Ltd	25,00,000
			Prayash Dealtrade Pvt Ltd	40,00,000
			Justify Vanijya Pvt Ltd	50,00,000
			Solty Financial Consultants P Ltd	50,00,000
			Achiever Commotrade Pvt Ltd	50,00,000
			Sishmahal Commotrade Pvt. Ltd	20,00,000
			Advantage Dealtrade Pvt. Ltd	25,00,000
			Origin VinimayPvt Ltd	40,00,000
			Rukmani International Pvt Ltd	50,00,000
			Total	**10,30,00,000**
12	Bholenath Real Estates Pvt. Ltd	2009-10	Lavender Dealcom Pvt. Ltd.	30,00,000
			Arcade Dealcom Pvt. Ltd	20,00,000
			Tarang Suppliers Pvt. Ltd	15,00,000
			Transit Vinimay Pvt. Ltd	62,00,000
			Vandana Dealers Pvt. Ltd	98,00,000
			Variety Dealcom Pvt. Ltd	25,00,000
			Vanila Vinimay Pvt. Ltd	15,00,000
			Outlook Tracom Pvt. Ltd	25,00,000
			Total	**2,90,00,000**
13	Rainbow Buildcon Pvt Ltd	2009-10	Anuraj Securities Pvt Ltd	20,00,000

S. No.	Name of Company	AY	Detail of Share Capital issued	
			Name of allottee	Total Amount of Share capital and Premium.
			Matribhumi Dealers Pvt Ltd	25,00,000
			Narottamka Trade & Vyapaar Pvt Ltd	15,00,000
			Puja Dealcom Pvt Ltd	40,00,000
			Tarang Suppliers Pvt LTd	30,00,000
			Vandana Dealers Pvt Ltd	30,00,000
			Puja Tie-Up Pvt Ltd	40,00,000
			Total	**2,00,00,000**
14	Shivansh Buildcon Pvt. Ltd	2012-13	Evershine Suppliers Pvt. Ltd	90,00,000
			Total	**90,00,000**
	Total Additions			94,14,07,100

During the appellate proceeding, Sh Vijay Kr Goyal has requested to keep the appellate matter pending for time being in case of M/s Mayukh Vinimay Pvt Ltd as the appeal against the order of 263 is pending for adjudication before the Hon'ble ITAT Kolkata where matter pertaining to jurisdiction of CIT who passed the order of 263, has been challenged. It is further submitted that assessee has also made request to ITAT Kolkata to transfer the said case to ITAT Jaipur which is still pending for consideration. In respect of addition made on a/c of bogus share capital, AO has also made similar addition of Rs. 10,54,95,000/= in the hands of M/s Mayukh Vinimay P Ltd, tantamounts to double addition. After duly taking a note of the same, appellate order in case of M/s Mayukh Vinimay Pvt Ltd is being kept in abeyance till the disposal of said appeal by Hon'ble ITAT. With regard to decisions relied upon by the undersigned, Sh Vijay Goyal were differentiated on facts as under:

(i) **Nova Promoters & Finlease Pvt. Ltd (2012) 342 ITR 169 (Delhi High Court):** ***Summons sent to the companies received back unserved and other summons remained uncomplied with*** *Whereas, in the case of assessee companies, notice u/s 133(6) was sent to investor companies, all of which were served and most of them were complied with.*

(ii) **CIT V/s N. R. Portfolio Pvt. Ltd 206 (2014) DLT (DB) (Del)/ 264 CTR 0258 (del) :** *Assessed u/s 144 of Itax Act. In this case the AO issued several notices and show cause notice which was not served/complied and assessment was framed u/s 144 of Income Tax Act. In our case all the compliances were made and evidences submitted.*

(iii) **N Tariks Properties Pvt. Ltd 227 Taxmann.com 373 (with reference to decision of Delhi high court in 264 CTR 472) :***AO noticed that extracts of bank account had been fabricated and AO found that immediately before issuance of cheques for the purpose of making pay order or demand draft there was deposit of cash. In our case no cash deposit in the bank account of shareholder company.*

(iv) **CIT v/s Navodaya Castle Pvt. Ltd 367 ITR 306 (Delhi High Court):** AO found that immediately before issuance of cheques for the purpose of making pay order or demand draft there was deposit of cash. In our case no cash deposit in the bank account of shareholder company.

(v) CIT V/s MAF Academy Pvt. Ltd 206 (2014) DLT 277 (DB)(Del)/ 361 ITR 0285 (Del) : AO found that immediately before issuance of cheques for the purpose of making pay order or demand draft there was deposit of cash. In our case no cash deposit in the bank account of Shareholder Company.

Further, the summons u/s section 131 of I.tax Act were sent to the shareholders which were received back unserved.

(vi) Rajmandir Estates Pvt. Ltd 70 Taxmann.com 124: Relates to order passed by CIT u/s 263 of ncome Tax Act, 1961.

(vii) CIT v/s Sumati Dayal (1995) 80 Taxman 89 (SC) & CIT V/s Durga Prasad More [1971] 82 ITR 540 (SC) : No application as ample evidence have been filed by assessee. Further no source of concealed income was found. Further no document was found as the result of intensive search operations to show outflow of unaccounted money against the receipts of share application money through the banking channels. This show the preponderance of probabilities is in favour of assessee.

(viii) CIT V/s Mussadilal Ram Bharose [1987] 165 ITR 14 This judgment relates to penalty u/s 271(1)(c).

In support of its contention, assessee through AR has relied upon following judgments fact of which are identical to the fact of the case of assessee:

Jurisdictional Rajasthan High Court

(i) CIT-1, Jaipur V/s M/s. ARL Infratech Ltd, wherein Hon'ble Rajasthan High Court has recently confirmed the findings of Hon'ble ITAT by deciding the appeal of revenue in DB ITA No 24/2014 vide order dated 28/09/2016.

(ii) Commissioner *of* Income-tax, Jaipur –II Versus Morani Automotives (P.) Ltd. No.- D.B. IT Appeal No. 619 *of* 2011 Dated.- October 23, 2013 (Rajasthan High Court).

(iii) Barkha Synthetics Ltd. vs. Asstt. CIT (005) 197 CTR (Raj) 432.

(iv) CIT vs. First Point Finance Ltd. (2006) 206 CTR (Raj) 626 : (2006) 286 ITR 477 (Raj HC).

(v) Commissioner of Income Tax Vs. Bhaval Synthetics (Raj HC) **(2013) 84 DTR** 0449 (Raj).

(vi) Commissioner of Income Tax Vs. AKJ Granites (P) Ltd. (Raj HC) (2008) 301 ITR 0298.

i) Commissioner of Income-Tax, Central, Jaipur Versus Supertech Diamond Tools (Pvt) Ltd. (Raj HC) D. B. IT Appeal No. 74 of 2012 **Dated: - 12 December 2013.**

viii) Commissioner of Income-tax - I, Jaipur Versus AL Lalpuria Construction (P.) Ltd (Raj HC) D.B. IT Appeal Nos. 256 of 2010 AND 26 & 39 of 2011 Dated: - 25 February 2013.

(ix) Commissioner of Income-tax, Ajmer Versus HS. Builders (P.) Ltd. D.B. INCOME Tax (Raj HC) APPEAL NO. 48 OF 2006 Dated: - 03 March 2012.

(x) CIT Vs Jai Kumar Bakliwal (2014) 101 DTR (Raj) 377 : (2014) 267 CTR (Raj) 396. No liability to prove source of source

(xi) Aravali Trading Co Vs Income Tax Officer (2008) 8 DTR (Raj) 199. Burden of the assessee stands discharged when the identity of the creditors is established and he confirms the loans.

(xii) **CIT Vs Heera Lal Chagan Lal Tank (2002) 157 ITR 281 (Raj)** Burden of the assessee stands discharged when the identity of the creditors is established and he confirms the loans.

Since, the common issues are involved in all these 15 companies therefore, for convenience, I am dealing the issue in composite manner first on the basis of facts and then on legality also. The followings facts issues emerge from the findings of AO and submissions submitted by ld AR.

a) Issue of according opportunity of cross examination of Sh Santosh Choube, Sh Ajit Sharma & Sh Rajesh Kumar Singh to the assessee.

b) Charging of Premium on shares and taxability by applying the provisions of section 56(1) of Income Tax Act.

c) Addition by applying the provisions of section 68 of Income Tax Act

2.1.4.2 (a) According opportunity to cross examine *Sh Santosh Choube, Sh Ajit Sharma & Sh Rajesh Kumar Singh*

But before asking for an opportunity for cross examining them, assessees has to disprove the correctness of their assertions as emanating from the statements recorded of Sh Santosh Choube, Sh Ajit Sharma and Sh Rajesh Kumar Singh. Corroborative evidences in form of bank statements obtained in this regard and their analysis further proves the theory of cash deposit prior to transfer of share application money. Vide show cause letter issued , assessee has already been confronted with the oral evidences gathered during the survey operation from aforementioned 3 persons by Investigation Directorate Kolkata. Further, the right of cross examination is not an absolute right as decided in **Nath International Sales vs. UOI**, AIR 1992 (Del) 295) wherein Hon'ble Supreme Court has also held that the **right of hearing does not necessarily include right of cross examination.** The right of cross examination must depend upon the circumstances of each case. In this regard, assessee is trying to use this shield of **"absence of opportunity to cross-examine"** of Sh Santosh Choube, Sh Ajit Sharma and Sh Rajesh Kumar Singh. It will be miscarriage of justice if assessee be given benefit on this a/c. It is also not possible to allow opportunity of cross-examination of each parties. Assessee is supposed to controvert all facts gathered from the oral evidences as well as from bank enquiries. In view of these facts, assessee's grievance is not justified as proper opportunity during the appellate proceeding has already been given to controvert those findings as mentioned in the show-cause letter.

2.1.4.2 (b) Charging of premium on shares & its taxability.

The AO has observed that companies have received abnormal share premium whereas as per the audited P&L account and balance sheet, these companies, do not have any business/profit and physical assets/assets are not in commensurate to value of share with the companies which appeared to be a part of a well planned exercise of tax evasion. In this regard, Ld AR has submitted following reasons for Charging of premium:

Name of Company	*Reason for Charging Share Premium*
Motisons Global Pvt. Ltd	*1. Owing a big and valuable land in the heart of city at Lal Kothi, Tonk Road, Jaipur and constructi one of the most beautiful building of Jaipur city thereon.* *2. Goodwill of Motisons Group.*
Motisons Entertainment (I) Pvt. Ltd	*1. The assessee company booked a big space (meant for Cinema Hall) in under construction comple naming "World Trade Park" Further, the leasing out this space to world famous cinema theatre operator **"Cinepolis"** was under process.* *2. Goodwill of Motisons Group.*
Motisons Buildtech Pvt. Ltd	*1. Owing a big and valuable agriculture land at Village Dudu, Gidani Nolya (At Ajmer Road, Near Dudu) for which planning of township was there.* *2. Owning valuable land in the heart of city at C-Scheme and constructing the building thereon* *2. Goodwill of Motisons Group.*
Godawari Estates Pvt. Ltd	*1. NBFC Company expecting good revenue.* *2. Goodwill of Motisons Group.*
Bholenath Real Estates Pvt Ltd	*(i) Owwing large chunk of agricultural land at Village Gaiji, Tehsil Mojamabad, Distt Jaipur (in*

	between Bagru to Dudu at main NH Jaipur Ajmer Road) and planning development of township thereon. *(ii) Market rate of land was very high than book value which was on cost.* *(iii) Goodwill of Motisons Group.*
Rainbow Buildcon Pvt. Ltd	*1. Owning large chunk of agricultural land at Village Gidani (Near Dudu at main NH Jaipur Ajmer Road and planning development of township thereon.* *2. The market rate of this land was very high than book value.* *3. Goodwill of Motisons Group.*
Shivansh Buildcon Pvt. Ltd	*1. Owning a valuable land in the heart of city at Seewad Area, Bapu Nagar, Jaipur and planning a commercial project thereon.* *2. Goodwill of Motisons Group.*

The ld AR has further submitted that that the shares were allotted to the investor companies at premium, after mutual discussion between assessee companies and investor companies. "***Motisons Group***" enjoys very high reputation and goodwill in market which was main reason for high premium. Hon'ble ITAT, Mumbai Bench in the case of **ACIT Vs. Gagandeep Infrastructure Pvt. Ltd. 2014-T10L-656-ITAT-Mum** has held that issue of **shares at premium is always a commercial decision which does not require any justification**. The assessee further submitted that wherever the authorized share capital is required to be increase, the same has been increased, it was purely a commercial decision of the companies on which income-tax Department cannot step into shoes of assessee. In view of this, it would be worthwhile to reproduce section 56(1) of the Act here as under:

> *"Income of every kind which is not to be excluded from the total income under this Act shall be chargeable to income-tax under the head "Income from other sources", if it is not chargeable to income-tax under any of the heads specified in section 14, items A to E."*

Here, I find that the money so received against the share capital and share premium is capital receipt and not revenue receipt, therefore the same cannot be taxed in the hands of assessee companies under section 56(1) of Income Tax Act, 1961. The CBDT vide circular/instruction No.2 dated 29.01.2015 has stated as under [371 ITR 6(st)].

> ***In reference to the above cited subject, I am directed to draw your attention to decision of the High Court of Bombay in the case of Vodafone India Services Pvt. Ltd V UOI for the Assessment year 2009-10 (WP No.871 of 2014) wherein the court has held interalia, that the premium on share issue was on account of a capital account transaction and does not give rise to income and hence, not liable to transfer pricing adjustment.***
>
> ***It is hereby informed that the Board has accepted the decision of the High Court of Bombay in the above mentioned writ petition. In view of the acceptance of the above judgment, it is directed that the ratio decidendi of the judgment must be adhered to by the field officers in all cases where the issue is involved. This may also be brought to the notice of the ITAT, DRP's and CIT (Appeals).***

In view of above instruction of CBDT share premium cannot be treated as revenue receipt taxable u/s 56(1) of Income Tax Act. Further this should be seen with reference to amendment made by Finance Act 2012 by insertion of clause (viib) to section 56 of Income Tax Act, 1961. This amendment was made effective from 01/04/2013. Memorandum explaining the provisions in Finance Bill 2012 stated as under*:*

"Share premium in excess of the fair market value is to be treated as income.

> ***"Section 56(2) provides for the specific category of incomes that shall be chargeable to income tax under the head "income from other sources". It is proposed to insert a new clause in 56(2). The new clause will apply where, accompany, not being a company in which the public are substantially interested, receives, in any previous year, from any person being a resident, any consideration for issue of shares. In such a case if the consideration received for issue of shares exceeds the face value of shares, the aggregate consideration received for such shares as exceeds the fair market value of the shares shall be chargeable to income Tax, under the head "income from other sources".***

The said amendment is effective from 1st April 2013, it will accordingly apply in relation to **AY 2013-14** and subsequent AYs. In the memorandum it is mentioned that premium in excess of fair market value is to be treated as income. **CBDT vide circular No.3 of 2012 dated 12.06.2012 has also mentioned that provisions of 56(2)(vii b) will be applicable for Assessment year 2013-14 onward**. In all the cases of following assessee companies share capital and premium was received in the assessment years earlier to **AY 2013-14** except the following one:-

Name of Company	Detail of Share Capital issued					
	Name of allottee	**No of shares**	**Share Capital @ Rs. 10 per share**	**Share Premium**	**Rate of Premium per share**	**Total Amount**
Motisons Global Pvt. Ltd	Alliance Tradecom Pvt. Ltd	12625	1,26,250	49,23,750	390	50,50,000
	Evershine Suppliers Pvt. Ltd	36250	3,62,500	1,41,37,500	390	1,45,00,000
	Mayukh Vinimay Pvt. Ltd	56125	5,61,250	2,18,88,750	390	2,24,50,000
	Regent Dealers Pvt. Ltd	4000	40,000	15,60,000	390	16,00,000
	Rose Suppliers Pvt. Ltd	1250	12,500	4,87,500	390	5,00,000
	Total	**1,10,250**	**11,02,500**	**4,29,97,500**		**4,41,00,000**

Therefore in view of clause (viib) of section 56 of I.Tax Act, the share premium charged by M/s Motisons Global Pvt Ltd in AY 2013-14 can be examined whether it exceeds the fair market value of the shares or not. In this regard the assessee has explained that the share premium in excess to value computed as per manner & method provided in this section r.w.r. 11UA of Income Tax Rules 1962 can only be taxed by applying provisions of section 56(viib) of the Act. The value of shares of the assessee company computed as per manner & method of this rules is as under:

Particulars	***As per Method (A) (Net assets value method)***	***As per Method (B) (Discounted free cash flow method)***
Book Value of total assets less prepaid expenses & preliminary expenses as on last B/s i.e. 31.03.2012	*53,88,09,212*	*53,88,09,212*
*Add: - Appreciation in market value of assets (In excess to book value) Land at SB-110**	*NA*	*25,52,48,216*
Total Assets (A)	***53,88,09,212***	***79,40,57,428***
Total Liabilities, excluding share capital and reserves & Surplus (L)	*76,56,570*	*76,56,570*
Total amount of paid up equity share capital as shown in B/S (PE)	*2,05,05,820*	*2,05,05,820*
Paid up value of such equity shares (PV)	*10*	
*Fair market value of shares [(A-L)/PE]*PV*	*[(53,88,09,212-7656570)/2,05,05,820]*10 = Rs. 259 per shares*	*[(79,40,57,428-7656570)/2,05,05,820]*10 = Rs. 384 per shares**
For deciding the issue price of shares the assessee company choose the price as determined by option 2 and considering the value of goodwill & enhancement in value of other assets the issue price of shares decided Rs. 400 per shares which is quite reasonable.		

The assessee has further clarified that the market value of land at SB-110, Tonk Road Jaipur, is taken on the basis of value of adjacent land at SB-111 purchased during the year under consideration **(just adjoining to land at SB-110)** and area of both the lands are almost same. It was further stated by the assessee that in option two the appreciation in value of assets has been taken only in respect to land as for this the direct evidence is available. The value of other assets & goodwill is not taken in above computations. However while deciding the value of shares the same should also be taken into consideration.

Therefore, I found the explanation of assessee in case of Motisons Global Pvt Ltd that the issue price of the shares in AY 2013-14 is in accordance with the value of shares as computed as per rule 11UA of Income Tax Rules 1962 and it is acceptable. Accordingly, no addition can be made in AY 2013-14 also as income of M/s Motisons Global Pvt Ltd as per provisions of section 56(2)(viib)of the Act 1961. Therefore, AO's action in this regard is not correct as per the applicable provisions of the Act.

2.1.4.2 (c) Addition by applying the provisions of section 68 of the Act

The assessee submitted that in all the cases, credit entries are supported by Share application containing (i) name/ address /PAN of party, (ii) detail of payment received, (iii) Copy of board resolution, (iv) Copy of PAN card of party , (v) Copy of bank statement showing the entry of payment made to assessee, (vi) Declaration of source of funds with party (vii) Copy of Ack. of ITR and Computation, (viii) Copy of audit report and audited balance sheet along with annexure. None of notice sent u/s

133(6) received back as "***Un-served***". Further it is also submitted that the ld AO has not made the addition by applying the provisions of section 68 of the Act so it cannot be applied by CIT(A). As per section 251 (1)(a) of Income Tax Act, 1961 the CIT (A) have the power *"in an appeal against an order of assessment he may confirm, reduce, enhance or annual the assessment"* but he has no power to modify the basic theme of assessment order. During the course of assessment proceedings the assessee has submitted ample documents and satisfied the ld AO. The ld. AO being satisfied with the submission of assessee on section 68 of the Act, has not applied section 68 of the Act for the addition. The provisions of section 68 specified the authority mentioned as "**Assessing Officer**". The CIT(A) is not assessing officer so he cannot step into the satisfaction of AO for making the addition when the ld AO has satisfied about the ingredients of section 68 of Income Tax Act. Hon'ble ITAT Delhi Bench in the case of **SH. SHAMSHER SINGH GILL C/O S.K. MONGA & ASSOCIATES Versus ITO, WARD-2, HARIDWAR ITA No 2987/Del/2015 order dated 28/02/2017.** It was further stated by ld AR that the assessee has submitted ample documents to prove identity, creditworthiness and genuineness of share capital. Under section 68 of Income Tax Act, 1961 the onus of the assessee is to prove the source of credit entry and there is no onus of assessee to prove the source of source or source of all channel sources. The amendment in section 68 of the Act was made by inserting the following proviso to section 68 w.e.f. 01/04/2013 which require to prove source of funds in the hands of shareholder company. Though not required by law but still the assessee proved source of funds in the hands of shareholder company. The amended section even does not require to prove source of funds in the hands of 3rd or 4th stage. I have also perused the case records. In this regard, I find that the AO has issued notice u/s 133(6) of the Act to inquiry the identity, creditworthiness and genuineness of transactions. AO has issued total 94 notices for share capital of Rs. 35,29,50,000/-. On perusal of case records, it is seen that compliance was made for 41 notices issued u/s 133(6) of the Act which involvesd share capital amounting to total of Rs. 15,59,00,000/-. The status of notices issued u/s 133(6) of Income Tax Act can be seen from chart given below:

Name of assessee company	**Total Notice issued**	**Total Amount for Notice issued**	**Received un-served**	**Number of Compliance**	**Amount under compliance**
Motisons Global Pvt. Ltd AY 2009-10	8	2,75,00,000	0	4	1,00,00,000
Motisons Global Pvt. Ltd AY 20111-12	16	6,96,50,000	0	9	3,64,00,000
Motisons Entertainment (I) Pvt. Ltd (AY 2009-10)	8	3,40,00,000	0	3	1,20,00,000
Motisons Entertainment (I) Pvt. Ltd (AY 2011-12)	8	1,95,00,000	0	3	75,00,000
Motisons Buildtech Pvt. Ltd AY 2009-10	10	3,03,00,000	0	3	70,00,000
Godawari Estates Pvt. Ltd AY 2010-11	6	2,00,00,000	0	3	1,10,00,000
Godawari Estates Pvt. Ltd AY 2012-13	24	10,30,00,000	0	15	6,22,00,000
Bholenath Real Estates Pvt. Ltd AY 2009-10	7	2,90,00,000	0	1	98,00,000

Rainbow Buildcon Pvt. Ltd AY 2009-10	7	2,00,00,000	0	0	0
Total	**94**	**35,29,50,000**	**0**	**41**	**15,59,00,000**

2.1.4.3 Further, in response to show cause notice issued by me u/s 250 (4) of the Act, is submitted that the assessee has also carried out search over the ROC site and found that charge has been registered over the assets of some of the investor companies under Companies Act in favour of leading banks like SBI etc for crores of rupees which proves that the shareholder companies are not shell company-rather creating of charge proves creditworthiness of the companies. The assessee submitted the following chart with search report on ROC site:

Name of Shareholder (Investor Company)	***Name of Assessee Company in which share were taken***	***Amount of share capital of the investor company***	***Amount, SRN and Charge Id and date of Charge created***	***Name of Bank/Financial Institution in whose favou charge was created***
Rukmani International Pvt Ltd	*Godawari Estates Pvt. Ltd*	*50,00,000*	*50 Crore SRN C05684162 Charge Id 10501185 date 24/03/14*	*Axis Bank Ltd*
Narottamka Trade & Vyapaar Pvt Ltd	*Rainbow Buildcon Pvt Ltd*	*15,00,000*	*85.50 Crore SRN C72436744 Charge Id 10606561 date 30/09/15*	*Union Bank of India*
Vikash Tradecom Pvt. Ltd	*Motisons Global Pvt. Ltd*	*25,00,000*	*9.43 Crore SRN C67525196 Charge Id 10345786 date10/02/2012*	*Punjab National Bank.*
Arcade Dealcom Pvt. Ltd	*Motisons Buildtech Pvt. Ltd*	*30,00,000*	*3.22 Crore SRN B44276514 Charge Id 10366837 date 29/06/2012*	*Punjab National Bank.*
Arcade Dealcom Pvt. Ltd	*Bholenath Real Estates Pvt. Ltd*	*20,00,000*	*3.22 Crore SRN B44276514 Charge Id 10366837 date 29/06/2012*	*Punjab National Bank.*
Matribhumi Dealers Pvt Ltd	*Rainbow Buildcon Pvt Ltd*	*25,00,000*	*50.00 Crore SRN C05683776 Charge Id 10501186 date 24/03/2014*	*Axis Bank Ltd*
Puja Tie Up Pvt. Ltd	*(i) Motisons Entertainment (I) Pvt. Ltd*	*15,00,000*	*2.50 Crore SRN C71816029 Charge Id 10431745 date 24/05/2013*	*Punjab National Bank.*

Name of Shareholder (Investor Company)	***Name of Assessee Company in which share were taken***	***Amount of share capital of the investor company***	***Amount, SRN and Charge Id and date of Charge created***	***Name of Bank/Financial Institution in whose favou charge was created***
	(ii) Motisons Buildtech Pvt. Ltd	*50,00,000*	*2.25 Crore SRN C718166656 Charge Id 10431744 date 24/05/2013*	
	(iii) Rainbow Buildcon Pvt Ltd	*40,00,000*	*1.65 Crore SRN C71814016 Charge Id 10431742 date 18/05/2013*	
			1.95 Crore SRN C71817654 Charge Id 10431746 date 22/05/2013	
Kingfisher Vinimay Pvt. Ltd	*(i) Motisons Global Pvt. Ltd*	*20,00,000*	*87.50 Crore SRN C03615010 Charge Id 10490641 date 31/03/2014*	*State Bank of India*
	(ii) Motisons Entertainment (I) Pvt. Ltd	*20,00,000*	*101.94 Crore SRN B73228603 Charge Id 10419836 date 21/03/2013*	
Nawab Vyapar Pvt. Ltd	*Motisons Global Pvt. Ltd*	*50,00,000*	*9.95 Crore SRN C67525006 Charge Id 10345784 date 10/02/2012*	*Punjab National Bank*
Snowfall Commercial Pvt. Ltd	*Godawari Estates Pvt. Ltd*	*25,00,000*	*8.00 Crore SRN B94083011 Charge Id 10289761 date 04/05/2011*	*Bank of India*
Total		***3,85,00,000***		

The assessee further clarified that out of above 10 cases, in 4 cases which have share capital of **Rs. 1.15 crores** with the following appellant Companies, notices u/s 133(6) sent by AO were also complied by these companies

Name of assessee company	***Name of investor company***	***Amount of Share application received***
Motisons Global Pvt. Ltd AY 2009-10	*Kingfisher Vinimay Pvt. Ltd*	*20,00,000*
Motisons Global Pvt. Ltd AY 2011-12	*Vikash Trade Com Pvt Ltd*	*25,00,000*
Motisons Entertainment (I) Pvt. Ltd (AY 2009-10)	*Kingfisher Vinimay Pvt. Ltd*	*20,00,000*
Godawari Estates Pvt. Ltd (AY 2012-13)	*Rukmani International Pvt Ltd*	*50,00,000*
Total		***1,15,00,000***

However, in case of following 9 parties cases having share capital of Rs. 2.70 crores with following appellant companies, notices u/s 133(6) issued remained **un-complied or not complied,** but their identity and creditworthiness is further proved from registration of charge under Companies Act

Name of assessee company	Name of investor company	Amount of Share application received
Motisons Global Pvt. Ltd (AY 2009-10)	Nawab Vyapar Pvt Ltd	50,00,000
Motisons Buildtech Pvt. Ltd (AY 2009-10)	Arcade Dealcom Pvt. Ltd	30,00,000
Motisons Buildtech Pvt. Ltd (AY 2009-10)	Puja Tie Up Pvt. Ltd	50,00,000
Motisons Entertainment (I) Pvt. Ltd (AY 2011-12)	Puja Tie Up Pvt. Ltd	15,00,000
Godawari Estates Pvt. Ltd (AY 2010-11)	Snowfall Commercial Pvt. Ltd	25,00,000
Bholenath Real Estates Pvt Ltd (AY 2009-10)	Arcade Dealcom Pvt. Ltd	20,00,000
Rainbow Buildcon Pvt Ltd (AY 2009-10)	Matribhumi Dealers Pvt Ltd	25,00,000
Rainbow Buildcon Pvt Ltd (AY 2009-10)	Puja Tie Up Pvt Ltd	40,00,000
Rainbow Buildcon Pvt Ltd (AY 2009-10)	Narottama Trade & Yyapaar Pvt Ltd	15,00,000
Total		**2,70,00,000**

Further six share applicant companies were assessed by the *same AO for AY 2013-14* wherein genuineness of these companies were not doubted. Further, out of these six companies, the assessment of one M/s **Mayukha Vinimay Pvt Ltd for AY 2009-10** was made in same circle i.e. Central Circle-2, Jaipur wherein addition of **Rs. 10,54,95,000/-** was made on account of its share capital by passing order u**/s 143(3) r.w.s.263** of the Act. In other Companies cases, assessment for AY 2009-10 was made u/s 148 of the Act by their respective jurisdictional AO wherein their funds/ share capital was assessed. The share capital received from these companies are as under:

S. No.	***Name of Company***	***AY***	***Detail of Share Capital issued***	
			Name of allottee	***Total Amount***
3	***Motisons Global Pvt. Ltd***	***2012-13***	***Alliance Tradecom Pvt. Ltd***	***3,05,00,000***
			Evershine Suppliers Pvt. Ltd	***1,60,00,000***
			Alliance Tradecom Pvt. Ltd	***3,95,58,900***
			Evershine Suppliers Pvt. Ltd	***4,86,99,600***
			Mayukh Vinimay Pvt. Ltd	***6,93,49,800***
			Regent Barter Pvt. Ltd	***4,04,71,800***
			Regent Dealers Pvt. Ltd	***7,59,99,900***
			Rose Suppliers Pvt. Ltd	***9,87,49,800***
			Total	***41,93,29,800***
4	***Motisons Global Pvt. Ltd***	***13-14***	***Alliance Tradecom Pvt. Ltd***	***50,50,000***
			Evershine Suppliers Pvt. Ltd	***1,45,00,000***
			Mayukh Vinimay Pvt. Ltd	***2,24,50,000***
			Regent Dealers Pvt. Ltd	***16,00,000***
			Rose Suppliers Pvt. Ltd	***5,00,000***

S. No.	*Name of Company*	*AY*	*Detail of Share Capital issued*	
			Name of allottee	*Total Amount*
			Total	*4,41,00,000*
7	*Motisons Entertainment (I) Pvt. Ltd*	*2012-13*	*Alliance Tradecom Pvt. Ltd*	*1,59,00,000*
			Evershine Suppliers Pvt. Ltd	*93,00,000*
			Evershine Suppliers Pvt. Ltd	*17,00,000*
			Mayukh Vinimay Pvt. Ltd	*1,55,00,000*
			Regent Barter Pvt. Ltd	*1,79,00,000*
			Regent Dealers Pvt. Ltd	*1,40,00,000*
			Rose Suppliers Pvt. Ltd	*35,00,000*
			Total	*7,78,00,000*
9	*Motisons Buildtech Pvt. Ltd*	*2012-13*	*Alliance Tradecom Pvt. Ltd*	*1,80,00,000*
			Evershine Suppliers Pvt. Ltd	*28,00,000*
			Regent Barter Pvt. Ltd	*1,60,27,500*
			Total	*3,68,27,500*
14	*Shivansh Buildcon Pvt. Ltd*	*2012-13*	*Evershine Suppliers Pvt. Ltd*	*90,00,000*
			Total	*90,00,000*
	Total Additions			*58,70,57,300*

2.1.4.4 **As regard Seized documents [party-1/Exhibit AS-3/Pge21],** Sh Vijay Goyal, the Ld AR of the assessee has further clarified that **FMV** and maximum appreciation written **250/-** and shares were also allotted for **Rs. 250/-** in that period. It is pertinent to also note that there is no Incriminating noting to show that share capital was acquired against the unaccounted cash of assessee group. As regard **Tally accounts,** the ld AR of assessee has explained that the tally accounts of **six companies (assessed by same AO for AY 2013-14**) were found in Pen drive of accountant **Shri Banwari lal Yogi** found and seized from residence of Chhabra Brothers. Same were received for reconciliation purpose. Since the up to date accounts were not there in Tally and missing supporting bills and vouchers from the searched premise clearly indicates that assessee group was not maintaining the books of account of shareholder companies. Further in such tally account there is no entry of outflow of any In this regard, it is also seen that the assessment of these six companies were made by ***same AO for AY 2013-14 wherein he has not made any adverse comments***. Further, the tally account have no material to show that the appellant companies obtained the share capital by giving unaccounted cash. As regard the statements of employees of Motisons Group/directors of these six investor companies, the AR of the appellant Companies has given a plausible explanation that employees of Motisons Group were directors of Six companies. Major Share Holding company of these Six companies was M/s Mayukh Vintrade Pvt. Ltd and shareholder of this company was Chhabra family members (Owner of Motisons Group), therefore the known director were appointed in these Six Companies. Further none of the employee admitted to have managed the unaccounted money of the assessee company routed in its books through share capital.

2.1.4.5 **Hon'ble Rajasthan High Court** in the case of **CIT -1, Jaipur Vs M/s. ARL Infratech Ltd,** has recently confirmed the findings of Hon'ble ITAT by deciding the appeal of revenue in DB ITA No 24/2014 vide order dated 28/09/2016. Hon'ble ITAT Jaipur Bench in this case has made the following findings :

".....Before, we proceed to decide the issue on merits, we would like to discuss the scheme of the Act and precedents on the issue involved in this appeal as under:

> ***''In cases where share application money is found recorded in the books of an assessee which may represent credit in the books and the share applicant is identified, that amount cannot be added in the assessee's hands u/s 68 of the Act. The Hon'ble Rajasthan High Court has repeatedly reiterated the above legal position. These cases are:***
>
> *(i) CIT vs. Shree Barkha Synthetics Ltd. 182 CTR 175 (Raj.)*
>
> *(ii) Barkha Synthetics Ltd. vs. ACIT (2005), 197 CTR 432 (Raj).13*
>
> ***In coming to the above conclusion, the Hon'ble Jurisdictional High Court has considered at length the relevant decisions on the issue like CIT vs. Steller Investment Ltd. (2000) 164 CTR (SC) 287 = 251 ITR 263 (SC) which has confirmed the decision of Hon'ble Delhi High Court reported in (1992) 192 ITR 287. The Hon'ble Court has gone to the extent of stating that even if it be assumed that the subscriber to the sharecapital are not genuine, nevertheless, under no circumstances can the amount of share capital be regarded as undisclosed income of the assessee. In this case, the share subscriber is identified. There can be no dispute regarding the above stated legal position. The following decisions also lay down the same ratio****:***
>
> ***(i) CIT vs. Lovely Exports (P) Ltd. (2008) 6 DTR 308 (SC)***
>
> ***(ii) CIT vs. Dolphin Conpack Ltd. (2006) 283 ITR 190 (Del.)***
>
> ***(iii) CIT vs. Gujarat Heavy Chemicals Ltd. (202) 256 ITR 795(SC)***
>
> ***(iv) CIT vs. Kwick Travels (1992) 199 ITR (St.) 85 (SC)***
>
> *This issue has been dealt at length by the Third Member in the case of Uma Polymers (P) Ltd. vs. DCIT, (2006) 101 TTJ (Jd.) T.M. 126 = (2006) 284 ITR (AT) 1 Jodhpur.''*

2.6 Adverting, the facts of the given case, we are of the considered opinion that all the share applicants stand identified. The assessee has provided PANs of the share applicants. The mode of payment has also been made explained. There is no direct or indirect relation between the assessee company and the share applicants. The statements recorded during survey has got no evidentiary value and the law is very much settled on this issue. In any case, even under the provisions of Section 68 of the Act, the assessee cannot be forced to prove the source of the source. The law on this subject is also settled by numerous decisions. The alleged report of the Inspector of the Department who is stated to have visited at the given addresses of the share applicants was never put or confronted to the assessee. The cumulative effects of these reasons is that the impugned addition cannot be added in the hands of the assessee company. Accordingly, we order to delete the entire additions and allow the appeal of the assessee.

3.0 In the result, the appeal of the assessee stands allowed....."

The Department filed appeal before Hon'ble Rajasthan High Court. Hon'ble Rajasthan High Court confirmed the findings of Hon'ble ITAT by deciding the appeal of revenue in DB ITA No 24/2014 vide order dated 28/09/2016.

Further, **Hon'ble Rajasthan High Court in another case Commissioner *of* Income-tax, Jaipur–II Versus Morani Automotives (P.) Ltd. No. D.B. IT Appeal No. 619 *of* 2011 Dated.- October 23, 2013 held that** :

> ***10. The points as sought to be raised by the appellant-revenue in the present case are all the matters relating to appreciation of evidence. The relevant factors have been taken into account and considered by the appellate authorities before returning the findings in favour of the assessee. Even as regards the three***

referred share capital contributors, it is noticed that they are existing assessees having PA numbers; and are being regularly assessed to tax. The appellate authorities cannot be said to have erred in deleting the additions in their regard too at the hands of assessee-company.

11. Ultimately, the question as to whether the source of investment or of credit has been satisfactorily explained or not remains within the realm of appreciation of evidence; and the Courts have consistently held that such a matter does not give rise to any substantial question of law. In the case of CIT v. Orissa Corpn. (P.) Ltd. [1986) 159 ITR 78 (SC), the Hon'ble Supreme Court held as under:-

> ***"13. In this case, the assessee had given the names and addresses of the alleged creditors. It was in the knowledge of the Revenue that the said creditors were income-tax assessees. Their index numbers were in the file of the Revenue. The Revenue, apart from issuing notices under s. 131 at the instance of the assessee, did not pursue the matter further. The Revenue did not examine the source of income of the said alleged creditors to find out whether they were credit-worthy or were such who could advance the alleged loans. There was no effort made to pursue the so-called alleged creditors. In those circumstances, the assessee could not do any thing further. In the premises, if the Tribunal came to the conclusion that the assessee has discharged the burden that lay on him, then it could not be said that such a conclusion was unreasonable or perverse or based on no evidence. If the conclusion is based on some evidence on which a conclusion could be arrived at, no question of law as such arises."***

12. In the case of CIT v. Chandra Prakash Rana [2001] 48 DTR 271 (Raj.), this Court noticed similar nature grounds urged on behalf of the revenue and found the same not leading to any substantial question of law. This Court noticed, observed, and held as under:

> *"7.* ***Learned counsel for the appellant (Revenue) contended that firstly Tribunal erred in accepting the explanation offered by assessee in relation to source of income. His second submission was that what was offered by assessee was no explanation and hence should not have been accepted and lastly learned counsel made sincere attempt on his part after taking us through factual scenario of the explanation and contended that it can never be taken as satisfactory explanation for deleting the addition made by AO. We do not agree to this submission for more than one reason.***
>
> ***8. In the first place, it is a pure question of fact, what to say question of law, much less substantial question of law. Secondly, this Court cannot again in this appeal undertake the examination of factual issues nor can draw factual inferences on the basis of explanation offered by assessee. Thirdly, once the explanation is accepted by the two appellate Courts i.e. CIT(A) and Tribunal in this case, then in such event, a concurrent finding recorded on such explanation by two appellate Courts is binding on the High Court.***
>
> ***9. Perusal of impugned finding quoted supra would go to show that Tribunal did examine the explanation offered by assessee in detail and then recorded a finding for its acceptance. Such finding when challenged does not constitute a substantial question of law within the meaning of s. 260A ibid in an appeal arising out of such order.***
>
> ***10. In our opinion, therefore, once the CIT(A) and Tribunal accepted the explanation of assessee and accordingly, deleted certain additions made by AO holding the transaction of shares to be genuine, then it would not involve any substantial issue of law as such. In other words, this Court in its appellate jurisdiction under s. 260A ibid, would not again de novo hold yet another factual inquiry with a view to find out as to whether explanation offered by assessee and which found acceptance to the CIT(A) and Tribunal is good or bad, or whether it was rightly accepted, or not. It is only when the factual finding recorded had been entirely de hors the subject, or that it had been based on no reasoning, or based on absurd reasoning to the extent that no prudent man of average judicial capacity could ever reach to such conclusion, or that it had been found against any provision of law, then a case for formulation of substantial question of law on such finding can be said to have been made out.***
>
> ***11. In our view, no such error could be noticed by us in the impugned order because as observed supra, the Tribunal did go into the details of explanation offered by assessee and then accepted the explanation by placing reliance on the documents filed by assessee. As a consequence thereof, the additions made by AO came to be deleted."***

13. In CIT v. Shree Barkha Synthetics Ltd. [2004] 270 ITR 477 (Raj.), in a similar nature matter, this Court observed that the Tribunal having found that the companies from which the share application money had been received by the assessee-company were genuinely existing and the identity of the individual investors were also established and they had confirmed the fact of making investment, the finding that assessee had discharged initial burden and addition under Section 68 could not be sustained, was essentially a finding of fact. This Court said,-

"19. A perusal of the aforesaid finding goes to show that deletion has been made on appreciation ofevidence, which was on record Finding that there was existence of investors and their confirmation has been obtained, were found to be satisfactory. All these conclusions are conclusions of fact based on material on record and, therefore, cannot be said to be perverse so as to give rise to question of law, which may be required to be considered in this appeal under s.260A of the IT Act."

14. The ratio of the decisions aforesaid directly applies to the present case too. Herein, as noticed, the appellate authorities have returned the findings of fact in favour of the assessee after due appreciation of the evidence on record, on relevant considerations, and on sound reasonings. These findings have neither been shown suffering from any perversity nor appear absurd nor are of such nature that cannot be reached at all. Thus, no case for interference in the findings of the appellate authorities is made out.

In the result, the appeal fails and is, therefore, dismissed."

Ld AR Sh Vijay Goyal has also submitted that the decisions of jurisdictional High Court is binding for all the revenue authorities as held by Hon'ble Apex Court in the case of **CIT Vs *G.M Mittal Stainless Steel (P), CIT (2003) 263 ITR 255* wherein it has held by Hon'ble Supreme Court that decision of jurisdictional High Court is binding on the Revenue authorities within the State. Revenue authorities within the State cannot refuse to follow the jurisdictional High Court's decision on the ground that the decision of some other High Court was pending disposal before the Supreme Court**. There are no material change in the facts of the appellant Companies with the facts of the above cited cases decided by Hon'ble Rajasthan High Court as the appellant Companies have submitted documents such as **(i) Share application containing the name/address/PAN of party, (ii) detail of payment received etc. (iii) Copy of board resolution, (iv) Copy of PAN card of party, (v) Copy of bank statement showing the entry of payment made to assessee,(vi) Declaration of source of funds with party (vii) Copy of Ack. of ITR and Computation, (viii) Copy of audit report and audited balance sheet along with annexure** proved all the ingredients of section 68 of the Act. Apart from this, it is also to be noted here that six companies involving share capital of Rs. 58,70,57,300/- to appellant companies were assessed by same AO for AY 2013-14 and in other cases as per the facts available from records non of the notices issued u/s 133(6) of the Act remained unserved and many of them have also made compliance to the notices issued u/s 133(6) of the Act. Further from search report of ROC, it is also seen that some of the investor companies have charge registered under Companies Act in favour of leading banks for crores of rupees.

2.1.4.6 Therefore, in view of the findings of Hon'ble jurisdictional High Court, the identity, creditworthiness and genuineness of transaction of these companies cannot be held as doubtful and addition by applying the provisions of section 68 of the Act cannot be upheld. However, it is also to be seen that the Investigation Directorate has carried out investigation for deposit of cash/DD at fourth stage of channel source in some cases. The Chart showing cash deposit/DD deposit at 4th Channel as per inquiries made by Investigation wing is as under:

Company	A.Y.	Amount	From Company	Cash deposit /Demand draft at 4th Channel per inquiry by investigation wing
Motisons Buildtech P Ltd	**2012-2013**	**15,00,000**	**Evershine Suppliers P Ltd**	**Swastik Traders**
Motisons Buildtech P Ltd	**2012-2013**	**20,00,000**	**Alliance Tradecom P Ltd**	**Swastik Traders and Global Securities**
Motisons Buildtech P Ltd	**2012-2013**	**17,00,000**	**Alliance Tradecom P Ltd**	**Swastik Traders**
Motisons Buildtech P Ltd	**2012-2013**	**30,00,000**	**Alliance Tradecom P Ltd**	**Swastik Traders**

Company	A.Y.	Amount	From Company	Cash deposit /Demand draft at 4th Channel per inquiry by investigation wing
	Total	82,00,000		
Motisons Entertainment P Ltd	2012-2013	18,00,000	Rose Suppliers P Ltd	Shyam Fashion and Durga Enterprises
Motisons Entertainment P Ltd	2012-2013	46,00,000	Regent Barter P Ltd	Durga Enterprises and Shyam Fashion
Motisons Entertainment P Ltd	2012-2013	4,50,000	Mayukh Vinimay P Ltd	Shyam Fashion and Durga Enterprises
Motisons Entertainment p Ltd	2012-2013	10,00,000	Mayukh Vinimay P Ltd	Shyam Fashion and Durga Enterprises
Motisons Entertainment P Ltd	2012-2013	16,00,000	Regent Dealers P Ltd	Shyam Fashion
Motisons Entertainment P Ltd	2012-2013	10,00,000	Regent Dealers P Ltd	Durga Enterprises
Motisons Entertainment P Ltd	2012-2013	8,00,000	Regent Dealers P Ltd	Durga Enterprises and Shyam Fashion
Motisons Entertainment P Ltd	2012-2013	29,00,000	Alliance Tradecom P Ltd	Swastik Traders and Global Securities
	Total	1,41,50,000		
Motisons Global P Ltd	2012-2013	17,00,000	Rose Suppliers P Ltd	Durga Enterprises and Shyam Fashion
Motisons Global P Ltd	2012-2013	18,00,000	Rose Suppliers P Ltd	Nibu Nagi
Motisons Global P Ltd	2012-2013	19,00,000	Rose Suppliers P Ltd	Nibu Nagi and Durga Enterprises
Motisons Global P Ltd	2012-2013	3,50,000	Rose Suppliers P Ltd	Durga Enterprises
Motisons Global P Ltd	2012-2013	14,00,000	Rose Suppliers P Ltd	Shyam Fashion
Motisons Global P Ltd	2012-2013	18,50,000	Rose Suppliers P Ltd	Durga Enterprises
Motisons Global P Ltd	2012-2013	18,00,000	Regent Barter P Ltd	Nibu Nagi
Motisons Global P Ltd	2012-2013	18,00,000	Mayukh Vinimay P Ltd	Nibu Nagi and Kevilhulie Sunotsu
Motisons Global P Ltd	2012-2013	35,00,000	Mayukh Vinimay P Ltd	Shyam Fashion and Durga Enterprises
Motisons Global P Ltd	2012-2013	16,00,000	Mayukh Vinimay P Ltd	Durga Enterprises
Motisons Global P Ltd	2012-2013	15,00,000	Mayukh Vinimay P Ltd	Shyam Fashion and Durga Enterprises
Motisons Global P Ltd	2012-2013	41,00,000	Mayukh Vinimay P Ltd	Shyam Fashion and Durga Enterprises
Motisons Global P Ltd	2012-2013	16,47,727	Evershine Suppliers P Ltd	PNB, Axis Bank, Siliguri
Motisons Global P Ltd	2012-2013	36,00,000	Evershine Suppliers P Ltd	Durga Enterprises and Shyam Fashion
Motisons Global P Ltd	2012-2013	18,00,000	Evershine P Ltd	Durga Enterprises
Motisons Global P Ltd	2012-2013	9,00,000	Regent Dealers P Ltd	Nibu Nagi

Company	A.Y.	Amount	From Company	Cash deposit /Demand draft at 4th Channel per inquiry by investigation wing
Motisons Global P Ltd	2012-2013	18,00,000	Regent Dealers P Ltd	Durga Enterprises
Motisons Global P Ltd	2012-2013	9,00,000	Regent Dealers P Ltd	Kevihulie Sinotsu
Motisons Global Private Limited	2012-2013	28,50,000	Regent Dealers P Ltd	Durga Enterprises and Shyam Fashion
Motisons Global Private Limited	2012-2013	18,50,000	Regent Dealers P Ltd	Shyam Fashion
Motisons Global Private Limited	2012-2013	22,00,000	Alliance Tradecom P Ltd	PNB, Axis Bank Siliguri, Swastik Traders a Global Securities
Motisons Global Private Limited	2012-2013	10,00,000	Alliance Tradecom P Ltd	Swastik Traders
Motisons Global Private Limited	2012-2013	35,00,000	Alliance Tradecom P Ltd	M/s Swastik Traders , Global Securities Axis Bank Siliguri,
Motisons Global Private Limited	2012-2013	20,00,000	Alliance Tradecom P Ltd	Swastik Traders and Global Securities
Motisons Global Private Limited	2012-2013	20,00,000	Alliance Tradecom P Ltd	Swastik Traders and Global Securities
Motisons Global Private Limited	2012-2013	16,00,000	Alliance Tradecom P Ltd	Durga Enterprises
Motisons Global Private Limited	2012-2013	9,50,000	Alliance Tradecom P Ltd	Shyam Fashion
Motisons Global Private Limited	2012-2013	10,00,000	Alliance Tradecom P Ltd	Shyam Fashion and Durga Enterprises
Motisons Global Private Limited	2012-2013	3000000	Alliance P Ltd	Shyam Fashion and Durga Enterprises
Motisons Global Private Limited	2012-2013	16,00,000	Alliance P Ltd P Ltd	Nibu Nagi
Motisons Global Private Limited	2012-2013	19,50,000	Alliance Tradecom P Ltd	Durga Enterprises
Motisons Global Private Limited	2013-2014	5050000	Alliance Tradecom P Ltd	Shyam Fashion and Durga Enterprises
	Total	6,44,97,727		
Shivansh Buildcon P Ltd	2012-2013	3,50,000	Evershine Suppliers P Ltd	Durga Enterprises, Swastik and Shyam Fas
	Total	3,50,000		
Grand Total		8,71,97,727		

2.1.4.7 **In view of above findings, it is also seen that this cash/DD was deposited at 4th Channel of source/stage. This money came to the hands of some of appellant companies through the six companies assessed in Jaipur. However, on perusal of written submissions and compliance to show cause letter , it is also seen that assessee has not controverted the facts narrated by Sh Santosh Choube, Sh Rajesh Kr Singh and Sh Ajit Sharma and also could not satisfactorily explain the reasons of cash deposits made to those accounts. Therefore, duly considering those facts and evidences(both documentary & oral) gathered during search & post-search operation , addition to the extent of Rs. 8,71,97,727/= is sustained and balance is deleted, details given as under:**

Name of Appellant Company	ITA No	AY	Addition Made by AO	Addition Sustained	Addition deleted/ Relief Given

Motisons Global Pvt. Ltd	**753/14-15**	**2009-10**	**2,75,00,000**	**----------**	**2,75,00,000**
Motisons Global Pvt. Ltd	**754/14-15**	**2011-12**	**6,96,50,000**	**----------**	**6,96,50,000**
Motisons Global Pvt. Ltd	**767/14-15**	**2012-13**	**42,07,29,600**	**5,94,47,727**	**36,12,81,873**
Motisons Global Pvt. Ltd	**755/14-15**	**2013-14**	**4,41,00,000**	**50,50,000**	**3,90,50,000**
Motisons Entertainment (I) Pvt. Ltd	**760/14-15**	**2009-10**	**3,40,00,000**	**----------**	**3,40,00,000**
Motisons Entertainment (I) Pvt. Ltd	**766/14-15**	**2011-12**	**1,95,00,000**	**----------**	**1,95,00,000**
Motisons Entertainment (I) Pvt. Ltd	**756/14-15**	**2012-13**	**7,78,00,000**	**1,41,50,000**	**6,36,50,000**
Motisons Buildtech Pvt. Ltd	**758/14-15**	**2009-10**	**3,03,00,000**	**----------**	**3,03,00,000**
Motisons Buildtech Pvt. Ltd	**759/14-15**	**2012-13**	**3,68,27,500**	**82,00,000**	**2,86,27,500**
Godawari Estates Pvt. Ltd	**769/14-15**	**2010-11**	**2,00,00,000**	**----------**	**2,00,00,000**
Godawari Estates Pvt. Ltd	**768/14-15**	**2012-13**	**10,30,00,000**	**----------**	**10,30,00,000**
Bholenath Real Estates Pvt Ltd	**770/14-15**	**2009-10**	**2,90,00,000**	**----------**	**2,90,00,000**
Rainbow Buildcon Pvt. Ltd	**757/14-15**	**2009-10**	**2,00,00,000**	**----------**	**2,00,00,000**
Shivansh Buildcon Pvt. Ltd	**771/14-15**	**2012-13**	**90,00,000**	**3,50,000**	**86,50,000**
Total additions			**94,14,07,100**	**8,71,97,727**	**85,42,09,373**

It is pertinent to mention here that M/s Mayukh Vinimay Pvt Ltd received share application of **Rs. 10,54,95,000/- in AY 2009-10** which was added as income of M/s Mayukh Vinimay Pvt Ltd in AY 2009-10. Thereafter in subsequent years the part of the funds owned by this company was invested in the companies under appeal as under:

S.No	***Name of Company (under your appeal)***	***Assessment Year***	***Amount***
1	*Motisons Global Pvt Ltd*	*2012-13*	*6,93,49,800*
2.	*Motisons Global Pvt Ltd*	*2013-14*	*2,24,50,000*
3	*Motisons Entertainment (India) Pvt Ltd*	*2012-13*	*1,55,00,000*
	Total		***10,72,99,800***

Further, it is also submitted that addition made by the AO tantamount to double addition. It is also mentioned here that as per Ld AR's request, appellate proceedings in case of M/s Mayukh Vinimay Pvt Ltd have been kept in abeyance till the disposal of appeal by Hon'ble ITAT.

In view of aforementioned findings, now additions made by the AO are being discussed with respect to grounds of appeal raised by the respective assessee in para below. ''

Section 68 of the Act provides regarding any sum found credited in the books of an assesse maintained and explanation offered by the assessee is not satisfactory in the opinion of the AO then such sum credited be charged to income-tax as the income of the assessee of that previous year. The Section 68 reads as under:-

> Section 68 – Cash Credits: 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.''

Thus the sum so received by assessee towards share application and share premium could have been taxed as income u/s 68 of the Act. However, the AO has not invoked provisions of sec 68 of the Act. The AO invoked the provisions of sec 56(1) of the Act which reads as under:-

''56. Income from other sources.

(1) *"Income of every kind which is not to be excluded from the total income under the Act shall be chargeable to income tax under the head." Income from other sources'', if it is not chargeable to income tax under any of the heads specified in section 14, items A to E.''*

The provisions of Section 56(1) the Act can be invoked to tax income of every kind which is not chargeable to tax under any head specified in Section 14 from Item No. A to E is chargeable under the head 'Income from other sources'' by the provisions of section 56 of the Act. . Therefore, provisions of sec 56(1) are not applicable. Further the amended provisions of sec 56 (2) of the I.T. Act, 1961 specify the various income to be assessed under this section. The premium on shares has been included by provision of sec 56(2)(viiib)of the Act w.e.f. 01-04-2014 which is reproduced as under:

> ''56(2) In particular, and without prejudice to the generality of the provisions of sub-section (1), the following incomes, shall be chargeable to income tax under the head ''Income from other sources'' namely:-
> (i) dividends
> (ia) to (viia)…
> (viib) Where a company, not being a company in which the public are substantially interested, receives, in any previous year, from any person being a resident, any consideration for issue of shares that exceeds the face value of such shares, the aggregate consideration received for such shares as exceeds the fair market value of the shares:''

This has also been included in the definition of income u/s 2(24)of the Act w.e.f. 01-04-2013. The relevant portion reads as under:-

> *''(xvi) any consideration received for issue of shares as exceeds the fair market value of the share referred to in clause (viib) of sub-section (2) of Section 56;]''*

To tax the income under the Act, it must come under the definition of income as provided u/s 2(24) of the I.T. Act, 1961. There were amendments in sec 2(24) of the Act and in section 56(2) of the Act w.e.f. 01-04-2013 are not applicable to A.Y. under consideration. By these amended provisions, any consideration received for issue of shares that exceeds the face market value of such shares the aggregate consideration received for such shares as exceeds the fair market value of the shares shall be taxable as per clause (viib) of sub-section 2 of section 56 of the Act. The CBDT vide Circular No. 3 of 2012 dated 12-06-2012 has also mentioned that provision of section 56(2)(viib) will be applicable for A.Y. 2013-14. Thus the relevant portion of CBDT Circular is reproduced is as under:-

'Share premium in excess of fair market value to be treated as income

In the Finance Bill, 2012, it had been proposed [section 56(2), as sub-clause [(viib)] that in case of a company, not being a company in which the public are substantially interested, which receives, in any previous year, from any person being a resident, any consideration for issue of shares and the consideration received for issue of such shares exceeds the face value of such shares, then the aggregate consideration received for such shares as exceeds the fair market value of the shares shall be chargeable to income tax. An exemption was provided in a case where the consideration for issue of shares is received by a venture capital undertaking from a venture capital company or a venture capital fund.

(i) It has now been further provided that such excess share premium is included in the definition of "income" under sub-clause (xvi) of clause (24) of section 2.

(ii) Considering that the proposed amendment may cause avoidable difficulty to investors who invest in start-ups where the fair market value may not be determined accurately, it is proposed to provide an exemption to any other class of investors as may be notified by the Central Government.

These amendments will take effect from 1st April, 2013 and will, accordingly, apply in relation to the assessment year 2013-14 and subsequent assessment years.''

The provisions of sec 56(2)(viib) of Income-tax Act, 1961 are applicable w.e.f. 1st April, 2013 and will accordingly apply in relation to Assessment Year 2013-14 and subsequent Assessment Years. The income as mentioned in section 56(2)(viib) is included in definition of section 2(24) of the Act w.e.f. 01-04-2013. Therefore, the provisions of these sections cannot be made applicable prior to that A.Y. 2013-14. It is pertinent to note that the ld. CIT(A) had issued the show cause notice to the assessee to tax the share capital under section 68 of the I.T. Act, 1961 as against section 56(1) applied by the AO. However, he had not made any addition under section 68 of the Act. His observation on this issue is in para 2.1.4.6 which reads as under:-

''2.1.4.6 Therefore, in view of the findings of Hon'ble Jurisdictional High Court, the identity, creditworthiness and genuineness of transaction of these companies cannot be held as doubtful and addition by applying the provisions of sec 68 of the Act cannot be upheld.'''

The Revenue has not preferred appeal against this findings the ld. CIT(A). It is also pertinent to note that AO has made whole addition by invoking section 56 of the Act, hence the amended provision w.e.f. 01-04-2013 are applicable only on shares premium received on fair market value. In view of these facts, circumstances of the case and the case laws relied on by the ld.AR of the assessee (supra), it is clear that share premium received cannot be considered as income for the year under consideration by invoking provisions of section 56(1) of the Act. Therefore, in our considered view, the ld. CIT(A) has rightly deleted the addition of Rs. 3,03,00,000/- and we concur with his findings on the issue in question Thus the Revenue's appeal in ITA No. 481/JP/2017 is dismissed.''

Since the issue raised by the Revenue in the present appeal is same as decided in the appeal of the Revenue in ITA No.481/JP/2017for the Assessment Year 2009-10 in the case of ACIT, Central Circle-2, Jaipur vs Motisons Buildtech Pvt. Ltd Jaipur shall apply mutatis mutandis in this appeal of Revenue also. Thus solitary ground of the Revenue's appeal for the A.Y. 2009-10 is dismissed. In the result the appeal of the Revenue in ITA No.486/JP/2017 stands dismissed.

3.1 Now we take up the appeal of the Revenue in ITA No.487/JP/2017 for the 2011-12 for adjudication wherein the Revenue has raised the solitary ground as under:-

> ''Whether on the facts and in the circumstances of the case the ld. CIT(A) was right in deleting the addition of Rs.6,96,50,000/- made u/s 56(1) of the Act ignoring the fact that assets of the assessee company don't commensurate to premium charged and further ignoring the fact that neither any business activity was performed nor any business income has been shown by the assessee.

3.2 Apropos solitary ground of the Revenue, the AO made the addition of Rs. 6,96,50,000/- u/s 56(1) of the Act in the hands of the assessee company by observing as under:-

> ''16. Having dealt with each of the contention of the assessee and having found the same to be untenable it is important to place on record certain aspects which have a bearing on the issue at hand. It is

true that the apparent must be considered real until it is shown that there are reasons to believe that the apparent is not the real. In a case of the present kind a party who relies on a recital in a deed has to establish the truth of those recitals, otherwise it will be very easy to make self-serving statements in documents either executed or taken by a party and rely on those recitals. If all that an assessee who wants to evade tax has to have some recitals made in a document either executed by him or executed in his favour then the door will be left wide open to evade tax. A little probing was sufficient in the present case to show that the apparent was not the real. The taxing authorities were not required to put on blinkers while looking at the documents produced before them. They were not entitled to look into the surrounding circumstances to find out the reality of the recitals made in those documents.

17. In the above back ground of the facts and circumstances surrounding this case, it is hereby held that the receipt of share capital and share premium was part of a colourful transaction by way of which a sum of Rs. 6,96,50,000/- was introduced into the books of the assessee company in the form of share premium attached to the share capital. As discussion above the **premium of Rs. 900/- per share was** not justified at all on the basis of absolutely no assets, no business activity, no income, no net worth nor any promise for creation of any assets, business activity, income or net worth in the future. Accordingly, the charging and receipt of share premium/ share capital to the tune of Rs. 6,96,50,000/- is held to be income of the assessee company in the nature of income envisaged u/s 56(1) of the Income Tax Act, 1961. The same is added back to the total income of the assessee.''

3.3 In first appeal, the ld. CIT(A) has deleted the addition of Rs. 6,96,50,000**/-** made by the AO by observing at pages 100 of his order as under:-

''3.2.2 I have considered assessee's submission and carefully gone through assessment order. I have also take a note of factual matrix of the case as well as applicable case laws relied upon. I have already given a detailed findings in para 2.1.4.7 wherein total of Rs. 8,71,97,727/- has been sustained in the hands of M/s. . Motisons Global Pvt. Ltd, M/s. Motisons Entertainment

Pvt. Ltd, M/s. Motisons Buildtech Pvt. Ltd and M/s. Shivansh Buildtech Pvt. Ltd, details of which are as under:-

Name of Appellant Company	ITA No.	A.Y.	Addition made by AO	Addition sustained	Addition deleted/Relief given
Motisons Global Pvt Ltd	753/14-15	2009-10	2,75,00,000	-	2,75,00,000
Motisons Global Pvt Ltd	754/14-15	2011-12	6,96,50,000	-	6,96,50,000
Motisons Global Pvt Ltd	767/14-15	2012-13	42,07,29,600	5,94,47,727	36,12,81,873
Motisons Global Pvt Ltd	755/14-15	2013-14	4,41,00,000	50,50,000	3,90,50,000
Motisons Entertainment (I) Pvt. Ltd	760/14-15	2009-10	3,40,00,000	-	3,40,00,000
Motisons Entertainment (I) Pvt. Ltd	766/14-15	2011-12	1,95,00,000	-	1,95,00,000
Motisons Entertainment (I) Pvt. Ltd	756/14-15	2012-13	7,78,00,000	1,41,50,000	6,36,50,000
Motisons Buildtech Pvt. Ltd	758/14-15	2009-10	3,03,00,000	-	3,03,00,000
Motisons Buildtech Pvt. Ltd	759/14-15	2012-13	3,68,27,500	82,00,000	2,86,27,500
Godawari Estates Pvt. Ltd	769/14-15	2010-11	2,00,00,000	-	2,00,00,000
Godawari Estates Pvt. Ltd	768/14-15	2012-13	10,30,00,000	-	10,30,00,000
Bholenath Real Estates Pvt. Ltd.	770/14-15	2009-10	2,90,00,000	-	2,90,00,000
Rainbow Buildcon Pvt. Ltd	757/14-15	2009-10	2,00,00,000	-	2,00,00,000
Shivansh Buildcon Pvt. Ltd	771/14-15	2012-13	90,00,000	3,50,000	86,50,000
			94,14,07,100	8,71,97,727	85,42,09,373

In view of the above facts and circumstances of the case as discussed above, addition of Rs.6,96,50,000/- made on a/c of bogus share capital in the

hands of M/s. Motisons Global Pvt. Ltd is hereby deleted. Assessee gets relief in Gr No. 2 & 3.''

Para 2.1.4.7 reads of ld. CIT(A)'s order as under:-

''2.1.4.7 In view of the above findings, it is also seen that this cash /DD was deposited at 4th Channel of source/ stage. This money came to the hands of some of appellant companies through the six companies assessed in Jaipur. However, on perusal of written submissions and compliance to show cause letter, it is also seen that the assessee has not controverted the facts narrated by Shri Santosh Choube, Shri Rajesh Kr Singh and Shri Ajit Sharma and also could not satisfactorily explain the reasons of cash deposits made to those accounts. Therefore, duly considering those facts as evidences (both documentary & oral) gathered during search and & Post-search operation, addition to the extent of Rs. 8,71,97,727/- is sustained and balance is deleted, details given as under:-

Name of Appellant Company	ITA No.	A.Y.	Addition made by AO	Addition sustained	Addition deleted/Relief given
Motisons Global Pvt Ltd	753/14-15	2009-10	2,75,00,000	-	2,75,00,000
Motisons Global Pvt Ltd	754/14-15	2011-12	6,96,50,000	-	6,96,50,000
Motisons Global Pvt Ltd	767/14-15	2012-13	42,07,29,600	5,94,47,727	36,12,81,873
Motisons Global Pvt Ltd	755/14-15	2013-14	4,41,00,000	50,50,000	3,90,50,000
Motisons Entertainment (I) Pvt. Ltd	760/14-15	2009-10	3,40,00,000	-	3,40,00,000
Motisons Entertainment (I) Pvt. Ltd	766/14-15	2011-12	1,95,00,000	-	1,95,00,000
Motisons Entertainment (I) Pvt. Ltd	756/14-15	2012-13	7,78,00,000	1,41,50,000	6,36,50,000
Motisons Buildtech Pvt. Ltd	758/14-15	2009-10	3,03,00,000	-	3,03,00,000
Motisons Buildtech Pvt. Ltd	759/14-15	2012-13	3,68,27,500	82,00,000	2,86,27,500
Godawari Estates Pvt. Ltd	769/14-15	2010-11	2,00,00,000	-	2,00,00,000

Godawari Estates Pvt. Ltd	768/14-15	2012-13	10,30,00,000	-	10,30,00,000
Bholenath Real Estates Pvt. Ltd.	770/14-15	2009-10	2,90,00,000	-	2,90,00,000
Rainbow Buildcon Pvt. Ltd	757/14-15	2009-10	2,00,00,000	-	2,00,00,000
Shivansh Buildcon Pvt. Ltd	771/14-15	2012-13	90,00,000	3,50,000	86,50,000
			94,14,07,100	8,71,97,727	85,42,09,373

It is pertinent to mention here that M/s. Mayukh Vinimay Pvt.Ltd received share application of Rs. 10,54,95,000/- in AY 2009-10 which was added as income of M/s.Mayukh Vinimay Pvt. Ltd ind A.Y. 2009-10. Thereafter in subsequent years the part of the funds owned by this company was invested in the companies under appeal as under:-

S.N.	Name of company (under your appeal)	Assessment Year	Amount
1.	Motisons Global Pvt. Ltd	2012-13	6,93,49,800
2.	Motisons Global Pvt. Ltd	2013-14	2,24,50,000
3.	Motisons Entertainment (India)Pvt ltd.	2012-13	1,55,00,000
	TOTAL		10,72,29,800

Further it is also submitted that addition made by the AO tantamount to double addition. It is also mentioned here that as per Ld. ARs request, appellate proceedings in case of M/s. MayukhVinimay Pvt. Ltd have been kept in abeyance till the dispostal of appeal by Hon'ble ITAT.

In view of aforementioned findings, now additions made by the AO are being discussed with respect to grounds of appeal raised by the respective assessee in para below.''

3.4 During the course of hearing, the ld. DR supported the order of the AO and submitted that the order of the ld. CIT(A) may be set aside.

3.5 On the other hand, the ld.AR of the assessee supported the order of the ld. CIT(A) for which the ld.AR of the assessee filed the following written submission praying therein to dismiss the appeal of the department.

> ‘’**2.02.1.2 Submission of assessee:-**
> The facts and circumstances of the issue raised in the departmental appeal for the AY 2011-12 under ground No 1 are exactly similar to Ground No 1 for AY 2009-10 in ITA No 486/JP/2017. The assessee has made detailed submission in AY 2009-10 for ITA No 486/JP/2017. In order to avoid repetition, we pray your honor kindly to consider the submission made for ITA No 486/JP/2017 for AY 2009-10 under para **2.01.2 above as also made for AY 2011-12 under Ground No 1 of ITA No 487/JP/2017.**

3.6 We have heard the rival contentions and perused the materials available on record. It is pertinent to mention that the similar issue has been dealt with and decided by this Bench of ITAT vide its order dated 30-10-2017 in the case of ACIT, Central Circle-2, Jaipur vs Motisons Buildtech Pvt. Ltd in ITA No. 481/JP/2017 (Revenue’s appeal) for the Assessment Year 2009-10. Since the issue raised by the Revenue in the present appeal is same as decided in the appeal of the Revenue in ITA

No.481/JP/2017for the Assessment Year 2009-10 in the case of ACIT, Central Circle-2, Jaipur vs Motisons Buildtech Pvt. Ltd Jaipur (supra) which shall apply mutatis mutandis in this appeal of Revenue also. Thus solitary ground of the Revenue's appeal in ITA No.487/JP/2017 for the A.Y. 2011-12is dismissed. In the result, the appeal of the Revenue in ITA No.487/JP/2017 stands dismissed.

4.1 The Revenue in ITA No.488/JP/2017 for the A.Y. 2012-13 has raised the solitary ground as under:-

> ''Whether on the facts and in the circumstances of the case the ld. CIT(A) was right in deleting the addition of Rs.36,12,81,873/- out of total addition of Rs. 42,07,29,600/- made u/s 56(1) of the Act ignoring the fact that assets of the assessee company don't commensurate to premium charged and further ignoring the fact that neither any business activity was performed nor any business income has been shown by the assessee.''

4.2 Apropos solitary ground of the Revenue, the AO made the addition of Rs. 42,07,29,600/- u/s 56(1) of the Act in the hands of the assessee company by observing as under:-

> ''24. Having dealt with each of the contention of the assessee and having found the same to be untenable it is important to place on record certain aspects which have a bearing on the issue at hand. It is true that the apparent must be considered real until it is shown that there are reasons to believe that the apparent is not the real. In a case of the present kind a party who relies on a recital in a deed has to establish the truth of those recitals, otherwise it will be very easy to make self-serving statements in documents either executed or taken by

a party and rely on those recitals. If all that an assessee who wants to evade tax has to have some recitals made in a document either executed by him or executed in his favour then the door will be left wide open to evade tax. A little probing was sufficient in the present case to show that the apparent was not the real. The taxing authorities were not required to put on blinkers while looking at the documents produced before them. They were not entitled to look into the surrounding circumstances to find out the reality of the recitals made in those documents.

25. In the above back ground of the facts and circumstances surrounding this case, it is hereby held that the receipt of share capital and share premium was part of a colourful transaction by way of which a sum of Rs. 42,07,29,600/- was introduced into the books of the assessee company in the form of share premium attached to the share capital. As discussion above the **premium of Rs.240/- & Rs. 290/- per share was** not justified at all on the basis of absolutely no assets commensurate to premium charged, no business activity, no income, no net worth nor any promise for creation of this much assets, business activity, income or net worth in the future. Accordingly, the charging and receipt of share premium/ share capital to the tune of Rs. 42,07,29,600/- is held to be income of the assessee company in the nature of income envisaged u/s 56(1) of the Income Tax Act, 1961. The same is added back to the total income of the assessee.''

4.3 In first appeal, the ld. CIT(A) has deleted the addition of Rs. 36,12, 81,873**/-** out of addition of Rs. 42,07, 29,600/- made by the AO and sustained the addition of Rs. 5,94,47,727**/- by observing at pages 59 to 111 of his order as under:-**

3.1.2 I have duly considered assessee's submission and carefully gone through assessment order. I have also taken a note of factual matrix of the case as well as applicable case laws relied upon.

Facts of the case are that no scrutiny assessment u/s 143(3) of the Act was done in assessee's case for **AY 2012-13** and the original return filed on **30.09.2012** declaring **nil** total income was **only** processed u/s 143(1) of the Act. **Various courts have held that processing of returns u/s 143(1) of the Act is no assessment.** It is obvious that if no incriminating material is found during search, then additions, if any, have to be made in the income shown in the return of income (***in the case of pending assessments which abate***) and to the computed income (***in case of assessments were completed***)**.** Thus

effectively, what was said in the case of **Kabul Chawla** was that making any addition in the returned income or income earlier assessed was not allowed if no material was found in the search which could lead to an addition on the basis of the said material. Now in this regard, I would like to discuss the issue pertaining to assessment completed u/s 153A r.w.s 143(3) of the Act when no incriminating documents were found from the assessee's premises. Before coming to the facts of the present case it would be appropriate to mention sec. 153A of the Act, the relevant part of which reads 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, 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 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 :*
>
> *Provided that the Assessing Officer shall assess or reassess the total income in respect of each assessment year falling within such six assessment years:*
>
> *Provided further that assessment or reassessment, if any, relating to any assessment year falling within the period of six assessment 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.*

As per the provisions of this section where a search is initiated u/s 132 of the Act, the A.O shall issue a notice requiring the person searched to furnish his return of income in respect of each assessment year falling within six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made. Once such returns are filed, the AO has to assess or reassess the total income of such six assessment years.(emphasis supplied by me). (**The decisive words used in the provisions are to 'assessee or reassess the total income'**). The A.O. is thus duty bound to determine the 'total income' of the assessee for such six assessment years and it is obvious that 'total income' refers to the sum total of income in respect of which a person is assessable. The total income therefore will cover not only the income emanating from declared sources or any material placed before the Assessing Officer but from all sources including the undisclosed ones, or based on the unplaced material before the AO.

Some related Judgments

a) ***CIT vs. Kabul Chawla (Delhi High Court)*** **:** *Completed assessments can be interfered with by the AO while making the assessment under Section 153 A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not…*

b) ***Gurinder Singh Bawa vs. DCIT (ITAT Mumbai)*** *: In All Cargo Global Logistics 137 ITD 287 (Mum)(SB), the Special Bench held that in a case where the assessment has*

abated the AO can make additions in the assessment, even if no incriminating material has been found. However, in a case where the assessment has not abated, ….

c) ***Anil Kumar Bhatia vs. ACIT (ITAT Delhi)*** **:** *S. 153A does not authorize the making of a de novo assessment. While under the 1st Proviso, the AO is empowered to frame assessment for six years, under the 2nd Proviso, only the assessments which are pending on the date of initiation of search abate.*

d) ***Sanjay Aggarwal vs. DCIT (ITAT Delhi)*** *: S. 153A: Addition in a search assessment for a AY which is not pending can be made only if incriminating material is found during search*

(i) *The language of s. 153A has been structured in such a way so as not to permit the making of addition for the assessment…*

e) ***Trishul Hi-Tech Industries vs. DCIT (ITAT Kolkata)*** *: It has been held by the ITAT, Kolkata Bench in the case of LMJ International Limited vs. DCIT 119 TTJ (Kol) 214 where nothing incriminating is found in the course of search relating to any assessment years, the assessments for……..*

f) *It has been held by the* ***ITAT, Kolkata Bench in the case of LMJ International Limited vs. DCIT 119 TTJ (Kol) 214*** *where nothing incriminating is found in the course of search relating to any assessment years, the assessments for such assessment years cannot be disturbed u/s 153C of the Act. Thus it is clear that the provisions of section 153C of the Act cannot be invoked automatically in respect of any assessment year unless there exists incriminating documents for that previous year. The provision of section 153C of the Act cannot be invoked on routine information or on income already accounted/disclosed in the original return, the assessment of which is complete. In this regard we may gainfully refer to the decision of the Mumbai Special Bench of the ITAT in the case of Al cargo Global Logistics Ltd vs. DCIT.*

Apart from above, there are several decisions of various judicial authorities where it has been held that in the absence of any incriminating material found during search, additions made on the assessed income are unsustainable in law. Some of these decisions are discussed in the following paragraphs:

(i) ***In the case of CIT vs. Kabul Chawla reported in 281 CTR 45, Delhi it has been held by the Hon'ble Delhi High Court that:***

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

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

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

iii. The AO will exercise normal assessment powers in respect of the six years previous to the relevant AY in which the search takes place. The AO has the power to assess and reassess the 'total income' of the aforementioned six years in separate assessment orders for each of the six years. In other words there will be only one assessment order in respect of each of the six AYs "in which both the disclosed and the undisclosed income would be brought to tax".

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

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

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

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

(ii) ***In the case of ACIT Vs. PACL India Ltd. New Delhi, the Hon'ble ITAT, F. Bench, Delhi has considered the various decisions of different judicial authorities and in para 10 of the order has held that:***

"Therefore, the question arises whether AO can make any addition in the reassessment proceedings u/s 153(A) after making inquiries which are not suggested by any d documents or asset seized during the search. It depends on the nature of

addition. The facts and circumstances of the assessee clearly show that no incriminating document found relating to the land development expenses debited in the books of accounts. No material was on the record on that basis which income of assessee could be further assessed by Assessing Officer. Therefore, the assessing officer has no jurisdiction to make or to resort to roving and fishing inquiries to find out whether any income has escaped assessment during these reassessment proceedings. Particularly, when there is no incriminating material found and seized during the course of search u/s 132(1) of the Act and nothing is available in record to reassess the income of assessee. In view of the above, this is not a fit case for making the addition in the year under consideration, the same are deleted."

(iii) In the case of M/s Ideal Appliance Company Pvt. Ltd. Vs. DCIT, Central Circle-44, Mumbai, the following legal issues were raised before the Hon'ble ITAT'1" Bench, Mumbai:

"1. The Ld CIT (A) failed to appreciate the fact that no incriminating documents /evidences were found during the course of search of third party, and hence, re-computing the income u/s I53A is bad in law and liable to be quashed.

2. The Ld CIT (A) failed to appreciate the fact that original assessment was made u/s 143(3) vide order 31st August 2007 after considering all the documents and materials on record and *due application ff mind and hence re-computing the income by merely changing head of income for the said year under the grab of section 153A based on same documents and materials, is bad in law and order is liable to be quashed,*

3. *The Ld CIT (A) erred in confirming the action of the AO reassessing the income u/s 143(3) r.w.s I53A, without appreciating the fact that only pending assessment abet and not the completed assessments and hence the order u/s 143(3) r.w.s I53A is bad in law and liable to be quashed.*

4. *The Ld CIT (A) erred in not allowing the decision of jurisdictional High Court wherein it was held that no addition can be made u/s I53A if no incriminating material / documents are found during search. Therefore, the order of the CIT (A) is bad in law."*

(iv) ***On these issues, it was held by the Hon'ble ITAT that:***

"9. From the above settled legal position of the issue that in the absence of any incriminating material found during search, additions made on the assessed income are unsustainable in law, we are of the considered opinion that the additions made in the instant case are not sustainable and accordingly, we delete the same. Considering our decision on the legal issue in favour of the assessee, the other grounds demand no specific adjudication. Thus, on the legal ground the assessee succeeds and rest of the grounds are dismissed as academic.

9.1. Further, regarding the non-abated nature of the assessments relating to the AYs 2007-2008, 2008-2009 and 2009-2010, it is a decided issued that the time limit for the issue of notice u/s 143(2) in the said AYs since expired on 30.9.2008 and they constitute non-abated assessments and therefore, the assessments for those AYs have to be reassessed under the special provisions in the light of the incriminating material seized during the search. The above said ratio was also followed by the Tribunal in the case of Gurinder Singh Bawa vs. CIT (supra) wherein it was held that ,,…… where the assessment had been completed under summary scheme under section 143(1) and time limit for issue of notice under section 143(2) had expired on the date of search ……..there was no assessment pending ……in such a case there was no question of abatement. Therefore, addition could be made only on the basis of incriminating material found during search."

(v) **The relevant issues as arising out of the decision in the case of Kabul Chawla as under:**

1) When there is no condition in section 153A of the Act that additions cannot be made without relevance to or without nexus to seized material, then is it for the Courts to read that condition into the provisions of section 153A of the Act? The answer is NO for the reason that the application of section 148 of the Act has been ousted by the non-obstante clause with which section 153A starts. Therefore, even if no incriminating material is found during search, if any undisclosed income has to be assessed for the relevant 6 years, it has to be in the proceedings under section 153A of the Act.

a) Now there are two situations - either the assessment was complete before the search or pending at that time. If the assessment was complete, and if any income which had escaped assessment in the regular assessment is found during proceedings u/s 153A, what is the AO supposed to do? He has no power to act u/s 147/148 because of the non-obstante clause. He is now precluded from invoking provisions of section 148 because of the conclusion drawn in Kabul Chawla.

b) The situation is even more serious if a pending assessment or reassessment abates. What if a show-cause notice had been issued on an undisclosed income prior to search? According to Kabul Chawla if no incriminating material is found during search, then NO ACTION can be taken in such cases also.

No interpretation of a provision of an Act can be such that it leads to results which were never intended. By drawing a conclusion that the presence of incriminating material, and addition thereon is necessary for making an addition which is not based on material found during search, Kabul Chawla has done exactly that, and so it has to be held that the conclusion so drawn is per incuriam.

In this regard I draw solace from the decision of the Allahabad High Court in the case of ***CIT v. Raj Kumar Arora [2014] 367 ITR 517(All.)*** *and the decision of the Delhi High Court in the case of* ***Filatex India Ltd. v. CIT[2014] 49 taxmann.com 465(Delhi)*** *both of which precede the decision in the case of Kabul Chawla.*

2) There is another situation which has not been anticipated in Kabul Chawla. In that case the Hon'ble High Court proceeded on the grounds that processing of a case u/s 143(1) was also assessment. It accordingly held that even if the returns have been processed u/s 143(1) it will be treated as if the assessments are complete.

Now after the decision of the Hon'ble Supreme Court in the case of ***Deputy Commissioner of Income-Tax v. Zuari Estate Development & Investment Co. Ltd. [2015] 373 ITR 661 (SC)*** *and* ***Assistant Commissioner of Income-Tax v. Rajesh Jhaveri Stock Brokers P. Ltd. [2007] 291 ITR 500(SC)*** *it is clear that processing of a case u/s 143(1) is not an assessment, which fact has been admitted by the Delhi High Court in the case of* ***Indu Lata Rangwala v. Deputy Commissioner of Income-Tax, WP(C) 1393/2002*** *in their decision dated 18.05.2016.*

3) *Hence, there now occurs a third category – of cases which have neither been completed nor are pending on the date of search. Kabul Chawla is silent on this situation, perhaps because it was not envisaged at that time. In view of these facts and legal position that the premise developed in Kabul Chawla, that additions can be made in the completed or abated assessments only if there is incriminating material in a proceeding u/s 153A, cannot and will not apply to such a situation.*

4) *Now we come to the question of whether it is necessary to have incriminating material in all the 6 years for an addition to me made on issues not covered by search. Though there is an attempt to interpret Kabul Chawla in a way that incriminating material is required in all the 6 years, this interpretation is incorrect because:*

a) ***this proposition has not been specifically spelt out in the Kabul Chawla case;***

b) ***the Delhi High Court in the case of CIT v. Chetan Das Lachman Das [2012] 211 Taxman 61 (Del.)/[2012] 254 CTR 392 (Del.) has specifically raised and then answered the question in favour of the revenue. It has stated that additions on non-search issues can be made even if there is incriminating material in even one year. This case is extremely important for the Revenue.***

Similar sentiments have been expressed in the case of CIT v. Anil Kumar Bhatia [2013] 352 ITR 493 (Del) where only one unsigned document dated 10.02.2003 showing a loan of Rs. 1,50,000/- was found during search conducted on 13.12.2005. The Hon'ble High Court held that this material was enough to justify additions in all the 6 years.

c) *Recently, the Kerala High Court in* ***Sunny Jacob Jewellers and Wedding Centre v. Deputy Commissioner of Income-Tax [2014] 362 ITR 664 (Ker)*** *has also very categorically stated that incriminating material found during search is not necessary in all the 6 years for additions to be made on other issues.*

While giving these decisions, the Hon'ble ITAT, Mumbai as well as the Hon'ble ITAT, Delhi Bench has referred to the decision of the Hon'ble Mumbai High Court in the case of All Cargo Global Logistics Limited Vs. DCIT, Central Circle-44, Mumbai and the decision of Hon'ble Delhi High Court in the case of **CIT Vs. Kabul Chawla** in **ITA No. 707/2014 dated 22.8.2015**. **Here it is pertinent to mention that the Department has not accepted the decisions of Hon'ble Mumbai High Court in the case of M/s All Cargo Global Logistics as well as Continental Warehousing (Nhava Sheva) Ltd., and SLP has been filed before the Hon'ble Supreme Court. The Hon'ble Supreme Court has granted leave vide order dated 12.10.2015 as reported in 64 taxmann.com 34 (S.C.). Similarly, in the case of Kabul Chawla SLP has also been filed.**

Now after the decision of the Hon'ble Supreme Court in the case of **Deputy Commissioner of Income-Tax v. Zuari Estate Development & Investment Co. Ltd. [2015] 373 ITR 661 (SC)** and **Assistant Commissioner of Income-Tax v. Rajesh Jhaveri Stock Brokers P. Ltd. [2007] 291 ITR 500(SC)** it is clear that processing of a case u/s 143(1) is not an assessment, which fact has been admitted by the Delhi High Court in the case of **Indu Lata Rangwala v. Deputy Commissioner of Income-Tax, WP(C) 1393/2002** in their decision dated 18.05.2016. Hence, there now occurs a third category – of cases which have neither been completed nor are pending on the date of search. **Kabul Chawla** is silent on this situation, perhaps because it was not envisaged at that time. It is my contention that the premise developed in **Kabul Chawla**, that additions can be made in the completed or abated assessments only if there is incriminating material in a proceeding u/s 153A, cannot and will not apply to such a situation.

Now we come to the question of whether it is necessary to have incriminating material in all the 6 years for an addition to me made on issues not covered by search. Though there is an attempt to interpret Kabul Chawla in a way that incriminating material is required in all the 6 years, this interpretation is incorrect because:

a) *this proposition* ***has not been specifically spelt out*** *in the Kabul Chawla case;*

b) *the Delhi High Court in the case of* ***CIT v. Chetan Das Lachman Das [2012] 211 Taxman 61 (Del.)/[2012] 254 CTR 392 (Del.)*** *has specifically raised and* ***then answered the question in favour of the revenue.*** *It has stated that additions on non-search issues can be made even if there is incriminating material in even one year. This case is extremely important for us.*

Similar sentiments have been expressed in the case of **CIT v. Anil Kumar Bhatia [2013] 352 ITR 493 (Del)** where only one unsigned document dated 10.02.2003 showing a loan of Rs. 1,50,000/- was found during search conducted on 13.12.2005. The Hon'ble High Court held that this material was enough to justify additions in all the 6 years.

c) Recently, the Kerala High Court in **Sunny Jacob Jewellers and Wedding Centre v. Deputy Commissioner of Income-Tax [2014] 362 ITR 664 (Ker)** has also very categorically stated that incriminating material found during search is **not necessary** in all the 6 years for additions to be made on other issues.

Therefore, in view of above discussion with regard to the provisions of Sec 153A of the Act, it is seen that from 01.06.2003 onwards the number of years from which assessments could be framed after search were reduced from 10 to six. Section 153A of the Act has mandated that there have to be 6 separate assessments instead of a block assessment. It also **started with a non-obstante clause** which stated that the operation of sections 139, 147,148,149,151,and 153 was ousted. In other words when an assessment was being completed u/s 153A, the sections mentioned above could not be invoked. The section did not, repeats, **and did not mention that for making an assessment u/s 153A of the Act**, it was necessary to have some incriminating material found during search. In the case of **Kabul Chawla,** it was stated that assessments had to be completed u/s 153A of the Act the moment a search has taken place. This is a common ground in all judicial pronouncements, and nobody has any objection to the said conclusion. **It was also stated** in the above case that, though not prescribed in the Act, but additions had to be made on the basis of incriminating material found during search. The additions

could not be arbitrary. This conclusion, and others arrived at in **para 37** of the judgment started the present controversy. It is obvious that if no incriminating material is found during search, then additions, if any, have to be made in the income shown in the return of income (***in the case of pending assessments which abate***) and to the computed income (**in case of assessments were completed**). Thus effectively, what was said in the case of ***Kabul Chawla*** was that making any addition in the returned income or income earlier assessed was not allowed if no material was found in the search which could lead to an addition on the basis of the said material.

Therefore, facts of case laws relied upon by the assessee are quite distinguishable with that of the present case. In view of these facts, assessee's contention is not correct that AO was not justified in reassessing the completed assessment. Assessee's appeal fails in Gr No 1.

3.2 **Ground No 2 and 3: -** ***"Regarding addition of Rs. 6,96,50,000/- made by applying the provisions of section 56(1) of Income Tax Act, 1961 treating the share capital and premium thereon received from various companies as income of the assessee. "***

3.2.1 **Submission made:** Relevant extract of which AR of the assessee are reproduced here as under:

"....

1) During the year under consideration the assessee allotted 14,33,432 equity shares of Rs. 10 each to various companies at a premium of Rs. 240 & 290 on various dates detail of which is as under: -

S.N.	Name	No. of Shares alloted/ applied during the year	Amount adjusted against share capital	Rate per share	Amount adjusted against share premium	Rate of premium per share	Issue price of the share	Total Consideration Received
1.	Alliance Tradecom Pvt. Ltd	122000	12,20,000	10	2,92,80,000	240	250	3,05,00,000
	Alliance Tradecom Pvt. Ltd	131863	13,18,630	10	3,82,40,270	290	300	3,95,58,900
2.	Evershine Suppliers Pvt. Ltd	64000	6,40,000	10	1,53,60,000	240	250	1,60,00,000
	Evershine Suppliers Pvt. Ltd	162332	16,23,320	10	4,70,76,280	290	300	4,86,99,600
3.	Mayukh Vinimay Pvt. Ltd	231166	23,11,660	10	6,70,38,140	290	300	6,93,49,800
4.	Mayukh Vintrade Pvt. Ltd	4666	46,660	10	13,53,140	290	300	13,99,800
5.	Regent Barter Pvt. Ltd	134906	13,49,060	10	3,91,22,740	290	300	4,04,71,800
6.	Regent Dealers Pvt. Ltd	253333	25,33,330	10	7,34,66,570	290	300	7,59,99,900

7.	*Rose Suppliers Pvt. Ltd*	*329166*	*32,91,660*	*10*	*9,54,58,140*	*290*	*300*	*9,87,49,800*
	Total	***1433432***	***1,43,34,320***		***40,63,95,280***			***42,07,29,600***

2) During the course of assessment proceedings the assessee submitted the following documents to prove their identity of shareholders, creditworthiness of shareholders and genuineness of transaction with them: -

Name of Shareholder	*Particulars of Documents submitted*	*Copy at PB Page*
Alliance Tradecom Pvt. Ltd	*1. Share application containing the name/address/PAN of party, detail of payment received etc.* *2. Copy of board resolution.* *3. Copy of PAN card of party.* *4. Copy of bank statement showing the entry of payment made to assessee.* *5. Declaration of source of funds with party.* *6. Copy of Ack. of ITR and Computation of AY 2012-13.* *7. Copy of audit report and audited balance sheet along with annexure of 31.03.12.*	*328-339 & 341-346* *340 & 347* *348* *349-356* *357-361* *362-363* *364-373*
vershine Suppliers Pvt. Ltd	*1. Share application containing the name/address/PAN of party, detail of payment received etc.* *2. Copy of board resolution.* *3. Copy of PAN card of party.* *4. Copy of bank statement showing the entry of payment made to assessee.* *5. Declaration of source of funds with party.* *6. Copy of Ack. of ITR and Computation of AY 2012-13.* *7. Copy of audit report and audited balance sheet along with annexure of 31.03.12.*	*374-377, 379-398 & 400-403* *378, 399 & 404* *405* *406-417* *418-421* *422-423* *424-434*
Mayukh Vinimay Pvt. Ltd	*1. Share application containing the name/address/PAN of party, detail of payment received etc.* *2. Copy of board resolution.* *3. Copy of PAN card of party.* *4. Copy of bank statement showing the entry of payment made to assessee.* *5. Declaration of source of funds with party.* *6. Copy of Ack. of ITR of AY 2012-13.* *7. Copy of audit report and audited balance sheet along with annexure of 31.03.12.*	*435-457 & 459-465* *458 & 466* *467* *468-475* *476-478* *479-480* *481-490*

Mayukh Vintrade Pvt. Ltd	*1. Share application containing the name/address/PAN of party, detail of payment received etc.* *2. Copy of board resolution.* *3. Copy of PAN card of party.* *4. Copy of bank statement showing the entry of payment made to assessee.* *5. Declaration of source of funds with party.* *6. Copy of Ack. of ITR of AY 2012-13.* *7. Copy of audit report and audited balance sheet along with annexure of 31.03.12.*	*491-504 & 506-509* *505 &510* *511* *512-516* *517-519* *520* *521-531*
Regent Barter Pvt. Ltd	*1. Share application containing the name/address/PAN of party, detail of payment received etc.* *2. Copy of board resolution.* *3. Copy of PAN card of party.* *4. Copy of bank statement showing the entry of payment made to assessee.* *5. Declaration of source of funds with party.* *6. Copy of Ack. of ITR of AY 2012-13.* *7. Copy of audit report and audited balance sheet along with annexure of 31.03.12.*	*532-542 & 544-557* *543 & 558* *559* *560-569* *570-573* *574-575* *576-585*
Regent Dealers Pvt. Ltd	*1. Share application containing the name/address/PAN of party, detail of payment received etc.* *2. Copy of board resolution.* *3. Copy of PAN card of party.* *4. Copy of bank statement showing the entry of payment made to assessee.* *5. Declaration of source of funds with party.* *6. Copy of Ack. of ITR of AY 2012-13.* *7. Copy of audit report and audited balance sheet along with annexure of 31.03.12.*	*586-601 & 603-612* *602 & 613* *614* *615-623* *624-628* *629-630* *631-639*
Rose Suppliers Pvt. Ltd	*1. Share application containing the name/address/PAN of party, detail of payment received etc.* *2. Copy of board resolution.* *3. Copy of PAN card of party.* *4. Copy of bank statement showing the entry of payment made to assessee.* *5. Declaration of source of funds with party.* *6. Copy of Ack. Of ITR A.Y. 2012-13* *7. Copy of audit report and audited balance sheet along with annexure of 31.03.12.*	*640* *641* *642* *643* *644* *645-646* *647-656*

3. All the share capital/share application was received through a/c payee cheques and verifiable from bank statement of assessee as well as bank statement of the party. The onus u/s 68 of the assessee is to prove the identity, capacity and genuineness of the transactions has been discharged which may be seen from the followings:-

i) Identity:-

The assessee proved the identity of all the companies by filing the share application received from the parties and the parties are duly in existence and the existence of the parties can be verified from the official website of MCA. The ld. AO also not doubted the identity of the above named companies. Further the assessment of AY 2009-10 (Copy at PB Page 135 to 136, 149 to

150, 163 to 164, 177 to 179, 191 to 193 and 206 to 208) and AY 2013-14 of these companies (Except Mayukh Vintrade Pvt. Ltd) were also completed at returned income. In the case of M/s Mayukh Vinmay Pvt Ltd original assessment u/s 148 was made for AY 2009-10 (copy at PB pg 151 to 164). Ld CIT III, Kolkotta passed order u/s 263 directing to pass the afresh order for AY 2009-10 (copy at PB pg 657 to 660) and in pursuance to order u/s 263, the same AO passed order u/s 143(3) r.w.s. 263 of Income Tax Act,1961 dated 21.03.2014 at total income of Rs. 10,55,58,280/- (Copy of order at PB Page 661 to 670)The assessment of AY 2013-14 was completed by the same AO of all the above companies (Except Mayukh Vintrade Pvt. Ltd) who completed the assessment of the assessee in the same month. The copies of assessment order are at PB pg 223 to 225, 239 to 241, 255 to 257, 273 to 275, 289 to 291, 305 to 307. It is further relevant to mention here that the department also carried out the survey operations over these parties (Except Mayukh Vintrade Pvt. Ltd) which also prove the existence of these parties.

ii) Creditworthiness

All the companies are Income Tax assessee and duly filing the Income Tax return and Balance sheets. There is sufficient source of funds with all the companies to investment share capital/share application in the assessee company. The assessee submitted the copies of bank account/declaration of source of funds with them of investor companies. The bank statement shows the huge transaction of high value in the accounts of the companies. The chart showing the amount invested by the above named companies in assessee company viz a viz own funds with the investor company are as under: -

Name of the Investor company	***Amount invested in assessee company***	***Share capital and reserve & surplus with Investor companies as on 31.03.2012***	***Share capital and reserve & surplus with Investor companies as on 31.03.2011***	***Share capital and reserve & surplus with Investor companies as on 31.03.2009***
Alliance Tradecom Pvt. Ltd	*7,00,58,900*	*11,05,42,868*	*11,07,03,338*	*11,07,00,991*
Evershine Suppliers Pvt. Ltd	*6,46,99,600*	*10,41,99,989*	*10,42,52,807*	*10,42,50,971*
Mayukh Vinimay Pvt. Ltd	*6,93,49,800*	*10,82,38,912*	*10,83,03,077*	*10,83,01,020*
Mayukh Vintrade Pvt. Ltd	*13,99,800*	*36,54,820*	*35,01,038*	*NA*
Regent Barter Pvt. Ltd	*4,04,71,800*	*10,51,11,109*	*10,52,03,352*	*10,52,01,041*
Regent Dealers Pvt. Ltd	*7,59,99,900*	*9,33,85,686*	*9,34,53,097*	*9,34,50,971*
Rose Suppliers Pvt. Ltd	*9,87,49,800*	*10,34,93,371*	*10,35,53,105*	*10,35,51,183*

From the above chart it is clear that all the Investor companies were having their own share capital and Reserve & surplus which were more than to the amount invested in the assessee company. The above chart shows that the investor companies were having their own independent funds and having their independent source to invest in the shares of the assessee company. Apart from the investment made in the shares of assessee group, the investor companies were also having investments in shares of other companies or loans & advances to other parties, therefore from the bank statement as well as financials statements of the investor companies their creditworthiness is duly proved. Further assessment of above named companies for AY 2009-10 (Except M/s Mayukh Vintrade Pvt. Ltd) was completed by the department wherein the source of funds with these companies whereby the net worth of these companies was created was accepted by the department. In the case of M/s Mayukh Vinmay Pvt Ltd original assessment u/s 148 was made for AY 2009-10 (copy at PB pg 163 to 164). Ld CIT III, Kolkotta passed order u/s 263 directing to pass the afresh order for AY 2009-10 (copy at PB pg 657 to 660) and in pursuance to order u/s 263, the same AO passed order u/s 143(3) r.w.s. 263 of Income Tax Act,1961 dated 21.03.2014 at total income of Rs. 10,55,58,280/- (Copy of order at

PB Page 661 to 670) This shows that the investor companies were have their own independent fund to invest.

iii) Genuineness

The assessee submitted the Share application forms received from above companies against the share application received from the companies. The share application is supported by Board Resolution passed in the investor companies. The assessee company has allotted the shares to the investor companies. The proper returns were filed before the ROC against allotment of the shares to these companies. Furthermore, the department has carried out intensive search operations over the assessee and no any incriminating material was found to show that the money against the share allotment was own money of the company. Shares certificates were issued against the allotment of the shares to these companies were not found from the possession of the assessee company or its director or employees. This fact shows that after allotment of shares by the appellant company share certificates were dispatched to the subscriber companies. No any entry in books of account or document was found showing payment of cash to these investor companies against receipt of cheques from these companies against allotment of shares. Therefore the genuineness of the transactions cannot be doubted. The department also carried out survey over the investor companies (Except Mayukh Vintrade Pvt. Ltd) and during the course of survey no material was found to presume that the investment made by them is not genuine.

4. The ld. AO has also not doubted the identity of the shareholders and he only doubted the creditworthiness and genuineness of the transactions on the basis of certain inquiries carried out by Investigation wing modus operandi of which has been discussed by ld. AO in para 10 to 16 of assessment order at page 6 to 15 of assessment order. From examination of finding of ld. AO your honor will find that the entire discussion is based on the investigation made by investigation wing and no independent inquiries were made by ld. AO at his own. Further whatever material/inquiries which is being discuss by ld. AO and on which the ld. AO is relying were collected behind the back of the assessee and the same was never brought in knowledge of the assessee and opportunity to confront the material was not provided to the assessee. The finding of ld. AO on such modus operandi and submission of the assessee on such is as under: -

a) Finding of ld. AO (Para 10): -

On examination by the investigation wing it is clearly found that systematic transfer of funds across several accounts, at time as many as six accounts, in a single day (or at the most two to three days). Major exercise has been done in two of the six companies – Alliance Tradecom Pvt. Ltd and Evershine Suppliers Pvt. Ltd.

Submission of assessee: -

From this finding no where it proves that the funds were introduced in such companies by the assessee company. Whatever amount received by the assessee was received through a/c payee cheques and source with investor companies was also proved. The investor company has also confirmed the investment in shares of assessee company made by them. It is relevant to mention here that if someone is investing the money in the assessee company he must be having the inflow of money from some source. What is the source of inflow with the investor company and how it is managing its affairs is not concern of the assessee. In the case of the assessee, it has

full filled its legal obligation. The assessee has proved the source of money with the investor companies. Thus in the case of the assessee the source of money is well proved. Further the transfer of funds from several accounts in same day or within couple of days does not automatically lead to the conclusion of that the same were managed affairs of the assessee group. It is relevant to mention here that if someone is giving money to other one there is no compulsion that such funds should remain in his a/c for some period and no prudent business man will keep ideal the funds in its bank a/c. The transfer of funds across several accounts in a single day or within few days was because of the reason that before inflow of funds with the concerning party the outflow of fund was predetermined but the same does not lead to conclude that the same were own managed funds of the assessee. Further, if the source of investment in the hands of investor company is doubtful than the addition can be made in the hands of investor company not in the hands of the assessee. The assessee has no onus to prove source of source. Reliance is placed on the following decisions.

i) *CIT Vs Jai Kumar Bakliwal (2014) 101 DTR (Raj) 377 : (2014) 267 CTR (Raj) 396.*
Head notes of the case is as under:-
Income from undisclosed sources─Cash credit─Genuineness and creditworthiness of transaction ─ Addition ─ Validity ─ Assessee was carrying on business of finance and earning income by way of interest─During course of work of financing and money lending, had raised loans from certain parties─As per AO most of parties were relatives of assessee and they were said to be unsecured loans─It had been claimed by AO that in most of cases, though amount was received by account payee cheque and most of creditors were assessed to Income Tax Act and had even provided their permanent account number but on desire of AO of producing said parties, none of parties were able to prove source of amount advanced to assessee─Thus, AO made addition u/s 68 as income from undisclosed sources─CIT(A) deleted addition holding that source of cash creditors was not required to be proved by assessee once identity, capacity and genuineness stands proved─ITAT dismissed revenue's appeal─Held, all cash creditors had affirmed in their examination that they had advanced money to assessee from their own respective bank accounts─Therefore, when there was categorical finding even by AO that money came from respective bank accounts of creditors, which did not flow in shape of money, then, such addition could not be sustained and had been rightly deleted by both two appellate authorities─There was no clinching evidence in present case nor AO had been able to prove that money actually belonged to none but assessee himself─Action of AO was based on mere suspicion─Accordingly, ITAT, after appreciation of evidence had rightly dismissed revenue's appeal─It was pure finding of fact─Revenue's appeal dismissed
Held:
All cash creditors had affirmed in their examination that they had advanced money to assessee from their own respective bank accounts. Therefore, when there was categorical finding even by AO that money came from respective bank accounts of creditors, which did not flow in shape of money, then, such addition could not be sustained and had been rightly deleted by both two appellate authorities. There was no clinching evidence in present case nor had AO been able to prove that money actually belonged to none but assessee himself. Action of AO was based on mere suspicion. Accordingly, ITAT, after appreciation of evidence had rightly dismissed revenue's appeal. When there was appreciation of evidence, then it was purely finding of fact and no question much less substantial question of law could be said to emerge out of said order of the Tribunal. There was not any infirmity or perversity in the order of the ITAT so as to call for any interference. Revenue's appeal dismissed.

ii) *CIT Vs Orissa Corporation (P) Ltd (1986) 159 ITR 79 (SC)*

The assessee had given named and addresses of the cash creditors, who were income tax assessees. Revenue apart from issuing summon u/s 131notices to creditors, did not pursue the matter further- it did not examine creditworthiness of the creditors- assessee could not, under the circumstances do anything further. Held that the additions were rightly deleted.

iii) Aravali Trading Co Vs Income Tax Officer (2008) 8 DTR (Raj) 199.
Once the existence of the creditors is proved and such persons own the credits, the assessee's onus stands discharged and the assessee is not required to prove the source from which the creditors could have acquired the money deposited with him. Held that merely because the depositors' explanation about the sources of money was not acceptable to the AO, it cannot be presumed that the deposits made by the creditors is money belonging to the assessee itself.

iv) CIT Vs Heera Lal Chagan Lal Tank (2002) 157 ITR 281 (Raj)
Burden of the assessee stands discharged when the identity of the creditors is established and he confirms the loans.

b) Finding of ld. AO (Para 11): -
It can be easily seen that there are cross-holdings amongst six companies, but major shareholding is of a 7th company, i.e., Mayukh Vintrade Pvt. Ltd. Thus, this latter company is the holding company of 6 companies, named earlier. Surprisingly or incidentally, the holding company is entirely owned by individuals or HUFs of Chhabra families. It is all clear that the webs of companies through which transactions have been routed to create a 'corporate veil'

Submission of assessee: -

Admittedly the assessee group were entirely owning the shares of the company naming M/s Mayukh Vintrade Pvt. Ltd and this company is major shareholder in other companies wherefrom the substantial amount of share capital was received to the assessee group. But this shareholding pattern is not of the year under consideration and the same was also as on 31.03.2011 too. Rather this proves the genuineness and creditworthiness of the transaction. Here the moot question is from where the inflow of the funds was- whether it was undisclosed income of the assessee company or from the independent funds of the investor companies. Further holding of share capital by director or their family members of the assessee company in one of the company who is holding the shares in investor companies does not mean that the funds in such investor companies were given by the assessee company more so when the funds from such companies is available with them from 31.03.2009 i.e. much prior to the investment made in the assessee company and assessment of AY 2009-10 of such companies (Except Mayukh Vintrade Pvt. Ltd) were made by the department wherein such funds and assets/investments against such funds was treated as genuine and in one other company M/s Mayukh Vinimay Pvt Ltd huge income was assessed for AY 2009-10 in the order passed u/s 143(3) read with section 263 of Income Tax Act. The separate assessment in the hands of the investor companies shows that these companies are independent company. Further M/s Mayukh Vintrade Pvt. Ltd is not holding company of the other companies as its holding in such companies is below to 50%.

c) Finding of ld. AO (Para 12): -
To peep into reality of each and every bank transaction of Motisons Group which emanated from these six companies an attempt to lift the curtain over the suspicious transactions. The assessee had made several transactions to hide the actual picture and a series of transactions

was made to colour illegal transactions. The ld AO reproduced the share holding pattern of the various companies as on 19/02/2013.

Submission of assessee: -

From the chart of share holding produced at page 7 to 8 of Assessment order, it can be seen the shareholding pattern of the investor companies but this chart do not have any material to show that the inflow of funds was from the assessee company. All the companies are independent company separately assessed by the same AO. The chart of shareholding produced by the AO is totally irrelevant to establish that the undisclosed income of the assessee company was introduced under the garb of share capital.

Also there is no introduction of any suspicious funds in the companies who subscribed the share capital of the assessee. The finding of ld. AO that series of transactions has been made to colour illegal transaction is not backed with any supporting documents and the same is only on the basis of presumption and assumptions.

It is relevant to mention here that out of total funds received from subscriber companies part of the funds were invested by them from advance received back by them from Shri Sanjay Chhabra and Shri Sandeep Chhabra (which were advanced by these companies to them on previous dates). The advance given to these persons by these subscriber companies were treated as genuine by ld. AO in their assessments than how the amount received back from such persons and utilized in subscription of the shares of assessee company can be treated as non genuine. The summary of such transactions is as under: -

Name of the company	*Funds received back from Shri Sanjay Chhabra which was invested in assessee company*	*Funds received back from Shri Sandeep Chhabra which was invested in assessee company*
Alliance Tradecom Pvt. Ltd	*3,20,00,000 (Page 361)*	*40,00,000 (PB Page 360-361)*
Evershine Suppliers Pvt. Ltd	*Nil*	*51,00,000 (PB Page 421)*

Thus part of the funds were invested by the investor companies out of the funds received from the above named persons which has been treated as genuine by ld. AO in their hands, therefore there is no reason to treat such funds as non genuine in the hands of the assessee company. This shows that the huge additions were made by ld. AO on surmises and conjecture, with pre set mind to make the additions and without having adverse evidences in possessions. The ld. AO as a result to search or as a result of long inquiries failed to prove that any short of suspicious funds has been transferred to the assessee and the full proof evidences submitted by the assessee has been disbelieve by ld. AO merely on surmises and conjectures.

d) Finding of ld. AO (para 13): -

It can be noticed from the above tables that the first receipts in the Motisons Group entities are evidenced on 12.7.2011. Subsequently, there have been receipts from various companies and up to 8.12.2011, they have necessarily gone to Motisons Group entities. It can easily be noticed that the payments to Sandeep Chhabra and Sanjay Chhabra have been reflected as loans by these companies. While the payments to Motisons Group companies have been reflected as share application money by recipient companies. It is thus clear that the two differently reflected type of transactions is the same set of companies indicates use of colourable device.

This issue has been examined during the search operation and all these six companies situated at Kolkata were covered through survey u/s 133A. It was found that these companies had opened bank accounts in HDFC Bank, Ashok Marg, Jaipur in November, 2011. In post-search proceedings, the statement of accounts of these six companies in IDBI, Girish Park, Kolkata and HDFC Bank, Jaipur were obtained. These statements were juxtaposed with 'Bank Books' of Tally accounts of each company, and efforts were made to trace backwards each and every transaction for source, beginning with the beneficiary Motisons group entities. The charts available with this office, numbered (1) to (6) supra in para 12, one for each of the six shell companies, clearly indicate systematic transfer of funds across several accounts, at time as many as six accounts, in a single day (or at the most two to three days). Major exercise has been done in two of the six companies – Alliance Tradecom Pvt. Ltd and Evershine Suppliers Pvt. Ltd. However, it would be noticed that in other four cases also, the pattern of transactions has been found to be identical, where the same set of companies' bank accounts have been used for layering the transfer of funds.

At the registered office of the Kolkata based companies physically it was found that the office was merely a room where copies of ITR and bank statements of all the companies were kept. One employee present there was asked to produce books of accounts of these companies. He informed that no books of accounts were kept at this office and that one Banwari Yogi of Jaipur used to send the final accounts to him from Jaipur, on the basis of which the ITR and audit reports were prepared by him. He further admitted that the bank accounts of these companies have been opened in the HDFC Bank at Jaipur. During the course of search at residence of Chhabra family the Tally accounts, MCA compliance data and importantly complete Tally accounts of six Kolkata shell companies was found in a pen drive belonging to Shri Banwari Lal Yogi.

Submission of assessee: -

i) In the chart of shareholding of investor companies given in para 12 of the assessment order the shareholding is given as on to 19.02.2013 i.e. relevant to AY 2013-14. It is not understandable that shareholding of some date of AY 2013-14 is how relevant to understand the transactions made during the year under consideration. However it is relevant to mention here that the shareholding mention in this para was same in AY 2011-12 and AY 2012-13 (except in the case of Mayukh Vintrade Pvt. Ltd). In the case of M/s Mayukh Vintrade Pvt. Ltd the major shareholding was same as in AY 2011-12 and only further few shares were issued to existing shareholders in AY 2012-13.

ii)Admittedly during the year under consideration the first receipt from the investor companies was from 12.07.2011 and the same received up to March-2012 but the funds which were invested by the investor companies in the assessee company were being owned by them much prior to the investment made in the assessee company and the investment was made by them by realizing the funds previously invested by them at some other place. This is not a case where source of the funds was from the assessee company. The investor companies were owning their funds much prior to investment made in the assessee company and the same was assessed and accepted by the Income Tax department also (Except in the case of Mayukh Vintrade Pvt. Ltd). Once the source of funds with the investor companies has been accepted by department as genuine which was owing by them much prior to investment made in the assessee company than how the same can be added as income of the assessee treating the same as non genuine.

iii) The amount given by the investor companies to Shri Sandeeep Chhabra and Shri Sanjay Chhabra was loan to these persons and the amount given to assessee was share application money.

The loan given by these companies to Shri Sandeeep Chhabra and Shri Sanjay Chhabra was accepted genuine by the ld. AO himself and only the share application money given to the assessee company is being treated as non genuine more so when part of the same was given out of advance received back from these two persons which has been treated genuine in the hands of these two persons. Further the allegation of ld. AO that two different reflected type of transactions indicates use of colorable device, this is to submit that the transactions has been reflected as per their true nature. The amount given to Shri Sandeeep Chhabra and Shri Sanjay Chhabra was actually loan by these companies and the same was later on repaid by these persons and the same was accepted as genuine by ld. AO. The amount given by investor companies to the assessee company was actually share application money and the same was duly supported by share application submitted by these companies. Further it is not understandable that the loan by these companies to Shri Sandeeep Chhabra and Shri Sanjay Chhabra and share application money to assessee company how can be the colorable device.

iv) As himself mentioned by ld. AO in this para that the survey u/s 133A of Income Tax Act, 1961 was carried out by the Income Tax department over these companies and from the assessment order it is well proved that during the course of survey no evidence was found to show that the inflow of funds in the investor companies was from the assessee company. When the department carried out intensive search over the assessee group and survey over the investor companies and during the course of both operations not a single evidence was found to show that the share application money received by the assessee was managed affairs to manage its unaccounted funds than how it can be presumed that the share application received by the assessee is non genuine. Admittedly those companies opened the bank accounts in HDFC, Jaipur but the same were because of the reason that they planned to made the investment in the assessee group and their directors were also residing in Jaipur, therefore in order to better & smooth management to funds, the bank accounts were opened in Jaipur branch. Further for considering a transaction as genuine the genuineness of source of funds is to be examined which is well proved as genuine in this case. The maintaining bank a/c by the companies in Jaipur cannot be a basis for treating the transaction as non genuine.

v) The assessee group was not maintaining the books of accounts of the investor companies and the same is evident from the search action carried out by the department as during the course of which no physical record i.e. books of accounts, bank statements etc. found from the premises of the assessee group and the same were found at Kolkatta office of these companies. Admittedly some soft copies of books of accounts and MCA compliance data were found in a pen drive of Shri Banwari Yogi but the same was received from directors of these companies because after being invested huge share capital by these companies in the assessee company, the directors of the assessee company had a meeting with the directors of the investor companies to check whether the proper records are being maintained by such companies or proper legal compliance has been being done by such companies because the assessee group received substantial share capital from these company and any kind of default made by those companies may lead to difficulty to the assessee group also. The data relating to these companies found in pen drive of accountant of the assessee group was given by director of investor companies during their meet with directors of assessee companies. The most important thing which the ld AO ignored that no any entry was found from the pen drive data to show the inflow of undisclosed money or cash from the assessee company or assessee group to these investor company. Therefore, from the irrelevant material it cannot be held that the share capital of the assessee company was not genuine.

e) Finding of ld. AO (para 14): -

It was noticed that the Motisons Group companies have allotted shares to Kolkata based companies in the different financial years. However, upto FY 2010-11 the allotment of shares to Kolkata based companies was not much. The allotment was increased manifold during the FY 2011-12, wherein nearly 32 crores worth of such shares were allotted. It may be pointed out at this stage that Motisons Group companies allotted shares at a very high premium to Kolkata based companies. On the other hand, the very same shares in the very same year has been allotted at very nominal prices to the family members and other group related concerns. A person with prudent mind can easily think of this fraudulence. It is clear that the Kolkata based companies practically having no business have acquired the shares of Motisons Group companies at very high rates for the reasons best known to them. In connection with this the details were explored in respect of the whereabouts of these companies. From detailed analysis it could easily be inferred that all of the companies are owned by the employees of Motisons Group.

Submission of assessee: -

i) The ld. AO is wrong in holding that the Motisons Group companies allotted the shares to the Kolkatta based companies at very premium and the same shares in the very same years were allotted at very nominal prices to the family members and other group related concerns. From the examination of details of shares allotted during the year (Copy at PB Page 118 to 121) your honor will find that during the year under consideration no share was allotted by the assessee company to other group concerns or family members of directors. As regard to allotment of shares in other companies this is to submit that in the year under consideration only one company of the assessee group M/s Shivansh Buildcon Pvt. Ltd allotted the shares to M/s Evershine Suppliers Pvt. Ltd as well as to Shri Sanjay Chhabra and Shri Sandeep Chhabra and the same was allotted at the same rate. The shares to Evershine Suppliers Pvt. Ltd were allotted @ 20 per shares and shares to Shri Sanjay Chhabra and Shri Sandeep Chhabra were also allotted @ 20 per shares. Thus this finding of ld. AO is wrong, perverse with sole motive to influence the appellate authorities by mentioning the wrong facts.

ii)The investor companies acquired the shares of the assessee company at high premium but the same for the reasons as describe in coming paras and the same was their individual commercial decision. ITAT, Mumbai Bench in the case of ACIT V/s Gagandeep Infrastructure Pvt. Ltd. 2014-T10L-656-ITAT-Mum observed that issue of shares at premium is always a commercial decision which does not require any justification.

iii) The ld. AO held that all the investor companies are owned by the employees of the Motisons Group is again a fact which is contra to the material available on the record. The company is always owned by the shareholders and from shareholding of the investor companies your honor will find that none of the employee of the Motisons Group is shareholder in the investor companies. If none of the employee of the Motisons Group is owing the shares of the investor companies than how they can be the owner of such companies. Thus this finding of ld. AO is also wrong, perverse with sole motive to influence the appellate authorities by mentioning the wrong facts.

f) Finding of ld. AO (Para 15): -

It is clear that these companies are merely paper companies having no business activity and it is merely name lending concern providing accommodation entries to the Motisons Group. Whole

statement of affairs has been designed to introduce money through banking channels by the Group in the form of share capital/share premium.

Submission of assessee: -

i) The finding of ld AO perverse. The same AO has assessed one of the Investor Company M/s Mayukh Vinimay Pvt Ltd at huge income of Rs. 10,55,58,280/- for the AY 2009-10 by passing order u/s 143(3) r.w.s 263 of Income Tax Act. How can be such a huge income of a paper company. From the documents submitted to the ld. AO no where it proves that all the companies are simply paper companies and providing only accommodation entries and the investment made by them in the assessee company is not genuine. The finding of the ld. AO is based on the assumption and presumption. The assessments of all these companies were made by same AO for AY 2013-14.

ii) The rate of share was decided after discussion of assessee company and investor company. The shares were issued to the investor companies at premium because of the reasons mentioned in coming paras.

iii) During the course of search over Motisons Group no documents/evidence was found to show that the companies who made investment in shares of the assessee company were funded by Motisons Group. Thus, if the ld AO is not in possession of any positive material against the assessee or its investor companies to prove his contention than the addition cannot be made merely on guess, presumption and assumption. Further there is nothing positive in the inquiries to allege that the assessee has introduced its own unexplained money under the garb of share capital and share premium.

iv) The allegation of ld. AO that the statement of affairs has been designed to introduce money through banking channels by the group in the form of share capital/share premium is completely wrong, perverse and contrary to the facts available on record. In forgoing paras we have submitted the detail of net worth of the investor companies and from examination of such net worth of the investor companies your honor will find that such companies owing their net worth much prior to investment made in the assessee company which has also been assessed and accepted by the department in their assessment proceedings. Further the net worth of those companies were being owned from the year when they were no way related/concerned from assessee group. Thereafter, there is no change in the net worth of investor companies except accumulated profit of the year to year added in net worth. When the investor companies owing the net worth prior to their relationship with the assessee company than how it can be presumed that the assessee group managed the funds of such companies and designed their statements of affairs as per its sweet will.

g) Finding of ld. AO (Para 16): -

The finding of ld. AO regarding systematic transfer of funds across several accounts based on the following : -

(i) Systematic transfer of funds across several accounts, at times as many as six accounts, in a single day (or at the most two to three days). Thus, in most of the cases, money was transferred from one bank account to another through RTGS, finally reaching the beneficiary (Motisons group company) on the same day.

(ii) The respective date-bands have been colour-coded on the Excel sheets (1) to (6) available with this office to highlight the above conclusion.

(iii) Initially, the six companies have received money from diverse sources. But going backwards, it is observed that money was being transferred from the accounts of only a few companies – Fastner Vinimay Pvt Ltd, Wise Merchants Pvt Ltd, Albatross Dealers Pvt Ltd, Swati Vanijya Pvt Ltd, Dover Distributors Pvt. Ltd, Olympic Vyapaar Pvt Ltd.

(iv) The money coming into the accounts of these companies is found to be coming mainly from three major sources – (1) four Kolkata-based proprietorship concerns, (2) bank accounts of Nibu Nagi /Kevilhulie Senotsu, Dimapur, and (3) through 'instruments' of banks in Bhutan.

(v) The four firms referred-to above are –

(a) Durga Enterprises (Prop. Rajesh Kr. Singh)
(b) Shyam Fashions (Prop. Ajit Sharma)
(c) Global Securities (Prop. Ashok Kr. Rai)
(d) Swastik Traders (Prop. Raj Kr. Oswal)

The detail discussion on above issue has been made by ld. AO at Page 12 to 15 of the assessment order.

Submission of assessee: -

i) It has been held that systematic transfer of funds across several accounts at times as many as six accounts in a single day (or at the most two to three days) this is to submit that from this finding no where it proves that the funds were introduced in such companies by the assessee company. Whatever amount received by the assessee was received through a/c payee cheques and source with investor companies was also proved. It is relevant to mention here that if someone is investing the money in the assessee company he must be having the inflow of money from some source. What is the source of inflow with the investor company and how it is managing its affairs is not concern of the assessee. The transfer of funds across several accounts in a single day or within few days was because of the reason that the before inflow of funds with the concerning party the outflow of fund was predetermined but the same does not lead to conclude that the same were funds of the assessee. Non of the above company is owned by the assessee company or group.

ii)The excel sheet which is being discuss by ld. AO is not in knowledge of the assessee and the same is also not appearing in assessment order too.

iii) The Six investor companies have not received the monies from hidden sources. Initially these companies received the money from sales of their own shares which they invested in previous years and they invested in the assessee company by realizing their old investment. Therefore the source in the hands of the investor company was not hidden. The ld. AO held that the money in the six companies were transferred from the companies naming Faster Vinimay Pvt Ltd, Wise Merchants Pvt Ltd, Albatross Dealers Pvt. Ltd, Swati Vanijya Pvt. Ltd, Dover Distributors Pvt. Ltd and Olympic Vyapaar Pvt. Ltd, this is contrary to the facts available in record. From the examination of declaration of source of funds available with investor companies to invest the same in the assessee company your honor will find that not a single amount was received by the investor companies from the companies named by ld. AO. The investor companies received the funds from other companies/parties which are not in the list named by the ld. AO and such companies/persons were not suspected by ld. AO. Further apart from the investment made by investor companies in the assessee group they also having other investments/assets which has been treated as genuine by the department then how the investment made in the assessee group can only be treated as non genuine. Even otherwise also, the assessee company has no concern for the source in the hands of the investor company. Further, the assessee company and

Motisons Group has no concern with M/s Faster Vinimay Pvt Ltd, Wise Merchants Pvt Ltd, Albatross Dealers Pvt. Ltd, Swati Vanijya Pvt. Ltd, Dover Distributors Pvt. Ltd and Olympic Vyapaar Pvt. Ltd.

iv) The ld. AO mentioned that money in the companies naming Faster Vinimay Pvt Ltd, Wise Merchants Pvt Ltd, Albatross Dealers Pvt. Ltd, Swati Vanijya Pvt. Ltd, Dover Distributors Pvt. Ltd and Olympic Vyapaar Pvt. Ltd coming from some proprietorship concerns, Bank a/c of Nibhu Negi/Kevilhulie, dimpur and through instruments at bank of Bhutan and in such accounts some suspected funds were deposited. In this regard we may submit as under: -

1)First of all as stated earlier the assessee group or its investor companies not received any amount from above named companies, therefore it is not understandable that how the alleged suspicious funds deployed in above named companies is being treated as managed by the assessee and how the assessee is beneficiary of such funds. If the above named companied naming Faster Vinimay Pvt Ltd, Wise Merchants Pvt Ltd, Albatross Dealers Pvt. Ltd, Swati Vanijya Pvt. Ltd, Dover Distributors Pvt. Ltd and Olympic Vyapaar Pvt. Ltd having inflow of some suspicious funds and then the same is being utilizing by them then investigation of such funds should have been made in the case of such companies and the necessary action regarding to such should have been taken against such companies as these companies are independent assessee. There is no whisper in the assessment order that any short of inquiries were made from these companies in this regard. The ld AO has no positive material against the assessee to establish that alleged suspicious funds were belonging to assesses group. There is no finding and evidence as a result of search or as a result of investigation that all channel source were being managed by the assessee group. If in some intermediate channel source, some suspicious funds has been deployed than the action should be taken in their hands. The assessee cannot be held responsible for the default of third or fourth channel. The onus under the law is to prove source and not source of source. Here the ld AO is putting the responsibility of the assessee to prove source of all sources.

2)The ld. AO held that moneys in the a/c of companies naming Faster Vinimay Pvt Ltd, Wise Merchants Pvt Ltd, Albatross Dealers Pvt. Ltd, Swati Vanijya Pvt. Ltd, Dover Distributors Pvt. Ltd and Olympic Vyapaar Pvt. Ltd were deposited from four proprietorship concerns and in bank a/c of such concerns the cash was deposited. As mentioned earlier the assessee company or its investor companies did not receive any amount from these named companies, therefore they are not responsible for their source of funds and the necessary action should have been taken in their hands. There is no whisper in the assessment order that any short of inquiries/action were taken on such companies to prove that the funds in such companies were managed for the benefit of the assessee group by the assessee group. In the case of the assessee the department can examine the source of source in the case of assessee but further source of such source till fourth or five channel cannot be examined to take action against the assessee. If on inquiry of source of source, something is found wrong, the necessary action in this regard should have been taken against such person in whose a/c such funds were introduced but not in the case of assessee as there is no contrary evidence against the assessee.

3)As regard to cash deposited by such concerns in their bank a/c, low ITR/non filing of ITR by their proprietor or some the proprietorship concern being managed by other person this is to submit that from all these it can be presumed that some unaccounted/unexplained funds have been introduced in bank a/c of such concerns but from this how it can be presume/proved that such funds were belonging of the assessee and the same were managed by the assessee. The necessary action of such unexplained/unaccounted funds should have been taken against the persons in whose bank a/c it was deposited or against the person who admitted to manage such bank a/c and by stretch of no imagination the action cannot be taken against the assessee. If this

position/presumption of the department is presume to be correct that in each and every case where a person deposit the cash in bank a/c and then after the same utilized for its own various purposes than the tax should have been collected from the persons in whose hands the funds were finally reached and not from the person in whose bank a/c the cash was deposited. But as per establish and admitted legal position always the source of such cash deposit is being asked from the person who in owing the bank a/c and action is being taken against such person and not against other person to whom such funds were given. In these type of cases the action against another person can only be taken if any positive material/evidence against such person is found to show that such funds belong to him. In the case of the assessee there is no evidence to prove that the cash deposit in bank a/c of fourth/fifth channel belong to the assessee. If this kind of practice is approved than the owner of the bank a/c will enjoy by depositing the unaccounted/unexplained cash in bank a/c freely and on being caught by department to avoid the tax implication, penalties etc. they will shift their burden on some other one.

4) *As regard to the statement of Shri Santosh Choubey this is to submit that as apparent from the assessment order this person admitted to deposit the cash in bank a/c in bank a/c of some of the concerns but he nowhere admitted that he deposited the unaccounted cash in the bank a/c. There is no finding in bank a/c in this regard. There may be possibility that he may deposit the cash from disclose source but it appears that no investigation has been made in this regard. Further this is to submit that the assessee group or its investor companies have no concern with the concerns managed by person naming Samtosh Choubey. Further if Santosh Choubey is admitting that he has deposited the cash in bank a/c of such concerns than primary onus is on him to prove the source of such cash and if he is not able to explain the source, the action in this regard should have been taken in his case and not in the case of the assessee. There is no whisper in the assessment order that why those cash deposits are being treated as belonging to the assessee group and why no action had been taken against Shri Santosh Choubey. The assessee group or its investor companies does not know to any Santosh Choubey and have no concern from this person.*

5) *Similarly as regard to cash deposited in bank a/c of Nibhu Nagi/Kevihulie Sentoshu and non filing of ITR by these persons does not automatically lead to the conclusion that the same money belongs to the assessee group. No inquiries in this regard were made from these two persons and the burden was shifted over the assessee simply on the ground that these persons are not filing their ITR. The findings of ld AO that their name and identities are being used by the assessee for operating bank a/c where huge cash transactions are being undertaken is without any basis or material. The onus was on the department to prove that the apparent is not real and the said onus was not discharged. The primary onus to prove the source of cash deposited in bank a/c is on these persons and no inquiries were made by department from these two persons or immediate beneficiary of funds of such bank a/c. If still it is presumed that there bank a/c were being managed by some other one than who was that person and why he was doing so. For finding out this truth the detail inquiries should had been made by the department but since the department carried out the search over the assessee group and the search party had pre set mind that the share capital of the assessee group was bogus therefore the twisted the facts and inquires. Further from the finding of the assessment order no where it proves that the cash deposited in these bank a/c was from undisclosed source. There may be possibility that the cash may have been deposited out of disclosed sources. But the department has not made any inquiries in this regard from holders of these bank a/c's.*

6) Regarding funds transferred in a/c of companies naming Faster Vinimay Pvt Ltd, Wise Merchants Pvt Ltd, Albatross Dealers Pvt. Ltd, Swati Vanijya Pvt. Ltd, Dover Distributors Pvt. Ltd and Olympic Vyapaar Pvt. Ltd through demand drafts of Bhutan National Bank and drunk PNB Bank ltd it is not clear from the assessment order that why the same are being treated as non genuine. There is no finding in the assessment order that some suspicious funds were introduced to obtain such demand drafts and if it is presumed to be so than still there no contrary material to show that the same was belonging to the assessee. There is no inquiry that how such demand drafts were originated and who managed such affairs. What was the source of funds to obtain the bank drafts. This also proves that the inquiries on which the department is relying are totally irrelevant for the determination of the share capital received by the assessee is own fund of the assessee group.

h) It is again relevant to mention here whatever finding/inquiries discussed above was never bought in the knowledge of the assessee and the same was never confronted from the assesses. Now it is settled law that evidences filed by assessee are to be evaluated and be accepted and the exception is when A.O. collects material in support of his finding, confronts it to the assessee, gives him reasonable opportunity of rebutting such material and after considering reply of assessee passes a speaking order. The A.O. was required to confront the assessee with any material collected at the back of the assessee and in case of statement of third Party recorded at the back of the assessee, opportunity of cross examination has to be offered to the assessee failing which the said material statement etc will be rendered unreliable and addition made on such material/statement will be illegal as held in : -

a) R.B. Mittal V CIT 246 ITR 283 (AP)
b) Khandelwal Constructions V CIT 227 ITR 900 (Guj)
c) CIT V Orissa Corporation Pvt. Ltd. 158 ITR 78(SC)
d) CIT V Inder Kumar 2014-TIOL-791-HC-Raj-IT

It is a fundamental principle of natural justice that no material should be relied upon against a party without giving him an opportunity of explaining the same. The right to know the materials on which A.O. is going to take a decision is a part of the right to defend on self. The A.O. is obliged to provide a reasonable opportunity of being heard. Reasonable opportunity does not merely mean an opportunity given but opportunity must be reasonable. There should be adequate notice. Duty of act fairly is part of the procedure. Fair hearing means that the party must be aware of the case against him and he must also know what evidence is being considered to draw a presumption affecting him.

i) In this regard we further place reliance on following decisions: -

i) The Hon'ble Rajasthan High Court in the case of Barkha Synthetics Ltd V ACIT 155 Taxman 289, has held that onus on assessee is to prove the existence of the party and in case the money is received through Banking channel then it is not the burden on the assessee to prove that such party has invested his own money or some other person made investment in the name of that person. Burden on assessee is to establish the transaction between assessee and creditor. If the revenue feels that money invested belongs to assessee than onus shifts on it. Onus is to be discharged by collecting evidences. Mentioning of modus operandi is not sufficient and it will not take the place of evidence.

ii) The Hon'ble Jurisdictional High Court in the case of CIT V/s Jai Kumar Bakliwal 366 ITR 217 has referred to the deposit of cash in the account of the creditor and observed as under: -

"Certainly, deposit of cash and immediate transfer of cheque or clearance of the cheque within a day or two casts a doubt as the transaction appears to be some what doubtful but suspicion howsoever strong it may be is not sufficient itself."

In the case of the assessee, the assessee has provided all details and companies, which applied for shares are filing I. Tax return and investment is reflected in their Balance sheet. The Hon'ble Raj High Court in the case of Jai Kumar Bakliwal (supra) has held that assessee is not required to prove the source of source. The Hon'ble Jurisdictional High Court in the case of Jai Kumar Bakliwal (supra) has referred to some observations from some decisions and these are reproduced as under:

Hon'ble Apex Court in the case of CIT V Daulat Ram Rawatmul [1973] 87 ITR 349 held as under:

"The onus to prove that the apparent is not the real is on the party who claims it to be so. As it was the department which claimed that the amount of fixed deposit receipt belonged to the respondent firm even though the receipt had been issued in the name of Biswanath, the burden lay on the department to prove that the respondent was the owner of the amount despite the fact that the receipt was in the name of Biswanath. A simple way of discharging the onus and resolving the controversy was to trace the source and origin of the amount and find out its ultimate destination. So far as the source is concerned, there is not material on the record to show that the amount come from the coffers of the respondent-firm or that it was tendered in Burrabazar Calcutta branch of the Central Bank, on November 15, 1944, on behalf of the respondent. As regards the destination of the amount, it has already been mentioned that there is nothing to show that it went to the coffers of the respondent. On the contrary, there is positive evidence that the amount was received by Biswanath on January 22, 1946. It would thus follow that both as regards the source as well as the destination of the amount, the material on the record gives no support to the claim of the department."

The Gauhati High Court, in the case of Nemi Chand v. CIT [2003] 264 ITR 254/[2004] 136 Taxman 213 held that it is not the business of the assessee to find out the source or sources from where the creditor had accumulated the amount which he had advanced in the form of loan to the assessee and Section 68 cannot be read to show that in the case of failure of sub-creditors to prove their creditworthiness the amount advanced as loan to the assessee by the creditor shall have to be read as corollary as the income from undisclosed source of the assessee himself.

This Court, in the case of Kanhailal Jangid v. Asstt. CIT [IT Appeal No.85 of 2001, dated 2.1.2007] held that the burden does not go beyond to put the assessee under an obligation to further prove that where from the creditor has got or procured the money to be deposited or advanced to the assessee. The fact that the explanation furnished by the creditor about the source from where he procured the money to be deposited or advanced to the assessee is not relevant for the purposes of rejecting the explanation furnished by the assessee and make additions of such deposits as income of the assessee from undisclosed sources by invoking Sec.68 unless it can be shown by the department that source of such money comes from the assessee himself or such source could be traced to the assessee itself.

This Court, in the case of Aravali Trading Co. V ITO [2010] 187 Taxman 338 (Raj.) has gone to the extent of observing the fact that the explanation furnished by the four creditors about the sources where from they acquired the money was not acceptable by the revenue could not provide necessary nexus for drawing inference that the amount admitted to be deposited by these four persons belonged to the assessee. The assessee having discharged his burden by

proving the existence of the depositors and the depositors owing their deposits, he was not further required to prove source of source.

As observed herein above, though u/s 68, AO is free to show with the help of the enquiry conducted by him into the transaction which has taken place between the creditor and the sub-creditor that the transaction between two were not genuine and that the sub-creditor had no creditworthiness, it will not necessarily mean that loan advanced by the sub-creditor to the creditors was income of the assessee from undisclosed sources unless there is evidence direct or circumstantial, to show that the amount which had been advanced by the sub-creditor to the creditor had actually been received by the sub-creditor from the assessee.

The logical interpretation will be that while the assessee has to prove as special knowledge i.e. from where he has received the credit and once he disclosed the source from which he has received money, he must also establish that so far as his transaction with his creditor is concerned, the same is genuine and his creditor had the creditworthiness to advance the loan which the assessee had received. When the assessee discharges the burden so placed on him, onus then shifts to the AO, if the AO assesses the said loan as the income of the assessee from undisclosed source he has to prove either by direct evidence or indirect/circumstantial evidence that the money which the assessee received from the creditor actually belong to and was owned by the assessee himself.

If there is direct evidence to show that the loan received by the assessee actually belong to the assessee, there will be no difficulty in assessing such amount as the income of the assessee from undisclosed source but if there is no direct evidence in this regard, then the indirect or circumstantial evidence has to be conclusive in nature and should point to the assessee as the person from whom the money has actually flown to the hands of the creditor and then from the hands of the creditor to the hands of the creditor.

iii) The ld. Delhi Bench of Income Tax Tribunal in the case of ITO V M/s. Reliance Marketting Pvt. Ltd. 2015-TIOL-319-TAT-Del at para 16 observed as under:

We have considered the submissions of both the parties and carefully gone through the material available on the record. In the present case it is an admitted fact that the assessee furnished the evidences to prove the identity of the creditors/share applicants by furnishing their PAN number and copy of acknowledgment of Income-tax Return. The amount on account of share application was received through banking channel, copies of the confirmation alongwith affidavit of the parties were furnished. The assessee also furnished the copy of share application forms, copy of Form no.2 filed with Register of Companies (ROC), showing allotment of shares to the applicants. Therefore, the assessee discharged the onus cast upon it, as such the ld. CIT (A) was fully justified in deleting the impugned addition made by the AO. Further more the ld. CIT (A) while deciding the issue in favour of the assessee relied upon the judgment of the Hon'ble Jurisdictional High Court in the case of CIT Vs Dwarkadshish Investment Pvt. Ltd. (supra) and the judgment of the Hon'ble Supreme Court in the case of CIT Vs Lovely Exports (P) Ltd. (supra), therefore, we do not see any infirmity in the order of the ld. CIT (A) and accordingly do not see any merit in this appeal of the department.

iv). The Hon'ble Apex Court in the case of Lalchand Bhagat Ambica Ram V CIT 37 ITR 288 has held that no addition can be made on the basis of surmises and conjectures. In this case the A.O. made addition on the basis of surrounding circumstances and entertained a suspicion that assessee was indulging in smuggling of food grains to Bengal as was the notoriety of grain merchants. The assessee could not be said to be indulging in smuggling without an iota of

evidence. The addition could not be made as the finding that sum of High denomination notes was secreted profits was based on surmises, suspicious and conjectures.

v). The Hon'ble Jurisdictional High Court in the case of CIT V AKJ Granites P. Ltd 301 ITR 298 observed that share application money given by various persons can not be presumed that same belongs to assessee and can not be assessed in his hands as undisclosed sources unless some nexus is established that share application money for augmenting the investment in business has flowed from the assessee's own money.

vi). The Hon'ble Delhi High Court in the case of CIT V Value Capital services P Ltd. 307 ITR 334 (Delhi) held that there is additional burden on the department to show that even if share applicants did not have the means to make investment, the investment made by them actually emanated from the coffers of the assessee so as to enable it to be treated as undisclosed income of the assessee.

vii) The Hon'ble Delhi High Court in the case of Divine Leasing and Finance Ltd. 299 ITR 268 mentioned that there is practice of conversion of unaccounted money through the channel of investment in share capital. But the assessee should not be harassed to prove the negative. If the A.O. harbours doubts of the legitimacy of any subscription he is empowered to carry out through investigation but if the A.O. fails to unearth any wrong or illegal dealings, he can not obdurately adhere to his suspicions and treat the subscribed capital as the undisclosed income of the assessee.

viii) The Hon'ble Delhi High Court after considering various judgments in the case of CIT V Kamdhenu Steel and Alloys Ltd. 361 ITR 220 held that if adequate evidence/materials given by assesee prima facie discharge the burden and if such evidence is not discarded or poured that evidence has been created then no addition should be made. The matter is not to be set aside as there is no procedural defect or irregularity and no fresh innings to A.O. for his negligence if he fails to collect information.

ix) Shares were issued on premium to employees having meager taxable income though company did not have fixed assets but of identity of share holders proved then onus on revenue to establish n bring material to prove that documents filed by assessee be not accepted. Ref. Chartered Motors Pvt Ltd. V ACIT (ITAt Ahm) 2014-TIOL-610-ITAT-Ahm.

x) The ld. Jaipur Tribunal in the case of DCIT V M/s Kamdhenu Steel and Alloys Ltd. 2014-TIOL-709-ITAT-Jaipur had an occasion to consider a case where search operations were conducted and the company has issued shares on premium. The ld. Jaipur Tribunal in Para 6 & 7 has mentioned as under:

At the outset, the learned A.R. for the assessee argued that in assessee's own case in ITA No.972/2009 CIT Vs. Kamdhenu Steel and other company for A.Y. 2004-05 = 2012-TIOL-236-HC-DEL-IT held that the assessee had submitted the particulars of registration of the applicant company, the confirmation from the share applicants, bank account details from which payment through account payee cheques, it has been held by the Hon'ble Delhi High Court that the assessee had discharged its initially onus. With the registration of the company, the identity has been established, the applicant company was having bank account, it had made the payments through account payee cheques. It is further held that it would not automatically follow that the said money belongs to the assessee and become unaccounted money. According the Hon'ble High Court, the assessee appears to be correct on this aspect. The Hon'ble Court felt that something more, which was necessary and required to be done by the Assessing Officer, was not done. The

Assessing Officer failed to carry his suspicion to logical conclusion by further investigation. The learned A.R. further drawn our attention on the findings given by the Hon'ble Court that just because of the creditor/share applicant could not be found at the addresses given, it would not give the revenue a right to invoke Section 68 of the IT Act without any additional material to support such a move. The Hon'ble Delhi High Court also not allowed to remit back the issue to the Assessing Officer to make further inquiry on addition made U/s 68 of the Act on the ground that there is no reason to send back to the Assessing Officer, onlyh substantial question of law can be decided and second inning cannot be allowed to the Revenue. The learned AR further submitted that during the course of search, no indiscriminating documents were found at the business premises of the assessee. The Assessing Officer issued notice U/s 133(6) of the Act to the share subscribers, which has been served by the postal authorities. The learned Assessing Officer made inquiry from the field office at its back without informing them and used the information against the assessee but the learned CIT (A) had provided opportunity on it. Thus, the appellant had discharged his onus and proved the identity of the persons by following company master details of ROC, copy of PAN No. confirmation. The appellant had received these subscriptions through banking channels, therefore, these transactions are genuine. Copy of return filed shows that subscribers have sufficient fund to apply the share subscription. It can be proved from the bank account of the subscribers on which Jawahar Market had been mentioned. Therefore, he prayed to confirm the order of the learned CIT(A).

We have heard the rival contentions of both the parties and perused the material available on the record. It is undisputed that during the course of search, relevant to A.Y. 2009-10, no incriminating documents were found in Kamdhenu group cases. The appellant filed confirmation of PAN No. addresses of the subscribers & company master detail of ROC. The share capital was received through proper banking channels. The Assessing Officer collected information U/s 133(6) of the Act, which was served on all the subscribers; therefore, these are the sufficient proof of identity, genuineness and creditworthiness of the subscribers. The learned Assessing Officer heavily relied upon the Inspector's report, which was against the natural justice as the copy was provided on 06.06.2011 to the appellant whereas assessment order was completed by the learned Assessing Officer on 26.12.2010. Jawahar Market is evident from the copy of bank account of subscriber, on which this address had been mentioned as well as on master detail of ROC. The share capital was subscribed in F.Y. 2005-06 and inquiries were made in F.Y. 2010-11. There is a time gap of near about 5 years, the share applicant might have changed their addresses, which could be verified from the ROC by the Assessing Officer to substantiate his findings, which has not been done by him. The learned CIT (A) has called for remand report from the Assessing Officer on furnishing of copy of bank account of M/s Megatronics Systems Pvt. Ltd. At the time of appellate proceedings. Further the Hon'ble Delhi High Court has decided assessee's own case on similar facts in its favour in A.Y. 2006-07. The learned CIT D.R. has not controverted the findings given by the learned CIT (A). Therefore, we upheld the order of the learned CIT (A).

j) Thus in view of above submission this is to submit that there is no cogent reason with ld. AO either as a result of search over the assessee as well as on inquiries carried out by the department to presume that the assessee introduced its unaccounted money in books of accounts in the form of share capital/share premium. The intermediate companies/persons are separate Income tax assessee and having their own net worth, own source of funds much prior to the investment made in the assessee company and if some suspicious funds had been introduced in accounts of such companies then the explanation of such funds should have been called from concerning person/company and in case of failure to do so the action should have been taken in the case of concerning person. Instead of doing so the department adopted a short cut method of

treating such suspicious money as unexplained money of the assessee and added the same income of the assessee without carrying necessary inquiries or taking necessary action against such persons by justifying its action on the basis of some irrelevant inquiries. There is no case or evidence with the department to presume that the assessee has introduced its explained money in accounts of such investor companies.

k) In this regard we will like to draw your kind attention towards the order passed by DCIT-CC-2, Jaipur in the case of M/s Mayukh Vinimay Pvt. Ltd for AY 2009-10 wherein the addition of Rs. 10,54,95,000/- was by ld. AO in return income of the assessee by passing an order u/s 143(3) read with section 263 of Income Tax Act treating the share premium as bogus and added the same total income of that assessee. The share premium was added as income of the that assessee but consequently the investments & other assets purchased by utilizing such share premium were treated genuine.

Following the same analogy in the case of the assesses company if the source of funds with the investor companies is being treated as non genuine than the additions of the same should have been made in the hands of such companies in the initial year wherein the source of funds were generated and not in the hands of the assessee company. In the case of the assessee the source of funds with investor companies has been well proved and the same is out of realization from previous investments/assets which has been considered as explained by the department itself in the assessment order of such companies. Once the department itself treated investments/assets of a company as genuine and if such company is reinvesting the funds realized from such investments/assets than how the same can be treated as non genuine.

Without prejudice to our all submission it is submitted that the assessee received share application of Rs. 6,93,49,800/- from M/s Mayukh Vinimay Pvt. Ltd and the initial source of funds with Mayukh Vinimay has already been added as income of M/s Mayukh Vinimay Pvt. Ltd and the investment by this company in the assessee company was made out of rotation of such funds than how the same can be again added as income of the assessee. The same will resulted to the double addition of the same amount.

5.After being doubted the creditworthiness and genuineness of the transactions on the basis of reasons/inquiries/analysis discuss in para 4 above the ld. AO further doubted the creditworthiness and genuineness of the transactions for the following reasons as given in para 11 (a to c) and para 18 of the assessment order: -

i) The assessee company was incorporated on 16.08.07 with the subscribe capital of Rs. 1,00,000/- only. The assessee company received the huge share premium just after few year of its incorporation.

ii) As per the audited P&L account and balance sheet the assessee company did not have any business what so ever.

iii) Perusal of the balance sheet of the assessee company revealed that there were no physical assets/assets are not in commensurate to value of share with the company wither in the form of fixed assets, plant & machinery etc.

In the above background the receipt of share capital Rs. 1,43,34,320/- and premium to the tune of Rs. 40,63,95,280/- during the year under consideration was not only abnormal but also appeared to be a part of a well planned exercise of tax evasion as discussed earlier.

Regarding these findings/observations of ld. AO we may submit as under: -

i) *Admittedly the assessee company received huge share premium just after few years of its incorporation but the same does not automatically make the share premium as non genuine and taxable in the hands of the assessee. The investment by the investee companies was made after being convinced with the future business planning of the assessee company. The assessee company was owing a big and valuable land in the heart of city at Lal Kothi, Tonk Road, Jaipur and constructed one of the most beautiful building of Jaipur city thereon. The assessee company was expecting good revenue in near future from operation/letting of such building and the investor companies were convinced to be partner of such prestigious project, therefore they invested the funds in the assessee company. Thus the investment made by the investee companies in shares of the assessee company on the basis of future business expansion plans of the assessee company and outcome there from.*

ii) *Admittedly when the share premium was received, there was no business in the assessee company in commensurate to share premium but as stated earlier the investment was made by the investee companies in shares of the assessee company on the basis of future business expansion plans of the assessee company and outcome therefrom. Further the assessee company is one of the group company of Motisons Group. The Motisons Group is very prestigious and well know group of the northern part of India, therefore the investor company invested the funds in the assessee company on the goodwill of the Motisons Group after knowing their future plans and future earnings. Therefore the share capital/share premium invested by investor companies was not on the basis of current affairs of the assessee company but the same was result of future business explanation plans coupled with goodwill of Motisons Group.*

iii) *Admittedly when the share were issued the book value of the assets of the assessee company was not in commensurate to the value of the shares but while making the investments the current market value of the assets and future potentiality & profitability of the project/assets are also taken into consideration and then the investments are made. There are lots of companies which issue the shares in market through IPO and the shares of such companies are subscribed on the basis of their declaration regarding their future business planning for which the funds raised in IPO. Thus the existing fixed assets of the company always not to be the criteria for deciding the investment in shares by investor companies.*

The assessee company is also in business of real estate and it is an admitted fact that market value of immovable assets increase and book value does not represent the real value. Shares of real estate companies command premium. The reasonableness of share premium is justifiable from the following details :-

Real Estate Company	*face value*	*High 2010*	*High 2011*	*5 year period*	
				High	*Low*
DLF	*2*	*322*	*270*	*392*	*104*
India bulls Real	*2*	*207*	*137*	*212*	*42*
Unitech	*2*	*87.8*	*66.9*	*97*	*8*
Sobha Devlopers	*10*	*367*	*272*	*558*	*189*
HDIL	*10*	*290*	*183*	*296.3*	*26.9*
Godrej Enterprises	*5*	*361*	*372*	*378*	*155*

Brigade Enterprises	*10*	*148*	*94*	*173*	*40.9*

iv) Regarding observation of ld. AO that share capital and premium appeared to be a part of a well planned exercise of tax evasion as discussed earlier this is to submit that taxing event arose when the income is earned and the tax evasion is arose when the undisclosed income is generated. In the forgoing paras the ld. AO himself doubted the share premium on the ground that the assessee company did not have any business so ever in commensurate to the share premium. When the assessee company is not having any such business wherefrom this much of income could be earned than question of tax evasion thereon does not arise.

The Hon'ble Apex Court in the case of CIT V Sati Oil Udyog Ltd 372 ITR 746 at page 761 observed:

The burden of proving that the assessee has attempted to evade tax on the revenue by establishing facts and circumstances from which a reasonable inference can be drawn that the assessee has, in fact, attempted to evade tax lawfully paid by it.

Therefore in view of finding given in these paras by the ld. AO it had to be proved first by the department that the assessee was having some income on which it has not paid the tax and the same brought in books of accounts in the form of share capital & premium thereon. But in the instant case the department could not prove any kind of undisclosed source of income of the assessee as a result of search over assessee as well as during the course of assessment proceedings. As a result of so called long inquiries/analysis the department could not evidentiary proved that the assessee company managed its funds with investor companies to brought the same in books of accounts in the form of share capital & premium thereon more so when the investor companies having their own sufficient funds to invest in the assessee company much prior to investment made in the assessee company and apart from investment made in assessee group having other investments/assets which were treated as genuine by the department. Further in the assessment of such investor companies the source of funds and application of funds is being treated as genuine by the department than how the same can be treated as non genuine in the case of assessee company. Reliance is placed on the decision of Hon'ble Supreme Court in the case of Commissioner of Income Tax Vs Smt. P. K. Noorjahan 237 ITR 570 (SC) and CIT Vs Bharat Engineering and Construction Co. (1972) 83 ITR 187 (SC)

6. The ld. AO by doubting the creditworthiness and genuineness of the share capital/share premium in above paras issued a show cause notice dated 06.02.2015 (copy at PB Page 108 to 112) to the assessee for treating the share capital/premium as income of the assessee on the following grounds: -

a) Share premium/Share capital paid by investor companies is not justified on any account and it is clear that entire money has been introduced in the assessee company in the garb of share premium. The purpose and justification of charging the share premium in excess of the justifiable amount, which in this case cannot be more than Rs.10/- per share, is absent from the above exercise of issue and subscription of shares at a premium of Rs.290 per share.

b) The detailed enquiries revealed that most of the companies are Kolkatta based. Directors of these companies are the employees of Moti Sons Group or the family members of Chhabra family. Detailed analysis showed the following facts:

(i) All the Directors were residents of Jaipur

(ii) Internet search showed that Directors of these Kolkatta based Companies are related to MotiSons Group companies through employment or otherwise

(iii) ITDMS and ITD search on PAN of these directors corroborated the given addresses to a large extent

(iv) Residential address of Rajeev Jain was the same as that of MotiSons Shares Pvt. Ltd., mentioned on the visiting Card of Haridwar office as branch Head.

(v) All these directors appointed between 12th and 17th October 2011 which was more than a coincidence (the previously existing Directors resigned in February 2012)

(vi) The email ID given on MCA website for all the companies is common and the same is for Motisons Group Companies. The Compliance officer Ms. Neha Jain, Company Secretary is common between these and Motisons group Companies, indicating absolute Control of Motisons Group upon these Kolkata based companies.

(vii) Registered address of all the companies is the same, which has been changed on 01.03.2012.

(viii) Two of the said companies information on MCA website were examined in detail. M/s. Alliance Tradecom & M/s. Evershine suppliers Pvt. Ltd were incorporated on 25.11.2008 and 05.01.2009 respectively. The inflow of capital upon incorporation was through share sold at a very high premium and thereafter the said Capital was claimed to be invested in Unquoted shares worth Rs.11.06 Crores and Rs.10.39 Crores respectively.

(ix) All above factors indicate systematic and deliberate creation of a colurable device to introduce share capital into Motisons Group Companies.

7. In response to show cause notice the assessee filed its reply vide letter dated 13.02.2015 (Copy at PB Page 113 to 115). The submission of the assessee on the observations of ld. AO as mentioned above in para 6 above is as under: -

a) The share premium was decided by the company and investors mutually and share applicant companies have agreed to pay this share premium. There was no bar to issue shares on premium under Companies Act and Income Tax Act for the period under relevant. Further the ld. AO held that the "------it is clear that entire money has been introduced in the assessee company in the garb of share premium----" but the ld. AO did not clear that what was the source of such money with the assessee which it introduced in the garb of share premium. The show cause notice as well as assessment order is completely silent on this issue. Without having some money it cannot be introduce in books of accounts and for having the money there should be some unexplained source of income. In the case of assessee the department as a result of search as well as during assessment proceedings or as a result of investigation could not prove the source of income of the assessee wherefrom this much of money was earned, therefore the finding of ld. AO on this issue is totally incorrect and does not maintainable in the eye of law.

The allegation of ld. AO is patently wrong, without any basis and merely on surmises and conjectures. Hon'ble Justice Hidayatullah of the Supreme Court in the case of Sreelekha Banerjee Vs CIT [1963] 49 ITR 112 (SC); 120 observed that the Income Tax

Department cannot by merely rejecting unreasonably a good explanation, convert good "proof into no proof" Hon'ble Supreme Court in the case of Uma Charan Shaw & Bros Co Vs CIT 37 ITR 271 has held that the surmises and conjectures, and the conclusion is the result of suspicion which cannot take the place of proof. Hon'ble Punjab & Haryana High Court in the case of CIT Vs Anupam Kapoor (2008) 299 ITR 179 (P & H) also held that suspicion, howsoever strong cannot take the place of legal proof.

b) Regarding the inquiries which are being discuss in the show cause notice this is to submit that whatever inquired being discuss by ld. AO was not in knowledge of the assessee that what sort of inquiries has been made by the department and what are the outcomes of such inquiries. Therefore the assessee requested from the ld. AO to provide the details of inquiries conduced in this regard along with supporting documents but the same not provided to the assessee. However on the issue raised by the ld. AO on the basis of so called inquiries we submit as under: -

i) The above finding of the ld AO is not relevant at all in deciding the issue of creditworthiness of the investor company and genuineness of the transactions. Even, if it is presumed that the investor companies are under the control of the directors of the assessee, then also the transaction cannot be treated as not genuine as the main issue is availability of funds in the hands of the investor company and if that is explainable then no question is arise for treating the share capital as not genuine.

(ii) The low creditability of directors of allottee company, their relationship with Motisons Group etc. have no relevance for examining the genuineness of share capital and creditworthiness of the investor company as in the case of assessee it is well proved by documentary evidence that the amount against share application money was received through genuine source of funds with investor companies and the amount was adjusted against allotment of shares. The source of funds with the investor companies which they invested in assessee company was also well explained genuinely. If department have some doubt regarding genuineness of funds with investor companies the necessary investigation of such funds should had been made in the case of investor companies and the necessary action should had been taken in their case. It is relevant to mention here that apart from the investment made in the assessee group the investor companies were having other assets/investment which were also managed by those companies at their own. It is also relevant to notice here that why only the investment made by those investment companies in the assessee group is being treated as non genuine and other investment/assets of those company is being treated as genuine. This shown that the assessment order was passed by ld. AO with settled mindset that the amount is to be added as income of the assessee.

(iii) Further whatever inquiries/analysis discuss by ld. AO in his show cause notice have no relevance in the case of the assessee because from such discussion only it can be proved (not conclusively) that the employees of assessee group was managing affairs of some of the companies who made the investment in some years in the assessee/companies of assessee group but such inquiries nowhere proves that the funds with such companies was not from their own independent sources and the same was introduced by the assessee company. In the instant case for adding the share capital/premium as income of the assessee the department has to prove that the amount so received was revenue receipt of the assessee and in the instant case the department could not prove the same as a result of search proceedings over the assessee group or during the course of assessment proceedings or as a result of investigation/analysis. Without proving the source of income or without proving that amount so received is income of the

assessee the same cannot be treated as income of the assessee merely on presumption, assumption and suspicious.

c) *The ld. AO opined that the analysis/inquiries indicate the systematic and deliberate creation of a colourable device to introduce 'Share capital' in Motisons group companies. The investment in share capital of assessee company by above named companies was independent decision/judgment of those companies. The assessee has filed copy of the board resolution of the investor company. The income tax department carried out intensive search over Motisons Group and during the course of search no documents/evidence was found to shown that the companies who made investment in shares of assessee company in the year under consideration were funded or undisclosed cash was given by Motisons Group. If these investor companies have their own independent funds, the same can be invested anywhere.*

It is admitted facts that during the year under consideration as well as in previous years the assessee company is not having any such business activities wherefrom this much undisclosed income could be earned than how the same can be managed to brought in books of accounts in form of share capital. In this case the department could not prove any kind of undisclosed source of income of the assessee as a result of search over assessee as well as during the course of assessment proceedings or as a result of inquiries. As a result of so called long inquiries the department could not evidentiary proved that the assessee company managed its funds with investor companies to brought the same in books of accounts in the form of share capital more so when the investor companies having their own sufficient funds to invest in the assessee company much prior to investment made in the assessee company.

Thus, from the above submission and record it is well proved that the amount so received by the assessee company from above named companies was received against share capital and the investment was made by them by their own disclosed source, therefore no addition in any way can be made in the hands of the assessee.

8. After considering the reply of the assessee on show cause notice issued by ld. AO he pointed certain issues in the reply of the assessee which have been discuss on page 25 to 33 (Para 21 to 25) of assessment. The finding of ld. AO and submission of assessee on such findings is as under: -

(a) Finding of AO: - Identity, Credit worthiness and genuineness of the transactions have been proved by filing certain documents. The assessee company has attempted to limit the scope within which revenue authorities can operate only with a self serving interest to make it appear that the transactions entered into get justified. The three aspects certainly are some of those angles, but to say that the revenue cannot go beyond, is not apparently vested with self serving interest but also with ignorance of law.

Certainly, simply because some form of identification on paper has been provided does not mean that the transaction stands explained from the viewpoint of the credit worthiness and genuineness.

Submission of assessee: -

i) The assessee submitted ample documents in supported to share application money received to prove the identity, creditworthiness and genuineness of transactions and from examination of

those documents its proves that the investing companies were having sufficient funds to make investment in share capital of the assessee company. There was no cash deposit in bank a/c of the investor company for subscribing the share capital of assessee company. The ld. AO rejected these evidences on surmises and conjectures. Hon'ble Justice Hidayatullah of the Supreme Court in the case of Sreelekha Banerjee Vs CIT [1963] 49 ITR 112 (SC); 120 observed that the Income Tax Department cannot by merely rejecting unreasonably a good explanation, convert good "proof into no proof" Hon'ble Supreme Court in the case of Uma Charan Shaw & Bros Co Vs CIT 37 ITR 271 has held that the surmises and conjectures, and the conclusion is the result of suspicion which cannot take the place of proof. Hon'ble Punjab & Haryana High Court in the case of CIT Vs Anupam Kapoor (2008) 299 ITR 179 (P & H) also held that suspicion, howsoever strong cannot take the place of legal proof.

ii) *From examination of financial statements of investor companies your honor will find that the investor companies had huge share capital and reserves. Apart from the investment made in the assessee group they have other investments/advances. As per declaration of source of funds submitted by them they realized money from their old investments/advances and made the same money was utilized for making the investment in assessee company. These companies are assessee of Income Tax department and there assessment for AY 2009-10 and AY 2013-14 was made by the department wherein the source and application of funds were admitted as genuine. Only in the case of Mayukh Vinimay Pvt. Ltd the share premium received by this company was added as income of this company and such funds were utilized for investment in shares of assessee company than how the same can be added as income of the assessee considering the same as non genuine. In case of any doubt, necessary action could be taken in the hands of these companies and if these companies failed to explain the source of investment, necessary addition can be made in the hands of these companies by applying the provisions of section 69 of Income Tax Act. However the ld. AO made the addition in the hands of assessee company under the complete disregard of provisions of Income Tax Act and merely on surmises and conjectures. The Hon'ble apex Court in the case of CIT vs. Lovely Exports (P) Ltd. 216 CTR 0195/ 6 DTR 308 (SC) held that if the share capital money is received by the assessee company from alleged bogus shareholders then the Department is free to proceed to reopen the individual assessments of such shareholders in accordance with law. Such share application money cannot be regarded as undisclosed income of the assessee company*

(iii) *As alleged by ld. AO the assessee is not attempted to limit the scope within which revenue authorities can operate and the assessee also accept that the revenue authorities can examine the transactions from all possible angles. In the law in the case of credit entry (such as loan, share capital etc.) the identity, genuineness and creditworthiness of the credit entries has to be examine and in the instant case the assessee has proved all these three ingredients and the ld. AO did not find any infirmity in such details. If the ld. AO is having doubt regarding the detail and submission filed by the assessee than he could surely go beyond for further inquiries but the inquiries should have been with the angel to unearth the truth of the transactions and in the instant case the inquiries should have been made with the angel to find out the following: -*

- *The huge amount received in the form of share capital/share premium. Whether the money so received is actually capital receipt in the hands of the assessee?*
- *Whether money received in the hands of the assessee company was from genuine source or the same was own funds of the assessee?*
- *If the money which flow in the hands of the assesses was managed affairs of the assessee than what was the source of inflow of such money?*

iv) The ld. AO has not carried out any short of inquiries in this regard in the case of the assessee. No inquiries from the shareholders, their bankers have been made to prove the contention of the assessee to be wrong. There is no evidence that the money received is a/c of the assessee's own undisclosed income. The assessee filed sufficient documents to prove that the amount so received was capital receipt and the same was received against share capital/share premium. The source of the funds from investor companies was also proved and there is no positive material to show that the investor companies was not having sufficient source to invest the money in assessee company. If the ld. AO is having doubt regarding genuine of source of funds with the investor companies he could have make the inquired in the case of such companies and if something found adverse than the necessary additions could have been made in the hands of such investor company only and in the inquiry if something positive reveals that the source of funds with such investor companies was funded by the assessee company than only the addition could be made in the hands of the assessee company. It is admitted facts that during the year under consideration the assessee company was not having any such source of income from which this much of income could be earned and the ld. AO is completely silent on this issue that where from this much of money was earned by the assessee company. Further as a result of so called long inquires by investigation wing it could not be proved evidentiary that the assessee managed the funds in intermediate companies to brought the same in books of accounts in the shape of share capital/share premium.

v) The finding of ld. AO that simply because some form of identification on paper has been provided does not mean that the transaction stands explained from the viewpoint of the credit worthiness and genuineness this is to submit that by filing the sufficient documents the assessee discharge its onus cast on it by the law and now onus in on the department to disprove the submission and documents of the assessee by positive evidence. The department has not discharged its onus and no inquired were carried out and no evidence is in possession with the department to disprove the claim of the assessee. On the one hand the ld. AO is claiming that the revenue authorities can examine the transaction from all possible angles and on the other hands the transactions are being doubted and added merely on surmises, conjectures and on the basis of some inquiries carried out by investigation wing which not proves anything contra against the assessee. It is further submitted that if the documents submitted by the assessee was not felt sufficient to accept the transaction than the ld. AO could ask from assessee to submit the further details/documents which is felt necessary for deciding the matter in justice & fair manner but the same was not done by ld. AO.

b) Finding of AO: - Regarding no bar of issuing of shares at premium, the assessee company has attempted to take an advantage out of the absence of a specific provision which bars the acceptance of share premium which does not match the net worth of the issuing company. In this regard, it needs to be pointed out that mere absence of a specific provision does not by itself mean that a particular colorable device or a sham transaction, acquires legal sanctity, there are numerous provisions related to Gift, sale consideration on sale of assets which came into being at a later stage, but the illegal and tax contravening transactions were still taken up and taxed by revenue authority of course, after the specific inclusion of governing statutes, the matter requires to be dealt within the framework of the specific provision. But, till such time it cannot be said about a transaction, which is patently beyond the realms of acceptability and which also are embedded with in here tax implications, that they need to be left alone only because there was no specific bar.

Section 56 of the IT Act has already been existence since long and subsection (1) of section 56 adequately covered transactions like the one being dealt with at present. Only because, sub-section (1) was a broad manifestation of the intent of revenue, sub section (2) which was more specific in content was introduced to take case of the misinterpretation & confusion which was being derived out of sub section (4). It must be appreciated that introduction of sub section (2) of section 56 of the Act was only a specific expression of the manner in which a specific transaction requires to be dealt with the intent of legislature and the content thereof already existed within the same act and within the same section and in the preceding sub-section No new idea which was conceptually district from section 56(1) of the Act was brought into being.

Hence, the assessee company cannot be allowed to escape the provision of law, simply because it contained a broader & wider manifestation of its true intent which was enunciated only after the transaction took place. The contention of the assessee is a pervert argument & deserves to be rejected.

Submission of assessee: -

i) Share premium is capital receipt:

If shares are issued at premium then capital receipt aggregate amount of premium is to be transferred to an account called the share premium account. This share premium account is not distributable as income just like as any other capital assets. On winding up, the surplus monies in the share premium account is to be returned to the share holders as capital. So long as the company is a going concern, the monies in share premium account can never be returned to the shareholders except through the medium of a reduction petition, or, in other words, except under exactly the same conditions as those under which any other capital asset can reach the shareholders hands. Distribution of share premium amount is not permitted through dividend. It is taken out of the category of divisible profits. The provisions in respect of issue of shares at premium are the same in the old company Act as well as in the new company Act. Hence companies Act clearly mentions that amount received as premium is capital receipt and not a revenue receipt. The share premium is also verifiable from returns of allotment submitted in ROC. As per departmental circular (MCA) No. 3/77 dated 15.04.1977 the monies in the share premium account cannot be treated as free reserves, as they are in the nature of capital reserves.

ii) On the issue of shares at premium, the ld. ITAT, Mumbai Bench in the case of ACIT V/s Gagandeep Infrastructure Pvt. Ltd. 2014-T10L-656-ITAT-Mum observed that issue of shares at premium is always a commercial decision which does not require any justification. Further the premium is a capital receipt which has to be dealt with in accordance with section 78 of companies Act 1956. Further the company is not required to prove the genuineness, purpose or justification for charging premium of shares, share premium by its very nature is a capital receipts and is not income for its ordinary sense. In the case before Mumbai bench has to consider a case where premium of Rs.190 per share was charged. The Tribunal observed as under:

"No doubt a non-est company or a Zero balance sheet company asking for Rs.190 per share defies all commercial prudence but at the same time we cannot ignore the fact that it is a prerogative of the Board of Directors of the company to decide the premium amount and it is the wisdom of the shareholders whether they want to subscribe to such a heavy premium. The Revenue authorities

cannot question the charging of such huge premium without any bar from any legislated law of the land. The amendment has been brought in the Income Tax Act under the head "income from other sources" by inserting clause.(vii b) to section 56 of the Act wherein it has been provided that any consideration for issue of shares, that exceeds the fair value of such shares, the aggregate consideration received for such shares as exceeds the fair market value of the shares shall be treated as the income of the assessee but the legislature in its, wisdom has made. The provision applicable w.e.f. 1.4.2013 i.e. on and from A.Y. 2013-14."

iii) *The ld. AO taxed the share capital/share premium by holding that mere absence of a specific provision does not by itself mean that a particular colorable device or a sham transaction, acquires legal sanctity and a transaction, which is patently beyond the realms of acceptability and which also are embedded within here tax implications, that they need to be left alone only because there was no specific bar this is to submit that for bringing a transaction into a Income Tax territory first it is to proved by the revenue authorities that the transaction is colorable device or a sham transaction. In the case of the assessee the investor companies are confirming that they have gave the amount to the assessee company as share premium and the assessee company is entering such amount in its books of accounts as a share premium. There is no evidence on record to prove that the transaction is sham transactions or not real transaction. The onus is on department to prove that the transaction is sham or not real. The allegation should be based on the evidences. The ld. AO is duty bound to prove a transaction not real and not acceptable with evidences which is absent in the instant case. Admittedly there are numerous deeming provisions related to Gift, sale consideration on sale of assets under which the deemed income are taxed but the deeming fiction can only strictly applied on the transactions for which it was made applicable. The same cannot be extended further for other transactions until and unless such transaction is covered in the definition of Income or deemed income as per Income Tax Law. If some specific transaction is not income or deemed income in the Income tax law than the same cannot be presumed as income by the revenue authorities at their own without having any positive material to presume that the same is actually income of the assessee. These type of transaction can only be dealt within the framework of the specific provision after the specific inclusion of governing statutes. In the Income Tax Act the charging of certain amounts share premium deemed to be income of the recipient companies w.e.f. 1.4.2013 i.e. on and from A.Y. 2013-14 and the same cannot be made applicable retrospectively.*

iv) *Admittedly the Section 56 of the IT Act has already been existence since long and but sub-section (1) of section 56 only covers the taxing the revenue transactions which not covered under other head of income but the same are included in the definition of income. The section 56(1) does not cover the taxing the deeming capital receipts and such receipts can only taxed under sub section 56 (2) of Income Tax Act, 1961 if consisting specific expression of the manner in which a specific transaction requires to be dealt with the intent of legislature. In the Income Tax Act the charging of certain amounts of share premium deemed to be income of the recipient companies w.e.f. 1.4.2013 i.e. on and from A.Y. 2013-14, therefore the share premium received prior to that period cannot be taxed as income of the assessee.*

c) *Finding of ld. AO: - It is wholly incorrect to say that the allegation is based on surmises and conjectures. The facts clearly prove that the assessee had entered into sham transactions as part of a well planned exercise of introducing unexplained money in the form of share capital and*

share premium without any justification of the value having been provided either by the issuing company or the subscribing company. The money so received was then immediately invested in the subscription of share capital at high premium with other companies, who in turn continued the exercise in the same form. The assessee company was thus part of this circular ring whereby unjustified and unsubstantiated share premium was being introduced.

Submission of assessee: -

i) The finding of ld AO is patently wrong, perverse and not backed with any supporting evidence. First of all regarding allegation that the assessee introduced its own unexplained money in the share capital and share premium this is to submit that the department carried out intensive search over the assessee and during the course of search not a single document/evidence was found to show that the assessee was having some undisclosed income or having some unexplained money. As a result of inquiries carried out by the investigation wing they also could not gathered any positive evidence to show that the assessee was having any undisclosed income or unexplained money. If there is no proof with the department to prove that the assessee was having some unexplained money than how it can be alleged that the assessee has introduced its unexplained money in the form of share capital and share premium. This is completely on the basis of surmises and conjectures.

ii) As regard to not providing the justification of the value of shares this is to submit that the shares issued at high rates does not make the transactions itself shame or colourful device to evade the tax. From the record it is well proved that the amount was received from the investor companies against share capital & share premium, therefore the transaction are being genuine. As stated in earlier paras, the Hon'ble ITAT, Mumbai Bench in the case of ACIT V/s Gagandeep Infrastructure Pvt. Ltd. 2014-T10L-656-ITAT-Mum observed that issue of shares at premium is always a commercial decision which does not require any justification. Further the company is not require to prove the genuineness, purpose or justification for charging premium of shares, share premium by its very nature is a capital receipts and is not income for its ordinary sense.

iii) The allegation of ld. AO is that the money so received was then immediately invested in the subscription of share capital at high premium with other companies, who in turn continued the exercise in the same form and the assessee company was thus part of this circular ring whereby unjustified and unsubstantiated share premium was being introduced. In this regard this is to submit that if someone is investing the money in the assessee company he must be having the inflow of money from some source. What is the source of inflow with the investor company and how it is managing its affairs is not concern of the assessee. In the case of the assessee, it has full filled its legal obligation. The assessee has proved the source of money with the investor companies. Thus in the case of the assessee the source of money is well proved. If the investor companies is not having proper source of funds with them than the action should have been taken in their hands and the same cannot be added as income of the assessee merely by holding that the assessee planned the funds of all the companies. There is no onus to prove source of source. In this regard, the assessee relies on the following decisions:-

(i) Hon'ble Rajasthan High Court in the case of Aravali Trading Co Vs Income Tax Officer (2008) 8 DTR (Raj) 199 has held that once the existence of the creditors is proved and such persons own the credits, the assessee's onus stands discharged and the assessee is not required to prove the source from which the creditors could have acquired the money deposited with him. Hon'ble jurisdictional High Court has held that merely because the depositors' explanation about the sources of money was not acceptable to the AO, it cannot be presumed that the deposit made by the creditors is money belonging to the assessee itself.

(ii) CIT Vs Orissa Corporation (P) Ltd (1986) 159 ITR 79 (SC)
The assessee had given named and addresses of the cash creditors, who were income tax assessees. Revenue apart from issuing summon u/s 131 notices to creditors, did not pursue the matter further- it did not examine creditworthiness of the creditors- assessee could not, under the circumstances do anything further. Held that the additions were rightly deleted.

(iii) CIT Vs Heera Lal Chagan Lal Tank (2002) 157 ITR 281 (Raj)

Burden of the assessee stands discharged when the identity of the creditors is established and he confirms the loans.

It is further submitted that the investor companies were having sufficient accumulated funds in the form of share capital and reserves & surplus much prior to the investment made in the assessee company and the same are more than to investment made in the shares of assessee group companies. The same funds were being managed by such company at their own and having investment in shares of other companies/loans & advances to various parties. The other investments/assets of investor companies are being treated as genuine than how the investment made in the assessee group can only be non genuine. Further if the allegation of the department is that the assessee managed its unexplained funds in such companies than there should be inflow of new capital in such companies for making the payment to the assessee company which has not been done in the instant case. The investment was made in the assessee company out of funds realized from previous investments/advances. If the payment was made by realizing the funds already invested by such company how such funds can be treated as unexplained money of the assessee.

d) Finding of ld. AO: - The contention of the assessee company is only based on accounting jugglery by way of which the transaction has been recorded in the books of accounts of all such persons including the assessee company, who have participated in this exercise. It needs to be understood that merely because the assessee company adjusted the money received, as share capital/share premium in its books of account, the transaction cannot be showed with the character of a capital receipt. It must be said that the face value of a share is intrinsically capital in nature because it imparts to the subscriber a right of participation and ownership in the issuing company. However, the share premium attached to each such share does not entitle the subscribed of anything else other than what the face value by itself has achieved for him. This participation and ownership in the issuing company remains the same. It is in fact a cost which the subscriber bears for

1) The value or worth of assets & profits which the issuer company already possesses or deriver, or

2) The value or worth of such assets or profits which the issues company may create in the further or may derive, for the proportionate benefit of the subscriber.

In the instant case, both of above are absent. Neither does the issuing company possess any asset worth its name nor does it derive any profit.

Neither does the assessee company hold any promise for the creation of assets or wealth in the future nor is there any foreseeable possibility of any profit being derived in the future.

The question which thus arises is that what is it that the subscriber company paid for in form of the share having face value of Rs. 10. The assessee company has failed to answer this question even

when a specific query in this regard had been raised thus the same creates doubts regarding genuineness of share capital and premium thereon credited in books of accounts

Submission of assessee: -

i) *The transfer of share application into share capital & share premium is not only based on accounting entries but they are supported by documentary evidence. It is not a case where the certain receipts has been accounted for by assessee company as per its own sweet will. The investor companies filed the share application forms to subscribe the shares of the assesses company and in the share application form the detail of share premium is also mentioned. Thus this is not a case where the claim of the assessee is based on accounting entries. There is no contra material with the department to prove that the adjustment made in books of accounts by the assessee is not correct or not based on documents.*

ii) *The ld. AO himself admitted that the face value of a share is intrinsically capital in nature because it imparts to the subscriber a right of participation and ownership in the issuing company and still while making the addition he made the addition of the share capital as well as share premium. Further if the shares are issued at premium then capital receipt aggregate amount of premium is to be transferred to an account called the share premium account. The book value of the share is increased by the amount credited in share premium account. This share premium account is not distributable as income just like as any other capital assets. On winding up, the surplus monies in the share premium account is to be returned to the share holders as capital. So long as the company is a going concern, the monies in share premium account can never be returned to the shareholders except through the medium of a reduction petition, or, in other words, except under exactly the same conditions as those under which any other capital asset can reach the shareholders hands. Distribution of share premium amount is not permitted through dividend. The companies Act clearly mentions that amount received as premium is capital receipt and not a revenue receipt.*

iii) *As himself admitted by ld. AO one of the deciding factor for share premium is the value or worth of such assets or profits which the issues company may create in the further or may derive, for the proportionate benefit of the subscriber. In forgoing paras we have described the future planning of the assessee by using the funds received from shareholders which also justified the share premium received from the investor companies.*

Therefore the ld. AO is wrong in holding that in the instant case neither does the assessee company hold any promise for the creation of assets or wealth in the future nor is there any foreseeable possibility of any profit being derived in the future. From the financials of the assessee company the justification given by the assessee in forgoing para regarding acquisition of assets and future planning for earning of profit can be duly verify. Further as stated in forgoing paras the shares at premium is always a commercial decision between investor and investee companies which does not require any justification.

e) *Finding of ld. AO: - The Inquiries which are being discussed in show cause notice are in relation to allottee companies and as held in earlier paras that there are cross-holdings amongst six companies naming Alliance Tradecom Pvt. Ltd, Evershine Suppliers Pvt. Ltd,*

Regent Barter Pvt. Ltd, Regent Dealers Pvt. Ltd, Rose Suppliers Pvt. Ltd and Mayukh Vinimaya Pvt. Ltd, but major shareholding is of a 7th company, i.e., Mayukh Vintrade Pvt. Ltd. Thus, this latter company is the holding company of 6 companies, named earlier. The holding company is entirely owned by individuals or HUFs of Chhabra families. It is all clear that the web of companies through which transactions have been routed to create a 'corporate veil'. It can easily be noticed that the payments to Sandeep Chhabra and Sanjay Chhabra have been reflected as loans by these companies. While the payments to Motisons Group companies have been reflected as share application money by recipient companies. On further examination by investigation wing it clearly indicate systematic transfer of funds across several accounts, at time as many as six accounts, in a single day (or at the most two to three days). Major exercise has been done in two of the six companies – Alliance Tradecom Pvt. Ltd and Evershine Suppliers Pvt. Ltd.

Submission of assessee: -

i) The detail submission on this issue has already been submitted in para 4 above of our submission.

ii)In addition to above this is to further submit that there is no evidence with the department to prove that the companies to whom shares were issued during the year were being funded by the assessee company. All the companies have their own independent funds to invest at their wisdom. It is further relevant to mention here that whatever funds paid by the investor companies to the assessee company were transferred from their own source of funds which they were possessing much prior to investment made in the assessee company and by no stretch of imagination it can be presumed that the those funds were introduced by the assessee company in the investor companies.

iii) Further from the show cause inquiries on the basis of which the modus operandi of issue of shares on share premium is being justify by the ld. AO no where it proves that the funds were introduced in such companies by the assessee company. There is no cogent reason to have such presumption either as a result of search over the assessee as well as inquiries carried out by the department. If we believe on the inquiries carried out by the department than there may be introduction of some suspicious funds in the intermediate companies where from the flow of funds started from one company/person to other company/person and part of such was received to the assessee company but still a question arose that how its prove that the same was unexplained money of the assessee company. The companies/persons from whom the assessee company received the share application money and the persons/companies from whom the investor companies of the assessee received the funds are separate Income tax assessee and having their own net worth, own source of funds much prior to the investment made in the assessee company and if some suspicious funds had been introduced in accounts of such companies then the explanation of such funds should have been called from concerning person/company and in case of failure to do so the action should have been taken in the case of concerning person. Instead of doing so the department adopted a short cut method of treating such suspicious money as unexplained money of the assessee and added the same income of the assessee without carrying necessary inquiries or taking necessary action against such persons by justifying its action on the basis of some irrelevant inquiries. There is no case or evidence with the department to presume that the assessee has introduced its explained money in accounts of such investor companies.

f) Finding of ld. AO: - Admittedly during the course of search over Motisons Group no documents/evidence was found to show that share capital and premium thereon was not genuine or unaccounted income was introduced in the garb of share premium but from the inquiries and modus operandi its reveals that the allotee companies are merely paper companies and providing accommodation entries. Therefore the indirect evidence/inquiries conducted give clear sign of introduction of large money in the company in the form of share capital/share premium more so when the justification of charging such higher rate not genuinely proved.

Submission of AO: -

i) In this para the ld. AO himself admitted that during the course of search over Motisons Group no documents/evidence was found to show that share capital and premium thereon was not genuine or unaccounted income was introduced in the garb of share premium. Thus if the department is not in possession of any positive material against the assessee or its investor companies than how the share capital and premium received thereon can be treated as non genuine or bogus. Further from the show cause indirect evidences/inquiries conducted during we have given our submission in detail on such inquiries and there is no positive/direct evidence against the assessee to alleged that the assessee has introduced its own unexplained money under the garb of share capital and share premium.

ii) The rate of share was decided after discussion of assessee company and investor company. The shares were issued to the investor companies at premium because of the reasons mentioned in forgoing paras. From the documents submitted to the AO no where it proves that all the companies are simply paper companies and providing only accommodation entries and the investment made by them in the assessee company is not genuine. The finding of the ld. AO is based on the assumption and presumption.

g) Finding of ld. AO: - It is clear that what is apparent is not real and the assessee's claim of having received investment is not genuine. As laid down by the Hon'ble Supreme Court in the case of CIT vs Sumati Dayal (1995) 80 TAXMAN 89 (SC), apparent must be considered real until it is shown that there are reasons to look into the surrounding circumstances to find out the reality and the matter has to be considered by applying the test of human probabilities. The evidences have to be judged by applying the test of human probabilities. Importing the ratio of the Hon'ble Supreme Court of India as propounded in the case of Sumati Dayal (supra), there is no dispute that the amount has been received by the appellant from various companies, some of which are listed companies, and the funds have been received against the issue of shares and that the funds have been received through banking channels. What is disputed is whether the funds received by the assessee is actually genuine investment or the unaccounted income introduced in the garb of investment. This raises the question whether the apparent could be considered as real. In the present case the claim of the assessee having received genuine investment is incorrect.

Submission of assessee: -

i) As laid down by the Hon'ble Supreme Court in the case of CIT v/s Sumati Dayal (1995) 80 Taxman 89 (SC), (Also relied by ld. AO) apparent must be considered real until it is shown that there are reasons to look into the surrounding circumstances to find out the reality and the matter has to be considered by applying the test of human probabilities. The evidences have to be judged by applying the test of human probabilities.

ii) The ld. AO is also admitting in this para that the amount has been received by the appellant from various companies and the funds have been received against the issue of shares and that the funds have been received through banking channels.

The dispute is whether the funds received by the assessee are actually genuine capital application or the unaccounted income introduced in the form of share application.

In this regard this is to submit that there is no reason with the department to presume that the amount received from the above mentioned companies is accommodation entries to brought the unaccounted money of the assessee in books of accounts. Further during the course of search the department has not found any undisclosed source of income of assessee for the year under consideration by which this much of income could be earned which also proves that the share capital received by the assessee is genuine. CIT Vs Bharat Engineering and Construction Co. (1972) 83 ITR 187 (SC) In this case tribunal came to the conclusion that unexplained cash credit entries in the first year of business of engineering construction company could not be income of assessee. The High Court after careful examination of the various findings reached by the Tribunal has come to the conclusion that the Tribunal's findings are findings of fact. Hon'ble Apex court confirmed that conclusion.

This gives the answer in favor of the assessee that in this case the apparent should be considered as real as the assessee company is not having any source of income from which this much of income could be earned than received of non genuine share capital to brought its unaccounted income in its books of accounts does not arise.

iii) The assessing officer merely disbelieved the explanation/statements given by the assessee and has converted good proof into no proof. Hon'ble Justice Hidayatullah of the Supreme Court in the case of Sreelekha Banerjee Vs CIT [1963] 49 ITR 112 (SC); 120 observed that the Income Tax Department cannot by merely rejecting unreasonably a good explanation, convert good "proof into no proof"

Hon'ble Supreme Court in the case of Uma Charan Shaw & Bros Co Vs CIT 37 ITR 271 has held that the surmises and conjectures, and the conclusion is the result of suspicion which cannot take the place of proof.

Hon'ble Punjab & Haryana High Court in the case of CIT Vs Anupam Kapoor (2008) 299 ITR 179 (P & H) also held that suspicion, howsoever strong cannot take the place of legal proof.

9.By giving the above findings the ld. made addition of Rs. 42,07,29,600/- in total income of the assessee u/s 56(1) of Income Tax Act, 1961. Regarding the applying the provisions of section 56(1) of Income Tax Act, 1961 we may submit as under: -

a) As per provisions of section 56(1) of Income Tax Act, 1961 "Income of every kind which is not to be excluded from the total income under this Act shall be chargeable to income-tax under the head "Income from other sources", if it is not chargeable to income-tax under any of the heads specified in section 14*, items A to E."*

In the case of the assessee company, the amount was received from investor companies were against share application and the same is capital receipt which was adjusted against share capital and share premium. The money so received to assessee company was capital receipt and was not revenue receipt, therefore the same cannot be taxed in the hands of assessee company under section 56(1) of Income Tax Act, 1961 because this section deal with income and not with capital receipts. The investors who subscribed the share capital of assessee company is also showing the amount paid to assessee as their investment in shares of assessee company and

necessary documents in this regard was submitted to ld. AO. Therefore the assessee has proved with documentary evidences that the amount was received against share application i.e. capital receipt, therefore the same cannot be treated as income of the assessee. Further for treating the share capital/share premium as income of the assessee company no cogent reason has been given by ld. AO.

b) There is no deeming fiction has been given in section 56(1) of Income Tax Act, 1961 wherein the income can be taxed under deeming provision. Certain deeming income has been charged as Income Tax Act which has been provided in section 56(2) of Income Tax Act, 1961 and as per provision of section 56(2) of Income Tax Act, 1961 the share premium received prior to AY 2013-14 were not taxable in any circumstances if the assessee has proved the identity, creditworthiness and genuineness of the transactions.

c) The Income for the purpose of the Income Tax Act has a well understood meaning as defined in section 2(24) of the Income Tax Act 1961. It is true that section 2(24) of the Income Act 1961 contains inclusive definition but it cannot be disputed that income should have been look into its normal meaning. The income will not include capital receipts unless it is specified in Income Tax Act. This argument clarifies after the amendment made by Finance Act 2012 w.e.f. 1.4.2013 in section 56(viib) of Income Tax Act, 1961 wherein certain share premiums were made taxable w.e.f. 01.04.2013. If the same were already taxable u/s 56(1) o Income Tax Act, 1961 and the same was already included in the definition of Income than why this amendment was made. Therefore the ld. AO is wrong in making the addition u/s 56(1) of Income Tax Act, 1961.

d) Charge of tax is on income as understood in the I. Tax Act and measure of income as per the computation provision. In case there is no charging provision for specific receipt, then it cannot be taxed. The five member Bench of the Apex Court in CIT V Vatika Township P Ltd 367 ITR 466 observed at page 494.

"Tax Laws are clearly in derogation of personal rights and property interests and are, therefore, subject to strict construction and any ambiguity must be resolved against imposition of the tax. In Billings V U.S 232 U.S.261 at page 265, 34 S.Ct 421 (1914), the Supreme Court clearly acknowledged this basic and long standing rule of statutory construction.

Tax Statutes should be strictly construed, and, if any ambiguity be found to exist, it must be resolved in favour of citizen.

"If a person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the crown seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the sprit of the law the case might otherwise appear to be" As observed in Partington V Attomey General LR4HL100.

Since for the year under consideration there was no provisions in Income Tax Act, 1961 wherein the fair value of share could be computed and the excess share premium could be taxed, therefore in absence of computation provision the same cannot be taxed. The reliance is placed in following cases: -

i) The Hon'ble Bombay High Court in the case of Cadell Wvg. Mills Co.(p) Ltd. V CIT 249 ITR 265 had an occasion to consider the taxability of a sum received in respect of consideration of tenancy Right. It was accepted both by revenue and the assessee that tenancy right is a Capital receipt. Income as defined in section 2(24)(vi) is the income chargeable u/s 45. Hence capital gain chargeable u/s 45 or not will be taxable in case the argument of the revenue is accepted. Legislature has not stopped with the word Capital gain but has mentioned that Capital gain chargeable u/s 45. Before the Bombay High Court, it was argued that in case surrender of tenancy rights is not taxable u/s 45 then it should fall u/s 56 of I.T. Act. If the capital asset has no cost then entire receipt is capital receipt. Before the Hon'ble High Court, the revenue contended that section 14, it is mentioned as capital gain and not capital gain chargeable u/s 45. This contention was not accepted by the High Court. If the computation provision do not apply to a case then such a case will not be covered under charging section. At later stage, a reference will be made to 56 (vii b) inserted by Finance Act 2012 w.e.f. 1.4.2013 as the same will be a computation provision. For the A.Y. 2011-12, computation provision were not there. In absence of computation provision, entire value of share premium can not be taxed u/s 56. As for tenancy right, the full consideration can not be taxed u/s 56, similarly entire share premium is not taxable u/s 56(1).

ii) The Hon'ble Apex Court in the case of CIT V D.P. Sandu Bros. Chembur (P) Ltd 273 ITR 1 also hold that as per 2(24)(vi) only income which is chargeable u/s 45 is to be included in income and if computation provision u/s 45 fails then charging provisions will fail. Ref. to CIT V B.C. Srinivasa Setty 128 ITR 294.

iv) The Hon'ble Rajasthan High Court in the Case of CIT V Gotan Lime Stone Khanij Udyog 269 ITR 399 also held that in case computation provision u/s 48 could not be applied for want of ascertainable cost of acquisition, then capital gain does not arise to be included in total income on account of failure of applicability of computation provision. The Hon'ble High Court referred to decision of Bombay High Court in the case of Cadell Wvg. Mills Co (P) Ltd. (Supra).

v) The Hon'ble Rajasthan High Court in the case of S. Zoraster and Co. V/s CIT 322 ITR 35 had on occasion to consider the taxability of receipt of Rs.20,000 received by vendee on default of the purchaser as per agreement for sell of Prem Prakash Talkies. The Hon'ble High Court after referring to the decision of Apex Court in the case of Travancore Rubber and Tea Co Ltd. V CIT 243 ITR 158 held that such receipt is capital receipt. Such Capital receipt is not taxable in view of judgment of Apex Court in D.P. Sandu Bros. Chembur (P) Ltd (Supra). Hence capital receipt is not taxable unless there is charging provision for a capital receipt and computation provisions are also applicable.

e) The Hon'ble Bombay High Court in the case of Vodafone India Services P. Ltd. V UOI 368 ITR 1 had an occasion to consider the difference between the share premium determined by revenue and the share premium charged as deemed loan and taxing of national interest on deemed loan. The Hon'ble Bombay High Court has referred to the decision of Apex Court in the case of Mathuram Aggarwal V/s State of MP (1999) 8 SCC 667 for the test to interpret a taxing statue which reads as under:

" The intention of the legislature is a taxation statute is to be gathered from the language of the provisions particularly where the language is plain and unambiguous. In a taxing Act it is not possible to assume any intention or governing purpose of the statute more than what is stated in the plain language. It is not the economic results sought to be obtained by making the provision which is relevant in interpreting a fiscal statute. Equally impermissible is an interpretation which does not flow from the plain, unambiguous language of the statute. Words cannot be added to or substituted so as to give a meaning to the statute which will serve the spent and intention of the legislature. The statute should clearly and unambiguously convey the three components of the tax law i.e. subject of the tax, the person who is liable to pay the tax and the rate at which the tax is to be paid. If there is any ambiguity regarding any of these ingredients in a taxation statute then there is no tax in law. Then it is for the legislature to do the needful in the matter."

Hon'ble Bombay High Court in this case (Vodafone case) observed that issue of shares at a premium is on capital account and gives rise to no income. 56(1) provides the income of every kind which is not excluded from the total income is chargeable under the head income from other sources. However before section 56 of the Act can be applied there must be income which arises. If the receipt is capital then it is not income. Hence share premium is not an income.

f) The CBDT vide circular/instruction No.2 dated 29.01.2015 has stated as under [371 ITR 6(st)].

In reference to the above cited subject, I am directed to draw your attention to decision of the High Court of Bombay in the case of Vodafone India Services Pvt. Ltd V UOI for the Assessment year 2009-10 (WP No.871 of 2014) wherein the court has held interalia, that the premium on share issue was on account of a capital account transaction and does not give rise to income and hence, not liable to transfer pricing adjustment.

It is hereby informed that the Board has accepted the decision of the High Court of Bombay in the above mentioned writ petition. In view of the acceptance of the above judgment, it is directed that the ratio decidendi of the judgment must be adhered to by the field officers in all cases where the issue is involved. This may also be brought to the notice of the ITAT, DRP's and CIT (Appeals).

In view of above instruction, it is clear that ratio deciding of treating of share premium as capital receipt is binding on revenue authorities.

g) By finance Act 2012 a new clause (viib) was inserted in 56(2). Memorandum explaining the provisions in Finance Bill 2012 stated as under:-

Share premium in excess of the fair market value is to be treated as income.

"Section 56(2) provides for the specific category of incomes that shall be chargeable to income tax under the head "income from other sources". It is proposed to insert a new clause in 56(2). The new clause will apply where, accompany, not being a company in which the public are substantially interested, receives, in any previous year, from any person being a resident, any consideration for issue of shares. In such a case if the consideration received for issue of shares exceeds the face value of shares, the aggregate consideration received for such shares as

exceeds the fair market value of the shares shall be chargeable to income Tax, under the head "income from other sources".

This amendment effective from 1st April 2013 and will accordingly apply in relation to assessment year 2013-14 and subsequent Assessment years. In the memorandum it is mentioned that premium in excess of fair market value is to be treated as income. This suggests that premium in excess of fair market value was not an income but is to be treated as income due to amended provision. Before the amendment, consideration received as premium was not income. The legislature in its wisdom required the share premium in excess of fair market value to be income from Assessment year 2013-14 and not the entire premium to be treated as income. CBDT vide circular No.3 of 2012 dated 12.06.2012 has also mentioned that provisions of 56(2)(vii b) will be applicable for Assessment year 2013-14 onward.

h) Section 56 is not a charging section. This section starts with the following sentence.

"Income of every kind which is not to be excluded from the total income under the Act shall be chargeable to income tax under the head." Income from other sources if it is not chargeable to income tax. Under any of the heads specified in section 14, items A to E.

For an income to be taxed u/s 56, it has to satisfy three conditions.

(a) It shall be classifiable as income as per the charging section of the Act.

(b) It shall not be excluded from the total income (e.g. section10).

(c) It is not chargeable to tax under any of the specified Heads in section 14, items A to E.

The finance Bill 2012 as presented on 16th March 2012 included a new clause (viib) u/s 56(2) of I.T. Act [342 ITR1(st)]. No proposal in the original bill to insert a new clause u/s 2(24). Subsequently Notice of amendments to Finance Bill was given [See 343 ITR 37(st)] and amendments also included the in section of clause (xvi) in 2(24) of I.T. Act and such clause is as under:

(xvi) Any consideration received for issue of shares as exceeds the fair market value of the shares referred to in clause (viib) of subsection (2) of 56.

The amendment introduced in 2(24) signifies that section 56 is not a charging section. Unless the income which is to be taxed u/s 56(2)(vii b) is included in the definition of income, then it can be taxed and be part of total income. Nature of income as mentioned in section 28(iiia), (iiib), (iiic),(iiid) and (iiie) are also included in definition of income.

i) This amendment if section 56(2)(viib) of Income Tax Act, 1961 effective from 1st April 2013 and will accordingly apply in relation to assessment year 2013-14 and subsequent assessment years and the provisions of this section cannot be made apply in previous years. In this regard the ratio has been laid down in following judgments: -

a) By Finance Act 1994, section 55(2) was amended to provide that cost of acquisition of a tenancy right will be taken as Nil. The Hon'ble Apex Court in the case of D.P. Sandu Bros. Chembur (P)

Ltd (supra), held that amendment took effect from 1st April, 1995 and therefore will not be applicable for A.Y. 1987-88. Similar finding has been recorded by Hon'ble Raj, High Court in the case of Gotan Lime Stone Khanij Udhyog.

The ratio of law in respect of amendment in 55(2) being held as prospective is applicable for 56(2)(vibe) and hence share premium in excess of fair market value can not be held taxable for A.Y. 2011-12.

b) Recently the Hon'ble Apex Court in the case of M.G. Pictures (Madras) Ltd V/s ACIT 373 ITR 39 held that amendment in section 40A(3) w.e.f. from 1.4.1996 is prospective and cannot be applied to previous years of Block period prior to F.Y. 1995-96.

c) The figure of 10,000 was changed to 20,000 u/s 40A(3) of Income Tax Act, 1961 and 269SS of Income Tax Act, 1961 by Direct Tax Laws (Amendment) Act 1987 w.e.f. 1.4.1989. The CBDT vide circular No.522 dated 18.08.1988 stated that amendment in section 40A(3) is applicable for A.Y. 1989-90 as it is a substantive provision and since 269SS is a procedural provision, the effective date will be 1.4.89 i.e. previous year relevant to A.Y. 89-90.

d) The five Judge Constitution Bench in the case of CIT V Vatika Township (P) Ltd. 367 ITR 466 had an occasion to consider as to whether Proviso added to section 113 of the I.T. Act, is prospective or retrospective. The Hon'ble Apex Court while considering the various decisions held (as per page 469 Of ITR 367).

That surcharge levied by assessing Officer for the block assessment pertaining to the period from June 1, 2002 was liable to be deleted.

An amendment made to a taxing statute can be said to be intended to remove hardships only of the assessee, not of the department. Imposing a retrospective levy on the assessee would have caused undue hardship and for that reason parliament specifically chose to make the proviso effective from June 1, 2002.

Where a benefit is conferred by a legislation, the rule against a retrospective construction is different. In a legislation confers a benefit on some persons but without inflicting a corresponding detriment on some other person or on the public generally, and where to confer such benefit appears to have been the legislators objects, then presumption would be that such a legislation, giving it a purposive construction, would warrant it to be given a retrospective effect. This exactly is the justification to treat procedural provision as retrospective. Where a law is enacted for the benefit of community as a whole, even in the absence of a provision the statute may be held to be retrospective in nature.

The Hon'ble Apex Court further noticed that CBDT circular mentioned that proviso is applicable from 1.6.2002. In respect of 56(2)(vii b), CBDT vide circular No.3 of 2012 dated 12.06.2012 has also mentioned that provisions of 56(2)(vii b) will be applicable for assessment year 2013-14 onward. Hence Share premium even if in excess of Fair market value is not taxable u/s 56(1) for the A.Y. 2011-12.

9. In view of the above submissions, it is clear that share premium received is a capital receipt and consideration received cannot be considered as income for the year under consideration. Without prejudice to our submission in this regard this is to submit in the in the show cause notice the ld. AO mentioned that share premium/share capital should be taxable in the hands of assessee company u/s 56(1) of Income Tax Act, 1961 on a/c of share premium/share capital alleged to be not in accordance with the value of the shares. In this regard without prejudice to our submission on this issue this is to submit that in case the share premium is made taxable as income of the assessee on the ground that the same is not as per fair market value and held as taxable than still the amount received against share capital amounting to Rs. 1,43,34,320/- cannot be treated as income of the assessee.

10. In addition of above submission it is further submitted that the assessee submitted sufficient documents to prove identity, creditworthiness and genuineness of share capital. To support that shareholders were genuine and creditworthiness is proved, the assessee enclosed necessary details, in respect of incorporation of such companies and details of cheques vide which amounts were received. The capacity of shareholders is verifiable from the copy of the balance sheet of the shareholders. The shareholders have funds on a prior date from the allotment of shares given by the assessee company and such funds were more than the amount of share application. Therefore, the addition on share application received to the assessee neither can be made u/s 56(1) of Income Tax Act, 1961 nor can be made u/s 68 of Income Tax Act, 1961. The various judgments and arguments regarding addition made u/s 56(1) of Income Tax Act, 1961 has been submitted in forgoing paras. The reliance regarding addition cannot be made u/s 68 of Income Tax Cat, 1961 is placed on the following decisions: -

i) Shalimar Buildcon (P) Ltd. vs ITO (2011) 128 ITD 0396 (Jaipur)

In this case Hon'ble ITAT Jaipur Bench has relied on its old decision in the case of Hotel Gaudavan ITA No. 1162 and 1137/JP/2008 and addition on account of share capital was deleted.

28.5 On identical issue, the Tribunal, Jaipur Bench in the case of Hotel Gaudavan (P) Ltd. (supra) has held as under :

"6. As regards the issue on merit in the Departmental appeal, we concur with the views of the learned CIT(A) that the AO has not considered the explanation of the assessee. The amount under consideration of Rs. 1.89 crore has been received by the assessee as share application money from M/s Jalkanta Technical & Financial Service (P) Ltd. (JTFSPL) after a proper resolution passed by the board of directors of the aforesaid company through banking channel. M/s JTFSPL is having permanent account and filing its return of income regularly. The AO has nowhere mentioned that money belongs to the assessee company and therefore, provisions of s. 68 cannot be invoked. The learned CIT(A) has rightly relied upon the decision of Hon'ble Delhi High Court in the case of CIT vs. Steller Investment Ltd. (2000) 164 CTR (SC) 287 which has been confirmed by the Hon'ble Supreme Court of India. The learned CIT(A) has also relied upon the decision of Hon'ble jurisdictional High Court in the case of Barkha Synthetics Ltd. vs. Asstt. CIT (2005) 197 CTR (Raj) 432 and also the decision of Tribunal, Jodhpur Bench in the case of Uma Polymers (P) Ltd. vs. Dy. CIT (dt. 27th Feb., 2006) [reported at (2006) 101 TTJ (Jd)(TM) 124—Ed.] where it has been held that the assessee has to prove the existence of the shareholders which in the present case is not under dispute. Therefore, the assessee has discharged the burden and therefore the AO was not justified in making any addition under s. 68 of the Act. The learned counsel for the assessee has referred to the decision of Hon'ble Supreme Court of India in the case of Divine Leasing & Finance Ltd. dt. 21st Jan., 2008, the copy of which is placed on record where it has been observed by the Supreme Court as under :

'Can the amount of share money be regarded as undisclosed income under s. 68 of IT Act, 1961 ? We find no merit in this SLP for the simple reason that if the share application money is received by the assessee company from alleged bogus shareholders, whose names are given to the AO, then the Department is free to proceed to reopen their individual assessments in accordance with law. Therefore, we find no infirmity in the order of the learned CIT(A), with the impugned judgment.'

The said decision of Hon'ble Supreme Court of India has been followed by the Tribunal, Delhi Bench in the case of ITO vs. Bhor Mal Dhansi Ram Ltd. in ITA No. 4670/Del/2007, dt. 3rd March, 2006. The copy of the said decision of Tribunal, Delhi Bench is placed on record. The learned counsel for the assessee Shri H.M. Singhvi, chartered accountant has also relied upon the decision of Hon'ble Supreme Court of India on the said issue in the case of CIT vs. Lovely Exports (P) Ltd. (2008) 216 CTR (SC) 195 : (2008) 6 DTR (SC) 308 wherein it has been held that if the share application money is received by the assessee company from alleged bogus shareholders, whose names are given to the AO, then the Department is free to proceed to reopen their individual assessments in accordance with law, but it cannot be regarded as undisclosed income of assessee company."

28.6 The Hon'ble Delhi High Court in the case of CIT vs. Divine Leasing & Finance Ltd. (supra) had an occasion to consider the addition on account of share application money. We are reproducing the held portion from the decision of Hon'ble Delhi High Court as mentioned in (2007) 207 CTR (Del) 38 (supra).

"Income—Cash credit—Share application money—Burden of proof can seldom be discharged to the hilt by the assessee—If the AO harbours doubts of the legitimacy of any subscription he is empowered, nay duty-bound, to carry out thorough investigations—But if the AO fails to unearth any wrong or illegal dealings, he cannot obdurately adhere to his suspicions and treat the subscribed capital as the undisclosed income of the company—If relevant details of address and identity of the subscribers are furnished to the Department along with copies of the shareholders registers, share application forms, share transfer register etc. it would constitute acceptable proof or explanation by the assessee—Department would not be justified in drawing an adverse inference only because the creditor/subscriber fails or neglects to respond to its notices—Tribunal has noted that the assessee company is a public limited company which had received subscriptions to the public issue through banking channels and the shares were allotted in consonance with the provisions of Securities Contract (Regulation) Act, 1956, as also the rules and regulations of Delhi Stock Exchange—Complete details were furnished—Tribunal has further found that the AO has not brought any positive material or evidence which would indicate that the shareholders were benamidars or fictitious persons or that any part of the share capital represented company's own income from undisclosed sources."

28.7 The Hon'ble apex Court in the case of CIT vs. Lovely Exports (P) Ltd. (supra) held that if the share capital money is received by the assessee company from alleged bogus shareholders then the Department is free to proceed to reopen the individual assessments of such shareholders in accordance with law. Such share application money cannot be regarded as undisclosed income of the assessee company.

28.8 The Hon'ble High Court in the case of First Point Finance Ltd. (supra) held that burden of proof on the assessee company lies to the extent of making out a case that investor exists and thereafter it is not for the assessee to further prove where they have brought money from to invest with it.

28.9 The Hon'ble Delhi High Court in the case of CIT vs. United Bio-tech (P) Ltd. 2010 TIOL-533-HC-Del held that in case the identity of the share applicants has been established and it is found that the said applicants are corporate assessees who are assessed to tax with IT Department then there is no case of any substantial question of law. In the instant case, the share applicants are corporate assessees.

28.10 The Hon'ble Delhi High Court in the case of CIT vs. Samir Bio-tech (P) Ltd. (supra) held that if investments have been shown by the share applicants in their audited balance sheet then the addition cannot be made under s. 68 of the Act.

28.11 In view of the legal position as discussed above, the AO was not justified in making the addition of Rs. 1.10 crore without bringing on record any material for the addition. Simply on the basis of information which is not substantiated in the course of assessment proceedings against the assessee, the AO could not have added the amount.

(ii) The Honb'le ITAT, Jaipur Bench, Jaipur in its recent judgment the case of M/s Jadau Jewellers & Manufacturers Pvt. Ltd., B-1, Trimutri Circle, Govind Marg, Jaipur in ITA No. 686/JP/2014 dated 14.12.2015 gave the following findings:-

".6.1 On facts also, the assessee has produced before the Assessing Officer copy of share application, confirmation of the cash creditors, copy of PAN, copy of Board resolution, copy of Director's report, auditor's report, copy of balance sheet, copy of P&L account, copy of bank account in all the cases to prove the identity, genuineness and creditworthiness of the cash creditors. The ld Assessing Officer made addition on the basis of investigation conducted by the ITO, Investigation Wing, Kolkata but the ld Assessing Officer of the assessee has not clarified what inquiry had been conducted and what evidences collected which goes against the assessee. The notice U/s 131 issued by the ITO, Investigation Wing, Kolkata were served in case of Vidya Agencies Pvt. Ltd. and Shivarpan Mercantiles Pvt. Ltd., but compliance could not be made on the given date because concerned officer was on leave. In case of Middleton Goods Pvt. Ltd. And Lactrodryer Marketing Pvt. Ltd., notices were served on the assessee and in compliance to the notice, the party submitted all the documents in the IT office. The case law referred by the ld CIT(A) i.e. decision of Hon'ble Delhi High Court in the case of Nipun Builders and Developers Pvt. Ltd. Vs. CIT and Vijay Power Generator Ltd. Vs CIT (supra) are not squarely applicable on the facts of the case as there was short time available with the Assessing Officer as well as Investigation Wing of Kolkata. The copy of inquiry has not been provided by the Assessing Officer to the assessee. As per findings of the Hon'ble Delhi High Court in the case Nipun Builders and Developers Pvt. Ltd. Vs. CIT (supra), the Investigation Officer at Kolkata had not deputed Inspector to enquire the whereabouts of the company. The case laws referred by the assessee are squarely applicable on the facts and circumstances of the appellant's case, therefore, we reverse the order of the ld CIT(A) on technical ground as well as on merit also…."

(iii) CIT v/s. Shree Barkha Synthetics Ltd. (2003) 182 CTR (Raj) 175 Appeal(High Court)—Substantial question of law—Cash credit vis-a-vis share application money—Tribunal found that 6 out of 7 companies from which the share application money had been received were genuinely existing and no enquiry was conducted in respect of the source of share application money at the time of making the investment in the assessee-company and thus the assessee has discharged its initial burden except in one case—As regards individual investors, the Tribunal found that identity of 9 out of 10 investors has been established and they have confirmed the fact

of making investment in the shares of the assessee-company and no further enquiry was directed by the AO—Thus, additions were sustained only in respect of investments said to have been made by U, an individual investor and by W Ltd., for the reason that such investments were not proved—Finding of the Tribunal is essentially a finding of fact which is not vitiated in law—No substantial question of law arise for consideration

iv) *CIT vs. First Point Finance Ltd. (2006) 206 CTR (Raj) 626 : (2006) 286 ITR 77 (Raj) Income—Cash credit—Share application money—Tribunal found that the investors are genuinely existing persons and they have filed confirmations in respect of investments made by them and their statements were also recorded—Amount of share capital/share application money could not be treated as unexplained cash credits and no addition could be made under s. 68—No substantial question of law arises.*

(v) *2014 (8) TMI 605 - MADRAS HIGH COURT The Commissioner of Income Tax Versus Pranav Foundations Ltd. T. C. (A). No. 262 of 2014 Dated - 12 August 2014*
Addition u/s 68 – Share application and share premium amount credited but not proved - Whether the Tribunal was right in upholding the order of the CIT(A) who deleted the addition made u/s 68, being the share application money and share premium amount credited by the assessee which was not proved – Held that:- Following the decision in CIT v. Lovely Exports (P) Ltd. [2008 (1) TMI 575 - SUPREME COURT OF INDIA] - all the four parties, who are subscribers of the shares, are limited companies and enquiries were made and received from the four companies and all the companies accepted their investment - the assessee has categorically established the nature and source of the sum and discharged the onus that lies on it in terms of Section 68 of the Act - When the nature and source of the amount so invested is known, it cannot be said to be undisclosed income - the addition of such subscriptions as unexplained credit under Section 68 of the Act is unwarranted – Decided against Revenue.

(vi) *INCOME TAX OFFICER vs. MS. SUPERLINE CONSTRUCTION P. LTD. ITAT, BOMBAY TRIBUNAL (A) ITA No. 3644 TO 3648, 3650, 3651Mum/2014 30th November, 2015 (2015) 45 CCH 0281 MumTrib*
Addition—Addition on account of bogus share application money—Assessee was in business of builder and developer—Assessment was completed u/s 143(3) r.w.s. 147—Re-assessment proceedings were initiated on basis of information received from Directorate of Income-tax (Investigation) without recording AO'S own satisfaction and information was accepted in mechanical manner—After reopening of assessment u/s 147, AO made addition of Rs.40 lakhs received by assessee from various corporate entities—Addition was made by AO on account of bogus share application money under provisions of s 68—CIT(A) deleted addition made by AO—Held, in case of CIT vs. M/s. Lovely Exports (Pvt) Ltd, reported in [2008] 216 CTR 195 (SC), it was held that If share application money was received by assessee company from alleged bogus shareholders whose name were given to AO then department was free to proceed to reopen their individual assessments in accordance with law but it could not be regarded as undisclosed income of assessee company—It was submitted by assessee that AO had failed to appreciate statements of any person recorded u/s 143(3) r.w.s. 147—That assessee-company had fully discharged burden of proof, onus of proof and explained source of share capital and advances received by established identity, creditworthiness and genuineness of transaction by banking instruments with documentary evidences—Assessee company substantiated details with documentary evidences as extracted from website of Ministry of Corporate Affairs, Government of India before AO—These facts had not been rebutted on behalf of Revenue—ITAT was not inclined to interfere with findings of CIT(A) who thus rightly deleted entire impugned additions of Rs.40 lakhs made by AO u/s 68 on account of share capital subscription received by assessee-company

Held:
It was pointed out in the case of CIT vs. M/s. Lovely Exports (Pvt) Ltd, reported in [2008] 216 CTR 195 (SC) that if the share application money is received by the assessee company from alleged bogus shareholders whose name are given to the AO then the department is free to proceed to reopen their individual assessments in accordance with law but it cannot be regarded as undisclosed income of assessee company.
(para 2.3)
In this background, it was submitted on behalf of the assessee that the Assessing Officer failed to appreciate that there was no documentary evidence against the assessee-company to support such impugned additions. It was further submitted by the assessee that the Assessing Officer failed to appreciate that the statements of any person recorded u/s 143(3) r.w.s. 147. The assessee-company had fully discharged the burden of proof, onus of proof and explained the source of share capital and advances received by established the identity, creditworthiness and genuineness of transaction by banking instruments with documentary evidences. The further stand of the assessee had been that the assessee-company substantiated the details with the documentary evidences as extracted from the website of Ministry of Corporate Affairs, Government of India before the Assessing Officer. These facts had not been rebutted on behalf of the Revenue.
(para 2.4)
In view of the facts and circumstances of the present case as well as considering the decisions as discussed above on the similar issue, ITAT was not inclined to interfere with the findings of the CIT(A) who had rightly deleted the entire impugned additions of Rs.40 lakhs made by the Assessing Officer u/s 68 of the Act on account of share capital subscription received by the assessee-company.
(para 2.5)
Conclusion:
When Assessee-company had substantiated details with documentary evidences as extracted from website of Ministry of Corporate Affairs, Government of India before AO, then additions made by AO u/s 68 on account of share capital subscription received by assessee-company was rightly deleted.

vii) *CIT vs. Illac Investment (P) Ltd. (2007) 207 CTR (Del) 687; assessee-company has satisfactorily established the identity of the share subscribers and deleted the addition under s. 68, no substantial question of law arises for consideration.*

viii) *CIT vs. Divine Leasing & Finance Ltd. (2007) 207 CTR (Del) 38; Income—Cash credit—Share application money—Burden of proof can seldom be discharged to the hilt by the assessee—If the AO harbours doubts of the legitimacy of any subscription he is empowered, nay dutybound, to carryout thorough investigations—But if the AO fails to unearth any wrong or illegal dealings, he cannot obdurately adhere to his suspicions and treat the subscribed capital as the undisclosed income of the company—If relevant details of address and identity of the subscribers are furnished to the Department along with copies of the shareholders register, share application forms, share transfer register, etc. it would constitute acceptable proof or explanation by the assessee—Department would not be justified in drawing an adverse inference only because the creditor/subscriber fails or neglects to respond to its notices—Tribunal has noted that the assessee-company is a public limited company which had received subscriptions to the public issue through banking channels and the shares were allotted in consonance with the provisions of Securities Contract (Regulation) Act, 1956, as also the rules and regulations of Delhi Stock Exchange—Complete details were furnished—Tribunal has further found that the AO has not brought any positive material or evidence which would*

indicate that the shareholders were benamidars or fictitious persons or that any part of the share capital represented company's own income from undisclosed sources—As regards receipt of share capital on issue of rights shares to five companies, these companies were duly incorporated under the Sikkimese Companies Act and were assessed under the Sikkimese Taxation Manual—Their share subscriptions were also received through banking channels and found to be valid by the jurisdictional AO—Therefore, no addition could be made under s. 68

ix) *Bhav Shakti Steel Mines (P) Ltd. vs. CIT (2009) 18 DTR (Del) 194 Income—Cash credit—Genuineness—CIT(A) not only found that the identity of each of the shareholders stood established, but also examined the fact that each of them were income-tax assessees and had disclosed the share application money in their accounts which were duly reflected in their IT returns as well as in their balance sheets—Tribunal was not therefore justified in coming to the conclusion that the CIT(A) had not considered the matter in the right perspective—Order passed by Tribunal remanding the matter for examining the share applicants set aside and that of CIT(A) restored*

x) *Meera Engineering & Commercial Co. (P) Ltd. vs. Asstt. CIT (1997) 58 TTJ (Jab) 527 Income—Cash credits—Genuineness of share capital of company—All the 51 shareholders filed their affidavits and confirmatory letters and 24 of them filed their replies also to notice under s. 133(6)—Names of parties purchasing the shares with amount subscribed were furnished before AO—All documents clearly show that shareholders do exist— Assessee-company had discharged its onus of explaining the cash credits as required under law—If the company is able to establish that shareholders existed and they have invested money for purchase of shares burden of company to prove the credit is discharged—Identity of shareholders not in dispute—Assessee is not required to prove credit-worthiness of shareholders—Addition deleted*

xi) *Allen Bradley India Ltd. vs. Dy. CIT (2002) 74 TTJ (Del) 604 : (2002) 80 ITD 43 (Del); Income—Cash credit—Subscription to share capital and loan—In case of limited companies jurisdiction of AO would be limited only to see whether identity of shareholders is established and whether they exist or not—Once identity is established, then, possibly no further enquiries need to be made—Since the shareholders of assessee-company were in existence, they were assessed to tax, complete details were available, share capital money as well as loan were received through account payee cheques and they were cleared through proper banking channels, AO was not justified in disbelieving the capital invested by the shareholder companies—Similarly, AO was not justified in disbelieving the loan taken from DTL as the cheques were cleared through bank channels and confirmation and supporting evidence was filed—CIT(A) was justified in deleting the additions.*

xii) *CIT vs STL Extrusion (P) Ltd. 333 ITR 269 (MP) Income—Cash credit—Share application money—Assessee has duly established the identity and source of credits—Assessee having duly furnished the name, age, address, date of filing the application of shares, number of shares of each subscriber there was no justification for the AO for making the impugned addition—Once the existence of the investors/share subscribers is proved, onus shifts on the Revenue to establish that either the share applicants are bogus or the impugned money belongs to the assessee itself—Additions not sustainable.*

xiii) *CIT vs Arunanda Textiles (P) Ltd. , 333 ITR 116 (Karnataka) Income—Cash credit—Share application money—Assessee able to identify the shareholders—It is not for the assessee-company to establish but it is for the Department to enquire with the investors about the capacity to invest the amount in the shares*

xiv) Uma Polymer (P) Ltd. , 101 TTJ 124, Jodhpur Income—Cash credit—Share application money—In respect of share capital money, the assessee-company has to prove only the existence of the person in whose name share application is received—No further burden is cast on the assessee to prove whether that person himself has invested the money or some other person has made the investment in his name—Burden to prove that the money did not belong to him but to somebody else is on the Revenue—Distinction between a public company and a private company is not very material for this purpose—AO treated the investments made by ten shareholders in the assessee-company as bogus and made addition under s. 68 —Not justified—In all the cases except that of V, AO had obtained the bank statements of the shareholders which clearly show that the accounts were regularly maintained and the shareholders had made deposits—Further, the shareholders are also assessed to tax—Simply because scrutiny assessments were not made in the case of shareholders, such assessments could not be made in the course of assessment of the assessee—Having regard to the information collected by the AO from the banks, identity of the shareholders was fully established—If any shareholder is found to have made unexplained investment, then addition of such investment is required to be made in the hands of the shareholder and not in the account of the assessee—U had invested in the share capital through cheque except for a small sum which was returned to her—Her bank account shows several entries, both credit and debit, which have no relation with the amount invested with the assessee-company—Merely because she has not submitted her returns after the asst. yr. 1984-85, it cannot be said that she was not assessed to tax—Though V has not been shown to be assessed to tax, he had made major part of investments towards share capital through cheques and his identity is not doubted—Accordingly, share capital advanced by U and V is also to be accepted as genuine—Therefore, no addition of share capital money could be made in the hands of the assessee-company.

11. Without prejudice to above this is to submit that the share application money cannot be treated as income of the assessee. Reliance is placed in following decisions: -

i) CIT vs. Lovely Exports (P) Ltd. (2008) 216 CTR (SC) 195 Income—Cash credit—Share application money—If the share application money is received by the assessee company from alleged bogus shareholders, whose names are given to the AO, then the Department is free to proceed to reopen their individual assessments in accordance with law, but it cannot be regarded as undisclosed income of assessee company

ii) CIT vs. Steller Investment Ltd. (200) 251 ITR 263 (SC) Even if the subscribers to the increased share capital of assessee-company were not genuine, the amount could not be regarded as undisclosed income of the assessee-company.

iii) Commissioner of Income Tax Vs. Bhaval Synthetics (Raj HC) (2013) 84 DTR 0449 (Raj) Held that even in case of doubt about subscribers to increased share capital, amount of share capital could not be regarded as undisclosed income of company—Amount referable to share application could not be attributed to assessee and could not be assessed in its hands—Appeal dismissed

iv) Commissioner of Income Tax Vs. Akj Granites (P) Ltd. (Raj HC) (2008) 301 ITR 0298 held that in respect of share applications received from different places accompanied with share application money, no presumption can be drawn that same belong to the assessee and cannot be assessed in his hands as his undisclosed income unless some nexus is established that share application money for augmenting the investment in business has flown from assessee's own money—No substantial question of law arises—Barkha Synthetics Ltd. vs. Asstt. CIT (2005) 197 CTR (Raj) 432 followed.

In view of the above submission this is to submit that the addition made by ld. AO is unjustified and deserve to be deleted.....”

‘’3.2.2 I have considered assessee's submission and carefully gone through assessment order. I have also taken a note of factual matrix of the case as well as applicable case laws relied upon. I have already given a detailed findings in para 2.1.4.7 wherein total of Rs. 8,71,97,727/- has been sustained in the hands of M/s. . Motisons Global Pvt. Ltd, M/s. Motisons Entertainment Pvt. Ltd, M/s. Motisons Buildtech Pvt. Ltd and M/s. Shivansh Buildtech Pvt. Ltd, details of which are as under:-

Name of Appellant Company	ITA No.	A.Y.	Addition made by AO	Addition sustained	Addition deleted/Relief given
Motisons Global Pvt Ltd	753/14-15	2009-10	2,75,00,000	-	2,75,00,000
Motisons Global Pvt Ltd	754/14-15	2011-12	6,96,50,000	-	6,96,50,000
Motisons Global Pvt Ltd	767/14-15	2012-13	42,07,29,600	5,94,47,727	36,12,81,873
Motisons Global Pvt Ltd	755/14-15	2013-14	4,41,00,000	50,50,000	3,90,50,000
Motisons Entertainment (I) Pvt. Ltd	760/14-15	2009-10	3,40,00,000	-	3,40,00,000
Motisons Entertainment (I) Pvt. Ltd	766/14-15	2011-12	1,95,00,000	-	1,95,00,000
Motisons Entertainment (I) Pvt. Ltd	756/14-15	2012-13	7,78,00,000	1,41,50,000	6,36,50,000
Motisons Buildtech Pvt. Ltd	758/14-15	2009-10	3,03,00,000	-	3,03,00,000
Motisons Buildtech Pvt. Ltd	759/14-15	2012-13	3,68,27,500	82,00,000	2,86,27,500
Godawari Estates Pvt. Ltd	769/14-15	2010-11	2,00,00,000	-	2,00,00,000
Godawari Estates Pvt. Ltd	768/14-15	2012-13	10,30,00,000	-	10,30,00,000
Bholenath Real Estates Pvt. Ltd.	770/14-15	2009-10	2,90,00,000	-	2,90,00,000
Rainbow Buildcon Pvt. Ltd	757/14-15	2009-10	2,00,00,000	-	2,00,00,000

Shivansh Buildcon Pvt. Ltd	771/14-15	2012-13	90,00,000	3,50,000	86,50,000
			94,14,07,100	8,71,97,727	85,42,09,373

In view of the above facts and circumstances of the case as discussed above, addition of Rs.36,12,81,873/- made on a/c of bogus share capital in the hands of M/s. Motisons Global Pvt. Ltd is hereby deleted. Assessee gets relief in Gr No. 2 & 3.''

Para 2.1.4.7 reads of ld. CIT(A)'s order as under:-

''2.1.4.7 In view of the above findings, it is also seen that this cash /DD was deposited at 4th Channel of source/ stage. This money came to the hands of some of appellant companies through the six companies assessed in Jaipur. However, on perusal of written submissions and compliance to show cause letter, it is also seen that the assessee has not controverted the facts narrated by Shri Santosh Choube, Shri Rajesh Kr Singh and Shri Ajit Sharma and also could not satisfactorily explain the reasons of cash deposits made to those accounts. Therefore, duly considering those facts as evidences (both documentary & oral) gathered during search and & Post-search operation, addition to the extent of Rs. 8,71,97,727/- is sustained and balance is deleted, details given as under:-

Name of Appellant Company	ITA No.	A.Y.	Addition made by AO	Addition sustained	Addition deleted/Relief given
Motisons Global Pvt Ltd	753/14-15	2009-10	2,75,00,000	-	2,75,00,000
Motisons Global Pvt Ltd	754/14-15	2011-12	6,96,50,000	-	6,96,50,000
Motisons Global Pvt Ltd	767/14-15	2012-13	42,07,29,600	5,94,47,727	36,12,81,873
Motisons Global Pvt Ltd	755/14-15	2013-14	4,41,00,000	50,50,000	3,90,50,000
Motisons Entertainment (I) Pvt. Ltd	760/14-15	2009-10	3,40,00,000	-	3,40,00,000
Motisons Entertainment (I) Pvt. Ltd	766/14-15	2011-12	1,95,00,000	-	1,95,00,000
Motisons Entertainment (I) Pvt. Ltd	756/14-15	2012-13	7,78,00,000	1,41,50,000	6,36,50,000
Motisons Buildtech Pvt. Ltd	758/14-15	2009-10	3,03,00,000	-	3,03,00,000
Motisons Buildtech Pvt.	759/14-15	2012-13	3,68,27,500	82,00,000	2,86,27,500

Ltd					
Godawari Estates Pvt. Ltd	769/14-15	2010-11	2,00,00,000	-	2,00,00,000
Godawari Estates Pvt. Ltd	768/14-15	2012-13	10,30,00,000	-	10,30,00,000
Bholenath Real Estates Pvt. Ltd.	770/14-15	2009-10	2,90,00,000	-	2,90,00,000
Rainbow Buildcon Pvt. Ltd	757/14-15	2009-10	2,00,00,000	-	2,00,00,000
Shivansh Buildcon Pvt. Ltd	771/14-15	2012-13	90,00,000	3,50,000	86,50,000
			94,14,07,100	8,71,97,727	85,42,09,373

It is pertinent to mention here that M/s. Mayukh Vinimay Pvt.Ltd received share application of Rs. 10,54,95,000/- in AY 2009-10 which was added as income of M/s.Mayukh Vinimay Pvt. Ltd in A.Y. 2009-10. Thereafter in subsequent years the part of the funds owned by this company was invested in the companies under appeal as under:-

S.N.	Name of company (under your appeal)	Assessment Year	Amount
1.	Motisons Global Pvt. Ltd	2012-13	6,93,49,800
2.	Motisons Global Pvt. Ltd	2013-14	2,24,50,000
3.	Motisons Entertainment (India)Pvt ltd.	2012-13	1,55,00,000
	TOTAL		10,72,29,800

Further it is also submitted that addition made by the AO tantamount to double addition. It is also mentioned here that as per Ld. ARs request, appellate proceedings in case of M/s. MayukhVinimay Pvt. Ltd have been kept in abeyance till the dispostal of appeal by Hon'ble ITAT.

In view of aforementioned findings, now additions made by the AO are being discussed with respect to grounds of appeal raised by the respective assessee in para below.''

4.4 During the course of hearing, the ld. DR supported the order of the AO and submitted that the order of the ld. CIT(A) may be set aside.

4.5 To this effect, the ld.AR of the assessee filed the following written submission praying therein to dismiss the appeal of the department.

> ‘’**2.03.1.2 Submission of assessee:-**
> The facts and circumstances of the issue raised in the departmental appeal for the AY 2012-13 under ground No 1 are exactly similar to Ground No 1 for AY 2009-10 in ITA No 486/JP/2017. The assessee has made detailed submission in AY 2009-10 for ITA No 486/JP/2017. In order to avoid repetition, we pray your honor kindly to consider the submission made for ITA No 486/JP/2017 for AY 2009-10 under para **2.01.2 above as also made for AY 2011-12 under Ground No 1 of ITA No 488/JP/2017.**

4.6 We have heard the rival contentions and perused the materials available on record. It is pertinent to mention that the similar issue has been dealt with and decided by this Bench of ITAT vide its order dated 30-10-2017 in the case of ACIT, Central Circle-2, Jaipur vs Motisons Buildtech Pvt. Ltd in ITA No. 481/JP/2017 (Revenue’s appeal) for the Assessment Year 2009-10. Since the issue raised by the Revenue in the present appeal is same as decided in the appeal of the Revenue in ITA No.481/JP/2017for the Assessment Year 2009-10 in the case of ACIT, Central Circle-2, Jaipur vs Motisons Buildtech Pvt. Ltd Jaipur (supra) which shall apply mutatis mutandis in the present appeal of Revenue also.

Thus solitary ground of ITA No.488/JP/2017 for the A.Y. 2012-13 of Revenue's appeal is dismissed. In the result, the appeal of the Revenue in ITA No.488/JP/2017 is dismissed.

5.1 The assessee in ITA No. 388/JP/2017 for the Assessment Year 2012-13 has raised the following grounds of appeal.

'1. On the facts and in the circumstances of the case and in law the ld. CIT (A) erred in: -

(a) confirming the addition of Rs. 5,94,47,727/- out of total addition of Rs. 42,07,29,600/- made by ld. AO treating the following amount received by the assessee against share capital and premium from companies mentioned as under as income of the assessee.

Date	***Amount***	***From Company***	***Cash deposit /Demand draft at 4th Channel as per inquiry by investigation wing***
07.12.2011	*1600000*	*Alliance Tradecom Private Limited*	*Nibu Nagi*
08.12.2011	*1950000*	*Alliance Tradecom Private Limited*	*Durga Enterprises*
13.07.2011	*2200000*	*Alliance Tradecom Private Limited*	*PNB, Axis Bank Siliguri, Swastik Traders and Global Securities*
16.07.2011	*1000000*	*Alliance Tradecom Private Limited*	*Swastik Traders*
18.07.2011	*3500000*	*Alliance Tradecom Private Limited*	*Axis Bank Siliguri,*
19.09.2011	*1600000*	*Alliance Tradecom Private Limited*	*Durga Enterprises*
20.07.2011	*2000000*	*Alliance Tradecom Private Limited*	*Swastik Traders and Global Securities*
20.09.2011	*950000*	*Alliance Tradecom Private Limited*	*Shyam Fashion*
21.07.2011	*2000000*	*Alliance Tradecom Private Limited*	*Swastik Traders and Global Securities*
21.09.2011	*1000000*	*Alliance Tradecom Private Limited*	*Shyam Fashion and Durga Enterprises*
26.09.2011	*3000000*	*Alliance Tradecom Private Limited*	*Shyam Fashion and Durga Enterprises*
13.07.2011	*1647727*	*Evershine Suppliers Private Limited*	*PNB, Axis Bank, Siliguri*
14.10.2011	*3600000*	*Evershine Suppliers Private Limited*	*Durga Enterprises and Shyam Fashion*
19.10.2011	*1800000*	*Evershine Suppliers Private Limited*	*Durga Enterprises*
09.12.2011	*1500000*	*Mayukh Vinimay Private Limited*	*Shyam Fashion and Durga Enterprises*
13.12.2011	*4100000*	*Mayukh Vinimay Private Limited*	*Shyam Fashion and Durga Enterprises*
15.10.2011	*1800000*	*Mayukh Vinimay Private Limited*	*Nibu Nagi and Kevilhulie Sunotsu*

17.10.2011	*3500000*	*Mayukh Vinimay Private Limited*	*Shyam Fashion and Durga Enterprises*
27.10.2011	*1600000*	*Mayukh Vinimay Private Limited*	*Durga Enterprises*
15.10.2011	*1800000*	*Regent Barter Private Limited*	*Nibu Nagi*
02.12.2011	*2850000*	*Regent Dealers Private Limited*	*Durga Enterprises and Shyam Fashion*
08.12.2011	*1850000*	*Regent Dealers Private Limited*	*Shyam Fashion*
14.10.2011	*900000*	*Regent Dealers Private Limited*	*Nibu Nagi*
19.10.2011	*1800000*	*Regent Dealers Private Limited*	*Durga Enterprises*
27.10.2011	*900000*	*Regent Dealers Private Limited*	*Kevihulie Sinotsu*
02.12.2011	*1400000*	*Rose Suppliers Private Limited*	*Shyam Fashion*
07.12.2011	*1850000*	*Rose Suppliers Private Limited*	*Durga Enterprises*
14.10.2011	*1700000*	*Rose Suppliers Private Limited*	*Durga Enterprises and Shyam Fashion*
15.10.2011	*1800000*	*Rose Suppliers Private Limited*	*Nibu Nagi*
17.10.2011	*1900000*	*Rose Suppliers Private Limited*	*Nibu Nagi and Durga Enterprises*
28.11.2011	*350000*	*Rose Suppliers Private Limited*	*Durga Enterprises*
Total	***59447727***		

(b)confirming the addition of Rs. 5,94,47,727/- by holding that the assessee could not explain the deposit of cash/DD in the accounts of other parties/persons at 4th Channel of source/stage and further erred in not providing opportunity of cross examination of Shri Santosh Choube, Shri Ajit Sharma and Sh Rajesh Kumar Singh and other persons; and

(c)confirming the addition of Rs. 5,94,47,727/- more so when he has categorically held that the addition made by ld. AO u/s 56(1) of Income Tax Act, 1961 is not sustainable and the identity, creditworthiness and genuineness of transaction of the transaction cannot be held as doubtful and the addition by applying the provisions of section 68 of I.Tax Act cannot be upheld.''

2.On the facts and in the circumstances of the case and in law the ld. CIT(A) erred in confirming the addition of Rs. 5500/- made by the AO by disallowing payment of ROC fees.

6.1 As regards ground no. 2 of the assessee regarding confirming the payment of Rs.5500/- towards ROC Fees by the ld. CIT(A), the ld.AR of the assessee has not pressed this ground of appeal during the course of

hearing. Thus Ground No. 2 of the assessee is dismissed being not pressed.

7.1 In Ground No. 1 (ITA No. 388/JP/2017), the assessee is aggrieved that the ld. CIT(A) has confirmed the addition of Rs. 5,94,47,727/- in the hands of the assessee. The relevant observation of the ld. CIT(A) at page 52 to 55 of his order is as under:-

> **2.1.4.6** Therefore, in view of the findings of Hon'ble jurisdictional High Court, the identity, creditworthiness and genuineness of transaction of these companies cannot be held as doubtful and addition by applying the provisions of section 68 of the Act cannot be upheld. However, it is also to be seen that the Investigation Directorate has carried out investigation for deposit of cash/DD at fourth stage of channel source in some cases. The Chart showing cash deposit/DD deposit at 4th Channel as per inquiries made by Investigation wing is as under:

Company	A.Y.	Amount	From Company	Cash deposit /Demand draft at 4th Channel per inquiry by investigation wing
Motisons Buildtech P Ltd	2012-2013	15,00,000	Evershine Suppliers P Ltd	Swastik Traders
Motisons Buildtech P Ltd	2012-2013	20,00,000	Alliance Tradecom P Ltd	Swastik Traders and Global Securities
Motisons Buildtech P Ltd	2012-2013	17,00,000	Alliance Tradecom P Ltd	Swastik Traders
Motisons Buildtech P Ltd	2012-2013	30,00,000	Alliance Tradecom P Ltd	Swastik Traders
	Total	82,00,000		
Motisons Entertainment P Ltd	2012-2013	18,00,000	Rose Suppliers P Ltd	Shyam Fashion and Durga Enterprises
Motisons Entertainment P Ltd	2012-2013	46,00,000	Regent Barter P Ltd	Durga Enterprises and Shyam Fashion
Motisons Entertainment P Ltd	2012-2013	4,50,000	Mayukh Vinimay P Ltd	Shyam Fashion and Durga Enterprises
Motisons Entertainment p Ltd	2012-2013	10,00,000	Mayukh Vinimay P Ltd	Shyam Fashion and Durga Enterprises
Motisons Entertainment P Ltd	2012-2013	16,00,000	Regent Dealers P Ltd	Shyam Fashion
Motisons Entertainment P Ltd	2012-2013	10,00,000	Regent Dealers P Ltd	Durga Enterprises
Motisons Entertainment P Ltd	2012-2013	8,00,000	Regent Dealers P Ltd	Durga Enterprises and Shyam Fashion
Motisons Entertainment P Ltd	2012-2013	29,00,000	Alliance Tradecom P Ltd	Swastik Traders and Global Securities

Company	A.Y.	Amount	From Company	Cash deposit /Demand draft at 4th Channel per inquiry by investigation wing
	Total	1,41,50,000		
Motisons Global P Ltd	2012-2013	17,00,000	Rose Suppliers P Ltd	Durga Enterprises and Shyam Fashion
Motisons Global P Ltd	2012-2013	18,00,000	Rose Suppliers P Ltd	Nibu Nagi
Motisons Global P Ltd	2012-2013	19,00,000	Rose Suppliers P Ltd	Nibu Nagi and Durga Enterprises
Motisons Global P Ltd	2012-2013	3,50,000	Rose Suppliers P Ltd	Durga Enterprises
Motisons Global P Ltd	2012-2013	14,00,000	Rose Suppliers P Ltd	Shyam Fashion
Motisons Global P Ltd	2012-2013	18,50,000	Rose Suppliers P Ltd	Durga Enterprises
Motisons Global P Ltd	2012-2013	18,00,000	Regent Barter P Ltd	Nibu Nagi
Motisons Global P Ltd	2012-2013	18,00,000	Mayukh Vinimay P Ltd	Nibu Nagi and Kevilhulie Sunotsu
Motisons Global P Ltd	2012-2013	35,00,000	Mayukh Vinimay P Ltd	Shyam Fashion and Durga Enterprises
Motisons Global P Ltd	2012-2013	16,00,000	Mayukh Vinimay P Ltd	Durga Enterprises
Motisons Global P Ltd	2012-2013	15,00,000	Mayukh Vinimay P Ltd	Shyam Fashion and Durga Enterprises
Motisons Global P Ltd	2012-2013	41,00,000	Mayukh Vinimay P Ltd	Shyam Fashion and Durga Enterprises
Motisons Global P Ltd	2012-2013	16,47,727	Evershine Suppliers P Ltd	PNB, Axis Bank, Siliguri
Motisons Global P Ltd	2012-2013	36,00,000	Evershine Suppliers P Ltd	Durga Enterprises and Shyam Fashion
Motisons Global P Ltd	2012-2013	18,00,000	Evershine P Ltd	Durga Enterprises
Motisons Global P Ltd	2012-2013	9,00,000	Regent Dealers P Ltd	Nibu Nagi
Motisons Global P Ltd	2012-2013	18,00,000	Regent Dealers P Ltd	Durga Enterprises
Motisons Global P Ltd	2012-2013	9,00,000	Regent Dealers P Ltd	Kevihulie Sinotsu
Motisons Global Private Limited	2012-2013	28,50,000	Regent Dealers P Ltd	Durga Enterprises and Shyam Fashion
Motisons Global Private Limited	2012-2013	18,50,000	Regent Dealers P Ltd	Shyam Fashion
Motisons Global Private Limited	2012-2013	22,00,000	Alliance Tradecom P Ltd	PNB, Axis Bank Siliguri, Swastik Traders a Global Securities
Motisons Global Private Limited	2012-2013	10,00,000	Alliance Tradecom P Ltd	Swastik Traders
Motisons Global Private Limited	2012-2013	35,00,000	Alliance Tradecom P Ltd	M/s Swastik Traders , Global Securities Axis Bank Siliguri,
Motisons Global Private Limited	2012-2013	20,00,000	Alliance Tradecom P Ltd	Swastik Traders and Global Securities

Company	A.Y.	Amount	From Company	Cash deposit /Demand draft at 4th Channel per inquiry by investigation wing
Motisons Global Private Limited	2012-2013	20,00,000	Alliance Tradecom P Ltd	Swastik Traders and Global Securities
Motisons Global Private Limited	2012-2013	16,00,000	Alliance Tradecom P Ltd	Durga Enterprises
Motisons Global Private Limited	2012-2013	9,50,000	Alliance Tradecom P Ltd	Shyam Fashion
Motisons Global Private Limited	2012-2013	10,00,000	Alliance Tradecom P Ltd	Shyam Fashion and Durga Enterprises
Motisons Global Private Limited	2012-2013	3000000	Alliance P Ltd	Shyam Fashion and Durga Enterprises
Motisons Global Private Limited	2012-2013	16,00,000	Alliance P Ltd P Ltd	Nibu Nagi
Motisons Global Private Limited	2012-2013	19,50,000	Alliance Tradecom P Ltd	Durga Enterprises
Motisons Global Private Limited	2013-2014	5050000	Alliance Tradecom P Ltd	Shyam Fashion and Durga Enterprises
	Total	6,44,97,727		
Shivansh Buildcon P Ltd	2012-2013	3,50,000	Evershine Suppliers P Ltd	Durga Enterprises, Swastik and Shyam Fas
	Total	3,50,000		
Grand Total		8,71,97,727		

2.1.4.7 **In view of above findings, it is also seen that this cash/DD was deposited at 4th Channel of source/stage. This money came to the hands of some of appellant companies through the six companies assessed in Jaipur. However, on perusal of written submissions and compliance to show cause letter , it is also seen that assessee has not controverted the facts narrated by Sh Santosh Choube, Sh Rajesh Kr Singh and Sh Ajit Sharma and also could not satisfactorily explain the reasons of cash deposits made to those accounts. Therefore, duly considering those facts and evidences(both documentary & oral) gathered during search & post-search operation , addition to the extent of Rs. 8,71,97,727/= is sustained and balance is deleted, details given as under:**

Name of Appellant Company	ITA No	AY	Addition Made by AO	Addition Sustained	Addition deleted/ Relief Given
Motisons Global Pvt. Ltd	753/14-15	2009-10	2,75,00,000	----------	2,75,00,000
Motisons Global Pvt. Ltd	754/14-15	2011-12	6,96,50,000	----------	6,96,50,000
Motisons Global Pvt. Ltd	767/14-15	2012-13	42,07,29,600	5,94,47,727	36,12,81,873
Motisons Global Pvt. Ltd	755/14-15	2013-14	4,41,00,000	50,50,000	3,90,50,000
Motisons Entertainment (I) Pvt. Ltd	760/14-15	2009-10	3,40,00,000	----------	3,40,00,000
Motisons Entertainment (I) Pvt. Ltd	766/14-15	2011-12	1,95,00,000	----------	1,95,00,000
Motisons Entertainment (I) Pvt. Ltd	756/14-15	2012-13	7,78,00,000	1,41,50,000	6,36,50,000
Motisons Buildtech Pvt. Ltd	758/14-15	2009-10	3,03,00,000	----------	3,03,00,000
Motisons Buildtech Pvt. Ltd	759/14-15	2012-13	3,68,27,500	82,00,000	2,86,27,500
Godawari Estates Pvt. Ltd	769/14-15	2010-11	2,00,00,000	----------	2,00,00,000
Godawari Estates Pvt. Ltd	768/14-15	2012-13	10,30,00,000	----------	10,30,00,000
Bholenath Real Estates Pvt Ltd	770/14-15	2009-10	2,90,00,000	----------	2,90,00,000
Rainbow Buildcon Pvt. Ltd	757/14-15	2009-10	2,00,00,000	----------	2,00,00,000

Shivansh Buildcon Pvt. Ltd	**771/14-15**	**2012-13**	**90,00,000**	**3,50,000**	**86,50,000**
Total additions			**94,14,07,100**	**8,71,97,727**	**85,42,09,373**

It is pertinent to mention here that M/s Mayukh Vinimay Pvt Ltd received share application of **Rs. 10,54,95,000/- in AY 2009-10** which was added as income of M/s Mayukh Vinimay Pvt Ltd in AY 2009-10. Thereafter in subsequent years the part of the funds owned by this company was invested in the companies under appeal as under:

S.No	*Name of Company (under your appeal)*	*Assessment Year*	*Amount*
1	*Motisons Global Pvt Ltd*	*2012-13*	*6,93,49,800*
2.	*Motisons Global Pvt Ltd*	*2013-14*	*2,24,50,000*
3	*Motisons Entertainment (India) Pvt Ltd*	*2012-13*	*1,55,00,000*
	Total		***10,72,99,800***

Further, it is also submitted that addition made by the AO tantamount to double addition. It is also mentioned here that as per Ld AR's request, appellate proceedings in case of M/s Mayukh Vinimay Pvt Ltd have been kept in abeyance till the disposal of appeal by Hon'ble ITAT.

In view of aforementioned findings, now additions made by the AO are being discussed with respect to grounds of appeal raised by the respective assessee in para below. ‘’

Thus the ld. CIT(A) confirmed the addition of Rs. 5,94,47,727 in the hands of the assessee.

7.2 During the course of hearing, the ld.AR of the assessee prayed for deletion of addition confirmed by the ld. CIT(A) amounting to Rs. 5,94,47,727/- for which the ld.AR of the assessee filed the following written submission.

‘’2.04.1.2 Submission of Assessee:-

a) The assessee has submitted sufficient documents before the ld AO to prove identity, creditworthiness and genuineness of share capital and ld AO satisfied that addition under section 68 cannot be made. The ld AO made the addition of Rs. ***Rs.42,07,29,600/-*** on account of share capital received by the assessee during this year by applying the provisions of section 56(1) of Income Tax Act on the ground that the assets of the assessee company don't commensurate to premium charged and any business activity was not performed or any business income has not been shown by the assessee. **However, the ld CIT(A)**

issued show cause notice to assessee to tax the share capital under section 68 of ITax Act as against 56(1) applied by ld AO. The assessee submitted detailed reply before ld CIT(A) vide letter dated 12/07/2016 **(copy at PB pg 671-745).** The ld CIT(A) has not confirmed/sustained the addition made by ld AO by applying the provisions of section 56(1) of Income Tax Act, on the basis of his detailed findings at **page 39-42 of his order.** Ld CIT(A) when satisfied that the addition u/s 56(1) can't be made, he tried to sustain the addition by applying the provisions of section 68 of Income Tax Act. He issued a show cause notice vide letter dated 09/03/2017 **(Copy at PB pg 746-792).** The assessee submitted detailed reply on the show cause notice of ld CIT(A) vide letter dated 24-03-2017 & 28/03/2017 alongwith documents **(Copy at Pb pg 793-867)**. To support that shareholders were genuine and creditworthiness is proved, the assessee has filed all details, in respect of incorporation/existence of investors and details of cheques vide which amounts were received. The capacity of shareholders is verifiable from the copy of the balance sheet of the shareholders. The shareholders have funds on a prior date from the allotment of shares given by the assessee company and such funds were more than the amount of share application. Ld CIT(A) **satisfied about the ingredients of section 68 of I.Tax Act however, he sustained the addition of Rs. 59447727/- on account of cash/DD deposited at 4th channel stage. The company wise breakup of this amount is given at pg 52-53 of the order of ld CIT(A). The details are as under:-**

Date	Amount	From Company	Cash deposit /Demand draft at 4th Channel as per inquiry by investigation wing	PB page No
07.12.2011	1600000	Alliance Tradecom Private Limited	Nibu Nagi	**PB pg 875/2012-13**
08.12.2011	1950000	Alliance Tradecom Private Limited	Durga Enterprises	**PB pg 875/2012-13**
13.07.2011	2200000	Alliance Tradecom Private Limited	PNB, Axis Bank Siliguri, Swastik Traders and Global Securities	**PB pg 870/2012-13**

16.07.2011	1000000	Alliance Tradecom Private Limited	Swastik Traders	**PB pg 870/2012-13**
18.07.2011	3500000	Alliance Tradecom Private Limited	Axis Bank Siliguri,	**PB pg 870/2012-13**
19.09.2011	1600000	Alliance Tradecom Private Limited	Durga Enterprises	**PB pg 875/2012-13**
20.07.2011	2000000	Alliance Tradecom Private Limited	Swastik Traders and Global Securities	**PB pg 870/2012-13**
20.09.2011	950000	Alliance Tradecom Private Limited	Shyam Fashion	**PB pg 875/2012-13**
21.07.2011	2000000	Alliance Tradecom Private Limited	Swastik Traders and Global Securities	**PB pg 870/2012-13**
21.09.2011	1000000	Alliance Tradecom Private Limited	Shyam Fashion and Durga Enterprises	**PB pg 875/2012-13**
26.09.2011	3000000	Alliance Tradecom Private Limited	Shyam Fashion and Durga Enterprises	**PB pg 875/2012-13**
Total	**20800000**			
13.07.2011	1647727	Evershine Suppliers Private Limited	PNB, Axis Bank, Siliguri	**PB pg 877/2012-13**
14.10.2011	3600000	Evershine Suppliers Private Limited	Durga Enterprises and Shyam Fashion	**PB pg 878/2012-13**
19.10.2011	1800000	Evershine Suppliers Private Limited	Durga Enterprises	**PB pg 879/2012-13**
Total	**7047727**			
09.12.2011	1500000	Mayukh Vinimay Private Limited	Shyam Fashion and Durga Enterprises	**PB pg 897/2012-13**
13.12.2011	4100000	Mayukh Vinimay Private Limited	Shyam Fashion and Durga Enterprises	**PB pg 897/2012-13**
15.10.2011	1800000	Mayukh Vinimay Private Limited	Nibu Nagi and Kevilhulie Sunotsu	**PB pg 895/2012-13**
17.10.2011	3500000	Mayukh Vinimay Private Limited	Shyam Fashion and Durga Enterprises	**PB pg 895/2012-13**
27.10.2011	1600000	Mayukh Vinimay Private Limited	Durga Enterprises	**PB pg 896/2012-13**
Total	**12500000**			
15.10.2011	1800000	Regent Barter Private Limited	Nibu Nagi	**PB pg 886/2012-13**
Total	**1800000**			
02.12.2011	2850000	Regent Dealers Private Limited	Durga Enterprises and Shyam Fashion	**PB pg 891/2012-13**
08.12.2011	1850000	Regent Dealers Private Limited	Shyam Fashion	**PB pg 892/2012-13**
14.10.2011	900000	Regent Dealers	Nibu Nagi	**PB pg 890/2012-13**

		Private Limited		
19.10.2011	1800000	Regent Dealers Private Limited	Durga Enterprises	**PB pg 890/2012-13**
27.10.2011	900000	Regent Dealers Private Limited	Kevihulie Sinotsu	**PB pg 890/2012-13**
Total	**8300000**			
02.12.2011	1400000	Rose Suppliers Private Limited	Shyam Fashion	**PB pg 882/2012-13**
07.12.2011	1850000	Rose Suppliers Private Limited	Durga Enterprises	**PB pg 882/2012-13**
14.10.2011	1700000	Rose Suppliers Private Limited	Durga Enterprises and Shyam Fashion	**PB pg 881/2012-13**
15.10.2011	1800000	Rose Suppliers Private Limited	Nibu Nagi	**PB pg 881/2012-13**
17.10.2011	1900000	Rose Suppliers Private Limited	Nibu Nagi and Durga Enterprises	**PB pg 881/2012-13**
28.11.2011	350000	Rose Suppliers Private Limited	Durga Enterprises	**PB pg 882/2012-13**
Total	**9000000**			
Total AY 2012-13	**59447727**			

b) Regarding application of 68 of ITax Act, 1961 by CIT(A)

i) Section 68 was not applied by AO, therefore, the CIT(A) cannot apply it.

ii) It is relevant to mention here that as per section 251 (1)(a) of Income Tax Act, 1961 the CIT (A) shall have the power *"in an appeal against an order of assessment he may confirm, reduce, enhance or annual the assessment"*. As regard applicability of section 68 of I.Tax Act by CIT(A) we submit that the assessee has made detailed submission before the ld AO and satisfied the ld AO that it has discharged its onus laid down under section 68 of Income Tax Act. The ld AO being satisfied with the submission of assessee on section 68, has not applied section 68 of Income Tax Act for the addition. The provisions of section 68 specify the authority mentioned as **"Assessing Officer**".

For the sake of clarity we are reproducing the provisions of section 68 of I.Tax Act as stood for AY 2012-13 as under:-

"Where any sum is found credited in the book 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."

Therefore, addition under section 68 of ITax Act can be made only he the explanation of the assessee is not satisfactory in the opinion of **"Assessing Officer".**

The Assessing Officer has been defined u/s 2(7A) of Income Tax act as under:-

"(7A) Assessing Officer" means the Assistant Commissioner [31][or Deputy Commissioner] [32][or Assistant Director] [31][or Deputy Director] or the Income-tax Officer who is vested with the relevant jurisdiction by virtue of directions or orders issued under sub-section (1) or sub-section (2) of section 120 or any other provision of this Act, and the [33][Additional Commissioner or] [34][Additional Director or] [35][Joint Commissioner or Joint Director] who is directed under clause (b) of sub-section (4) of that section to exercise or perform all or any of the powers and functions conferred on, or assigned to, an Assessing Officer under this Act ;]"

Therefore, CIT(A) is not assessing officer so he cannot invoke the provisions of section 68 for making the addition particularly when the Assessing Officer has satisfied about the ingredients of section 68 of Income Tax Act. In the case of the assessee the ld. AO has not framed an opinion that the explanation given by the assessee was not satisfactory but he framed an opinion after examining the facts, documents and explanation that the additions of share capital cannot be made u/s 68 but it should have been made u/s 56(1) of Income Tax Act, 1961 then the jurisdiction of CIT (A) in limited to deciding the matter whether the addition under this section is correct or not. In the appellate proceeding the addition cannot be confirmed by applying all together different section by invoking a section for which satisfaction is required to be by "Assessing Officer" and the assessing officer after considering the detailed reply and documents was satisfied about the ingredients of section 68.

c) Regarding confirming the addition of Rs. 5,94,47,727/- by CIT(A)

A) All the share capital/share application was received through a/c payee cheques and verifiable from bank statement of assessee as well as bank statement of the party. The onus u/s 68 of the assessee is to prove the identity, capacity and genuineness of the transactions has been discharged which may be seen from the followings:-

i) Identity:-

The assessee proved the identity of all the companies by filing the share application received from the parties and the parties are duly in existence and the existence of the parties can be verified from the official website of MCA. The ld. AO also not doubted the identity of the above named companies. Further the assessment for AY 2009-10 **(Copy at PB Page 122-208 & 657-670**) and for AY 2013-14 **(Copy at PB Page 209-307**) of these companies were also completed u/s 143(3) of Income Tax Act. In the case of M/s Mayukh Vinmay Pvt Ltd original assessment u/s 148 was made for AY 2009-10 **(copy at PB pg 151 to 164). Ld CIT III, Kolkotta passed order u/s 263 directing to pass the afresh order for AY 2009-10 (copy at PB pg 657 to 660) and in pursuance to order u/s 263, the same AO passed order u/s 143(3) r.w.s. 263 of Income Tax Act,1961 dated 21.03.2014 at total income of Rs. 10,55,58,280/- (Copy of order at PB Page 661 to 670).**

The assessment of AY 2013-14 was completed by the same AO of all the above companies (Except Mayukh Vintrade Pvt. Ltd) who completed the assessment of the assessee in the same month. The copies of assessment order are at **PB pg 223 to 225, 239 to 241, 255 to 257, 273 to 275, 289 to 291, 305 to 307.** It is further relevant to mention here that the department also carried out the survey operations over these parties (Except Mayukh Vintrade Pvt. Ltd) which also prove the existence of these parties.

ii) Creditworthiness

All the companies are Income Tax assessee and duly filing the Income Tax return and Balance sheets. There is sufficient source of funds with all the companies to investment share capital/share application in the assessee company. The

assessee submitted the copies of bank account/declaration of source of funds with them of investor companies. The bank statement shows the huge transaction of high value in the accounts of the companies. The chart showing the amount invested by the above named companies in assessee company viz a viz own funds with the investor company are as under: -

Name of the Investor company	**Amount invested in assessee company**	**Share capital and reserve & surplus with Investor companies as on 31.03.2012**	**Share capital and reserve & surplus with Investor companies as on 31.03.2011**	**Share capital and reserve & surplus with Investor companies as on 31.03.2009**
Alliance Tradecom Pvt. Ltd	7,00,58,900	11,05,42,868	11,07,03,338	11,07,00,991
Evershine Suppliers Pvt. Ltd	6,46,99,600	10,41,99,989	10,42,52,807	10,42,50,971
Mayukh Vinimay Pvt. Ltd	6,93,49,800	10,82,38,912	10,83,03,077	10,83,01,020
Mayukh Vintrade Pvt. Ltd	13,99,800	36,54,820	35,01,038	NA
Regent Barter Pvt. Ltd	4,04,71,800	10,51,11,109	10,52,03,352	10,52,01,041
Regent Dealers Pvt. Ltd	7,59,99,900	9,33,85,686	9,34,53,097	9,34,50,971
Rose Suppliers Pvt. Ltd	9,87,49,800	10,34,93,371	10,35,53,105	10,35,51,183

From the above chart it is clear that all the Investor companies were having their own share capital and Reserve & surplus which were more than to the amount invested in the assessee company. The above chart shows that the investor companies were having their own independent funds and having their independent source to invest in the shares of the assessee company. Apart from the investment made in the shares of assessee group, the investor companies were also having investments in shares of other companies or loans & advances to other parties, therefore from the bank statement as well as financials statements of the investor companies their creditworthiness is duly proved. Further assessment of above named companies for AY 2009-10 (Except M/s Mayukh Vintrade Pvt. Ltd) was completed by the department wherein the source of funds with these companies whereby the net worth of these companies was created was accepted by the department. In the case of M/s Mayukh Vinmay Pvt Ltd original assessment u/s 148 was made for AY 2009-10 **(copy at PB pg 163 to 164). Ld CIT III, Kolkotta passed order u/s 263 directing to pass the afresh order for AY 2009-10 (copy at PB pg 657 to 660) and in pursuance to order u/s 263, the**

same AO passed order u/s 143(3) r.w.s. 263 of Income Tax Act,1961 dated 21.03.2014 at total income of Rs. 10,55,58,280/- (Copy of order at PB Page 661 to 670) This shows that the investor companies were have their own independent fund to invest.

iii) Genuineness

The assessee submitted the Share application forms received from above companies against the share application received from the companies. The share application is supported by Board Resolution passed in the investor companies. The assessee company has allotted the shares to the investor companies. The proper returns were filed before the ROC against allotment of the shares to these companies. Furthermore, the department has carried out intensive search operations over the assessee and no any incriminating material was found to show that the money against the share allotment was own money of the company. Shares certificates were issued against the allotment of the shares to these companies were not found from the possession of the assessee company or its director or employees. This fact shows that after allotment of shares by the appellant company share certificates were dispatched to the subscriber companies. No any entry in books of account or document was found showing payment of cash to these investor companies against receipt of cheques from these companies against allotment of shares. Therefore the genuineness of the transactions cannot be doubted. The department also carried out survey over the investor companies (Except Mayukh Vintrade Pvt. Ltd) and during the course of survey no material was found to presume that the investment made by them is not genuine.

B) Onus to prove source of source

From the show cause notice given by ld CIT(A) and excel sheet provided to the assessee showing chain of source it is apparent that even there is no cash deposit till 3rd stage of channel source **(Copy at Pb pg 528 to 557/ AY 2013-14)**. The ld CIT(A) confirmed the addition of Rs. **5,94,47,727/-** on account of cash/DD deposited at 4th channel or beyond to that stage .

In such cases, the inquiry should have been made from the concerns in whose bank a/c such funds floated and necessary action should have been taken in the cases of such concern but the assessee cannot be hold responsible for cash/DD deposit in some account at 4th Channel. **Under section 68 of Income Tax Act, 1961 the onus of the assessee is to prove the source of credit entry and there is no onus of assessee to prove the source of source or source of all channel sources. The amendment in section 68 of I. Tax was made by inserting the following proviso to section 68 w.e.f. 01/04/2013 which require to prove source of finds in the hands of shareholder company.** Though not required by law but still the assessee has proved source of finds in the hands of shareholder company. The amended section even does not require to prove source of funds in the hands of 3rd or 4th stage.

Further the amendment in section 68 of I.Tax was made by inserting the following proviso to section 68 w.e.f. 01/04/2013

*"**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:

The above proviso was inserted with effect from the **1st day of April, 2013** so it cannot be applied retrospectively. Therefore as per law the assessee has no onus to prove source of source. Hon'ble Mumbai High Court in the case of **Commissioner of Income Tax 1 *Vs* M/s. Gagandeep Infrastructure Pvt.Ltd held as under:-**

"(e) We find that the proviso to Section 68 of the Act has been introduced by the Finance Act 2012 with effect from 1st April, 2013. Thus it would be effective only from the Assessment Year 201314 onwards and not for the subject Assessment Year. In fact, before the Tribunal, it was not even the case of the Revenue that Section 68 of the Act as in force during the subject years has to be read/understood as though the proviso added subsequently effective only from 1st April, 2013 was its normal meaning. The Parliament did not introduce to proviso to Section 68 of the Act with retrospective effect nor does the proviso so introduced states that it was introduced "for removal of doubts" or that it is "declaratory". Therefore it is not open to give it retrospective effect, by proceeding on the basis that the addition of the proviso to Section 68 of the Act is immaterial and does not change the interpretation of Section 68 of the Act both before and after the adding of the proviso. In any view of the matter the three essential tests while confirming the pre proviso Section 68 of the Act laid down by the Courts namely the genuineness of the transaction, identity and the capacity of the investor have all been examined by the impugned order of the Tribunal and on facts it was found satisfied. Further it was a submission on behalf of the Revenue that such large amount of share premium gives rise to suspicion on the genuineness (identity) of the shareholders i.e. they are bogus. The Apex Court in Lovely Exports (P) Ltd. (supra) in the context to the pre amended Section 68 of the Act has held that where the Revenue urges that the amount of share application money has been received from bogus shareholders then it is for the Income Tax Officer to proceed by reopening the assessment of such shareholders and assessing them to tax in accordance with law. It does not entitle the Revenue to add the same to the assessee's income as unexplained cash credit.

(f) In the above circumstances and particularly in view of the concurrent finding of fact arrived at by the CIT(A) and the Tribunal, the proposed question of law does not give rise to any substantial question of law. Thus not entertained.

But in the case of the assessee the fact remains that the assessee has also proved source of source by submitting the copy of bank statement of the share applicant company wherein no cash deposit was made against the share application money.

C) As regard to the statement of **Shri Santosh Choube, Shri Ajit Sharma and Shri Rajesh Kumar Singh, as mentioned in show cause notice of ld CIT(A) PB pg 403-408,** the assessee has submitted before ld CIT(A) that:-

i) As regard to the statement of Shri Santosh Choubey first of all this is to submit the assessee group or its Shareholder (investor) companies have no concern with this person or concerns managed by Shri Santosh Choubey. The assessee group do not know to any person naming Shri Santosh Choubey. Regarding the statement of Shri Santosh Choubey and its reliance for taking the adverse action against the assessee we submit as under: -

a) This person admitted to maintain the bank a/c of Shri Ajit Sharma and Rajesh Kumar Singh and used for its own purpose therefore onus to prove the source of amount deposited in their bank accounts primarily lay on this person .

b) At Q. No. 12 of statement of this person he said that *"The Motisons Jewellers group of Jaipur was the beneficiary of accommodation entries arranged by me through the bank accounts of the above prop. concerns. The cash was received by me from Motisons Jewellers group from time to time and was deposited into a number of bank accounts including the two bank accounts of M/s Shyam Fashion (Prop. Ajit Sharma) and M/s Durga Enterprises (Prop. Rajesh Kr Singh) in IDBI, Girish Park Branch, Kolkata."*

In this regard it is quite interesting to note that a person stating that Motisons Jewellers group was the beneficiary of the accommodation entries arranged by him and he is also admitting that cash was received by him from "Motisons Jewellers Group" to deposit the same is bank accounts maintaining by him but no further questions were made from him to controvert that whatever he is stating is true or not. The important thing is that Motisons Jewellers group is not a human being therefore it was necessary and for the interest of equities, fairness, and justice to ask questions that : -

- What is the identity of the M/s Motisons Jewellers.
- In Jaipur where the Motisons Group exists?
- Who are the owners of this group?

- Who was the person who was contacting to him regarding cash dealing?
- How the cash reached to him?
- From whom he was communicating and how he was communicating? What are his telephone number.
- Whether he ever visited the office of Motisons Group, or ever meet to owners or their employees of Motisons Group?
- Who were the brokers of Kolkatta through whom he know the Motisons Group?

As this person had admitted that he received the cash from Motisons Jewellers Group then he should know the answers of all the above questions. The fact is that he has made wrong statements and these words were put in his mouth by the person who recorded his statement. Further even if his statements are considered as true then also additions cannot be made in the hands of assessee company and in such situation (**without consenting**) at the worst, the addition could be made in the hands of "Motisons Jewellers group". Further in his statement this person also admitted that money was finally transferred to the a/c of Motisons Jewellers group but no question were asked from this person that what is the detail of such accounts in which the money were transferred. It is most importantly relevant to notice that M/s Motisons Jewellers did not receive any share application from the six companies than how this person choose to take the name of Motisons Jewellers and how he know the name of Motisons Jewellers and how he come to know that the assessee group is engaged in the Jewellery business too. This shows that the name of "Motisons Jewellers Group" was put into the mouth of this person by the search party with a motive to make their case strong.

The AO and Investigation team neither followed the principle of law nor principle of evidence rather appeared to be bent upon making huge additions without any basis. The AO has not made independent inquiry on this issue.

a) It is settled law that the AO is quasi-judicial authority and should be governed in his function by judicial consideration and must conform to the rules of natural justice and must proceed without bias- Tin Box Co. Vs CIT 249 ITR 216 (SC).

b) It is also settled law that the AO must act honestly on the material before him and not vindictively, capriciously, or arbitrarily- Gurumukh Singh Vs CIT 12 ITR 393, 427 (FB), Dakeshwari Cotton Mills Ltd Vs CIT 26 ITR 775,

c) It is also settled law that the AO is not entitled to make a pure guess without any evidence or material at all - Dakeshwari Cotton Mills Ltd Vs CIT 26 ITR 775,

But in the case of assessee, the ld AO and the investigating team has brushed aside all the principles of law and utilizing a statement which is totally irrelevant, unacceptable to frame a high-pitched assessment purely on surmises, conjectures and suspicion.

c) In view of above mentioned the statements of this person have no legal sanctity and cannot be relied upon. From the reading statement of this person its appears that the investigating party recorded the statement by putting words in his mouth with sole motive to use the same against the assessee group to make a strong case against the assessee. Therefore we submit that the statement of this person is completely false, incorrect and not acceptable and therefore cannot be relied upon unless the opportunity of cross examination is not given to the assessee.

d) In the light of above mentioned serious defects in the statement of this person the **cross examination of this person is warranted to decided the matter in fair and just manner**. It is further relevant to mention here that it is settle legal position that before using some material and statements against the assessee the opportunity of cross examination and confrontation should have been provided to the assessee. Therefore the circumstances strongly warranted in this case for cross examination of statement of this person. In this regard we would like to refer the recent judgment of Jaipur Bench of ITAT passed in the case of **Shri Prateek Kothari in appeal No. 159/JP/16** wherein it was held as under: -

"2.8 We have heard the rival contentions and perused the material available on record. The transaction under question relates to unsecured loans taken by the assessee amounting to Rs 1 Crores from M/s Mehul Gems Pvt Ltd during the impunged assessment year and not accepting the said loan transaction as a genuine transaction by the Assessing officer and the resultant addition made under section 68 of the Act. Undisputedly, the primary onus to establish genuineness of the loan transaction is on the assessee. In the instant case, the assessee has provided the necessary explanation, furnished documentary evidence in terms of tax filings, affidavits and confirmation of the Directors, bank statements of the lender, balance sheet of the lender company, and an independent confirmation has also been obtained by the Assessing officer to satisfy the cardinal test of identity, creditworthiness and genuineness of the loan transaction. However, the Assessing officer has not given any finding in respect of such explanation, documentary evidence as well as independent confirmation. Apparently, the reason for not accepting the same is that the Assessing officer was in receipt of certain information from the investigation wing of the tax department as per which the transaction under consideration is a bogus loan transaction. The said information received from the investigation wing thus overweighed the mind of the Assessing officer. The Assessing officer stated that the primary onus is on the assessee to establish the genuineness of the transaction claimed by it and if the investigation done by the department leads to doubt regarding the genuineness of the transactions, it is incumbent on the assessee to produce the parties alongwith necessary documents to establish the genuineness of the transaction. In response, the assessee submitted that Shri Bhanwarlal Jain is not known to him and regarding various incriminating documentary evidences seized during the course of search and statements recorded of Shri Bhanwarlal Jain and other persons, he specifically requested the AO to provide copies of such incriminating documents and statement of all various persons recorded in this regard and provide an

opportunity to the assessee to cross examine such persons. However, the AO didn't provide to the assessee copies of such incriminating documents and statements of various persons recorded and allow the cross-examination of any of these persons. While doing so, the AO stated that "in his statements, Bhanwarlal Jain had described that they are indulged in providing accommodation entries of bogus unsecured loans and advances through various Benami concerns (70) operated and managed by them. This admission automatically makes all the transactions done by them as mere paper transactions and in these circumstances, further as per the information name and address of assessee and the Benami Concern through which accommodation entry of unsecured loans was provided is appearing in the list of beneficiaries to whom the said Group has provided. This admission is sufficient to reject the contentions of the asseesse." Further, regarding cross examination, the AO stated that "the right of cross examination is not an absolute right and it depends upon the circumstances of each case and also on the statute concerned. In the present case, no such circumstances are warranted as in the list of beneficiaries to whom accommodation entries were provided by the said group categorically contains the name and address of the assessee. Further the group has categorically admitted to providing of accommodation entries of unsecured loans through various benami concerns." The AO further relied upon the decision of Hon'ble Supreme Court in the case of C. Vasantlal & Co. Vs. CIT 45 ITR 206(SC) and Hon'ble Rajasthan High Court in case of Rameshwarlal Mali vs. CIT 256 ITR 536(Raj.) among others. In this regard, it was submitted by the assessee that if the entries and material are gathered behind the back of the assessee and if the AO proposes to act on such material as he might have gathered as a result of his private enquiries, he must disclose all such material to the assessee and also allow the cross examination and if this is not done, the principles of natural justice stand violated.

2.9 In light of above discussions, in our view, the crux of the issue at hand is that whether the principle of natural

justice stand violated in the instant case. In other words, where the AO doesn't want to accept the explanation of the assessee and the documentation furnished regarding the genuineness of the loan transaction and instead wants to rely upon the information independently received from the investigation wing of the department in respect of investigation carried out at a third party, can the said information be used against the assessee without sharing such information with the assessee and allowing an opportunity to the assessee to examine such information and explain its position especially when the assessee has requested the same to the Assessing officer.

2.10 In this regard, the Hon'ble Supreme Court in the case of Dhakeswari Cotton Mills Ltd. v. CIT (1954) 26 ITR 775 (SC) has held that "The rule of law on this subject has been fairly and rightly stated by the Lahore High Court in the case of Seth Gurmukh Singh where it was stated that while proceeding under sub-section (3) of section 23, the Income-tax Officer, though not bound to rely on evidence produced by the assessee as he considers to be false, yet if he proposes to make an estimate in disregard of that evidence, he should in fairness disclose to the assessee the material on which he is going to find that estimate; and that in case he proposes to use against the assessee the result of any private inquiries made by him, he must communicate to the assessee the substance of the information so proposed to be utilized to such an extent as to put the assessee in possession of full particulars of the case he is expected to meet and that he should further give him ample opportunity to meet it." It was held in that case that "In this case we are of the opinion that the Tribunal violated certain fundamental rules of justice in reaching its conclusions. Firstly, it did not disclose to the assessee what information had been supplied to it by the departmental representative. Next, it did not give any opportunity to the company to rebut the material furnished to it by him, and lastly, it declined to take all the material that the assessee wanted to produce in support of its case. The result is that the assessee had not had a fair hearing."

The Hon'ble Supreme Court in case of C. Vasantlal & Co. Vs. CIT 45 ITR 206 (SC) has held that "the ITO is not bound by any technical rules of the law of evidence. It is open to him to collect material to facilitate assessment even by private enquiry. But, if he desires to use the material so collected, the assessee must be informed about the material and given adequate opportunity to explain it. The statements made by Praveen Jain and group were material on which the IT authorities could act provided the material was disclosed and the assessee had an opportunity to render their explanation in that regard."

The Hon'ble Supreme Court in case of Kishinchand Chellaram v. CIT (1980) 125 ITR 713 (SC) has held that "whether there was any material evidence to justify the findings of the Tribunal that the amount of Rs. 1,07,350 said to have been remitted by Tilokchand from Madras represented the undisclosed income of the assessee. The only evidence on which the Tribunal could rely for the purpose of arriving at this finding was the letter, dated 18-2-1955 said to have been addressed by the manager of the bank to the ITO. Now it is difficult to see how this letter could at all be relied upon by the Tribunal as a material piece of evidence supportive of its finding. In the first place, this letter was not disclosed to the assessee by the ITO and even though the AAC reproduced an extract from it in his order, he did not care to produce it before the assessee or give a copy of it to the assessee. The same position obtained also before the Tribunal and the High Court and it was only when a supplemental statement of the case was called for by this Court by its order, dated 16-8-1979 that, according to the ITO, this letter was traced by him and even then it was not shown by him to the assessee but it was forwarded to the Tribunal and it was for the first time at the hearing before the Tribunal in regard to the preparation of the supplemental statement of the case that this letter was shown to the assessee. It will, therefore, be seen that, even if we assume that this letter was in fact addressed by the manager of the bank to the ITO, no reliance could be placed upon it, since it

was not shown to the assessee until at the stage of preparation of the supplemental statement of the case and no opportunity to cross examine the manager of the bank could in the circumstances be sought or availed of by the assessee. It is true that the proceedings under the income-tax law are not governed by the strict rules of evidence and, therefore, it might be said that even without calling the manager of the bank in evidence to prove this letter, it could be taken into account as evidence. But before the income-tax authorities could rely upon it, they were bound to produce it before the assessee so that the assessee could controvert the statements contained in it by asking for an opportunity to cross examine the manager of the bank with reference to the statements made by him."

2.10 In light of above proposition in law and especially taking into consideration the decision of the Hon'ble Supreme Court in case of C. Vasantlal & Co. (supra) relied upon by the Revenue and which actually supports the case of the assessee, in the instant case, the assessment was completed by the AO relying solely on the information received from the investigation wing, statement recorded u/s 132(4) of Shri Bhanwarlal Jain and others, and various incriminating documentary evidence found from the search and seizure carried out by Investigation Wing, Mumbai on the Shri Bhanwarlal Jain group on 03.10.2013. It remains undisputed that the assessee was never provided copies of such incriminating documents and statements of Shri Bhanwarlal Jain and various persons and an opportunity to cross examine such persons though he specifically asked for such documents and cross examination. On the other hand, the burden was sought to be shifted on the ITA No. 159/JP/16 The ACIT, Central -2, Jaipur vs. M/s Prateek Kothari, Jaipur 21 assessee by the A.O. It is clear case where the principle of natural justice stand violated and the additions made under section 68 therefore are unsustainable in the eye of law and we hereby delete the same. The order of the ld CIT(A) is accordingly confirmed and the ground of the Revenue is dismissed."

ii) It is relevant to mention here that statements of Shri Ajit Sharma and Shri Rajesh Kumar Singh are no relevance in the case of the assessee because in their statement these persons have not admitted that they were maintaining the bank account for the benefit of assessee group. They admit to maintain their bank account by some Shri Santosh Choubey.

Therefore, the addition on share application received by the assessee can neither be made u/s 56(1) of Income Tax Act, 1961 nor u/s 68 of Income Tax Act, 1961. The various judgments and arguments regarding addition made u/s 56(1) of Income Tax Act, 1961 has been submitted in forgoing paras. The reliance regarding addition cannot be made u/s 68 of Income Tax Cat, 1961 is placed on the following decisions: -

a) Rajasthan High Court: -

(i) CIT-1, Jaipur V/s M/s. ARL Infratech Ltd, (PB pg 130 to 143/Case Laws) wherein Hon'ble Rajasthan High Court has recently confirmed the findings of Hon'ble ITAT by deciding the appeal of revenue in DB ITA No 24/2014 vide order dated 28/09/2016 regarding deletion of addition of share capital made by applying the provisions of 68 of Income Tax Act, 1961.

(ii) Commissioner *of* Income-tax, Jaipur –II Versus Morani Automotives (P.) Ltd. No.- D.B. IT Appeal No. 619 *of* 2011 Dated.- October 23, 2013 (Rajasthan High Court) (PB pg 144 to 149/Case Laws).

The findings of Hon'ble Rajasthan High Court was as under:-

10. The points as sought to be raised by the appellant-revenue in the present case are all the matters relating to appreciation of evidence. The relevant factors have been taken into account and considered by the appellate authorities before returning the findings in favour of the assessee. Even as regards the three referred share capital contributors, it is noticed that they are existing

assessees having PA numbers; and are being regularly assessed to tax. The appellate authorities cannot be said to have erred in deleting the additions in their regard too at the hands of assessee-company.

11. Ultimately, the question as to whether the source of investment or of credit has been satisfactorily explained or not remains within the realm of appreciation of evidence; and the Courts have consistently held that such a matter does not give rise to any substantial question of law. In the case of CIT v. Orissa Corpn. (P.) Ltd. [1986) 159 ITR 78 (SC), the Hon'ble Supreme Court held as under:-

"13. In this case, the assessee had given the names and addresses of the alleged creditors. It was in the knowledge of the Revenue that the said creditors were income-tax assessees. Their index numbers were in the file of the Revenue. The Revenue, apart from issuing notices under s. 131 at the instance of the assessee, did not pursue the matter further. The Revenue did not examine the source of income of the said alleged creditors to find out whether they were credit-worthy or were such who could advance the alleged loans. There was no effort made to pursue the so-called alleged creditors. In those circumstances, the assessee could not do any thing further. In the premises, if the Tribunal came to the conclusion that the assessee has discharged the burden that lay on him, then it could not be said that such a conclusion was unreasonable or perverse or based on no evidence. If the conclusion is based on some evidence on which a conclusion could be arrived at, no question of law as such arises."

12. In the case of CIT v. Chandra Prakash Rana [2001] 48 DTR 271 (Raj.), this Court noticed similar nature grounds urged on behalf of the revenue and found the same not leading to any substantial question of law. This Court noticed, observed, and held as under:-

"7. Learned counsel for the appellant (Revenue) contended that firstly Tribunal erred in accepting the explanation offered by assessee in relation

to source of income. His second submission was that what was offered by assessee was no explanation and hence should not have been accepted and lastly learned counsel made sincere attempt on his part after taking us through factual scenario of the explanation and contended that it can never be taken as satisfactory explanation for deleting the addition made by AO. We do not agree to this submission for more than one reason.

8. In the first place, it is a pure question of fact, what to say question of law, much less substantial question of law. Secondly, this Court cannot again in this appeal undertake the examination of factual issues nor can draw factual inferences on the basis of explanation offered by assessee. Thirdly, once the explanation is accepted by the two appellate Courts i.e. CIT(A) and Tribunal in this case, then in such event, a concurrent finding recorded on such explanation by two appellate Courts is binding on the High Court.

9. Perusal of impugned finding quoted supra would go to show that Tribunal did examine the explanation offered by assessee in detail and then recorded a finding for its acceptance. Such finding when challenged does not constitute a substantial question of law within the meaning of s. 260A ibid in an appeal arising out of such order.

10. In our opinion, therefore, once the CIT(A) and Tribunal accepted the explanation of assessee and accordingly, deleted certain additions made by AO holding the transaction of shares to be genuine, then it would not involve any substantial issue of law as such. In other words, this Court in its appellate jurisdiction under s. 260A ibid, would not again de novo hold yet another factual inquiry with a view to find out as to whether explanation offered by assessee and which found acceptance to the CIT(A) and Tribunal is good or bad, or whether it was rightly accepted, or not. It is only when the factual finding recorded had been entirely de hors the subject, or that it had been based on no reasoning, or based on absurd reasoning to the extent

that no prudent man of average judicial capacity could ever reach to such conclusion, or that it had been found against any provision of law, then a case for formulation of substantial question of law on such finding can be said to have been made out.

11. In our view, no such error could be noticed by us in the impugned order because as observed supra, the Tribunal did go into the details of explanation offered by assessee and then accepted the explanation by placing reliance on the documents filed by assessee. As a consequence thereof, the additions made by AO came to be deleted."

13. In CIT v. Shree Barkha Synthetics Ltd. [2004] 270 ITR 477 (Raj.), in a similar nature matter, this Court observed that the Tribunal having found that the companies from which the share application money had been received by the assessee-company were genuinely existing and the identity of the individual investors were also established and they had confirmed the fact of making investment, the finding that assessee had discharged initial burden and addition under Section 68 could not be sustained, was essentially a finding of fact. This Court said,-

"19. A perusal of the aforesaid finding goes to show that deletion has been made on appreciation ofevidence, which was on record Finding that there was existence of investors and their confirmation has been obtained, were found to be satisfactory. All these conclusions are conclusions of fact based on material on record and, therefore, cannot be said to be perverse so as to give rise to question of law, which may be required to be considered in this appeal under s.260A of the IT Act."

14. The ratio of the decisions aforesaid directly applies to the present case too. Herein, as noticed, the appellate authorities have returned the findings of fact in favour of the assessee after due appreciation of the evidence on record, on relevant considerations, and on sound reasonings. These findings have neither been

shown suffering from any perversity nor appear absurd nor are of such nature that cannot be reached at all. Thus, no case for interference in the findings of the appellate authorities is made out.

In the result, the appeal fails and is, therefore, dismissed."

(iii) Barkha Synthetics Ltd. vs. Asstt. CIT (005) 197 CTR (Raj) 432. (PB pg 150 to 156/Case Laws)

Substantial question of law—Cash credit vis-a-vis share application money—Tribunal found that 6 out of 7 companies from which the share application money had been received were genuinely existing and no enquiry was conducted in respect of the source of share application money at the time of making the investment in the assessee-company and thus the assessee has discharged its initial burden except in one case—As regards individual investors, the Tribunal found that identity of 9 out of 10 investors has been established and they have confirmed the fact of making investment in the shares of the assessee-company and no further enquiry was directed by the AO—Thus, additions were sustained only in respect of investments said to have been made by U, an individual investor and by W Ltd., for the reason that such investments were not proved—Finding of the Tribunal is essentially a finding of fact which is not vitiated in law—No substantial question of law arise for consideration.

(iv) CIT vs. First Point Finance Ltd. (2006) 206 CTR (Raj) 626 : (2006) 286 ITR 477 (Raj HC). (PB pg 157 to 162/Case Laws)

Income—Cash credit—Share application money—Tribunal found that the investors are genuinely existing persons and they have filed confirmations in respect of investments made by them and their statements were also recorded—Amount of share capital/share application money could not be treated as unexplained cash credits and no addition could be made under s. 68—No substantial question of law arises.

(v) **Commissioner of Income Tax Vs. Bhaval Synthetics** (Raj HC) **(2013) 84 DTR** 0449 (Raj) **(PB pg 163 to 165/Case Laws)**Held that *even in case of doubt about subscribers to increased share capital, amount of share capital could not be regarded as undisclosed income of company—Amount referable to share application could not be attributed to assessee and could not be assessed in its hands—Appeal dismissed*

(vi) **Commissioner of Income Tax Vs. Akj Granites (P) Ltd.** (Raj HC) (2008) 301 ITR 0298 **(PB pg 166 to 168/Case Laws)**held that in respect of share applications received from different places accompanied with share application money, no presumption can be drawn that same belong to the assessee and cannot be assessed in his hands as his undisclosed income unless some nexus is established that share application money for augmenting the investment in business has flown from assessee's own money—No substantial question of law arises—Barkha Synthetics Ltd. vs. Asstt. CIT (2005) 197 CTR (Raj) 432 followed.

(vii) **Commissioner of Income-Tax, Central, Jaipur Versus Supertech Diamond Tools (Pvt) Ltd. (Raj HC)** D. B. IT Appeal No. 74 of 2012 **Dated: - 12 December 2013. (PB pg 169 to 174/Case Laws)**

(viii) **Commissioner of Income-tax - I, Jaipur Versus AL Lalpuria Construction (P.) Ltd (Raj HC) D.B. IT Appeal Nos. 256 of 2010 AND 26 & 39 of 2011 Dated: - 25 February 2013. (PB pg 175 to 176/Case Laws)**

(ix) **Commissioner of Income-tax, Ajmer Versus HS. Builders (P.) Ltd. D.B. INCOME Tax (Raj HC) APPEAL NO. 48 OF 2006 Dated: - 03 March 2012. (PB pg 177 to 185/Case Laws)**

(x) **CIT Vs Jai Kumar Bakliwal (2014) 101 DTR (Raj) 377 : (2014) 267 CTR (Raj) 396 (PB pg 186 to 192/Case Laws). No liability to prove source of source.**

(xi) **Aravali Trading Co Vs Income Tax Officer (2008) 8 DTR (Raj) 199. (PB pg 193 to 200/Case Laws)** Burden of the assessee stands discharged when the identity of the creditors is established and he confirms the loans.

(xii) **CIT Vs Heera Lal Chagan Lal Tank (2002) 157 ITR 281 (Raj) (PB pg 201 to 202/Case Laws) Burden of the assessee stands discharged when the identity of the creditors is established and he confirms the loans.**

b) ITAT Jaipur/Jodhpur

i) **Shalimar Buildcon (P) Ltd. vs ITO (2011) 128 ITD 0396 (Jaipur) (PB pg 214 to 238/Case Laws)**
In this case Hon'ble ITAT Jaipur Bench has relied on its old decision in the case of Hotel Gaudavan ITA No. 1162 and 1137/JP/2008 and addition on account of share capital was deleted.

28.5 *On identical issue, the Tribunal, Jaipur Bench in the case of Hotel Gaudavan (P) Ltd. (supra) has held as under :*

"6. As regards the issue on merit in the Departmental appeal, we concur with the views of the learned CIT(A) that the AO has not considered the explanation of the assessee. The amount under consideration of Rs. 1.89 crore has been received by the assessee as share application money from M/s Jalkanta Technical & Financial Service (P) Ltd. (JTFSPL) after a proper resolution passed by the board of directors of the aforesaid company through banking channel. M/s JTFSPL is having permanent account and filing its return of income regularly. The AO has nowhere mentioned that money belongs to the assessee company and therefore, provisions of s. 68 cannot be invoked. The learned CIT(A) has rightly relied upon the decision of Hon'ble Delhi High Court in the case of CIT vs. Steller Investment Ltd. (2000) 164 CTR (SC) 287 which has been confirmed by the Hon'ble Supreme Court of India. The learned CIT(A) has also relied upon the

decision of Hon'ble jurisdictional High Court in the case of Barkha Synthetics Ltd. vs. Asstt. CIT (2005) 197 CTR (Raj) 432 and also the decision of Tribunal, Jodhpur Bench in the case of Uma Polymers (P) Ltd. vs. Dy. CIT (dt. 27th Feb., 2006) [reported at (2006) 101 TTJ (Jd)(TM) 124—Ed.] where it has been held that the assessee has to prove the existence of the shareholders which in the present case is not under dispute. Therefore, the assessee has discharged the burden and therefore the AO was not justified in making any addition under s. 68 of the Act. The learned counsel for the assessee has referred to the decision of Hon'ble Supreme Court of India in the case of Divine Leasing & Finance Ltd. dt. 21st Jan., 2008, the copy of which is placed on record where it has been observed by the Supreme Court as under :

'Can the amount of share money be regarded as undisclosed income under s. 68 of IT Act, 1961 ? We find no merit in this SLP for the simple reason that if the share application money is received by the assessee company from alleged bogus shareholders, whose names are given to the AO, then the Department is free to proceed to reopen their individual assessments in accordance with law. Therefore, we find no infirmity in the order of the learned CIT(A), with the impugned judgment.'

The said decision of Hon'ble Supreme Court of India has been followed by the Tribunal, Delhi Bench in the case of ITO vs. Bhor Mal Dhansi Ram Ltd. in ITA No. 4670/Del/2007, dt. 3rd March, 2006. The copy of the said decision of Tribunal, Delhi Bench is placed on record. The learned counsel for the assessee Shri H.M. Singhvi, chartered accountant has also relied upon the decision of Hon'ble Supreme Court of India on the said issue in the case of CIT vs. Lovely Exports (P) Ltd. (2008) 216 CTR (SC) 195 : (2008) 6 DTR (SC) 308 wherein it has been held that if the share application money is received by the assessee company from alleged bogus shareholders, whose names are given to the AO, then the Department is free to proceed to reopen their individual assessments in accordance with

law, but it cannot be regarded as undisclosed income of assessee company."

28.6 *The Hon'ble Delhi High Court in the case of CIT vs. Divine Leasing & Finance Ltd. (supra) had an occasion to consider the addition on account of share application money. We are reproducing the held portion from the decision of Hon'ble Delhi High Court as mentioned in (2007) 207 CTR (Del) 38 (supra).*

"Income—Cash credit—Share application money—Burden of proof can seldom be discharged to the hilt by the assessee—If the AO harbours doubts of the legitimacy of any subscription he is empowered, nay duty-bound, to carry out thorough investigations—But if the AO fails to unearth any wrong or illegal dealings, he cannot obdurately adhere to his suspicions and treat the subscribed capital as the undisclosed income of the company—If relevant details of address and identity of the subscribers are furnished to the Department along with copies of the shareholders registers, share application forms, share transfer register etc. it would constitute acceptable proof or explanation by the assessee—Department would not be justified in drawing an adverse inference only because the creditor/subscriber fails or neglects to respond to its notices—Tribunal has noted that the assessee company is a public limited company which had received subscriptions to the public issue through banking channels and the shares were allotted in consonance with the provisions of Securities Contract (Regulation) Act, 1956, as also the rules and regulations of Delhi Stock Exchange—Complete details were furnished—Tribunal has further found that the AO has not brought any positive material or evidence which would indicate that the shareholders were benamidars or fictitious persons or that any part of the share capital represented company's own income from undisclosed sources."

28.7 *The Hon'ble apex Court in the case of CIT vs. Lovely Exports (P) Ltd. (supra) held that if the share capital money is received by the assessee company from alleged bogus shareholders then the Department is free*

to proceed to reopen the individual assessments of such shareholders in accordance with law. Such share application money cannot be regarded as undisclosed income of the assessee company.

***28.8** The Hon'ble High Court in the case of First Point Finance Ltd. (supra) held that burden of proof on the assessee company lies to the extent of making out a case that investor exists and thereafter it is not for the assessee to further prove where they have brought money from to invest with it.*

***28.9** The Hon'ble Delhi High Court in the case of CIT vs. United Bio-tech (P) Ltd. 2010 TIOL-533-HC-Del held that in case the identity of the share applicants has been established and it is found that the said applicants are corporate assessees who are assessed to tax with IT Department then there is no case of any substantial question of law. In the instant case, the share applicants are corporate assessees.*

***28.10** The Hon'ble Delhi High Court in the case of CIT vs. Samir Bio-tech (P) Ltd. (supra) held that if investments have been shown by the share applicants in their audited balance sheet then the addition cannot be made under s. 68 of the Act.*

***28.11** In view of the legal position as discussed above, the AO was not justified in making the addition of Rs. 1.10 crore without bringing on record any material for the addition. Simply on the basis of information which is not substantiated in the course of assessment proceedings against the assessee, the AO could not have added the amount.*

(ii) The Honb'le ITAT, Jaipur Bench, Jaipur in its judgment the case of M/s Jadau Jewellers & Manufacturers Pvt. Ltd., B-1, Trimutri Circle, Govind Marg, Jaipur in ITA No. 686/JP/2014 dated 14.12.2015 (PB pg 239 to 267/Case Laws) gave the following findings:-

".6.1 On facts also, the assessee has produced before the Assessing Officer copy of share application,

confirmation of the cash creditors, copy of PAN, copy of Board resolution, copy of Director's report, auditor's report, copy of balance sheet, copy of P&L account, copy of bank account in all the cases to prove the identity, genuineness and creditworthiness of the cash creditors. The ld Assessing Officer made addition on the basis of investigation conducted by the ITO, Investigation Wing, Kolkata but the ld Assessing Officer of the assessee has not clarified what inquiry had been conducted and what evidences collected which goes against the assessee. The notice U/s 131 issued by the ITO, Investigation Wing, Kolkata were served in case of Vidya Agencies Pvt. Ltd. and Shivarpan Mercantiles Pvt. Ltd., but compliance could not be made on the given date because concerned officer was on leave. In case of Middleton Goods Pvt. Ltd. And Lactrodryer Marketing Pvt. Ltd., notices were served on the assessee and in compliance to the notice, the party submitted all the documents in the IT office. The case law referred by the ld CIT(A) i.e. decision of Hon'ble Delhi High Court in the case of Nipun Builders and Developers Pvt. Ltd. Vs. CIT and Vijay Power Generator Ltd. Vs CIT (supra) are not squarely applicable on the facts of the case as there was short time available with the Assessing Officer as well as Investigation Wing of Kolkata. The copy of inquiry has not been provided by the Assessing Officer to the assessee. As per findings of the Hon'ble Delhi High Court in the case Nipun Builders and Developers Pvt. Ltd. Vs. CIT (supra), the Investigation Officer at Kolkata had not deputed Inspector to enquire the whereabouts of the company. The case laws referred by the assessee are squarely applicable on the facts and circumstances of the appellant's case, therefore, we reverse the order of the ld CIT(A) on technical ground as well as on merit also…."

(iii) **Uma Polymer (P) Ltd. , 101 TTJ 124, Jodhpur (PB pg 282 to 318/Case Laws)** Income—Cash credit—

Share application money—In respect of share capital money, the assessee-company has to prove only the existence of the person in whose name share application is received—No further burden is cast on the assessee to prove whether that person himself has invested the money or some other person has made the investment in his name—Burden to prove that the money did not belong to him but to somebody else is on the Revenue—Distinction between a public company and a private company is not very material for this purpose—AO treated the investments made by ten shareholders in the assessee-company as bogus and made addition under s. 68 —Not justified—In all the cases except that of V, AO had obtained the bank statements of the shareholders which clearly show that the accounts were regularly maintained and the shareholders had made deposits—Further, the shareholders are also assessed to tax—Simply because scrutiny assessments were not made in the case of shareholders, such assessments could not be made in the course of assessment of the assessee—Having regard to the information collected by the AO from the banks, identity of the shareholders was fully established—If any shareholder is found to have made unexplained investment, then addition of such investment is required to be made in the hands of the shareholder and not in the account of the assessee—U had invested in the share capital through cheque except for a small sum which was returned to her—Her bank account shows several entries, both credit and debit, which have no relation with the amount invested with the assessee-company—Merely because she has not submitted her returns after the asst. yr. 1984-85, it cannot be said that she was not assessed to tax—Though V has not been shown to be assessed to tax, he had made major part of investments towards share capital through cheques and his identity is not doubted—Accordingly, share capital advanced by U and V is also

to be accepted as genuine—Therefore, no addition of share capital money could be made in the hands of the assessee-company.

(iv) **The ld. Jaipur Tribunal in the case of DCIT V M/s Kamdhenu Steel and Alloys Ltd. 2014-TIOL-709-ITAT- (PB pg 203 to 213/Case Laws)** Case relates to search and issue of shares on premium. Held that the assessee had submitted the particulars of registration of the applicant company, the confirmation from the share applicants, bank account details from which payment through account payee cheques, so the assessee had discharged its initially onus.

(v) **M/s. ARL Infratech Ltd. vs. The ACIT ITA No. 619/JP/2013 (PB pg 268 to 281/Case Laws)** ITAT Jaipur. The findings of Hon'ble ITAT was as under:-

Before, we proceed to decide the issue on merits, we would like to discuss the scheme of the Act and precedents on the issue involved in this appeal as under:-

''In cases where share application money is found recorded in the books of an assessee which may represent credit in the books and the share applicant is identified, that amount cannot be added in the assessee's hands u/s 68 of the Act. The Hon'ble Rajasthan High Court has repeatedly reiterated the above legal position. These cases are:
(i) CIT vs. Shree Barkha Synthetics Ltd. 182 CTR 175 (Raj.)
(ii) Barkha Synthetics Ltd. vs. ACIT (2005), 197 CTR 432 (Raj).13

In coming to the above conclusion, the Hon'ble Jurisdictional High Court has considered at length the relevant decisions on the issue like CIT vs. Steller Investment Ltd. (2000) 164 CTR (SC) 287 = 251 ITR 263 (SC) which has confirmed the decision of Hon'ble Delhi High Court reported in (1992) 192 ITR 287. The Hon'ble Court has gone to the extent of stating that even if it be assumed that the subscriber to the share capital are not genuine, nevertheless, under no circumstances can the amount of share capital be regarded as undisclosed income of the assessee. In this case, the share subscriber is identified. There can be no dispute regarding the above stated legal position. The following decisions also lay down the same ratio:-

(i) CIT vs. Lovely Exports (P) Ltd. (2008) 6 DTR 308 (SC)
(ii) CIT vs. Dolphin Conpack Ltd. (2006) 283 ITR 190 (Del.)
(iii) CIT vs. Gujarat Heavy Chemicals Ltd. (202) 256 ITR 795(SC)
(iv) CIT vs. Kwick Travels (1992) 199 ITR (St.) 85 (SC)

This issue has been dealt at length by the Third Member in the case of Uma Polymers (P) Ltd. vs. DCIT, (2006) 101 TTJ (Jd.) T.M. 126 = (2006) 284 ITR (AT) 1 Jodhpur.''

2.6 Adverting, the facts of the given case, we are of the considered opinion that all the share applicants stand identified. The assessee has provided PANs of the share applicants. The mode of payment has also been made explained. There is no direct or indirect relation between the assessee company and the share applicants. The statements recorded during survey has got no evidentiary value and the law is very much settled on this issue. In any case, even under the provisions of Section 68 of the Act, the assessee cannot be forced to prove the source of the source. The law on this subject is also settled by numerous decisions. The alleged report of the Inspector of the Department who is stated to have visited at the given addresses of the share applicants was never put or confronted to the assessee. The cumulative effects of these reasons is that the impugned addition cannot be added in the hands of the assessee company. Accordingly, we order to delete the entire additions and allow the appeal of the assessee.

3.0 In the result, the appeal of the assessee stands allowed.

The department filed appeal before Hon'ble Rajasthan High Court. Hon'ble Rajasthan High Court confirmed the findings of Hon'ble ITAT by deciding the appeal of revenue in DB ITA No 24/2014 vide order dated 28/09/2016

(c) Other High Courts

(i) 2014 (8) TMI 605 - MADRAS HIGH COURT The Commissioner of Income Tax Versus Pranav Foundations Ltd. T. C. (A). No. 262 of 2014 **Dated -** 12 August 2014 **(PB pg 343 to 346/Case Laws)**
Addition u/s 68 – Share application and share premium amount credited but not proved - Whether the Tribunal was right in upholding the order of the CIT(A) who

deleted the addition made u/s 68, being the share application money and share premium amount credited by the assessee which was not proved – Held that:- Following the decision in CIT v. Lovely Exports (P) Ltd. [2008 (1) TMI 575 - SUPREME COURT OF INDIA] - all the four parties, who are subscribers of the shares, are limited companies and enquiries were made and received from the four companies and all the companies accepted their investment - the assessee has categorically established the nature and source of the sum and discharged the onus that lies on it in terms of Section 68 of the Act - When the nature and source of the amount so invested is known, it cannot be said to be undisclosed income - the addition of such subscriptions as unexplained credit under Section 68 of the Act is unwarranted – Decided against Revenue.

(ii) **CIT vs. Illac Investment (P) Ltd. (2007) 207 CTR (Del) 687; (PB pg 341 to 342/Case Laws)** assessee-company has satisfactorily established the identity of the share subscribers and deleted the addition under s. 68, no substantial question of law arises for consideration.

(iii) **CIT vs. Divine Leasing & Finance Ltd. (2007) 207 CTR (Del) 38; (PB pg 321 to 340/Case Laws)** Income—Cash credit—Share application money—Burden of proof can seldom be discharged to the hilt by the assessee—If the AO harbours doubts of the legitimacy of any subscription he is empowered, nay dutybound, to carryout thorough investigations—But if the AO fails to unearth any wrong or illegal dealings, he cannot obdurately adhere to his suspicions and treat the subscribed capital as the undisclosed income of the company—If relevant details of address and identity of the subscribers are furnished to the Department along with copies of the shareholders register, share application forms, share transfer register, etc. it would constitute acceptable proof or explanation by the assessee—Department would not be justified in drawing an adverse inference only because the creditor/subscriber fails or neglects to respond to its notices—Tribunal has noted that the assessee-company

is a public limited company which had received subscriptions to the public issue through banking channels and the shares were allotted in consonance with the provisions of Securities Contract (Regulation) Act, 1956, as also the rules and regulations of Delhi Stock Exchange—Complete details were furnished—Tribunal has further found that the AO has not brought any positive material or evidence which would indicate that the shareholders were benamidars or fictitious persons or that any part of the share capital represented company's own income from undisclosed sources—As regards receipt of share capital on issue of rights shares to five companies, these companies were duly incorporated under the Sikkimese Companies Act and were assessed under the Sikkimese Taxation Manual—Their share subscriptions were also received through banking channels and found to be valid by the jurisdictional AO—Therefore, no addition could be made under s. 68

(iv) **CIT v/s Value Capital services P Ltd. 307 ITR 334 (Delhi) (PB pg 319-3202/Case Laws)** held that there is additional burden on the department to show that even if share applicants did not have the means to make investment, the investment made by them actually emanated from the coffers of the assessee so as to enable it to be treated as undisclosed income of the assessee.

(v) **CIT v/s STL Extrusion (P) Ltd. 333 ITR 269 (MP) (PB pg 347 to 350/Case Laws)** Income—Cash credit—Share application money—Assessee has duly established the identity and source of credits—Additions not sustainable.

(vi) **CIT v/s Arunanda Textiles (P) Ltd. , 333 ITR 116 (Karnataka) (PB pg 351 to 353/Case Laws)** Share application money—Assessee able to identify the shareholders—It is not for the assessee-company to establish but it is for the Department to enquire with the investors about the capacity to invest the amount in the shares.

(vii) **Bhav Shakti Steel Mines (P) Ltd. vs. CIT (2009) 18 DTR (Del) 194** Income—Cash credit—Genuineness—CIT(A) not only found that the identity of each of the shareholders stood established, but also examined the fact that each of them were income-tax assessees and had disclosed the share application money in their accounts which were duly reflected in their IT returns as well as in their balance sheets—Tribunal was not therefore justified in coming to the conclusion that the CIT(A) had not considered the matter in the right perspective—Order passed by Tribunal remanding the matter for examining the share applicants set aside and that of CIT(A) restored

(d) Other Benches of ITAT

(i) **ITO V M/s. Reliance Marketing Pvt. Ltd. 2015-TIOL-319-TAT-Del (PB pg 367 to 375/Case Laws)** identity of the creditors/share applicants by furnishing their PAN number and copy of acknowledgment of Income-tax Return. The amount on account of share application was received through banking channel, copies of the confirmation alongwith affidavit of the parties were furnished. The assessee also furnished the copy of share application forms, copy of Form no.2 filed with Register of Companies (ROC), showing allotment of shares to the applicants. Therefore, the assessee discharged the onus cast upon it,

(ii) **INCOME TAX OFFICER vs. MS. SUPERLINE CONSTRUCTION P. LTD.** ITAT, BOMBAY TRIBUNAL (A) ITA No. 3644 TO 3648, 3650, 3651Mum/2014 30th November, 2015 (2015) 45 CCH 0281 Mum Trib. **(PB pg 376 to 392/Case Laws)** Addition—Addition on account of bogus share application money—Assessee was in business of builder and developer—Assessment was completed u/s 143(3) r.w.s. 147—Re-assessment proceedings were initiated on basis of information received from Directorate of Income-tax (Investigation) without recording AO'S own satisfaction and information was accepted in mechanical manner—After reopening of assessment u/s 147, AO made addition of Rs.40 lakhs

received by assessee from various corporate entities—Addition was made by AO on account of bogus share application money under provisions of s 68—CIT(A) deleted addition made by AO—Held, in case of CIT vs. M/s. Lovely Exports (Pvt) Ltd, reported in [2008] 216 CTR 195 (SC), it was held that If share application money was received by assessee company from alleged bogus shareholders whose name were given to AO then department was free to proceed to reopen their individual assessments in accordance with law but it could not be regarded as undisclosed income of assessee company—It was submitted by assessee that AO had failed to appreciate statements of any person recorded u/s 143(3) r.w.s. 147—That assessee-company had fully discharged burden of proof, onus of proof and explained source of share capital and advances received by established identity, creditworthiness and genuineness of transaction by banking instruments with documentary evidences—Assessee company substantiated details with documentary evidences as extracted from website of Ministry of Corporate Affairs, Government of India before AO—These facts had not been rebutted on behalf of Revenue—ITAT was not inclined to interfere with findings of CIT(A) who thus rightly deleted entire impugned additions of Rs.40 lakhs made by AO u/s 68 on account of share capital subscription received by assessee-company

Held:

It was pointed out in the case of CIT vs. M/s. Lovely Exports (Pvt) Ltd, reported in [2008] 216 CTR 195 (SC) that if the share application money is received by the assessee company from alleged bogus shareholders whose name are given to the AO then the department is free to proceed to reopen their individual assessments in accordance with law but it cannot be regarded as undisclosed income of assessee company.

(para 2.3)

In this background, it was submitted on behalf of the assessee that the Assessing Officer failed to appreciate that there was no documentary evidence against the assessee-company to support such impugned additions. It was further submitted by the assessee that the

Assessing Officer failed to appreciate that the statements of any person recorded u/s 143(3) r.w.s. 147. The assessee-company had fully discharged the burden of proof, onus of proof and explained the source of share capital and advances received by established the identity, creditworthiness and genuineness of transaction by banking instruments with documentary evidences. The further stand of the assessee had been that the assessee-company substantiated the details with the documentary evidences as extracted from the website of Ministry of Corporate Affairs, Government of India before the Assessing Officer. These facts had not been rebutted on behalf of the Revenue.
(para 2.4)

In view of the facts and circumstances of the present case as well as considering the decisions as discussed above on the similar issue, ITAT was not inclined to interfere with the findings of the CIT(A) who had rightly deleted the entire impugned additions of Rs.40 lakhs made by the Assessing Officer u/s 68 of the Act on account of share capital subscription received by the assessee-company.
(para 2.5)
Conclusion:

When Assessee-company had substantiated details with documentary evidences as extracted from website of Ministry of Corporate Affairs, Government of India before AO, then additions made by AO u/s 68 on account of share capital subscription received by assessee-company was rightly deleted.

(iii) **Meera Engineering & Commercial Co. (P) Ltd. vs. Asstt. CIT (1997) 58 TTJ (Jab) 527 (PB pg 393 to 399/Case Laws)** Income—Cash credits—Genuineness of share capital of company—All the 51 shareholders filed their affidavits and confirmatory letters and 24 of them filed their replies also to notice under s. 133(6)—Names of parties purchasing the shares with amount subscribed were furnished before AO—All documents clearly show that shareholders do exist— Assessee-company had discharged its onus of explaining the cash credits as required under law—If the company is able to establish that shareholders existed and they have

invested money for purchase of shares burden of company to prove the credit is discharged—Identity of shareholders not in dispute—Assessee is not required to prove credit-worthiness of shareholders—Addition deleted

(iv) **Allen Bradley India Ltd. vs. Dy. CIT (2002) 74 TTJ (Del) 604 : (2002) 80 ITD 43 (Del);** Income—Cash credit—Subscription to share capital and loan—In case of limited companies jurisdiction of AO would be limited only to see whether identity of shareholders is established and whether they exist or not—Once identity is established, then, possibly no further enquiries need to be made—Since the shareholders of assessee-company were in existence, they were assessed to tax, complete details were available, share capital money as well as loan were received through account payee cheques and they were cleared through proper banking channels, AO was not justified in disbelieving the capital invested by the shareholder companies—Similarly, AO was not justified in disbelieving the loan taken from DTL as the cheques were cleared through bank channels and confirmation and supporting evidence was filed—CIT(A) was justified in deleting the additions.

(v) **2017 (3) TMI 1047-ITAT AHMEDABAD Income Tax Officer, Ward 8 (1), Ahmedabad Versus Seven Star Aviation Services Pvt. Ltd (PB pg 400 to 404/Case Laws)**Addition u/s 68 - share application money and unsecured loan received. Held that: - When the depositors are regular tax payers and the advances made by such depositors as also share application monies paid by such shareholders are duly accepted in their personal assessments, there cannot be any occasion to hold that these amounts are unexplained in the hands of the company. The credit worthiness or identity cannot be an issue in such a situation.

(vi) **2016 (10) TMI 920 - ITAT HYDERABAD M/s. Hariom Concast and Steel Pvt. Ltd. Versus Income Tax Officer, Ward-2 (2) , Hyderabd (PB pg 405 to 411/Case Laws)** Addition for shares issued on

premium. Held that: - Share premium cannot be brought to tax invoking the provisions of Section 68, unless there is a link with either quid pro quo transaction or investing by assessee-company in their accounts so as to receive it back as share capital. No such evidence was brought on record.

(e) Supreme Court

i) **CIT vs. Lovely Exports (P) Ltd. (2008) 216 CTR (SC) 195** Income—Cash credit—Share application money—If the share application money is received by the assessee company from alleged bogus shareholders, whose names are given to the AO, then the Department is free to proceed to reopen their individual assessments in accordance with law, but it cannot be regarded as undisclosed income of assessee company.

ii) **CIT vs. Steller Investment Ltd. (200) 251 ITR 263 (SC)** Even if the subscribers to the increased share capital of assessee-company were not genuine, the amount could not be regarded as undisclosed income of the assessee-company.

(iii) **CIT Vs Orissa Corporation (P) Ltd (1986) 159 ITR 79 (SC)**

D) Ratio Laid down in following cases not applicable to the facts of the case of assessee:-

a) Nova Promoters & Finlease Pvt. Ltd (2012) 342 ITR 169 (Delhi High Court): - <u>Summons sent to the companies received back unserved and other summons remained uncomplied with</u> Whereas, in the case of this assessee company, notice u/s 133(6) was sent to investor companies, all of which were served and some of them were complied with.

b) CIT V/s N. R. Portfolio Pvt. Ltd 206 (2014) DLT (DB) (Del)/ 264 CTR 0258 (del) Assessed u/s 144 of Itax Act. In this case the AO issued several notices and show cause notice which was not served/complied and assessment was framed u/s 144 of Income Tax

Act. In our case all the compliances were made and evidences submitted.

c) **N Tariks Properties Pvt. Ltd 227 Taxmann.com 373 (with reference to decision of Delhi high court in 264 CTR 472)** AO noticed that extracts of bank account had been fabricated and AO found that immediately before issuance of cheques for the purpose of making pay order or demand draft there was deposit of cash. In our case no cash deposit in the bank account of shareholder company.

d) **CIT v/s Navodaya Castle Pvt. Ltd 367 ITR 306 (Delhi High Court)**AO found that immediately before issuance of cheques for the purpose of making pay order or demand draft there was deposit of cash. In our case no cash deposit in the bank account of shareholder company.

e) **CIT V/s MAF Academy Pvt. Ltd 206 (2014) DLT 277 (DB)(Del)/ 361 ITR 0285 (Del)** AO found that immediately before issuance of cheques for the purpose of making pay order or demand draft there was deposit of cash. In our case no cash deposit in the bank account of shareholder company. Further, the summons u/s section 131 of I.tax Act were sent to the shareholders which were received back un-served.

In view of the above submission, the humble assessee prays your honor kindly to delete the addition of Rs. 5,94,47,727/- confirmed by ld CIT(A)''

7.3 On the other hand, the ld. DR relied on the oreder of the AO.

7.4 We have heard the rival contentions and perused the materials available on record. It is pertinent to mention that the similar issue has been dealt with and decied by this Bench of ITAT in the case of Motisons Buildtech Pvt. Ltd vs ACIT, Central Circle-2,Jaipur vide its order dated

30-10-2017 in ITA No.385/JP/2017 (Assessee's appeal)for the Assessment Year 2012-13 by observing as under:-

> ‘’8.4 We have heard the rival contentions and perused the materials available on record. In this ground, it is noted that the AO made the addition of Rs.3,68,27,500/- out of which the ld CIT(A) deleted the addition of Rs. 2,86,27,500/- and sustained the addition of Rs.82.00 lacs as mentioned at para 3.2.2. and 2.1.4.6 & 2.1.4.7 of the ld. CIT(A)’s order (supra). The question arises as to whether the ld CIT(A) can make the addition u/s 68 of the Act or not. For this purpose, the definition of Section 68 of the Act is as under:-
>
> ‘’*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.’*
>
> From the above definition, it is noted that Section 68 of the Act does not empower the ld. CIT(A) to make addition under this Act. Thus the addition u/s 68 can only be made by the Assessing Officer. The definition of the Assessing Officer has been provided in Section 2(7A) of the Act which reads as under:-
>
> [(*7A*) “Assessing Officer” means the Assistant Commissioner [or Deputy Commissioner] [or Assistant Director] [or Deputy Director] or the Income-tax Officer who is vested with the relevant jurisdiction by virtue of directions or orders issued under sub-section (1) or sub-section (2) of section 120 or any other provision of this Act, and the [Additional Commissioner or] [Additional Director or] [Joint Commissioner or Joint Director] who is directed under clause (*b*) of sub-section (4) of that section to exercise or perform all or any of the powers and functions conferred on, or assigned to, an Assessing Officer under this Act ;]
>
> Thus the ld. CIT(A) is not the Assessing Officer as per Income-Tax Act. Therefore, the ld. CIT(A) does not have any legal sanction to make the addition u/s 68 of the Act. Ld. CIT(A) in his order at para 2.1.4.6 had clearly

held that the identity, creditworthiness and genuineness of transactions of these companies cannot be held doubtful and addition by applying the provision of sec 68 of the Act cannot be upheld. The ld. CIT(A) has sustained the addition of Rs. 82.00 lacs without specifying any provision of Income tax Act. No such addition can be sustained without invoking the relevant provisions of the Act. Moreover, the addition has been sustained in the hands of that assessee where cash /DD was deposited at 4th Channel. Hon'ble Rajasthan High Court and other Hon'ble Courts held that assessee cannot be asked to explain the source of the source. The relevant portions of the verdicts given by Hon'ble High Courts in the following cases are as under:-

(i) In the case of CIT vs Jai Kumar Bakliwal (2014) 366 ITR 217 (Raj):- Held, dismissing the appeal, that all the cash creditors were assessed to Income-tax and they provided a confirmation as well as their permanent account number. They had their own respective bank accounts which they had been operating and it was not the claim of the Assessing Officer that the assessee was operating their bank accounts. Most of the cash creditors appeared before the Assessing Officer and their statements under section 131 of the Income-tax Act, 1961, were also recorded on oath. There was no clinching evidence nor had the Assessing Officer been able to prove that the money actually belonged to none but the assessee. The addition of Rs. 17,27,250 under section 68 was not justified.

(ii) In the case of Nemi Chand Kothari vs CIT (2003) 264 ITR 254 (Gau): Held that it is not the business of the assessee to find out the source or sources from where the creditor had accumulated the amount which he had advanced in the form of loan to the assessee and section 68 cannot be read to show that in the case of failure of sub-creditors to prove their creditworthiness the amount advanced as loan to the assessee by the creditor shall have to be read as corollary as the income from undisclosed source of the assessee himself.

(iii) In the case of Shankar Industries vs CIT (1978) 114 ITR 689 (Cal.): Observed that that mere establishing identity of the creditor and nothing more is not sufficient and something more is to be proved by the assessee and in the aforesaid case, the assessee was unable to prove beyond identity and, therefore, the Calcutta High Court upheld the findings of the Tribunal. However, in the present case, we notice that not only the identity of the creditor has been proved but from the facts which have been culled out, the assessee has been able to prove the genuineness also.

(iv) In the case of Kanhailal Jangid vs ACIT (2008) 217 CTR 354 (Raj): Held that the burden does not go beyond to put the assessee under an

obligation to further prove that where from the creditor has got or procured the money to be deposited or advanced to the assessee. The fact that the explanation furnished by the creditor about the source from where he procured the money to be deposited or advanced to the assessee is not relevant for the purposes of rejecting the explanation furnished by the assessee and make additions of such deposits as income of the assessee from undisclosed sources by invoking section 68 unless it can be shown by the Department that source of such money comes from the assessee himself or such source could be traced to the assessee itself.

(v) In the case of Aravali Trading Co. vs ITO (2008) 220 CTR (Raj): Observed that the fact that the explanation furnished by the four creditors about the sources where from they acquired the money was not acceptable by the Revenue could not provide necessary nexus for drawing inference that the amount admitted to be deposited by these four persons belonged to the assessee. The assessee having discharged his burden by proving the existence of the depositors and the depositors owing their deposits, he was not further required to prove source of source.

Taking into consideration the facts and circumstances of the case and case laws relied on (supra), the ld. CIT(A) is not justified in confirming the addition of Rs. 82.00 lacs which is directed to be deleted. It is also noted that during the course of hearing of appeal before the ld. CIT(A), the assessee had requested for cross examination of Shri Sanbtosh Choubey Shri Ajit Sharma, Shri RajeshKumar Singh and other persons which was denied by the ld. CIT(A). The ITAT Coordinate Bench in the case of Prateek Kothari (supra) has given verdict that without providing opportunity of cross examination of the materials gathered and statement recorded behind the assessee cannot be used. However, we hold that Revenue is free to initiate proceedings in the hands of these concerns who have received the amount after deposit in cash/DD in respective bank A/cs. Thus Ground No. 1 of the assessee is allowed.''

It may be further noted that the issue raised by the assessee in Ground No.1 of the present appeal is same and the decision taken in the appeal of the assessee in ITA No. 385/JP/2017 for the Assessment Year 2012-13 in the case of Motisons Builtech vs ACIT, Central Circle-2, Jaipur (supra)

shall apply mutatis mutandis in the present ground of appeal No. 1 of the assessee. Thus Ground No. 1 of the assessee's appeal in ITA No. 388/JP/2017 is allowed.

8.1 The solitary ground of the Revenue in ITA No. 489/JP/2017 for the Assessment Year 2013-14 is as under:-

> *''1. Whether on the facts and in the circumstances of the case the ld. CIT(A) was right in deleting the addition of Rs. 3,90,50,000/- out of the total addition of Rs. 4,41,00,000/- made u/s 56(1) of the Act ignoring the fact that assets of the assessee company don't commensurate to premium charged and further ignoring the fact that neither any business activity was performed nor any business income has been shown by the assessee.''*

8.2 Apropos solitary ground of the Revenue, the AO made the addition of Rs.4,41,00,000/- u/s 56(1) of the Act in the hands of the assessee company by observing as under:-

> ''24. Having dealt with each of the contention of the assessee and having found the same to be untenable it is important to place on record certain aspects which have a bearing on the issue at hand. It is true that the apparent must be considered real until it is shown that there are reasons to believe that the apparent is not the real. In a case of the present kind a party who relies on a recital in a deed has to establish the truth of those recitals, otherwise it will be very easy to make self-serving statements in documents either executed or taken by a party and rely on those recitals. If all that an assessee who wants to evade tax has to have some recitals made in a document either executed by him or executed in his favour then the door will be left

wide open to evade tax. A little probing was sufficient in the present case to show that the apparent was not the real. The taxing authorities were not required to put on blinkers while looking at the documents produced before them. They were not entitled to look into the surrounding circumstances to find out the reality of the recitals made in those documents.

17. In the above back ground of the facts and circumstances surrounding this case, it is hereby held that the receipt of share capital and share premium was part of a colourful transaction by way of which a sum of Rs. 4,41,00,000/- was introduced into the books of the assessee company in the form of share premium attached to the share capital. As discussion above, the premium of Rs. 390/- per share was not justified at all on the basis of absolutely no assets commensurate to premium charged, no business activity, no income, no net worth nor any promise for creation of this much assets, business activity, income or net worth in the future. Accordingly, the charging and receipt of share premium/ share capital to the tune of Rs. 4,41,00,000/- is held to be income of the assessee company in the nature of income envisaged u/s 56(1) of the Income Tax Act, 1961. The same is added back to the total income of the assessee.''

8.3 In first appeal, the ld. CIT(A) has deleted the addition of Rs. 3,90,50,000/- out of the total addition of Rs. 4,41,00,000/-made by the AO by observing at pages 108 & 109 of his order as under:-

''3.2.2 I have considered assessee's submission and carefully gone through assessment order. I have also take a note of factual matrix of the case

as well as applicable case laws relied upon. I have already given a detailed findings in para 2.1.4.7 wherein total of Rs. 8,71,97,727/- has been sustained in the hands of M/s. . Motisons Global Pvt. Ltd, M/s. Motisons Entertainment Pvt. Ltd, M/s. Motisons Buildtech Pvt. Ltd and M/s. Shivansh Buildtech Pvt. Ltd, details of which are as under:-

Name of Appellant Company	ITA No.	A.Y.	Addition made by AO	Addition sustained	Addition deleted/Relief given
Motisons Global Pvt Ltd	753/14-15	2009-10	2,75,00,000	-	2,75,00,000
Motisons Global Pvt Ltd	754/14-15	2011-12	6,96,50,000	-	6,96,50,000
Motisons Global Pvt Ltd	767/14-15	2012-13	42,07,29,600	5,94,47,727	36,12,81,873
Motisons Global Pvt Ltd	755/14-15	2013-14	4,41,00,000	50,50,000	3,90,50,000
Motisons Entertainment (I) Pvt. Ltd	760/14-15	2009-10	3,40,00,000	-	3,40,00,000
Motisons Entertainment (I) Pvt. Ltd	766/14-15	2011-12	1,95,00,000	-	1,95,00,000
Motisons Entertainment (I) Pvt. Ltd	756/14-15	2012-13	7,78,00,000	1,41,50,000	6,36,50,000
Motisons Buildtech Pvt. Ltd	758/14-15	2009-10	3,03,00,000	-	3,03,00,000
Motisons Buildtech Pvt. Ltd	759/14-15	2012-13	3,68,27,500	82,00,000	2,86,27,500
Godawari Estates Pvt. Ltd	769/14-15	2010-11	2,00,00,000	-	2,00,00,000
Godawari Estates Pvt. Ltd	768/14-15	2012-13	10,30,00,000	-	10,30,00,000
Bholenath Real Estates Pvt. Ltd.	770/14-15	2009-10	2,90,00,000	-	2,90,00,000
Rainbow Buildcon Pvt. Ltd	757/14-15	2009-10	2,00,00,000	-	2,00,00,000
Shivansh Buildcon Pvt. Ltd	771/14-15	2012-13	90,00,000	3,50,000	86,50,000
			94,14,07,100	8,71,97,727	85,42,09,373

In view of the above facts and circumstances of the case as discussed above, addition of Rs. 3,03,00,000/- made on a/c of bogus share capital in the hands of M/s. Motisons Buildtech Pvt. Ltd is hereby deleted. Assessee gets relief in Gr No. 2 & 3.''

Para 2.1.4.7 reads of ld. CIT(A)'s order as under:-

''2.1.4.7 In view of the above findings, it is also seen that this cash /DD was deposited at 4th Channel of source/ stage. This money came to the hands of some of appellant companies through the six companies assessed in Jaipur. However, on perusal of written submissions and compliance to show cause letter, it is also seen that the assessee has not controverted the facts narrated by Shri Santosh Choube, Shri Rajesh Kr Singh and Shri Ajit Sharma and also could not satisfactorily explain the reasons of cash deposits made to those accounts. Therefore, duly considering those facts as evidences (both documentary & oral) gathered during search and & Post-search operation, addition to the extent of Rs. 8,71,97,727/- is sustained and balance is deleted, details given as under:-

Name of Appellant Company	ITA No.	A.Y.	Addition made by AO	Addition sustained	Addition deleted/Relief given
Motisons Global Pvt Ltd	753/14-15	2009-10	2,75,00,000	-	2,75,00,000
Motisons Global Pvt Ltd	754/14-15	2011-12	6,96,50,000	-	6,96,50,000
Motisons Global Pvt Ltd	767/14-15	2012-13	42,07,29,600	5,94,47,727	36,12,81,873
Motisons Global Pvt Ltd	755/14-15	2013-14	4,41,00,000	50,50,000	3,90,50,000
Motisons Entertainment (I) Pvt. Ltd	760/14-15	2009-10	3,40,00,000	-	3,40,00,000
Motisons Entertainment (I) Pvt. Ltd	766/14-15	2011-12	1,95,00,000	-	1,95,00,000
Motisons Entertainment (I) Pvt. Ltd	756/14-15	2012-13	7,78,00,000	1,41,50,000	6,36,50,000
Motisons Buildtech Pvt. Ltd	758/14-15	2009-10	3,03,00,000	-	3,03,00,000
Motisons Buildtech Pvt. Ltd	759/14-15	2012-13	3,68,27,500	82,00,000	2,86,27,500
Godawari	769/14-15	2010-11	2,00,00,000	-	2,00,00,000

Estates Pvt. Ltd					
Godawari Estates Pvt. Ltd	768/14-15	2012-13	10,30,00,000	-	10,30,00,000
Bholenath Real Estates Pvt. Ltd.	770/14-15	2009-10	2,90,00,000	-	2,90,00,000
Rainbow Buildcon Pvt. Ltd	757/14-15	2009-10	2,00,00,000	-	2,00,00,000
Shivansh Buildcon Pvt. Ltd	771/14-15	2012-13	90,00,000	3,50,000	86,50,000
			94,14,07,100	8,71,97,727	85,42,09,373

It is pertinent to mention here that M/s. Mayukh Vinimay Pvt.Ltd received share application of Rs. 10,54,95,000/- in AY 2009-10 which was added as income of M/s.Mayukh Vinimay Pvt. Ltd in A.Y. 2009-10. Thereafter in subsequent years the part of the funds owned by this company was invested in the companies under appeal as under:-

S.N.	Name of company (under your appeal)	Assessment Year	Amount
1.	Motisons Global Pvt. Ltd	2012-13	6,93,49,800
2.	Motisons Global Pvt. Ltd	2013-14	2,24,50,000
3.	Motisons Entertainment (India)Pvt ltd.	2012-13	1,55,00,000
	TOTAL		10,72,29,800

Further it is also submitted that addition made by the AO tantamount to double addition. It is also mentioned here that as per Ld. ARs request, appellate proceedings in case of M/s. MayukhVinimay Pvt. Ltd have been kept in abeyance till the dispostal of appeal by Hon'ble ITAT.

In view of aforementioned findings, now additions made by the AO are being discussed with respect to grounds of appeal raised by the respective assessee in para below.''

8.4 During the course of hearing, the ld. DR supported the order of the AO and submitted that the order of the ld. CIT(A) may be set aside .

8.5 On the other hand, the ld.AR of the assessee supported ld. CIT(A)'s order up to the relief given by him and also filed the following written submission.

''2.05.1.1 **Brief Facts of the case**

a) During the year under consideration the assessee allotted 1,10,250 equity shares of Rs. 10 each to various companies at a premium of Rs. 390 on various dates detail of which is as under: -

S.N.	Name	No. of Shares alloted/ applied during the year	Amount adjusted against share capital	Rate per share	Amount adjusted against share premium	Rate of premium per share	Issue price of the share	Total Consideration Received
1.	Alliance Tradecom Pvt. Ltd	12625	1,26,250	10	49,23,750	390	400	50,50,000
2.	Evershine Suppliers Pvt. Ltd	36250	3,62,500	10	1,41,37,500	390	400	1,45,00,000
3.	Mayukh Vinimay Pvt. Ltd	56125	5,61,250	10	2,18,88,750	390	400	2,24,50,000
4.	Regent Dealers Pvt. Ltd	4000	40,000	10	15,60,000	390	400	16,00,000
5.	Rose Suppliers Pvt. Ltd	1250	12,500	10	4,87,500	390	400	5,00,000
	Total	**1,10,250**	**11,02,500**		**4,29,97,500**			**4,41,00,000**

b) The ld AO issued several notices to assessee to explain the share capital. The assessee submitted detailed reply and documents from time to time as under:-

S.No	Particulars	Copy at PB pg No
1	Copy of query letter of AO dated 05.01.2015.	105-106

2	Copy of reply of assessee dated 13.01.2015 filed in response to query letter dated 05.01.2015.	107-110
3	Copy of show cause notice of AO dated 06.02.2015.	111-114
4	Copy of reply of assessee dated 13.02.2015 filed in response to show cause notice dated 06.02.2015.	115-117
5	Copies of documents filed before AO along with various submission in respect of identity, creditworthiness of shareholder and genuineness of transactions	118-330

c) During the course of assessment proceedings the assessee submitted the following documents to prove their identity of shareholders, creditworthiness of shareholders and genuineness of transaction with them: -

Name of Shareholder	**Particulars of Documents submitted**	**Copy at PB Page**
Alliance Tradecom Pvt. Ltd	8. Share application containing the name/address/PAN of party, detail of payment received etc.	119-120
	9. Copy of board resolution.	11
	10. Copy of PAN card of party.	122
	11. Copy of bank statement showing the entry of payment made to assessee.	123-124
	12. Declaration of source of funds with party.	125
	13. Copy of Ack. of ITR and Computation of AY 13-14.	126-128
	14. Copy of audit report and audited balance sheet along with annexure of 31.03.13.	129-141
Evershine Suppliers Pvt. Ltd	1. Share application containing the name/address/PAN of party, detail of payment received etc.	142-146
	2. Copy of board resolution.	147
	3. Copy of PAN card of party.	148
	4. Copy of bank statement showing the entry of payment made to assessee.	149-150
	5. Declaration of source of funds with party.	151
	6. Copy of Ack. of ITR and Computation of AY 13-14.	152-154
	7. Copy of audit report and audited balance sheet along with annexure of 31.03.13.	155-167

Mayukh Vinimay Pvt. Ltd	1. Share application containing the name/address/PAN of party, detail of payment received etc. 2. Copy of board resolution. 3. Copy of PAN card of party. 4. Copy of bank statement showing the entry of payment made to assessee. 5. Copy of Ack. of ITR and Computation of AY 13-14. 6. Copy of audit report and audited balance sheet along with annexure of 31.03.13.	168-171 172 173 174-175 176-178 179-190
Regent Dealers Pvt. Ltd	1. Share application containing the name/address/PAN of party, detail of payment received etc. 2. Copy of board resolution. 3. Copy of PAN card of party. 4. Copy of bank statement showing the entry of payment made to assessee. 5. Declaration of source of funds with party. 6. Copy of Ack. of ITR and Computation of AY 13-14. 7. Copy of audit report and audited balance sheet along with annexure of 31.03.13.	191 192 193 194 195 196-198 199-210
Rose Suppliers Pvt. Ltd	1. Share application containing the name/address/PAN of party, detail of payment received etc. 2. Copy of board resolution. 3. Copy of PAN card of party. 4. Copy of bank statement showing the entry of payment made to assessee. 5. Declaration of source of funds with party. 6. Copy of Ack. of ITR and Computation of AY 13-14. 7. Copy of audit report and audited balance sheet along with annexure of 31.03.13.	211 212 213 214 215 216-218 219-230
Copy of ITR, Balance sheet and assessment order of Income Tax Act, 1961 of AY 2009-10 of following companies: - I. Alliance Tradecom Pvt. Ltd II. Evershine Suppliers Pvt. Ltd III. Mayukh Vinimay Pvt. Ltd IV. Regent Dealers Pvt. Ltd V. Rose Suppliers Pvt. Ltd		 231-245 246-259 260-273 274-287 288-301

Copy of assessment order passed u/s 143(3) of Income Tax Act, 1961 of AY 2013-14 of following companies: -	
I. Alliance Tradecom Pvt. Ltd	302-304
II. Evershine Suppliers Pvt. Ltd	305-307
III. Mayukh Vinimay Pvt. Ltd	308-310
IV. Regent Dealers Pvt. Ltd	311-313
V. Rose Suppliers Pvt. Ltd	314-316
Copy of order dated 20.03.2013 passed u/s 263 of Income Tax Act, 1961 in the case of M/s Mayukh Vinimay Pvt. Ltd	317-320
Copy of order dated 21.03.2014 passed u/s 143(3) r.w.s. 263 of Income Tax Act, 1961 in the case of M/s Mayukh Vinimay Pvt. Ltd	321-330

The assessee has submitted sufficient documents before the ld AO to prove identity, creditworthiness and genuineness of share capital and ld AO satisfied that addition under section 68 cannot be made. Therefore, the ld. AO has not made the addition under the deeming provisions of section 68 of Income Tax Act. The ld AO made the addition of **Rs. 4,41,00,000/-** on account of share capital received by the assessee during this year by applying the provisions of section 56(1) of Income Tax Act on the ground that the assets of the assessee company don't commensurate to premium charged and any business activity was not performed or any business income has not been shown by the assessee.

c) **However, the ld CIT(A) issued show cause notice to assessee to tax the share capital under section 68 of ITax Act as against 56(1) applied by ld AO.** The assessee submitted detailed reply before ld CIT(A) vide letter dated 12/07/2016 **(copy at PB pg 331-403).** The ld CIT(A) has not confirmed/sustained the addition made by ld AO by applying the provisions of section 56(1) of Income Tax Act, on the basis of his detailed findings at **page 39-43 of his order.** Ld CIT(A) when satisfied that the addition u/s 56(1) can't be made, he tried to sustain the addition by applying the provisions of section 68 of Income Tax Act. He issued a show cause notice vide letter dated 09/03/2017 **(Copy at PB pg 404-450).** The assessee submitted detailed reply on the show cause notice of ld CIT(A) vide letter dated 24-03-2017 & 28/03/2017 alongwith documents **(Copy at Pb pg 451-525)**. To support that shareholders were genuine and creditworthiness is proved, the assessee has filed all details, in respect of incorporation/existence

of investors and details of cheques vide which amounts were received. The capacity of shareholders is verifiable from the copy of the balance sheet of the shareholders. The shareholders have funds on a prior date from the allotment of shares given by the assessee company and such funds were more than the amount of share application. Ld CIT(A) **satisfied about the ingredients of section 68 of I.Tax Act however, he sustained the addition of Rs. 50,50,000/- on account of cash/DD deposited at 4th channel stage and deleted the addition the rest of addition. The company wise breakup of this amount is given at pg 52-54 of the order of ld CIT(A).**

2.05.1.2 Submission of assessee:-

The facts and circumstances of the Grounds and issue raised in the departmental appeal for the AY 2013-14 under ground No 1 are exactly similar to Ground No 1 for AY 2009-10 in ITA No 486/JP/2017. The assessee has made detailed submission in AY 2009-10 for ITA No 486/JP/2017. In order to avoid repetition, we pray your honor kindly to consider the submission made for ITA No 486/JP/2017 for AY 2009-10 under para **2.01.2 above as also made for AY 2013-14 under Ground No 1 of ITA No 489/JP/2017.**

The findings made by ld CIT(A) for this year AY 2013-14 considering the amended section 56(2)(viib) of Income Tax Act applicable w.e.f 01/04/2013 are not under challenge by the department. However, we submit that during the year under consideration the provisions of section 56(2)(viib) of Income Tax Act, 1961 made applicable and the share premium in excess to value computed as per manner & method provided in this section r.w.r. 11UA of Income Tax Rules is taxable. The value of shares of the assessee company computed as per manner & method of this rules is as under: -

Particulars	**As per Method (A) (Net assets value method)**	**As per Method (B) (Discounted free cash flow method)**
Book Value of total assets less prepaid expenses & preliminary expenses as on	53,88,09,212	53,88,09,212

last B/s i.e. 31.03.2012		
Add: - Appreciation in market value of assets (In excess to book value) Land at SB-110*	NA	25,52,48,216
Total Assets (A)	**53,88,09,212**	**79,40,57,428**
Total Liabilities, excluding share capital and reserves & Surplus (L)	76,56,570	76,56,570
Total amount of paid up equity share capital as shown in B/s (PE)	2,05,05,820	2,05,05,820
Paid up value of such equity shares (PV)	10	10
Fair market value of shares [(A-L)/PE]*PV	[(53,88,09,212-7656570)/2,05,05,820]*10 = Rs. 259 per shares	[(79,40,57,428-7656570)/2,05,05,820]*10 = Rs. 384 per shares*
For deciding the issue price of shares the assessee company choose the price as determined by option 2 and considering the value of goodwill & enhancement in value of other assets the issue price of shares decided Rs. 400 per shares which is quite reasonable.		

* Note 1: - The market value of land at SB-110 is taken on the basis of value of adjacent land at SB-111 purchased during the year under consideration **(just adjoining to land at SB-110)** and area of both the lands are almost same.

Note 2: - In option two the appreciation in value of assets has been increased in the case of land only as for this the direct evidence of increase in market value is available. The value of other assets & goodwill is not taken in above computations. However while deciding the value of shares the same was taken into consideration.

> In view of above this is to submit that the issue price of the shares is in accordance with the value of shares as computed as per rule 11UA of Income Tax Rules, therefore no addition can be made as income of the assessee as per provisions of section 56(2)(viib)of Income Tax Act, 1961. ‘’

8.6 We have heard the rival contentions and perused the materials available on record. It is pertinent to mention the clause (viib) of sub section (2) of section 56 which was inserted vide Finance Act, 2013 w.e.f 01.04.2013 i.e. are applicable for A. Y. 2013-14. The amended provision provides that where a closely held company issues its shares at a price which is more than its fair market value then the amount received in excess of fair market value of shares shall be charged to tax in the hands of the company as income from other sources. The provision of Clause (viib) of sub-section 2 of section 56 reads as under:-

> ***[(viib)*** *where a company, not being a company in which the public are substantially interested, receives, in any previous year, from any person being a resident, any consideration for issue of shares that exceeds the face value of such shares, the aggregate consideration received for such shares as exceeds the fair market value of the shares:*
>
> ***Provided*** *that this clause shall not apply where the consideration for issue of shares is received-*
>
> *(i) by a venture capital undertaking from a venture capital company or a venture capital fund; or*
>
> *(ii) by a company from a class or classes of persons as may be notified by the Central Government in this behalf.*
>
> ***Explanation****.-For the purposes of this clause,-*
>
> *(a) the fair market value of the shares shall be the value-*
>
> *(i) as may be determined in accordance with such method as may be prescribed; or*

(ii) as may be substantiated by the company to the satisfaction of the Assessing Officer, based on the value, on the date of issue of shares, of its assets, including intangible assets being goodwill, know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature,

whichever is higher;

(b) "venture capital company", "venture capital fund" and "venture capital undertaking" shall have the meanings respectively assigned to them in clause (a), clause (b) and clause (c) of [22][Explanation] to clause (23FB) of section 10];

It is also pertinent to menton that Rule 11UA (2) of Income Tax Rules, 1962 provides the method of calculation of fair market value of unquoted shares in term of explanation (a) (i) to section 56(2)(viib). In the assessee's case, the company has issued 1,10,250/- equity shares at the premium of Rs. 390/-per share. In view of the amended provisions of section 56(2)(viib) of Income Tax Act, the AO should have calculated the fair market value of the shares as mentioned in explanation (a) of section 56(viib) of the Act and excess amount of fair market value of the shares received if any could have been taxed u/s 56(2) of Income Tax Act. However, the AO has not done any exercise in this regard and the entire amount received against share capital during this year amounting to Rs. 4,41,00,000/- was taxed u/s 56(1) of Income Tax Act. For the year under consideration, the amended law is applicable. The share premium/ capital received in excess of fair market value of the shares shall be taxed. The ld. CIT(A) deleted the addition. However, in the interest of equity and

justice, the AO is directed to calculate the fair market value of the share in accordance with the provisions of section 56(2)(viib) of I.Tax Act and if the amount received against share capital during the year is found in excess of fair market value of shares, then the addition to that extent the excess of fair market value of shares shall be made in the hands of the assessee company. Thus the appeal of the Revenue is allowed for Statistical purposes.

9.1 Now we take up the assessee's appeal in ITA No. 389/JP/2017 where the assessee has raised the following grounds of appeal.

1.On the facts and in the circumstances of the case and in law the ld. CIT (A) erred in: -

a) confirming the addition of Rs. 50,50,000/- out of total addition of Rs. 4,41,00,000/- made by ld. AO treating the following amount received by the assessee against share capital and premium from company mentioned as under as income of the assessee.

Date	***Amount***	***From Company***	***Cash deposit /Demand draft at 4th Channel as per inquiry by investigation wing***
28.04.2012	*5050000*	*Alliance Tradecom Private Limited*	*Shyam Fashion and Durga Enterprises*

b) confirming the addition of Rs. 50,50,000/- by holding that the assessee could not explain the deposit of cash/DD in the accounts of other parties/persons at 4th Channel of source/stage and further erred in not providing opportunity of cross examination of Shri Santosh Choube, Shri Ajit Sharma and Sh Rajesh Kumar Singh and other persons; and

c) confirming the addition of Rs. 50,50,000/- more so when he has categorically held that the addition made by ld. AO u/s 56(1) of Income Tax Act, 1961 is not sustainable and the identity, creditworthiness and genuineness of transaction of the transaction cannot be held as doubtful and the addition by applying the provisions of section 68 of I.Tax Act cannot be upheld.

2. On the facts and in the circumstances of the case and in law the ld. CIT(A) erred in confirming the addition of Rs. 8,000/- made by AO by disallowing the payment of ROC fees.

10.1 During the course of hearing, the ld.AR of the assessee has not pressed the Ground No. 2, hence, the same is dismissed being not pressed.

11.1 In Ground No. 1 (ITA No. 389/JP/2017), the assessee is aggrieved that the ld. CIT(A) has confirmed the addition of Rs. 50,50,000/- in the hands of the assessee. The relevant observation of the ld. CIT(A) at page 52 to 55 of his order is as under:-

2.1.4.6 Therefore, in view of the findings of Hon'ble jurisdictional High Court, the identity, creditworthiness and genuineness of transaction of these companies cannot be held as doubtful and addition by applying the provisions of section 68 of the Act cannot be upheld. However, it is also to be seen that the Investigation Directorate has carried out investigation for deposit of cash/DD at fourth stage of channel source in some cases. The Chart showing cash deposit/DD deposit at 4th Channel as per inquiries made by Investigation wing is as under:

Company	A.Y.	Amount	From Company	Cash deposit /Demand draft at 4th Channel per inquiry by investigation wing
Motisons Buildtech P Ltd	2012-2013	15,00,000	Evershine Suppliers P Ltd	Swastik Traders
Motisons Buildtech P Ltd	2012-2013	20,00,000	Alliance Tradecom P Ltd	Swastik Traders and Global Securities
Motisons Buildtech P Ltd	2012-2013	17,00,000	Alliance Tradecom P Ltd	Swastik Traders

Company	A.Y.	Amount	From Company	Cash deposit /Demand draft at 4th Channel per inquiry by investigation wing
Motisons Buildtech P Ltd	2012-2013	30,00,000	Alliance Tradecom P Ltd	Swastik Traders
	Total	82,00,000		
Motisons Entertainment P Ltd	2012-2013	18,00,000	Rose Suppliers P Ltd	Shyam Fashion and Durga Enterprises
Motisons Entertainment P Ltd	2012-2013	46,00,000	Regent Barter P Ltd	Durga Enterprises and Shyam Fashion
Motisons Entertainment P Ltd	2012-2013	4,50,000	Mayukh Vinimay P Ltd	Shyam Fashion and Durga Enterprises
Motisons Entertainment p Ltd	2012-2013	10,00,000	Mayukh Vinimay P Ltd	Shyam Fashion and Durga Enterprises
Motisons Entertainment P Ltd	2012-2013	16,00,000	Regent Dealers P Ltd	Shyam Fashion
Motisons Entertainment P Ltd	2012-2013	10,00,000	Regent Dealers P Ltd	Durga Enterprises
Motisons Entertainment P Ltd	2012-2013	8,00,000	Regent Dealers P Ltd	Durga Enterprises and Shyam Fashion
Motisons Entertainment P Ltd	2012-2013	29,00,000	Alliance Tradecom P Ltd	Swastik Traders and Global Securities
	Total	1,41,50,000		
Motisons Global P Ltd	2012-2013	17,00,000	Rose Suppliers P Ltd	Durga Enterprises and Shyam Fashion
Motisons Global P Ltd	2012-2013	18,00,000	Rose Suppliers P Ltd	Nibu Nagi
Motisons Global P Ltd	2012-2013	19,00,000	Rose Suppliers P Ltd	Nibu Nagi and Durga Enterprises
Motisons Global P Ltd	2012-2013	3,50,000	Rose Suppliers P Ltd	Durga Enterprises
Motisons Global P Ltd	2012-2013	14,00,000	Rose Suppliers P Ltd	Shyam Fashion
Motisons Global P Ltd	2012-2013	18,50,000	Rose Suppliers P Ltd	Durga Enterprises
Motisons Global P Ltd	2012-2013	18,00,000	Regent Barter P Ltd	Nibu Nagi
Motisons Global P Ltd	2012-2013	18,00,000	Mayukh Vinimay P Ltd	Nibu Nagi and Kevilhulie Sunotsu
Motisons Global P Ltd	2012-2013	35,00,000	Mayukh Vinimay P Ltd	Shyam Fashion and Durga Enterprises
Motisons Global P Ltd	2012-2013	16,00,000	Mayukh Vinimay P Ltd	Durga Enterprises
Motisons Global P Ltd	2012-2013	15,00,000	Mayukh Vinimay P Ltd	Shyam Fashion and Durga Enterprises
Motisons Global P Ltd	2012-2013	41,00,000	Mayukh Vinimay P Ltd	Shyam Fashion and Durga Enterprises
Motisons Global P Ltd	2012-2013	16,47,727	Evershine Suppliers P Ltd	PNB, Axis Bank, Siliguri
Motisons Global P Ltd	2012-2013	36,00,000	Evershine Suppliers P Ltd	Durga Enterprises and Shyam Fashion
Motisons Global P Ltd	2012-2013	18,00,000	Evershine P Ltd	Durga Enterprises

Company	A.Y.	Amount	From Company	Cash deposit /Demand draft at 4th Channel per inquiry by investigation wing
Motisons Global P Ltd	2012-2013	9,00,000	Regent Dealers P Ltd	Nibu Nagi
Motisons Global P Ltd	2012-2013	18,00,000	Regent Dealers P Ltd	Durga Enterprises
Motisons Global P Ltd	2012-2013	9,00,000	Regent Dealers P Ltd	Kevihulie Sinotsu
Motisons Global Private Limited	2012-2013	28,50,000	Regent Dealers P Ltd	Durga Enterprises and Shyam Fashion
Motisons Global Private Limited	2012-2013	18,50,000	Regent Dealers P Ltd	Shyam Fashion
Motisons Global Private Limited	2012-2013	22,00,000	Alliance Tradecom P Ltd	PNB, Axis Bank Siliguri, Swastik Traders a Global Securities
Motisons Global Private Limited	2012-2013	10,00,000	Alliance Tradecom P Ltd	Swastik Traders
Motisons Global Private Limited	2012-2013	35,00,000	Alliance Tradecom P Ltd	M/s Swastik Traders , Global Securities Axis Bank Siliguri,
Motisons Global Private Limited	2012-2013	20,00,000	Alliance Tradecom P Ltd	Swastik Traders and Global Securities
Motisons Global Private Limited	2012-2013	20,00,000	Alliance Tradecom P Ltd	Swastik Traders and Global Securities
Motisons Global Private Limited	2012-2013	16,00,000	Alliance Tradecom P Ltd	Durga Enterprises
Motisons Global Private Limited	2012-2013	9,50,000	Alliance Tradecom P Ltd	Shyam Fashion
Motisons Global Private Limited	2012-2013	10,00,000	Alliance Tradecom P Ltd	Shyam Fashion and Durga Enterprises
Motisons Global Private Limited	2012-2013	3000000	Alliance P Ltd	Shyam Fashion and Durga Enterprises
Motisons Global Private Limited	2012-2013	16,00,000	Alliance P Ltd P Ltd	Nibu Nagi
Motisons Global Private Limited	2012-2013	19,50,000	Alliance Tradecom P Ltd	Durga Enterprises
Motisons Global Private Limited	2013-2014	5050000	Alliance Tradecom P Ltd	Shyam Fashion and Durga Enterprises
	Total	6,44,97,727		
Shivansh Buildcon P Ltd	2012-2013	3,50,000	Evershine Suppliers P Ltd	Durga Enterprises, Swastik and Shyam Fas
	Total	3,50,000		
Grand Total		8,71,97,727		

2.1.4.7 **In view of above findings, it is also seen that this cash/DD was deposited at 4th Channel of source/stage. This money came to the hands of some of appellant companies through the six companies assessed in Jaipur. However, on perusal of written submissions and compliance to show cause letter , it is also seen that assessee has not controverted the facts narrated by Sh Santosh Choube, Sh Rajesh Kr Singh and Sh Ajit Sharma and also could not satisfactorily explain the reasons of cash deposits made to those accounts. Therefore, duly considering those facts and evidences(both documentary & oral) gathered during search &**

post-search operation , addition to the extent of Rs. 8,71,97,727/= is sustained and balance is deleted, details given as under:

Name of Appellant Company	ITA No	AY	Addition Made by AO	Addition Sustained	Addition deleted/ Relief Given
Motisons Global Pvt. Ltd	753/14-15	2009-10	2,75,00,000	----------	2,75,00,000
Motisons Global Pvt. Ltd	754/14-15	2011-12	6,96,50,000	----------	6,96,50,000
Motisons Global Pvt. Ltd	767/14-15	2012-13	42,07,29,600	5,94,47,727	36,12,81,873
Motisons Global Pvt. Ltd	755/14-15	2013-14	4,41,00,000	50,50,000	3,90,50,000
Motisons Entertainment (I) Pvt. Ltd	760/14-15	2009-10	3,40,00,000	----------	3,40,00,000
Motisons Entertainment (I) Pvt. Ltd	766/14-15	2011-12	1,95,00,000	----------	1,95,00,000
Motisons Entertainment (I) Pvt. Ltd	756/14-15	2012-13	7,78,00,000	1,41,50,000	6,36,50,000
Motisons Buildtech Pvt. Ltd	758/14-15	2009-10	3,03,00,000	----------	3,03,00,000
Motisons Buildtech Pvt. Ltd	759/14-15	2012-13	3,68,27,500	82,00,000	2,86,27,500
Godawari Estates Pvt. Ltd	769/14-15	2010-11	2,00,00,000	----------	2,00,00,000
Godawari Estates Pvt. Ltd	768/14-15	2012-13	10,30,00,000	----------	10,30,00,000
Bholenath Real Estates Pvt Ltd	770/14-15	2009-10	2,90,00,000	----------	2,90,00,000
Rainbow Buildcon Pvt. Ltd	757/14-15	2009-10	2,00,00,000	----------	2,00,00,000
Shivansh Buildcon Pvt. Ltd	771/14-15	2012-13	90,00,000	3,50,000	86,50,000
Total additions			94,14,07,100	8,71,97,727	85,42,09,373

It is pertinent to mention here that M/s Mayukh Vinimay Pvt Ltd received share application of **Rs. 10,54,95,000/- in AY 2009-10** which was added as income of M/s Mayukh Vinimay Pvt Ltd in AY 2009-10. Thereafter in subsequent years the part of the funds owned by this company was invested in the companies under appeal as under:

S.No	*Name of Company (under your appeal)*	*Assessment Year*	*Amount*
1	*Motisons Global Pvt Ltd*	*2012-13*	*6,93,49,800*
2.	*Motisons Global Pvt Ltd*	*2013-14*	*2,24,50,000*
3	*Motisons Entertainment (India) Pvt Ltd*	*2012-13*	*1,55,00,000*
	Total		***10,72,99,800***

Further, it is also submitted that addition made by the AO tantamount to double addition. It is also mentioned here that as per Ld AR's request, appellate proceedings in case of M/s Mayukh Vinimay Pvt Ltd have been kept in abeyance till the disposal of appeal by Hon'ble ITAT.

In view of aforementioned findings, now additions made by the AO are being discussed with respect to grounds of appeal raised by the respective assessee in para below. ''

Thus the ld. CIT(A) confirmed the addition of Rs. 50,50,000/- in the hands of the assessee.

11.2 During the course of hearing, the ld.AR of the assessee prayed for deletion of addition confirmed by the ld. CIT(A) amounting to Rs.

50,50,000/- for which the ld.AR of the assessee filed the following written submission.

> ‘’**Submission of Assessee: (a)**) The facts and circumstances of the issue raised in the departmental appeal for the AY 2013-14 under ground No 1 are exactly similar to Ground No 1 for AY 2012-13 in ITA No 388/JP/2017. The assessee has made detailed submission in AY 2012-13 for ITA No 388/JP/2017. In order to avoid repetition, we pray your honor kindly to consider the submission made for ITA No 388/JP/2017 for AY 2012-13 under para **2.04.1.2 above as also made for AY 2013-14 under Ground No 1 of ITA No 389/JP/2017. In view of the above submission, the humble assessee prays your honor kindly to delete the addition of Rs. 50,50,000/- confirmed by ld CIT(A)’’**

11.3 On the other hand, the ld. DR opposed the submission of the assessee and relied on the order of the AO

11.4 We have heard the rival contentions and perused the materials available on record. It is pertinent to mention that the issue in Revenue’s appeal has been restored back to the AO. Since this is connected to the same, hence it is also restored back to the AO in the same terms as mentioned while deciding Revenue’s appeal in ITA No. 489/JP/2017.

Thus the Ground No. 1 of the assessee appeal in ITA No. 389/JP/2017 is allowed for Statistical purposes.

12.0 In the result, the appeals filed by the assessee in ITA No. 388 is partly allowed & 389/JP/2017 is partly allowed for Statistical purposes and the appeals of the Revenue in ITA No.486, 487 & 488/JP/2017 are dismissed and appeal of the Revenue in ITA No. 489/JP/2017 is allowed for Statistical purposes.

Order pronounced in the open Court on 02 -11-2017.

Sd/-	Sd/-
(कुल भारत)	(भागचन्द)
(KUL BHARAT)	(Bhagchand)
न्यायिक सदस्य /Judicial Member	लेखा सदस्य / Accountant Member

जयपुर / Jaipur
दिनांक / Dated:- 02 /11/ 2017
*Mishra
आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- M/s. Motisons Global Pvt. Ltd., Jaipur
2. प्रत्यर्थी / The Respondent- The ACIT, Central Circle-2 Jaipur/DCIT, Central Circle-2, Jaipur
3. आयकर आयुक्त(अपील) / CIT(A).
4. आयकर आयुक्त / CIT,
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA No. 388/JP/2017)

आदेशानुसार / By order,

सहायक पंजीकार / Assistant. Registrar