

INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "G": NEW DELHI
BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 2703 /Del/2010

(Assessment Year: 2002-03)

ACIT, Central Circle-23, New Delhi (Appellant)	Vs.	Surya Build well Pvt. Ltd, B-1, Udyog Nagar, Peera Garhi Chowk, New Delhi (Respondent)
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CO No. 116/Del/2013

(In ITA No. 2703/Del/2010)

(Assessment Year: 2002-03)

Surya Build well Pvt. Ltd, B-1, Udyog Nagar, Peera Garhi Chowk, New Delhi (Appellant)	Vs.	ACIT, Central Circle-23, New Delhi (Respondent)
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ITA No. 2702 /Del/2010

(Assessment Year: 2004-05)

ACIT, Central Circle-23, New Delhi	Vs.	Surya Build well Pvt. Ltd, B-1, Udyog Nagar, Peera Garhi Chowk, New Delhi
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ACIT V Surya Build well Private Limited
ITA No 2702, 2703 /Del/2010,
2121, 2122 & 2123/Del/2012, 2706 /Del/2013
Surya Build well Private Limited V ACIT
Co No 115 & 116/Del/2013 &
CO No. 96, 97 & 98/Del/2014
A Y 2004-05 to 2009-10

(Appellant)

(Respondent)

CO No. 115/Del/2013
(In ITA No. 2702/Del/2010)
(Assessment Year: 2004-05)

Surya Build well Pvt. Ltd,
B-1, Udyog Nagar, Peera Garhi
Chowk, New Delhi

Vs.

ACIT,
Central Circle-23,
New Delhi

(Appellant)

(Respondent)

ITA No. 2121, 2122, 2123/Del/2012
(Assessment Year: 2004-05, 2005-06 and 2006-07)

DCIT,
Central Circle-23, Room No. 359
New Delhi

Vs.

Surya Build well Pvt. Ltd,
4th Floor, Block-A, NDM-1,
Plot No. B-2, 3,4, Netaji
Subhash Place, New Delhi
PAN:AAFCS6329G

(Appellant)

(Respondent)

ITA No. 2706/Del/2013
(Assessment Year: 2007-08)

ACIT,
Central Circle-23,
New Delhi

Vs.

Surya Build well Pvt. Ltd,
4th Floor, Block-A, NDM-1,
Plot No. B-2, 3,4, Netaji
Subhash Place, New Delhi

ACIT V Surya Build well Private Limited
ITA No 2702, 2703 /Del/2010,
2121, 2122 & 2123/Del/2012, 2706 /Del/2013
Surya Build well Private Limited V ACIT
Co No 115 & 116/Del/2013 &
CO No. 96, 97 & 98/Del/2014
A Y 2004-05 to 2009-10
PAN:AAFCS6329G

(Appellant)

(Respondent)

CO No. 96/Del/2014

(In ITA No. 2706/Del/2013)

(Assessment Year: 2007-08)

Surya Build well Pvt. Ltd,
4th Floor, Block-A, NDM-1,
Plot No. B-2, 3,4, Netaji Subhash
Place, New Delhi

Vs.

ACIT,
Central Circle-23,
New Delhi

(Appellant)

(Respondent)

CO No. 97 and 98/Del/2014

(In ITA No. 2708 and 2712/Del/2013)

(Assessment Year: 2008-09 and 2009-10)

Surya Build well Pvt. Ltd,
B-1, Udyog Nagar, Peera Garhi
Chowk, New Delhi

Vs.

ACIT,
Central Circle-23,
New Delhi

(Appellant)

(Respondent)

Revenue by :

Shri SS Rana, CIT DR

Assessee by:

Shri Arvind Kumar, Adv

Date of Hearing

26/10/2017

Date of pronouncement

14/11/2017

ORDER

PER BENCH

1. This is the batch of 11 appeals pertaining to the same assessee from assessment year 2002 – 03 to assessment year 2009 – 10 and similar issues are also involved in these appeals, therefore, these are disposed of by this common order assessment year wise.

Assessment year 2002 – 03

ITA number 2703/DEL/2010 (by AO)

ITA No. 116/DEL/2013 (by assessee)

2. ITA number 2703/DEL/2010 is filed by Assessing Officer against the order of the Ld. Commissioner of Income Tax (Appeals)–III, New Delhi dated 03/03/2010.
3. The revenue has raised the following grounds of appeal in ITA No. 2703 /DEL/2010:-
 - “1. Whether on the facts and in the circumstances of the case, the CIT (A) has erred in law and on facts in deleting the addition of Rs 70,00,000/- made by the AO u/s 68 of the IT Act?
 2. Whether on the facts and in the circumstances of the case, the CIT (A) has erred in law and on fact in deleting the addition of Rs 35,000/- made by the AO u/s 68 of the IT Act on account of commission paid to obtain accommodation entries ?

3. Whether on the facts and in the circumstances of the case, the CIT (A) has correctly relied on the decision of the Apex Court in the case of M/s Lovely Exports (P) Ltd. without appreciating that the facts of the case are different from those of M/s Lovely Exports (P) Ltd.
4. The order of the CIT (A) is perverse and not tenable in law and on facts.”
4. Assessee has also filed cross objection in the appeal vide ITA No. 116/DEL/2013 raising following grounds of appeal for Assessment Year 2002-03:-
 - “1. On the facts and circumstances of the case and in law, the appeal filed by the Department against the impugned order of Ld. CIT (A) should be dismissed and his order should be accordingly upheld.
 2. On the facts and circumstance of the case and in law, Ld. CIT (A) ought to have allowed the appeal of the assessee on the further ground that, the assessment originally completed did not abate under second proviso to Sec. 153A and therefore, income originally assessed could not have been disturbed as no incriminating material was found in the search.”
5. Brief facts stated are that assessee is one of the companies of Vikas Surya group. Search and seizure operation was carried out on 01/09/2005 on this

Vikas Surya group including the above company. Consequent to these search and notice under section 153A of was issued on the assessee to furnish the true and correct return of total income for the assessment year. Assessee filed its return of income on 9/2/2007 declaring income of Rs. 22290/-. During the assessment proceedings prior to search, it was noted by the Ld. Assessing Officer that the statement of two persons were recorded by the Additional Director Of Investigation Unit, New Delhi under section 131 of the Income Tax Act, where they have stated that they are engaged in the business of providing accommodation entries. The Ld. Assessing Officer has attached these statements of the above persons as per Annexure A- 1, and Annexure A – 2, to the assessment order. During the course of assessment proceedings, the assessee company was asked to furnish necessary details of share application money and share capital received by it with respect to 3 companies. Assessee submitted the requisite details vide letter dated 05/11/2007 and 12/11/2007 stating that these all are the companies being assessed to tax, having the permanent account number and are in regular business. The Ld. Assessing Officer issued show cause notice to the assessee on 31/10/2007 to produce all the above company's respective persons from whom the loan is taken, with requisite details to prove the identity and creditworthiness of the depositors as well as the genuineness of the transactions. The Ld. Assessing Officer further deputed the inspector for making necessary enquiries at the addresses of these companies, but it was

reported by the inspector that no such company existed at the given address.

Therefore, the Ld. Assessing Officer treated the sum of Rs. 20 Lacs received from ENPOL private limited, Rs. 25 Lacs received from IKA processors and distributors' private limited and Rs. 25 Lacs received from Junoon capital services private limited as income of the assessee under section 68 of the Income Tax Act. The Ld. Assessing Officer over and above these Rs. 70 lakhs made an addition of Rs. 35,000/- on account of commission paid for obtaining these accommodation entries by the assessee. Consequently, the assessment under section 153A of the Income Tax Act, 1961 was passed on 26/12/2007 by the Ld. Deputy Commissioner of Income Tax, Central Circle, 23, New Delhi determining the total income of the assessee at Rs. 7057290/- against the income shown by the assessee in its return of income of Rs. 22290/-.

6. Assessee, aggrieved with the order of the Ld. Assessing Officer preferred appeal before the Commissioner of Income Tax (Appeals) –III, New Delhi contesting the addition made by the Ld. Assessing Officer on account of share capital, share application money of Rs. 70 lakhs and Rs. 35,000 on account of commission for obtaining accommodation entries. Before the Ld. CIT (A) assessee made a detailed submission who vide para No. 7 stated that assessee has established the identity of the shareholders by providing their address and confirmation to the effect that they have contributed to the share capital of the assessee company by receiving cheques through banking

channel and all these companies are assessed to income tax. The assessment records available with the assessee were also submitted before the Ld. AO. The Ld. CIT(A). Further, relying on the decision of the Hon'ble Supreme Court in case of CIT Vs. Lovely Exports Private Limited 216 CTR 295 as well as several other judicial precedents deleted the above addition. The Ld. CIT(A) further noted that that relying on the statement of certain persons under section 131 of the act on 22/09/2003, much before the search, were general statements. He further held that despite having conducted the search on the premises of the appellant no evidence or other material could be gathered to hold that the appellant had routed its own money. Thus, vide order dated 03/03/2010, he deleted the addition of Rs. 70 lakhs on account of share application money as well as Rs. 35,000/- as payment of commission. The revenue, aggrieved with the order of the Ld. CIT (A) has preferred appeal before us. In the same appeal, assessee has also raised cross objections stating that in absence of any incriminating material found during the course of the search, the additions could not have been made in the hands of the assessee. The relevant grounds of cross objections are stated hereinabove in para No. 4.

7. The Ld. authorized representative has furnished the application for condonation of delay in filing the cross objection and further submitted that in any case, applying the rule No. 27 of the Income Tax Appellate Tribunal Rules. He can support the order of the Ld. CIT (A) and contested that as there

is no incriminating evidence found during the course of the search, the addition cannot be made. The Ld. departmental representative did not object to the proposition of the Ld. authorized representative. With respect to the delay in filing of the cross objection. Hence, in the interest of justice, being legal issue, we condone the delay as sufficient cause is shown.

8. The Ld. authorized representative submitted that impugned assessment year involved in assessment year 2002-03 for which the return of income was filed by the assessee on 28/10/2002 and such return was processed and assessed under section 143(1) of the Income Tax Act. He further submitted that search took place on 'Vikas Surya Group' on 1/9/2005. He further submitted that in any case, the time-limit for issue of notice under section 143(2) for the Assessment Year 2002 – 03 expired on 30/9/2003. Therefore, as on the date of the search these assessment was not pending. He further submitted that if the assessment is not pending on the date of the search, then, addition in the hands of the assessee i.e. the person searched can be made only if incriminating documents are unearthed during the course of the search. He further submitted that in the present case, during the course of search no incriminating evidences were found. He further stated that persons whose statements are recorded are prior to the date of the search and are not during the course of the search. He took us through the assessment order to show that the whole addition has been made in the hands of the assessee on the basis of statement of 2 persons taken by the Additional Director of

Investigation, New Delhi recorded under section 131 of the Income Tax Act, prior to the date of the search. He took us to the various paragraphs of the assessment order to show that there is no reference of any incriminating material found during the course of the search by the Assessing Officer. He further took us to the order of the Ld. CIT (A) at para No. 9 on page No. 35 to show that these facts have also been recorded by the Ld. CIT (A) that no evidences were found by the Ld. Assessing Officer during the course of search. On the merits of the case, he submitted that the assessee has furnished complete details with respect to the 3 companies submitting share application forms, minutes of the board resolution authorizing those companies to make the investment in this company, copy of certificate of incorporation, Permanent Account Number and returns of the income of these companies. He further submitted that the complete details were given to the Ld. Assessing Officer, however, he was guided by the statement of those 2 persons recorded by the investigation wing of the income tax Department. He further stated that the copies of the statements attached with the assessment order. However, no cross examination was given of these persons. He further stated that nowhere in statement the name of the assessee company was given by these 2 persons. He further submitted that these companies are really doing regular business and filing the tax returns on regular basis. In view of this on the merits he submitted that the assessee has completely discharged its onus of proving the identity and creditworthiness of these

companies and also the genuineness of the transaction. He further submitted that merely because the inspector did not find the concerned companies existing on the given address cannot be used against the assessee in absence of any opportunity of cross-examination of these 2 persons whose statements have been utilized by the Assessing Officer. He further submitted that even during assessment proceedings assessee was not given copies of these statements which are annexed by AO to the assessment order.

9. The Ld. Departmental Representative vehemently contested the claim of the Ld. Authorized Representative stating that during the course of investigation carried out by the investigation wing statements of these 2 persons were recorded where they have stated that they are in the business of providing accommodation entries. He further submitted that the statement of these 2 persons clearly shows that they are not engaged in any financing business etc but they are the accommodation entry providers. He further stated that Assessing Officer was having the incriminating evidence of the statement of these 2 persons even prior to the search. He further on the merits submitted that the assessee has failed to submit the identity, creditworthiness of the lenders as well as genuineness of the transaction as according to the inspector these companies do not exist at the place the addresses given by the assessee. With respect to the creditworthiness he submitted that the assessee has taken share application money from accommodation entry providers and therefore the creditworthiness of these companies cannot be

established. He further stated that regarding the genuineness of the transaction as these are the accommodation entries they are not genuine. Further, the assessee has also failed to produce directors of these companies before the Ld. Assessing Officer. The onus of the assessee to prove these credits is not discharged. He therefore submitted that Ld. CIT (A) has deleted the addition incorrectly.

10. We have carefully considered the rival contention and also perused the orders of the lower authorities. We firstly go to the cross objection filed by the assessee stating that as the assessment involved is not pending as on the date of the search no addition can be made in the hands of the assessee in absence of any incriminating material found during the course of search. Admittedly, the impugned assessment year is assessment year 2002 – 03 for which assessee has filed its return of income on 28/10/2002. According to the provisions of section 143 (2) of the Act, time-limit for issue of notice under that section expired on 30/09/2003. Therefore, as on that date, the assessment year 2002 – 03 was not pending. Identical issue has arose before the Hon'ble Delhi High Court in case of CHINTELS INDIA LTD Vs DEPUTY COMMISSIONER OF INCOME TAX - CIRCLE-8 [2017-TIOL-1366-HC-DEL-IT] wherein it has been held that if no notice under section 143 (2) of the Act has been issued to the assessee, the return filed by the assessee becomes final. The Hon'ble Court held that :-

“AY 2008-09

19. The above submissions have been considered. As far as AY 2008-09 is concerned, the fact that there was no notice sent to the Assessee under Section 143(3) of the Act before the deadline, i.e., 30th September, 2009, is not in dispute. The CBDT Circular No. 549 dated 31st October, 1989 deals with such a situation. Para 5.13 thereof reads as under:

“5.13 A proviso to sub-section (2) provides that a notice under the sub-section can be served on the assessee only during the financial year in which the return is furnished or within six months from the end of the month in which the return is furnished, whichever is later. This means that the Department must serve the said notice on the assessee within this period, if a case is picked up for scrutiny. It follows that if an assessee, after furnishing the return of income does not receive a notice under section 143(2) from the Department within the aforesaid period, he can take it that the return filed by him has become final and no scrutiny proceedings are to be started in respect of that return.”

20. In *Vipan Khanna v. Commissioner of Income Tax (supra)*, the Punjab and Haryana High Court referred to the same circular and observed that in case where the AO chose to verify the return and

frame an assessment he has to issue a notice under Section 143(2) of the Act requiring the Assessee to produce his books of accounts and other material in support of his return. The High Court proceeded to observe:

“...Thereafter he can make an assessment under sub-section (3) of section 143 of the Act. Another important change incorporated in sub-section (2) of section 143 of the Act is that the notice under this sub-section cannot be served on an assessee after the expiry of 12 months from the end of the month in which the return is furnished. Therefore, in a case where a return is filed and is processed under section 143(1)(a) of the Act and no notice under sub-section (2) of section 143 of the Act thereafter is served on the assessee within the stipulated period of 12 months, the assessment proceedings under section 143 come to an end and the matter becomes final. Thus, although technically no assessment is framed in such a case, yet the proceedings for assessment stand terminated.”

21. In the present case, the facts speak for themselves. The Assessee filed its return on 21st October, 2008. The return was processed under Section 143(1) of the Act on 27th March, 2010. It has held by this Court in *Indu Lata Rangwala v. Deputy Commissioner of Income Tax (supra)* that the mere processing of a

return under Section 143(1) of the Act and the sending of an intimation to the Assessee will not make it an 'assessment'. At the same time, the consequences of the Department not issuing a notice under Section 143(2) of the Act within the time stipulated as far as the filing of the return in normal course is concerned was not examined either in Commissioner of Income Tax v. Kabul Chawla (supra) or Indu Lata Rangwala v. Deputy Commissioner of Income Tax (supra). As notice by the Punjab & Haryana High Court in Vipin Khanna v. Commissioner of Income Tax (supra), the CBDT circular makes it abundantly clear that once an Assessee does not receive a notice under Section 143(2) of the Act within the period stipulated then such an Assessee "can take it that the return filed by him has become final and no scrutiny proceedings are to be started in respect of that return."

22. The inevitable conclusion, therefore, in the present case, is that the ITAT was in error in holding that the assessment for AY 2008-09 should be treated as 'pending' whereas in terms of the above CBDT circular it should be treated as final in respect of which no scrutiny are to be started."

11. Hence, by 30.09.2003, the assessment was completed as no notice was issued and hence, it was not pending. Further Hon'ble Delhi High Court in case of CIT versus Kabul Chawla [2015-TIOL-2006-HC-DEL-IT] has held that:-

“Summary of the legal position

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

- i. Once a search takes place under Section 132 of the Act, notice under Section 153 A (1) will have to be mandatorily issued to the person searched requiring him to file returns for six AYs immediately preceding the previous year relevant to the AY in which the search takes place.
- ii. Assessments and reassessments pending on the date of the search shall abate. The total income for such AYs will have to be computed by the AOs as a fresh exercise.
- iii. The AO will exercise normal assessment powers in respect of the six years previous to the relevant AY in which the search takes place. The AO has the power to assess and

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

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

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

vi. Insofar as pending assessments are concerned, the jurisdiction to make the original assessment and the

assessment under Section 153A merges into one. Only one assessment shall be made separately for each AY on the basis of the findings of the search and any other material existing or brought on the record of the AO.

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

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

12. Therefore according to the decision of the Hon'ble Delhi High Court completed assessments can be interfered with by the Ld. Assessing Officer for making an assessment under section 153A, only on the basis of some incriminating material/requisition of documents/undisclosed income/property discovered, which was not disclosed during the course of original assessment

proceedings or while filing the original return of income. In the present case, we could not find out from the order of the Ld. Assessing Officer that addition has been made based on some incriminating evidence found during the course of search. Furthermore, the Ld. CIT (A) has also categorically held in para No. 9 of his order that despite having conducted the search on the premises of the appellant, no evidence or other material could be gathered to hold that the appellant had routed its own money. Even before us, The Ld. departmental representative could not show any incriminating evidence which is found during the course of the search which even remotely can lead to the above addition made by the Ld. Assessing Officer. In view of this, respectfully following the decision of the Hon'ble Delhi High Court in case of CIT versus Kabul Chawla (supra), we confirm the finding of the Ld. CIT (A) that addition has been made by the Ld. Assessing Officer without finding any incriminating evidence with respect to the share application money/share capital of Rs. 70 lakhs from 3 companies. In the result cross objection filed by the assessee succeeds.

13. As while deciding the cross objection of the assessee for assessment year 2002 – 03, We have held that the addition has been made in the hands of the assessee without unearthing any incriminating material during the course of the search carried on the assessee, such addition cannot be made. As no incriminating evidence could be brought to our notice. With respect to the above addition made by the Ld. Assessing Officer on account of share

capital/share application money and on commission expenditure, we do not find any infirmity in the order of the Ld. CIT (A) and therefore the appeal filed by the revenue is dismissed.

14. In the result, for assessment year 2002 – 03 ITA number 2703/DEL/2010 filed by the revenue is dismissed and cross objection filed by the assessee in CO No. 116/DEL/2013 filed by the assessee is allowed. Accordingly appeals of the assessee as well as the cross objection of the revenue for assessment year 2002 – 03 are disposed off.

Assessment year 2004 – 05

ITA No. 2121/Del/2012 (by AO)

ITA number 2702/Del/2010 (by AO)

CO No. 115/Del/2013 (by assessee)

15. ITA number 2702/Del/2010 is filed by the Assessing Officer against the order of the Ld. CIT (Appeals) – iii, New Delhi (hereinafter referred to as the Ld. CIT(A) dated 03/03/2010, wherein the he has deleted the addition of Rs. 1.84 crores on account of share capital issued to 16 companies as well as Rs., 92,000/- on account of commission paid for obtaining the accommodation entries with respect to these 16 shareholders, which was added by the Ld. Deputy Commissioner of Income Tax, CC – 23, New Delhi (hereinafter referred to as the Ld. Assessing Officer) in his order under section 153A of the Income Tax Act, 1961 passed on 26/12/2007 for assessment year 2004 – 05.

Pursuant to search and seizure operation carried out on 01/09/2005 on 'Vikas Surya group'.

16. The Revenue has raised the following grounds of appeal in ITA No. 2702/Del/2010 for the Assessment Year 2004-05:-

- “1. Whether on the facts and in the circumstances in law and on facts in deleting the addition of u/s 68 of the IT Act ?
2. Whether on the facts and in the circumstances of the case, the Id CIT(A) has erred in law and on fact in deleting the addition of Rs 92,000/- made by the AO u/s 68 of the IT Act on account of commission paid to obtain accommodation entries ?
3. Whether on the facts and in the circumstances of the case, the CIT (A) has correctly relied on the decision of the Apex Court in the case of M/s Lovely Exports (P) Ltd. without appreciating that the facts of the case are different from those of M/s Lovely Exports (P) Ltd.
4. The order of the CIT (A) is perverse and not tenable in law and on facts.”

17. The assessee has raised the following grounds of appeal in CO No. 115/Del/2013 for Assessment Year 2004-05 filed in above appeal preferred by revenue:-

- “1. On the facts and circumstances of the case and in law, the appeal filed by the department against the impugned order of Id CIT (A) should be dismissed and his order should be accordingly upheld.
2. On the facts and circumstances of the case and in law, Id CIT(A) ought to have allowed the appeal of the assessee on the further ground that, the assessment originally completed did not abate under second proviso to section 153A and therefore, income originally assessed could not have been disturbed as no incriminating material was found in the search.”
18. The brief facts of the case are that assessee is a company who filed its return of income for the impugned assessment year on 30/10/2004 at total income of Rs. 755290/- and the above return was processed and assessed under section 143 (1) of the income tax act. This return of income of the assessee was not picked up for the scrutiny.
19. On 01/09/2005 the search took place on ‘Vikas Surya group’ and above named assessee company which is part of that particular group therefore, notice under section 153A of the income tax act was issued upon the assessee on 15/06/2006 requiring it to furnish the true and correct return of total income for the aforementioned assessment year. In response to that notice the assessee filed its return of income on 9/2/2007 declaring income of Rs. 7 55290/-. Thereafter notices under section 142 (1) and 143 (2) were

issued on is 20/4/2007. The impugned assessment year is assessment year 2004 – 05 for which the due date of filing of the return was 30/9/2004 and the last date for issue of notice under section 143 (2) was on 30/9/2005. As the date of search is 01/09/2005. The impugned assessment year was pending for assessment as on the date of the search and hence it is abated.

20. During the assessment proceedings it was noted by the Ld. Assessing Officer that assessee has obtained Rs. 1.84 crores from 16 companies. He noted that the Additional Director of Investigation, New Delhi has recorded the statement of 2 persons under section 131 of the income tax act and both the above persons as stated in the respective statement that they are engaged in the business of providing accommodation entries by taking equivalent cash and certain premium. They also disclosed the modus operandi of their operations stating that they have floated a number of private limited companies, opened their bank accounts, obtain their permanent account number and filed the income tax return of such companies declaring a very nominal income. They also explained how they used to give the accommodation entries by charging various premiums ranging from 0.25% to 2%, depending upon the nature and amount of the entries. The Ld. Assessing Officer further attached the copies of the statement of these 2 persons.
21. During the assessment proceedings, the assessee company was asked to furnish the necessary details of share application money and share capital received by them by submitting the confirmation as well as the audited

accounts and copies of the income tax returns of those share applicants. The Ld. Assessing Officer also issued summons to various parties concerned and the summons were either received back unserved or were not complied with. This was brought to the notice of the assessee by issue of notice dated 31/10/2007, which was replied by the assessee on 12/11/2007, wherein the assessee submitted the address of the parties. The Ld. Assessing Officer also issued the fresh summons on these addresses. However, they were also not served on the parties as returned by the postal authorities. Therefore, on the basis of information available on record, the Ld. Assessing Officer noted that in case of some of the parties on the date of issue of cheques to the assessee company as a capital on the earlier date or before that cash was deposited in their bank account to make available the bank balance with those share applicants. In case of some of the parties, Inspector was deputed to make local enquiry at address furnished by the assessee, he found that these companies are not existing at the given address. In view of the above facts the Ld. Assessing Officer made an addition of Rs. 1.84 crores in the hands of the assessee under section 68 of the Income Tax Act. The Ld. Assessing Officer further made the addition of Rs. 92,000/- in the hands of the assessee holding that the above share application obtained by the assessee is in the form of accommodation entry and the assessee might have incurred an expenditure of commission at the rate of 0.5% of the total amount of the above entries and therefore this amount has been spent by the assessee.

Hence, the addition was made. Consequently, the assessment order under section 153A of the Income Tax Act was passed on 26.12.2007 under section 153A of the Income Tax Act, 1961.

22. The assessee being aggrieved with the order of the Ld. Assessing Officer preferred an appeal before the Ld. CIT (A) who Vide order dated 3/3/2010 in appeal No. 477/07 – 08 decided the issue by deleting the addition of Rs. 1.84 crores in the hands of the assessee on account of the share application money of this is 16 companies as well as consequent deletion of the addition of Rs., 92,000/ on account of expenditure incurred on accommodation entries. The main reason for the deletion of the above addition by the Ld. CIT(A) was that that the assessee has submitted the copies of the share application forms, the minutes of the board resolution authorizing the companies to make the application for shares, copy of certificate of incorporation, copy of permanent account number etc. He further held that though inspector has given a report to the Ld. Assessing Officer that the concern companies were not found existing on the given address. However, these companies were regularly doing the business and filing the tax return on regular basis, the taxes are also paid by them on the income soared. Therefore according to the Ld. CIT (A). The assessee has discharge its onus under section 68 of the income tax act. He further stated that there are no incriminating documents or other assets which were found or seized to indicate that the appellant had in fact rooted its own money through these companies. He further submitted that

the statement given by the certain individuals recorded by the investigation wing of the income tax Department under section 131 of the act on 22/9/2003.

Much before the search may have cost suspicion in the mind of the assessee Officer despite having conducted the search on the premises of the appellant is no evidence or other material could be gathered to hold that the appellant had rooted its own money. It was further held by him that these were the general statements given by those individuals. Therefore aggrieved by the order of the Ld. CIT (A), revenue is in appeal before us.

23. The assessee has also filed across objection, challenging that the addition made by the Ld. Assessing Officer is not based on any incriminating documents and therefore is not sustainable. The claim of the Ld. authorized representative is that 153A notice was issued to the assessee on 15/6/2006 for assessment year 2004 – 05 for which the assessee had already filed its return of income on 30/10/2004 and as no notice under section 143 (2) was issued to the assessee on or before 30/9/2005, therefore assessment was not pending at the time of issue of notice under section 153A of the income tax act. He therefore submitted that as no incriminating evidence as recorded in the assessment order or otherwise was found during the course of the search and therefore he contended that in the completed assessment no addition can be made by the Ld. Assessing Officer without finding any incriminating material during the course of search.

24. The Ld. departmental representative vehemently contested this argument of the Ld. authorized representative stating that according to the provisions of section 153A of the income tax Act, pendency of the assessment is required to be seen at the time of initiation of the search under section 132 of the income tax act and not at the time of issue of notice under section 153A of the income tax act. He therefore submitted that as the search took place on 01/09/2005 by which date the last date by which the notice under section 143(2) should have been issued did not elapse and therefore the assessment for the Assessment Year 2004 – 05 is an abetted assessment and Ld. Assessing Officer gets an absolute power to make an assessment as if it is a regular assessment. He further referred to the decision of the Hon'ble Delhi High Court in case of CIT versus Kabul Chawla (supra) wherein it has been held that 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.. He therefore submitted that the impugned assessment is abetted.
25. We have carefully considered the rival contention and also perused the orders of the Ld. lower authorities. Apparently in this case for assessment year 2004-05, assessee furnished its return of income on 30/10/2004. The notice under section 143 (2) could have been issued to the assessee on or before

30/9/2005. However, search took place on 01/09/2005 in the group concern as well as the assessee and therefore as on the date of the search the assessment for assessment year 2004 – 05 was pending. Therefore, respectfully following the decision of the Hon'ble Delhi High Court in CIT versus Kabul Chawla which is relied by the Ld. CIT DR the assessment for AY 2004 – 05 stands abetted and Assessing Officer is empowered to make the assessment of disclosed income and in addition thereto of undisclosed income, which is unearthed on account of incriminating documents found during the course of search. In view of this, the cross objection filed by the assessee is dismissed.

26. On the appeal of the revenue, the Ld. CIT DR vehemently submitted that assessee has obtained share capital from 16 companies which are belonging to the group of the person who are entry operators and therefore the assessee has failed to prove the identity and creditworthiness of those companies. Regarding genuineness of the transaction of these companies, he submitted that as the entry operators have given the share capital accommodation entries to the assessee, the transactions cannot be said to be genuine. He vehemently supported the order of the Ld. Assessing Officer and stated that Assessing Officer has conclusively proved that the companies are not existing at the given address and before giving money to the assessee on the previous day or on some earlier occasion they have deposited cash in their bank accounts to generate bank balance to give it is resemblance of

genuineness of the transaction and their creditworthiness before issue of the cheques. He further submitted that the Ld. CIT(A) has also not looked into the whole transaction with a view to examine a fact that these are not the normal transactions, but the transactions with entry operators. He further submitted that the statement of the parties which is referred to by the Ld. Assessing Officer in his order are the entry operators and therefore the Ld. CIT (A) has erroneously referred to them as general statements. He relied upon the several decisions as under

- i. Navodaya Castles private limited versus CIT 2015 – TIOL – 314 – S. C – IT & 367 ITR 306 (2014) (DEL)
- ii. CIT versus M, A. F Academy private limited 361 ITR 258 (2014) (Delhi)
- iii. Rick Lunsford trade and investment limited versus CIT 2016 – TIOL – 207 -SC – IT and 385 ITR 399 (2016) (Kolkata)
- iv. CIT versus Nipun builders and developers private limited (2013) 350 ITR 407 (Delhi)
- v. CIT versus Nova promoters and Finlay's private limited (2012) 342 ITR 169 (Delhi)
- vi. CIT versus ultramodern exports private limited (2013) 40 Taxmann.com 458 (Delhi)

- vii. CIT versus Frostair private limited (2012) 26 Taxmann.com
11 (Delhi)
- viii. CIT versus N R portfolio private limited (2013) 263 CTR
456 (Delhi)
- ix. CIT versus Empire built Tech private limited (2014) 366
ITR 110 (Delhi)
- x. CIT versus focus exports private limited (2014) 51
Taxmann.com 46 (Delhi)

In the end, he submitted that the order of the Ld. CIT (A) is erroneous.

27. The Ld. authorized representative submitted that during the course of assessment proceedings, the assessee has submitted the complete details to show that the amount has been received from the company's for allotment of shares to them in the appellant company. Their identity is proved and sources are also stents explained. He submitted that the assessee has also submitted the assessment particulars of all these companies were provided and hence discharged the complete onus. He submitted that in the case, the Assessing Officer is not satisfied about the capacity of the source of the receipt of these funds, and then the assessment should have been done of this sum in the hands of those companies and not the assessee. He submitted that statements of the persons recorded by the Assessing Officer or the investigation wing have not been given to the assessee prior to the assessment order but same were attached as Annexure to the assessment

order. He further submitted that the assessee has not been given any opportunity for cross examination of these persons. He submitted that such request to the Assessing Officer could have been made only if the copies of the statements were given to the assessee. He further stated that in absence of any cross examination and in not following the process of natural Justice by the Ld. Assessing Officer no adverse inferences could have been drawn against the assessee. He further stated that in the statement of those persons which are given to the assessee as part of the assessment order also does not say anything about the assessee and therefore these are stated to be the general statement made by those persons. Even otherwise, they do not relate to the assessee and assessee does not want to comment on such statements which do not say anything about the transaction entered into by the assessee. He extensively referred to the statement recorded by the investigation wing which is attached to the assessment order stating that these statements do not relate to assessee at all. Further, he submitted that merely because the cash has been deposited by these companies before issue of the cheques to the assessee company share capital it does not become a non-genuine transaction. Therefore, he submitted that Ld. CIT (A) has correctly deleted the addition as assessee has discharged the onus of the issue of the share capital as provided under section 68 of the Income Tax Act.

28. We have carefully considered the rival contentions and also perused the orders of the lower authorities. Admittedly, the assessee has issued shares in

the name of 16 companies during the year for Rs. 1.84 crores. Before the Assessing Officer the assessee has submitted the preliminary details such as share application forms, minutes of the board resolution authorizing the companies to make the application for the shares, copy of the certificate of incorporation copy of the permanent account number and the assessment details of those companies who were regularly doing the business and filing their tax returns on regular basis. In view of this, it is correct that assessee has submitted the primary details to the Ld. Assessing Officer to discharge its initial onus under section 68 of the act. However, the issue here is that Ld. Assessing Officer after examination of the preliminary details submitted by the assessee issued summons to several companies which are either not served or were not complied with. The Assessing Officer further deputed the inspector who also found that these companies did not exist at the given addresses. However, the report of the inspector was on the basis of the local enquiries. What are those local enquiries conducted by the inspector and what is his report and how these companies are existing and being assessed by the income tax Department, is not known. The Ld. Assessing Officer could have examined these details from the Assessing Officer of those companies to ascertain the correct facts of the income and if those companies are not existing how they are filing the return of income, which are being accepted by the revenue and how they are assessed to income tax. This basic enquiry which should have been done by the Ld. Assessing Officer has not been

done. Furthermore, the assessee has submitted that addition have been made by the Assessing Officer based on the statement of two-person which was not recorded by the Assessing Officer but by the investigation wing of the income tax Department. Those 2 statements are also attached with the assessment order citing various annexure. We have also perused those statements. We did not find the name of the assessee in those statements. However, it is apparent that those persons have given the complete modus operandi about how do they carry on this business of providing accommodation entries. However, to link those statements with the transactions entered into by the assessee of issue of share capital, the Ld. Assessing Officer should have carried out some enquiries with respect to the directors of those companies as well as the transactions of the assessee and also should have verified whether these companies are really shell companies or in fact carrying out any business at or from the given address. Further, we have carried out the examination of the list of the companies which are given at page No. 2 of the assessment order of those 16 companies and also compared the names of that company which are given by the entry operator vide a statement dated 22/9/2003, which is annexed as part of the assessment order. On comparison of the names of the companies out of the 16 company. We could only find the name of the company which is mentioned at serial No. 11 at page No. 2 of the assessment order and we could not find all other 15 companies in that particular list. Therefore it is also not apparent

that how the Assessing Officer has stated that these companies from which the assessee has obtained the share application money are connected with the entry operators whose statement has been recorded by the investigation wing of the income tax Department. Coming to the order of the Ld. CIT (A) he has also accepted the version of the assessee despite there being the statement of the entry operators and without examining the fact whether this entry operator is related to all these companies or not, has deleted the addition. It should have been the concern of the Ld. CIT (A) to verify the genuineness of the transaction of these companies for issue of share capital. Furthermore, the Ld. CIT (A) has merely brushed aside the statement recorded of these entry operators stating that they are general in nature. Without examining whether there is any connection between these companies from whom the assessee has obtained share capital and those entry operators he has deleted the addition. In view of this we are of the opinion that the Ld. Assessing Officer has made the addition without making adequate enquiries and not giving assessee an opportunity to rebut all evidences including the statement of entry operators. The Ld. CIT(A) has deleted the addition without examining the connection of those entry operators with these companies and merely relied upon the written submission made by the assessee. We have also perused the various decisions cited by the Ld. departmental representative before us. However, in none of the cases the facts are like in the case before us that statement of the entry operators were

recorded prior to the date of the search and same were not given to the assessee in assessment process, the name of the companies which were given by the entry operators did not find place in the list of companies to whom issue of shares made by the company, except the fact that there are serious concern about the identity, creditworthiness and genuineness of these transactions. It is also fact that assessee has failed to produce the directors of the investor company and report of the inspector is also negative. Despite this, there are serious differences between the decision cited before us as well as the case of the assessee with respect to the statement of those entry operators, list of the companies mentioned by those entry operators and linkage of them with the transactions entered into by the assessee is sorely missing. In view of this we set aside the whole issue back to the file of the Ld. Assessing Officer with a direction to examine the taxability under section 68 of the income tax act of these share application money of Rs. 1.84 crores afresh after making due enquiries. Needless to say that assessee must be given the adequate opportunity of hearing as well as of the cross examination as stated in the order of the Ld. CIT (A) of those entry operators before passing the judgment on the merits of the issue. In the result ground No. 1 of the appeal of the revenue is set aside to the file of the Ld. Assessing Officer accordingly.

29. The ground No. 2, 3 and 4 are also related to the same issue and are consequential with respect to the addition of Rs. 92,000/–, we direct the Ld. Assessing Officer to examine the addition only after deciding the ground No. 1

of the appeal afresh. In view of this ground No. 2 – 4 of the appeal of the revenue are dismissed.

30. In the result appeal of the revenue is allowed for statistical purposes.
31. Now we come to ITA No. 2121/Del/2012 for assessment year 2004 – 05 which is filed by the revenue against the order of the Ld. CIT(A) –XXXIII, New Delhi dated 24/2/2012 passed in appeal No. 613/10 – 11/413 against the order of the Ld. Assessing Officer passed under section 153A, read with section 143 (3) of the Income Tax Act, 1961 on 31/12/2010 passed in pursuance of searches seizure operation carried out on the assessee on 19 – 01 – 2009.
32. The revenue has raised the following grounds of appeal in ITA No. 2121/Del/2012 for the Assessment Year: 2004-05:-
 - “1. On the facts and in the circumstances of the case, the CIT (A) has erred in law and on facts in deleting the disallowance of Rs. 14,38,008/- made by the Assessing Officer on account of payments made to various suppliers/contractors as the assessee had failed to prove the genuineness of these expenses.
 2. On the facts and in the circumstances of the case, the CIT(A) has erred in law and on facts in deleting the addition of Rs. 1,84,00,000/- made by the Assessing Officer u/s 68 of the Income tax Act, 1961 on account of bogus share application money received by the assessee.

- 3 On the facts and in the circumstances of the case, the CIT (A) has erred in law and on facts in deleting the addition of Rs. 92,000/- made by the Assessing Officer u/s 68 of the Income tax Act, 1961 on account of commission paid by the assessee for obtaining accommodation entries in the garb of share application money.
- 4 On the facts and in the circumstances of the case, the CIT(A) has erred in not appreciating the fact that the appeal of the department on the same issue is still pending before the ITAT.
- 5 The order of CIT (A) is erroneous and is not tenable on facts and in law.”
33. As already stated, while stating the facts of the various appeals in the case of the assessee that originally there was a search on Surya Vikas group on 01/09/2005. Pursuant to that for this assessment year assessment under section 153A was already passed which was subject matter of appeal in ITA No. 2702/Del/2010. Now another search was carried out on 19/1/2009 on the assessee company itself and consequent to that notice under section 153A of the Act was issued on 27/11/2009. In response to that the company filed its return of income declaring income of Rs. 755290/- on 18/12/2009. During the assessment, it was noted by the Ld. Assessing Officer that assessee has purchased some material from for companies/firms etc amounting to Rs. 1438008/- of which assessee could not prove the genuineness of the

expenses of those purchases and therefore the Ld. Assessing Officer after holding that assessee has not shown the TIN number of those parties made the disallowance of this sum. Furthermore, the income assessed under section 153A vide order dated 26/12/2007 of Rs. 19247290/- was further enhanced by the disallowance of the above sum and total income was determined at Rs. 20685298/-. The Ld. Assessing Officer further mentioned a paragraph about the addition already made in the hands of the assessee of Rs. 1.84 crores on account of sale application money as well as disallowance/addition of Rs. 92,000/- on account of the commission on the same. Consequently, assessment under section 153A/143 (3) of the Act was passed on 31/12/2010 determining total income of the assessee of Rs. 20685298/-. Assessee being aggrieved with the order of the Ld. Assessing Officer preferred an appeal before the Ld. CIT(A).

34. Before the Ld. CIT (A) assessee submitted that whole addition of Rs. 1438008/- has been made by Id Assessing Officer for the only reason mentioned in show cause notice dated 16/12/2010. the Ld. Assessing Officer made some enquiry, in some other case in respect of M/s Spiral Aluminum and Glass which was not founded the address mentioned in the bill. Therefore, on the same ground he issued a show cause notice to the appellant. The Ld. CIT(A) held that assessee has not purchased any material from M/s Spiral Aluminum and Glass. He further held that all the bills shows the name, address and phone number of the contractor or suppliers,

description of the goods supplied and nature of services rendered along with the rates and measurement etc. According to him, it goes to show that the transaction with these parties have been made in the normal course of the business of the assessee. Further, the assessee has also made payments through account payee cheques to these parties after deducting income tax at source by cheques, therefore it cannot be stated that these parties are not available because on perusal of the tax deduction at source records most of these parties are assessed to tax separately from year to year. Furthermore these parties are the contractors and have done some work for the assessee. Therefore, they need not have the TIN number. Hence, the Ld. Assessing Officer, according to the Ld. CIT(A) was erroneous in making these addition/disallowances, hence he deleted the same. Therefore, revenue aggrieved with the order of the Ld. CIT(A) preferred appeal before us.

35. Ld. departmental representative vehemently relied on the order of the Ld. Assessing Officer, whereas the Ld. Authorized Representative relied upon the order of the Ld. CIT(A) and reiterated the same submission, which were made before him. He further submitted that this is an assessment under section 153A of the Income Tax Act and as the assessment for assessment year 2004-05 is not pending as on that day therefore, the addition should have been made only on the basis of the incriminating material found during the course of the search, which is absent with respect to this addition. He therefore submitted that this addition cannot be made on technical ground as

no incriminating material was found as well as on the merit as the parties have existed, payments have been made to them through account payee cheques, the complete details of the work done is contained in the bills, and tax deduction at source have been made from this parties payment who are regularly assessed to income tax. In response to the argument of the Ld. Authorized Representative that there is no incriminating material pertaining to this addition, the Ld. departmental representative submitted that addition can be made in the search proceedings even in absence of any incriminating materials.

36. We have carefully considered the rival contentions and perused the orders of the lower authorities. Apparently in this case, the assessment under section 153A of the income tax act has been made for assessment year 2004 – 05 on 31/12/2010 pursuant to the search on 19/1/2009 on the assessee. Apparently the assessment proceedings were not pending on the date of search in the present case. Therefore, if any addition is required to be made during the course of framing of the assessment under section 153A of the Income Tax Act, it should have been made on the basis of the incriminating material found during the course of the search. With respect to the addition made by the Ld. Assessing Officer of disallowing the expenditure of purchases and work done by the assessee through contractor was not based on any incriminating material CIT(A) has recorded in his order that no adverse material has been brought on record by the Ld. Assessing Officer for making this disallowance.

No such material has also been brought before us. Therefore, apparently respectfully following the decision of the Hon'ble Delhi High Court in case of CIT versus Kabul Chawla (supra), in the concluded/completed assessment, no addition can be made in absence of incriminating material hence, this issue itself the addition deserves to be deleted.

37. Even otherwise on the merits of the case, the Ld. Assessing Officer has made the disallowance stating that spiral aluminum and glass was not found at the given address and therefore this disallowance has been made. In the present case, the Ld. CIT (A) has categorically recorded that assessee has not made any purchases from this party, which is apparent from the show cause notice issued by the Ld. Assessing Officer that it has been issued erroneously. Furthermore, the Ld. CIT (A) has recorded that all payments have been made by the cheque and on which tax is deducted. With respect to the bills all the bills are having the name, address and telephone numbers of the persons from whom the work has been carried out by the assessee. The details of the bill are also exhaustive with measurement and the rates of amount paid. It is also not denied that these parties are regularly assessed to income tax and are in the business for which the payments have been made by the assessee to them. Therefore, we do not find any infirmity in the order of the Ld. CIT(A) in deleting the above disallowance. In the result ground No. 1 of the appeal of the revenue is dismissed.

38. The ground No. 2 of the appeal of the revenue is with respect to the addition of Rs. 1.84 crores made by the Assessing Officer under section 68 of the income tax act, 1961 on account of bogus share application money received by the assessee. Ground No. 3 of the appeal of the revenue is with respect to deletion of the addition of Rs. 92,000 made by the Assessing Officer under section 68 of the income tax act on account of commission paid by the assessee for obtaining accommodation entries in the garb of share application money. Ground No. 4 of the appeal of the revenue is with respect to the fact that the appeal of the Department is pending on the same issue before the coordinate bench.
39. We have carefully perused these grounds of appeal which are already dealt with by us in ITA number 2702/Del/2010 where we have set aside both these addition to the file of the Ld. Assessing Officer. Therefore, these grounds are not required to be adjudicated here, as they have already been taken care of. In that appeal even otherwise this ground do not arise from the assessment order as no incriminating material have been found with respect to these additions in this assessment year and therefore even otherwise this addition cannot be sustained in this appeal. The Ld. Assessing Officer is further directed to proceed to make the assessment at Rs. 755290/- in the present case as the original addition was already deleted by the Ld. CIT (A) and now we have set aside the whole issue back to the file of the Assessing Officer. In view of this ground No. 2, 3 and 4 of the appeal of the revenue are dismissed.

40. In view of this, the appeal of the revenue in ITA No. 2121/Del/2012 for assessment year 2004 – 05 is dismissed.

A Y 2005-06

ITA No. 2122/Del/2012 (by revenue)

41. This appeal is filed by the revenue against the order of the Ld. CIT (Appeals) –XXXIII, New Delhi dated 24/2/2012 in appeal No. 614/10 – 11/414 wherein the disallowance of Rs. 7416612/- made by the Assessing Officer on account of payment made to various suppliers and contractors is deleted.
42. The revenue has raised the following grounds of appeal in ITA No. 2122/Del/2012 for the Assessment Year: 2005-06:-
- “1. On the facts and circumstances of the case, the Id CIT (A) has erred in law and on facts in deleting the disallowance of Rs. 7416612/- made by the Assessing Officer on account of payments made to various suppliers/ contractors as the assessee had failed to prove the genuineness of these expenses.
2. The order of the Id CIT(A) is erroneous and is not tenable on facts and in law.”
43. Briefly stated the facts of the case are that search and seizure operation was carried out on 19/01/2009 on the premises of the assessee and pursuant to

that notice under section 153A of the income tax act was issued on 27/11/2009 in response to which the assessee filed its return of income on 18/12/2009 Rs. 4 899140/-. During the course of assessment proceedings it was noted by the Ld. Assessing Officer that assessee has paid a sum of Rs. 7416612/- to 8 contractors where the vouchers did not have the requisite information like TIN number and bill number etc therefore he disallowed the above sum. Consequently he passed an order under section 153A, read with section 143(3) of the Income Tax Act, 1961 on 31/12/2010 for Rs. 8315752/- against the assessed income under section 153A of the Income Tax Act per order dated 26/12/2007 of Rs. 899140/-. Against this the assessee preferred an appeal before the Ld. CIT (A) who vide order dated 24/2/2012 deleted the addition holding that impugned assessment is completed assessment and in absence of any incriminating material the addition cannot be made. However he upheld the addition made by the Ld. Assessing Officer in 153A of the Act. With respect to the merits of the addition he held that the Ld. Assessing Officer vide letter dated 16/12/2010 found that party M/s spiral aluminum and glass Ltd is nonexistent and therefore the purchases made from these party deserves to be disallowed as non genuine. However, the Ld. CIT appeal noted that assessee has not purchased any material from that party and further the assessee has produced the concerned bills and vouchers before the Assessing Officer which contains the name of the parties, addresses of the seller/ service providers. Furthermore, the tax has been deducted from

these parties and payments have also been made to these parties by account payee cheque. Therefore it cannot be said that these parties are non genuine. He further questioned that merely because in some other party, which was not found and from whom assessee has not purchased any material the same analogy cannot be applied in the case of the assessee without finding any adverse material.

44. The Ld. departmental representative relied upon the orders of the Ld. Assessing Officer and Ld. authorized representative relied upon the order of the Ld. CIT (A) and further submitted that there is no incriminating material found during the course of search in the case of the assessee as these assessment is completed assessment. He further submitted that this is the 2nd assessment under section 153A of the income tax act in the hands of the assessee and in both the assessment proceedings, as well as in both the search, no incriminating documents with respect to this addition/disallowances was found. He therefore contested that this addition cannot be made in the hands of the assessee for this reason. On the merits of the issue, he submitted that the assessee is carrying on its business and therefore the payments have been made to these parties for the purpose of the work carried on by these parties and material supplied by them. They are all assessed to income tax; they are also subject to tax deduction at source on payment by the assessee and are regularly supplying material to the assessee. He further stated that payments have also been made through

account payee cheque. He further stated that identical issue arose in the assessment year 2004-05; there also the Ld. CIT(A) has deleted the disallowance.

45. We have carefully considered the rival contention and also perused the orders of the lower authorities. The impugned assessment year before us is assessment year 2005 – 06 for which the assessee filed its return of income on 27/10/2005 and which was assessed under section 143 (1) of the Income Tax Act. Further with respect to the 2nd search carried on the assessee on 19/1/2009, the assessment under section 153A was framed. Original assessment under section 153A was passed on 26/12/2007 in consequence to the search carried out on Surya Vikas group on 1/9/2005. Therefore, the present assessment year is a completed assessment year in the present case. Admittedly, in the assessment order or before us the Ld. Departmental Representative could not point out any incriminating material with respect to the disallowance made by the Ld. Assessing Officer of these expenses. Therefore, respectfully following the decision of the Hon'ble Delhi High Court in case of CIT versus Kabul Chawla (supra), no addition can be made in the hands of the assessee for these and impugned assessment year in absence of any incriminating evidence as this assessment is concluded/completed assessment. Even otherwise this issue arose in assessment year 2004 – 05 wherein on identical facts and circumstances we have deleted the disallowance made by the Ld. Assessing Officer. The parties before us

confirmed that there is no change in the facts and circumstances of the case.

Therefore, for this year too for the same reasons as given by us in deleting the addition for assessment year 2004–05, with respect to the disallowance of the expenses we direct the Ld. Assessing Officer to delete the above disallowance. Accordingly, we confirm the order of the Ld. CIT appeal. In the result, the solitary ground of the appeal of revenue is dismissed.

46. In the result ITA No. 2122/Del/2012 for assessment year 2005–06 filed by the revenue is dismissed.

Assessment year 2006 – 07

ITA No. 2123/Del/2012 (by revenue)

47. This appeal is filed by revenue against the order of the Ld. CIT (A) – XXIII, New Delhi dated 24/2/2012 in appeal No. 615/10 – 11/415 wherein the addition of Rs. 3986752/- on account of payment made to various suppliers and contractors made by the Ld. Assessing Officer is deleted.
48. Revenue has raised the following grounds of appeal in ITA No. 2123/Del/2012 for the Assessment Year: 2006-07:-
- “1. On the facts and circumstances of the case, the Id CIT(A) has erred in law and on facts in deleting the disallowance of Rs. 3986752/- made by the Assessing Officer on account of payments made to various suppliers/ contractors as the assessee had failed to prove the genuineness of these expenses.

2. The order of the Id CIT(A) is erroneous and is not tenable on facts and in law.”
49. Parties before us submitted that the facts relating to this appeal is identical to the ITA No. 2122/Del/2012 for assessment year 2005-06. They further submitted that their argument also remains the same. The Ld. Authorized Representative further contended that in the present case the assessment is passed under section 153A of the Act on the basis of search carried out on 19/01/2009 wherein the addition of Rs. 3986752/- has been made to the income already assessed under section 153A for order dated 26/12/2007 of Rs. 9299570/-. He further submitted that the present assessment is also a completed assessment and not pending at the time of initiation of the search. Therefore, if any addition is required to be made should have been made on the basis of the incriminating documents found during the search otherwise not. He vehemently submitted that there is no incriminating material found during the course of the search carried out by the income tax Department on 19/01/2009 as well as on 01/09/2005.
50. We have carefully considered the rival contentions and also perused the orders of the lower authorities. We have already decided the identical issue in the case of the assessee in ITA No. 2122/Del/2012 for assessment year 2005-06 wherein we have deleted the addition on merit as well as held that in absence of any incriminating material the disallowance cannot be made in the

hands of the assessee as this assessment year is also a completed assessment. Therefore, for the similar reasons, we confirm the order of the Ld. CIT (A) and direct the Ld. Assessing Officer to delete the disallowance of Rs. 3986752/-. Consequently, ground No. 1 of the appeal of the revenue is dismissed.

51. In the result appeal of the revenue in ITA No. 2123/Del/2012 for assessment year 2006-07 is dismissed.

Assessment year 2007 – 08

ITA No. 2706/Del/2013 (by revenue)

CO No. 96/Del/2014 (by assessee)

52. This appeal is filed by the revenue against the order of the Ld. CIT (A) dated 21/1/2013 in appeal No. 899/10 – 11/450 for assessment year 2007 – 08 contesting the following grounds of appeal:-

1. On the facts and in the circumstances of the case, the CIT (A) has erred in deleting the addition of Rs. 3 90, 0954/- made by the Assessing Officer on account of suppliers and contractors.
2. The order of the CIT (A) is erroneous and is not tenable on facts and in law.

53. The assessee has raised the following grounds of appeal in CO No. 96/Del/2014 for Assessment Year 2007-08 :-

- “1. Under the facts and circumstances of the case and in law Ld. CIT (A) erred in confirming the addition of 1020912/- for lease agreement charges, paid for putting the properties, being stock in trade, on rent for enhancing market value and marketability of the properties.
2. Under the facts and circumstances of the case and in law Ld. CIT (A) erred in disallowing lease agreement charges and brokerage expenditure ignoring the fact that they were business expenditure as the concerned properties were stock in trade and income on their sale has been declared and accepted by the Department as business income.
- 3, under the facts and circumstances of the case and in law, the Ld. CIT (A) ^ in confirming the addition of Rs. 3 086234/- under section 14 A of the act ignoring the fact that there is no requisite satisfaction of the Ld. Assessing Officer about the claim of the assessee, having regard to the accounts of the assessee. ”
54. The brief facts of the case , is that assessee is a company which is showing income from business, capital gain and house property as well as income from other sources. The assessee is a builder and real estate developer and involved in the development of a shopping complex in New Delhi. It was engaged in the construction work at Rohini, Delhi. Originally for assessment year 2007-08, assessee filed its return of income on 31/10/2007, which was

subsequently revised on 21/12/2007 Rs. 426593900/-. The return of income was duly processed on 28/4/2008 under section 143 (1) of the income tax act.

55. Search and seizure operation was carried out on 19/01/2009 on the company and consequent to that assessment under section 153A of the Income Tax Act was initiated by issue of notice on 27/11/2009. In respect to the said notice the assessee filed the return of income declaring income of Rs. 26593900/- on 18/12/2009.
56. During the course of assessment proceedings, the Ld. Assessing Officer has noted that assessee is using its funds for advancing loans to the sister concerns and further it has received a dividend of Rs. 2133682/- which is an exempt income and assessee has not disallowed any sum under section 14A of the Income Tax Act. Therefore, assessee was asked to give the details of the disallowance with respect to the interest expenditure which has been utilized for the purpose of making any investment in those exempt income earning investments. Assessee submitted calculation of interest attributable to investment in mutual funds and share application money amounting to Rs. 3086234/- which was disallowed by the Ld. Assessing Officer under section 14A of the income tax act. Further, Rs. 3900954/- was also disallowed out of the expenses paid to various parties such as petty contractors for the reason that the TIN not quoted in the bills supplied by those contractors as assessee has failed to prove the genuineness of those expenditure. Further, the assessee has claimed an expenses of Rs. 1020912/- towards lease

agreement charges incurred. During the year for preparation of the lease agreements of the property is given on rent by the assessee. The Ld. Assessing Officer stated that this expenditure is not for the purpose of the business income but it is related to the income from 'house property'. The assessee contested that these expenditure are businesses expenditure of the assessee as they are required to populate the shopping complex. It was stated by the assessee before the Ld. Assessing Officer that if the shopping complex is first put on hire and then sold it fetches good value as it has continued stream of earning to the buyer of that real estate. Assessee therefore submitted that this expenditure is allowable as business expenditure. Alternatively assessee further stated that these expenditure, if considered under income from house property, same may be allowed as expenditure under that had, if permitted. The Ld. Assessing Officer held that this expenditure are not deductible under section 37(1) or Section 24 of the income tax act while computing the income from the house property and therefore the deduction was denied. Consequently, assessment under sections 153A, read with section 143 (3) of the act was passed on 31/12/2010 for assessment year 2007 – 08. Assessee being aggrieved with the order of the Ld. Assessing Officer preferred an appeal before the Ld. CIT (A). The Ld. CIT(A) deleted the addition on account of the disallowance of contract expenses payment. However, confirmed the disallowance under section 14 A as well as lease agreement expenditure. On the disallowance deleted

revenue is in appeal and on disallowance confirmed assessee has filed the cross objection.

57. The Ld. departmental representative with respect to the appeal of the revenue has reiterated the same argument which was stated by the Ld. Assessing Officer in its assessment order. He further submitted that the identical issue is covered in the earlier years case of the assessee. Therefore, they may also be considered. With respect to the disallowance under section 14 A, on cross objection of the assessee, he submitted that assessee has himself stated that the interest expenditure is disallowable and therefore the addition has been correctly confirmed by the Ld. CIT (A). With respect to the lease agreement charges he stated that these are not deductible expenditure either under income from house property as well as under the computation of income under the head profits and gains of business.
58. Ld. authorized representative submitted that disallowance on account of the petty contract expenses incurred by the assessee are also contested by revenue in earlier years. He reiterated the same arguments that were raised in earlier years with respect to the genuineness of the payment made by the assessee to these contractors. He further submitted that all the addition made by the Ld. Assessing Officer in the present case are not emanating out of the any documentary evidence which is incriminating evidence found during the course of search. He further submitted that assessment year 2007 – 08 is not an abetted assessment, but a completed assessment. He therefore submitted

that looking at the provisions of section 153A of the income tax act additions can be made to the returned income of the assessee on the basis of incriminating evidences.

59. We have carefully considered the rival contentions and also perused the orders of the lower authorities. The fact of filing of the return and pendency of the assessment shows that for assessment year 2007- 08, assessee filed its return of income on 31/10/2007 for Rs. 26593900/- which was subsequently revised on 21/12/2007 and same was processed under section 143 (1) on 28/4/2008. The search took place on 19/1/2009 and notice under section 153A was issued on 27/11/2009 in the case of the assessee for which the assessee filed return of income under section 153A on 18/12/2009 for Rs. 26593900/-. For assessment year 2007-08, the time-limit for issue of notice under section 143 (2) expired on 30/9/2008. Therefore, on the date of search this assessment was not pending. Hence, it does not get abetted but is a completed assessment. This view is also supported by the decision of the Hon'ble Delhi High Court in case of CHINTELLTD INDIA Vs DEPUTY COMMISSIONER OF INCOME TAX - CIRCLE-8 [2017-TIOL-1366-HC-DEL-IT]. Therefore, as held by the Hon'ble Delhi High Court in Pr. CIT versus Kabul Chawla (supra) addition in such assessment could be made only on the basis of the incriminating documents found during the course of search. In the present case the first disallowance is made on account of disallowance under section 14 A of the income tax act of Rs. 3086234/- and second disallowance

is on account of a payment made to certain contractors of Rs. 3900954/-. The last disallowance was with respect to the addition on account of lease agreement charges of Rs. 1 020912/-. For none of disallowances Assessing made are based on any incriminating material found during the course of the search. None was produced before us by the Ld. departmental representative. In view of these facts, we cannot uphold any disallowance, as they are not emerging out of incriminating documents found during the course of the search. Hence, all these disallowances/additions made by the Ld. Assessing Officer deserve to be deleted.

60. However, for completeness of the issues involved, we also deal with the various disallowances made by the Ld. Assessing Officer on merit,
61. The disallowances made by the Ld. Assessing Officer with respect to the material purchased by the assessee from 6 parties amounting to Rs. 3900954/- for the reason that on the bills submitted by these parties they have not quoted the TIN numbers. Therefore, the Ld. Assessing Officer has doubted the genuineness of these payments. We have already dealt with this issue in appeal for earlier years. In that order where we have confirmed the order of the Ld. CIT (A) in deleting those addition as the payments have been made by the assessee supported by the bills of those parties with the rates of the work done, name and address of the parties and the rates for which the work done has been mentioned. Further, the payments have been made by the assessee by account payee cheque by deducting tax at source, wherever

applicable. It was further the fact that these parties are assessed to income tax regularly and are supplying material to the assessee. The Ld. Assessing Officer has made this disallowance based on some Inquiry carried on by him in some other party which could not be found at the given address. It is stated that assessee has not purchased any goods from that party. In view of this we do not find any infirmity in the order of the Ld. CIT (A) in deleting the addition by holding that the appellant company has discharged its onus by providing copy of the bills raised by the contractor containing full address, nature of services rendered or goods supplied on payment has been made by account payee cheque and tax deduction at source has been deducted as per the provision of the law. He further held that the Assessing Officer is not conducted any enquiry to disbelieve these documents furnished by the assessee, but simply arrive at the conclusion that these expenses are not genuine. In view of this we find no infirmity in the order of the Ld. CIT (A) in deleting the above addition. In view of this, the solitary ground raised by the revenue in ITA number 2706/ Del/2013 for assessment year 2007 – 08 is dismissed.

62. Now we come to the cross objection filed by the assessee where the disallowance confirmed by the Ld. CIT (A) on 14A of Rs. 3086234 and expenses only is agreement charges of Rs. 1 020912 are contested. Though, we have held that all these additions have been made by the Ld. Assessing Officer completed assessment without finding any incriminating evidences

unearthed during the course of the search. Therefore, as such both the disallowances made by the Ld. Assessing Officer and confirmed by the CIT (A) are not sustainable. However, as we have decided the issue in the appeal of the revenue of disallowance of certain expenses on merit. We also discuss the issues on merit. With respect to both the disallowances.

63. Coming on the merits of the issue of the 1st disallowance of Rs. 3 086234/- under section 14 A of the income tax act. It is noted that assessee has given interest-free advances to some of the parties and has also borrowed the loan from banks of 19.38 crores on which interest expenses of Rs. 66.98 lakhs have been paid. On examination of the details it was noted that assessee has invested in the floating rate mutual funds on which assessee has received a dividend amount of Rs. 2 133682 and therefore as the dividend income is exempt disallowance is required to be made on account of section 14 A for earning such exempt income. The assessee explained that assessee has invested a sum of Rs. 5.5 crore in fixed deposits received for which the loan was the source of the funds FDR was encashed on 11/01/2007 and invested in principle floating-rate mutual fund on which the assessee has received dividend. Therefore, with respect to this amount. There is a direct nexus of amount borrowed for the purpose of earning exempt income. Hence the interest were doubted in the table given at page No. 3 of the assessment order at serial No. 5 in investment in mutual fund was made from 1/11/2007, which was encased on 26/3/2007 for 5.5 crores and interest is working out

thereon of rupees 1142945/- related to 74 days. In view of this, interest disallowance under rule 8D (2) (i) is required to be upheld. With respect to the other investment where the interest expenditure of Rs. 1 943289/-. There is no nexus of the sum borrowed with the amount of some invested in the mutual funds. The some of the interest amount is with respect to investment made by the assessee in sister Concern Company from which no dividend has been received. Even otherwise, looking to the balance sheet of the company assessee has share capital of rupees 278 lakhs and reserves and surplus of 1346 Lacs which makes the total shareholder's funds of rupees 1624 Lacs. The amount of investment made by the assessee is for 0 Lacs as on 31/3/2006 and only Rs. 7 lakhs as on 31/3/2007. Therefore it is apparent that the investment made by the assessee in exempt income generating investments is far less than interest-free funds available with the assessee. The Hon'ble Supreme Court recently in case of Godrej & Boyce Manufacturing Co. Ltd versus DCIT (394 ITR 449 (SC)) has held that:-

“38. In the present case, we do not find any mention of the reasons which had prevailed upon the Assessing Officer, while dealing with the Assessment Year 2002-2003, to hold that the claims of the Assessee that no expenditure was incurred to earn the dividend income cannot be accepted and why the orders of the Tribunal for the earlier Assessment Years were not acceptable to the Assessing Officer,

particularly, in the absence of any new fact or change of circumstances. Neither any basis has been disclosed establishing a reasonable nexus between the expenditure disallowed and the dividend income received. That any part of the borrowings of the assessee had been diverted to earn tax free income despite the availability of surplus or interest free funds available (Rs. 270.51 crores as on 1.4.2001 and Rs. 280.64 crores as on 31.3.2002) remains unproved by any material whatsoever. While it is true that the principle of *res judicata* would not apply to assessment proceedings under the Act, the need for consistency and certainty and existence of strong and compelling reasons for a departure from a settled position has to be spelt out which conspicuously is absent in the present case. In this regard we may remind ourselves of what has been observed by this Court in *Radhasoami Satsang v. CIT* [1992] 193 ITR 321/60 Taxman 248 (SC).

"We are aware of the fact that strictly speaking *res judicata* does not apply to income tax proceedings. Again, each assessment year being a unit, what is decided in one year may not apply in the following year but where a fundamental aspect permeating through

the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year."

In view of this we direct the Ld. Assessing Officer to delete the disallowance of interest under section 14 A of Rs. 3 086234/-, except sum of Rs. 1142945/- . In the result ground No. 3 of the cross objection of the assessee is partly allowed.

64. Coming to the other disallowance of Rs 102 0912/- on account of lease agreement charges. The brief facts relating to this issue is that the appellant and developed and promoted the shopping mall namely Vikas Surya shopping mall at Rohini, New Delhi. Development promotion and selling of the space in the mall is quite different when compared to other commercial properties when the promoter/developer remains quite obvious to the fact that in what are the buyer is going to use the space sold on the other hand, in the case of shopping mall the promoter has to convince demonstrate – the buyer were invariably investor looking for a good return on their investment in the form of rent and depreciation that there exist good business opportunities in the mall. The said insurance in turn is based on the fact that various established brands will be having their outlets and there will be almost all types of goods and services available under one roof and thereby maximum footfalls. . Therefore,

to show Makepeace property more attractive and marketable the appellant has tried to lease out the certain spaces. During the year and incurred a sum of Rs. 1 020912 for the execution of 2 lazy these agreements for a period of 12 years, 9 years and claimed the same as business expenditure. These are the 50% charges of the stamp duty paid by the assessee for the purpose of lease from the SM departmental store private limited and for the purpose of JDS Apparels private limited. On these bases assessee claimed this expenditure as business expenditure. The main plank of the claim of the assessee was that these expenditure have been incurred by the assessee not only rent from these parties but to make its shopping mall more attractive and to increase the footfall for so that other properties of the shopping mall are being sold at considerably good rate. This is one of the business tactics prevailing currently is stated by the assessee. However, the Ld. Assessing Officer confused himself with the business transaction of the assessee and stated that as these expenditure are been incurred for the purpose of the renting of the immovable property the are chargeable to tax under the head income from house property and that particular computation of income from house property does not give any deduction of such kind of expenditure and therefore these expenditure are disallowed. The Ld. CIT (A) also followed the same line of argument and confirmed the order of the Ld. Assessing Officer.

65. Before us. The Ld. authorized representative submitted the same arguments as well wait before the lower authorities. He submitted that these expenditure

have not been claimed by the assessee against the income from house property. He submitted that these expenditure have been incurred by the assessee prior to the entering into the renting agreement with the assessee. He further explained that most of the shopping mall is our 1st populated by putting the parties on the long grant and leaves by the developers so that these properties can be sold by the assessee. Based on the rent multiplier basis for on the basis of the higher selling price based on the cash flow generated by the developers. He further stated that it is none of the intention of the assessee to hire the property on rental basis to somebody and earn rental income. He further stated that if the properties are rented out in the mall speak the big brands and other big showrooms, then the other properties of the mall are also sold at higher rates and considerably quickly. This saves time in selling the properties, as well as also on the higher rate of the other properties. He submitted that the claim of the assessee and this expenditure is required to be deducted under the computation of the income as profits and gains of the business of the assessee under section 37 (1) of the income tax act, as it does not relate to the rental income but it relates to the overall project of the assessee. Therefore he submitted that the lower authorities have failed to understand the business concept of development of a real estate in projects like shopping mall etc and has considered it is a mere activity of printing of the properties.

66. The Ld. departmental representative relied upon the orders of the lower authorities.
67. You carefully considered the rival contention and also perused the orders of the lower authorities. It is an undisputed fact that the assessee is a developer of real estate and has constructed all in Rohini, New Delhi. It has given the property only is to 1. Departmental store namely VSM departmental stores and also to another brand 'Ritu Wears" on a long-term lease and assessee is explained its rational that for the purpose of the sale of the large chunk of the property searches shopping mall it is necessary that there increases a substantial footfall and population of the merchants. It is a matter of common knowledge that Developers, particularly in the Delhi-National Capital Region, advertise retail spaces or shops in malls as great investment. Many also provide assurances of guaranteed income of 10-12 per cent over a period. Dynamics of this segment is different from that of residential properties. The success of a mall depends on a number of factors including the location, design, anchor tenants, tenant mix and mall management. Like any other real estate investments, one need to ensure that the developer has the requisite experience and a proven track record of running malls successfully. In the business like the assessee, some developers offer guaranteed returns by entering into a lease agreement with the buyer. In the matter of financing of such real estate development projects also the lender Such as banks are wary of lending to high-risk asset development such as a

retail mall. In order to fill that gap, developers offer assured return schemes at interest rates that are much lower than what a bank would charge them. Developers are able to offer such schemes as they enter into pre-lease agreements with retailers for 9 years or longer. Such investments can be good if developers keep their commitments. Pre-leased properties are available at 10-12 per cent yield. In the long term, value appreciation and rent appreciation are the norm in the business of the assessee. Therefore, the expenditure incurred by the assessee is not an expenditure which falls for the deduction under the head of income from house property at the claim of the assessee is that for the purpose of computation of total income of the assessee under the head business and profits and gains of this real estate development, such expenditure are required to be granted as deduction. To understand the claim of the assessee. It is necessary for the revenue authorities to understand the business of the assessee and whether such expenditure as Surrey false on the assessee is a businessman or not is required to be examined. In the present case, the revenue authorities below have failed to understand this particular aspect of the business of the assessee. This expenditure of the assessee is required to be examined from the test laid down for deduction of such expenditure under section 37 (1) of the income tax act. The expenditure incurred by the assessee is

- a. not of the expenditure described under section 32 to section 36,
- b. this has been incurred by the assessee during the accounting year,

- c. it is in respect of business which was carried on by the assessee and the profits of which are to be computed and assessed and are incurred after the businesses set up,
- d. it is not in the nature of personal expenses of the assessee and
- e. Further it has been laid out and expended wholly and exclusively for the purposes of the such business.

Therefore according to us this expenditure of the assessee satisfies all the test laid down for its deduction under section 37 (1) of the income tax act. Hon'ble Supreme Court has on occasion to consider that what the expenditure is for the purposes of the business in CIT versus Malayalam plantations Ltd 53 ITR 140 wherein the Hon'ble Supreme Court has held that for the purpose of the businesses vider in scope, then the expression for the purposes of earning profit. Its range is vide. It may take in not only the day to day running of the business but also the rationalization of its administration and modernization of its machinery, it may include measures for the preservation of the business and for the protection of its assets and property for export creation. It may also comprehend payment of statutory dues and taxes imposed on a precondition to commerce or for carrying on of the business. It may comprehend many other acts incidental to the carrying on of a business. Therefore, such expenditure incurred by the assessee cannot be limited in its scope to comprehend that it is incurred for the purpose of earning

of the rent. We may at this stage state that the expenditure is incurred by the assessee in present day business environment in different ways. It is for the revenue to first understand the business of the assessee and then decide about the allowability of the same by putting themselves into the shoes of businessmen. The business are being carried out in today's environment involved most volatile manner, it has also become innovative. Therefore, the time has come that revenue should also become contemporary with the running businesses and acquaint themselves with its volatility and innovativeness. Considering the business intent of the assessee and the manner of incurring expenditure, it is apparent that expenditure incurred by the assessee cannot be considered to be not business expenditure. According to us, it is for the purpose of the business of the assessee and hence deductible. For aforesaid reasons we reverse the finding of the lower authorities and direct the Ld. Assessing Officer to allow the claim of the assessee on account of lease agreement charges of Rs. 1 020912/- as deductible business expenditure under the head of profits and gains of business and profession. In the result ground No. 1 and 2 of the CO of the assessee is allowed.

68. Though we have held that disallowance under section 14 A of the income tax act is partly sustainable vide ground No. 3 of the cross objection of the assessee and ground No. 1 and 2 of the cross objection of the assessee are

allowed. While dealing with the cross objection filed by the assessee, however, on the issue of addition and disallowance made by the Ld. Assessing Officer in case of completed assessment. We have held that there is no evidence much less incriminating evidence found during the course of the search. Hence, even otherwise none of the addition/disallowances made by the Ld. Assessing Officer challenged either in the appeal of the revenue or in the cross objections of the assessee are sustainable.

69. In the result the CO No. 96/del/2014 for assessment year 2007 – 08 of the assessee is partly allowed.
70. In the result appeal of the revenue in ITA number 2706/del/2013 is dismissed and cross objection No. 96/del/2014 for assessment year 2007 – 08 filed by the assessee is partly allowed.

AY 2008-09

ITA No 2708/Del/2013 (By revenue)

CO No 97/Del/2014 (By assessee)

71. This appeal is filed by the revenue against the order of the Ld. CIT (A) wherein the interest disallowance of Rs. 1688299/- made by the Ld. Assessing Officer under section 14 A of the income tax act is deleted. Further The Ld. Assessing Officer also made the addition on account of the contract expenses of Rs. 14900/- which is also deleted by the order of the Ld. CIT

appeal. Therefore, revenue is in appeal before us raising following grounds of appeal in ITA number 2708/del/2013 for assessment year 2008 – 09.

72. The parties before us submitted that the issue covered in the appeal of the revenue is identical to the issue in appeal of the assessee for assessment year 2007 – 8. The further submitted that their arguments also remain the same.
73. As we already deleted the disallowance under section 14 A of the income tax act to the extent that Ld. Assessing Officer has not able to prove the nexus of the sum so used for the purpose of earning of the exempt income while deciding the appeal of the assessee for assessment year 2007 – 08. In the present case also, the Ld. Assessing Officer has failed to establish nexus of the borrowed interest bearing funds diverted to the investment which are yielding exempt income. Therefore, we do not find any infirmity in the order of the Ld. CIT (A) in deleting the addition/disallowances under section 14 A, on account of the interest expenditure of Rs. 1 688299/-. In the result this ground of appeal of the revenue is dismissed.
74. The next ground of the appeal of the revenue is risk respect to the contract expenses of Rs. 1 4900 disallowed on account of the failure of the assessee to prove the genuineness in the eyes of the Ld. Assessing Officer. This ground is also identical to the ground No. 1 of the appeal of the revenue for assessment year 2007 – 08. We have already deleted. That is about disallowance made by the Ld. Assessing Officer for reasons given that under.

Therefore, for the similar reasons we also direct the Ld. Assessing Officer to on account of the contract are expenses of Rs. 1 4900. In the result ground number of the appeal of the revenue is dismissed.

75. In the result ITA number 2708/del/2013 filed by the revenue is dismissed.
76. As the Ld. CIT appeal has sustained on account of lease agreement charges of Rs. 614328/- and brokerage for leasing of Rs. 2063565/-. Therefore, assessee has filed cross objection.
77. The assessee has raised the following grounds of appeal in CO No. 97/Del/2014 for Assessment Year 2008-09:-
 - “1. Under the facts and circumstances of the case and in law Ld. CIT (A) erred in confirming the addition of 20,63,565/- for brokerage expenses and Rs.6,14,328 for lease agreement charges, totaling to Rs.26,77,893/-, being expenses paid for putting the properties, being stock in trade, on rent for enhancing market value and marketability of the properties.
 2. Under the facts and circumstances of the case and in law Ld. CIT (A) erred in disallowing lease agreement charges and brokerage expenditure ignoring the fact that they were business expenditure as the concerned properties were stock in trade and income on their sale has been declared and accepted by the Department as business income.”

78. Both the parties before us stated that the issue involved in the cross objections filed by the assessee in the above appeal are squarely covered by cross objection preferred by the assessee vide ground No. 1 and 2. The parties further submitted that their arguments also remained the same. We have carefully considered the rival contention and also perused the orders of the lower authorities. We have dealt with this issue in CO No. 96/del/2014 for assessment year 2007 – 08 and after detailed discussion. We have given our reasons for allowing the cross objections of the assessee with respect to the expenditure claimed wherein. Therefore, for the same reasons we direct the Ld. Assessing Officer to allow the claim of the assessee with respect to the deduction of expenditure under the head income from business. Therefore, reversing the findings of the lower authority. We allow ground No. 1 and 2 of the cross objection of the assessee.
79. In the result cross objection filed by the assessee is allowed.
80. In the result appeal filed by the revenue in ITA number 2708/del/2013 for assessment year 2008 – 09 is dismissed and cross objection filed by the assessee in above appeal in CO No. 97/del/2014, is allowed.

A Y 2009 - 10

ITA No 2712/Del/2013 (By revenue)

Co No. 98/del/2014 (By Assessee)

81. this appeal is filed by the revenue in ITA No. 2712/del/2013 against the order of the Ld. CIT appeal dated _____ passed against the order passed by the Ld. Assessing Officer under section 143 (3) read with section 153A of the income tax act making disallowance under section 14 A of the income tax act of Rs. 2 558557/- and please agreement charges and brokerage expenditure of Rs. 6 0475/- and Rs. 7 23204/- respectively.
82. The revenue has raised the solitary ground of appeal against the disallowance deleted by the Ld. CIT (A) under section 14 A of the income tax act of Rs. 2558557/-. The parties before us confirmed that facts of this case are identical to the facts for assessment year 2007 – 08 and 2008 – 09. Therefore, the submitted that their arguments are also similar as they were advanced in those appeals. We have already decided these appeals by this order wherein we have deleted the disallowance made by the Ld. Assessing Officer on account of interest expenditure under section 14 A of the income tax act. In view of the failure on part of the revenue to prove the nexus of the funds used for the purpose of making investment in exempt income generating investments. The Ld. CIT appeal has deleted the about disallowance by giving the cogent reasons and we do not find any infirmity therein. None has been pointed out by the Ld. departmental representative. Hence, ground No. 1 of the appeal of the revenue in ITA No. 27 12/del/2013 is deleted.

83. In view of this, the appeal in ITA No. 2712/del/2013 for assessment year 2009-10 of the revenue is dismissed

84. The assessee has raised the following grounds of appeal in CO No. 97/Del/2014 for Assessment Year 2009-10:-

“1. Under the facts and circumstances of the case and in law Ld. CIT (A) erred in confirming the addition of Rs. 7,23,204/- for brokerage expenses and Rs.60,475/- for lease agreement charges totaling to Rs. 7,83,679/- being expenses paid for putting the properties, being stock in trade, on rent for enhancing market value and marketability of the properties.

2. Under the facts and circumstances of the case and in law Ld. CIT (A) erred in disallowing lease agreement charges and brokerage expenditure ignoring the fact that they were business expenditure as the concerned properties were stock in trade and income on their sale has been declared and accepted by the Department as business income.”

85. Both the parties before us stated that the issue involved in the cross objections filed by the assessee in the above appeal are squarely covered by cross objection preferred by the assessee vide ground No. 1 and 2. The parties further submitted that their arguments also remained the same. We have carefully considered the rival contention and also perused the orders of

the lower authorities. We have dealt with this issue in CO No. 96/del/2014 for assessment year 2007 – 08 and after detailed discussion. We have given our reasons for allowing the cross objections of the assessee with respect to the expenditure claimed wherein. Therefore, for the same reasons we direct the Ld. Assessing Officer to allow the claim of the assessee with respect to the deduction of expenditure under the head income from business. Therefore, reversing the findings of the lower authority. We allow ground No. 1 and 2 of the cross objection of the assessee.

86. In the result cross objection filed by the assessee is allowed.
87. In the result appeal filed by the revenue in ITA number 2712/del/2013 for assessment year 2009-10 is dismissed and cross objection filed by the assessee in above appeal in CO No. 98/del/2014, is allowed.
88. Accordingly, all the appeals are disposed off.

Order pronounced in the open court on 14/11/2017.

-Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER

-Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated:14/11/2017
A K Keot
Copy forwarded to
1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi