IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'A' BENCH, NEW DELHI

BEFORE SHRI B.P. JAIN, ACCOUNTANT MEMBER, AND SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER

ITA No. 995/DEL/2011
[Assessment Year: 2006-07]

M/s Puri Construction Ltd W-82/A, Greater Kailash - II New Delhi	Vs.	The Dy. C.I.T Circle - 18 New Delhi

PAN : AAACP2760 K

ITA Nos. 754/DEL/2015 & 1327/DEL/2011
[Assessment Year: 2006-07]

The Dy. C.I.T Circle – 18 New Delhi	Vs.	M/s Puri Construction Ltd W-82/A, Greater Kailash - II New Delhi PAN : AAACP2760 K
[Appellant]		[Respondent]

Date of Hearing : 29.11.2017
Date of Pronouncement : 27.12.2017

Assessee by : Shri Salil Aggarwal, Adv
Shri Shaliesh Gupta, Adv
Shri Madhur Aggarwal, Adv

Revenue by : Smt. Aparna Karan- CIT [DR]

ORDER

PER B.P. JAIN, ACCOUNTANT MEMBER,

The above captioned appeals - one by assessee and two by revenue - relate to Assessment year 2006-07. ITA No. 1327/Del/2011 and ITA No. 995/Del/2011 are cross appeals arising from an order of assessment dated 31.12.2008 u/s 143(3) of the Income-tax Act, 1961 [hereinafter referred to as 'the Act' for short]. ITA No. 754/Del/2015 preferred by revenue arises from an order of assessment dated 31.12.2010 u/s 153A/143(3) of the Act. Since the issues involved in all the appeals are common and pertain to same assessee, therefore we have heard all the appeals together and thus are being decided by this consolidated order for the sake of convenience and brevity.

2. The factual matrix of the case, in brief, are that the assessee is engaged in the business of real estate development and promotion and dealing in sale and purchase of land. A return of income declaring an income of Rs. 4,72,53,660/- was filed on 30.11.2006. The assessment was completed u/s 143(3) of the Act at total income of Rs. 33,06,83,820/- making addition of Rs. 14,03,92,386/- on account of land development expenses Rs. 10,50,00,000/- on account of payment

made to M/s. Sino Credit and Leasing Ltd. (hereinafter referred to as 'SCLL') and Rs. 2,00,00,000/- as income from other sources. On further appeal, CIT(A) vide order dated 31.12.2010 deleted all the additions so made by ld. AO except an addition of 2,30,11,467/- (included in figure of 14,03,92,386/-) and as such revenue has preferred appeal with respect to deletion of additions amounting to Rs. 11,45,18,528/- on account of land development expenses, Rs. 2,00,00,000/- on account discrepancy in books of accounts and Rs. 10,50,00,000/- with respect to amount paid to M/s SCLL. Thus the grounds so raised by revenue in ITA No. 1327/Del/2011 read as under:

"1. On the fact and in the circumstances of the case the CIT(A) has erred in law and on facts in deleting the addition of Rs.11,45,18,528/- by holding that the genuineness of the same could only be examined in the assessment year 2005-06 and not in assessment year 2006-07.

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.2,00,00,000/- made by the AO on account of discrepancies in the books of account of 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

RTs.10,50,00,000/- made by the AO without going into the merits of the case.

4. On the facts and in the circumstances of the case the CIT(A) has erred in law and on facts in holding that issue of payment of Rs.10,50,00,000/- is still alive and may be examined afresh in the order u/s 153A without appreciating the fact the search assessment in the present case was time barring on 31.12.2010 i.e. the date of pronouncements of order by CIT(A).”

3. As regards confirmation of disallowance of Rs. 2,30,11,467/-, the assessee company has preferred an appeal in ITA No. 995/Del/2011 in which following grounds have been raised:

“1. That on the facts and circumstances of the case and in law the CIT(A) erred in holding that the sum of Rs.3 Crores paid to M/s.Manami Construction Co.Pvt.Ltd towards land development expenses was not proved to have been incurred wholly and exclusively for the purposes of business and was, therefore, not allowable as deduction. Based on this finding the disallowance of Rs. 2,30,11,467/- being the proportionate amount of expenditure out of Rs. 3 Crores relating to the assessee and claimed by it in its accounts, is erroneous on facts and in law.

1.1. That both the AO and the CIT(A) erred in rejecting the affidavit filed on behalf of M/s Manami Construction Co.Pvt.Ltd confirming the work done and the payment having been

received. Also ignoring the further evidence filed by appellant towards providing the transaction as business transaction."

4. Further, there was a search conducted on 05.01.2009 under section 132(1) of the Act on the appellant and the learned AO vide an order dated 31.12.2010 in assessment u/s 153A/143(3) of the Act repeated all the additions so made earlier in assessment framed u/s 143(3) of the Act dated 31.12.2008 i.e. making additions of Rs. 14,03,92,386/- on account of land development expenses, Rs. 10,50,00,000/- on account of payment made to SCLL and Rs. 2,00,00,000/- as income from other sources and the learned CIT (A) vide order dated 17.11.2014 deleted all the additions and as such, revenue has preferred appeal in ITA No. 754/Del/2015 wherein following grounds have been raised:

"1. On the facts and in the circumstance of the case and in law, the CIT (A) has erred in deleting the addition of Rs.10.50 crores made by the AO on account of disallowance of sum paid to M/s.Sino Credits & Leasing Ltd.

2. On the facts and in the circumstance of the case and in law, the CIT(A) has erred Ld.CIT(A) erred in ignoring the corroborating/incriminating evidences found during the course of survey proceedings u/s 133A carried out twice on 20.11.2007 and 05.01.2009 at the business premises of Sh.S.K.Gupta in the

form of ledger account and other relevant incriminating documents/evidences.

3. On the facts and in the circumstance of the case and in law, the CIT(A) has erred in ignoring the corroborating/incriminating evidences collected through independent investigation in the form of bank statement, return of income, balance sheet etc. which unequivocally established the modus operandi of M/s. Sino Credits & Leasing Ltd as an entry operator.

4. On the facts and in the circumstance of case and in law, the CIT (A) has erred in not appreciating the statement recorded on oath u/s 131 on 19.12.2008 and u/s 133A on 20..11.2007 and 05.01.2009 of Sh.SK Gupta wherein he was admitted that M/s Sino Credits & Leasing Ltd is one of the companies controlled and managed by him being engaged in providing accommodation entries to M/s.Mad Entertainment Network Ltd on the basis incriminating documents found impounded during the course of survey and collected during the independent investigation.

5. On the facts and in the circumstance of the case and in law, the CIT(A) has erred in holding that these statement recorded u/s 133A of the Income Tax Act, 1961 of Shri S.K.Gupta on 05.01.2009 has no evidentiary value against the provisions of section 133A (3) (iii) which empowers the Income Tax Authority

to record the statement of any person which may be useful for, or relevant to, any proceedings under this Act.

6. On the facts and in the circumstance of the case and in law, the CIT(A) has erred in ignoring the statement recorded on oath u/s 132(4) of Sh.Mohinder Puri wherein he offered unaccounted income for taxation on account of entries provided by M/s.Sino Credit & Leasing Ltd.

7. On the facts and in the circumstance of the case and in law, the CIT(A) has erred in ignoring the fact that even during the course of course of cross examination on oath of Sh.S.K.Gupta with Sh. Mohinder Puri held on 17.04.204, Sh. Gupta admitted to be an entry operator who has provided entries to M/s.MAD Entertainment Network Ltd and earned commission income thereon.

8. On the facts and in the circumstances of the case and in law, the CIRT(A) has erred in ignoring the fact that the affidavit submitted by Sh.SK Gupta on 27.02.2009 wherein he has claimed to have genuine business transaction with M/s Sino Credits & Leasing Ltd and M/s.Mad Puri Construction Pvt.Ltd is false in view of his statement recorded on oath during the cross examination before Sh.Mohinder Puri on 17.04.2014 and 21.04.2014.

9. On the facts and in the circumstance of the case and in law, the CIT(A) has erred in ignoring that the assessee produced

fabricated evidences in the form of MOU and arbitration award to give legal colour to the alleged transactions to escape from taxation.

10. On the facts and in the circumstance of the case and in law, the order of the Ld. CIT (A) is bad in law in as much as the same is rendered in violation of the categorical finding of the Income Tax Settlement Commission (ITSC) vide their order u/s 245 D(4) dated 22.6.2012 that Sh.S.K.Gupta is an entry operator and the companies managed and controlled by him are doing no real business but providing accommodation entry.

11. On the facts and in the circumstance of the case and in law, the CIT(A has erred in law and on facts in deleting the disallowance of Rs.14,03,92,386/- made against the claim for land development expenses.

12. The order of the CIT(A) is erroneous and is not tenable on facts and in law.

13. The appellant craves leave to add, alter or amend any/all of the grounds of appeal before or during the course of the hearing of the appeal."

5. During the course of hearing, the learned AR for the assessee has also raised a legal plea under Rule 27 of ITAT Rules, 1963 to submit that the additions made under section 153A of the Act are beyond the scope of assessment proceedings as they are not based on any

incriminating material found during search. This legal plea was raised in support of the findings of order of CIT(A) dated 17.11.2014 and as such, another issue involved in the instant appeals is as under:

> *"That additions made in the order of assessment dated 31.12.2010 under section 143(3) of the Act since are not based on any incriminating material found as a result of search on the assessee company, the same are in excess of jurisdiction and therefore, not in accordance with law."*

6. In view of the above factual background, we now firstly take up ITA No. 1327/Del/2011 being appeal preferred by revenue arising from the order of CIT(A) dated 31.12.2010 disposing off the appeal against an order of assessment dated 31.12.2008 under section 143(3) of the Act.

7. Ground 1 relates to deletion of addition of Rs. 11,45,18,528/- being the expenditure claimed by the assessee under section 40(a)(ia) of the Act in the instant assessment year.

7. The factual matrix emanating from the order below is that the appellant sold land measuring 10.53 acres in Sector-53, Gurgaon to M/s. Parsvnath Developers Ltd. The sale of land was by the appellant

alongwith two directors namely Mohinder Puri and Arjun Puri and other related persons namely M/s MAD Entertainment Network Ltd., M/s. Florentine Estates of India Ltd. and M/s. Sunil/Gurlien Manchanda. This sale was under an agreement dated 4.4.2005 and aggregate consideration accruing as a result of the said sale was of Rs. 149.98 crores. Against the consideration accrued to the assessee on the sale of land and, the appellant claimed an expenditure of Rs. 11,45,18,828/- under proviso to section 40(a)(ia) of the Act. The premise of the claim is that TDS was deposited on 25.1.2005 i.e. during the instant assessment year 2006-07; and therefore, in the computation of total income for the instant assessment year, sum of Rs. 11,45,18,528/-was claimed as deduction under the narration "expenditure disallowed under section 40a(ia) of the Act in financial year 2004-05 now allowable". It is relevant to state here that expenditure of Rs. 11,45,18,828/- was claimed under section 37(1) of the Act in assessment year 2005-06 but disallowed in the computation of income filed by the assessee for assessment year 2005-06 under section 40(a)(ia) of the Act and assessee had added back expenditure debited in the profit and loss account of Rs. 11,45,18,528/- on the ground that though the company deducted TDS but the same was not deposited before the due date for assessment year 2005-06.

7.2 During the assessment proceedings for assessment year 2006-07, the learned Assessing Officer has noted that expenditure of Rs. 11,45,18,528/- pertained to 24 parties and in order to verify the identity and genuineness of these 24 parties and the work stated to have been done by them, he made enquiries by issuing summons under section 131 of the Act to them, deputing inspector to conduct inquiries at the premises of the above parties and issuing notices u/s 133(6) of the Act to certain banks asking for the account opening forms and statement of account of the aforesaid parties. The learned Assessing Officer has also noted that summons were also issued to some persons who were found related to one or more of the 24 parties on the basis of account opening forms received from the banks. The result of the enquiries was incorporated in the show cause notice issued to the assessee company on 19.12.2008. The appellant furnished a reply dated 26.12.2008 to the Assessing Officer. The contentions raised therein have been summarized in the appellate order of CIT(A) and reads as under:

> *"(i) Following evidence was furnished in support of the genuineness of the expenditure incurred.*
>
> *(ii) Copies of account of the payees, confirmation of the payees. PAN of payees and details of payments made by cheques/drafts.*

(b) Copies of bills/invoices issued by the payees on the basis of which the payments were made to them.

(c) Copies of TDS Certificates in Form No. 16A to all the payees giving PAN of payees, amounts credited, date of payments/credits, Tax deducted and Tax paid giving Challan No. date and branch of bank where deposited.

(d) Latest proof of existence of some of the contractor companies.

(ii) A request was made that the evidence gathered on the back of the assessee in the form of statements recorded, submissions made and documents furnished by the various parties, reports of the inspector, copies of the bank accounts etc. may be furnished to enable the Appellant to go through them and also to enable it to exercise right of cross examination based on the case law cited.

(iii) It was also requested that the appellant be allowed time to find out and furnish the current addresses of the various payees, to whom the notices issued by the A.O. were not served.

(iv) In order to show the genuineness of the transaction 12 affidavits of the payees were filed which showed that these parties existed, that they were identifiable and had worked for the Appellant and the payments were made to them;

(v) As the opportunity provided was inadequate, further time was asked to be given to gather more evidence and furnish the same."

7.3 The Assessing Officer however held that the expenditure claimed is not genuine and fictitious and contractors to whom payments have been made are mere name lenders. He therefore, made the disallowance of Rs. 11,45,18,528/- under section 37(1) of the Act. Before the CIT(A), the appellant inter-alia, submitted as under:

"(iii) The claim was disallowed under section 37 of the IT Act, the final conclusion of the AO being that the sum of Rs. 11,45,18,528/- was-

- *not genuine but fictitious, and*
- *the "contractors" are all mere name lenders.*

The expenditure has not been allowed u/s 37 of the Act, on the inherent finding that it was not genuinely incurred as "land development expenditure" and was not paid to the contractors, who according to him, did not do any work and were mere name lenders. In the face of this finding the question for consideration of the applicability u/s 40(a)(ia), which applies only where the expenditure is otherwise allowable, by the AO does not arise. Because if the AO gives a finding that the expenditure itself is not allowable as deduction u/s 37, it is not an expenditure being amount payable to a contractor and, therefore, in the first place, tax is not deductible thereon under Chapter XVII-B. This being the position emerging from the order of the AO itself, the logical result would be that the deductibility of the expenditure in the AY 2006-07 can not be considered because the deductibility was shifted from the AY 2005-06 to AY 2006-07 only because of the compulsion of Section 40(a)(ia). If Section 40(a)(ia) does not survive on the basis of the finding of the AO the matter has necessarily to be relegated for its consideration in the AY 2005-06. This is so because the expenditure was incurred in that year Since the assessee was following mercantile system of accounting the actual payment was not relevant so

long as the expenditure was incurred and accounted for in the year 2005-06.

(iv) This brings the matter to an important aspect as to whether on the present facts the AO while dealing with the assessment for the AY 2006-07 could consider the genuineness of the expenditure in the AY 2006-07. It is undisputed that the expenditure was incurred in the AY 2005-06. The genuineness of that expenditure can be considered in that year only i.e. in the course of assessment proceedings for that year. No expenditure was incurred in the AY 2006-07 and as we have stated the claim was made in the computation of total income to this year only because of the compulsion of Section 40(a)(ia). If Section 40(a)(ia) itself does not apply according to the AO's findings then the only jurisdiction of the AO is to consider the admissibility of the expenditure u/s 37 for which the focus must shift to AY 2005-06. It is in that year a finding about the genuineness has to be given."

7.4 Apart from the above, vide written submissions dated 4.11.2010, it was submitted as under:

"In continuation of our submissions on grounds No.3 to 9 filed on 21-9-2010 we make further submissions as under:"

"2. Return for the A.Y.2005-06 was filed on 31-10-2005. Copy of the acknowledgement of return is at page 1. The computation of total income is at page 2. Copy of Annual Accounts is at Pages 3 to 17.

2.1 The profit and loss account, inter-alia, showed an expenditure of Rs.11,51,81,489/- under the head ' Land Development Expenditure' (page 7), In the computation of total income a sum of Rs.11,45,18,428/- was added back, describing it as " Expenses not allowable u/s 40(a) (ia) of I.T.Act,1961" (Page 2).

3. On 19-2-2007 the AO issued a notice u/s 143(2) and a notice u/s 142(l) alongwith a questionnaire which are at pages 18 to 23. In Query No.24(G) (Page 23) specific details were called for in respect of land development expenses.

3.1 The assessee furnished a reply which is at pages 24 to 121. In para 9 (b) it was stated as under: (Page 25).

"During the Financial year the assessee company has incurred expenses on its land and land of its associate companies/partners on the Gurgaon Land on account of its development which includes clearing and leveling of land, its soiling, fencing, lighting sanitation, boundary etc to make it in salable conditions and to attract high profile buyers. At last assessee company alongwith its associate companies/partners dealt with Parsvanath Developers Ltd. For development of this land. Copies of Bills / Invoices alongwith confirmation from suppliers in respect of expenses incurred on development of land are enclosed."

Further in para 14 it was stated as under : (Page26)

" As mentioned above, Development expenses were incurred for cleaning leveling etc., or preliminary development expenses to

make the land of section 53, village Wazirabad, Gurgaon into saleable conditions. Details of these expenses are enclosed herewith.

Further to state that these expenses were incurred during the year but final payments were made in next year. On audit objection regarding accounting conventions which state Mercantile basis of Accounting bills were accounted for on accrual basis therefore there was delay in depositing the TDS amount and same were disallowed u/s 40(a) (ia) of 1. Tax Act of calculating Income of the Company for year."

3.2 The details furnished as per the questionnaire issued by the AO and the explanation/submissions filed were considered by the AO who passed the assessment order u/s 143(2) on 26-3-2007, a copy of which is enclosed at pages 123 to 126. The details and explanation furnished with regard to land development expenditure incurred were accepted.

IV. It is relevant to mention that ledger copy of account of land development e expenditure as appearing in the books of account is at pages 28 to 35. This shows that the expenditure was accounted for in the books of account for the F.Y.2004-05. It is also borne out from the record

that tax was deducted in respect of each payment which was credited in the books of account for the year ending 31-3-2005. A copy of TDS Account is at page 36. Further, the tax deducted was not paid within the prescribed period but was deposited

only on 25-10-2005 as is evident from the copy of the consolidated challan at page 122.

*V. **To reiterate***

(i) Necessary6 details in respect of land development expenses incurred during the F.Y.2004-05 were called for and furnished. Also was furnished copy of ledger account of the land development expenses.

(ii) The expenses were incurred in the F.Y.2004-04, as per mercantile method of accounting employed (kindly see page 13).

(iii) Tax was deducted from the payment credited in the books during F.Y.200-05 but was not paid within the prescribed period.

(iv) Tax deducted in F.Y.2004-05 was paid in F.Y.2005-06 on 25/10/2005.

(v) Along with the details of expenditure were also furnished copies of bills/invoices along with confirmation from suppliers in respect of expenses incurred on development of land.

(vi) AO considered the above facts/details/explanations and completed the assessment for the Asstt.Year 2005-06 u/s 143(3) on 26/3/07 after accepting the same.

7.5 The learned CIT(A) having regard to the aforesaid contentions held that the expenditure was incurred and also accounted for in the

assessment year 2005-06. It was held that during the assessment year 2005-06, the said expenditure was not claimed because of non-deduct of TDS under section 40a(ia) of the Act. It was held that the ground that expenditure cannot be disallowed on account of non-genuineness in assessment year 2006-07 because the said issue does not relate to this year. It was noted that this plea was taken by the appellant before Assessing Officer also during the assessment proceedings but the Assessing Officer had overruled the objection by saying that the disallowance is to be made in the year when the expenditure is claimed. However, the CIT(A) on examination of the issue held that since expenditure was incurred and accounted for in the books of accounts maintained for assessment year 2005-06, its genuineness could only be considered in the assessment year 2005-06 and could not be shifted to the assessment year 2006-07 as the law on this issue has been laid down in the case of Kikabhai Premchand vs. CIT reported in 24 ITR 506 (SC) and CIT vs. S.K. Chitnavis (1932) 2 Company Cases 464 that the assessing officer can only take into consideration income, profit or gains made in that year and is not concerned with the profits or losses for another year. It was thus held that genuineness of expenditure could have been examined only in assessment year 2005-06 and not in the present assessment year 2006-07. It was held that

only aspect which would be examined in the instant year whether the expenditure incurred in preceding year could be allowed in view of proviso to section 40a(ia) of the Act and once TDS was duly deposited in the instant assessment year i.e. 2006-07, expenditure ought to have been allowed in terms of proviso to section 40(a)(ia) of the Act and as such, the disallowance made was deleted.

7.6 The learned CIT DR read page 3 para 4 and page 4 para's 6 to 8 of AO's order passed under section 143(3) of the Act, wherein, learned AO has discussed regarding the facts of said claim of land development expenses so made by assessee company. It was contended by learned CIT DR that the assessee company has claimed land development expenses paid to 24 parties for which detailed investigations were carried out by learned AO during the course of assessment proceedings (at pages 12 to 60 of AO's order), wherein, at pages 59 to 60 of the AO's order it was held by learned AO that the said claim made by assessee company is a bogus claim, as none of the parties were found at the their given addresses and summons issued to these parties were never complied.

7.7 Further the learned CIT DR argued that, the only finding recorded by learned CIT (A) vide order dated 31.12.2010 while deleting the said

disallowance is that, since the said expenditures pertained to preceding assessment year, wherein, claim was made in Profit & Loss Account of AY 2005-06, the said expenditure was only disallowed in Return of Income of AY 2005-06, as TDS was not deposited on the same and since in the instant assessment year 2006-07, TDS has been duly deposited, as such, learned AO was only supposed to apply the provisions of section 40(a)(ia) mechanically and the expenditures so claimed could not have been examined under the provisions of section 37 of the Act, is contrary to the provisions of the Income Tax Act, as the assessee has claimed the said expenditure in the Return of Income of impugned assessment year and as such, the said claim was correctly examined in the impugned assessment year 2006-07.

7.8 That further the learned CIT DR reiterated the above submissions for the same additions again made in assessment under section 153A of the Act, as learned AO has merely repeated the said addition and even the findings so recorded in original assessment proceedings have been merely extrapolated in assessment framed under section 153A of the Act dated 31.12.2010.

7.9 The learned counsel of assessee supported the order of learned CIT (A) and further argued that the said disallowance of Rs. 11, 45, 18,

528/- is beyond the jurisdiction of learned AO, as the same was never claimed as expenditure in the Profit & Loss Account for impugned assessment year 2006-07, rather the same was claimed as expenditure in AY 2005-06, for which due assessment was made by learned AO under section 143(3) of the Act, who accepted the genuineness of said expenditure after due and proper examination. Learned Counsel of Assessee Company relied on following pages of Paper Book – I:

a) Profit & Loss Account for AY 2005-06, wherein, said expenditure of Rs. 11, 45, 18, 528/- was claimed as expenditure (see page 55 of PB – I).
b) Computation of income for AY 2005-06, wherein, the said expenditure was added back as TDS was deducted but not deposited within due date (see page 50 of PB – I).
c) Notice of AO dated 19.02.2007 during assessment proceedings for AY 2005-06, wherein, specific query was raised by AO with regards to claim of said land development expenses (see page 68 – 69 of PB – I).
d) Copy of reply to AO during assessment proceedings for AY/ 2005-06, wherein, specific reply was furnished to the AO regarding claim of land development expense along with necessary documentary proofs containing bills and confirmations of the parties to whom said payments are being made by assessee company (see page 72 – 73, 76 – 83 and 85 – 169.
e) Copy of assessment order for AY 2005-06 dated 26.03.2007 under section 143 of the Act.

7.10 Further, it was submitted by the learned counsel of the assessee company that the said payment with respect to land development expense was paid by assessee company for the reason that the assessee had sold its 10.53 acres of land located in Sector – 53, Gurgaon during the assessment year under consideration to M/s Parsvnath Developers Ltd. For the same, the appellant had incurred a total expenditure of Rs. 11, 51, 81, 489/- under the head "land and development expenses" in AY 2005-06 and since out of aforesaid total expenditure, TDS was not deposited within time though deducted with respect to expenditure of Rs. 11, 45, 18, 528/- and as such, the same was added back in computation of income for AY 2005-06, by describing it as "expense not allowable under section 40(a)(ia) of the Income Tax Act. The reason for adding back the same in computation of income for AY 2005-06 was that even though the said expenditure was incurred and claimed in AY 2005-06 and tax was also deducted at source and though it was claimed as expenditure in P&L Account, since the TDS was not deposited with the statutory period, the expenditure so claimed was voluntarily added back in the computation of income as not allowable under section 40(a)(ia) of the Act. The tax was duly deposited on 25.10.2005 (see page 170 of PB – I) i.e. during AY 2006-07, therefore, in the computation of total income for AY 2006-07, the same was

claimed as deduction by showing it as “expenditure disallowed under section 40(a)(ia) in AY 2005-06, now allowable in AY 2006-07”.

7.11 It was further, argued that no expenditure was incurred in AY 2006-07 and the same was only claimed in computation of income for AY 2006-07 due to provisions of section 40(a)(ia) of the Act. In other words, for considering the genuineness and deciding the admissibility of deduction in respect of expenditure on land development expenses, a finding was necessarily supposed to be given by AO in the course of assessment for AY 2005-06 (which was not given) and the transactions for AY 2005-06 cannot be considered for the purposes of computation of total income for AY 2006-07.

7.12 That further, the ld CIT (A) vide order dated 31.12.2010, while giving relief to the assessee – appellant, gave directions to the revenue authorities to take appropriate action as per law for AY 2005-06 and bring to tax the above expenditure as non genuine in AY 2005-06, which has not been done by revenue authorities and as such, the addition needs to be deleted on this ground also.

7.13 To sum up, it was argued by learned counsel for assessee that the transaction relating to land development expense were incurred in AY 2005-06. That the expenditure were also booked in P&L Account for AY

2005-06, because of the provisions of section 40(a)(ia) of the Act, the said claim was deferred to AY 2006-07. The only jurisdiction of the AO in AY 2006-07 was to consider the allowability by confining himself to provisions of section 40(a)(ia). Instead, of doing that the AO transgressed his jurisdiction by looking into the genuineness of the expenses for the preceding assessment year. The AO could not have given a finding that the expenses for the preceding assessment year were not genuine in the course of making assessment for AY 2006-07 and as such, the relief so given by learned CIT (A) is just and proper and be upheld.

8. We have heard the rival contentions and perused the material on record. The learned CIT(A) in its order dated 31.12.2010 deleted the disallowance by holding as under:

> *"5. I have carefully considered the submissions filed by the appellant and the case laws relied upon by him. The following facts emerge from these submissions and are borne out from record:*
>
> *"1. The expenses of Rs.11,45,18,528/- were incurred in the FY 2004-05 and were accounted for in the books of account in the FY 2004-05 as per mercantile system of accounting regularly employed by the Appellant.*

ii. Tax was deducted in respect of each sum credited to the accounts of the payees as required by section 194C of the Act.

iii Tax deducted was reflected in the books of account for the year ending 31-3-2005. It was not paid within the period prescribed under the Act but was paid on 25-10-2005. Necessary proof of payment of the Total TDS of Rs.31,17,853/- on 25-10-2005 was furnished by filing copy of the Challan.

iv. In the computation of total income for the assessment year 2005-06 the sum paid of Rs.11,45,18,428 was added back as " expenses not allowed u/s 40 (a) (ia) of the Act,1961."

v. Since tax was paid on 25-10-2005 the amount of Rs.11,45,18,428/- was claimed as deduction in the Astt.Year 2006-07 in view of the proviso to Section 40(a) (ia).

vi. Necessary details in respect of land development expenses were called for by the AO in the course of assessment for the A.Y.2005-06, vide questionnaire dt 19-12-07 and furnished along with bills/ invoices confirmation from suppliers and were considered by the AO in the course of assessment for A.Y.2005-06 completed u/s 163(3) on 26-3-2007 after accepting the same. It is seen from the assessment order that the Assessing Officer has disallowed the expenditure of Rs.11,45,18,528/- out of total disallowance of Rs.14,03,92,386/- by holding the as non genuine and fictitious. However, it is not disputed by the Assessing Officer that the expenditure was incurred and

accounted for in the asstt.year 2005-06 under the mercantile method of accounting regularly employed. The same was not claimed in A.Y 2005-06 only because of compulsion of section 40(a) (i) and its deduction was shifted to Asstt. Year 2006-07 where it was claimed as per mandatory provision contained in proviso to section 40(a) (ia). The ground, that the expenditure cannot be disallowed in A.Yr.2006-07 because it does not relate to the year, was taken by the appellant before the Assessing Officer also during the assessment proceedings but the Assessing Officer had overruled the objection by saying that the disallowance is to be made in the year when the expenditure is claimed.

Although, the issue is a bit complete because , in the year 2005-06, the expenditure was incurred but the claim was withdrawn in the computation of income on technical ground (u/s 40(a)(ia) of the I.T.Act) so there was no question of disallowing the same whereas in the near year, i.e. A.Yr 2006-07 was expenditure is claimed and disallowed but the disallowance is challenged on the ground that the expenditure does not relate to this year.
However, after going through the submissions of the assessee and the various case laws cited by him, I am of the view that since the expenditure was incurred and accounted for in the books of account maintained for the Asstt. Year 2005-06, its genuineness could only be considered in the Asstt.Year 2005-06 and could not be shifted to the Asstt.Year 2006-07, as the law on this issue has been laid down in the case of Kikabhai Premchand vs.CIT 24 ITR 506 (SC) and CIT^ vs.S.M.Chitnavis (1932) 2

Company cases 464, that the assessing officer can only take into consideration income profit or gains made in that year and is not concerned with the profits or losses for another year.

Thus, for considering the genuineness of expenditure, a finding ought to have been given in the course of assessment for the assessment year 2005-06 when it was incurred and the A.O., while making assessment for the asstt.Year 2006-07, could not examine the transactions of the proceeding year and telescope those transactions for computing the income for the asstt.Year 2006-07. I, therefore hold that it was not permissible for the A.O. to make the transactions entered into in the preceding year subject matter of assessment for the assessment year 2006-07. The only aspect, which the A.O. could examine in the asstt.Year 2006-07, was whether the expenditure incurred in the preceding year could be allowed in view of the proviso to sec 40(a) (ia).

I agree with the appellant that the proviso to section 40(a) (ia) is a mandatory provision and if the conditions set out therein are fulfilled it is obligatory to allow the deduction. In the present case the facts which are borne out from record are that the expenditure was shown and accepted as one in respect of which tax was deductible u/s 194C. Tax was actually so deducted in the assessment year 2005-06 when the expenditure was incurred. The tax deducted u/s 194C has been shown to be deposited on 25-10-2005. Thus all the conditions set out in the proviso to section 40(a) (ia) are fulfilled. This being so it is mandate of the

said proviso that the deduction ought to be allowed. Accordingly, it is directed that the deduction of Rs.11,45,18,5628/- be allowed by the A.O.

However the Assessing officer is free to investigate the genuineness of the expenditure of Rs. 11,45,18,528/- in assessment year 2005-06 by taking appropriate action as per law and tax the above sum if the expenditure is not genuine."

8.1 On examination of the facts on record, it is undisputed that appellant had incurred a total expenditure of Rs. 11, 51, 81, 489/- under the head "land and development expenses" in AY 2005-06 and since out of total expenditure of 11, 51, 81, 489/-, TDS was not deposited within time though deducted with respect to expenditure of Rs. 11, 45, 18, 528/- and as such, the same was added back in computation of income for AY 2005-06, by describing it as "expense not allowable under section 40(a)(ia) of the Income Tax Act. The reason given for adding back the same in computation of income for AY 2005-06 was that even though the said expenditure was incurred and claimed in AY 2005-06 and tax was also deducted at source and though it was claimed as expenditure in P&L Account, since the TDS was not deposited with the statutory period, the expenditure so claimed was voluntarily added back in the computation of income as not allowable under section 40(a)(ia) of the Act. The tax was duly deposited on

25.10.2005 i.e. during AY 2006-07, therefore, in the computation of total income for AY 2006-07, the same was claimed as deduction by showing it as “expenditure disallowed under section 40(a)(ia) in AY 2005-06.

8.2 On going through the paper book filed by the assessee, we have seen that the amount of Rs. 11, 45, 18, 528/- was never claimed as expenditure in the Profit & Loss Account for impugned assessment year 2006-07, rather the same was claimed as expenditure in AY 2005-06, for which due assessment was made by learned AO under section 143(3) of the Act, who accepted the genuineness of said expenditure after due and proper examination. Following documents have been filed by assessee company in support of the above:

(a) Profit & Loss Account for AY 2005-06, wherein, said expenditure of Rs. 11, 45, 18, 528/- was claimed as expenditure (see page 55 of PB – I).

(b) Computation of income for AY 2005-06, wherein, the said expenditure was added back as TDS was deducted but not deposited within due date (see page 50 of PB – I).

(c) Notice of AO dated 19.02.2007 during assessment proceedings for AY 2005-06, wherein, specific query was raised by AO with regards to claim of said land development expenses (see page 68 – 69 of PB – I).

(d) Copy of reply to AO during assessment proceedings for AY/ 2005-06, wherein, specific reply was furnished to the AO regarding claim of land development expense along with necessary documentary proofs containing bills and confirmations of the parties to whom said payments are being made by assessee company (see page 72 – 73, 76 – 83 and 85 – 169.

(e) Copy of assessment order for AY 2005-06 dated 26.03.2007 under section 143 of the Act.

8.3 The genuineness of the expenditure on land development expenses incurred in assessment year 2005-06 under section 37(1) of the Act can only be examined in assessment year 2005-06 and not in the instant assessment year. Infact, such an examination as is evident from the order of CIT(A) and facts stated by us wherein it was dealing him in assessment year 2005-06. Once, such an examination has already taken place and no adverse finding recorded therein, the only issue that remained for adjudication in the instant year was allowability in terms of proviso to section 40a(ia) of the Act. The said proviso to section 40a(ia) of the Act reads as under:

"Provided that where in respect of any such sum, tax has been deducted in any subsequent year, or has been deducted during the previous year but paid after the due date specified in sub-section (1) of section 139, such sum shall be allowed as a

deduction in computing the income of the previous year in which such tax has been paid."

8.4 The aforesaid proviso expressly provides that where in respect of any sum, tax has been deducted in any subsequent year, such sum shall be allowed as deduction in computing the income of the previous year in which such tax has been paid. In such circumstances, the conclusion of CIT(A) to hold that since genuineness of expenditure stood examined in assessment year 2005-06 and tax was duly deducted in assessment year 2006-07, therefore, the disallowance made in the impugned order of assessment was on account of non-genuineness of expenditure was not tenable.

8.5 We also find that the learned CIT DR has though extensively relied on enquiries conducted by learned AO but has failed to controvert the factual findings recorded by learned CIT (A), and the status of directions to the revenue authorities to take appropriate action as per law for AY 2005-06 and bring to tax the above expenditure as non genuine in AY 2005-06.

8.6 In support of the above conclusion, we seek to draw support from the case of *Kikabhai Premchand vs CIT (SC) reported in 24 ITR 506 wherein it was held as under:*

"It is well recognized that in revenue cases regard must be had to the substance of the transaction rather than to its mere form. In the instant case disregarding technicalities it was impossible to get away from the fact that the business was owned and run by the assessee himself. In such circumstances it was wholly unreal and artificial to separate the business from its owner and treat them as if they were separate entities trading with each other and then by means of a fictional sale introduce a fictional profit which in truth and in fact is non-existent. Cut away the fictions and one reach the position that the man is supposed to be selling to himself and thereby making a profit out of himself which on the face of it is not only absurd but against all canons of mercantile and income-tax law. He may keep it and not show a profit. He may sell it to another at a loss and cannot be taxed because he cannot be compelled to sell at a profit. But in this purely fictional sale to himself he is compelled to sell at a fictional profit when the market rises in order that he may be compelled to pay to Government a tax which is anything but fictional. The appellant's method of book-keeping reflected the true position. As he made his purchases he entered his stock at the cost price on one side of the accounts. At the close of the year he entered the value of any unsold stock at cost on the other side of the accounts thus cancelling out the entries relating to the same unsold stock earlier in the accounts; and then that was carried forward as the opening balance in the next year's accounts. This cancelling out of the unsold stock from both sides of the accounts left only the transactions on which there had been actual sales and gave the true and actual profit

or loss on his year's dealings. In the same way, the appellant had reflected the true state of his finances and given a truthful picture of the profit and loss in his business by entering the bullion and silver at cost when he withdrew them for a purely non-business purpose and utilised them in a transaction which brought him neither income nor profit nor gain. Hence in the circumstances of this case, no income arose to the appellant as a result of the transfer of the shares and silver bars to the trustees."

8.7 In view of the above facts and circumstances of the case, we uphold the deletion of addition of Rs. 11,47,18,428/- by the CIT(A) and dismiss the ground raised by the revenue

9. Ground 2 relates to addition of Rs. 2,00,00,000/- on account of discrepancy in the books of accounts of the assessee company. The Assessing Officer in the order of assessment has perused of profit and loss account of the assessee. It was observed that sum of Rs. 10,50,00,000/- had been debited on account of payment in terms of arbitration order which had been claimed to have been paid to SCLL. Further in the balance sheet of the assessee, it reflected a payment of Rs. 7,35,50,000/- as compensation payable. However, from the perusal of the Citi Bank account of assessee, it is noticed that Rs. 5,27,00,000/- has been actually paid to SCLL during the instant

assessment year which fact had also been confirmed from Shri S.K. Gupta's SCLL account which gives complete narrations of entries amounting to Rs. 5,27,00,000/- given to PCL. Thus, the Assessing Officer was of the opinion that it reflects only a sum of Rs. 5,35,00,000/- shown as payable by the assessee to SCLL instead of Rs. 7,35,00,000/-. He therefore, observed and held that the assessee company had paid Rs. 2,00,00,000/- over and above the amount of Rs. 10,50,00,000/- debited to the profit and loss account of SCLL and since the assessee has not been provided any explanation for the above difference in compensation payable, the same was added to the total income of the assessee company for the year under consideration under the head 'income from other sources' on account of discrepancies in the books of account of the assessee.

9.1 Before the ld. CIT(A), the assessee contended that the aforesaid addition was made without giving any opportunity to the assessee company. It also stated that the basis adopted for making the addition was Annexure in order of assessment and a printout was taken which contained loan transactions from April, 2005 to March, 2006 extracted from the laptop belonging to Shri S.K. Gupta, who was a director of SCLL. It was contended that the aforesaid alleged discrepancy is based on fundamental misconception as sum of Rs. 2,00,00,000/- was paid

vide cheque no. 245122 dated 25.2.2006 and cheque no. 245128 dated 1.3.2006 of Rs. 1,00,00,000/- drawn on Citi Bank, New Delhi. It was stated that these payments were made on behalf of M/s. Florentine Estates of India Ltd. and M/s. Mad Entertainment Network Ltd. respectively and were duly reflected in the books of accounts and the accounts of the respective companies were duly debited. The ledger accounts and all evidences to support the aforesaid claim were furnished. The CIT(A) on examination of the aforesaid, deleted the addition.

9.2 Learned CIT DR argued that said addition was correctly made by learned AO, as the assessee company was not able to substantiate the discrepancies in its books of accounts of a sum of Rs. 2,00,00,000/-. He heavily relied on the order of assessment so passed by learned AO. The learned CIT DR agreed to the fact that even though, said addition was made by learned AO under section 153A of the Act, and the same was deleted by learned CIT (A) and though no appeal has been preferred by Revenue in the appeal so filed under section 153A proceedings but revenue has accepted the said deletion by learned CIT (A) only in 153A proceedings.

9.3 The ld. counsel for the assessee again supported the order of learned CIT (A) dated 31.12.2010 and further, submitted that during the impugned assessment year the 2006-07, the assessee company had showed payments of cheques aggregating to Rs. 5,27,00, 000/-, however, the party to whom the said amount was paid M/s Sino Credit & Leasing Ltd. (SCLL) has confirmed of receiving only cheques upto Rs. 3, 27, 00, 000/- from the assessee company. That however, the correct position is that the amount of Rs. 1 crore each, no doubt was paid by the assessee company, but was paid on behalf of M/s Florenstine Estates India Ltd. and M/s Mad Entertainment Network Ltd., these payments were duly reflected in the books of assessee company and the accounts of the respective companies were duly debited as well. These being subsidiary companies their accounts were duly submitted in the course of the assessment. However, the addition was made by learned AO without providing any opportunity what so ever, and also without verifying the facts, which was duly examined and appreciated by learned CIT (A) and as such, the relief given by learned CIT (A) is just and proper.

10. We have considered the rival submissions and perused the material on record. The learned CIT(A) while deleting the addition has held as under:

"6 I have considered the submissions. The facts as started in the submissions show that AO is not right in the stating that no explanation was provided for the said payment of Rs.2 Crores. This was because the appellant was not called upon to explain the matter. The appellant has clarified the matter based on the records maintained by it to the effect that payment of RTs.1 crore each, aggregating Rs.2 Crores was made to M/. Sino Credits Leasing Ltd on behalf of M/s. Florentine Estates of India Ltd and M/s. Mad Network Ltd respectively, and, necessary adjustment was made in the books of account by the appellant by raising debit notes. There was therefore no discrepancy in the matter and accordingly the addition of Rs.2 crores cannot be sustained. The addition of Rs.2 crores is deleted and Grounds No.10 is allowed.

10.1 The ld CIT DR in his contentions, has not rebutted the aforesaid factual findings recorded in the impugned order of CIT(A) and in absence of such rebuttal, we are unable to persuade ourselves to form an opinion to the contrary. The fact of the matter remains that Rs. 2,00,00,000/- was explained by the assessee having been paid by debiting account of the group company and such payments have been made through banking channels. The revenue has not been able to place any material to rebut the aforesaid cogent explanation tendered in the appellate proceedings. No opportunity was granted in the assessment proceedings. We also notice that identical addition had

been made in the order of assessment dated 31.12.2010 under section 153A/143(3) of the Act in pursuance to search conducted on 5.11.2009 under section 132(1) of the Act. The said addition stood deleted in an order dated 17.11.2014 passed by CIT(A) though the revenue has preferred an appeal in ITA No. 754/Del/2015, but such deletion of addition has not been challenged before us which also supports the aforesaid claim of the assessee company. Having regard to the aforesaid factual position, we uphold the deletion of addition of Rs. 2,00,00,000/- on account of discrepancy in the books of accounts. As a result, ground raised by the revenue is rejected.

11. Ground No. 3 and 4 relates to addition of Rs. 10,50,00,000/- being an expenditure incurred on payments to SCLL as compensation by the assessee company the relevant facts as noted in the order of CIT(A) are that during the assessment proceedings, AO noted that appellant had claimed a deduction of Rs. 10.50 crores paid to M/s Sino Credits and Leasing Ltd. as compensation against their claim consequent upon the arbitration settlement dated 2.05.2005. A query was raised in the questionnaire dated 19.02.2008 regarding the payment of Rs. 10.5 crores to M/s Sino Credits and Leasing Ltd. Subsequently, on 24.12.2008 notice u/s 142(1) dated 23.12.2008 was given to the assessee by the Assessing Officer alongwith copy of a

statement of Shri S.K Gupta, Director SCLL recorded in which Shri Gupta and reportedly stated that SCLL was involved in giving bogus entries, that the impugned transaction with Puri Construction Ltd. was not a genuine transaction, that he did not attend any arbitration proceedings and does not know the Judge who conducted such proceedings. The AO therefore required the Appellant to show cause why Rs. 10.50 crores be not disallowed. A consolidated reply to the questionnaires dated 19.12.2008 and 29.12.2008 was furnished to the Assessing Officer and, it was submitted as under:

> *"We have further also received on 24.12.2008 your notice u/s 142(1) dated 23.12.2008 regarding the statement of Sh. S.K Gupta, Director, Sino Credits & Leasing Ltd. We do not know under what circumstances Sh. S.K. Gupta has given the attached statement. We hereby reaffirm and reiterate all of the above documentary evidences regarding this transaction. All the payment made to M/s Sino Credits & Leasing Ltd. were made under the judicial award passed by an Additional District & Sessions Judge (Retd.) and a settlement agreement reached with M/s Sino Credits & Leasing Ltd. It is obvious that Sh. S.K Gupta in an attempt to wriggle out of his liability in pay hefty taxes on account of the damages received by him under the judicial order has concocted a new story out of his imaginations. In view of the documentary evidence, which speaks for itself, the claim of deduction of Rs. 10.50 crores is justified on facts and in law and may be accepted. It is further stated that we have been*

confronted with this shocking statement of Sh. S.K Gupta only on 24.12.2008. We have been asked to show cause the genuineness of this transaction 26.12.2008, whereas 25.12.2008 is a Christmas holiday. We are, therefore, left with no option at this juncture but to reiterate and reaffirm the documentary evidence on record. We would also like to be given an opportunity to exercise our right to allow our advocate to cross examine Mr. S.K Gupta on the incredible stamen given by him. It is shocking that any reliance can be placed on his statement when he himself has been a signatory to all the agreements, a party before the Ld. Arbitrator and a recipient of all the cheques. It is prayed that no disallowance is called for."

11.1 The appellant alongwith the above reply, furnished evidences in the shape of MOU dt. 20.06.2004 entered into between the assessee and SCLL, Judicial Award passed by Sri Om Prakash Addl. District & Sessions Judge (Retd.) dt. 02.05.2005, agreement of Settlement dt. 31.10.2005 between assessee and SCLL and copy of account of SCLL in the books of assessee showing the details of payment made to SCLL. Also, further vide letter dated 29.12.2008 copies of six interim orders passed by Shri Om Prakash, Arbitrator in the course of arbitration proceedings were also filed.

11.2 Since the assessee had sought an opportunity to cross examine Shri S.K. Gupta, a notice dated 26.12.2008 was issued to enable the

assessee to cross examine Shri S.K. Gupta. However, he failed to attend the said proceedings on the designated date and time and as a result, the Assessing Officer proceeded to make the addition without providing any cross examination in the course of assessment proceedings. The Assessing Officer relied on the statement dated 20.11.2007 and 19.12.2008 of Shri S.K. Gupta and Annexure -2 seized from the premises of Shri S.K. Gupta to hold that the expenditure incurred is an accommodation entry and not an eligible business expenditure. It was held that agreements referred by the appellant though run into several pages elaborating every aspect relating to the various litigations involved with the subject land but there is no mention of any litigation between PCL and SCLL. It was observed that perusal of the balance sheet and profit & loss account of SCLL for assessment year 2006-07 does not indicate any nature of receipt corresponding to the payments that PCL has claimed to have made to SCLL. It was also held that the SCLL Is a company involved in transactions of shares and securities and there is no hint therein implying any kind of land development activities being done by SCLL. It was held that though the confirmation letters filed do not bear the signature of authorized signatory of SCLL and therefore, they do not

have any evidentiary value. The Assessing Officer therefore, concluded as under:

> *"18. Hence, in the light of the above facts in respect of the payments claimed by the assessee company to have been made to SCLL, it is held that SCLL is a bogus concern existing primarily for the purpose of providing accommodation entries to beneficiaries like PCL and that the payments of Rs. 10,50,00,000/- made by Puri Construction Ltd. to Sino Credits & Leasing Ltd. is not a genuine transaction in contradiction to the claims made by the assessee company. Therefore, the total amount of Rs. 12,50,00,000/- is added to the total income of the assessee company for the year under consideration."*

11.3 Before the CIT(A), the appellant submitted that addition made is not valid since no opportunity for cross examination was granted to the assessee company. The CIT(A) however deleted the additions by holding as under:

> *"I have carefully considered the submissions made on behalf of the Appellant. The AO has made the addition on the following evidence/documents-*
>
> *a) Statement of Shri S.K.Gupta said to have been recorded by the DDIT in the course of survey on 20-11-2007;*

b) A printout stated to have been taken out from the laptop impounded from Shri S,K.Gupta in the course of survey on 20-11-2007; and

c) Statement of Shri S.K.Gupta recorded by the AO on 19-12-2008.

With regard to the statement of Shri S.K.Gupta, said to have been recorded on 20-11-2007, the AO has remarked that there is an admission by Shri Gupta of issuing accommodation entries. In respect of the printout sated to have been taken on from the laptop of Shri S.K.Gupta, the AO has analyzed the entries and has taken the view that the withdrawals have been passed on to the Appellant and commission @ 3.5% has been retained for providing accommodation entries. As regard the statement recorded on 19-12-2008, reference has been made again to the admission of Sri S.K.Gupta of providing accommodation entries to the Appellant. It is also said that P & L A/c & B/s of SCLL does not indicate any nature of receipts corresponding to payment by the appellant. For these cumulative reasons the AO has held the payment of Rs.10.50 crores as non-genuine and disallowed the same.

The appellant's contention is that copy of the statement said to have been recorded by the DDIT on 20-11-2007 has not been provided in the course of assessment not even till date. Likewise, copy of the aforesaid printout also was not provided in the course of assessment. The AO, it is stated, is wrong in stating-in para 16 that assessee was confronted with the copy of thereof. The Appellant was not even given a chance to

controvert the proposed inference sought to be drawn against it. The Appellant came to know that a statement was recorded on 20-11-2007, from the assessment order. Similarly, the printout, which has been annexed as Annexure II, came to be known only after the receipt of the assessment order. Even the P & L A/c and B/s of SCLL, which has been annexed as Annexure III to the assessment order was not furnished in the course of assessment and it came to be known only on receipt of assessment order. It has also been contended that the documentary evidence in the form of MOU / AWARD/SETTLEMENT was not even considered and as held by the apex court in the two cases cited, could not be rejected on the face of it unless valid reasons were given for doing so. Instead cognizance was taken of oral statement of Sri S.K.Gupta which was not tested by cross-examination. Under these circumstances, it has been pointed out that there has been a total violation of the principles of natural justice and non adherence of the proper procedure for making the assessment. Likewise, with respect to the statement recor4ded on 19-12-2008, do doubt a copy was given but no cross examination could be carried as Shri S.K.Gupta did not appear. The action of the AO in drawing adverse inference under these circumstances was totally in violation of the principles of natural justice and the rule of law and violation of the proper procedure of making assessment. A long list of case of law has been cited which uniform ally states that the material collected on the back of the assessee and intended to be used against the assessee must be produced before the assessee so that he can controvert it and

if any statement is to be used against the assessee, an opportunity to cross examine the deponent ought to be allowed.

In view of the fact that the main objection/ground taken by the appellant was that cross examination of Shri S.K.Gupta, Director SCLL, should be allowed, my predecessor required the A.O. to allow opportunity to the appellant to cross examine Shri Gupta. The AO in his report dt.7-6-2010 has stated that summons were issued u/s 131 to Shri Gupta for personal attendance on 20-5-2010 but Shri Gupta did not appear Summons were again issued for 28-5-2010 also but Shri Gupta did not appear. Summons were again issued for 28-5-2010 also but Shri Gupta did not attend even on this date. Yet another summons were issued for 4-6-2010 which also resulted in non-appearance of Shri Gupta. The AO reported that, as a result cross examination of Shri Gupta could not be affected.

In his report however, the AO has also stated that a search u/s 132 has been carried out on 5-1-2009 in the case of the Appellant Company alongwith other group cases. During the course of the search, the issue of providing alleged accommodation entries by SCLL to the Appellant was confronted to Shri Mohinder Puri, one of the Directors of the assessee company. The AO has reported that there has been an offer of the amount involved as additional income.

The assessment in this case was completed on 31-12-2008. The search was carried out on 5-1-2009 is a subsequent event. On the question of whether cognizance of subsequent events can be

taken in the course of Appeal the apex court has laid down as under:

" Subsequent events may be taken not of by the appellate authority-During the progress and passage of proceedings from the taxing authority to appellate authority or authorities if subsequent events occur, the appellate authority has to examine and evaluate the same and mould the relief accordingly. This is so because for making the right or remedy claimed by the party just and meaningful as also legally and factually in accord with the current realities, the court can, and in many cases must, take cautious cognizance of events and developments subsequent to the institution of the proceedings provided the rules of fairness to both sides are scrupulously obeyed [Pasupuleti Venkateswarlu vs.The Motor & General Traders, AIR 1975 SC 1409, 1410: Hasmat Rai vs.Raghunath Prasad, AIR 1981 SC 1711,1716-17].

Since the issue involved in Ground No.14 is also a matter which is being pursued by the AO in the course of assessments relating to search and in view of the fact that on the basis of the order passed by the AO it is not possible to continue the disallowance and since the matter is still alive with the same A.O., I consider it proper that the issue be examined afresh. Under the circumstances, the disallowance of Rs.10.50 crores in the present assessment is deleted.

10. In the result, the appeal of the appellant is party allowed."

11.4 The ld CIT DR submitted that the said addition is made on the basis of statement so recorded of one Sh. S.K. Gupta on 19.12.2008 during the course of assessment proceedings under section 143(3) of the Act, wherein, it was stated by Sh. S.K. Gupta that the transactions entered between assessee company and M/s Sino Credit & Leasing Ltd. (SCLL) is not genuine and is nothing but a mere accommodation entry provided by Sh. S.K. Gupta to Puri group of companies. That further, learned CIT DR relied on pages 70 to 77 of assessment order, wherein, it was mentioned by learned AO that during the course of survey on Sh. S.K. Gupta on 20.11.2007, various documents were impounded substantiating the fact that the said amount of Rs. 10.50 crores is nothing but mere accommodation entries. Further, learned CIT DR argued that the said statement was provided to the assessee company for rebuttal, and further, Sh. S.K. Gupta was also summoned for cross examination, however, Sh. S.K. Gupta failed to turn up for cross – examination and as such, the addition so deleted by learned CIT (A) is not just and proper.

11.5 That further, learned CIT DR argued that the said addition was again made by learned AO in 153A proceedings, as there was incriminating material in the shape of statement of Sh. Mohinder Puri (discussed at pages 10 to 13 of the assessment order under section

153A of the Act), who had voluntary offered to surrender the said amount of Rs. 10.50 crores and further on the basis of books of accounts so seized during the course of search on assessee, thus, it was contended by learned CIT DR, that the said addition may be sustained in either of the two proceedings i.e. either in original assessment proceedings or under proceedings under section 153A of the Act.

11.6 Learned CIT DR filed following written submissions, in addition to her oral submission, which is compilation of various case laws sought to be relied by her, the said submission is extracted here below:

> "In the above case, it is humbly submitted that the following decisions may kindly be considered.
>
> 1 *"Bhagirath Aggarwal v. CIT Delhi High Court, 2013 31 taxmann.com 274*
>
> *An addition in assessee's income relying on statements recorded during search operations cannot be deleted without providing statements to be incorrect.*
>
> 2 *Raj Hans Towers (P) Ltd. v. CIT, Delhi High Court, 2015, 56 taxmann.com 67*

Where assessee had not offered any satisfactory explanation regarding surrendered amount being not bonafide and it was also not borne out in any contentions raised before lower authorities, additions so made after adjusting expenditure were justified.

3 *PCIT v. Avinash Kumar Setia, Delhi High Court, 2017 81 taxmann.com 476*

Where assessee surrendered certain income by way of declaration and withdraw same after two years without any satisfactory explanation, it could not be treated as bonafide and hence, addition would sustain.

4 *CIT v. Kuwer Fibers (P) Ltd. Delhi High Court, 2016, 2017 TIOL 30 HC Del IT*

1 *Addition made on basis of director's statement recorded during the course of search proceedings is sustainable, where the statements recorded are duly corroborated by evidences on record.*

2 *Adoption of estimated valuation is justified, when the purchases were made outside the books of account and proper accounting or reconciliation was not made by the assessee*

3 *Rejection of valuer's report is sustainable, where neither the valuer's report was produced within the stipulated time nor was it unverified*

5 *M/s Pebble Investment and Finance Ltd. v. ITO Supreme Court 2017, 2017-TOIL-238-SC-IT*

Dismissed SLP challenging the judgment, whereby, the High Court had held that statement made u/s 133A could be relied upon for purposes of assessment, in absence of any contrary evidence or explanation as to why such statement was not credible.

6. *Video Master vs JCIT, supreme court, 2015 66 taxmann.com 361 (SC)*

Where addition on account of undisclosed income was based on statement of partner of assessee – firm, it could not be said that addition was based on no evidence."

11.7 The learned counsel of assessee submitted that the said sum was paid by assessee to M/s Sino Credit & Leasing Ltd and the said payment was made by assessee company on the directions and judicial award granted by Additional District & Sessions Judge and on settlement agreement reached with M/s Sino Credit & Leasing Ltd. That however, learned AO in the order of assessment has relied on the statement of Sh. S.K. Gupta recorded on 24.12.2008 and also on survey being conducted on Sh. S.K. Gupta on 20.11.2007.

11.8 It was further, submitted by the learned counsel of assessee that statement of Sh. S.K. Gupta, being director of M/s Sino Credit & Leasing Ltd. cannot be relied and needs to be excluded for consideration, as he has not been produced for cross – examination, even though specific request for the same was made by assessee – appellant vide letter dated 26.12.2008. Reliance is placed on following judgments in support of the aforesaid proposition:

(a) PCIT vs Best Infrastructure (P) Ltd. (Delhi High Court) reported in 397 ITR 82.
(b) Kishinchand Chellaram vs. CIT. [1980] 125 ITR 713 (SC)
(c) CIT vs Ashwani Gupta. 322 ITR 396 (Del)
(d) Andaman Timber Industries vs CCE (SC) reported in 127 DTR 241.

11.9 That further, it was submitted that even the statement of Sh. S.K. Gupta so relied on by the Revenue, cannot be relied on, as Sh. Gupta had retracted the said statement by filing an affidavit dated 27.02.2009 (at pages 36 to 39 of PB – II) and further, in proceedings under section 153A of the Act, when learned CIT (A) remanded the matter back to the file of AO for remand report, than Sh. S.K. Gupta appeared before AO and was also cross examined by director of assessee company, wherein, learned CIT (A) has recorded a finding in order dated 17.11.2014 at page 119 of the said order, that Sh. S.K.

Gupta has deviated from his statement at different stages and has also filed an affidavit dated 27.02.2009, which he accepted when he was cross examined by director of assessee company and as such, the addition so made solely on the basis of statement of Sh. S.K. Gupta's statement needs to be deleted, as such, as the said statement has been correctly held to be unreliable in face of subsequent denials by Sh. S.K, Gupta.

11.10 Further, the ld. counsel for the assessee relied on the statement of Sh. Om Prakash, retired Additional & Sessions Judge, who acted as an arbitrator between assessee company and M/s SCLL, wherein, the learned judge had accepted regarding the award so granted between dispute pending between assessee and M/s SCLL and the said fact has not been rebutted by the learned counsel of Revenue and as such, the addition needs to be deleted on this ground also.

11.11 That further, the learned counsel of assessee relied on following documentary evidences in support of his argument that the payment so made to M/s SCLL is genuine and duly backed by documentary evidences:

(i) Copy of reply filed before AO containing copies of six interim orders passed by Sh. Om Prakash, Additional District & Sessions Judge (at pages 22 to 37 of PB – I).

(ii) Copy of account of M/s SCLL in books of assessee company (at pages 203 of PB – I).

(iii) Copy of MOU entered into with SCLL on 20.06.2004 (at page 204 to 219 of PB – I).

(iv) Copy of Judicial Award from Arbitrator (at pages 220 to 244 of PB – I).

(v) Copy of agreement of settlement dated 02.04.2005 (at pages 245 to 245 of PB – I).

12. We have considered the rival submissions and perused the material on record.

12.1 The fact of the case are that the assessee company remitted sum of Rs. 10.50 crores to M/s Sino Credit & Leasing Ltd. in terms of judicial award by Additional District & Sessions Judge and settlement agreement reached with M/s Sino Credit & Leasing Ltd. The learned AO in the order of assessment has relied on the statement of Sh. S.K. Gupta recorded on 24.12.2008 and also on survey being conducted on Sh. S.K. Gupta on 20.11.2007. We have gone through the following documentary evidences with regard to payment made by assessee company to M/s SCLL:

(i) Copy of reply filed before AO containing copies of six interim orders passed by Sh. Om Prakash, Additional District & Sessions Judge (at pages 22 to 37 of PB – I).

(ii) Copy of account of M/s SCLL in books of assessee company (at pages 203 of PB – I).

(iii) Copy of MOU entered into with SCLL on 20.06.2004 (at page 204 to 219 of PB – I).

(iv) Copy of Judicial Award from Arbitrator (at pages 220 to 244 of PB – I).

(v) Copy of agreement of settlement dated 02.04.2005 (at pages 245 to 245 of PB – I).

12.2 The learned AO has not rebutted any of the aforementioned documentary evidences so furnished by the assessee and learned AO has relied on the statement of Sh. S.K. Gupta dated 24.12.2008, where statement needs to be excluded for consideration, as he has not been produced for cross – examination, even though specific request for the same was made by assessee vide letter dated 26.12.2008 and specific notices were issued to Sh. S.K. Gupta during course of appellate proceedings and as such, since he being witness of the department should have been brought forward and should have been allowed to cross examine by assessee company and in absence of such, the statement of Sh. S.K. Gupta is not an admissible evidence and should be excluded altogether In support of our said findings, we rely on following judgments:

(a) PCIT vs Best Infrastructure (P) Ltd. (Delhi High Court) reported in 397 ITR 82.

37*. Fourthly, a copy of the statement of Mr. Tarun Goyal, recorded under Section 132 (4) of the Act, was not provided to the Assessees. Mr. Tarun Goyal was also not offered for the cross-examination. The remand report of the AO before the CIT(A) unmistakably showed that the attempts by the AO, in ensuring the presence of Mr. Tarun Goyal for cross-examination by the Assessees, did not succeed. The onus of ensuring the presence of Mr. Tarun Goyal, whom the Assessees clearly stated that they did not know, could not have been shifted to the Assessees. The onus was on the Revenue to ensure his presence. Apart from the fact that Mr. Tarun Goyal has retracted his statement, the fact that he was not produced for cross-examination is sufficient to discard his statement.*

b) Andaman Timber Industries vs CCE (SC) reported in 127 DTR 241.

Not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee

disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority.

12.3 That further, it is seen from the record that even the statement of Sh. S.K. Gupta so relied on by the Revenue, cannot be relied on, as Sh. Gupta had retracted the said statement by filing an affidavit dated 27.02.2009 (at pages 36 to 39 of PB – II) and further, in proceedings under section 153A of the Act, when learned CIT (A) remanded the matter back to the file of AO for remand report, than Sh. S.K. Gupta appeared before AO and was also cross examined by director of assessee company, wherein, learned CIT (A) has recorded a finding in order dated 17.11.2014 at page 119 of the said order, that Sh. S.K. Gupta has deviated from his statement at different stages and has also filed an affidavit dated 27.02.2009, which he accepted when he was cross examined by director of assessee company and as such, the addition so made solely on the basis of statement of Sh. S.K. Gupta's statement and without rebutting the documentary evidences so relied on by the assessee company is hereby deleted and as such the findings

so recorded by the learned CIT(A) extracted below is held to be justified and proper:

> *"2.1 I have considered the grounds raised in appeal and the facts of the case. I have also considered the submission filed by the AR of the appellant.*
>
> *2.2 The appellant raised ground against disallowance of Rs.10.50 crores on account of payments made to Sino Credits Leasing Ltd (SCLL). During the year under consideration the appellant has shown payment of Rs.10.50 crores to SCLL on account of land development. The assessee is the power of land approx.10.53 acres in Gurgaon. The SCIL is the developer. As per the MOU between the owner and the developer the SCIL was to develop land in Sector 53, Gurgaon belonging to the assessee company. Survey u/s 133A was carried out on 5/1/2009 at the business premises of SCIL. Shri Gupta admitted that the MOU signed by him is only to give legal colour to the entire transaction. He further explains that a cheque of Rs.1 crore was received from PCL through Sh.S.S.Aneja, Advocate /CA and after deducting his commission @ 3.5% the balance Rs.96.50 lacs was returned back. He further stated that he is doing the business of accommodation entries. He further stated that he never had any dispute with the assessee. In his statement on 19/12/2008 recorded u/s131 protested by the appellant as recorded at the back of the assessee he stated that he does not know anyone in Puri Construction Ltd. Probably someone from their finance department approached him through some*

chartered accountant known to him. They delivered him the cheques and he returned them equivalent amount in cash after taking his commission.

2.3 The AR of the assessee argues that the statement recorded u/s 133A dt 19/12/2008 recorded on the back of assessee has no evidentiary value since it was violative of the principles of natural justice. As regards the statement recorded u/s 133A on 5/1/2009 the AR of the assessee states that the statement of Sh.Gupta recorded during the survey operations at his business premises cannot be used against him in view of S.Khader Khan' decision (supra) and Dhinga Metals (supra). I am in agreement on the issue that the statement recorded on 5/1/2009 has no evidentiary value.

2.4 Coming to the statement recorded on 19/12/2008 the Assessing Officer was directed to provide opportunity to the appellant to cross-examine Sh.Gupta. For this purpose the matter wa s remanded back to him. Detailed cross-examination was carried out on 17/4/2014 & 21/4/2014 respectively by Sh.Mohinder Puri, Managing Director of the assessee company.

2.5. In his statement on 19/12/2008 (Q.No.3) Sh.Gupta stated that he did not know anyone in Puri Construction Ltd and probably someone from their finance department approached him through some Chartered Accountant known to him when cheque were delivered and equivalent amount of cash was returned after deducting commission.

2.6 As regards the deposition that some persons from the finance department of the assessee approached Sh.Gupta through CA/Advocate known to him (Q.No.33 of cross examination is reproduced).

Question No.33
In the statement of that day you further stated, "probably someone from their Finance Department approached me through some chartered accountant known tome". I put it to you that your statement clearly indicates that it was based upon conjecture and surmises and you did not even state the name of the person from the finance department of Puri Construction Ltd. Is that correct?.

Answer by Shri S.K.Gupta - Yes

2.7 Sh.Gupta refers to the role of Sh.Aneja in facilitating the transaction between the assessee and Sh.Gupta. For this purpose department recorded statement of Sh.Aneja on oath on 5/1/2009, wherein his attention was drawn to the statement given by Sh.Gupta. He has categorically stated in his statement before the assessing Officer as under:

2.8 The A.O. refers to the role of Shri Aneja in facilitating the transaction between the assessee and Shri Gupta. He also refers to the commission of 3.5% received by Shri Gupta and the remaining paid in cash to the assessee. Firstly, it may be emphasized that statement of Shri Aneja was recorded on

5.1.2009 on oath by the Income Tax Department and his attention was drawn to the statement of Shri Gupta wherein he has stated that the entries given to the assessee are through Shri A.S.Aneja. He has categorically stated in his statement before the Income Tax authorities as under:

" It is submitted that the statements of Shri S.K.Gupta is baseless and without any evidence. I am looking after the taxation work of Taneja Group and Puri Construction Company. No cash has even been routed through me for any type of transaction to Shri S.K.GGupta."

2.9. This contradiction was brought to the notice of Shri Gupta during cross examination at Question No.68. Shri Gupta responded by saying that Mr.Aneja is free to give any statement. The Assessing Officer, however concluded in Para 2.5 that "there is every possibility that Shri Aneja may have also given a false statement on oath." The conclusion drawn by the Assessing Officer is based on surmises conjectures and is not supported by any evidence.

2.10. It is relevant to point out that the alleged role of Aneja as a mediator has been denied by Aneja, and that Gupta has admitted that he had not other evidence to show that cash was paid to Aneja or to any Directors of the assessee company or any other person of the Company. In the face of denial by Aneja and in the absence of evidence that cash was actually passed on to Aneja or to any director or any person of the

company, there is no evidence to substantiate the finding of the Assessing Officer.

2.11 The alleged ledger account in the laptop has not been corroborated by any independent evidence. The fact remains that there is no evidence except the statement of Sh.Gupta to corroborate the so called transaction between the appellant and Sh.Gupta.

2.12 Further, on the issue regarding Arbitration award, I have perused the statement recorded on oath of Sh. Om Prakash, ADJ (Retd) Sole Arbitrator, he has confirmed the MOU, the arbitration award. His statement is being disbelieved by the Assessing Officer on the suspicious account that no record of the proceedings has been kept and he is not sure to which party these record have been returned. There is no specific guideline as to how many years the records pertaining to such arbitrations should be kept. The award was given by him in April, 2005. Hi statement was recorded in April, 2009. As stated by the there was no statutory obligations on him to keep such records. In view of this there is no ground for the Assessing Officer to draw adverse conclusions.

2.13. I have also perused the statement of Sh.Mohinder Puri recorded during the course of search on 5th & 6th January, 2009. He has categorically stated that the transactions are genuine., As is also mentioned in the order of assessment, he refers to his age i.e.68 years and triple by pass heart surgery

and subsequently in 2002 to 2004 a nd 2006 6 stents have been inserted in his heart vessels and the doctors having suggested to him to have a second bypass surgery and in view of the false allegations made by Sh. Gupta and the search operation being carried. On Gurupurab of Sh.Guru Gobind Singh he suffered mental agony and stress on his heart and feared fatal consequences. He further starts that he is compelled to end all litigations and offers to agree to additional income. He has further stated that at this stage he is not in a poiostion to examine Sh.SK Gupta.

2.14 In this regard the Kelkar Committee, reported in 258 ITR (Statute) 50, wherein the committee had made critical references to the procedures adopted by the Officers during the course of search operations. The Finance Minister has observed in his Budget Speech for the Financial Year 2003-04 that in view of the recommendations of the Kelkat Committee that no confessional statement shall be obtained during the search and seizure operations. The Board has also in his letter No.F-287/2/2003(1) dated 10tyh March, 2003 pointed out that the past confessions, if any, not based on any credible evidence, are retraced by the assessee and, therefore, the Board had advised that no attempt should be made to obtain the confession for the undisclosed income. The Assessing Officer should rely upon the evidence gathered during the course of search and thereafter, while framing the assessment order.. The instructions issued by the CBDT are binding on the officer of he department.

*2.15. Keeping in view the circumstances under which the statement was recorded and also the instructions issued by the CBDT dt.10/3/2004 *supra), the Assessing Officer should rely on the evidence gathered.*

2.16. In view of the facts that the case and legal position, I hold that there was no ground to disbelieve that the amount paid amounting to R.10.50 crores to SCIL on account of land development expenses is allowable expenditure. Accordingly, the disallowance of Rs.10.50 crores deserves to be deleted.

2.17. Further, I have carefully considered the submission made on behalf of the appellant. On the basis of documents filed in the course of assessment, Shr.SK Gupta was exhaustively cross examined by the appellant. The final conclusion which emerges from the cross-examination is that S.K.Gupta himself had deviated from his own statements made earlier by filing an affidavit dated 27/02./2009 and a confirmation certificate of the transactions with the appellant dated 21/03/2009, In fact, SK Gupta had stated that the transaction with the appellant company was duly disclosed by SCLL in their books of account and that return of income was filed on the basis of such books of account and that return of income was filed on the basis of such books of account

2.18. In the result the disallowance of Rs.10.50 Crores made by the Assessing Officer is deleted. The Ground Nos 2,2.1., 2.2 & 2.3 is allowed."

12.4 Further, we have also seen from the material available on record that the statement of arbitrator, Sh. Om Prakash, retired Additional & Sessions Judge, who acted as an arbitrator between assessee company and M/s SCLL (recorded at pages 13 and 14 of AO's order dated 31.12.2010), wherein, the learned judge had accepted regarding the award so granted between dispute pending between assessee and M/s SCLL and the said fact has not been rebutted by the learned counsel of Revenue and as such, this fact is also important to establish and substantiate the fact that the amount so paid to M/s SCLL is genuine and justified.

12.5 Thus, the relief so given by learned CIT (A) with respect to ground no. 3 and 4 in ITA No. 1327/Del/2011 is upheld and, ground raised by the revenue are rejected.

13. Now we take up ITA No. 995/Del/2011, the appeal preferred by the assessee against the order of CIT(A) dated 31.12.2010 wherein the solitary addition confirmed of Rs. 2,30,11,467/- by learned CIT (A) on

account of land development expense paid to M/s Manami Construction Pvt. Ltd.

13.1 The relevant facts are that during the instant assessment year, the appellant incurred an expenditure of Rs. 3,28,89,260/- on account of land development expenses. The aforesaid expenditure inter-alia included an expenditure of Rs. 3,00,00,000/- paid to M/s.Manami Construction Pvt. Ltd. (hereinafter referred to as 'MCCPL') and the proportionate expenditure claimed by the appellant out of the aforesaid sum was Rs. 2,30,11,467/-. The Assessing Officer made enquiries in respect of the aforesaid claim by issuing summons under section 131 of the Act which were returned back with postal remarks "N/F Rg.10/11" and "Not known Rg. 11/11". Subsequently, the Assessing Officer issued commission under section 131(1)(d) of the Act to the DDIT (Inv), Unit (III)(3), Kolkata who got enquiries made through his Inspector. The Inspector could not serve the summons as no concern of the said name existed at the address namely 156A, Lenin Sarani, Kolkata. The inspector also reported that there were two companies of the same name with different Permanent Account Numbers. One company was assessed with DCIT, Circle 3, Kolkata and a small income of Rs. 569/- was returned for the assessment year 2007-08. The records also showed that return for assessment year 2006-07

showing income of Rs. 1227 was filed and the assessment was pending. One address was given in the return for refund purposes i.e. 1A, Grant Lane Room No. 14, Kolkata. It was also reported that there is only a small room and notice could not be served at the person sitting at the given address did not know anything about this concern. The Assessing Officer also noted that in form No. 3CD attached along with the return of income for the assessment year 2006-07 the assessee had shown dealings in trading and investments and there was no concrete evidence of any kind of construction related work having been done by MCCPL either for assessee company or any other party. The Assessing Officer has also noted that perusal of copy of the invoice showed that there was no registration number. The Assessing Officer also remarked that at the bottom of invoice, it was stated that all disputes, if any, shall be subject to Delhi Jurisdiction although MCCPL was a Kolkata based company.

13.2 Having regard to the above, the Assessing Officer concluded that claim of assessment was unwarranted and false. The CIT(A) after considering the contentions raised by the appellant had upheld the disallowance by holding as under:

"I have carefully considered the facts and the submissions. The appellant has filed a copy of the invoice dated 26th October, 2005 issued by MCCPL. The particulars of work mentioned are ` Development of site including removal and filling of rocky soil to make level one (Ex.WCT)". The quantity mentioned is 48398 square meters and @ 645.60 per square meter, the amount chargeable is shown at Rs.3,12,45,749/-. On this invoice there is noting by PCL viz." Settle for 3 crores only". An affidavit was filed before the AO to the following effect:

Affidavit

I, Pramod Sharma, Director, Manami Construction Co.Pvt.Ltd ., currently having office at 44-B, 1st Floor, Kali Krishna Tagore Street, Kolkata-700072, West Bengal, do hereby solemnly affirm as under:-

I. In the calendar year 2005, I have carried out work of removal and filling of rocky soil to make level one at Village Wazirabad, Sector 53, Gurgaon site of M/s Puri Construction Ltd.,

That I had received an amount of Rs.3,05,00,000/- for above work against following cheque Nos.:

Amount(Rs.)	Date	Cheque No.
20,00,000/-	03-10-2005	008479
20,00,000/-	03-10-2005	008480
20,00,000/-	03-10-2005	008482
20,00,000/-	03-10-2005	008483
20,00,000/-	03-10-2005	008485
20,00,000/-	25-12-2005	151864
20,00,000/-	26-12-2005	151865
20,00,000/-	27-12-2005	151866
20,00,000/-	28-12-2005	151867
20,00,000/-	29-12-2005	151868
20,00,000/-	30-12-2005	151869
20,00,000/-	02-01-2006	151870
10,00,000/-	04-01-2006	151871
15,00,000/-	23-01-2006	424309
15,00,000/-	24-01-2006	424312
8,00,000/-	24-01-2006	245040

All the above cheques were drawn on Citibank, New Delhi.

3. That I further verify that my address at the time of billing was 156-A, Lenin Sarni, Kolkata-13, which was shifted to 44-B, 1st Floor, Kali Krishna Tagore Street, Kolkata – 72 later on and further reaffirm that I had received the above amount of Rs.5,05,00,000/- towards carrying out the work at Village Wazirabad, Sector 53, Gurgaon site of M/s.Puri Construction Ltd.

4. Our PAN NO is AADCM3686J

A perusal of the affidavit shows that the work was allotted in the end of October,2005 and was stated to have been carried out during a period of two months.

An aggregate sum of Rs.1 crore was paid by five cheques dated 3-10-05 prior to the issue of invoice on 26-10-05) and remaining payment was spread over during the month of December, 2005 and January, 2006. Normally in a contract of this magnitude interim payments are made only on the receipt of interim bills. Generally it is after ensuring that the interim work has been done that the payment is released. There is nothing on record to show the progress of the work for which the payments were made intermittently. It is also relevant to point out that although the payment is shown to have been received by the payee there is no independent evidence to show that the labour and machinery was employed for carrying out the work by MCCPL. The balance sheet enclosed with written submissions does not indicate the expenses incurred by MC CPL and the profit or loss resulting from this transaction. Moreover, MCCPL is an investment company dealing in shares and securities and it has not been shown that it had necessary expenses to carry out the contract work. The affidavit at best can be taken as evidence to show that cheques stated therein were received by MCCPL but it does not establish anything with regards to actual carrying out of the work. To be an allowable expenditure within section 37(1) the money paid out or way must be paid out wholly and exclusively for the purpose of business. The true test of an expenditure laid down wholly and exclusively for the purpose of trade or business is that it is

incurred by the assessee and it is incidental and necessary to running his business. The appellant has only proved that the money was paid and it was paid to an existing person but the appellant has not been able to prove either that the expenditure was incurred or that it was for the purpose of his business. It is a case where some payments have been made even prior to the receipt of the Invoice. There is also no independent evidence to show that the payee had requisite experience and expertise to carry on this work and that it did actually employ the labour and machinery for doing the work and that that any profit or loss resulted which was shown by it in the books of account. It is therefore, held that the expenditure is not proved to have been incurred wholly and exclusively for the purpose of business and is therefore not allowable as deduction.

I, however, agree with the appellant that in this case for part of the expenditure incurred recovery was made from five parties. At best, therefore, the disallowance could have been only proportionate amount of Rs.3 crores worked out to 12.71/16.57 of Rs.3 crores i.e. 2,30,11,467. Since there is no adverse inference in respect of the remaining expenditure no proportionate disallowance would be justified in respect thereof. The disallowance therefore, is restricted to Rs.2,30,11,467/- as against to Rs.2,58,73,858/- made by the AO. The appellant will, therefore, get a relief of Rs.28,62,391/-."

13.3 Before us, the learned counsel of the assessee company submitted that the said payment was made to M/s Manami Construction Pvt. Ltd. for removal and filling of rocky soil to make level one at Village Wazirabad, Sector – 53, Gurgaon site of assessee company and the assessee company had furnished following documentary evidences in support of the said transaction:

(i) Copy of Account of M/s Manami Construction Pvt. Ltd. in books of assessee company (at pages 274 to 275 of PB – I).
(ii) Copy of invoice dated 26.10.2005 so raised by M/s Manami Construction Pvt. Ltd (at page 276 of PB – I).
(iii) Certificate of TDS on payment so made to M/s Manami Construction Pvt. Ltd. (at page 277 of PB – I).
(iv) Copy of Affidavit of Sh. Pramod Sharma (director of M/s Manami Construction Pvt. Ltd.) dated 24.12.2006.
(v) Copy of annual accounts of M/s Manami Construction Pvt. Ltd. (at pages 280 to 286 of PB – I).

13.4 That in rebuttal, it was further, argued by learned counsel of assessee company that all the above documentary evidences were arbitrarily brushed aside by both learned AO and CIT (A) and further, the reliance so placed on investigation carried out by learned AO is unjustified, as the assessee had furnished the current addresses and affidavit of M/s Manami Construction Pvt. Ltd. on 24.12.2006, which

remains unrebutted and uncontested by lower authorities and as such, the addition needs to be deleted on this ground also.

13.5 That in rebuttal learned CIT DR relied on her arguments made earlier and further placed reliance on the orders of assessment with respect to the grounds so raised in the memo of appeal by Revenue and Assessee.

13.6 Having considered the rival submissions and perused the material on record, we have noticed that the said payment was made to M/s Manami Construction Pvt. Ltd. for removal and filling of rocky soil to make level one at Village Wazirabad, Sector – 53, Gurgaon site of assessee company and the assessee company had furnished following documentary evidences in support of the said transaction:

(i) Copy of Account of M/s Manami Construction Pvt. Ltd. in books of assessee company (at pages 274 to 275 of PB – I).
(ii) Copy of invoice dated 26.10.2005 so raised by M/s Manami Construction Pvt. Ltd (at page 276 of PB – I).
(iii) Certificate of TDS on payment so made to M/s Manami Construction Pvt. Ltd. (at page 277 of PB – I).
(iv) Copy of Affidavit of Sh. Pramod Sharma (director of M/s Manami Construction Pvt. Ltd.) dated 24.12.2006.
(v) Copy of annual accounts of M/s Manami Construction Pvt. Ltd. (at pages 280 to 286 of PB – I).

13.7 We have noticed that all the above documentary evidences were arbitrarily brushed aside by both learned AO and CIT (A) and further, the reliance so placed on investigation carried out by learned AO was prior to the date of affidavit of director of M/s Manami Construction Co. Pvt. Ltd., wherein, current address of the said concern was furnished by the assessee company and further, all the details in the shape of nature of work done and payment made was also furnished before the learned AO, which all remained unrebutted and uncontested by lower authorities and as such, relying on the following judgments on the proposition of lack of enquiry the said disallowance so made is deleted:

a) 361 ITR 10 (Del) CIT v. Gangeshwari Metal (P) Ltd.

*"**9**. As can be seen from the above extract, two types of cases have been indicated. One in which the assessing officer carries out the exercise which is required in law and the other in which the assessing officer 'its back with folded hands' till the assessee exhausts all the evidence or material in his possession and then comes forward to merely reject the same on the presumptions. The present case falls in the latter category. Here the assessing officer, after noting the facts, merely rejected the same. This would be apparent from the observations of the assessing officer in the assessment order to the following effect: -*

"Investigation made by the Investigation Wing of the Department clearly showed that this was nothing but a sham transaction of accommodation entry. The assessee was asked to explain as to why the said amount of Rs. 1,11,50,000/- may not be added to its income. In response, the assessee has submitted that there is no such credit in the books of the assessee. Rather, the assessee company has received the share application money for allotment of its share. It was stated that the actual amount received was Rs. 55,50,000/- and not Rs. 1,11,50,000/- as mentioned in the notice. The assessee has furnished details of such receipts and the contention of the assessee in respect of the amount is found correct. As such the unexplained amount is to be taken at Rs. 55,50,000/-. The assessee has further tried to explain the source of this amount of Rs. 55,50,000/- by furnishing copies of share application money, balance sheet, etc. of the parties mentioned above and asserted that the question of addition in the income of the assessee does not arise. This explanation of the assessee has been duly considered and found not acceptable. This entry remains unexplained in the hands of the assessee as has been arrived by the Investigation wing of the Department. As such entries of Rs. 55,50,000/- received by the assessee are treated as an unexplained cash credit in the hands of the assessee and added to its income. Since I am satisfied that the assessee has furnished inaccurate particulars of its income, penalty proceedings under section 271(1)(c) are being initiated separately."

***10**. The facts of Nova Promoters and Finlease (P) Ltd. (supra) fall in the former category and that is why this Court decided in favour of the revenue in that case. However, the facts of the present case are clearly distinguishable and fall in the second category and are more in line with facts of Lovely Exports (P) Ltd.(supra). There was a clear lack of inquiry on the part of the assessing officer once the assessee had furnished all the material which we have already referred to above. In such an eventuality no addition can be made under section 68 of the Act. Consequently, the question is answered in the negative. The decision of the Tribunal is correct in law." [Emphasis supplied]*

b) 357 ITR 146 (Del) CIT vs. Fair Finvest Ltd.

*"**6**. This Court has considered the submissions of the parties. In this case the discussion by the CIT (Appeals) would reveal that the assessee has filed documents including certified copies issued by the Registrar of Companies in relation to the share application, affidavits of the Directors, Form 2 filed with the ROC by such applicants confirmations by the applicant for company's shares, certificates by auditors etc. Unfortunately, the assessing officer chose to base himself merely on the general inference to be drawn from the reading of the investigation report and the statement of Mr. Mahesh Garg. To elevate the inference which can be drawn on the basis of reading of such material into judicial conclusions would be improper, more so*

when the assessee produced material. The least that the assessing officer ought to have done was to enquire into the matter by, if necessary, invoking his powers under Section 131 summoning the share applicants or directors. No effort was made in that regard. In the absence of any such finding that the material disclosed was untrustworthy or lacked credibility the assessing officer merely concluded on the basis of enquiry report, which collected certain facts and the statements of Mr. Mahesh Garg that the income sought to be added fell within the description of Section 68." [Emphasis supplied]

13.8 In the result, the disallowance made and sustained of Rs. 2,30,11,467/- is deleted and the ground raised by the appellant is allowed.

14. Now, we take up ITA No. 754/Del/2015 being an appeal by the revenue against the order of CIT(A) dated 17.11.2014 disposing off the appeal preferred by the assessee against the order of assessment dated 31.12.2010 under section 153A/143(3) of the Act.

14.1 Ground No. 1 to 10 challenge the deletion of addition of Rs. 10.50 crores made by the Assessing Officer on account of disallowance of sum paid to M/s. SCLL. We have already dealt with the aforesaid issue while disposing off the aforesaid Ground Nos. 3 and 4 in ITA No.

1327/Del/2011 and therefore, having regard to the finding contained therein, the issue as raised in Grounds is not maintainable and the deletion by the CIT(A) is upheld and Grounds raised by the revenue are rejected.

14.2 Ground No. 11 challenge the deletion of addition of Rs. 14,03,92,386/- on account of land development expenses. This issue has also been dealt by us while disposing off the Ground No. 1 in ITA No. 1327/Del/2011 and therefore, having regard to the findings contained therein, deletion of said disallowance is upheld and ground raised by the revenue is rejected.

14.3 Ground 12 and 13 are general and therefore, are dismissed.

15. Now the only issue remaining is the legal issue raised by the assessee under Rule 27 of ITAT Rules whereby the assessee had submitted that that additions made in the order of assessment dated 31.12.2010 under section 143(3) of the Act since are not based on any incriminating material found as a result of search on the assessee company, the same are in excess of jurisdiction and therefore, not in accordance with law."

15.1 The learned counsel of assessee submitted that during the course of search on 05.01.2009, no incriminating material was seized from the assessee's premises. The books of accounts seized were already part of record, which were made basis of additions in original order of assessment under section 143(3) of the Act; and thus, the same could not be said to be incriminating in nature. It was submitted that reliance placed by AO on the statement of Sh. Mohinder Puri and construing it to be incriminating in nature is also unjustified and uncalled, as the statement cannot be construed to be incriminating in nature and more specifically when the said statement has been retracted subsequently and has not been acted upon and as such, it was submitted by the learned counsel of assessee company that no incriminating material was found as a result of search from assessee's premises and as such, the additions so made under section 153A of the Act for impugned assessment year are uncalled for and unjustified. In support of the said proposition reliance was placed on following judgments:

(i) PCIT vs Best Infrastructure (P) Ltd. (Delhi High Court) reported in 397 ITR 82.
(ii) CIT vs. Kabul Chawla 380 ITR 573 (Del)
iv) Pr. CIT v. Meeta Gutgutia 395 ITR 526 (Del)
v) CIT v. Harjeev Aggarwal 290 CTR 263 (Del)
vi) CIT vs Naresh Kumar Aggarwal 369 ITR 171 (Andhra Pradesh)

15.2 The ld DR, however, supported the jurisdiction to frame assessment and contend that there was sufficient material in the shape of books of accounts found as a result of search to support the additions even in the assessment framed pursuant to search and referred to various judgments including the judgment of Jurisdictional High Court in the case of Dayawanti vs. CIT reported in 390 ITR 496. He has also referred to statement of Shri Mahinder Puri recorded in the course of search to contend that the said statement was an incriminating evidence which conferred jurisdiction on the Assessing Officer to make the impugned addition in assessment framed under section 153A/143(3) of the Act.

15.3 The ld counsel for assessee submitted that the judgments so relied by learned CIT DR are not applicable to the facts of the case of assessee company, as in all the cases so relied on by learned CIT DR additions were based on seized material found during the course of search in addition to the statements so recorded during the course of search and Hon'ble High Court of Delhi in recent judgment of PCIT vs Best Infrastructure (P) Ltd. (Delhi High Court) reported in 397 ITR 82, has held that additions cannot be made on the basis of mere statements recorded during the course of search, unless and until the

same is backed by documents seized and found as a result of search, which is absent in the instant appeal.

15.4 We have considered the rival submissions and perused the material on record. The learned counsel of assessee – appellant under Rule 27, argued and submitted that during the course of search on 05.01.2009, no incriminating material was seized from the assessee's premises, and further, the learned CIT DR had relied on books of account seized from the assessee's premises and further, the statement of Sh. Mohinder Puri during the course of search on 05.01.2009.

16. We have considered the rival submissions and perused material on record. We have noticed that learned AO in section 153A proceedings has merely repeated the additions so made in original assessment proceedings under section 143(3) of the Act and there was no new addition made by learned AO during section 153A proceedings. Thus, on the date of search i.e. on 05.01.2009, the assessee company's assessment was finalized on 31.12.2008 and as such, the proceedings were not pending on the date of search and thus, additions could only have been made in proceedings under section 153A of the Act only

when any incriminating material was found during the search. Our above view derives strength from the following judgments:

a) Hon'ble High Court of Delhi in the case of CIT vs Kabul Chawla reported in 380 ITR 573:

b)

"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."

b) Pr. Principal CIT vs. Meeta Gutgutia reported in 395 ITR 526

"61. It appears that a number of High Courts have concurred with the decision of this Court in Kabul Chawla (supra) beginning with the Gujarat High Court in Principal Commissioner of Income Tax v. Saumya Construction Pvt. Ltd. (supra). There, a search and seizure operation was carried out on 7th October, 2009 and an assessment came to be framed under Section 143(3) read with Section 153A(1)(b) in determining the total income of the Assessee of Rs. 14.5 crores against declared income of Rs. 3.44 crores. The ITAT deleted the additions on the ground that it was not based on any incriminating material found during the course of the search in respect of AYs under consideration i.e., AY 2006-07. The Gujarat High Court referred to the decision in Kabul Chawla (supra), of the Rajasthan High Court in Jai Steel (India), Jodhpur v. ACIT (supra) and one earlier decision of the Gujarat High Court itself. It explained in para 15 and 16 as under:

"15. On a plain reading of section 153A of the Act, it is evident that the trigger point for exercise of powers thereunder is a search under section 132 or a requisition under section 132A of the Act. Once a search or requisition is made, a mandate is cast upon the Assessing Officer to issue notice under section 153A of the Act to the person, requiring him to furnish the return of income in respect of each assessment year falling within six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made and assess or reassess the same. Since the assessment under section 153A of the Act is linked with search and requisition under sections 132 and 132A of the Act, it is evident that the object of the section is to bring to tax the undisclosed income which is found during the course of or pursuant to the search or requisition. However, instead of the earlier regime of block assessment whereby, it was only the undisclosed income of the block period that was assessed, section 153A of the Act seeks to assess the total income for the assessment year, which is clear from the first proviso thereto which provides that the Assessing Officer shall assess or reassess the total income in respect of each assessment year falling within such six assessment years. The second proviso makes the intention of the Legislature clear as the same provides that assessment or reassessment, if any, relating to the six assessment years referred to in the sub-section pending on the date of initiation of search under section 132 or

requisition under section 132A, as the case may be, shall abate. Subsection (2) of section 153A of the Act provides that if any proceeding or any order of assessment or reassessment made under sub-section (1) is annulled in appeal or any other legal provision, then the assessment or reassessment relating to any assessment year which had abated under the second proviso would stand revived. The proviso thereto says that such revival shall cease to have effect if such order of annulment is set aside.

Thus, any proceeding of assessment or reassessment falling within the six assessment years prior to the search or requisition stands abated and the total income of the assessee is required to be determined under section 153A of the Act. Similarly, subsection (2) provides for revival of any assessment or reassessment which stood abated, if any proceeding or any order of assessment or reassessment made under section 153A of the Act is annulled in appeal or any other proceeding.

16. Section 153A bears the heading "Assessment in case of search or requisition". It is "well settled as held by the Supreme Court in a catena of decisions that the heading or the Section can be regarded as a key to the interpretation of the operative portion of the section and if there is no ambiguity in the language or if it is plain and clear, then the heading used in the section strengthens that meaning. From the heading of section 153. the intention of the

Legislature is clear, viz., to provide for assessment in case of search and requisition. When the very purpose of the provision is to make assessment In case of search or requisition, it goes without saying that the assessment has to have relation to the search or requisition, in other words, the assessment should connected With something round during the search or requisition viz., incriminating material which reveals undisclosed income. Thus, while in view of the mandate of sub-section (1) of section 153A of the Act, in every case where there is a search or requisition, the Assessing Officer is obliged to issue notice to such person to furnish returns of income for the six years preceding the assessment year relevant to the previous year in which the search is conducted or requisition is made, any addition' or disallowance can be made only on the basis of material collected during the search or requisition, in case no incriminating material is found, as held by the Rajasthan High Court in the case of Jai Steel (India) v. Asst. CIT (supra), the earlier assessment would have to be reiterated, in case where pending assessments have abated, the Assessing Officer can pass assessment orders for each of the six years determining the total income of the assessee which would include income declared in the returns, if any, furnished by the assessee as well as undisclosed income, if any, unearthed during the search or requisition. In case where a pending reassessment under section 147 of the Act has abated, needless to state that the scope and ambit of the

assessment would include any order which the Assessing Officer could have passed under section 147 of the Act as well as under section153A of the Act.

19. On behalf of the appellant, it has been contended that if any incriminating material is found, notwithstanding that in relation to the year under consideration, no incriminating material is found, it would be permissible to make additions and disallowance in respect of an the six assessment years. In the opinion of this court, the said contention does not merit acceptance, inasmuch as. the assessment in respect of each of the six assessment years is a separate and distinct assessment. Under section 153A of the Act, assessment has to be made in relation to the search or requisition, namely, in relation to material disclosed during the search or requisition. If in relation to any assessment year, no incriminating material is found, no addition or disallowance can be made in relation to that assessment year in exercise of powers under section 153A of the Act and the earlier assessment shall have to be reiterated. In this regard, this court is in complete agreement with the view adopted by the Rajasthan High Court in the case of Jai Steel (India) v. Asst. CIT (supra). Besides, as rightly pointed out by the learned counsel for the respondent, the controversy involved in the present case stands concluded by the decision of this court In the case of CIT v. Jayaben Ratilal Sorathia (supra) wherein it has been held that while it cannot be disputed that

considering section 153A of the Act, the Assessing Officer can reopen and/or assess the return with respect to six preceding years ; however, there must be some incriminating material available with the Assessing Officer with respect to the sale transactions in the particular assessment year."

62. Subsequently, in Principal Commissioner of Income Tax-1 v. Devangi alias Rupa (supra), another Bench of the Gujarat High Court reiterated the above legal position following its earlier decision in Principal Commissioner of Income Tax v. Saumya Construction P. Ltd. (supra) and of this Court in Kabul Chawla (supra). As far as Karnataka High Court is concerned, it has in CIT v. IBC Knowledge Park P. Ltd. (supra) followed the decision of this Court in Kabul Chawla (supra) and held that there had to be incriminating material qua each of the AYs in which additions were sought to be made pursuant to search and seizure operation. The Calcutta High Court in CIT-2 v. Salasar Stock Broking Ltd. (supra), too, followed the decision of this Court in Kabul Chawla (supra). In CIT v. Gurinder Singh Bawa (supra), the Bombay High Court held that:

"6...once an assessment has attained finality for a particular year, i.e., it is not pending then the same cannot be subject to tax in proceedings under section 153A of the Act. This of course would not apply if incriminating

materials are gathered in the course of search or during proceedings under section 153A of the Act which are contrary to and/or not disclosed during the regular assessment proceedings."

c) CIT v. Sinhgad Technical Education Society 397 ITR 344 (SC)

18) In this behalf, it was noted by the ITAT that as per the provisions of Section 153C of the Act, incriminating material which was seized had to pertain to the Assessment Years in question and it is an undisputed fact that the documents which were seized did not establish any co-relation, document-wise, with these four Assessment Years. Since this requirement under Section 153C of the Act is essential for assessment under that provision, it becomes a jurisdictional fact. We find this reasoning to be logical and valid, having regard to the provisions of Section 153C of the Act. Para 9 of the order of the ITAT reveals that the ITAT had scanned through the Satisfaction Note and the material which was disclosed therein was culled out and it showed that the same belongs to Assessment Year 2004-05 or thereafter. After taking note of the material in para 9 of the order, the position that emerges therefrom is discussed in para 10. It was specifically recorded that the counsel for the Department could not point out to the contrary. It is for this reason the High Court has also given its imprimatur to the aforesaid approach of the Tribunal. That apart, learned senior counsel appearing for the respondent,

argued that notice in respect of Assessment Years 2000-01 and 2001-02 was even time barred."

16.1 The only material (if any) on which reliance is placed by AO is the statement of Sh. Mohinder Puri and construing it to be incriminating in nature is also unjustified, as the statement cannot be construed to be incriminating in nature and more specifically when the said statement has been retracted subsequently and has not been acted upon and as such, the additions so made in an order under section 153A/143(3) of the Act for impugned assessment year are in excess of scope of assessment. In support of the said proposition reliance is placed on following judgments:

(i) PCIT vs Best Infrastructure (P) Ltd. (Delhi High Court) reported in 397 ITR 82.

38. *Fifthly, statements recorded under Section 132 (4) of the Act of the Act do not by themselves constitute incriminating material as has been explained by this Court in Harjeev Aggarwal (supra). Lastly, as already pointed out hereinbefore, the facts in the present case are different from the facts in Smt. Dayawanti Gupta(supra) where the admission by the Assesses themselves on critical aspects, of failure to maintain accounts and admission that the seized documents reflected transactions of unaccounted sales and purchases, is non-existent in the present case. In the said case, there was a factual finding to the effect that the Assessees were habitual offenders, indulging in clandestine*

operations whereas there is nothing in the present case, whatsoever, to suggest that any statement made by Mr. Anu Aggarwal or Mr. Harjeet Singh contained any such admission.

(ii) 290 CTR 263 CIT v. Harjeev Aggarwal

***21**. A plain reading of Section 132 (4) of the Act indicates that the authorized officer is empowered to examine on oath any person who is found in possession or control of any books of accounts, documents, money, bullion, jewellery or any other valuable article or thing. The explanation to Section 132 (4), which was inserted by the Direct Tax Laws (Amendment) Act, 1987 w.e.f. 1st April, 1989, further clarifies that a person may be examined not only in respect of the books of accounts or other documents found as a result of search but also in respect of all matters relevant for the purposes of any investigation connected with any proceeding under the Act. However, as stated earlier, a statement on oath can only be recorded of a person who is found in possession of books of accounts, documents, assets, etc. Plainly, the intention of the Parliament is to permit such examination only where the books of accounts, documents and assets possessed by a person are relevant for the purposes of the investigation being undertaken. Now, if the provisions of Section 132(4) of the Act are read in the context of Section 158BB(1) read with Section 158B(b) of the Act, it is at once*

clear that a statement recorded under Section 132(4) of the Act can be used in evidence for making a block assessment only if the said statement is made in the context of other evidence or material discovered during the search. A statement of a person, which is not relatable to any incriminating document or material found during search and seizure operation cannot, by itself, trigger a block assessment. The undisclosed income of an Assessee has to be computed on the basis of evidence and material found during search. The statement recorded under Section 132(4) of the Act may also be used for making the assessment, but only to the extent it is relatable to the incriminating evidence/material unearthed or found during search. In other words, there must be a nexus between the statement recorded and the evidence/material found during search in order to for an assessment to be based on the statement recorded."

16.2 Thus, it is held that the additions so made under section 153A of the Act are mere repetition of additions made in assessments already made under section 143(3) of the Act and as such, all the additions so made are beyond the scope of assessment of provisions of section 153A of the Act and thus, the said ground raised in Rule 27 of ITAT Rules by assessee – appellant is allowed.

17. In the result, appeals filed by revenue in ITA No. 1327/Del/2011 and 754/Del/2015 are dismissed and appeal in ITA No. 995/Del/2011 filed by assessee is allowed.

The order is pronounced in the open court on 27.12.2017.

Sd/-	**Sd/-**
[SUDHANSHU SRIVASTAVA]	**[B.P. JAIN]**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 27th December, 2017

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi