

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "E", NEW DELHI**

**BEFORE SHRI G.D. AGARWAL, PRESIDENT
AND
SHRI K. NARASIMHA CHARY, JUDICIAL MEMBER**

**ITA No.7530/Del/2017
Assessment Year : 2014-15**

M/s Versatile Datamatics (P) Ltd. ACIT, Central Circle- 15,
25, Bazar Land, Bangali Market Vs. New Delhi.
New Delhi 110001

**PAN : AABCV8793K
(Appellant)**

(Respondent)

**ITA No.7531/Del/2017
Assessment Year : 2013-14**

M/S Superior Calltech (P) Ltd., ACIT, Central Circle- 15,
25, Bazar Lane, Bangali Market, Vs. New Delhi.
New Delhi.

**PAN : AAKCS2341F
(Appellant)**

(Respondent)

**ITA No.7532/Del/2017
Assessment Year : 2013-14**

Metbrass Plassim India Ltd., ACIT, Central Circle- 15,
25, Bazar Lane, Bangali Market, Vs. New Delhi.
New Delhi.

**PAN : AADCM9501A
(Appellant)**

(Respondent)

Assessee by : Shri Gautam Jain, Adv.
Shri Piyush Kumar Kamal, CA
Department by : Ms. Shefali Swaroop, CIT-DR

Date of hearing : 30-07-2018
Date of pronouncement : 17.09.2018

ORDER**PER BENCH:**

These appeals are by the respective assessees challenging the separate orders of the CIT(A)- XXVI, New Delhi (for short "Ld. CIT(A)") relating to assessment year 2013-14. Since both the assessees are group companies and the impugned assessment had arisen pursuant to the search and seizure operations dated 28.3.2015, and facts and grounds raised in this appeal are similar, we deem it just and convenient to dispose them of by way of this common order.

ITA No.7531/Del/2017:

2. Brief facts of the case necessary for disposal of the appeal, are that the assessee company is one of the group companies of MMG (MM Aggarwal) group and is engaged in the business of preparation, manufacturing, packing and sale of soft drinks on the basis of concentrate and other raw material procured from Coca Cola in the capacity of bottler and distributor of Coca Cola procure in India. In addition, the MMG group has business interests in several segments like chartering and leasing of vessels to ONGC and other companies, real estate, education and hospitality etc. For the Asstt. Year 2013-14, they have filed their original return of income on 26.9.2013 declaring a total income of Rs.1,84,981/-. It was processed u/s 143(1) of the Income Tax Act, 1961 (for short "the Act"). Subsequently, search & seizure operation u/s 132 of the Act was carried out on 28.03.2015 in the case of M.M. Aggarwal Group

of companies. The case of the assessee was also covered in the said search. During the course of such search carried out at different premises located in India relating to M.M. Aggarwal Group of companies, documents and data storage devices, etc. belonging to the assessee also were found and seized. Notice u/s 153A of the Act was issued to the assessee on 10.05.2016, and in response thereto, the assessee filed the return of income on 1.06.2016 declaring an income as Rs.1,84,980/-.

3. During the course of assessment proceedings, learned Assessing Officer observed that the assessee has raised share capital of Rs.24 lacs from Rhone Sales (P) Ltd. And Rs.15 lacs from Rapi Marketing (P) Ltd. And further observed that the pre-search enquiry revealed that the assessee group had received substantial amount of share capital from various non-descript and shell companies which did not have any factual identity and creditworthiness. It was further found that the investment by such entities with the assessee group was mainly in the form of share capital which was subscribed at an abnormally high premium which lacked genuineness on their part to have agreed to subscribe at such premium without having received any return either in the form of dividends or appreciation in the value of their investment till date. Further the Ld. Assessing Officer observed that search action further established beyond doubt that the assessee company like other group companies had received the impugned share capital from various non-descript and shell entities/companies which grossly lacked creditworthiness and were in the nature of accommodation entries to convert the undisclosed income of

the assessee group having been received in the form of such share capital from the stated entities/companies. He further observed that search action revealed the modus operandi of the assessee group for converting their undisclosed income through the aid of various personnel/employees who categorically admitted having aided the group in such misdemeanor by facilitating the process of creating various bogus companies within the group and having received share capital from such outside non-descript/shell companies and thereafter making the same available in the operating companies of the group through a layered structure as per the instructions of the promoter and his other employees/office bearers.

4. In his order, Ld. Assessing Officer examined the tax returns from the income-tax data base and referred to the enquiries conducted on Delhi and Kolkata based companies, the statements of Shri Narender Kumar Jain, who is close confident and associate of the promoter of the MMG Group Shri Sanjeev Agrawal, Shri Ashwani Verma, their CA, the statement of Shri Narinder Kumar Garg who is Director of M/s North Delhi Beverages Pvt. Ltd., the statement of Shri Sanjeev Aggarwal, who is director-cum-promoter of MM group companies, the statement of Shri Krishan Kumar Bajaj, General Manager-Finance of the assessee company. He also examined the statement of various other persons, the enquiries conducted u/s 133(6) of the Act and the summons issued to various directors of the non-descript companies u/s 131 of the Act which were either returned back or delivered but there was no response or only part compliance.

5. Ld. Assessing Officer finally reached the conclusion that the assessee failed to establish the identity, creditworthiness and genuineness of the parties wherefrom funds were received by the investor of the assessee who are also group companies of the assessee group. Since the assessee has received an amount of Rs.39,00,000/- towards share capital and share premium and could not discharge the burden cast on it to his satisfaction, Ld. Assessing Officer treated the same as unexplained cash credit u/s 68 of the Act as the income of the assessee for the relevant period under consideration.

6. Assessee carried the matter in appeal before the Id. CIT(A). The assessee challenged the Assessment Order on two counts, on law and facts. On the question of law, assessee challenged the assumption of jurisdiction u/s 153A of the Act stating that the original return was filed on 26.9.2013 which was processed u/s 143(1). Time for issuance of notice u/s 143(2) of the notice expired by 30.9.2014, whereas search u/s 132 was conducted in this case on 28.03.2015 and notice u/s 153A was issued on 10.05.2016. It is submitted that no incriminating material was detected as a result of search and the addition was made on the basis of post-search enquiries and statements recorded u/s 132(4) of the Act. Relying on various decisions, it was argued that since no assessment was pending on the date of search and the addition has been made on the basis of post-search enquiries and statements recorded u/s 132(4) on various persons, therefore, the Assessing Officer has no power to assume jurisdiction under the provisions of section 153A of the Act.

7. Insofar as the merits of the case are concerned, it was submitted that the assessee had filed all and complete details like the complete address and PAN number of the investor company along with the distinctive number of share certificates, the various cheques issued on different dates with the name of the bank, the name and address of the directors as on 31.03.2013, the complete copy of the income tax return for assessment year 2013-14, copy of Form No.2 of the assessee filed with ROC as 'Return of Allotment', copy of Board Resolution of the assessee company relating to the amounts received from Rhone Sales (P) Ltd. and Rapi Marketing (P) Ltd. to substantiate the identity and creditworthiness of the investor companies and the genuineness of the transactions. Ld. AR, therefore, submitted that no addition could have been made u/s 68 of the Act, and the same should be deleted.

8. Ld. CIT(A), however, having perused the assessment order and case laws cited on behalf of the assessee returned a categorical finding that the assessment proceedings were pending at the time of search and was abated. He further found that the department found information in respect of the share certificates and the counterfoils thereof and other significant related material during the course of search operations that upon collating with the information received by the department lead to specific inputs in respect of doubtful nature on genuineness of the equity infused in the companies of the group, and the material so gathered is prima facie incriminating in its nature and substance so as to attract the provisions of S. 153A of the Act. Having found so, he proceeded to observe

that the A.O. proceeded to frame assessment u/s 153A after the search on appellant group on 28.03.2015 and on receipt of appraisal report from the DI (Investigation) that the appellant company has received an unexplained credit in its books u/s 68 of the IT Act, and, therefore, the legal ground that the assumption of jurisdiction to issue notice under Section 153A is bad under law, had no legs to stand. Thus, he dismissed the legal ground raised by the assessee challenging the validity of assumption of jurisdiction u/s 153A is concerned.

9. So far as the addition on merit is concerned, Id. CIT(A) dismissed the said grounds also by stating that besides the summon was issued but not delivered, notice u/s 133(6) of the Act was also issued requisitioning the relevant extracts of statements of bank account statement of the investors showing payments made towards share application money, Copies of allotment letters, Share Application form duly filled by the investor companies, Confirmation in respect of allotment of equity shares to the investors, Copy of PAN card of the investor companies, Memorandum & Articles of Association of the investor companies clearly depicting their corporate identity number, Copies of share certificates issued by the assessee company, chart showing details of director of the investor companies, chart showing details of shareholders of the investor companies, Copies of the acknowledgement of the Income tax return filed for AY 2009-10 by the investor companies along with their audited financials for the year ended 31st March 2009, but the assessee had neither produced the investor nor arranged to provide the requisite

information and documents directly from it as such failed to substantiate its contention. He further recorded that the assessee has presented a whole series of jurisprudence without substantively discharging its primary onus due to which there was no substantive basis to accept the contentions of the assessee. On this premise, the addition was confirmed.

10. Ld. CIT(A) further observed that with effect from assessment year 2013-14 onwards, the provisions of section 56(2)(viib) are attracted to the case of the assessee. He observed that the share premium charged by the assessee clearly falls within the mischief of this section in absence of assessee furnishing a reliable and robust basis of valuation of such equity shares as per Rule 11UA(1)cb of the Act.

11. Aggrieved by such an order of the Id. CIT(A), the assessee preferred the appeal stating that in the absence of any incriminating material found as a result of search, initiation of proceeding u/s 153A are bad and the addition of Rs.39 lacs by the learned AO and upholding of the same by the learned CIT(A) are against the law declared by the Hon'ble jurisdictional High Court in the cases of CIT vs Kabul Chawla, 380 ITR 573 and PCIT vs Meeta Gutgutia, 395 ITR 526. Assessee further assailed the findings of the learned CIT(A) that the original assessment in this matter was pending as on the date of issuance of notice u/s 153A of the Act is factually incorrect. It is further stated by the assessee in the grounds of appeal that the authorities below wrongly assumed that the credits by way of share capital represented unexplained cash credit and wrongly shifted the burden to the assessee. According to the assessee, the authorities below

failed to notice that the shareholders are corporate entities duly assessed to tax and had subscribed to share capital through banking channels and supported by necessary documents as such, in view of the material placed on record by the assessee to prove the genuineness of transactions and creditworthiness of the share creditors is beyond any doubt. Assessee further challenged the findings of the learned CIT(A) in respect of other applications of provisions u/s 56(2)(vii)(b) of the Act to the facts of the case.

12. Ld. AR, at the outset, strongly objected to the order of the Id. CIT(A) dismissing the appeal of the assessee. So far as ground relating to the validity of assumption of jurisdiction u/s 153A of the Act is concerned, he submitted that the addition made by the Assessing Officer and sustained by the Id. CIT(A) is illegal and beyond the scope of provisions of section 153A/143(3) of the Act. He submitted that on the date of search on 28.03.2015 no incriminating material was found in respect of the addition made by the Assessing Officer and the assessment was not pending. Neither the Assessing Officer nor the Id. CIT(A) has referred to any incriminating material found as a result of search while making/sustaining the addition.

13. He further submitted that the sum offered by Mr. Sanjeev Aggarwal in his statement recorded u/s 132(4) amounting to Rs.88.52 crores comprised of two components i.e. pertaining to assessment year 2008-09 –and balance – Rs.57.74 crores. He submitted that Shri Sanjeev Aggarwal has retracted from his statement regarding surrender of income to the

extent of Rs.30.78 crores pertaining to assessment year 2008-09 which is evident from pages 30 to 35 of the Paper Book.

14 While placing reliance on the decision of the Delhi Bench of the Tribunal in the case of Brahmaputra Finlease (P) Ltd. vs. DCIT vide ITA No.332/Del/2017 order dated 29.12.2017 for assessment year 2007-08, the decision of the Hon'ble Delhi High Court in the case of CIT vs. Best Infrastructure (India) (P) Ltd. reported in 397 ITR 82 and the decision of the Hon'ble Delhi High Court in the case of CIT vs. Harjeev Aggarwal reported in 290 CTR 263, he submitted that the statements recorded u/s 133(4) do not by themselves constitute incriminating material.

15. He placed reliance on the decision of the Hon'ble Delhi High Court in the case of CIT vs. Kabul Chawla reported in 380 ITR 573, the decision in the case of Pr.CIT vs. Meeta Gutgutia reported in 395 ITR 526 and various other decisions, for the principle that that in absence of any incriminating material found as a result of search, assumption of jurisdiction u/s 153A is not in accordance with law. For a similar proposition of law, he also relied on the decisions reported in Pr.CIT vs. Lata Jain, 384 ITR 543 (Del); CIT v. Chetan Das Laxhman Das 211 Taxman 61 (Del); CIT vs. Anil Kumar Bhatia 352 ITR 493 (Del); CIT vs. Kurele Paper Mills P. Ltd. dated 06.07.2015 380 ITR 571 (Del); CIT vs. MGF Automobiles Ltd 241 Taxman 440 (Del); Pr. CIT vs. Smt. Kusum Gupta ITA No.634/2015; Praveen Kumar Jolly W.P. (C) 8721/2014 & CM No.20052/2014; Pr. CIT vs. Mahesh Kumar IT Appeal No.810/2016; Pr. CIT vs. Ram Avtar Verma IT Appeal Nos.61 & 62/2017; and Pr. CIT vs. Best Infrastructure (India) (P) Ltd 397 ITR 82.

16. Insofar as the merit of the case is concerned, Ld. AR submitted that the assessee for the impugned assessment year has received share capital of Rs.24 lacs from Rhone Sales (P) Ltd. and Rs.15 lacs from Rapi Marketing (P) Ltd . The assessee had given details of the said company such as Complete Address with PAN numbers, List of Directors, distinct cheques numbers of different dates for purchase of shares, copy of confirmation of the investor company, their bank statement, copy of annual return of the said company, list of shareholders of the investor company, copy of company master data of the investor company and various other details to substantiate the identity and creditworthiness of the investor company and the genuineness of the transaction.

17. It is his further submission that the burden of the assessee was discharged since the investor is a listed group company and copy of audited financial statement, acknowledgement of return of income, confirmations of investor, bank statements, memorandum of article or association were filed. Further, assessment was completed u/s 143(3) of the Act in the case of the said investor company. There is no evidence on record to suggest that the money received as share capital and share premium has originated from the coffers of the assessee company.

18. Placing reliance on several decisions, Ld. AR argued that non-production of shareholder/director by the assessee cannot be a ground for making addition u/s 68 if assessee discharged the initial onus cast on it. He submitted that the Assessing Officer has not established that the particulars furnished by the assessee are false especially when no

enquiries were made either from the shareholder by issuing notice u/s 133(6) or enquiry from the Assessing Officer of the Investor Company or banker of investor or registrar of company.

19. In respect of the allegation leveled by the Assessing Officer that the investor company had low income, is concerned, he submitted that low income of shareholder is not a relevant consideration and only net worth is relevant to determine the creditworthiness of the shareholder. He submitted that since the assessment has been completed u/s 143(3) in the case of the investor company which is a group company and a listed company, therefore, the Assessing Officer, without making proper enquiry could not have made addition on flimsy ground.

20. Referring to the order of the Id. CIT(A) invoking the provisions of section 56(2)(viib) read with Rule 11UA(1)(cb) is concerned, he submitted that the Id. CIT(A) without giving any opportunity to the assessee held that the share premium charged by the assessee falls within the mischief of the said provisions. He submitted that the Id. CIT(A) cannot sustain an addition on the basis of new source of income which was not there in the assessment order. In any case he submitted that the book value of the shares is much more than the share premium charged by the company. He accordingly submitted that in absence of any incriminating material, no addition could have been made by disturbing a completed assessment. Further, the assessee has discharged the initial burden cast on it by furnishing sufficient details to prove the identity and capacity of the investor company and genuineness of the transaction. Since the investor

company has been assessed u/s 143(3) and since the investment of the assessee in the investor company has also not been doubted by the Assessing Officer, therefore, under the facts and circumstances of the case no addition is sustainable legally and factually.

21. Per contra, Ld. DR heavily relied on the order of the Id. CIT(A). She submitted that the A.O. has extensively and exhaustively proved that identities and creditworthiness of such parties & genuineness of transactions regarding amount of Rs.39 lacs as share capital & share application money paid to the Assessee company by several entities/firms/companies are bogus, non-existent paper entities having no worthy business to advance such share capital & share application money. Thus said assessee company has miserably failed to prove all three ingredients required for provision of section 68 of Act.

22. Placing reliance the decision in the case of CIT vs. MAF Academy (P.) Ltd. reported in 361 ITR 258, she submitted that the Hon'ble Delhi High Court in the said case has held that where assessee, a private limited company, sold its shares to unrelated parties at a huge premium and thereupon within short span of time those shares were purchased back even at a loss, share transactions in question were to be regarded as bogus and, thus, amount received from said transactions was to be added to assessee's taxable income under section 68 of the Act.

23. Further, placing reliance on the decision of the Hon'ble Delhi High Court in the case of CIT vs. Navodaya Castle Pvt. Ltd. reported in 367 ITR 306, she submitted that the Hon'ble High Court remitted the matter back

to the Tribunal for fresh adjudication since the assessee was unable to produce the directors and the principal officers of the six shareholder companies and also that as per the information and details collected by the Assessing Officer from the concerned bank, the Assessing Officer had genuine concerns about identity and creditworthiness of shareholders as well as genuineness of the transactions. She submitted that the SLP filed by the assessee was dismissed by the Hon'ble Supreme Court.

24. Referring to the decision of the Hon'ble Bombay High Court in the case of Konark Structural Engineering (P.) Ltd. vs. DCIT reported in 90 taxmann.com 56, she submitted that the Hon'ble High Court in the said decision has held that where assessee-company received certain amount as share capital from various shareholders, in view of fact that summons served to shareholders under section 131 were unserved with remark that addressees were not available and moreover those shareholders were first time assesseees and were not earning enough income to make deposits in question, impugned addition made by AO under sec. 68, has to be confirmed.

25. On the basis of the decision in the case of Prem Castings (P.) Ltd. vs. CIT reported in 88 taxmann.com 189, she submitted that the Hon'ble High Court has held that where assessee company had received share capital from various contributors and admitted that alleged investors were close friends and business associates of its directors, burden was upon assessee to disclose true and correct details of said investors and since identity of

alleged investors was never established additions made under section 68 was justified

26. Ld. DR relied on the decision in the case of CIT vs. Nipun Builders & Developers (P.) Ltd. reported in 350 ITR 407, for the principle that where assessee failed to prove identity and capacity of subscriber companies to pay share application money, amount so received was liable to be taxed under section 68.

27. Referring to the decision in the case of CIT vs. Nova Promoters & Finlease (P) Ltd. reported in 342 ITR 169, she submitted that the Hon'ble Delhi High Court has held that amount received by assessee from accommodation entry providers in garb of share application money, was to be added to its taxable income under section 68.

28. In CIT vs. Ultra Modern Exports (P.) Ltd. reported in 40 taxmann.com 458, Ld. DR submitted that the Hon'ble Delhi High Court has held that where in order to ascertain genuineness of assessee's claim relating to receipt of share application money, Assessing Officer sent notices to share applicants which were returned unserved, however, assessee still managed to secure documents such as their income tax returns as well as bank account particulars, in such circumstances, Assessing Officer was justified in drawing adverse inference and adding amount in question to assessee's taxable income under section 68.

29. Referring to the decision in the case of CIT vs. Frostair (P.) Ltd. reported in 26 taxmann.com 11, she submitted that the Hon'ble Delhi

High Court has held that where details furnished by assessee about share applicants were incorrect, addition under section 68 was proper.

30. Referring to the decision in the case of CIT vs. N R Portfolio Pvt. Ltd. reported in 29 taxmann.com 291, she submitted that the Hon'ble Delhi High Court has held that if AO doubts the documents produced by assessee, the onus shifts on assessee to further substantiate the facts or produce the share applicant in assessment proceeding.

31. Referring to the decision in the case of CIT vs. Empire Builtech (P.) Ltd. reported in 366 ITR 110, she submitted that the Hon'ble Delhi High Court has held that u/s 68 it is not sufficient for assessee to merely disclose address and identities of shareholders; it has to show genuineness of such individuals or entities. She also placed reliance on the decisions reported in CIT vs. Focus Exports (P.) Ltd., 51 taxmann.com 46 (Delhi), PCIT vs. Bikram Singh, ITA No.55/2017 (Delhi), and Rick Lunsford Trade & Investment Ltd. vs. CIT, 385 ITR 399 (Cal) for the same principle.

32. Ld. DR further submitted that in the case of Rick Lunsford Trade & Investment Ltd. vs. CIT [2016-TIOL-207-SC-ITJ (Supreme Court), the Hon'ble Supreme Court has dismissed the SLP upholding the decision of the Hon'ble High Court that it is open to the Revenue Department to make addition on account of alleged share capital u/s 68, where the assessee company has failed to show genuineness of its shareholders. A.O. has categorically after making necessary inquires & after taking into

consideration of investigation reports & search & seizure materials made the addition.

33. The sum and stance of the argument of the Id. DR is that, the investee companies are paper-existing only without physical existence, those were never produced for examination by A.O, such entities have no worthy business to advance such investment, such entities have no proper identity of existence without any creditworthiness, such entities only indulged to provide accommodation entries of unaccounted/undisclosed money routed through banking channel creation of PAN & filing of Income Tax returns etc., thus doing only non-genuine transaction/bogus transaction, and basing on these discrepancies, significant deficiencies/discrepancies have been established by said A.O. to prove identity as non-existent/bogus only paper entities/creditworthiness is absent due to negligible/loss Income of such entities/genuineness of transaction is only sham/non-genuine.

34. Ld. DR justified the impugned order stating that the Id. CIT(A) has correctly in fact & in law has dismissed the appeal of assessee holding that Assessee has failed to prove identity, creditworthiness & genuineness of transaction & burden of proving such ingredients of provision of section 68 of Act was never discharged from Assessee due to utter failure to produce substantive corroborative evidence to prove such. He has categorically held that Assessee has not done a reliable & robust valuation of share premium charges strictly as per Rule 11 UA(I)cb r.w.s. 56(2)(viib)

& Ld. CIT(A) has dismissed the appeal of the Assessee which is justified under the facts and circumstances of the case.

35. She submitted that considering all facts and the cited case laws, the appeal of assessee is liable to be dismissed inasmuch as the grounds of appeal are devoid of any merit.

36. We have considered the rival arguments made by both the sides in the light of the orders of the authorities below. We have also considered the case law that is brought to our notice. Ld. Assessing Officer made addition of Rs.39 lacs in the hands of the assessee u/s 68 of the Act basing on various enquiries conducted and statements recorded of various persons u/s 132(4) and 131, stating that the assessee failed to substantiate to his satisfaction the identity and creditworthiness of the investor and the genuineness of the transaction with cogent evidence. According to the Assessing Officer, since the assessee could not produce the investor company and since its returned income is meager considering the huge investment made by it in the shares of the assessee company with huge premium, therefore, the provisions of section 68 are clearly attracted.

37. Ld. CIT(A) also upheld the action of the Assessing Officer on merit in the appeal preferred by the assessee. He has also dismissed the ground raised by the assessee challenging the validity of assumption of jurisdiction u/s 153A in absence of any incriminating material found during the course of search. Ld. CIT(A) alternatively also held that the addition is sustainable on account of mischief of provisions of section 56(2)(viib) read

with Rule 11UA(1)cb, the reasons for which have already been reproduced in the preceding paragraph.

38. It is the submission of the Id. AR that the original return was filed on 26.09.2013 declaring income at Rs.1,84,981/- which was assessed u/s 143(1) of the Act. He further submitted that the period for issue of notice u/s 143(2) expired by 30.9.2014 since such notice cannot be served on the assessee after the expiry of six months from the end of the financial year in which the returns was furnished and thereby the assessment proceedings reached finality and there was no pending proceedings. It is not the case of the revenue that any notice u/s 143(2) of the Act was issued or served before the prescribed time limit and, therefore, the assessment on the date of search was not pending. Since the addition made by the Assessing Officer is not based on any incriminating material found during the course of search and addition has been made on the basis of post-search enquiry and on the basis of statements recorded u/s 132(4) of the Act, therefore, the same cannot constitute incriminating material so as to enable the Assessing Officer to assume jurisdiction u/s 153A of the Act.

39. Before adverting to the merits of the case, we deem it necessary to deal with the legal ground raised by the assessee challenging the validity of the assumption of jurisdiction u/s 153A of the Act, in absence of any incriminating material found during the course of search when the assessment was not pending. It is an admitted fact that the original return of income was filed on 26.09.2013 which was processed u/s 143(1) of the

Act. The period for issue of notice u/s 143(2) expired by 30.09.2014 i.e. the notice u/s 143(2) could not have been served on the assessee after the expiry of six months from the end of the financial year in which the return is furnished. Therefore, in absence of issue of any notice u/s 143(2) and since no other proceedings are pending, therefore, it had attained the finality much prior to the date of search on 28.03.2015. Under these circumstances, the finding of the Id. CIT(A) that the assessment proceedings were pending at the time of search and was abated is factually incorrect.

40. Para 5 page 11 of the impugned order reads that,-

“The basis of addition as taken by the A.O. was statement recorded of Shri Sanjeev Agarwal during the course of search wherein he has surrendered an amount of Rs.88.52 crore out of which a sum of Rs. 30.78 crores were referred to for the assessment year 2008-09 and rest of amount was non descriptive and vague and was surrendered subject to cross checking of the facts and to explain after access to the books of accounts. The said statement was retracted by said Shri Sanjeev Agarwal on 18.05.2015 within two months from the date of original statement. Though the appellant has stated to have recorded all the transactions under appeal in its books of account and offered all the necessary and relevant proof thereof as such. Since the assessment proceedings were pending at the time of search and was abated, the legal ground objected as such by the appellant was not valid as such the same is bound to be rejected.....”

41. At this juncture reference to the case law relied upon by the Ld. AR becomes necessary. In CIT vs. Best Infrastructure (India) (P) Ltd. reported in 397 ITR 82 the Hon’ble jurisdictional High Court has held that statements recorded u/s 132(4) of the Act do not by themselves constitute incriminating material, with the following observations:-

“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 Commissioner of Income Tax v. Harjeev Aggarwal (supra). Lastly, as already pointed out hereinbefore, the facts in the present case are different from the facts in Smt. Dayawanti Gupta v. CIT (supra) where the admission by the Assessee 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 Assessee 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.

39. For all the aforementioned reasons, the Court is of the view that the ITAT was fully justified in concluding that the assumption of jurisdiction under Section 153A of the Act qua the Assessee herein was not justified in law.”

42. Further in CIT vs. Harjeev Aggarwal reported in 290 CTR 263 (Del)

Hon’ble Court observed that,-

“23. It is also necessary to mention that the aforesaid interpretation of Section 132(4) of the Act must be read with the explanation to Section 132(4) of the Act which expressly provides that the scope of examination under Section 132(4) of the Act is not limited only to the books of accounts or other assets or material found during the search. However, in the context of Section 158BB(1) of the Act which expressly restricts the computation of undisclosed income to the evidence found during search, the statement recorded under Section 132(4) of the Act can form a basis for a block assessment only if such statement relates to any incriminating evidence of undisclosed income unearthed during search and cannot be the sole basis for making a block assessment.”

43. The Co-ordinate Bench of the Tribunal in the case of Brahmputra Finlease (P) Ltd. vide ITA No.3332/Del/2017 order dated 29.12.2017, following the above decision of the Hon’ble Delhi High Court, has observed as under :-

“4.19 We find that in the case of best infrastructure (India) private limited (supra), despite the admission of accommodation entry in statements under section 132(4) of the Act, the court held that the statement do not

constitute as incriminating material. In the instant case, neither is there any statement of any accommodation entry operator claiming that any entry was not provided nor any director has admitted that assessee obtained accommodation entry. Thus, the case of the assessee is on better footing than the case of Best Infrastructure (I) P. Ltd (supra). In such facts and circumstances, respectfully following the decision of the Hon'ble Delhi High Court in the case of best infrastructure (India) private limited (supra), we do not have any hesitation to hold that the statement under section 132(4) of Sh. Sampat Sharma cannot be treated as incriminating material found during the course of search. In the result, we hold that addition of share capital in the year under consideration has been made without relying on any incriminating material found during the course of search."

44. In the light of the above decisions, statements recorded u/s 132(4) of the Act, 1961 cannot constitute as incriminating material.

45. In this context, it could be seen from the order of the Id. CIT(A) that there was no surrender of income for the impugned assessment year and the surrender was only for the assessment year 2008-09 which too was retracted within two months. He has also observed that the statement was non descriptive and vague and subject to cross checking of fact to be explained after access to books of accounts. We, therefore, find merit in the submissions of the Id. counsel for the assessee that the addition made by the Assessing Officer u/s 68 of the Act is not based on any incriminating material and is based on statements recorded during search u/s 132(4) and post-search enquiries.

46. As has been stated above, the addition of Rs.39 lacs was not made on the basis of any incriminating material, but is based on statements recorded during the search u/s 132(4) and post-search enquiries. It has been held in various decisions that completed assessments cannot be

disturbed u/s 153A in absence of any incriminating material. We shall refer to the leading cases on this aspect.

47. The Hon'ble Delhi High Court in the case of Kabul Chawla reported in 380 ITR 573 has held that the completed assessment can be interfered with by the Assessing Officer while making the assessment u/s 153A only on the basis of some incriminating material found on or 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 not known in the course of original assessment. Following the above decision, the Hon'ble Jurisdictional High Court in the case of CIT vs. Meeta Gutgutia reported in 395 ITR 526 has taken a similar view and has held that once the assessment has attained finality for a particular year i.e. it is not pending then the same cannot be subject to tax in proceedings u/s 153A of the Act. This, of course, would not apply if incriminating materials are gathered in the course of search or during the proceedings u/s 153A which are contrary to and/or not disclosed during the regular assessment proceedings.

48. Again in the case of Pr.CIT vs. Lata Jain reported in 384 ITR 543 the Hon'ble Delhi High Court has held that in absence of any incriminating material found as a result of search, assumption of jurisdiction u/s 153A was not in accordance with law. The various other decisions relied on by the Id. counsel for the assessee also supports his case.

49. In the case of CIT vs. Sinhgad Technical Education Society reported in 397 ITR 344 Hon'ble Supreme Court upheld the decision of Hon'ble

Bombay High Court wherein the Hon'ble High Court had upheld the decision of the Tribunal holding that the incriminating material which was seized has 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.

50. Since in the instant case addition of Rs.39 lacs was made on the basis of statements recorded u/s 132(4) and post-search enquiry and no incriminating material was found/seized during the course of search, therefore, following the decisions cited (supra), we hold that no addition could have been made u/s 153A since the assessment was not abated in the instant case. In view of the above, we hold that the Id. CIT(A) was not justified in upholding the action of the Assessing Officer in assuming jurisdiction u/s 153A of the Act. Accordingly, the addition made by the Assessing Officer and upheld by the Id. CIT(A) in the 153A assessment proceedings being void ab-initio are deleted.

51. Inasmuch as the assessee succeeds on the legal ground, we deem it not necessary to delve deeper into the arguments made by the Id. counsel for the assessee on merit since such adjudication would be academic in nature.

52. The appeal filed by the assessee is accordingly allowed.

ITA No.7532/Del/2017

53. After hearing both the sides, as stated above in the 1st paragraph, facts of this case and the grounds raise in this appeal are similar to the facts and grounds involved in ITA No. 7531/del/2017. We have already decided the issue and the appeal filed by the assessee has been allowed. Following similar reasoning, the appeal filed by the assessee is allowed.

ITA 7530 of 2017:

54. This matter relates to the assessment year 2014-15 and the facts of this matter are slightly different from those involved in the earlier two matters. In this case the original return of income was filed on 25/09/2014 declaring a total income of Rs. 29, 655/-and it was processed under section 143(1) of the Act. Search conducted on 28/03/2015. Though the return of income was processed under section 143(1) of the Act, still the time for issuance of notice under section 143(2) was available till 30/09/2015. In view of the decision of the Hon'ble jurisdictional High Court in CIT vs., Kabul Chawla, vide paragraph No. 37 (v), the word "assess" in section 150(3A) is relatable to abated proceedings (i.e., those pending on the date of search) and the word "reassess" to completed assessment proceedings. It is, therefore, clear that in this matter as on the date of search the time to issue notice under section 143(2) of the Act was very much available to the Learned Assessing Officer, as such, it cannot be said that the assessment in this matter was concluded. This matter relates to abated proceedings.

55. There is no dispute of the fact that the assessee received a share capital and share premium of Rs. 21, 84, 000/-out of which the face value of the shares was Rs. 87, 360/-and the premium was Rs. 20, 96, 640/-. Learned Assessing Officer held that the assessee failed to establish the identity, creditworthiness and genuineness of the parties where from funds were received by the investors of the assessee who are also the group companies for the assessee group and consequently the assessee being the beneficiary, an amount of Rs. 21, 84,000/-was treated as unexplained cash credit under section 68 of the Act to the assessable income of the assessee for the period under consideration.

56. When the assessee preferred appeal before the Learned Commissioner of Income Tax (Appeals), by way of impugned order, Ld. CIT(A) vide paragraph No. 5.9 inferred that the material found during the search in respect of equity received by the assessee cannot lead to the conclusion drawn by the AO, no specific corroborative evidence has been brought on record by assessing officer to prove that the equity subscription is an accommodation entry. Ld. CIT(A) further observed that the assessee had also discharged its onus and submitted all the documentary evidence in respect of the investment and the details are submitted in this regard by the assessee were also made part of the order of the Assessing Officer. Ld. CIT(A), however, dealt with this matter under section 56 (2) (viib) of the Act and recorded a finding that the case of the assessee clearly falls in the mischief of this section and hence the premium charged by the assessee has to be subjected to the provisions of section

56 (2) read with rule 11 UA (1)cb of the Act. On this premise, Ld. CIT(A) confirmed the addition of share premium component.

57. The assessee is , therefore, in this appeal before us stating that in the absence of any incriminating material found in the search conducted, assumption of jurisdiction under section 153A of the Act is bad under law. The assessee further contended that the Ld. CIT(A) erroneously invoked the provisions under section 56(2)(viib) of the Act, and that too without affording any opportunity to bring to tax a credit duly recorded and explained. It is, therefore, clear that the entire dispute in this matter revolves around the issue of application of the provisions of section 56(2)(viib) of the Act to the facts of this case.

58. Argument of the Ld. AR is that the Ld. CIT(A) vide paragraph No. 5.11 of his order observed that the transaction was entered into during the financial year 2008-09 relevant to assessment year 2009-10, and though the assessee has not received the amount during the financial year 2013-14 (relevant to assessment year 2014-15), the quantum including the share premium was recognized only in the financial year 2013-14. Ld. AR , therefore, submits that the provisions of section 56(2)(viib) of the Act, which came into force through the Finance Act, 2012 w.e.f. 01/04/2013 cannot be made applicable retrospectively to the case of the assessee.

59. Insofar as the facts are concerned recorded by the Ld. CIT(A), revenue does not dispute the same either by way of an appeal or by way of cross objections. Ld. DR also could not controvert any of the facts recorded by the Ld. CIT(A). In these circumstances, we are of the

considered opinion that the provisions under section 56(2)(viib) of the Act cannot be made applicable to the case of the assessee inasmuch as the amount was received in the years earlier to the year under consideration. On this score the assessee succeeds. We accordingly answer the grounds in favour of the assessee and hold that the addition cannot be sustained.

60. In the result, all the three appeals are allowed.

Order pronounced in the open Court on this 17th September, 2018.

Sd/-

(G.D. AGRAWAL)
PRESIDENT

Dated: 17th September, 2018.

VJ

Copy of order to: -

- 1) The Appellant
- 2) The Respondent
- 3) The CIT
- 4) The CIT(A)
- 5) The DR, I.T.A.T., New Delhi

Sd/-

(K. NARASIMHA CHARY)
JUDICIAL MEMBER

By Order

//True Copy//

Assistant Registrar
ITAT, New Delhi

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