IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES "A" : DELHI

BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER
AND
SHRI L.P. SAHU, ACCOUNTANT MEMBER

ITA.No.3555/Del./2015
Assessment Year 2011-2012

Shri Ajay Sharma, Ghaziabad. PAN CDSPS1356L C/o. M/s. O.P. Sapra & Associates, C-763, New Friends Colony, New Delhi - 110 025.	vs.	The DCIT (Central Circle), Income Tax Office, 3rd Floor, CGO Complex-1, Hapur Road, Ghaziabad. Uttar Pradesh.
(Appellant)		(Respondent)

For Assessee :	Shri Kapil Goel, Advocate.
For Revenue :	Shri Sanjay Goyal, CIT-D.R.

Date of Hearing :	14.02.2019
Date of Pronouncement :	05.03.2019

ORDER

PER BHAVNESH SAINI, J.M.

This appeal by assessee has been directed against the order of Ld. CIT(A), Ghaziabad, Dated 31st March, 2015 for the A.Y. 2011-2012.

2. Briefly the facts of the case are that a search under section 132 of the Income Tax Act was conducted in the case of Shri Pankaj Sharma and assessee (Shri Ajay Sharma) on 11th October 2010. It was informed that cash was going to be withdrawn from A/c.xxx 2277 of M/s. A.K. Traders with HDFC Bank, Ambedkar Road, Ghaziabad, source of which is not explained in the hands of the assessee, proprietor of M/s. A.K. Traders. When the team visited the Bank premises, it was found that an amount of Rs.2.78 crores was already got transferred to account xxx16097 with Punjab National Bank, Navyug Market, Ghaziabad, standing in the name of M/s. Tushar Building Material Supplier, Gautam Budh Nagar. Bank Authorities were requested to put the balance of Rs.1,78,35,905/- standing to credit in A/c. No.xxx2277 of M/s. A.K. Traders under restraint. Meanwhile, the team immediately visited Punjab National Bank and it was found that by that time the entire amount of Rs.2.78 crores had been withdrawn in cash. The Bank premises of HDFC, Ghaziabad in the case of Bank A/c. xxx2277 of M/s. A.K. Traders was searched on

11th October, 2010 and balance standing to the credit was seized. The statement of assessee was recorded in which he has stated that he does not know about the source of the amount credited to the account and the entire affairs were being looked after by his brother in law Shri Pankaj Sharma. The A.O. recorded that so many concerns are being operated and the amounts in the accounts have been credited by transfer through RTGS or otherwise and accommodation entries have been provided. A list showing names of beneficiaries and numerous firms who had been given accommodation entries by assessee and others are noted at pages 5 to 13 of the assessment order. The A.O. on the basis of the search and seizure operation and enquiries conducted noted that assessee is engaged in the business of providing accommodation entries. Notice under section 153A of the I.T. Act was issued for A.Ys.2005-2006 to 2010-2011 on 18th September, 2012 and notice under section 142(1) was issued for assessment year under appeal i.e., 2011-2012 on 18th September, 2012, for filing of the return of income. The assessee filed return of income on 14th

March 2013 showing income of Rs.57,140/- from salary income and other sources. The A.O. on the same day on 14th March 2013 issued notices under section 143(2) and 142(1) of the Income Tax Act, seeking explanation of assessee. The A.O. considered 3% commission income on the gross deposits and made addition of Rs.1.04 crores and further made addition on protective basis on Rs.34.67 crores. The A.O. passed the assessment order under section 143(3) dated 31st March 2013 and computed the total income of assessee at Rs.35,72,04,017/-. The Ld. CIT(A) dismissed the appeal of assessee.

3. The assessee raised several grounds in appeal challenging the above additions. The assessee also filed the following additional grounds of appeal.

> *"That impugned assessment order passed by Ld. Assessing officer u/s 153A/143(3) of the Act is invalid and void ab initio for want of valid notice u/s 143(2) as per law as evident from fact that when return in response to notice u/s 142(1) dated*

14/12/2012 was admittedly filed on 14/03/2013 notice u/s 143(2) is issued on very same day that is 14/03/2013 which shows non application of mind in issuing notice u/s 143(2) and thereafter in framing the assessment and accordingly all proceedings are nullity.

"That impugned assessment framed u/s 143(3) on basis of notice u/s 143(2) dated 14/03/2013 is invalid and void ab initio being made on basis of non est return filed u/s 153A/153C on 14/03/2013 as no return was there u/s 139/142 filed on 14/03/2013 to validly issue notice u/s 143(2) which shows non application of mind in issuing notice u/s 143(2) and thereafter in framing the assessment and accordingly all proceedings are nullity"

"That impugned assessment framed u/s 153A/143(3) is invalid and void ab initio being made without issuance of any show cause much

less any show cause notice as evident from order sheet entries of case records filed in paper book "

4. Learned Counsel for the Assessee submitted that all facts are available on record and it is not in dispute that return of income was filed on 14th March, 2013 and on the same day, A.O. issued notice under section 143(2). Therefore, entire assessment order is a illegal and vitiated and is liable to be quashed. He has submitted that additional ground may be admitted for hearing. PB 35 is order sheet to show that return of income was filed on 14th March, 2013 and on the same day, notice under section 143(2) have been issued to assessee. PB 24 is notice under section 143(2) dated 14th March, 2013. He has a submitted that the issue is covered in favour of the assessee by the order of ITAT, Delhi A-Bench, in the case of Ashtech Industries Pvt. Ltd., Delhi vs. DCIT, Circle-3(2), New Delhi, in ITA.No.2332/Del./2018, Dated 20th December, 2018. He has submitted that a similar view have been taken by ITAT, Delhi SMC-Bench in the case of Satish Kumar, New Delhi vs. ITO, Ward-2(3), Faridabad in ITA.No.3586/Del./2018, Dated 14th January, 2019.

5. On the other hand, Ld. D.R. referred to page 28 of the Ld. CIT(A) order and submitted that assessee did not co-operate with the A.O, therefore, there was no time left with the A.O. to issue notice under section 143(2) of the Income Tax Act. He has, therefore, submitted that additional ground may not be admitted.

6. We have considered the rival submissions and perused the material on record. The additional ground is legal in nature and goes to the root of the matter. It is well settled Law that taxability of the income should be in accordance with law. All the material facts are available on record. Therefore, it being the legal issue, we admit the additional ground of appeal for the purpose of disposal of the appeal. We rely upon decision of Hon'ble Supreme Court in the case of NTPC 229 ITR 383 (SC). We also rely upon the decision of Hon'ble Gauhati High Court in the case of Assam Company India Limited 256 ITR 423 (Gau.) in which it was held that *"the Tribunal may consider any new ground if facts are available on record."* The additional ground is, therefore, admitted for deciding the appeal.

6.1. It is not in dispute that search was conducted in the case of the assessee and others on 11th October, 2010, therefore, the assessment year under appeal i.e., A.Y. 2011-2012 is the year of search. It is not in dispute that assessee filed return of income on 14th March, 2013 and on the same day, notice under section 143(2) have been issued. This fact is mentioned in the assessment order. The assessee also filed copy of the notice under section 143(2) and copy of the order sheet on record, which also supports the same fact that notice under section 143(2) have been issued on the date of filing of the return of income itself.

6.2. Learned D.R. referred to page-22 of the Ld. CIT(A) Order. The A.O. in the assessment order has mentioned that notice under section 142(1) have been issued on 18th September, 2012. The Ld. CIT(A) noted in para 6.4 of the appellate order, as referred to by the Ld. D.R. that this notice issued under section 142(1) on 18th September, 2012 was received un-served. Another notice under section 142(1) with questionnaire is issued on 14th December, 2012 for compliance on 3rd January, 2013 but, there were no

compliance. Summons under section 131 and show cause notice under section 276CC was issued on 6th June, 2012 but, there was no compliance. The A.O. as well as the Ld. CIT(A) have nowhere mentioned in the impugned orders, if any of the above notices have been served upon the assessee ? Therefore, there is no question of any non-compliance or non cooperation on the part of the assessee as is contended by the Ld. D.R. The contention of the Ld. D.R. is, therefore, rejected. It, therefore, stands established that the A.O. issued notice under section 143(2) on the same day when the return of income was filed by the assessee. Thus, there was no application of mind on the part of the A.O. The entire assessment proceedings are vitiated and are bad in the eye of Law. The issue is covered in favour of the assessee by order of the ITAT, Delhi Bench in the case of Ashtec Industries Pvt. Ltd., Delhi vs. DCIT, Circle-3(2), New Delhi (supra) which is reproduced as under.

"IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'A' NEW DELHI

BEFORE SHRI H. S. SIDHU, JUDICIAL MEMBER
AND
SHRI L.P. SAHU, ACCOUNTANT MEMBER

I.T.A. No. 2332/Del/2018
Assessment Year: 2009-10

ASHTECH INDUSTRIES PVT. LTD., D-49, MANSAROVAR PARK, SHAHDARA, DELHI – 110 032 (PAN: AAECA0120G)	VS.	DCIT, CIRCLE 3(2), NEW DELHI
(ASSESSEE)		(RESPONDENT)

Assessee by: SH. KAPIL GOEL, ADVOCATE
Revenue by: SH. SRIDHAR DORA, SR. DR.

ORDER

PER H.S. SIDHU, JM

This appeal is filed by assessee against the Order dated 08.3.2018 passed by the Ld. CIT(A), New Delhi relating to Assessment Year 2009-10 on the following grounds:-

1. The initiation of proceedings u/s 148 is without jurisdiction.

2. The initiation of action u/s 148 is bad in law, being based on bald allegations equating the same with tangible material.

3. The initiation of action u/s 147 on the basis of search material found during search of third party i.e. Jain brothers, is contrary to law in view of non-obstante clause in S.

153A/153C, specifically prohibiting action u/s. 147, inter alia.

4. Even otherwise, the initiation of proceedings u/s 148 and the consequent assessment u/s 147 is contrary to law in the absence of any incriminating material to form reason to believe, as per the report of Investigation Wing & AO relied on, which only directs the AO to examine the details and after this examination only to determine whether there could be any justification for initiation of action u/s 147. Thus, the issue of notice u/s. 148 and the consequent assessment u/s 147 is without the authority of law and do not provide jurisdiction to the AO to make re-assessment u/s 147.

5. That the assessment u/s 147 is unlawful, arbitrary and without jurisdiction on account of lack of application of mind and lack of approval u/s.151 from competent authority.

6. That the assessment u/s 147 is contrary to law laid down by the Hon'ble Supreme Court in GKN Driveshaft case, without following the procedure laid down by the Hon'ble Supreme Court.

7. That the assessment is bad in law being made without following the principles of equity and justice and denying the assessee of proper opportunity to defend, without supplying the copies of material relied on and cross examination of the witnesses whose statements have been relied upon to initiate action and complete assessment.

8. That the Id. AO has erred on facts and in law in making the addition of Rs. 1,85,00,000/- on account of alleged accommodation entry, merely following the investigation report, ignoring the voluminous evidence to the contrary brought on record by the assessee. The addition is made on the basis of conjectures and surmises.

9. That the Id. CIT(A) has erred in law and on facts in confirming the order of Id. AO both on legal grounds and on merits.

10. That the Id. CIT(A) has erred in law in treating the vague and general information of investigation wing and of the AO of the searched party M/s Jain Brothers as sacrosanct without examination with reference to the seized material and the facts of the assessee's case.

11. That the Id CIT(A) has erred in importing approval of the higher authorities u/s 151 on assumptions without existence of the actual correspondence regarding approval and without confronting the assessee with the same..

12. The appellant craves leave and sanction of the Hon'ble ITAT to file additional evidence, if so required for proper prosecution of the case, based on facts and circumstances, which has not been or could not be adduced or filed before lower authorities either

because proper and sufficient opportunity was not provided or because it was not solicited or its need was not appreciated.

13. The appellant craves leave to and permission of the Hon'ble ITAT to add to or alter any of the grounds of appeal at any time up to the final decision of the appeal.

14. The assessment may please be set aside as null and void and addition of Rs. 1,85,00,000/- be deleted or such other relief as your Honors may deem fit under the circumstances of the case, be allowed.

2. The assessee has also filed the following additional ground under Rule 11 of the ITAT Rules.

"That impugned assessment order passed by the AO u/s. 147/143(3) of the Act is invalid and void abnitio for want of valid notice u/s. 143(2) as per law as evident from fact that when return in response to notice u/s. 148 was admittedly filed on 27.4.2016 notice u/s. 143(2) is issued on very same day that is 27.4.2016 which shows non

application of mind in issuing notice u/s. 143(2) and thereafter in framing the assessment and accordingly all proceedings are nullity."

3. The brief facts of the case are that assessee filed its return of income on 29.9.2009 declaring an income of Rs. 3,39,85,750/-. The assessment u/s. 143(3)/147 of the Income Tax Act, 1961 (in short "Act) was made on 24.11.2016 at a total income of Rs. 5,24,85,750/-. In the assessment order, AO added Rs. 1,85,00,000/- on account of accommodation entries u/s. 68 of the I.T. Act. Aggrieved with the addition, the assessee appealed before the Ld. CIT(A), who vide its impugned order dated 8.3.2016 dismissed the appeal of the assessee. Now against the impugned order, assessee is in appeal before us.

4. Ld. Counsel for the assessee has submitted that the additional ground in identical facts has been accepted and assessment u/s. 143(3) of the Act was passed without proper issue and service of notice u/s. 143(2) of the Act, which was later quashed by the ITAT and the Hon'ble High Court in the following cases:-

i) Hon'ble Delhi ITAT in case of Micron Enterprises Pvt. Ltd. Vs. ITO in I.T.A .No. 901/DEL/2016 (A.Y .2006-07) order dated 14/05/2018

ii) Hon'ble Delhi ITAT in Harsh Bhatia case ITA Nos. 1262/& 1263/DEL/2017 [A.Ys. 2008-09 & 2009-10] order dated 17.10.2017.

iii) Hon'ble Delhi High Court in the case of Director of Income Tax Vs. Society for Worldwide Inter Bank Financial, Telecommunications in ITA No. 441/2010, reported at 323 ITR 249

iv) Delhi High Court decision in the case of Silver Line reported at 383 ITR 455.

5. On the merits of the case, Ld. Counsel for the assessee stated that the addition made u/s 68 of the Act is for mere reason of non production of directors in person of share holder companies same cannot be a justified ground to draw adverse inference u/s 68 of the Act where those share holders are found to be existing and identified in detail as summons have been duly served on them. Mere non production of share holder companies director is argued to be no valid reason for making addition u/s 68 of the Act *dehors* voluminous evidences filed which has not been objectively and lawfully controverted in manner known to law, in view of following coordinate benches decisions, where similar argument in identical circumstances of additions based on S.K.Jain group search has been deleted u/s 68 of the Act.

- *Kautilya Monetary Services Pvt ltd ITA 5975/Del/2014 D bench (30/11/2018) ITAT Delhi*

- *Moti Adhesives P Ltd ITA: 3133/Del/2018 SMC 25/06/2018 ITAT Delhi*
- *Heat Flex Cables P Ltd ITA: 2376/Del/2018 SMC 1/8/2018 ITAT Delhi*
- *Alok Fintrade P Ltd ITA: 180/JP/2015 ITAT JAIPUR BENCH*
- *Signature Buildwell Pvt Ltd ITAT Delhi D Bench ITA: 4249/Del/2015 12/12/2018*
- *SRM Securities Pvt Ltd ITAT G bench ITA 7825/Del/2017 11/12/2018*

6. On the contrary, Ld. Sr. DR vehemently opposed the request of Ld. counsel for the assessee and prayed for dismissal of additional ground application. However, on the merit of the case, he argued that without production of director of share holder companies, addition u/s 68 may please be confirmed and accordingly, he relied upon the orders of the authorities below.

7. We have heard both the parties and perused the records, especially the impugned order and the case laws cited by the Ld. Counsel for the assessee. We note that Assessee filed its return of income for the assessment year 2009-2010 on 29.09.2009 declaring income of Rs. 339,85,750/- and the same was processed u/s 143(1) of the Act on 19.02.2011. Later on, certain information as mentioned in assessment order was received from Investigation Wing regarding search and survey action of Surender Kumar Jain and his brother Virendra Jain and it was reported by Investigation

Wing to the AO that they were engaged in business of providing accommodation entries allegedly through certain companies. On the basis of said Investigation Wing information, reopening was made u/s 148 of the Act by the AO vide notice u/s 148 of the Act dated 28.03.2016. In response to the same, admittedly return was filed by letter dated 27.04.2016 which is specifically acknowledged by AO in assessment order at Para 2 of the assessment order. Notably, said return is expressly accepted by AO as valid return for purposes of assessment u/s 148 of the Act. As mentioned in assessment order itself, when the said return was taken on order sheet by AO vide order sheet entry dated 27.04.2016, at same time, notice u/s 143(2) of the Act was issued on very same date that is 27.04.2016 which is one of the major issue on which validity of the assessment is challenged before us. Copy of this return and notice u/s 143(2) of the Act dated 27.04.2016 are placed on records before us. We further note that AO supplied the reasons recorded (without approval) to assessee (as placed in paper book before us) which were objected before the AO in detailed manner vide objection letter dated 27.04.2016 in which note worthy aspect is assessee specifically sought from AO copies of back material referred in reasons including investigation wing report/letter, seized documents etc referred therein, AO without confronting any back material as evident from objection disposal order dated 17.05.2016 rejected

assessee's objection challenging reopening action. In various letters placed in paper book and referred in written submission before us, it was specifically asked to AO during assessment proceedings to confront the back material as referred in reasons recorded namely in letters dated 07/06/2016, 20/10/2016 which request of assessee has not been adverted to by the AO is patent from objection disposal order dated 17/05/2016 and further notices dated 09/08/2016 u/s 142(1) and show cause notice dated 13/10/2016. In none of these notices as placed in paper book, we could find the back material being confronted to assessee as specifically requested by assessee. We note here that the Tribunal in various decisions specially one which is referred by Ld counsel for the assessee extensively in case of Moti Adhesives (ITA 3133/Del/2018) in order dated 25/06/2018 copy placed before us, has been consistently holding while taking support from Hon'ble Apex court leading decision in Andaman Timber Industries case (Civil Appeal No. 4228 OF 2006) reported at 127 DTR 241 that violation of principle of natural justice (here withholding of back material referred in reasons which is specifically requested for repeatedly) is a serious flaw and results in nullity of the order so passed, which is squarely applicable to present case. Be that as it may, even on merits, for the companies from where assessee recd. share capital assessee placed before Ld AO in its reply dated 07/06/2016 all evidences like

share application form, board resolution confirming investment made, confirmation of share capital raised, Share certificate, income tax particulars of share holders, bank statement of share holders and form 2 for allotment of shares along with their audited final a/c thus discharging its primary burden u/s 68 on three ingredients of identity, creditworthiness and genuineness of share holders. AO unimpressed by the same in the only show cause notice which is placed in paper book is dated 13/10/2016 where only thing asked by AO is to produce the directors of those share holder companies. For mere non production of said shareholders without anything more, as evident from pages 6 & 12 even though summon issued u/s 131 have been accepted to be served on them in the assessment order adverse inference u/s 68 of the Act is drawn by AO to make addition of Rs 185,00,000 which is impugned here before us. In first appeal, before Ld CIT(A) confirmed the order of the AO has rejected assessee's detailed submissions challenging reopening action u/s 148 of the Act and while confirming the addition made by AO it is very glaring from ld CIT(A)'s order page 16 that primary reason which has weighed on him to confirm said addition is mere non production of share holder companies directors in person. In this background, the assessee is before us challenging the orders of the authorities below.

7.1 At the outset Ld counsel for the assessee has drawn our attention to the additional ground application filed before us in terms of Rule 11 of ITAT rules. In said additional ground application it is stated as under:

> *" Quote*
>
> *Additional ground of Appeal*
>
> *"That impugned assessment order passed by Ld. Assessing officer u/s 147/143(3) of the Act is invalid and void ab initio for want of valid notice u/s 143(2) as per law as evident from fact that when return in response to notice u/s 148 was admittedly filed on 27/04/2016 notice u/s143(2) is issued on very same day that is 27/04/2016 which shows non application of mind in issuing notice u/s 143(2) and thereafter in framing the assessment and accordingly all proceedings are nullity"*

7.2 We note that the aforesaid additional ground in identical facts is accepted and assessment u/s 143(3) of the Act was quashed by the ITAT and Hon'ble High Court, are mentioned herein below:

i) *Hon'ble Delhi ITAT in case of Micron Enterprises Pvt. Ltd. Vs. ITO in I.T.A .No. 901/DEL/2016 (A.Y .2006-07) order dated 14/05/2018*

ii) *Hon'ble Delhi ITAT in Harsh Bhatia case ITA Nos. 1262/& 1263/DEL/2017 [A.Ys. 2008-09 & 2009-10] Order dated 17.10.2017*

iii) Hon'ble Delhi High Court in the case of Director of Income Tax Vs. Society for Worldwide Inter Bank Financial, Telecommunications in ITA No. 441/2010, reported at 323 ITR 249

iv) Section 292BB & Section 143(2) are both dealt succinctly in Delhi High Court decision in case of Silver Line reported at 383 ITR 455 wherein it has been held as under:-

"…12. The Court first proposes to consider the question as to whether in terms of the proviso to Section 292BB of the Act, the Assessee was precluded, at the stage of the proceedings before the ITAT, from raising a contention regarding failure of the AO to issue a notice under Section 143(2) of the Act. The legal position appears to be fairly well settled that Section 292BB of the Act talks of the drawing of a presumption of service of notice on an Assessee and is basically a rule of evidence. In ***Commissioner of Income Tax v. Parikalpana Estate Development (P.) Ltd.*** *(supra) in answering a similar question, the Court referred to its earlier decision in Commissioner ITA No. 578 of 2015 & connected matters Page 10 of 15 of* ***Income Tax v. Mukesh Kumar Agrawal*** *(2012) 345 ITR 29 (All.) and pointed out that Section 292BB of the Act was a rule of evidence which validated service of notice in certain circumstances. It introduces a deeming fiction that once the Assessee appears in any proceeding or has cooperated in any enquiry relating to assessment or reassessment it shall be deemed that any notice under*

> *any provision of the Act that is required to be served has been duly served upon him in accordance with the provisions of the Act and the Assessee in those circumstances would be precluded from objecting that a notice that was required to be served upon him under the Act was not served upon him or not served in time or was served in an improper manner. It was held that Section 292BB of the Act is a rule of evidence and it has nothing to do with the mandatory requirement of giving a notice and especially a notice under Section 143(2) of the Act which is a notice giving jurisdiction to the AO to frame an assessment. The decision of the Allahabad High Court in* ***Manish Prakash Gupta v. Commissioner of Income Tax*** *(supra) is also to the same effect."*

7.3 While arguing on above additional ground application, Ld. counsel for the assessee has drawn our attention to written submission filed in paper book of 218 pages (from page 1 to 27) that as noted in impugned assessment order at pages 5&6 that notice u/s 143(2) of the Act was issued on 27/04/2016 on return submitted u/s 148 of the Act vide order sheet entry dated 27/04/2016, (copy of return u/s 148 letter dated 27.04.2016 and notice u/s 143(2) dated 27/04/2016 are at pages 5&6 with additional ground application), in view of Jurisdictional Delhi High Court decision in case of Society for worldwide reported at 323 ITR 249 followed in identical set of facts by Delhi ITAT in case of Micron

Enterprises Pvt Ltd vs ITO in ITA 901/Del/2016 dated 14/05/2018 (copies enclosed in additional ground application at pages 12 to 24) and in view of no contrary jurisdictional High Court decision, we request that extant orders of AO and Ld CIT(A) may be quashed on this short count itself. The logic behind this proposition is patent non application of mind and undue haste on part of AO in issuing notice at same time when return u/s 143(2) of the Act is filed as admitted in order itself, which is sine qua non u/s 143(2) of the Act which uses the phrase "if considers it necessary or expedient", and on expression "considers it necessary" we draw our kind attention to Hon'ble Apex Court decision in case of Bhikubhai Patel vs State of Gujarat (4 SCC 144) relevant extract of which is reproduced below for sake of ready reference (which directly fits in extant facts to support proposition put forth):

> *"…24. Proviso opens with the words where the State Government is of opinion that substantial modifications in the draft development plan and regulations are necessary ..These words are indicative of the satisfaction being subjective one but there must exist circumstances stated in the proviso which are conditions precedent for the formation of the opinion. Opinion to be formed by the State Government cannot be on imaginary grounds, wishful thinking, however, laudable that may be. Such a course is impermissible in law.*

The formation of the opinion, though subjective, must be based on the material disclosing that a necessity had arisen to make substantial modifications in the draft development plan.

25. The formation of the opinion by the State Government is with reference to the necessity that may have had arisen to make substantial modifications in the draft development plan. The expression: so considered necessary is again of crucial importance. The term consider means to think over; it connotes that there should be active application of the mind. In other words the term consider postulates consideration of all the relevant aspects of the matter. A plain reading of the relevant provision suggests that the State Government may publish the modifications only after consideration that such modifications have become necessary. The word necessary means indispensable, requisite; indispensably requisite, useful, incidental or conducive; essential; unavoidable; impossible to be otherwise; not to be avoided; inevitable. The word necessarymust be construed in the connection in which it is used. (See-Advanced Law Lexicon, 3rd Edition, 2005; P. Ramanatha Aiyar)

26. The formation of the opinion by the State Government should reflect intense application of mind with reference to the material available on record that it had become necessary to propose

substantial modifications to the draft development plan."

7.4 Ld. Counsel for the assessee also stated that there is no application of mind in present case what to speak of intense application of mind where notice u/s 143(2) is ostensibly prepared before hand or hand in hand at same time when return u/s 148 is filed on 27/04/2016, hence, he requested to quash the assessment.

7.5 On careful consideration of the entire conspectus of the case, as per Hon'ble Supreme court ruling in case of National Thermal Power Corporation Ltd Vs CIT [(1998) 229 ITR 383 SC)], we admit the additional ground raised above by the assessee being purely legal in nature on basis of material on records. Once the decks are clear from admission of purely legal additional ground , we now turn our attention to the adjudication of the same which should not detain us for long in view of Delhi ITAT decision in case of Micron Enterprises Pvt. Ltd.(supra) which has decided the identical issue in favour of assessee by relying on Hon'ble Delhi High Court in the case Society for Worldwide Inter Bank Financial, Telecommunications supra. We are reproducing the reasoning from ITAT decision in case of Micron Enterprises Pvt. Ltd.(supra) on which no contrary decision is brought to our attention:

"Learned Counsel for the Assessee submitted that assessee filed reply to the notice under section 148 of the I.T. Act on dated 26.11.2013 which is noted in the assessment order, copy of which, is filed at page-11 of the paper book, in which, assessee explained that the return already filed under section 139(1) may be treated as return filed in response to notice under section 148 of the I.T. Act. He has submitted that on the same day A.O. issued notice under section 143(2) i.e., on 26.11.2013, copy of which, is filed at page-12 of the paper book. He has, therefore, submitted that the A.O. has not validly assumed jurisdiction under section 147 and 143(3) of the I.T. Act to pass the assessment order against the assessee. He has submitted that the issue is covered in favour of the assessee by the judgment of the Hon'ble Delhi High Court in the case of Director of Income Tax vs. Society for Worldwide Interbank Financial Telecommunications (2010) 323 ITR 249 (Del.) in which it was held as under : "Both the CIT(A) and the Tribunal have returned a concurrent and clear finding of fact that the notice under s. 143(2) was issued on 23rd March, 2000 and since the return was filed on 27th March, 2000, the notice was not a valid one and, therefore, the assessment completed on the basis of the notice was also invalid and was consequently set aside. It is for the first time that the counsel for the appellant contends that the notice, in fact, was issued on 27th March, 2000 and not on 23rd March, 2000, the date which is recorded on the notice itself. No such contention was raised before the lower appellate authorities. Consequently, the said contention cannot be raised before

the Court for the first time. The appellant has stated that the return was filed by the assessee on 27th March, 2000 and the notice under s. 143(2) was served upon the Authorized Representative of the assessee by hand when the Authorized Representative of the assessee came and filed return. However, the date of the notice was mistakenly mentioned as 23rd March, 2000. Assuming the aforesaid to be true, the notice was served on the Authorized Representative simultaneously on his filing the return which clearly indicates that the notice was ready even prior to the filing of the return. The provisions of s. 143(2) make it dear that the notice can only be served after the AO has examined the return filed by the assessee. Whereas it is dear that when the assessee came to file the return, the notice under s. 143(2) was served upon the Authorized Representative by hand. Thus, it would amount to gross violation of the scheme of s. 143(2).” 5.1. And the conclusion is as under : “Assessment made in pursuance of a notice under section 143(2) issued on 23rd March, 2000 when the return was filed on 27th March, 2000 is invalid.” 6. He has submitted that the same order have been followed by ITAT, Delhi Bench, in the case of Shri Harsh Bhatia, New Delhi vs. ITO, Ward-50(3), New Delhi in ITA.No.1262 and 1263/Del./2017 dated 17.10.2017 in which the Tribunal held as under : 10. “It was further argued by the ld. counsel for the assessee Dr. Rakesh Gupta that notice u/s 143(2) of the Act, was issued on 17.09.2014 and which is the same date on which return was filed. This is apparent from the Assessing Officer’s order in para 3 at page 1. Therefore, the Assessing Officer

has not applied his mind independently while issuing notice u/s 148 of the Act. On this count also, the assessment deserves to be quashed. Accordingly, under the facts and circumstances of the case, the legal grounds of the assessee are allowed." 7. On the other hand, Ld. D.R. submitted that assessee did not file return under section 148 within the specified period. Therefore, this ground of appeal of assessee may be dismissed. 8. After considering the rival submissions, I am of the view that the issue is covered in favour of the assessee by the Judgment of Hon'ble Delhi High Court in the case of Director of Income Tax vs. Society for Worldwide Interbank Financial Telecommunications (supra) and Order of ITAT, Delhi Bench in the case of Shri Harsh Bhatia, New Delhi vs. ITO, Ward-50(3), New Delhi (supra). It is an admitted fact that assessee filed reply in response to the notice under section 148 of the I.T. Act on 26.11.2013 and submitted before A.O. that original return filed before him may be treated as return filed in response to the notice under section 148 of the I.T. Act. The A.O. on the same day served notice under section 143(2) upon assessee-company whose signature tally on the said notice. Therefore, notice issued under section 143(2) is invalid and resultantly, the assessment is vitiated and is liable to be quashed. I, accordingly, set aside the orders of the authorities below and quash the re-assessment proceedings in the matter. Resultantly, all additions stands deleted. In view of the above, there is no need to decide other contentions raised by Learned Counsel for the Assessee. 9. In the result, appeal of assessee is allowed."

7.6 Further we also find force in argument of Ld counsel for the assessee that language of section 143(2) of the Act in so far as it uses the phrase "if considers it necessary or expedient" presupposes application of mind on part of Ld AO before notice u/s 143(2) of the Act is issued which words have been explained by Hon'ble Apex court in case of Bhikubhai Patel vs State of Gujarat (4 SCC 144) relevant extract of which is reproduced above where it is observed by Hon'ble Apex court that "…*The expression: so considered necessary is again of crucial importance. The term consider means to think over; it connotes that there should be active application of the mind. In other words the term consider postulates consideration of all the relevant aspects of the matter. A plain reading of the relevant provision suggests that the State Government may publish the modifications only after consideration that such modifications have become necessary. The word necessary means indispensable, requisite; indispensably requisite, useful, incidental or conducive; essential; unavoidable; impossible to be otherwise; not to be avoided; inevitable. The word necessarymust be construed in the connection in which it is used. (See-Advanced Law Lexicon, 3rd Edition, 2005; P. Ramanatha Aiyar).."* which fits in present case fully. Guided by these felicitous observation of Hon'ble Supreme court we have no hesitation in our mind in accepting the legal plea raised by Ld AR before us and thus

holding that notice u/s 143(2) issued at same time and date of return filing u/s 148 (vide order sheet entry dated 27/04/2016) vitiates the entire exercise and accordingly all subsequent proceedings are held to be invalid in eyes of law and therefore we quash the orders passed by AO and Ld CIT(A) and allow additional ground raised by assessee.

7.7 Even otherwise, on the merit of the case i.e. addition made u/s 68 that for mere reason of non production of directors in person of share holder companies same cannot be a justified ground to draw adverse inference u/s 68 of the Act where those share holders are found to be existing and identified in detail as summons have been duly served on them. Mere non production of share holder companies director is argued to be no valid reason for making addition u/s 68 of the Act *dehors* voluminous evidences filed which has not been objectively and lawfully controverted in manner known to law. For this Ld counsel for the assessee placed before us during the course of hearing a comprehensive chart of case laws from coordinate benches of ITAT where similar argument in identical circumstances of additions based on S.K.Jain group search has been deleted u/s 68 of the Act. Our view is fortified by the following decisions:-

- *Kautilya Monetary Services Pvt ltd ITA 5975/Del/2014 D bench (30/11/2018) ITAT Delhi (held in crux that "..The Assessing Officer, after going through the evidences furnished by the assessee sat with folded hands and did not make any effort and not made any independent enquiry and made the addition only by relying on the report of the Investigation Wing…")*
- *Moti Adhesives P Ltd ITA: 3133/Del/2018 SMC 25/06/2018 ITAT Delhi (authored by one of us Hon'ble JM) (held in crux that " Whether once assessee places before Ld AO all the relevant and best documents in its possession to establish its burden u/s 68 of the Act qua cash credit (here share capital received) , can simply because there is no personal appearance from director of said cash creditor (share holder) as called for by Ld AO, adverse inference u/s 68 can be drawn by Ld AO without discharging secondary burden lying on Ld AO u/s 68 of the Act? In my view the answer to this issue as framed, can only be in negative as once all important and crucial documents are filed by assessee to prove its case qua share capital received u/s 68 of the Act, then simply harping on non production of director in person before the AO cannot be justified ground to draw adverse inference without adequate discharge of secondary burden lying on AO u/s 68 of*

the Act. Burden u/s 68 of the Act as it is settled law keeps shifting." Also held that "Even if there was any doubt if any regarding the creditworthiness of the share applicants was still subsisting, then AO should have made enquiries from the AO of the share subscribers as held by Hon'ble High Court in CIT vs DATAWARE (supra) which has not been done, so no adverse view could have been drawn.")

- *Heat Flex Cables P Ltd ITA: 2376/Del/2018 SMC 1/8/2018 ITAT Delhi (Held in crux that "Since the investor companies have confirmed the transaction with the assessee-company which were conducted through banking channel and entire evidence were brought on record, thereafter, if the A.O. was not satisfied with the documents on record and explanation of the assessee- company and the Investors, the A.O. should have made further enquiry on the same. However, it is a case where the A.O. has failed to conduct necessary enquiry, verification and deal with the matter in depth. Therefore, the explanation of the assessee- company should not have been disbelieved by the authorities below.")*
- *Alok Fintrade P Ltd ITA: 180/JP/2015 ITAT JAIPUR BENCH (Held that "..It is thus a case where the AO was in receipt of material information from the Investigation Wing, Delhi that the assessee company has received accommodation entries in*

form of share application/investment from two companies as divulged during the course of search and seizure operations in case of S K Jain group. In these situations, the Courts have held that the Assessing Officer cannot sit back with folded hands and then come forward to merely reject the explanation so made, without carrying out any verification or enquiry into the material placed before him by the assessee. If the Assessing Officer harbours any doubts of the legitimacy of any subscription he is empowered, nay duty-bound, to carry out thorough investigations. But if the Assessing Officer fails to unearth any wrong or illegal dealings, he cannot obdurately adhere to his suspicions and treat the subscribed capital as the undisclosed income of the Company. 22. Further, being the reassessment proceedings, where the AO is ceased of certain information and documents, it is incumbent upon him to confront the same to the assessee and allow the latter to file its objections and rebuttal. The additions made, merely relying on these information and documentation, without confronting the assessee cannot be accepted. Besides furnishing the reasons for reopening the assessment to the assessee company, there is nothing on record that such information/documentation was confronted to the assessee. Further, the AO has relied upon the statement of third parties

namely, shri S.K. Jain, shri V.K. Jain, shri Assem Kumar Gupta and shri Rajesh Agarwal, the assessee again deserves an opportunity to cross examine such persons as held by the Hon'ble Supreme Court in case of Andaman Timber Industries (supra)")

- *Signature Buildwell Pvt Ltd ITAT Delhi D Bench ITA: 4249/Del/2015 12/12/2018 (Held in crux that "There is no dispute that the information received from the office of the DIT [INV], New Delhi triggered the proceedings and the Assessing Officer, taking a leaf out of the said INV report, proceeded to verify the transactions entered into by the assessee with the five companies mentioned elsewhere. It is not the case of the Revenue that cash was found to be deposited in the accounts of five companies prior to subscribing the shares of the appellant company. It is also not the case of the Revenue that the assessee has produced cheques from the five companies by giving cash. No doubt there is a contradiction in the statement of Shri Waseem Gupta, but that alone cannot be a deciding factor once the corroborative evidences in the form of bank statements have been filed by the assessee. The Assessing Officer did not make any effort to examine the bank statement furnished by the assessee.")*

- *SRM Securities Pvt Ltd ITAT G bench ITA 7825/Del/2017 11/12/2018 (Held in crux that When assessee has discharged its initial burden of proving the identity, creditworthiness of the parties and genuineness of the transactions. Ld AO must reach to the submission of the assessee by conducting exhaustive inquires to throw back the onus on the assessee. Further non receipt of the details u/s 133 (6) should be the trigger point to make further inquires; it is not the resting point. In the present case, the fact shows that the assessing officer has merely relied upon the enquiries conducted by the investigation wing of the department and has not confronted the assessee with material that he has received from the investigation wing to the assessee to rebut the same. Unless the initial onus discharged by the assessee is thrown back to the assessee by AO by carrying out systematic investigation/ inquiry, addition u/s 68 cannot be upheld)*

7.8 We find that assessee has filed all evidences like share application form, board resolution confirming investment made, confirmation of share capital raised, Share certificate, income tax particulars of share holders, bank statement of share holders and form 2 for allotment of shares along with their audited final a/c in support of share capital recd. to establish its case as stated in reply to Ld AO dated 07/06/2016 (paper book pages 47 to 50). We further find that no where any shareholder company was found to be fictitious or non existing rather all share holder companies are duly found to be existing as summons have been served on them.

(Refer Hon'ble Supreme court in Orissa Corporation case 159 ITR 78). We further find that no cogent material is brought on records in assessment order by Ld AO to demolish the copious evidences furnished by assessee. We furtehr find that Ld AO has no where confronted any back material to assessee as stated in facts above. We find that Ld AO nowhere made any independent enquiry from concerned and competent AO of share holder companies etc. We find that only on basis of investigation wing report (unconfronted to assessee) acting purely on borrowed satisfaction without any independent application of mind addition has been made u/s 68 by Ld AO. We find that no where in entire assessment order Ld AO framed his own independent objective and rational "opinion" on basis of material placed on record within the meaning of provision of section 68 of the Act. Further Ld CIT-A has also simply and easily endorsed finding of Ld AO without making any independent efforts on enquiry on his part , which finding of Ld CIT-A also do not objectively consider the various submissions and arguments of assessee. So we have no hesitation in accepting Ld AR's argument that for mere reason of non production of directors in person of share holder companies same cannot be a justified ground to draw adverse inference u/s 68 of the Act. We are supported by decisions relied by Ld AR as mentioned above. Moreover, our stated decision is supported by decision of honourable Delhi High Court against

which the SLP has been dismissed by the honourable Supreme Court recently in [2018] 99 taxmann.com 45 (SC) in Principal Commissioner of Income Tax, Central-1 v. Adamine Construction (P.) Ltd; honourable Supreme Court has also dismissed the Special Leave Petition of the revenue in [2018] 98 taxmann.com 173 (SC) Principal Commissioner of Income Tax v. Himachal Fibers Ltd.; Hon'ble Delhi High Court in the case of Oriental International Company Pvt. Ltd 401 ITR 83 which decisions are relied in decisions mentioned above in arguments of Ld AR. We thus reverse the finding of Ld AO as confirmed by Ld CIT(A) in this regard. On basis of this discussion we find no merit in addition of Rs 1,85,00,000 made u/s 68 of the Act, hence, we delete the same and allow the appeal of the assessee accordingly.

8. In the result, the appeal of the Assessee is allowed."

6.3. Similar view have been taken by ITAT, SMC Bench in the case of Shri Satish Kumar, Delhi vs. ITO, Ward-2(3), Faridabad (supra). Following the above orders, we set aside the orders of the authorities below and quash the assessment order. Resultantly, all additions, stand deleted. In the result, additional ground of appeal of assessee is allowed. In this view of the matter, there is no need to decide remaining

grounds on merit as the same are left with academic discussion only.

7. In the result, appeal of Assessee is allowed.

Order pronounced in the open Court.

Sd/-	Sd/-
(L.P. SAHU)	(BHAVNESH SAINI)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Delhi, Dated 05th March, 2019.

VBP/-

Copy to

1.	The appellant
2.	The respondent
3.	CIT(A) concerned
4.	CIT concerned
5.	D.R. ITAT 'A' Bench, Delhi
6.	Guard File.

// BY Order //

Assistant Registrar : ITAT Delhi Benches :
Delhi.