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| <b>IN THE INCOME TAX APPELLATE TRIBUNAL</b>                         |
| <b>COCHIN BENCH, COCHIN</b>   |
| <b>BEFORE S/SHRI CHANDRA POOJARI, AM &amp; GEORGE GEORGE K., JM</b> |

| Sl. No. | ITA No./C.O. No. | A.Y.    | Appellant  | Respondent   |
|---------|------------------|---------|--|--|
| 1.      | 347/Coch/2017    | 2009-10 | The Dy. CIT, Central Circle, Kollam  | Shri P. Sunil Kumar, Sabari Quality Foods, Asramam Kollam-2.<br>[PAN:AADPK 3945M]            |
| 2.      | 348/Coch/2017    | 2010-11 | -do-   | -do-   |
| 3.      | 349/Coch/2017    | 2011-12 | -do-   | -do-   |
| 4.      | 350/Coch/2017    | 2012-13 | -do-   | -do-   |
| 5.      | 351/Coch/2017    | 2013-14 | -do-   | -do-   |
| 6.      | 352/Coch/2017    | 2014-15 | -do-   | -do-   |
| 7.      | 354/Coch/2017    | 2015-16 | -do-   | -do-   |
| 8.      | 355/Coch/2017    | 2011-12 | Shri P. Sunil Kumar, Sabari Quality Foods, Asramam, Kollam-691 002.<br>[PAN:AADPK 3945M] | The Asst. CIT, Central Circle, Kollam  |
| 9.      | 358/Coch/2017    | 2012-13 | The Asst. CIT, Central Circle, Kollam  | M/s. Sabari Enterprises, 37,Ashramam Gardens, Asramam, Kollam-691 001.<br>[PAN: AACCS 7082H] |
| 10.     | 359/Coch/2017    | 2014-15 | -do-   | -do-   |
| 11.     | 360/Coch/2017    | 2015-16 | -do-   | -do-   |
| 12.     | 33/Coch/2017     | 2009-10 | Shri P. Sunil Kumar, Sabari Quality Foods, Asramam, Kollam-691002.<br>[PAN:AADPK 3945M]  | The Asst.CIT,Central Circle, Kollam  |
| 13.     | 34/Coch/2017     | 2010-11 | -do-   | -do-   |
| 14.     | 35/Coch/2017     | 2011-12 | -do-   | -do-   |
| 15.     | 36/Coch/2017     | 2012-13 | -do-   | -do-   |
| 16.     | 37/Coch/2017     | 2013-14 | -do-   | -do-   |
| 17.     | 38/Coch/2017     | 2014-15 | -do-   | -do-   |
| 18.     | 39/Coch/2017     | 2015-16 | -do-   | -do-   |
| 19.     | 40/Coch/2017     | 2012-13 | M/s. Sabari Enterprises, 37,Ashramam Gardens, Asramam, Kollam-691 001.                   | The Asst.CIT,Central Circle, Kollam  |

|     |              |         |                   |      |
|-----|--------------|---------|-------------------|------|
|     |              |         | [PAN: AACCS 7082H |      |
| 20. | 41/Coch/2017 | 2014-15 | -do-              | -do- |
| 21. | 42/Coch/2017 | 2015-16 | -do-              | -do- |

|                    |                             |
|--------------------|-----------------------------|
| <b>Revenue by</b>  | Shri Shantham Bose, CIT(DR) |
| <b>Assessee by</b> | Shri Iype Mathew, FCA       |

|                              |            |
|------------------------------|------------|
| <b>Date of hearing</b>       | 25/09/2018 |
| <b>Date of pronouncement</b> | 13/12/2018 |

### **ORDER**

Per BENCH:

These appeals filed by the Revenue and the Cross Objections and appeal in ITA No.355/Coch/2017 filed by the assesseees are directed against the different orders of the CIT(A) for different assessment years. Since the issues involved in these appeals and Cross Objections are common, they were clubbed together, heard together and are being disposed of by this common consolidated order.

2. The first common ground in ITA Nos. 347 to 352 & 354/Coch/2017 covering AYs 2009-10 to 2015-16 is with regard to deletion of addition made under section 68 of the I.T. Act.

3. Since the facts are similar in all the appeals, we consider the facts as narrated in ITA No. 347/Coch/2017. The assessee is an individual conducting

business of trading of import duty scrips. A search was conducted at the residential and business premises of the assessee on 03/02/2015. The assessee has filed his return of income u/s. 139(1) on 30/09/2009, declaring a total income of Rs.3,21,05,740/-. Consequent to search, notice u/s. 153A was issued for the assessment years 2009-10 to 2014-15 on 29/11/2016 in response to which the assessee filed return of income on 06/12/2016, declaring a total income of Rs.3,21,05,740/-.

3.1 The assessee is primarily a trader in export incentives received under Vishesh Krishi Gram Udyog Yojna, Duty Entilement Pass Book etc. The export incentives received by the cashew exporters, marine exporters who are mainly based in Kollam are purchased by the assessee and sold to importers based outside the State. The assessee conducts same kind of business through the following Companies as Managing Director:

- i) M/s. Sabari Quality Foods
- ii) M/s. Sabari Enterprises P. Ltd.
- iii)M/s. Sabari Millenium Exporters P. Ltd.
- iv)M/s. Sabari Switchgear P. Ltd.

Among the major purchasers of export incentives as per the books of accounts of Sabari Quality foods, Sabari Millennium Exporters p. Ltd. and Sabari Switchgear P. Ltd. are:

- 1) Basanth Impex, a proprietorship of Shri Manish Khetan with its address as Old China Bazar Street, Kolkota.

- 2) Shyam International, a proprietorship of Shri Manish Khetan with its address as Old China Bazar Street, Kolkota.
- 3) Sree Chao Impex, a proprietorship of Sri Manish Khetan with its address as Old China Bazar Street, Kolkota.
- 4) M/s Ajay Iron and Steel P Ltd , Fortune Chambers,6 Lyons Range, Mezzanine Floor, Kolkota
- 5) Vani Exporters, CLIVE Ghat Street, Room No. 7, 2<sup>nd</sup> Floor, Kolkota
- 6) Mayur Impex, P-68B, Block -2, Scheme -VII M, CIT Road, Kolkota

3.2 The seized materials as per annexure marked SKP/KLM/DS 1 to 23 clearly showed a lot of trade activities between the assessee and these companies namely, M/s.Sabari Enterprises P Ltd, M/s. Sabari Millenium Exports P Ltd, M/s. Sabari Switchgear P Ltd , and Basanth Impex, Shyam International, Sree Chao Impex, Ajay Iron and Steel P Ltd, Vani Exports and Mayur Impex. The total turnover of the aforementioned businesses and their turnover with each of businesses of Sabari Group (Sabari Quality Foods)

a) Basant Impex & Shree Chao Impex

| Asst.Year | Total Turnover | Turnover with SQF | Turnover with Sabari Millenium Exports P Ltd | Turnover with Sabari Enterprises Ltd | Turnover with Sabari Switchgear P Ltd |
|-----------|----------------|-------------------|--|--------------------------------------|---------------------------------------|
| 2009-10   | 410006631      | 386596312         | 8594439                                      | 0                                    | 14815880                              |
| 2010-11   | 244490336      | 194527698         | 34520537                                     | 0                                    | 15442101                              |
| 2011-12   | 938148418      | 175959088         | 287770321                                    | 465465876                            | 8953133                               |
| 2012-13   | 256142048      | 98954776          | 29957586                                     | 116784990                            | 10444696                              |

I.T.A. Nos.347-354 etc. /Coch/2017 &  
C.O. Nos. 33-39, 40-42/Coch/2017

|         |           |           |           |           |          |
|---------|-----------|-----------|-----------|-----------|----------|
| 2013-14 | 167547824 | 27370525  | 13802840  | 124601709 | 1772750  |
| 2014-15 | 106509871 | 16065781  | 25116634  | 64952906  | 374550   |
| Total   |           | 899474180 | 399762357 | 771805481 | 51803110 |

b) Shyam International

| Asst.Year | Total Turnover | Turnover with SQF | Turnover with Sabari Millenium Exports P Ltd | Turnover with Sabari Enterprises Ltd | Turnover with Sabari Switchgear P Ltd |
|-----------|----------------|-------------------|--|--------------------------------------|---------------------------------------|
| 2009-10   | 500617946      | 443543973         | 53660593                                     | 0                                    | 3413380                               |
| 2010-11   | 523243688      | 514163516         | 4718097                                      | 0                                    | 4362075                               |
| 2011-12   | 0              | 0                 | 0  | 0                                    | 0                                     |
| 2012-13   | 0              | 0                 | 0  | 0                                    | 0                                     |
| 2013-14   | 0              | 0                 | 0  | 0                                    | 0                                     |
| 2014-15   | 371758345      | 156528239         | 47586619                                     | 167643487                            | 0                                     |
| 2015-16   | 341213767      | 164791823         | 176521944                                    | 0                                    | 0                                     |
| Total     | 0              | 1279027551        | 28487253                                     | 167643487                            | 7775455 -                             |

c). M/s. Ajay Iron and Steel P Ltd

| Asst.Year | Total Turnover | Turnover with SQF | Turnover with Sabari Millenium Exports P Ltd | Turnover with Sabari Enterprises Ltd | Turnover with Sabari Switchgear P Ltd |
|-----------|----------------|-------------------|--|--------------------------------------|---------------------------------------|
| 2009-10   | 0              | 0                 | 0  | 0                                    | 0                                     |
| 2010-11   | 0              | 0                 | 0  | 0                                    | 0                                     |
| 2011-12   | 64841          | 0                 | 64841  | 0                                    | 0                                     |

I.T.A. Nos.347-354 etc. /Coch/2017 &  
C.O. Nos. 33-39, 40-42/Coch/2017

|         |         |   |         |          |   |
|---------|---------|---|---------|----------|---|
|         |         |   |         |          |   |
| 2012-13 | 0       | 0 | 0       | 0        | 0 |
| 2013-14 | 4034750 | 0 | 2555749 | 1479001  | 0 |
| 2014-15 | 4457276 | 0 | 2576166 | 1881110  | 0 |
| 2015-16 | 0       | 0 | 0       | 48718355 | 0 |
| Total   | 0       | 0 | 5196756 | 52078466 | 0 |

d) Vani Exporters

| Asst.Year | Total Turnover | Turnover with SQF | Turnover with Sabari Millenium Exports P Ltd | Turnover with Sabari Enterprises Ltd | Turnover with Sabari Switchgear P Ltd |
|-----------|----------------|-------------------|--|--------------------------------------|---------------------------------------|
| 2009-10   | 120407959      | 15500035          | 58934156                                     | 0                                    | 45973768                              |
| 2010-11   | 125761421      | 118503685         | 87124  | 0                                    | 7170612                               |
| Total     | 0              | 134003720         | 59021280                                     | 0                                    | 53144380                              |

3.3 The Assessing Officer noticed from the aforementioned tables that Kolkota based businesses were having substantial transaction with the businesses of Shri Sunil Kumar, M/s Sabari Millenium Exports P. Ltd., Sabari Enterprises P. Ltd. and Sabari Switchgear P Ltd. On an examination of the books of accounts of Sabari

Quality Foods, Sabari Enterprises P Ltd, and Sabari Switchgear P Ltd, they have declared a profit as a percentage of their sales as under:

| Asst Year | Gross profit ratio declared by Sabari Quality Foods | Gross profit ratio declared by Sabari Enterprises Ltd | Gross profit ratio declared by Sabari Millenium P Ltd | Gross profit ratio declared by Sabari Switchgear P Ltd |
|-----------|---|---|---|--|
| 2009-10   | 2.7   | -   | 2   | -  |
| 2010-11   | 3.3   | -   | 12  | 11   |
| 2011-12   | 6.4   | 4.8   | 4.5   | 20   |
| 2012-13   | 4.6   | 2.6   | 5.4   | 15   |
| 2013-14   | 5.8   | 1.1   | 20  | 25   |
| 2014-15   | 3.6   | 6.4   | 18  | 52   |

The Assessing Officer noticed that the businesses of Sabari Group declared a profit of 1.1 to 52% for the Asst Years mentioned above. The Kolkota based businesses declared incomes in their returns as under:

Basanth Impex and Shree Chao Impex

| Asst Year | Total Turnover | Total Income Returned | Gross profit ratio declared |
|-----------|----------------|-----------------------|-----------------------------|
| 2009-10   | 1217756546     | 134990                | 0.10                        |
| 2010-11   | 910675187      | 207600                | 0.14                        |
| 2011-12   | 1884595022     | 252810                | 0.11                        |
| 2012-13   | 1636835083     | 189540                | 0.28                        |
| 2013-14   | 1194591232     | 218590                | 0.19                        |
| 2014-15   | 801062840      | 291630                | 0.73                        |

M/s. Ajay Iron and Steel P Ltd

| AsstYear | Total Turnover | Total Income Returned | Gross profit ratio declared |
|----------|----------------|-----------------------|-----------------------------|
| 2009-10  | 0              | 640                   | 0                           |
| 2010-11  | 0              | 5390                  | 0                           |
| 2011-12  | 0              | 66100                 | 0                           |
| 2012-13  | 0              | 372908                | 0                           |
| 2013-14  | 0              | 331001                | 0                           |
| 2014-15  | 3963751        | 449359                | 3.05                        |
| 2015-16  | 69970609       | 2896310               | 3.43                        |

Mayur Impex

| AsstYear | Total Turnover | Total Income Returned | Gross profit ratio declared |
|----------|----------------|-----------------------|-----------------------------|
| 2009-10  | 652200365      | 143400                | 0.086                       |
| 2010-11  | 139942304      | 167910                | 0.399                       |
| 2011-12  | 433860902      | 179160                | 0.988                       |
| 2012-13  | 965138557      | 214270                | 0.47                        |
| 2013-14  | 656787328      | 125770                | 0.62                        |
| 2014-15  | 242906501      | 292310                | 2.49                        |
| 2015-16  | 3594855        | 9830                  | 57.76                       |

Vani Exports

| AsstYear | Total Turnover | Total Income Returned | Gross profit ratio declared |
|----------|----------------|-----------------------|-----------------------------|
| 2009-10  | 2863662066     | 990900                | 0.60                        |
| 2010-11  | 3031108532     | 760114                | 0.34                        |
| 2011-12  | 845673545      | 211683                | 3.0                         |
| 2012-13  | 2184183988     | 982890                | 0.42                        |
| 2013-14  | 658241184      | 374514                | 0.60                        |
| 2014-15  | 444409756      | 525030                | 1.06                        |
| 2015-16  | 220741120      | 408150                | 2.92                        |

Shyam International

| Asst Year | Total Turnover | Total Income Returned | Gross profit ratio declared |
|-----------|----------------|-----------------------|-----------------------------|
| 2009-10   | 1432628764     | 188960                | 0.06                        |
| 2010-11   | 1862136442     | 211590                | 0.16                        |
| 2011-12   | 607109343      | 94480                 | 0.37                        |
| 2012-13   | 403987517      | 206970                | 0.46                        |
| 2013-14   | -              | -                     | IT Not Filled               |
| 2014-15   | 1651106916     | 265480                | 0.22                        |
| 2015-16   | 2991294481     | 103420                | 0.28                        |

3.4 According to the Assessing Officer, it was evident from the declared turnover and total income returned that the Kolkota businesses were not earning profits in the scale of Sri Sunil Kumar even though they are also doing the same business and these businesses were also viewed in the background of a statement recorded from Sri Mahesh Khetan S/o Late Gouri Shankar Khetan by the Deputy Director of Income tax (Inv)Unit 2(1), Kolkota on 7.4.2016. The substantive part of the statement is the answer to question no.10 which states:  
" Apart from the above companies these are the concerns in which my family members and I are/were associated with:

| SI No | Name of the Concerns | Name of proprietor        | Nature of business      |
|-------|----------------------|---------------------------|-------------------------|
| 1     | M/s Basanth Impex    | Late Gouri Shankar Khetan | Deals in import licence |
| 2     | Shree Chao Impex     | -do-                      | -do-                    |
| 3     | Shyam International  | Mrs. Seema Khetan         | -do-                    |
| 4     | Mayor Impex          | Shri Manish Khetan        | -do-                    |

All these proprietorships concerns run from 9 Old China Bazar Street, Kolkotta-01" .

Further he stated that his late father Shri Gouri Shankar Khetan managed and controlled all the above proprietorships and after his death he had taken over the business related work. In answer to question 12 he had explained that books of accounts of M/s Basanth Impex, M/s Shree Chao Impex, M/s Shyam International and M/s Mayur Impex were maintained by Sabari Group and are kept in their possession. He stated that they only put signature on legal documents, P&L A/c, Balance Sheet, Cheque books as per direction of Sabari Group. He also went on state under Oath that M/s Basanth Impex, M/s Shree Chao Impex, M/s Shyam International and M/s Mayur Impex are controlled and managed by Sabari Group itself. According to him all the business activities, books of accounts etc. in respect of these proprietorships concerns were performed and maintained by Sabari Group. They were used only for signing authorities by Sabari Group. In lieu of signature they got commission from Sabari

Group. He had further stated that the proprietorship concerns were only paper transactions. In reply to notice u/s. 142(1) on 29/11/2016, an affidavit was filed before the Judicial First Class Magistrate, Alipur stating that the statement given before the Income tax Authority was being retracted on the following grounds

1 That he was the proprietor of M/s Mayur Impex, 9, Old China Bazar Street, Kolkotta-700001. Further the name of the concerns as Sl. 1& 2 in which his father late Gourii Shankar Khetan was the proprietor of the firm.

- (i) M/s Chao Impex, 9, Old Bazar Street, Kolkotta-70001
- (ii) M/s. Basanth Impex, 9, Old Bazar Street, Kolkotta-700001

2. That all the business transactions were made by his father.

3. That he was forced to sign on the statement perpetuated to have been given by him and that there was criminal intimidation. He was also forced to sign a certificate at the end of the statement whose meaning he did not understand.

4. That he was not allowed to go through the statement and he was just following the direction of the officer taking deposition

5. That he was retreating his earlier statement which was recorded under threat correction and pressure.

3.5 Shri Manish Khetan had alleged criminal intimidation while recording the statement by the Income tax Authority and that the same was being retracted since it was done under coercion and pressure. According to the Assessing Officer, though he had alleged criminal intimidation no complaint was raised before any authority. Moreover, it was found that the affidavit dated 12<sup>th</sup> May 2016 was never furnished to the Income tax Authority who had recorded the

statement after retracting. According to the Assessing Officer, in order that retraction is to be accepted as evidence, the witness need to be cross examined. Reliance was placed on the judgment of the Supreme Court in the case of CIT vs. Durga Prasad More (82 ITR 540) (SC) where in a case party relied on self serving recitals in documents it was for the party to establish the truth of these recitals. According to the Assessing Officer, for a retraction to be valid, threat or coercion has to be proved. He relied on the decision of the ITAT, Ahmedabad Bench in the case of Manoharlal Kasturchand Chokshi vs. ACIT (61 ITD 55). Reliance was also placed on the decision of the ITAT, Bangalore Bench in the case of Carpenters Classics (Exim) (P) Ltd. vs. DCIT (108 ITD 142) wherein it was held that when a statement was made voluntary and was not alleged to have been obtained under threat or coercion onus was on assessee to prove that declaration was made under any misconception of facts, since assessee has not taken any steps to rectify his declaration before authorities before whom such declaration was made, there was no valid reason for retraction of the same after 2 and ½ months. According to the Assessing Officer it was his father and later on he himself who handled the business. They received a commission every year for their dealing with Sabari Group. His Pan is AFCPK5709F and the bank accounts of these proprietorship were in Kollam branches of various banks as under:

i)A/c No 200007114711 with IndusInd Bank, Kollam Branch in the name of Basanth Impex.

ii. A/c No 200007114811 with IndusInd Bank, Kollam Branch in the name of Mayur Impex

iii.A/c No 200007114803 with IndusInd Bank, Kollam Branch in the name of Shyam International

3.6 It was found that another Kolkota based business having substantial transactions with Sri Sunil Kumar and his companies are M/s Ajay Iron and Steel P Ltd. A survey u/s 133A was conducted at the business premises of the company at Kolkota on 28/4/2016 and during the course of it a statement was recorded from Sri, Ravi Biyala, Chartered Accountant. In the statement, Sri Ravi Biyala stated that M/s Ajay Iron and Steel P Ltd conducts its business at Kollam and the Kolkota address is for namesake only. In support of this, he produced sales tax file of M/s Ajay Iron and Steel P Ltd which declared Nil sales in Kolkota. It was found that Sri Viswajith Menon, CEO of Sabari Group was one of the directors of this company. According to the Assessing Officer the retraction of Shri Ravi Biyala dated 20/12/2016 at this late hour can be taken as an afterthought by Ravi Biyala or due to the influence made by the assessee. On an examination of the books of accounts of the assessee and his companies, it was found that enormous funds were obtained under the head loans and advances from the Kolkota businesses and these loans were non interest bearing and remained in the books for period ranging from one to three years. According to the Assessing Officer round tripping of funds or ploughing back of

funds seem to be a clear possibility. The Assessing Officer found that there was regrouping of liabilities as Sundry Creditors or Loans and Advances. On the basis of the principle of preponderance of probability funds remaining as payable in the hands of the assessee are to be considered as assessee's funds received from persons whose creditworthiness is not proved. According to the Assessing Officer, the balance sheet, P & L A/c and its schedules of M/s Basanth Impex, Shyam International, Shree Chao, M/s Ajay Iron and Steel P Ltd showed sundry creditors and sundry debtors and no long term loans to Shri Sunil Kumar or his companies and only M/s Ajay Iron and Steel paid amounts for share application to Sabari Enterprises Ltd., Sabari Millennium Impex P Ltd and Sabari Switchgear P. Ltd. and received share premium from financial years 2009-10 onwards. According to the Assessing Officer, even though as per the accounts of M/s Basanth Impex P. Ltd., Shri Sunil Kumar, his companies and his friends are grouped in sundry creditors, the payment to Thulsidhas and Tulsi Developers P Ltd during the FY 2012-13 was a loan as Tulsi Developers P Ltd is not in the business of trading of duty scrips. These transaction makes it abundantly clear that payments were made to businesses of the assessee and his close relatives in the guise of trading on behalf of the assessee.

3.7 The AO found that the assessee had received Rs 1,70,62,169/- from M/s. Sabari Millennium Impex P Ltd as loans and advances. This was loan paid to Director Sri Sunil Kumar by M/s. Sabari Millennium Impex P Ltd which was

incorporated in 2003. As the reserves for the financial year 2007-2008 was only Rs 1,88,051/-, payment received from M/s Sabari Millenium P Ltd was restricted to Rs 1,88,051/-. According to the Assessing Officer, during the relevant previous year a sum of Rs 40,23,407 from M/s. Sabari Switchgear was received as loans and advances which was also a payment by M/s Sabari Switchgear P Ltd to its Managing Director and therefore taken as deemed dividend u/s 2(22)(e). The Assessing Officer made addition to total income at Rs 40,23,407/- as the previous years accumulated profits was Rs 57,83,680/-. Under the head Sundry creditors, the balances from the following are:

|                     |                   |
|---------------------|-------------------|
| Basanth Impex       | : 16169669        |
| Shyam International | : 78815886        |
| Vani Exporters      | : <u>48103927</u> |

Therefore these balances were added to the total income as unexplained income and addition on account of this was Rs 14,30,89,482/-.

4. On appeal the CIT(A) deleted the addition by observing that the AO had made addition, not on the basis of facts or evidences, but purely on assumption and suspicion. The CIT(A) observed that the Assessing Officer had not brought on record any evidence to prove that the assessee was generating any unaccounted income. According to the CIT(A), the addition was made only on suspicion, which cannot be sustained. Thus, considering overall facts of the case, the CIT(A) deleted the addition of Rs.14,30,89,482/- u/s. 68 of the Act.

5. Against this, the Revenue is in appeal before us. The Ld. CIT(DR) submitted that when the credits were found in the books of accounts, it is the duty of the assessee to prove the genuineness of the transactions and the capacity of the lenders to advance loans. According to him, the transaction was not satisfactorily explained by the assessee. It was submitted that the retraction statement cannot be considered. The Ld. CIT(DR) submitted that the CIT(A) should have caused necessary enquiry under the power vested with him in terms of section 250(4) of the Act or he should have directed the Assessing Officer to cause necessary enquiry. Since he has failed to do so, he prayed that the issue may be remitted to the file of the CIT(A) for fresh consideration.

6. On the other hand, the Ld. AR submitted that the assessee sold the import licenses to the Calcutta based Companies on F Form basis and saved the sales tax @ 4% on the turnover, which was the main reason for the higher profit earned. The Ld. AR submitted that the statement recorded u/s. 133A of the I.T. Act does not authorize any income tax authority to examine any person on oath and hence, any such statement has no evidentiary value and any admission made during such statement cannot by itself be made the basis for addition. The Ld. AR relied on the judgment of the Jurisdictional High Court in the case of Paul Mathew & Sons vs. CIT (263 ITR 101) and the judgment of the Madras High Court in the case of CIT vs. Kader Khan & Sons (300 ITR 157). The Ld. AR submitted that this view was supported by the CBDT Circular dated 10/03/2003.

6.1 The Ld. AR submitted that Shri Manish Khetan had no knowledge about the business of the Calcutta based companies since his father, Shri Gauri Shankar Khetan was looking after the business till his death in July, 2015. It was submitted that Shri Manish Khetan retracted the above statement by way of an affidavit after 2 and ½ months from the date of recording his statement u/s. 133A by the Income tax authorities. The Ld. AR submitted that the retraction is valid and his submission that the original statement recorded was under coercion was to be accepted. It was submitted that there was no evidence for payment of any commission from Sabari Group to the Calcutta based companies and the Bank accounts of these concerns were maintained by them in Kollam branches in order to save the bank charges on account of transfer of funds and for speedy transfer of funds. It was submitted that Shri Ravi Biyala was only a partner of the C.A. firm, who had audited the accounts of M/s. Ajay Iron & Steel Pvt. Ltd. and he had issued an audit report in Form No. 3CA and its annexure in Form No. 3CD. It was submitted that Shri Ravi Biyala also retracted his statement by way of an affidavit dated 20/12/2016, by which he admitted that he had only little knowledge about the affairs of the Company. The Ld. AR submitted that the Assessing Officer had doubted that the credits appearing in the assessee's books were his own funds and round tripping of funds or ploughing back of funds seem to be a clear possibility which showed that the Assessing Officer himself was not convinced that the funds were that of the assessee. The Ld. AR relied on the judgment of the Madras High Court in the case of A. Rajendran & Ors. Vs. ACIT

(291 ITR 178), Rajasthan High Court in the case of CIT vs. Jaykumar Bakliwal (366 ITR 217) and Madras High Court in the case of Lalitha Jewellery Mart vs. DCIT (39 ITR 425) wherein it was held that an addition u/s. 68 cannot be made on suspicion. The Ld. AR relied on the judgment of the Supreme Court in the case of Lalchand Bhagat Ambica Ram vs. CIT (37 ITR 288) wherein it was held that additions in the assessments cannot be made on mere suspicion and surmises or by taking note of the notorious practices prevailing in trade circles. The Ld. AR submitted that the assessee had disclosed the identity of the creditor, its creditworthiness by providing income tax assessment details of the creditors and the Assessing Officer was having in his possession the financial statements of the creditors and the Assessing Officer had himself admitted that the funds were received through banking channels. Therefore, it was submitted that all the criteria prescribed for proving the credits as per the provisions of sec. 68 having been discharged, the onus of proving otherwise shifted to the Assessing Officer and he cannot make an addition u/s. 68 merely on the basis of his assumptions that the funds were of the assessee himself and without discharging this onus with documentary evidences, the addition made u/s. 68 is not sustainable. For this, the Ld. AR relied on the judgment of the Delhi High Court in the case of CIT vs. Shiv Dhooti Pearls and Investments Ltd. (237 Taxman 104) wherein it was held that Assessing Officer had ample 'freedom' to make an enquiry "Not only into the Source(s) of the Creditor, but also of his (Creditor's) Sub-Creditors and prove, as result, of such an enquiry that money received by

the Assessee, in form of Loan from Creditor though routed through Sub-Creditors, actually belonged to, or was of, Assessee himself. It was not burden of Assessee to prove genuineness of transactions between his Creditor and Sub Creditors nor was it burden of Assessee to prove that Sub Creditor had credit worthiness to advance cash credit to Creditor from whom cash credit has been, eventually, received by Assessee." The Ld. AR relied on the following judgments of the High Courts in support of the above contention:

- 1) CIT vs. Sahibganj Electric Cables Pvt. Ltd. (115 ITR 408) (Cal.)
- 2) ACIT vs. Hanuman Agarwal (151 ITR 150) (Patna)
- 3) Mod Creations Pvt. Ltd. vs. ITO (354 ITR 282) (Delhi)
- 4) CIT vs. Anirudh Narayan Agarwal (84 CCH 24)(All.)
- 5) DCIT vs. Rohini Builders (265 ITR 360) (Guj.)

7. We have heard the rival submissions and perused the record. The seized material marked as SKP/KLM/DA 1 to 23 clearly showed a lot of trade activities between the assessee and these companies namely, M/s.Sabari Enterprises P Ltd, M/s. Sabari Millenium Exports P Ltd, M/s. Sabari Switchgear P Ltd , and Basanth Impex, Shyam International, Sree Chao Impex, Ajay Iron and Steel P Ltd, Vani Exports and Mayur Impex. The narrated facts in earlier pages of this order in the tabular form proved the trade activities carried on by the assessee with the alleged parties. The Assessing Officer has not denied these business transactions with the alleged parties. The assessee is a trader of DEPB import licences. The assessee purchases these licenses from exporters in Kerala and other neighbouring states and sells them to these Kolkata based companies and

who sells it to other importers. These alleged Kolkota based companies acted as middlemen between the assessee and the final buyers, i.e. importers and, therefore, these Kolkota based companies have no option but to operate on thinnest of margins. Search was conducted at the residential as well as business premises of the assessee, Shri Sunil Kumar and consequently, statement of Shri Mahesh Khetan, s/o Late Shri Gauri Shankar Khetan, who managed the affairs of M/s. Basanth Impex, Shree Chao Impex, Shyam International and Mayur Impex, was recorded by DDIT, Kolkota, wherein Shri Mahesh Khetan stated that "all the business activities, books of accounts etc. in respect of these proprietary concerns were performed and maintained by Sabari Group. They were used only for signing authorities by Sabari group. In lieu of signature they got commission from Sabari group". However, Shri Mahesh Khetan, later retracted from his statement claiming that the statement from him was taken exerting undue pressure and force. Subsequent to retraction by Shri Mahesh Khetan, the Assessing Officer did not carry out any further investigation and relied on the statement originally recorded by the DDIT, Kolkota. In the statement, originally recorded by the DDIT, Kolkota, Shri Mahesh Khetan stated that the books of accounts of his concerns, i.e., Basanth Impex, Shyam International, Vani Exports etc. were maintained by the assessee Shri P. Sunil Kumar. However, search was conducted at the premises of the assessee, and if the books of Mahesh Khetan's group were found at assessee's premises, the Assessing Officer would have mentioned the same in the assessment order. Obviously, the books of accounts

relating to Shri Gauri Shankar Khetan and Shri Mukesh Khetan group of cases were not found within the contents of original statement of Shri Mahesh Khetan recorded by DDIT, Kolkata are not true and cannot be relied upon. Similarly, statement of Chartered Accountant, Shri Ravi Biyala was recorded, who also retracted subsequently. During the course of assessment proceedings, since the Assessing Officer was using these statements against the assessee, the assessee requested cross-examination of Shri Khetan and Shri Biyala, which was not given by the Assessing Officer as there was no sufficient time available with the Assessing Officer. As seen from the facts of the case, the Assessing Officer has not found any mistake in the books of account maintained by the assessee and he has not rejected the assessee's books of account. The addition made by the AO was mainly based on the statement recorded from Shri Manish Khetan who later retracted his statement and therefore, much credence cannot be given to the statement recorded from these persons as we do not know whether the statement is correct as they have not brought on record any corroborative evidence. Further, the Assessing Officer has not given opportunity of cross examination of these persons to the assessee. The books of accounts of these concerns were duly audited and they have filed the returns of income. The Department having accepted their returns of income, it is not possible to reject certain entries without bringing in any contra evidence against those entries. The main reason for making the addition in the hands of the assessee is that the other concerns were doing business with very low margin of profit. The

Assessing Officer suspected extending such huge advances to the assessee. In our opinion, suspicion cannot be reason for making additions and it cannot replace the evidence on record. As rightly pointed out by the CIT(A), neither the Assessing Officer nor the Investigating authorities have brought on record any incriminating documents to suggest that the assessee is holding unaccounted income which was lend to the certain persons and got it back as loans and advances. The Assessing Officer cannot draw inference on the basis of suspicion, conjuncture and surmises. Suspicion cannot take place of material in support of the findings of the Assessing Officer. The Assessing Officer should act in a judicial manner, proceed with judicial spirit and should come to judicial conclusion. The Assessing Officer is required to act as a reasonable person and not arbitrarily and capriciously. The assessment should be made on the basis of adequate material and it should stand on its own legs. The Assessing Officer without examining the issue properly, he cannot come to the conclusion that the assessee had advanced loans to other business concerns and got it back. The evidence brought on record by the Assessing Officer does not suggest that the source of funds received from the alleged parties was sourced by the assessee. Addition was made only because of low profit margin of the parties who had advanced money to the assessee. These are the assessments u/s. 153A of the Act. The documents relied on by the Assessing Officer for the purpose of determining the income of the assessee is to be put before he assessee for comments or for cross examination. More so, if the Assessing Officer wants to

rely on any statement of third party, the same is required to be furnished to the assessee and if the assessee wants to cross examine any of the parties whose statements were relied on by the Assessing Officer, the same is to be provided to the assessee.

7.1 In the present case, the assessee is having grievance of not being provided an opportunity of cross examination of the parties whose statements were relied on by the Assessing Officer while framing the assessment, though the said parties retracted the statements. According to us, not allowing the assessee to cross examine the parties whose statements were relied upon to make addition in the impugned assessment order is a serious flaw which makes the order null and void in as much as it amounted to violation of principles of natural justice because of which the assessee were adversely affected. More so, the circumstances surrounding the case are not strong enough to justify rejection of the assessee's plea of providing opportunity of cross examination. In the present case, the entire evidence has to be appreciated in a wholesome manner and even when there is a documentary evidence, the same can be overlooked if there are surrounding circumstances to show that the claim of the assessee is opposed to the normal course of human thinking and conduct or human probabilities. There is difficulty in rejecting the assessee's plea as opposed to the normal course of human conduct. The evidence collected by the lower authorities was not enough to establish their stand that the main transactions

carried out by the assessee with the above parties were only paper transactions and only accommodation entries. As discussed earlier, there is no evidence which was brought on record to directly show that these transactions are accommodation entries. Therefore, no addition could be made on account of these alleged transactions in the hands of the assessee by treating them as unexplained credits u/s. 68 of the Act. In our opinion, transaction shall be accepted to be real as there is no evidence showing otherwise. Further, the surrounding circumstances apart from the direct evidence in the instant case did not contain anything which belied the claim of the assessee. In view of this we are of the opinion that the addition made by the Assessing Officer cannot be sustained. As such, the CIT(A) is justified in deleting such additions made u/s. 68 of the I.T. Act and confirm the order of the CIT(A). Similar ground was raised in other appeals. This ground of appeals of the Revenue is dismissed for all the assessment years.

8. The next ground in ITA Nos. 349 & 350/Coch/2017 is with regard to deletion of addition made u/s. 69B of the I.T. Act at Rs. 1.00 crore and Rs.7.01 cores for the assessment years 2011-12 and 2012-13 respectively.

8.1 The facts of the case as narrated in ITA No. 349/Coch/2017 are that from the balance sheet of M/s. Basanth Impex for the F.Y. 2010-11, it was found that an amount of Rs.1,00,00,000/- was paid to Shri Thulasidhas, a close friend and

partner of the assessee. They were partners of M/s. Sabari Developers, a firm with the same address as that of M/s. Thulasi Developers P. Ltd. The payment was made by Basanth Impex as interest free loan on behalf of the assessee. Therefore, this amount was assessed in the hands of the assessee u/s. 69B of the Act.

8.2 On appeal, the CIT(A) found that the loan was given by M/s. Basanth Impex to Shri Thulasidhas and therefore, the amount cannot be given by the assessee to Shri Thulasidhas. According to the CIT(A), the Assessing Officer has not spoken about any evidence in support of this conclusion drawn. It was noticed that the transaction was not recorded in the books of the assessee and the transactions between M/s. Basanth Impex and Shri Thulasidhas had taken place through banking channels and was duly recorded by them in their books. Under these facts and circumstances of the case, the CIT(A) held that the addition made by the Assessing Officer cannot be sustained and thereby, deleted the addition of Rs. 1,00,00,000/- u/s. 69B of the Act.

8.3 Against this, the Revenue is in appeal before us. The Ld. CIT(DR) submitted that since M/s. Basanth Impex did not have the wherewithal to advance loan, the funds came from the assessee only. It was submitted that the CIT(A) overlooked the close nexus between M/s. Basanth Impex and the assessee. The Ld. DR submitted that the proprietor of M/s. Basanth Impex, Shri

Manish Khetan admitted on oath that this was only a paper business doing the bidding of the assessee. Therefore, it was prayed that the addition made u/s. 69B of the Act may be restored.

8.4 On the other hand, the Ld. AR submitted that the addition was not made on the basis of any documentary evidence but purely on suspicion, presumption and surmises and therefore, it cannot be assessed as unexplained investment of the assessee /s. 69B of the I.T. Act.

8.5 We have heard the rival submissions and perused the record. Since, the transaction was between M/s. Basanth Impex and Shri Thulasidas, there is no material on record to suggest that the assessee was in any way involved in this business. Therefore, the order of the CIT(A) on this issue is confirmed, deletion of addition is justified. This ground of appeals of the Revenue is dismissed.

8.6 Similarly, for the assessment year 2012-13, the Assessing Officer made the addition u/s. 69B towards interest free loans of Rs.80 lakhs advanced by M/s. Basanth Impex to Shri Thulasidas, a close friend and associate of the assessee, interest free loans of Rs. 2 crores advanced by Ms/. Basanth Impex to Shri Jayakrishnan, a close friend and associate of the assessee and interest free loans of Rs.4.21 crores advanced by M/s. Basanth Impex to M/s. Thulasi Developers which is promoted by Shri Thulasidas, a close friend and associate of the

assessee. The Assessing Officer suspected that these advances were actually made by the present assessee himself, hence, he treated it as unexplained income of the assessee. As discussed earlier in para 8.5, there is no material to establish that loans advanced by M/s. Basanth Impex to these persons are undisclosed investments of the assessee. In other words, the assessee had not advanced the loans to these parties. Hence, we are not in a position to interfere with the order of the CIT(A) in deleting the addition. Thus, this ground of appeals of the Revenue is also dismissed.

9. The next ground in ITA No. 348/Coch/2017 is with regard to deletion of the addition of Rs. 61 lakhs being investment made by the assessee in shares of Penver Products (P) Ltd.

9.1 The facts of the case are that the assessee had purchased 19444 shares of Penver Products (P) Ltd. each costing Rs.828 and the requisite proof was furnished by the MD of the said firm under oath. Thus, the total investment came to Rs.1,60,99,632 (Rs.1.61 crores). The assessee made payment of Rs.1 crore as shown by seized material SKP/KLM/DS/8 and the balance of Rs.61 lakhs was paid by M/s. Basanth Impex which did not have the sources to make such a large investment. Therefore, the Assessing Officer made the addition of Rs.61 lakhs, being unexplained investment.

9.2 On appeal, the CIT(A) deleted the addition by observing that the assessee, M/s. Basant Impex and M/s. Penver Products Pvt. Ltd. are three different entities. The assessee had paid an amount of Rs. 1 crore for subscription of 12,077 shares of M/s. Penver Products Pvt. Ltd. and recorded the same in his books of account. Similarly, M/s. Basanth Impex had paid an amount of Rs.61 lakhs for subscribing 7367 shares of M/s. Penver Products Pvt. Ltd. and recorded the same in its books of account. The CIT(A) observed that there is no evidence showing that the assessee funded Rs, 61 lakhs to M/s. Basanth Impex out of books. Under the facts and circumstances of the case, the CIT(A) held that the only on the basis of suspicion and in the absence of any evidence, the Assessing Officer was not justified in making the addition of Rs.61 lakhs u/s. 69 of the Act and deleted the same.

9.3 Against this, the Revenue is in appeal before us. The Ld. CIT(DR) submitted that the CIT(A) overlooked the fact that M/s. Basanth Impex did not have the sources to make such a large investment and that preponderance of probability suggested that the investment was made on the behalf of the assessee.

9.4 On the other hand, the Ld. AR submitted that the assessee had duly reflected this investment in his books of accounts. If the Assessing Officer had doubt about the sources of investment by M/s. Basanth Impex, the Ld. AR

submitted that inquiry should have been conducted in the case of M/s. Basanth Impex and addition should have been made in that case.

9.5 We have heard the rival submissions and perused the record. The total investment was made at Rs.1.61 crores. Out of this, the assessee paid Rs. 1 crore and the balance amount of Rs. 61 lakhs was paid by M/s. Basanth Impex towards subscription of 7367 shares of M/s. Penver Products Pvt. Ltd. which was duly recorded in the books of account of M/s. Basanth Impex. Being so, it cannot be said that the said investment was by the assessee so as to treat the unexplained investment in the hands of the assessee. Accordingly, we do not find any infirmity in deletion of the addition by the CIT(A). This ground of appeal of the Revenue is dismissed. Thus, the appeals of the Revenue in ITA Nos. 348, 349 & 350/Coch/2017 are dismissed.

10. The next ground in ITA Nos. 354/Coch/2017 is with regard to deletion of addition towards unexplained investment of Rs.3,08,19,727/-.

10.1 The facts of the case are that during the course of search a piece of paper was found, claimed to have been in the handwriting of Shri Vishwajith Menon, CEO of Sabari Group. There was some calculation on this piece of paper and at the end of calculation a figure of 1.33 was jotted down. The Assessing Officer co-related these jottings to purchase of land at Ambalipadam by M/s. Sabari Quality Foods. A cash flow statement was filed by the assessee which showed a

total cash outflow of Rs.4,22,00,079/-. According to the Assessing Officer, the actual cash outflow as per the seized document PSK/DS/2(1) was Rs.7,39,53,500/- in place of Rs.6,07,00,000/- and the difference between the two was treated as unaccounted investment made by the assessee.

10.2 On appeal, the CIT(A) found that there was no mention of any statement recorded of Shri Vishwajith Menon in respect of the paper and this transaction in the assessment order. No statement of the assessee was seen to have been taken on this transaction which was lawfully required, as the addition was made in his hands. The CIT(A) observed that no inquiry was made with the seller of land to verify the actual price of land and no admission was made by the assessee during the course of search regarding payment of unaccounted consideration for purchase of land. The CIT(A) noticed that the Assessing Officer had not made any effort whatsoever to enquire about the transaction reflected in the seized piece of paper. The CIT(A) was of the opinion that the piece of paper found and seized during the course of search was good enough to start investigation but not good at all to reach a conclusion. According to the CIT(A) addition made on the basis of loose paper, notings without any cogent supporting corroborative evidence cannot be sustained. Accordingly, he deleted the addition.

10.3 Against this, the Revenue is in appeal before us. The Ld. CIT(DR) submitted that the CIT(A) overlooked that as per section 132(4A), the contents of seized documents are presumed to be true. It was submitted that the CIT(A) erred in holding that sufficient enquiries had not been done by the Assessing Officer and the CIT(A) could have got the same investigated by the Assessing Officer rather than summarily deleting the addition.

10.4 The Ld. AR submitted that the Assessing Officer himself admitted that the advance paid as per books was Rs.6,07,00,000/- which was evident from the first sentence of para 13, page 10 of his assessment order. So what was not recorded even according to the Assessing Officer should have been 13253500/- i.e., Rs.73953500/- minus Rs.6,07,00,000/- in place of which he made an addition of Rs.3,08,19,727/- which figure cannot be derived from the other figures mentioned in his assessment order. Therefore, with respect to this addition also, no explanation was sought from the assessee and the quantum of addition was also not as per provisions of s. 69B since the section envisages only to add what is not recorded in the books of accounts. The Ld. AR relied on section 34 of the Indian Evidence Act wherein it is held that only entries in the books of accounts regularly kept in the course of business are relevant evidences. Further, the Ld. AR relied on the judgment of the Supreme Court in the case of Jain Hawala case which was followed recently in Birla Sahara case wherein it was held that there should be independent evidence to prove that this

transaction took place and the recipients had actually received this payment. In the case of Ambalipadam land, it was submitted that the copy of the document was available with the Assessing Officer and the names and addresses of the land owners were mentioned in these documents. It was submitted that the Assessing Officer should have made enquiry with the land owners, whether they have received the actual consideration of Rs.7,39,53,500/- before proceeding with the addition. As the addition was made without any corroborative evidence and without making any enquiry, the Ld. AR prayed that the addition may be deleted. For this, he relied on the judgment of the Jurisdictional High Court in the case of CIT vs. Lakshmi Hospital (347 ITR 367).

10.5 We have heard the rival submissions and perused the record. In this case the addition was made on the basis of jottings in a loose paper found during the course of search. The Assessing Officer co-related these jottings in the loose paper to purchase of land at Ambalipadam by M/s. Sabari Quality Foods. According to him, there was a difference between the actual transaction recorded by the assessee in his books of account and entries in the loose paper found during the course of search. In our opinion, entries in the loose paper cannot be considered as material to sustain the addition. More so, the CIT(A) observed that there was no statement recorded from the assessee towards this transaction by the Department. Further, there was no inquiry made with the seller of the land to verify the actual price of the land and there was no

admission made by the assessee during the course of search regarding this transaction. Under these facts and circumstances, the CIT(A) deleted the addition as no corroborative material was found to sustain the addition. Accordingly, we do not find any infirmity in the order of the CIT(A) and confirm the same. This ground of appeal of the Revenue is dismissed.

11. The next ground in ITA Nos. 347/Coch/2017 is with regard to deletion of addition made u/s. 2(22)(e) of the I.T. Act.

11.1 The facts of the case are that the assessee received Rs.1,70,62,169/- from M/s. Sabari Milineium Impex P. Ltd. as loans and advances which was paid to Director, Shri Sunil Kumar, the assessee. As the reserves for the F.Y. 2007-08 was only Rs.1,88,051/-, the payment received from M/s. Sabari Milineium Impex P. Ltd. was restricted to Rs.1,88,051/-. During the relevant previous year, a sum of Rs.40,23,407/- from M/s. Sabari Switchgear P. Ltd. as loans and advances was paid to its Managing Director and therefore, taken as deemed dividend u/s. 2(22)(e) of the Act. The Assessing Officer made addition to total income of Rs.40,23,407/- as the previous years accumulated profits at Rs.57,83,680/-.

11.2 On appeal, the CIT(A) deleted the addition by observing that the addition was made in a routine mechanical manner without verifying the facts of the

case. During the year under consideration, it was observed that the reserves and surplus of M/s. Sabari Milineium Impex P. Ltd. was a negative figure and consequently provisions of section 2(22)(e) are not applicable. In the case of M/s. Sabari Switchgear P. Ltd., it was observed that the assessee had given loan to the company in net effect and therefore, no addition can be made in the hands of the assessee u/s. 2(22)(e) of the Act. Accordingly, the CIT(A) deleted both the additions. .

11.3 Against this, the Revenue is in appeal before us. The Ld. CIT(DR) submitted that CIT(A) overlooked the fact that section 2(22)(e) does not envisage "netting off" of dealings between the shareholder and company. If the shareholder had received loans from the company in which he is substantially interested, the condition of section 2(22)(e) was met. Accordingly, he justified the addition made by the Assessing Officer.

11.4 On the other hand, the Ld. AR submitted that the loan of Rs.1,70,62,169/- was not out of the Reserves and Surpluses of M/s. Sabari Milineium Impex P. Ltd. as on 31/03/2009 since the same as per its balance sheet as on 31/03/2009 was only a negative figure of Rs.18,09,269/-. Similarly, the loan of Rs.40,23,407/- received from Sabari Switchgear P. Ltd. was included under the Schedule of Loans and Advances. The assessee had advanced Rs.8,48,01,579/- to M/s. Sabari Switchgear P. Ltd. during this assessment year itself and was

included under the Schedule Deposits and Advances in the balance sheet of the assessee as on 31/03/2009. So, it was submitted that when these amounts were clubbed together, the net amount as on 31/03/2009 will only be an advance to M/s. Sabari Switchgear P. Ltd. at Rs.8,07,78,171.43. Therefore, it was submitted that both the schedules should have been verified by the Assessing Officer which was available to him. As there was no loans as on 31/03/2009, it was submitted that the both the additions may be deleted.

11.5 We have heard the rival submissions and perused the record. During the year under consideration, the assessee received Rs.40,23,407/- as loan from M/s. Sabari Switchgear Pvt. Ltd. The accumulated profit of this Company was Rs.57,83,680/-. Hence, the Assessing Officer treated the amount of Rs.40,23,407/- as deemed dividend u/s. 2(22)(e) of the I.T. Act. However, the Assessing Officer has not noticed the fact that the assessee had advanced a sum of Rs.8,48,01,579/- to M/s. Sabari Switchgear Pvt. Ltd. Thus, net amount of Rs.8,07,78,171.43 as on 31/03/2009 was advanced by the assessee to M/s. Sabari Switchgear P. Ltd. Without verifying these facts, the Assessing Officer treated the advance of Rs.40,23,407/- given by M/s. Sabari Switchgear Pvt. Ltd. to the assessee as deemed dividend u/s. 2(22)(e) of the Act which is not correct. Hence, the CIT(A) deleted the addition. In view of this, we do not find any infirmity in the order of the CIT(A) and the same is confirmed. Hence, this ground of appeal of the Revenue in ITA No. 347/Coch/2017 is dismissed.

11.6 The only ground in assessee's appeal in ITA No. 355/Coch/2017 is with regard to deletion of addition of Rs.62,78,256/- made u/s. 2(22)(e) of the I.T. Act as deemed dividend.

11.7 We have heard both the parties. In this assessment year, the assessee being the Managing Director and beneficiary owner of shares of M/s. Sabari Switchgear Pvt. Ltd., received loan of Rs.4,94,78,237/-. The cumulative profit in the hands of M/s. Sabari Switchgear Pvt. Ltd. was at Rs.62,78,256/-. To that extent, the Assessing Officer treated it as deemed dividend. Now the contention of the Ld. AR that this is a temporary advance to the assessee. In our opinion, even temporary advance is to be treated as deemed dividend u/s. 2(22)(e) of the Act unless the assessee proved that it is on account of commercial expediency and the transaction is only trade advance. In the present case, since the assessee has not been able to prove that it is trade advance, we are not in a position to interfere with the order of the CIT(A). Hence, this ground of appeal of the assessee is dismissed. The appeal of the assessee in ITA No. 355/Coch/2017 is dismissed.

12. The only common ground in ITA Nos. 358 & 359/Coch/2017 is with regard to deletion of addition made u/s. 68 of the Act at Rs.6.53 crores and 2.00 crores for the assessment year 2012-13 and 2014-15 respectively. The facts in these cases are similar to the facts in ITA Nos. 347 to 352 and 354/Coch/2017 and

therefore, by applying the same ratio as in para 7 above, we confirm the finding of the CIT(A) and accordingly, this ground of appeals of the Revenue is dismissed.

12.1 The only ground in ITA No. 360/Coch/2017 is with regard to addition made u/s. 68 of the I.T. Act amounting to Rs.5,44,344/- being amount payable to M/s. Shyam International.

12.2 At the time of hearing, the Department sought withdrawal of the appeal in view of the CBDT Circular No. 3/2018 in F.No. 279/Misc. 142/2007-ITJ(Pt) dated 11/07/2018 wherein the monetary threshold limit for filing appeals before the ITAT was enhanced and tax effect is below Rs.20 lakhs. In the present case, the tax effect being less than Rs.20 lakhs, this ground of appeal of the Revenue is dismissed.

13. The other common ground in all the Revenue appeals is that the CIT(A) erred in holding that the Assessing Officer had made inadequate enquiry on any point. The Ld. DR submitted that the CIT(A) should have issued a direction u/s. 250(4) for conduct of further enquiry and report especially when his power is co-terminus with that of the Assessing Officer.

13.1 We have heard the rival submissions and perused the record. In all these appeals, the CIT(DR) made the plea that there is no enquiry made by the Assessing Officer and the CIT(A) should have set aside the issue to the file of the Assessing Officer for fresh enquiry. In our opinion, the argument of the CIT(DR) is misconceived. The assessments were framed u/s. 153A of the I.T. Act and it is the duty of the investigating authorities as well as the Assessing Officer to make necessary enquiry before framing the assessment. The failure on the part of the Assessing Officer to carry out necessary enquiry for bringing evidence on record, cannot be attributed to the assessee and at this stage, we are not in a position to extend time so as to cause further enquiries to facilitate evidence on record to sustain the additions. There cannot be any further enquiry or examination of facts, if the basic facts necessary for the disposal of the matter are already on record. In our opinion, factually, further enquiry can be done in rare cases by the CIT(A) only when it is not possible for the CIT(A) to make just order. There cannot be any further enquiry or calling for remand report by the CIT(A) for patching up the weak part of the case and fill up the omission of the authorities by giving another innings. The CIT(A) should decide the matter one way or the other rather than causing further enquiry, when all the facts required for adjudication were already available on record. In our opinion, calling for remand report by the CIT(A) should be made in very rare cases and exceptional circumstances. If at the original stage, there was patently grave error committed by the authorities or when the assessment by the Assessing Officer was made in

a haste owing to limitation period or remand can also be justified if the first appellate authority has violated and not followed without meeting the statutory provisions properly. In the present case, we do not find any lapse on the part of the CIT(A) in not calling for the remand report or not conducting further enquiry. In view of this, we dismiss all the appeals of the Revenue.

C.O. Nos. 33 to 39 & 40 to 41/Coch/2017

14. The first common ground in these cross objections is that the last panchanama was drawn in this case on 17/04/2015.

14.1 The facts of the case as narrated in C.O. No. 33/Coch/2017 are that the assessee contended that the last panchanama was drawn in this case on 17.04.2015 and, therefore, year of search would be F.Y. 2015-16 i.e. A.Y. 2016-17. In view of this fact, assessment u/s.153A can be made for six preceding years starting from 2010-11 and not 2009-10.

14.2 We have heard both the parties. The date of search has to be reckoned with last warrant executed and there was no dispute about the fact that last warrant was executed in F.Y. 2014-15 and, therefore, the AO had correctly initiated the proceedings u/s. 153A for A.Y. 2009-10 and dismissed this ground of appeal of the assessee. Accordingly, this ground of Cross Objections of the assessee is dismissed.

15. The next common ground of the assessee is that the AO issued Notice U/S.153A on 29.11.2016 without having jurisdiction as his objection filed on 26.12.2016 was not disposed off u/s.124(3).

15.1 From the statement of facts narrated by the assessee himself, the CIT(A) observed that centralization order was served on the assessee on 08.11.2016, which was received by the assessee at his Chennai address on 21.11.2016. Since the order was already passed on 08.11.2016, the CIT(A) was of the view that the ACIT, Central Circle had valid jurisdiction and accordingly he issued notice U/s. 153A on 29.11.2016. The Principal CIT, Chennai had given time upto 25.11.2016 for filing objections. However, no objection was filed by the assessee by that date and the AO correctly issued Notice on 29.11.2016. The CIT(A) was of the view that the assessee filed his objection on 26.12.2016, which can only be treated as an afterthought and needed to be ignored, as by then assessment proceedings were in advance stage and the appellant was aware that substantial additions are likely to be made. In view of the sequences of events discussed above, the CIT(A) held that this ground of appeal was of no relevance and the same was dismissed.

15.2 We have heard the rival submissions and perused the record. Considering the above facts, we do not find any infirmity in the order of the CIT(A) and

uphold the same. Thus, this ground of Cross Objections of the assessee is dismissed.

16. The next common ground of the assessee is that the assessment was getting barred by limitation of time on 31.12.2017 and not on 31.12.2016.

16.1 The Ld. AR contended that the last Panchanama was drawn on 17.04.2015 and, therefore, the time barring date for completion of assessment was 31.12.2017. Since the AO took time barring date as 31.12.2016, there was paucity of time and he was not given cross-examination of persons, whose statements were used against him in the assessment proceedings.

16.2 We have heard both the parties. The dates of limitation have to be counted from the date of execution of last warrant and not the last panchanama, therefore, the AO correctly held 31.12.2016 as time barring date for finalization of assessment. Accordingly, we confirm the finding of the CIT(A) and dismiss this ground of Cross Objections of the assessee.

17. The next common ground of the assessee is that principle of natural justice was violated and he was not given a proposal for addition before passing the assessment order.

17.1 The CIT(A) rejected this contention of the assessee as factually incorrect. According to the CIT(A), during the course of appellate proceedings, the assessee filed paper book on technical grounds and Page Nos.12 to 16 of the paper book was a letter written by the assessee to the AO and the same was dated 19.12.2016. According to the CIT(A), in this letter the assessee had furnished his explanation against the proposed addition by the Assessing Officer and therefore, this letter in itself is a proof that the assessee was made aware of the intention of the AO and he was also given opportunity to defend himself. Thus, according to the CIT(A), it was very clear that the principle of natural justice was not violated in this case. Therefore, this ground of appeal, being factually incorrect, was dismissed. We confirm the same and dismiss this ground of Cross Objections of the assessee.

18. The next common ground of the assessee is that no notice u/s.143(2) was issued and, therefore, the assessment needs to be quashed.

18.1 The CIT(A) noticed that this ground was not raised by the assessee before the AO. Notice u/s. 143(2) was issued to establish the jurisdiction by the AO. From the records, the CIT(A) found that the Assessing Officer had issued Statutory Notices and the same was complied by the assessee also. It was observed that the assessee had raised this issue of jurisdiction, albeit belatedly, before the CIT, Chennai, when the case was transferred from Chennai to Kollam.

Since the objection was filed late, beyond the date given by the Principal CIT, Chennai, the same was not considered by him. In view of these facts, the CIT(A) held that this ground was not maintainable and the same was dismissed. We confirm the same and dismiss this ground of Cross Objections of the assessee.

19. The next common ground is that the original assessment was completed u/s, 143(3) and no incriminating material was found in the search.

19.1 The Ld. AR submitted that the seized document SKP/KLM/DS 1 to 23 were accounted for in the books of accounts of the assessee and, therefore, it was not an incriminating seized material. The Ld. AR contended that in absence of incriminating found in the search, assessment u/s.153A was not sustainable under the law. According to the CIT(A), there was no doubt about the fact that documents evidencing financial transactions of the assessee were found and seized during the course of search at assessee's premises. The CIT(A) held that whether these transactions were recorded in the books of the assessee and whether the income emanating from these transactions were offered to tax by the assessee or not could only be ascertained in assessment proceedings u/s.153A r.w.s. 143(3). According to the CIT(A), it is not necessary that all the documents found and seized in the search should result in addition to total income. The CIT(A) took the view that the very purpose of assessment is to examine these documents and then the AO takes a decision regarding the

taxability. Therefore, the CIT(A) did not find any infirmity in the action of the AO and dismissed this ground of appeal of the assessee. We are in agreement with the finding of the CIT(A) and dismiss this ground of Cross Objections of the assessee.

C.O. No. 42/Coch/2017

20. Since we have dismissed the Revenue appeal in ITA No.360/Coch/2017 in view of the tax effect, the cross objection of the assessee has become infructuous and the same is dismissed as infructuous.

22. In the result, the appeals of the Revenue as well as the Cross Objections and appeal of the assessee are dismissed.

Order pronounced in the open Court on this 13<sup>th</sup> December, 2018.

sd/-  
(GEORGE GEORGE K.)  
JUDICIAL MEMBER

sd/-  
(CHANDRA POOJARI)  
ACCOUNTANT MEMBER

Place: Kochi

Dated: 13<sup>th</sup> December, 2018

GJ

Copy to:

1. Shri Sunil Kumar, Sabari Quality Foods, Asramam, Kollam-2
2. M/s. Sabari Enterprises, Asramam, Kollam-2.
3. The Deputy Commissioner of Income-tax, Central Circle, Kollam.
4. The Commissioner of Income-tax(Appeals)-IV, Kochi.,

I.T.A. Nos.347-354 etc. /Coch/2017 &  
C.O. Nos. 33-39, 40-42/Coch/2017

5. The Pr. Commissioner of Income-tax, Central, Kochi.
6. D.R., I.T.A.T., Cochin Bench, Cochin.
7. Guard File.

By Order

(ASSISTANT REGISTRAR)  
I.T.A.T., Cochin