

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES "A", JAIPUR
श्री रमेश सी शर्मा, लेखा सदस्य एवं श्री विजय पाल राव, न्यायिक सदस्य के समक्ष
BEFORE: SHRI RAMESH C SHARMA, AM & SHRI VIJAY PAL RAO, JM

आयकर अपील सं./ITA No. 1053/JP/2018
निर्धारण वर्ष /Assessment Year :2010-11

M/s Agrasen Agro Industries Pvt. Ltd., Plot No. 6 and 7, C-Block, Multimetals Ltd. Campus, Kansua Road, Large Scale Industrial Area, Kota.	बनाम Vs.	Deputy Commissioner of Income Tax, Central Circle, Room No. 212, 2 nd Floor, C.R. Building, Rawat Bhata Road, Kota.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AACCA 0206 D		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

आयकर अपील सं./ITA No. 1188/JP/2018
निर्धारण वर्ष /Assessment Year :2010-11

Deputy Commissioner of Income Tax, Central Circle, Kota.	बनाम Vs.	M/s Agrasen Agro Industries Pvt. Ltd., C-Block, 6/7, Multimetals Campus, Large Scale Industrial Area, Kota, Rajasthan.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AACCA 0206 D		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

आयकर अपील सं./ITA No. 1205/JP/2018
निर्धारण वर्ष /Assessment Year :2011-12

Deputy Commissioner of Income Tax, Central Circle, Kota.	बनाम Vs.	M/s Agrasen Agro Industries Pvt. Ltd., C-Block, 6/7, Multimetals Campus, Large Scale Industrial Area, Kota, Rajasthan.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AACCA 0206 D		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

प्रत्याक्षेपण / C.O. No. 48/JP/2018
(Arising out of आयकर अपील सं. / ITA No. 1205/JP/2018)
निर्धारण वर्ष / Assessment Year 2011-12

M/s Agrasen Agro Industries Pvt. Ltd., Plot No. 6 and 7, C-Block, Multimetals Ltd. Campus, Kansua Road, Large Scale Industrial Area, Kota.	बनाम Vs.	Deputy Commissioner of Income Tax, Central Circle, Room No. 212, 2 nd Floor, C.R. Building, Rawat Bhata Road, Kota.
स्थायी लेखा सं. / जीआईआर सं. / PAN/GIR No.: AABCM 6604 J		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri Vijay Goyal (CA) &
Shri Gulshan Agarwal (CA)
राजस्व की ओर से / Revenue by : Shri Varinder Mehta (CIT-DR)

सुनवाई की तारीख / Date of Hearing : 22/01/2019
उदघोषणा की तारीख / Date of Pronouncement : 27/03/2019

आदेश / ORDER

PER: R.C. SHARMA, A.M.

These are cross appeals by the assessee and the revenue for the A.Y. 2010-11, one revenue's appeal for the A.Y. 2011-12 and one cross objection by the assessee for the A.Y. 2011-12 respectively against the order passed by the Id. CIT(A) in the matter of order passed U/s 153A read with Section 143(3) of the Income Tax Act, 1961 (in short the Act). The grounds taken in the cross appeals by the assessee and the revenue are as under:

Grounds of assessee's appeal for the A.Y. 2010-11

"1. On the facts and in the circumstances of the case and in law the order passed u/s 153 A read with section 143(3) of the Income Tax Act 1961

is bad in law, void ab-initio, and deserves to be annulled as the assessment for the year under consideration was not abated as on the date of search and CIT (A) erred in holding that the contention of the assessee cannot be accepted in view of SLPs admitted in various cases. The Id. CIT (A) further erred in holding that the additions are to be adjudicated on merits as per relevant ground of appeal hence the issue remains for academic discussion only.

2. *On the facts and in the circumstances of the case and in law the Id. CIT (A) erred in not declaring the assessment order as bad in law and void ab initio. The findings of Id CIT(A) in this regard are perverse and erroneous. It is contended that the Id. AO passed the assessment order against the doctrine of “audi alterm partem”, violating the principle of natural justice and not giving the opportunity of cross examination of the alleged accommodation entry providers, therefore the assessment order ought to held as bad in law and deserves to be annulled.*
3. *That the order of the Id CIT (A), confirming the addition made by the AO is arbitrary, whimsical, capricious, perverse, based on no evidence or irrelevant material or irrelevant evidence, and against the law and facts of the case. The addition confirmed by Id. CIT (A) deserves to be deleted.*
4. *On the facts and in the circumstances of the case and in law the Id. CIT (A) erred in confirming the additions made u/s 68 of the Income Tax Act, 1961 by: -*
 - (a) *solely relying on the statements of some alleged accommodation entry providers recorded by some other authorities in some other cases/actions and the opportunity to cross examination was also not provided to assessee.*
 - (b) *giving a contradictory finding that a doubt is raised on the identity and genuineness of the company whose name is mentioned in the statement of accommodation entry providers as well as reports of DDIT (Inv.)-Kolkatta.*
 - (c) *holding that the assessee has not adduced any evidence to rebut the adverse factual finding made by the AO in the assessment*

order though detailed paper book for relevant AY and common paper books have been submitted, and

(d) holding that incriminating material had been found during the course of search of accommodation entry provider. Further incriminating material had been gathered by issuing commission to DDIT (Inv.) Kolkatta.

5. *On the facts and in the circumstances of the case and in law the Id. CIT(A) erred in confirming the addition of Rs. 67,85,000/- on account of unsecured loan received by the assessee from following party and erroneously held that the identity, creditworthiness and genuineness of the under mentioned company is doubtful: -*

<i>Name of the company from whom loan received</i>	<i>Addition during the year Amount</i>	<i>Maximum Balance during the year in account Amount</i>	<i>Name of alleged entry operator whose statement were relied</i>
<i>Jalsagar Commerce Pvt. Ltd</i>	<i>67,85,000</i>	<i>62,85,000</i>	<i>Shri Anand Sharma</i>

The CIT(A) further erred in confirming the addition of Rs. 67,85,000/- as against actual addition of Rs. 62,85,000/- made by the Id. A.O.

6. *On the facts and in the circumstances of the case and in law the Id. CIT(A) erred in rejecting the theory of peak credit and erred in not allowing the benefit of telescoping, recycling and rotation of funds.*

7. *The assessee prays for leave to Add, to amend, to delete, or modify the all or any grounds of appeal on or before the hearing of appeal."*

Grounds of revenue's appeal for the A.Y. 2010-11

"1. *Whether on the facts and circumstances of the case and in law, the CIT(A) was justified in deleting the addition of Rs. 1,45,00,000/- made by the AO u/s 68 of the IT Act on account of unexplained share application money allegedly obtained by the assessee from M/s Teac Consultants Pvt. Ltd. and M/s Sangam Distributors Pvt. Ltd., M/s Tech Consultants Pvt. Ltd.*

2. *Whether on the facts and circumstances of the case and in law, the CIT(A) was justified in deleting the addition of Share application money by observing that the alleged investor companies M/s Teac Consultants Pvt. Ltd. and M/s Sangam Distributors Pvt. Ltd., M/s Tech Consultants Pvt. Ltd. are not shell companies without considering the financial statements of these companies.*
3. *Whether on the facts and circumstances of the case and in law, the CIT(A) was justified in deleting the addition of unsecured loans allegedly obtained from M/s Teac Consultants Pvt. Ltd. and M/s Sangam Distributors Pvt. Ltd., M/s Tech Consultants Pvt. Ltd. merely for the reason that evidences in the form of statement on oath of the relevant entry operators were not available on record.*
4. *Whether on the facts and circumstances of the case and in law, the CIT(A) was justified in deleting the addition of unsecured loans allegedly obtained from M/s Teac Consultants Pvt. Ltd. and M/s Sangam Distributors Pvt. Ltd., M/s Tech Consultants Pvt. Ltd. despite the fact that the directors or Principal Officers of these companies were never produced before the AO for examination despite number of opportunities provided by the AO for producing and also ignoring the fact that the assessee neither expressed its inability in producing the lenders nor produced them either.*
5. *Whether on the facts and circumstances of the case and in law, the CIT(A) was justified in deleting the addition of unsecured loans allegedly obtained from M/s Teac Consultants Pvt. Ltd. and M/s Sangam Distributors Pvt. Ltd., M/s Tech Consultants Pvt. Ltd. merely by observing that the assessee has cooperated in assessment by showing his willingness to produce the Directors of lender companies and some Directors/Officers were also produced before the AO despite the fact that even the Directors which were produced before the AO failed to substantiate the genuineness of the alleged transactions.*
6. *Whether on the facts and circumstances of the case and in law, the CIT(A) was justified in deleting the addition of unsecured loans by observing that the appellant cannot be fastened upon the burden to produce the lenders before the AO and in not considering the decision of the Hon'ble Supreme Court in Navodaya Castles (p) Ltd Vs CIT(2015)*

56 taxmann.com 18(SC) when there were genuine concerns of the genuineness of the transactions.

7. *Whether on the facts and circumstances of the case and in law, the CIT(A) was justified in deleting the disallowance of Rs. 53,523/- made by the AO by invoking the provisions of section 14A of the IT Act.*

The Appellant crave, leave or reserving the right to amend modify, alter add or forego any ground(s) of appeal at any time before or during the hearing of this appeal.”

Grounds of revenue’s appeal for the A.Y. 2011-12

- “1. *Whether on the facts and circumstances of the case and in law, the CIT(A) was justified in deleting the addition of Rs. 1,20,00,000/- made by the AO u/s 68 of the IT Act on account of unexplained share application money allegedly obtained by the assessee from M/s ISIS Mercantile Pvt. Ltd.*
2. *Whether on the facts and circumstances of the case and in law, the CIT(A) was justified in deleting the addition of Share application money by observing that the alleged investor company M/s ISIS Mercantile Pvt. Ltd. is not shell company without considering the financial statements of the company.*
3. *Whether on the facts and circumstances of the case and in law, the CIT(A) was justified in deleting the addition of unsecured loans allegedly obtained from M/s ISIS Mercantile Pvt. Ltd. merely for the reason that evidences in the form of statement on oath of the relevant entry operators were not available on record.*
4. *Whether on the facts and circumstances of the case and in law, the CIT(A) was justified in deleting the addition of unsecured loans allegedly obtained from M/s ISIS Mercantile Pvt. Ltd. despite the fact that the director or Principal Officer of the company was never produced before the AO for examination despite number of opportunities provided by the AO for producing and also ignoring the fact that the assessee neither expressed its inability in producing the lenders nor produced them either.*
5. *Whether on the facts and circumstances of the case and in law, the CIT(A) was justified in deleting the addition of unsecured loans*

allegedly obtained from M/s ISIS Mercantile Pvt. Ltd. merely by observing that the assessee has cooperated in assessment by showing his willingness to produce the Director of lender company and some Directors/Officers were also produced before the AO despite the fact that even the Directors which were produced before the AO failed to substantiate the genuineness of the alleged transactions.

6. *Whether on the facts and circumstances of the case and in law, the CIT(A) was justified in deleting the addition of unsecured loans by observing that the appellant cannot be fastened upon the burden to produce the lenders before the AO and in not considering the decision of the Hon'ble Supreme Court in Navodaya Castles (p) Ltd Vs CIT(2015) 56 taxmann.com 18(SC) when there were genuine concerns of the genuineness of the transactions.*
7. *Whether on the facts and circumstances of the case and in law, the CIT(A) was justified in deleting the disallowance of Rs. 1,98,478/- made by the AO by invoking the provisions of section 14A of the IT Act.*

The Appellant crave, leave or reserving the right to amend modify, alter add or forego any ground(s) of appeal at any time before or during the hearing of this appeal."

Grounds of assessee's C.O. for the A.Y. 2011-12

1. *On the facts and in the circumstances of the case and in law the order passed U/s 153A read with Section 143(3) of the Income Tax Act, 1961 is bad in law, void-ab-initio, and deserves to be annulled as the assessment for the year under consideration was not abated as on the date of search and CIT(A) erred in holding that the contention of the assessee cannot be accepted in view of SLP's admitted in various cases. The Id. CIT(A) further erred in holding that the additions are to be adjudicated on merits as per relevant ground of appeal hence the issue remains for academic discussion only.*
2. *On the facts and in the circumstances of the case and in law the Id. CIT(A) erred in not declaring the assessment order as bad in law and void an initio. It is contended that the A.O. passed the assessment order against the doctrine of "audi alterm partem", violating the principle of natural justice and not giving the opportunity of cross*

examination of the alleged accommodation entry providers, therefore, the assessment order ought to hold as bad in law and deserves to be annulled. The findings of the Id. CIT(A) in this regard are perverse and erroneous.

3. *The appellant craves leave to add, alter, amend, any of the grounds of appeal at or before the time of hearing of appeal.”*

2. Common grounds have been taken in both the appeals therefore all the appeals as well as the cross objection are being heard together and for the sake of convenience, a composite order is being passed.

3. Rival contentions have been heard and record perused. Facts in brief are that the assessee is engaged in the business of leasing of property and plant and machinery. There was a search at various premises of M/s Kota Dall Mill group, Kota on 02/7/2015. The assessee company was carrying out the leasing business. It had leased out its property and plant & machinery to M/s Kota Dali Mill. The company was also engaged in the business of trading during the year under consideration. The return of income was e-filed on 31.08.2010 u/s 139(1) of the Act for the A.Y. 2010-11 declaring total income at Rs. 39,010/-. Further, notice u/s 153A of the IT Act, 1961 was issued on 05.07.2016, which was served upon the assessee through Income Tax Inspector. The return of income was e-filed on 13.07.2016 u/s 153A of I. T. Act, 1961 for the A.Y. 2010-11 declaring total income at Rs. 39,010/-. Thereafter, notice u/s 142(1)/143(2) of the IT Act, 1961 was

issued on 26.09.2016 alongwith questionnaire/ Annexure-A, through Income Tax Inspector requiring certain details/information, which was served upon the assessee.

4. During the course of assessment proceedings, the Assessing Officer made addition U/s 68 of the Act. The Assessing Officer has relied upon some of the documents/information/details/third party information/statement recorded by the Investigation Wing. However, the said information/documents/statements recorded were not confronted with the assessee and opportunity of cross-examination of witnesses was not given despite of repeated requests of the assessee. The Assessing Officer held that the Directors/Principal Officers were not produced for personal verification and observed that the statement of four persons accepting the accommodation entry was there. The Assessing Officer also relied on the surrender made by Shri Rajendra Agarwal and his family members on account of long term capital gains. Before the Assessing Officer, the Assessing Officer filed documents viz confirmation, acknowledgement of return, balance sheet, bank statement, affidavit, master data of ROC, assessment order of cash creditors u/s 143(3) filed. Where ever summons issued by DDIT, Kolkata, was complied by submitting the required information. With regard to statement of four persons so recorded, it was submitted that

these were recorded in the back of the assessee and no opportunity of cross examination was given in spite of requests vide letter dated 11/12/2017 placed on record. With regard of surrender of long term capital gain by Shri Rajendra Agarwal, it was contended by the assessee that it has no bearing with the assessment of this company as the company is separate assessee. However, the Assessing Officer rejected the assessee's submission and made following additions:

Assessment year	Nature of Addition	Description of addition	Addition Made Amount	Total additions for the Assessment year
2010-11	Share Capital & Premium	M/s Sangam Distributors Pvt. Ltd.	1,30,00,000	
	Share Capital & Premium	M/s Teac Consultants Private Limited.	15,00,000	
	Unsecured Loan	M/s Jalsagar Commerce Pvt. Ltd.	62,85,000	
	Others	Disallowance u/s 14A	53,523	2,08,38,523
2011-12	Share Capital & Premium	M/s ISIS Mercantiles Pvt. Ltd.	1,20,00,000	
	Others	Disallowance u/s 14A	1,98,478	1,21,98,478

5. Assessee approached before the Id. CIT(A) against the order of the Assessing Officer for assessment year 2010-11.

6. The Id. CIT(A) vide letter dated 21-03-2018 called remand report from the AO and directed the Id AO to provide the copy of various

documents relied by him and to provide the opportunity of cross-examination of witness. The AO vide letter dated 12-04-2018 provided copy of various inquiry reports and asked the assessee to intimate the name of persons required for cross examination. The assessee vide letter dated 20/04/2018 filed on 24/04/2018 intimated the name of persons required for cross-examination. The assessee further submitted that the assessee is always available for cross-examination subject to prior information of one week. The assessee vide letter dated 04/05/2018 (filed on 07/05/2018 submitted the information desired by the AO in remand proceedings.

7. The AO vide letter dated 07/05/asked the assessee to file power of attorney of persons who will make cross examination of witness and give assurance to bear all the expenses of cross examination including cost of travelling etc. The assessee vide letter dated 18/05/2018 intimated the Id AO that the assessee is ready to bear the cost of cross-examination and it would like to cross-examine the witnesses at Kota. The AO submitted the remand report to Id. CIT(A) vide letter dated 21/05/2018, copy of which was forwarded to assessee by Id CIT(A) vide letter dated 28/05/2018 for A.Y 2010-11 and 2011-12. However, at this stage also, opportunity of cross-examination of witness was not given to the assessee. The A.O. asked the Id CIT(A) to issue detailed guidelines

and procedure to be followed by him for conduct of cross-examination.

The assessee filed rejoinder on the remand report of the AO.

8. The Id CIT(A) partly allowed the appeal by deleting/sustaining the additions as under:-

Assessment year	Nature of Addition	Description of addition	Addition Made by AO Amount	Addition Deleted by CIT(A)	Addition sustained by CIT(A)
2010-11	Unsecured Loan	M/s Jalsagar Commerce Pvt. Ltd	62,85,000		67,85,000
	Share Capital & Premium	M/s Sangam Distributors Pvt. Ltd	1,30,00,000	1,30,00,000	
	Share Capital & Premium	M/s Teac Consultants Private Limited	15,00,000	15,00,000	
	Others	Disallowance u/s 14A	55,523	55,523	
2011-12	Share Capital & Premium	M/s ISIS Mercantiles Pvt. Ltd	1,20,00,000	1,20,00,000	
	Others	Disallowance u/s 14A	1,98,478	1,98,478	

Aggrieved by the order of Id CIT(A), both assessee and department is in appeal before us.

9. Rival contentions have been heard the record perused. At the outset, the Id AR of the assessee placed on record the order of this Tribunal in the case of Kota Dall Mill for the A.Y. 2010-11 and M/s Baran Roller Flour Mills Pvt. Ltd. for the A.Y. 2010-11 and contended that the

assessee has taken the similar ground in the group main lead case M/s Kota Dall Mill (in ITA 997/JPR/2018, for A.Y 2010-11). Hon'ble ITAT has followed this decision in assessee's another group case M/s Baran Roller Flour Mills Pvt. Ltd. (in CO 45/JPR/2018 A.Y 2010-11). The facts and circumstances of this case are same to M/s Kota Dall Mill/ M/s Baran Roller Flour Mills Pvt. Ltd.

10. It was also argued by the Id AR that the completed assessment cannot be reviewed without having incriminating material. It was also contended that the provisions of Section 153A of the Act cannot be applied in respect of assessment year in respect of which assessment has already been completed unless some incriminating material/information comes in the possession/knowledge of the assessing officer during the course of search proceedings. The assessment for AY 2010-11 and AY 2011-12 were not pending as on the date of search, as shown by following table.

Assessment Year	Date of filing of return u/s 139(1)	Time limit prescribed for issue of notice u/s 142(1)/143(2) of I Tax Act
2010-11	31-08-2010	30-09-2011
2011-12	15-09-2011	30-09-2012

In support of the submissions made herein, the assessee placed reliance on the following judicial precedents:

- (i) Hon'ble Delhi High Court in PCIT vs Kurele Paper Mills Pvt Ltd [2016] 380 ITR 571 (Delhi) has held that where no

incriminating evidence related to share capital issued was found during the course of search, Assessing officer was not justified in invoking section 68 for the purpose of making additions on account of share capital. (Copy at Case Law PB 2-3 filed in case of M/s Kota Dall Mill)

The revenue filed SLP before Hon'ble Supreme Court against the above order, which has been dismissed vide SLP No 21186/2015 dated 07/12/2015 (Copy at Case Law PB 2-3) Therefore, Hon'ble Supreme Court has approved the findings made by Hon'ble Delhi High Court.

- (ii) Hon'ble Delhi High Court in Principal Commissioner of Income Tax Central-2, New Delhi v. Meeta Gutgutia [2017] 395 ITR 526. In this case Hon'ble Delhi High Court the entire gamut of the case law had been analysed and the legal position was reiterated that unless there is incriminating material qua each of the AYs in which additions are sought to be made, pursuant to search and seizure operation, the assumption of jurisdiction under Section 153A of the Act would be vitiated in law. (Copy at Case Law PB 4-26 in case of M/s Kota Dall Mill)

The revenue filed SLP before Hon'ble Supreme Court against the above order, which has been dismissed vide SLP No 1812/2018 dated 02/07/2018 (Copy at Case Law PB 27-28 in case of M/s Kota Dall Mill) Therefore, Hon'ble Supreme Court has approved the findings made by Hon'ble Delhi High Court.

- (iii) Hon'ble Delhi High Court in the case of Pr. CIT Central-2 v/s Ram Narain Jindal in ITA 1020,1021,1023/2017 vide order dated 21/11/2017 (Copy at Case Law PB 29-30 in case of M/s Kota Dall Mill) relying the decision of Kabul Chawla has held that:-

"In these appeals, the addition made under Section 153A were set aside by the Tribunal, on application of the decision in 'Commissioner of Income Tax Vs. Kabul Chawla', 380 ITR 573 (Del.).

It was held that in the absence of any incriminating material concerning such additions found during the search proceedings, the matter, which was examined earlier in the assessment proceedings, could not be reopened."

The revenue filed SLP before Hon'ble Supreme Court against the above order, which has been dismissed vide SLP No 23833/2018 dated 03/08/2018 (Copy at Case Law PB 31-32 in

case of M/s Kota Dall Mill) Therefore, Hon'ble Supreme Court has approved the findings made by Hon'ble Delhi High Court.

- (iv) Hon'ble Delhi High Court has decided the legal position in the case of CIT Vs Kabul Chawla 380 ITR 573 (Del) (Copy at Case Law PB 114-125 in case of M/s Kota Dall Mill) after analyzing the case laws earlier decided by various courts and held that since no incriminating material was unearthed during the search, no additions could have been made to the income already assessed.
- v) Hon'ble Rajasthan High Court in Jai Steel (India) Vs Aast Commissioner of Income Tax (2013) 259 CTR (Raj) 281. (Copy at Case Law PB 33-43 in case of M/s Kota Dall Mill) Hon'ble Jurisdictional High Court has analyzed the provisions of section 153A in detail and held that in case nothing incriminating is found on account of search or requisition, then the question of reassessment of the concluded assessments does not arise, which would require more reiteration and it is only in the context of the abated assessment under second proviso which is required to be assessed.
- (vi) Hon'ble Mumbai High Court in the case of Commissioner of Income Tax & Ors. vs Deepak Kumar Agarwal & ORS. (2017) 100 CCH 0011 (Copy at Case Law PB 129-135 in case of M/s Kota Dall Mill)
- (vii) Hon'ble Gujarat High Court in Principal Commissioner of Income Tax v. Saumya Construction Pvt. Ltd. (2016) 387 ITR 529 (Guj); (Copy at Case Law PB 181-193 in case of M/s Kota Dall Mill)
- (viii) Hon'ble Karnataka High Court in CIT v. IBC Knowledge Park Pvt. Ltd. (2016) 385 ITR 346 (Kar) (Copy at Case Law PB 160-180)
- (ix) Kolkata High Court in Pr. CIT-2 v. Salasar Stock Broking Ltd. 2016-TIOL-2099-HC-KOL-IT (Copy at Case Law PB 213-214 in case of M/s Kota Dall Mill)
- (x) Hon'ble Bombay High Court in CIT v. Gurinder Singh Bawa (2016) 386 ITR 483 (Bom). (Copy at Case Law PB 207-209 in case of M/s Kota Dall Mill)
- (xi) Hon'ble Delhi High Court in the case of Pr. CIT Central-3 v/s Dharampal Premchand Ltd in ITA 512,513,514/2016 vide order

dated 21/08/2017. (Copy at Case Law PB 194-198 in case of M/s Kota Dall Mill)

- (xii) Hon'ble Delhi High Court in the case of Pr. CIT -2 v/s M/s Global Realty Creations Ltd, M/s Global Heritage Venture Ltd in ITA 1097-1098/2017,1099/2017 &1100 /2017 vide order dated 04/12/2017 (Copy at Case Law PB 199-201 in case of M/s Kota Dall Mill)
- (xiii) Hon'ble Delhi High Court in the case of Pr. CIT -6 v/s New Horizon Buildwell P. Ltd. in ITA 1107/2017 & 1112/2017 vide order dated 05/12/2017 (Copy at Case Law PB 202-203 in case of M/s Kota Dall Mill)
- (xiv) Hon'ble Delhi High Court in the case of Pr. CIT -1 v/s Rakesh Kumar Garg & Kusum Lata Garg in ITA 984/2017, 114/2018, 94/2018 & 1029/2017 vide order dated 12/03/2018. (Copy at Case Law PB 204-206 in case of M/s Kota Dall Mill)
- (xv) Principal Commissioner of Income-Tax-18 V. Ms. Lata Jain [2016] 384 ITR 543 (Delhi) (Copy at Case Law PB 158-159 in case of M/s Kota Dall Mill)
- (xvi) Hon'ble ITAT Jaipur has decided several cases following the decision of Hon'ble Delhi High Court in the case of Kabul Chawla and decision of Hon'ble jurisdictional High Court in the case of Jai Steels. However, some of the cases are cited here for ready reference:-
 - a) ITAT Jaipur in the case of M/s Rajasthan Fort & Palace Pvt. Ltd. Vs. The DCIT, Central circle-3, Jaipur. ITA No 597 to 599 /JP/2017 order dated 24/01/2018 (Copy at Case Law PB 80-94 in case of M/s Kota Dall Mill)
 - b) 2017 (9) TMI 459 - ITAT Jaipur Dr. Vikram Goyal Versus The DCIT, Central Circle-1, Jaipur ITA No 174/JP/2017 order dated 24/08/2017 (Copy at Case Law PB 95-104 in case of M/s Kota Dall Mill)
 - c) 2017 (9) TMI 638 - ITAT Jaipur M/S. Shyam Sarover Buildcon Pvt. Ltd. & M/S. Shivsagar Buildcon Pvt. Ltd. Versus The Deputy Commissioner Of Income-Tax, Central Circle-3, Jaipur ITA No 710/JP/2016 order dated 27/07/2017 (Copy at Case Law PB 105-113 in case of M/s Kota Dall Mill)

- (d) The Honb'le ITAT, Jaipur Bench, Jaipur in the case of M/s Jadau Jewellers & Manufacturers Pvt. Ltd in ITA No. 686/JP/2014 dated 14.12.2015 Copy at Case Law PB 44-54 in case of M/s Kota Dall Mill)

Thus, the law as envisaged by the Jurisdictional High Court and various other High Court, followed by Hon'ble ITAT is that, if no incriminating material has been found, then no addition can be made in the assessment completed under section 153A which has not been abated.

In support of the contention that the statement cannot be taken as incriminating material, reliance was placed on the following judicial precedents:

- (i) Hon'ble Delhi Court in **Commissioner of Income Tax v. Harjeev Aggarwal (2016) 290 CTR 263** held that statements recorded under Section 132 (4) of the Act do not by themselves constitute incriminating material.
(Copy at Case Law PB 496-508 in case of M/s Kota Dall Mill)
- (ii) **Hon'ble DELHI HIGH COURT [2017] 397 ITR 82** in the case of **Principal Commissioner of Income Tax, Delhi Versus Best Infrastructure (India) Pvt. Ltd wherein in para 38 of the order has held that** statements recorded under Section 132 (4) of the Act do not by themselves constitute incriminating material as has been explained by this Court in Commissioner of Income Tax v. Harjeev Aggarwal (supra).
(Copy at Case Law PB 509-523 in case of M/s Kota Dall Mill)

Thus the as a result of search the department did not find any positive material against the assessee to show that the unsecured loan and share capital and share premium capital received from various companies are not genuine.

In view of above submission this is to submit that order passed u/s 153A r.w.s. 143(3) of Income Tax Act, 1961 is bad in law, *void-ab initio* and deserve to be annulled and the findings made by Id CIT(A) deserves to be set aside.

11. In support of the proposition that the assessment order passed without giving opportunity of cross examination amounts to violation of principles of natural justice, therefore, the assessment order ought to have been held as bad in law and deserves to be annulled. Reliance was placed on the decision in the case of M/s Baran Roller Flour Mills Pvt. Ltd. for the A.Y. 2010-11 and 2011-12. It was argued by the Id AR that the assessee has taken the similar ground in the group's main lead case M/s Kota Dall Mill (in ITA 997/JPR/2018, ITA 998/JPR/2018, ITA 999/JPR/2018, ITA 1000/JPR/2018, ITA 1119/JPR/2018, ITA 1001/JPR/2018 and ITA 1002/JPR/2018 for A.Y 2010-11 to A.Y 2016-17). Hon'ble ITAT has followed its findings on this issue in assessee's another group case M/s Baran Roller Flour Mills Pvt. Ltd (in CO 45/JPR/2018 & CO 46/JPR/2018). The facts and circumstances of this case are same to M/s Kota Dall Mill. The assessee relies upon findings of Hon'ble Tribunal in the case of M/s Kota Dall Mill which is at Pg 76-87 of the order of Hon'ble ITAT.

12. From the record we also found that the assessee made repeated requests for cross examination of witnesses. The Ld AO did not provide the opportunity of cross examination of witnesses. The Assessee raised this issue before Id CIT(A). Ld CIT(A) called remand report from AO and directed to provide the assessee opportunity of cross examination. Ld

AO during the remand proceeding asked the assessee the name of persons to whom the assessee wants to cross examine and to give assurance to bear the expenses of witnesses. The assessee provided the name of persons to whom it wants to cross examine and gave assurance to bear all the cost relating to cross examination of witness. However the Id AO did not provide the opportunity of the cross examination and Id CIT (A) also held that there was no need to give the opportunity of cross examination. Thus, the lower authorities violated the principle of natural justice, which tenders the assessment void ab-initio.

13. In support of the above proposition, reliance was placed on the decision of Hon'ble Supreme Court in the case of Andaman Timber Industries V/S Commissioner of Central Excise, Kolkata-II 2016 (15) SCC 785 (SC) (Copy at Case Law PB 808-811 filed in case of M/s Kota Dall Mill), wherein Hon'ble Supreme Court has held that:-

“According to us, not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the assessee. It would be pertinent to note

that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the appellant themselves to explain as to why their ex-factory prices remain static. It was not for the Tribunal to have guess work as to for what purposes the appellant wanted to cross-examine those dealers and what extraction the appellant wanted from them”.

- ii) **Commissioner of Income Tax v. Ashwani Gupta, 2010 322 ITR 396 (Del);** The Delhi High Court held that once there is a violation of the principles of natural justice inasmuch as when its seized material was not provided to an assessee nor was he permitted to cross examine a person on whose statement the Assessing Officer relied, it would amount to deficiency, amounting to a denial of opportunity and therefore violation of principles of natural justice. In that case CIT (A) had deleted addition made by the Assessing Officer since the Assessing Officer had failed to provide copies of seized material to the assessee nor had he allowed the assessee to cross-examine the party concerned. The Division Bench held that once there is violation of the principles of natural justice inasmuch as seized material was not provided to the assessee nor was given opportunity of cross examining the person whose statement was being used against the assessee the order could not be sustained.
- iii) **H.R. Mehta V. Assistant Commissioner of Income Tax 387 ITR 561(Bombay);**

“In our view in the light of the fact that the monies were advanced apparently account payee cheque and was repaid vide account payee cheque the least that the revenue should have done was to grant an opportunity to the assessee to meet the case against him by providing the material sought to be used against assessee in arriving before passing the order of reassessment. This not having been done, the denial of such opportunity goes to root of the matter and strikes at the very foundation of the reassessment and therefore renders the orders passed by the CIT (A) and the Tribunal vulnerable. In our view the assessee was bound to be provided with the material used against him apart from being permitting him to cross examine the deponents. Despite the request dated 15th February, 1996 seeking an opportunity to cross examine the deponent and furnish the assessee with copies of statement and disclose material, these were denied to him. In this view of the matter we are inclined to allow the appeal on this very issue”.

- iv) Decision of Hon’ble ITAT Jaipur Bench in the case of **Shri Prateek Kothari in appeal No. 159/JP/16 order dated 16/12/16 (Copy at Case Law PB 827-848 filed in case of M/s Kota Dall Mill) is applicable for this case. In the case of Shri Prateek Kothari** the assessee had requested for cross examination of Shri Sanbtosh Choubey Shri Ajit Sharma, Shri Rajesh Kumar Singh and other persons which was denied by the Id. CIT(A). The ITAT Coordinate Bench in the case of Prateek Kothari (supra) has given verdict that without providing opportunity of cross-examination of the materials gathered and statement recorded behind the assessee cannot be used. In this case Hon’ble ITAT has held that:-

“2.8 We have heard the rival contentions and perused the material available on record. The transaction under question relates to unsecured loans taken by the assessee amounting to Rs 1 Crores from M/s Mehul Gems Pvt Ltd during the impugned assessment year and not accepting the said loan transaction as a genuine transaction by the Assessing officer and the resultant

addition made under section 68 of the Act. Undisputedly, the primary onus to establish genuineness of the loan transaction is on the assessee. In the instant case, the assessee has provided the necessary explanation, furnished documentary evidence in terms of tax filings, affidavits and confirmation of the Directors, bank statements of the lender, balance sheet of the lender company, and an independent confirmation has also been obtained by the Assessing officer to satisfy the cardinal test of identity, creditworthiness and genuineness of the loan transaction. However, the Assessing officer has not given any finding in respect of such explanation, documentary evidence as well as independent confirmation. Apparently, the reason for not accepting the same is that the Assessing officer was in receipt of certain information from the investigation wing of the tax department as per which the transaction under consideration is a bogus loan transaction. The said information received from the investigation wing thus overweighed the mind of the Assessing officer. The Assessing officer stated that the primary onus is on the assessee to establish the genuineness of the transaction claimed by it and if the investigation done by the department leads to doubt regarding the genuineness of the transactions, it is incumbent on the assessee to produce the parties alongwith necessary documents to establish the genuineness of the transaction. In response, the assessee submitted that Shri Bhanwarlal Jain is not known to him and regarding various incriminating documentary evidences seized during the course of search and statements recorded of Shri Bhanwarlal Jain and other persons, he specifically requested the AO to provide copies of such incriminating documents and statement of all various persons recorded in this regard and provide an opportunity to the assessee to cross examine such persons. However, the AO didn't provide to the assessee copies of such incriminating documents and statements of various persons recorded and allow the cross-examination of any of these persons. While doing so, the AO stated that "in his statements, Bhanwarlal Jain had described that they are indulged in providing accommodation entries of bogus unsecured loans and advances through various Benami concerns (70) operated and managed by them. This admission automatically makes all the transactions done by them as mere paper transactions and in these circumstances, further as per the information name and address of

assessee and the Benami Concern through which accommodation entry of unsecured loans was provided is appearing in the list of beneficiaries to whom the said Group has provided. This admission is sufficient to reject the contentions of the assessee.” Further, regarding cross examination, the AO stated that “the right of cross examination is not an absolute right and it depends upon the circumstances of each case and also on the statute concerned. In the present case, no such circumstances are warranted as in the list of beneficiaries to whom accommodation entries were provided by the said group categorically contains the name and address of the assessee. Further the group has categorically admitted to providing of accommodation entries of unsecured loans through various benami concerns.” The AO further relied upon the decision of Hon’ble Supreme Court in the case of C. Vasantlal & Co. Vs. CIT 45 ITR 206(SC) and Hon’ble Rajasthan High Court in case of Rameshwarlal Mali vs. CIT 256 ITR 536(Raj.) among others. In this regard, it was submitted by the assessee that if the entries and material are gathered behind the back of the assessee and if the AO proposes to act on such material as he might have gathered as a result of his private enquiries, he must disclose all such material to the assessee and also allow the cross examination and if this is not done, the principles of natural justice stand violated.

2.9 *In light of above discussions, in our view, the crux of the issue at hand is that whether the principle of natural justice stand violated in the instant case. In other words, where the AO doesn’t want to accept the explanation of the assessee and the documentation furnished regarding the genuineness of the loan transaction and instead wants to rely upon the information independently received from the investigation wing of the department in respect of investigation carried out at a third party, can the said information be used against the assessee without sharing such information with the assessee and allowing an opportunity to the assessee to examine such information and explain its position especially when the assessee has requested the same to the Assessing officer.*

2.10 *In this regard, the Hon’ble Supreme Court in the case of Dhakeswari Cotton Mills Ltd. v. CIT (1954) 26 ITR 775 (SC) (Copy at Case Law PB 812-818 filed in case of M/s Kota Dall Mill) has held that “The rule of law on*

this subject has been fairly and rightly stated by the Lahore High Court in the case of Seth Gurmukh Singh where it was stated that while proceeding under sub-section (3) of section 23, the Income-tax Officer, though not bound to rely on evidence produced by the assessee as he considers to be false, yet if he proposes to make an estimate in disregard of that evidence, he should in fairness disclose to the assessee the material on which he is going to find that estimate; and that in case he proposes to use against the assessee the result of any private inquiries made by him, he must communicate to the assessee the substance of the information so proposed to be utilized to such an extent as to put the assessee in possession of full particulars of the case he is expected to meet and that he should further give him ample opportunity to meet it.” It was held in that case that “In this case we are of the opinion that the Tribunal violated certain fundamental rules of justice in reaching its conclusions. Firstly, it did not disclose to the assessee what information had been supplied to it by the departmental representative. Next, it did not give any opportunity to the company to rebut the material furnished to it by him, and lastly, it declined to take all the material that the assessee wanted to produce in support of its case. The result is that the assessee had not had a fair hearing.”

The Hon’ble Supreme Court in case of C. Vasantlal & Co. Vs. CIT 45 ITR 206 (SC) has held that “the ITO is not bound by any technical rules of the law of evidence. It is open to him to collect material to facilitate assessment even by private enquiry. But, if he desires to use the material so collected, the assessee must be informed about the material and given adequate opportunity to explain it. The statements made by Praveen Jain and group were material on which the IT authorities could act provided the material was disclosed and the assessee had an opportunity to render their explanation in that regard.”

The Hon’ble Supreme Court in case of Kishinchand Chellaram v. CIT (1980) 125 ITR 713 (SC) (Copy at Case Law PB 585-591 filed in case of M/s Kota Dall Mill) has held that “whether there was any material evidence to justify the findings of the Tribunal that the amount of Rs. 1,07,350 said to have been remitted by Tilokchand from Madras represented the undisclosed

income of the assessee. The only evidence on which the Tribunal could rely for the purpose of arriving at this finding was the letter, dated 18-2-1955 said to have been addressed by the manager of the bank to the ITO. Now it is difficult to see how this letter could at all be relied upon by the Tribunal as a material piece of evidence supportive of its finding. In the first place, this letter was not disclosed to the assessee by the ITO and even though the AAC reproduced an extract from it in his order, he did not care to produce it before the assessee or give a copy of it to the assessee. The same position obtained also before the Tribunal and the High Court and it was only when a supplemental statement of the case was called for by this Court by its order, dated 16-8-1979 that, according to the ITO, this letter was traced by him and even then it was not shown by him to the assessee but it was forwarded to the Tribunal and it was for the first time at the hearing before the Tribunal in regard to the preparation of the supplemental statement of the case that this letter was shown to the assessee. It will, therefore, be seen that, even if we assume that this letter was in fact addressed by the manager of the bank to the ITO, no reliance could be placed upon it, since it was not shown to the assessee until at the stage of preparation of the supplemental statement of the case and no opportunity to cross examine the manager of the bank could in the circumstances be sought or availed of by the assessee. It is true that the proceedings under the income-tax law are not governed by the strict rules of evidence and, therefore, it might be said that even without calling the manager of the bank in evidence to prove this letter, it could be taken into account as evidence. But before the income-tax authorities could rely upon it, they were bound to produce it before the assessee so that the assessee could controvert the statements contained in it by asking for an opportunity to cross examine the manager of the bank with reference to the statements made by him.”

2.11 *In light of above proposition in law and especially taking into consideration the decision of the Hon'ble Supreme Court in case of C. Vasantlal & Co. (supra) relied upon by the Revenue and which actually supports the case of the assessee, in the instant case, the assessment was completed by the AO relying solely on the information received from the investigation wing, statement recorded u/s 132(4) of Shri Bhanwarlal Jain*

and others, and various incriminating documentary evidence found from the search and seizure carried out by Investigation Wing, Mumbai on the Shri Bhanwarlal Jain group on 03.10.2013. It remains undisputed that the assessee was never provided copies of such incriminating documents and statements of Shri Bhanwarlal Jain and various persons and an opportunity to cross examine such persons though he specifically asked for such documents and cross examination. On the other hand, the burden was sought to be shifted on the ITA No. 159/JP/16 The ACIT, Central -2, Jaipur vs. M/s Prateek Kothari, Jaipur 21 assessee by the A.O. It is clear case where the principle of natural justice stand violated and the additions made under section 68 therefore are unsustainable in the eye of law and we hereby delete the same. The order of the Id CIT(A) is accordingly confirmed and the ground of the Revenue is dismissed.”

14. It was also argued by the Id AR that the assessment order has been passed on the basis of unacceptable, unreasonable, incorrect and misconceived interpretation of the various judicial pronouncements of Hon'ble Apex Court and Hon'ble High Courts as relied upon by the Ld. AO, which is explained as under:

- (i) **Dhakeswari Cotton Mills Ltd V. Commissioner of Income Tax, West Bengal (1954) 26 ITR 775 (SC):**

Ld. AO has proceeded with to pass the assessment order in violation of the principles and ratio laid down by the Hon'ble Apex Court in the aforesaid judgment.

While placing reliance upon the judgment of Hon'ble Apex Court in case Dhakeswari (supra) , Ld. AO declined access to the documents, relied upon by him and did not afford opportunity for cross-examination of witnesses, statements of which were recorded behind the back of Appellant on the pretext that Income Tax Officer is not fettered by

technical rules of evidence and pleadings and he is entitled to act on material which may not be accepted as evidence in a court of law. However, Id. AO failed to appreciate that Hon'ble Apex Court in the case of Dakeshari (supra) has held that in making the assessment the Income Tax Officer is not entitled to make a pure guess and make an assessment without reference to any evidence or any material and also that material relied upon by the Income Tax Officer should be disclosed to the Assessee, which in the case of Appellant, Ld. AO failed to do. The relevant para of the above judgment is reproduced below:

“In this case we are of the opinion that the Tribunal violated certain fundamental rules of justice in reaching its conclusions. Firstly, it did not disclose to the assessee what information had been supplied to it by the departmental representative. Next, it did not give any opportunity to the company to rebut the material furnished to it by him, and lastly, it declined to take all the material that the assessee wanted to produced in support of his case. The result is that the assessee had not had a fair hearing”.

“in the result we allow this appeal, set aside the order of the Tribunal and remand the case to it with directions that in arriving at its estimate of gross profits and sales it should give full opportunity to the assessee to place any relevant material on the point that it has before the Tribunal, whether it is found in the books of account or elsewhere and it should also disclose to the assessee the material on which the Tribunal is going to found its estimate and then afford him full opportunity to meet the substance of any private enquiries made by the Income Tax Officer if it is intended to make the estimate on the foot of those enquiries”.

In view of the above, it is evident reliance placed by the Ld. AO on the judgment of Hon'ble Apex Court in case of Dhakeswari (supra) is misconceived.

(ii) **Roshan Di Hatti v. CIT (1977) 107 ITR 938 (SC) and Kale Khan Mohammed Hanif v. CIT [1963] 50 ITR 1 (SC):**

The reliance has been placed by the Ld. AO on the aforesaid judgments of Hon'ble Apex Court to substantiate that prima facie onus is always on the assessee to prove the cash credit entry found in the books of account of the assessee and where the nature and source thereof cannot be explained satisfactorily, it is open to the revenue to hold that it is the income of the assessee and no further burden is on the revenue to show that the income is from any particular source.

In this context, it is submitted that in the present case of the Appellant, Appellant has already discharged its prima facie onus to prove the cash credit by furnishing relevant documents substantiated identity, creditworthiness and genuineness of the transaction. The Ld. AO could not point out any defects in the documents or material so furnished by the appellant. However, Ld. AO failed to apply ratio laid down by Hon'ble Apex Court that burden of proof is fluid for the purposes of Section-68. Once assessee has submitted basic documents relating to identity, genuineness of transaction and creditworthiness then AO must do some inquiry to call for more details to invoke Section 68. However, in the instant case of Appellant, the burden of proof for identity, creditworthiness and genuineness of the transaction was duly discharged by the Appellant by submitting all the relevant records and affidavit of respective Lenders. The respective Lenders have also filed relevant documents with Ld. AO and respective authorities, in reply to notice under Section-131 and 133(6) of the Act. It is also pertinent to mention that no authorities raised any doubt regarding the truthfulness of the document, furnished by the Appellant or respective Lenders. Thus, the reliance placed by the Ld. AO is not only misconceived but also

misinterpretation of the law laid down by Hon'ble Apex Court. Furthermore, the Ld. AO did not appreciate the ratio decided by the Hon'ble Apex Court in Roshan Di Hatti case (ibid), which is reproduced below:

“the Tribunal acted without any material or, in any event, the finding of fact reached by the Tribunal was unreasonable or such that no person acting judicially and properly instructed as to the relevant law would come to such a finding. We accordingly allow the appeal, set aside the order of the High Court and answer the question referred by the Tribunal in negative. The Commissioner will pay the costs of the appeal to the assessee”.

The case of Appellant is squarely covered under the aforesaid finding of Hon'ble Apex Court as the finding of the Ld. AO is unreasonable and any person acting judiciously and properly instructed as to the relevant law would not have come to such a finding. The non-appreciating of facts properly and non-appreciation of record by Ld. AO and as also not adopting judicious approach has resulted in unreasonable and arbitrary assessment order.

The Judgment of Kale Khan Mohammed Hanif (ibid) is distinct from the case of Appellant and has no applicability to the Appellant. The observations of Hon'ble Apex Court are reproduced below:

“It was open to the assessee to raise the question that the finding that those amounts were income received from undisclosed sources was not based on any evidence or was, for other reasons, perverse”. And also *“The assessee accepted the decision of the Tribunal and did not move the High Court to direct a reference in regard to those questions under Section 66(2). Those questions, therefore, cannot be raised in this Court. We have deed with the reference made on the basis that*

the finding that the amounts of the credit entries were income received from undisclosed sources was disputed only on the ground that the income from the business had been computed on the basis of an estimate. In the circumstances of the case we could not have done anything else”.

It is to be noted that the documentary proof substantiating the identity, credit worthiness and genuineness of the transaction, furnished by the Appellant, remained undisputed by the Ld. AO. Thus, placing reliance to the said judgment with that of the case of Appellant is a misconceived interpretation of the Ld. AO.

(iii) **Commissioner of Income-tax v. Durga Prasad More [1971] 82 ITR 540 (SC) and Sumati Dayal v. Commissioner of Income-tax [1995] 80 TAXMANN 89/214 ITR 801 (SC):**

Ld. AO, while placing reliance upon the aforesaid judgments has held that the theory of preponderance of human probability as pronounced by the Hon'ble Apex Court in the case of CIT v. Durga Prasad More (1971) 82 ITR 540 and Sumati Dayal v. CIT (1995) 80 Taxmann 89/214 ITR 801 (SC) is of utmost importance. In the cases where it has been established that the source company is a near 'Paper Company' solely engaged in the activity of providing accommodation entries, the presumption on the basis of human probability is important. Ld. AO has placed reliance upon the observation of Hon'ble Supreme Court in CIT v. Durga Prasad More (1971) 82 ITR 540 that it is true that an apparent must be considered real until it is shown that there are reasons to believe that the apparent is not the real and a little probing was sufficient in the present case to show that the apparent was not the real. The taxing authorities were not required to put on blinkers while looking at the documents produced before them. However, it is humbly submitted that while interpreting the aforesaid judgment, the Ld. AO failed to consider the finding of Hon'ble Apex

Court that “*it is true that an apparent must be considered real until it is shown that there are reasons to believe that the apparent is not the real*”.

In the case of the appellant, all the documentary evidences were produced before Ld. AO both by the appellant and by the respective lenders as well and the documents produced are the public documents which are available on public domain itself. These documents include documents filed with ROC, bank statements, assessment carried out by the Income Tax Department and so on. The ld. AO did not point out any defects in such documents. **It is further most importantly relevant to mention here that the Income Tax department carried out intensive search over the appellant group and as a result of search no evidence was found to prove that the assessee was having some undisclosed income which was routed in books of accounts in the shape of unsecured loans.** Thus, the Ld. AO must have considered apparent as real as Ld. AO failed to establish and also to show any reason to believe that the apparent is not the real. Unless and until there was any reason to disbelieve the truthfulness of documentary evidences, there was no case and basis with the Ld. AO to treat the apparent as not real only on the basis of guess, assumptions, presumptions and surmises, which is not permissible under the law. Furthermore, it was the onus of the Ld. AO to prove that apparent was not the real, for which he was at liberty to call upon any further clarification and subsequent documents. Since, it is not proved that the documents furnished were not the true, no assumption and presumption can be drawn that the apparent was not the real. The test of human probability is also not applicable in the case of appellant as reality of the transactions carried out by the appellant in the course of normal business activities have been duly proved beyond doubt with the documentary evidences and confirmed by the respective lenders/parties also and even acceptable before the judicial authorities. It shows misconceived interpretation by the Ld. AO without having any nexus with the facts of the case of the appellant.

(iv) **Commissioner of Income Tax v. Independent Media (P) Ltd 210 Taxmann 14 (Delhi) (2012)**

Though the Ld. AO has placed reliance upon the aforesaid judgment to substantiate his action for making addition under Section-68 of the Act but the act of Ld. AO is derogatory to the aforesaid judgment of Hon'ble High Court of Delhi. Ld. AO did not provide opportunity to the cross-examination of so-called witnesses, relied upon by Ld. AO, which must have been allowed as held by the Hon'ble High Court of Delhi in the above judgment. The relevant paras are reproduced below:

“the Tribunal, however, may be justified in directing the assessing officer to afford an opportunity to the assessee of cross-examination the persons who had allegedly given statements before the Investigation Wing implicating the assessee in the modus operandi adopted by them, namely, giving of accommodation entries for commission”.

“the assessee appears to have sought cross-examination of those persons but that opportunity was not given by the assessing officer as found by the Tribunal, a position not disputed before us on behalf of the Revenue”.

“We may only state that the assessing officer shall act in accordance with law”.

Since, the act of the Ld. AO is not in accordance with the law, the Ld. AO failed to appreciate the ratio laid down by Hon'ble Court while carrying out assessment proceedings in the instant case of Appellant. It is humbly submitted that ratio of the aforesaid judgment rather supports the contention of the Appellant and proves its case and not the case made out by the Ld. AO.

(v) **A. Govindarajulu Mudaliar Vs. CIT [1958] 34 ITR 807 (SC):**

The facts and circumstances of case of Appellant has no relevancy, even remotely, with the judgment of Hon'ble Apex Court, as relied upon by

the Ld. AO. In that case the Appellant did not prove his version that the gift was alleged to have been made by the Appellant to his aunt and by her to him. More so, the conclusion to which the Appellate Tribunal came amply warranted by the facts of the case. Furthermore, in that case it was held that *“But seeing that in this case the Appellant had moved the High Court and a decision has been pronounced adverse to him and this has become final obviously it would not be open to him to question the correctness of the decision of the Tribunal on grounds which might have taken in an appeal against the judgment of the High Court”*. Thus, the facts and law of the aforesaid case has no relevancy to that of the case of the Appellant.

(vi) **G.R. Siri Ram V. CIT (1975) 98 ITR 337 (P&H):**

The case is also not relevant to the case of Appellant inasmuch as in this case the Appellant had agreed before the ITO that there was no evidence available with the Ladies in support of the cash credits mentioned above. The case of Appellant is not relevant to the facts, mentioned above. In the instant case of Appellant-Company furnished all the documents showing source of the receipt of the funds and also submitted documentary evidences to support its version, which remained un-rebutted in the hand of Ld. AO. Considering the facts regarding discharge of onus by the Appellant, the aforesaid judgment, relied upon by the Ld. AO has no relevancy.

(vii) **CIT V. Kishori Lal & Santoshi Lal (1995) 216 ITR 9 (Raj.):**

Though, the Ld. AO has placed reliance upon the aforesaid judgment but act of the Ld. AO is contrary to the ratio laid down by the Hon'ble High Court of Rajasthan in the aforesaid judgment. The relevant para from the aforesaid judgment is reproduced below:

“In the assessment proceedings, the Income Tax Officer is supposed to follow the principle of natural justice and when a notice is given to the

assessee to explain such an entry, the explanation which has been given has to be taken into consideration”.

In the instant case of Appellant, Ld. AO has acted in utter disregard to the principle of natural justice and neither considered documentary evidences nor considered the explanation of the Appellant. Furthermore, Ld. AO without appreciating what has been held in the aforesaid judgment of Hon’ble Court has acted in derogatorily to the aforesaid pronouncement itself.

It has clearly been held by the Hon’ble Court that **“If the explanation is not supported by any documentary or other evidence, then the deeming fiction credited by Section-68 can be invoked”.**

In the instant case of the Appellant ample documentary evidences were submitted by the Appellant as well as by the Lender Companies. More so, the Lender Companies executed affidavits duly supported by the relevant records and the same were submitted to the Ld. AO along with the explanation. Furthermore, the respective Lenders duly complied with the notices under Section-131 and/or Section-133 of the Act. Thus, considering the ratio laid down by the Hon’ble Court the invoking of Section-68 by the Ld. AO is unlawful.

(viii) **P.V. Raghava Reddy V. CIT (1956) 29 ITR 942 and M.M. A.K. Mohindeen Thambay & Co. V. CIT (1959) 36 ITR 481:**

The aforesaid cases, relied upon by the Ld. AO have no relevancy to the case of Appellant. In this case the Hon’ble Court held that the question of burden of proof cannot be made to depend exclusively upon the fact of a credit entry in the name of the assessee or in the name of a third party. In either case, the burden lies upon the assessee to explain the credit entry, though the onus might shift to the ITO under certain circumstances. In the instant case of the Appellant, the Appellant discharged its onus and burden of proof, in respect of unsecured loan obtained by it by submitting

documentary evidences of the respective Lenders before the Ld. AO for substantiating identity, creditworthiness and genuineness of the transactions. The documentary evidences produced by the Appellant remained un-rebutted, therefore, onus remained shifted to the Ld. AO, which was not discharged by Ld. AO. There is clear distinction between two types of matters (1) where the explanation and evidences are produced by an assessee and (2) where no explanation and evidences are produced by the assessee. Since, the Appellant case falls under (1) above, the case relied upon by the Ld. AO is distinct and not applicable to the case of the Appellant. More so, the Ld. AO has not made out a case that the amount standing in their name or in credit did not belong to lender but belong to the assessee, which was prima facie case made out department in both the judgments relied upon by the Ld. AO.

(ix) **Shanker Industries V. Addl CIT (1978) 114 ITR 689 (Cal.):**

While placing reliance upon the aforesaid judgment, Ld. AO has tried to substantiate its action under Section-68 of the Act. However, Ld. AO failed to discharge its onus, as laid down by the Hon'ble Court in this judgment. The relevant para from the aforesaid judgment is reproduced below:

“We would like to observe that the law on this point is now well settled. It is necessary for the assessee to prove prima facie the transaction which results in a cash credit in his books of account. Such proof includes proof of the identity of his creditor, the capacity of such creditor to advance the money and, lastly, the genuineness of the transaction. These things must be proved prima facie by the assessee and only after the assessee has adduced evidence to establish prima facie the aforesaid, the onus shifts on the department”.

15. In view of above, it was contended that the cases cited by AO are entirely distinguished from those the appellants case or AO failed to apply the ratio laid down by the Hon'ble Courts in those cited cases, as

such no reliance should be placed on the cases, having no relevancy with the Appellant case. However, most of the cases, cited by the AO are supporting the contention of the Appellant, as submitted above. In view of the above, impugned assessment orders for AY 2010-11 and AY 2011-12 deserve to be quashed as the same is bad in law, perverse and without jurisdiction and passed in violation of principles of natural justice.

16. We have heard the rival contentions and carefully gone through the orders of the authorities below. We also perused the order passed by the Coordinate Bench in group case, as cited above. We had also deliberated on the judicial pronouncements referred by the lower authorities in their respective orders as well as cited by the Id. AR and Id. DR during the course of hearing before us in the context of factual matrix of the case. In the instant case, we find that the time limit prescribed for issue of notice u/s 142(1)/143(2) of I.Tax Act for AY 2010-11 & AY 2011-12 has expired before the search. Therefore, the assessment for AY 2010-11 & A.Y 2011-12 was deemed completed. After the assessment completed for the above years, the department carried out search & seizure operations on 02.07.2015. The Income Tax department carried out intensive search and seizure operations over the assessee and during the course of search no material found from the

possession of the assessee which shows that the unsecured loan and share capital & Premium received by the assessee during the year from various companies are not genuine/bogus. We found that the similar issues have been dealt by the Tribunal in the group concern of the assessee namely M/s Kota Dall Mill and M/s Baran Roller Flour Mills as quoted above. Respectfully following the decision of the Coordinate Bench in group case of the assessee we not find any merit in the addition so made by the Assessing Officer, in so far as assessments were not abated and no incriminating material was found during the course of search. With regard to ground No. 2 raised by the assessee against the addition made without providing opportunity of cross examination, the same is covered by the order of the Tribunal in the group concern of M/s Kota Dall Mill page No. 76 to 87 and the Baran Roller Flour Mills page 57 to 91.

17. By the impugned order, the Id. CIT(A) has deleted the addition made with respect to the loan taken from M/s Sangam Distributors Pvt. Ltd., M/s Teac Consultants Private Limited and M/s ISIS Mercantiles Pvt. Ltd. At the outset, it was submitted by the Id AR that the issue with respect to the loan taken from the above three concerns are squarely covered by the decision of the Coordinate Bench decision in the case of M/s Kota Dall Mill Vs DCIT order dated 31/12/2018. In respect of the

loan of Rs. 1.30 crores in respect of share capital and premium taken from M/s Sangam Distributors Pvt. Ltd., the Tribunal has decided in the issue in the case of M/s Kota Dall Mill Vs. DCIT (supra) for the A.Y. 2010-11 and in the case of DCIT Vs. M/s Baran Roller Flour Mills P. Ltd. order dated 11/01/2019 in ITA No. 1206 & 2017/JP/2018 and CO Nos. 45 & 46/JP/2018. The précised observation of the Tribunal in the case of Kota Dall Mills Vs. DCIT (supra) are from page No. 92 to 102 as reproduced under:

“15. We have considered the rival submissions as well as the relevant material on record. The AO has made the addition on account of unsecured loans taken from all the parties whereas the Id. CIT (A) has deleted the addition in respect of the loans taken from M/s. Birla Arts Pvt. Ltd., M/s. Teac Consultant Pvt. Ltd and M/s. Sangam Distributors Pvt. Ltd. and confirmed the addition made on account of loan taken from M/s. Jalsagar Commerce Pvt. Ltd. The issue of addition made in respect of the unsecured loans taken from M/s. Jalsagar Commerce Pvt. Ltd. was considered and decided by us in the assessee’s appeal. The revenue is aggrieved by the order of the Id. CIT (A) as the unsecured loans taken from these three companies were deleted on the ground that the AO was not having any material to substantiate that these companies are controlled by so called entry operators. The relevant finding of the Id. CIT (A) in para 6.1 to 6.14 are as under :

6.1 As discussed in para 4.4.8 above, in respect of these three lenders namely M/s Birla Arts Private Limited, M/s Teac

Consultants Private Limited and M/s Sangam Distributors Private Limited adverse findings alongwith eloquent evidences in the form of statement on oath of relevant entry operators are not visible in the reports dated 28.11.2017 and 06.12.2017 from Investigation Directorate, Kolkata and therefore it could not be treated as shell company.

6.2 Now, coming to the loan from M/s Birla Arts Private Limited no notice under Section 131 or 133(6) of the Act was issued to this company, either by the AO or by the concerned AO or by the DDIT (Inv.) Kolkata. This shows that no independent enquiry was done by the AO to establish that the said companies were shell companies, blind reliance has been placed by the AO on the investigation report of the DDIT, Kolkata. Also, on bare perusal of the assessment order, it is evident that the name of the said companies does not appear in the statement of any of the entry operators as reproduced by the AO in the Assessment Order.

6.3 As far as the remaining lender companies namely, M/s Teac Consultants Private Limited and M/s Sangam Distributors Pvt. Ltd. are concerned, it is evident from the documents placed on record that Notice was issued by DDIT, Kolkata u/s 131 to these companies which was duly complied with and relevant documents were filed. There is no fact on record that the notices remained unserved or these companies were not found existent on the given addresses. Furthermore, Affidavit of the directors were also submitted wherein the Directors confirmed providing unsecured loan to the Appellant and source of providing the said loan. Also, it is evident from the assessment Order that no statement/evidence has been relied upon or provided by the AO

for substantiating that these companies are controlled by the so-called Entry Operators.

6.4 For these three creditors namely, M/s Birla Arts Private Limited, M/s Teac Consultants Private Limited and M/s Sangam Distributors Private Limited, the Appellant in discharge of its onus u/s 68 of the Act has filed confirmation of accounts as well as bank statement reflecting the transactions with other substantiating documents along with assessment orders in case of lender companies, which are available at page no.443 to 644 of PB. From these documentary evidences placed on record, identity, creditworthiness and genuineness of transactions is established. There is no gain saying that the onus squarely lies on the appellant to prove the identity, creditworthiness and genuineness of the cash credits. In the case of Addl. CIT v. Bahri Bros. (P) Ltd. [1985] 154 ITR 244 (Pat), the Hon'ble Patna High Court has held "*if the loans are given by an account paying cheque, it amounts to identification of the parties and discharge of burden by the borrower.*" In view of the above, it is clear that Appellant discharged its burden u/s 68 of the Act. Even otherwise, there is no adverse finding of any investigation conducted by the department in relation to these companies. Therefore, in the absence of any independent inquiry and any adverse findings to rebut the evidences filed by the Appellant, I find that the addition in respect of unsecured loans from 03 companies namely, M/s Birla Arts Private Limited, M/s Teac Consultants Private Limited and M/s Sangam Distributors Private Limited totaling to Rs. 12,36,40,000/- is unjustified; firstly, on the ground that no inquiries were made to rebut the evidences filed by the Appellant

and secondly, on the ground that Appellant duly discharged its burden casted upon u/s 68 of the Act to explain nature and source of the transactions by proving the identity, creditworthiness of creditor and genuineness of the transaction. In particular, none of the material or statements have been provided in the Assessment Order wherein names of the said companies are mentioned. Notably, the transactions with the said four companies are duly verifiable from confirmation of accounts placed at page no. 453 to 455, 532 to 534 & 588 to 589 of PB with supporting bank statements placed at page no. 444 to 452, 521 to 531 & 571 to 587 PB and have been carried out through banking channels only and thus, appellant has duly proved the identity, creditworthiness and genuineness of the transactions.

6.5 Furthermore, from the perusal of documentary evidences submitted by the Appellant, it is seen that transactions have been done through banking channels and on the date of making of loans, there is balance available in the accounts of the borrowers, which proves the creditworthiness and genuineness of the transactions. There is no case of any cash deposition in the account of any of the creditors at the time of issuing cheques/RTGS in favour of the Assessee. Therefore, in view of the settled judicial precedent in case of CIT V. VARINDER RAWLLEY [2014] 366 ITR 232 (PUNJAB & HARYANA), CIT V. VIJAY KUMAR JAIN [2014] 221 TAXMAN 180, CIT v. Victor Electrodes Ltd. [2010] 329 ITR 271, Addl. CIT v. Bahri Bros. (P) Ltd. [1985] 154 ITR 244 (Pat) and others as referred by the Appellant, I am of the considered view that Appellant duly discharged its burden casted upon it u/s 68 of the Act. It is further seen that no notice u/s 131 or 133(6) of the IT Act were issued to

M/s Birla Arts Private Limited, however as far as the companies M/s Teac Consultants Private Limited and M/s Sangam Distributors Private Limited are concerned, these have duly replied to the notices issued by DCIT/DDIT(Inv.), Kolkata in respect of commission, these facts remain uncontroverted by the AO.

6.6 The AO during assessment proceedings took negative inference from the statement of Shri Rajendra Agarwal recorded during search u/s 132(4) wherein he made disclosure in respect of Long Term Capital Gain in his individual hands. I have gone through the statement of Shri Rajendra Agarwal and his disclosure made in his statement, Notably, the disclosure made was in his personal capacity only and with respect to LTCG only and not in respect of any other transactions be it be receipt of unsecured loans. Further, Rajendra Agarwal is not a partner in the Appellant Firm. Therefore, I find that in the absence of any nexus of the Statement of Shri Rajendra Agarwal with the appellant firm or its total income, this basis of addition adopted by the AO is farfetched & cannot be concurred.

6.7 It is further seen that AO has not brought any specific defect / discrepancies in the direct evidence brought on record by the Appellant. The AO has observed that on the date of debit in the account statement of creditor, there is corresponding credit entry of equal amount, however, this observation of the AO is itself not sufficient to prove beyond doubt that Appellant routed its unaccounted income by these companies rather it proves the source in the hands of the Appellant. It is usual business practice, while making loans to party, funds are required to be arranged by the lender, therefore reflection of such entries in bank statement

doesn't lead to draw any adverse inference against the Appellant. Needless to say that Appellant is not required to prove source of the source u/s 68 of the Act in view of the settled judicial precedents.

6.8 In my considered view, mere not believing an explanation cannot lead to a conclusion that the borrowed amount is the income of the assessee (borrower) from some undisclosed sources while in the present case, no evidences of any generation of undisclosed income or their utilization in the form of unsecured loans has been found and brought on record.

6.9 Similarly, I find that various observations of the AO on balance sheet / ITR of the lender companies are misconstrued, misconceived and are factually incorrect. I further find that the various other allegations/observations of the AO are misconceived and premature only and in view the appellant's submission made in para 10 as reproduced in Para No. 4.2 of this order, the same does not lead any where to draw any adverse inference against the Appellant. Further, the various case laws relied upon by the AO are distinguishable from the facts of the present case as categorically countered by the Appellant in his written submissions as mentioned in para 16 as reproduced in Para No. 4.2above.

6.10 It is settled judicial precedents that under the income tax law primary burden u/s 68 of the Act is on the Appellant and once this burden is discharged u/s 68 of the Act, no addition u/s 68 of the Act is justifiable in the hands of the Assessee in view of the judgments in case of Shree Barkha Synthetics Ltd. V/s Assistant Commissioner of Income-tax (2006) 155 TAXMAN 289 (RAJ.), COMMISSIONER OF INCOME-TAX, JAIPUR -II V. MORANI

AUTOMOTIVES (P.) LTD. [2014] 264 CTR 86 (RAJASTHAN-HC), CIT v. Orissa Corpn. (P.) Ltd. [1986] 159 ITR 78/25 Taxman 80F (SC), Commissioner of Income-tax v/s Mark Hospitals (P.) Ltd. [2015] 373 ITR 115 (Madras)(MAG.), Commissioner of Income-tax, Ajmer v. Jai Kumar Bakliwal [2014] 366 ITR 217 (Rajasthan), CIT v/s. Creative World Telefilms Ltd (2011) 333 ITR 100 (Bom), Commissioner of Income-tax-I v. Patel Ramniklal Hirji [2014] 222 Taxman 15 (Gujarat)(MAG.), Principal Commissioner of Income-tax-4 v. G & G Pharma India Ltd. [2016] 384 ITR 147 (Delhi) referred above which have been also been followed recently by Hon'ble Delhi Tribunal in case of ITO vs. Softline Creations (P) Ltd. in ITA No. 744/Del/2012 vide its order dated 10.02.2016. Further, Hon'ble Apex Court as well as High Court has held that once the identity of creditor is established, the department is free to reopen the assessment of creditor and no addition can be made in the hand of borrower as rightly held in case of CIT v/s Lovely Exports Pvt. Ltd. [2008] 216 CTR 195 (SC), Commissioner of Income-tax v. Rock Fort Metal & Minerals Ltd. [2011] 198 TAXMAN 497 (Delhi), Divine Leasing & Finance Limited [2008] 299 ITR 268 (Delhi) CIT v. Orissa Corporation (P.) Ltd. [1986] 159 ITR 78/25 Taxman 80F (SC) and others on this question of law.

6.11 Further, power to call for information/production of evidences or enforcing attendance under the law is given to the income tax authorities only and therefore, in view of the judgment CIT v/s Victor Electrodes Ltd. [2010] 329 ITR 271, the Appellant cannot be fastened upon the burden to produce the lenders before the assessing authorities though in the instance case, appellant has

cooperated in assessment by showing his willingness to produce the directors of lender companies and some directors/officer were also produced before the AO. Thus, in view of the judicial precedents referred above, under the facts and circumstances of the present case it is untenable to make any addition for alleged non-appearance by the concerned person before the authorities though they complied with the notices/summon issued to them.

6.12 In the present case in hand, I find that AO asked Assessee to produce lender companies without verifying the facts of lending money from respective jurisdiction assessing officer and without verifying their returns of income and balance sheet wherein these transactions are reported, accordingly the AO has not followed the principles laid down under section 68 of the Act. The Hon'ble Gujrat High Court in the case of Commissioner of Income-tax v. Ranchhod Jivabhai Nakhava [2012] 21 taxmann.com 159 (Guj.) has held that:-

Once the assessee has established that he has taken money by way of account payee cheques from the lenders who are all income tax assessees whose PAN have been disclosed, the initial burden under section 68 was discharged. It further appears that the assessee had also produced confirmation letters given by those lenders. [Para 15]

Once the Assessing Officer gets hold of the PAN of the lenders, it was his duty to ascertain from the Assessing Officer of those lenders, whether in their respective returns they had shown existence of such amount of money and had further shown that those amount of money had been lent to the assessee. If before verifying of such fact from the Assessing Officer of the lenders of the assessee, the Assessing Officer decides to examine the lenders and asks the assessee to further prove the genuineness and creditworthiness of the transaction, the Assessing Officer

*does not follow the principle laid down under section 68.
[Para 16]*

In the instance case before me , the AO has not followed the due procedure of law u/s 68 of the Act. Therefore, requiring the Assessee to produce the directors of the lender company was not legally tenable in view of the judgment of Gujrat High Court (supra).

6.13 It is noted that no clinching evidences has been brought on record that any unaccounted income was routed through unsecured loans by the Appellant Firm as no evidences as to receipt/payment of cash for receipt of unsecured loans were found during search in case of the Appellant. Mere suspicion howsoever strong cannot take place of evidence. Thus, in the absence of any incriminating material found during search to rebut the evidences filed by the Appellant, the impugned addition made in respect of unsecured loan u/s 68 of the Act is legally untenable and unjustified.

6.14 In view of the above discussion of relevant facts and following the several ratios on the subject from Hon'ble Apex Court, High Courts including jurisdictional High Courts, Tribunals including jurisdictional Tribunals, the impugned addition in respect of unsecured loans from 03 companies namely, M/s Birla Arts Private Limited, M/s Teac Consultants Private Limited and M/s Sangam Distributors Private Limited totaling to Rs.12,36,40,000/- is not sustainable and hence the same stands deleted.”

Thus the Id. CIT (A) was of the view that so far as the loans taken from M/s. Jalsagar Commerce Pvt. Ltd., the AO was having the statement of Shri Anand Sharma to the effect that the said company

was involved in providing accommodation entry and controlled by the entry operator whereas in respect of these three companies the AO was not having any document or even the statement of any person who are entry operators and controlling these companies so as to establish that the transactions are in the nature of bogus accommodation entries. We have already considered the issue on merits in respect of the addition made on account of unsecured loans taken from M/s. Jalsagar Commerce Pvt. Ltd. whereas the loans taken from these companies are even as per the revenue on better footings of genuineness than M/s. Jalsagar Commerce Pvt. Ltd. There is no dispute that the AO was not having any evidence or even any statement to impugn the transactions as bogus accommodation entries. Further, the assessee has produced all the relevant supporting documentary evidence as we have reproduced in the foregoing paras as referred by the Id. A/R of the assessee and these creditor companies were subject to regular assessments and scrutiny assessments under section 143(3) were completed by the department as per the details reproduced. Therefore, once these creditor companies are regularly assessed to tax and duly examined by the department at the scrutiny assessments, then the transactions of loans cannot be held as bogus when the same were accepted in the hands of the creditors. We further note that these companies were having sufficient funds in the shape of share capital, reserves and surplus. The details of the share capitals of these companies are as under :-

M/s Birla Arts Pvt. Ltd

Assessment Year	Financial Year	Share capital raised	
1998-1999	1997-1998	12,90,000	
1999-2000	1998-1999	16,82,000	
2003-2004	2002-2003	50,00,000	
2004-2005	2003-2004	2,74,40,000	

2005-2006	2004-2005	3,69,50,000	
2007-2008	2006-2007	3,26,00,000	
2010-2011	2009-2010	250,00,000	
2011-2012	2010-2011	20,00,000	
2014-2015	2013-2014	67,57,37,000	

M/s Teac Consultants Pvt. Ltd

Assessment Year	Financial Year	Share raised	capital
1996-1997	1995-1996	26,00,000	
2001-2002	2000-2001	73,98,000	
2003-2004	2002-2003	1,00,00,000	
2005-2006	2004-2005	4,85,50,000	
2007-2008	2005-2006	3,35,00,000	
2010-2011	2009-2010	2,76,00,000	
2011-2012	2010-2011	94,00,000	

M/s Sangam Distributors Pvt. Ltd.

Assessment Year	Financial Year	Share raised	capital
2005-2006	2004-2005	2,47,50,000	
2006-2007	2005-2006	10,50,00,000	
2007-2008	2006-2007	7,93,50,000	
2011-2012	2010-2011	2,50,00,000	
2013-2014	2012-2013	13,00,00,000	

These details clearly show that at the time of granting of loans to the assessee these companies were having sufficient funds. Further, we have already recorded the details of repayment made by the assessee of these loans and once regular repayment was there even prior to the date of search, then the transactions cannot be doubted as nothing can be achieved by taking the loan and then repaying the same through banking channel even if there is corresponding channelization of cash. As we have discussed earlier that the AO has not pointed out any discrepancy in the financial statements or in the bank account statements of the loan creditors to show that there was deposit or introduction of the cash prior to giving the loan to the assessee, accordingly, in view of the facts and circumstances of the

case as well as our finding on the issue of addition in case of M/s. Jalsagar Commerce Pvt. Ltd., we do not find any error or illegality in the order of Id. CIT (A) qua this issue.”

18. Similarly in the case of DCIT Vs. Baran Flour Mills Pvt. Ltd., the Tribunal has dealt the issue for the A.Y. 2010-11 as under:

“6. We have considered the rival submissions as well as the relevant material on record. For the assessment year 2010-11, the assessee received share capital with premium from two companies details of which are as under :-

- | | | |
|-----|------------------------------------|-----------------|
| (1) | M/s. Sangam Distributors Pvt. Ltd. | Rs. 90,00,000/- |
| (2) | M/s. Teac Consultants Pvt. Ltd. | Rs. 15,00,000/- |

There is no dispute that during the course of search and seizure no incriminating material was either found or seized disclosing any undisclosed income or indicating any bogus transaction of receipt of share capital and premium by the assessee from these two companies. Further, the AO has also not referred or relied upon any seized document while making the addition of the amount of Rs. 1,05,00,000/- on account of share capital and premium received from these two companies under section 68 of the IT Act. The sole basis of the addition made by the AO is the information received from the Investigation Wing Kolkata which is also in turn is nothing but the narration of the statements of various persons allegedly operators of bogus entry provider. The AO has referred to the statement of Shri Anand Sharma and other three persons as mentioned in the report of the Investigation Wing for treating the share capital and premium received from these two companies as undisclosed cash credit being the assessee’s own unaccounted and undisclosed income routed in the shape of share capital and

premium. It is also not disputed that the AO was not even having the alleged statement of Shri Amit Kedia and Shri Alok Harlalka but only a reference was made in the report of the Investigation Wing. Therefore, except the report of the Investigation Wing Kolkata, the AO was not having any other material in his possession to support his decision of treating the share capital and premium received from these two companies as bogus transaction and addition under section 68 of the Act. On the contrary, the assessee has produced the following documentary evidence in support of the claim :-

M/s Teac Consultants Pvt. Ltd

S. No.	Particulars	Paper Book Page No.
1	Copy of Ack. of ITR of AY 2010-11 along with computation sheet	426-427
2	Copy of Balance sheet of AY 2010-11 along with enclosures	428-433
3	Copy of relevant page of bank statement showing the entry of payment made to assessee.	434
4	Confirmation of account showing the transaction with assessee company along with ledgers from the books of share applicants	435-436
5	Copy of share allotment advice	437
6	Copy of share application form of equity share	438
7	Copy of affidavit of Mr Jitendra Sharma director of company.	439-442
8	Copy of balance sheet of company of 31.03.2010, 31.03.2011, 31.03.2012, 31.03.2013, 31.03.2014, 31.03.2015 and 31.03.2016.	443-449
9	Copy of assessment order passed in the case of above named company for AY 2005-06, AY 2006-07, AY 2012-13 and 2014-15.	450-469
10	Copy of ROC master data.	470-471
11	Copy of PAN card.	472
12	Certificate of Incorporation.	473

13	Copy of Certificate of NBFC Registration.	474
14	Copy of Summon no. 1433 dated 13.10.2017 and reminder summon no.-1592 dated 31.10.2017 issued by DDIT (Investigation), Unit-1(3), Kolkata u/s 131 of Income Tax Act, 1961 to M/s Teac Consultants Private Limited.	475-478
15	Copy of reply in response to summon issued to the company.	479-481
16	Copy of letter for confirmation of source of funds used for applying the shares along with supporting documents	482-485

M/s Sangam Distributors Pvt. Ltd.

S. No.	Particulars	Paper Book Page No.
1	Copy of Ack. of ITR of AY 2010-11 along with computation sheet	486-487
2	Copy of Balance sheet of AY 2010-11 along with enclosures	488-489
3	Copy of relevant page of bank statement showing the entry of payment made to assessee.	490
4	Confirmation of account showing the transaction with Assessee Company.	491
5	Copy of share application form of equity share	492-493
6	Copy of affidavit of Mrs Neelam Gautam director of M/s Birla Arts Pvt Ltd. On behalf of amalgamated company M/s Sangam Distributors Pvt Ltd.	494-497
7	Copy of order dated 19.07.2014 passed by Calcutta High Court regarding amalgamation of other companies in this company	498-524
8	Copy of balance sheet of company of 31.03.2010, 31.03.2011, 31.03.2012, and 31.03.2013.	525-528
9	Copy of assessment order passed in the case of above named company for AY 2006-07, AY 2007-08 and 2013-14.	529-540
10	Copy of ROC master data.	541-542
11	Copy of PAN card.	543
12	Certificate of Incorporation.	544

Thus it is manifest from the details of the documentary evidence produced by the assessee that the assessee established its claim of genuineness of the transaction as well as creditworthiness of these share applicants by showing the transactions in the books of accounts and financial statements of the share applicants, the availability of the funds to establish the capacity of the share applicants to subscribe to the share capital of the assessee with premium. Further, the income tax returns of the share applicants were also filed which show that all the transactions were disclosed in the return of income. Apart from the capacity of the share applicants, the assessee has also produced the bank statements of the share applicants to show that the payment of the money was made through banking channel and the AO has not pointed out any discrepancy either in the bank account statements of the share applicants or in the financial statements to show that there was any corresponding deposits of money prior to the payment to the assessee which could indicate a slightest scope of assessee's own money routed through share applicants. Therefore, in the absence of any such finding or any such discrepancy in the bank account statements and financial statements, the AO has not produced any material or record to contradict the documentary evidence filed by the assessee in support of the claim. Further, there is a decision of Hon'ble Calcutta High Court in case of M/s. Sangam Distributors Pvt. Ltd. approving the amalgamation of the company. The assessee also produced the confirmation and affidavits of the Directors of the share applicant companies apart from the financial statements to show the sufficiency of fund with the share applicants and regular business activities and flow of funds. Further, the assessee also produced the ROC Master Data of share applicants to show that the status of these companies as

per ROC record is **"Active/Amalgamated"**. The share applicant companies are also regularly assessed to tax and subject to scrutiny assessment. The assessee produced the assessment orders passed under section 143(3) in respect of the share applicant companies, details of which are as under :-

Assessment u/s 143(3) :

Name of Company	Assessment year	Income Assessed	Assessment Order u/s 143(3) at PB pg
M/s Teac Consultants Pvt. Ltd	2005-06	13,980	451-453
M/s Teac Consultants Pvt. Ltd	2006-07	45,395	454-455
M/s Teac Consultants Pvt. Ltd	2012-13	49,91,290	459-462
M/s Teac Consultants Pvt. Ltd	2014-15	10,14,150	466/
M/s Sangam Distributors Pvt.Ltd	2006-07	Nil	530-531
M/s Sangam Distributors Pvt.Ltd	2007-08	9,600	534-535
M/s Sangam Distributors Pvt.Ltd	2013-14	6,79,400	538
M/s ISIS Mercantile Pvt. Ltd.	2006-07	6,936/-	500-501
M/s ISIS Mercantile Pvt. Ltd	2013-14	21,81,459/-	502-505
M/s ISIS Mercantile Pvt. Ltd	2014-15	Nil (Amalgamated with M/s Magnate Capital Market Pvt. Ltd.)	509-510

Thus it is clear that both the share applicant companies are regularly assessed and assessment orders under section 143(3) were passed wherein the transactions of investment made in the shares of the assessee were not disturbed by the AO. Hence all these documentary evidences as well as the admitted facts clearly

established that the assessee has discharged its onus of proving the identity and creditworthiness of the share applicants as well as genuineness of the transactions. The AO has not brought on record any evidence to contradict the documentary evidence filed by the assessee. The Id. CIT (Appeals) has deleted the addition in para 5 to 5.13 as under :-

"5. On being perusal of reports dated 28.11.2017 and 06.12.2017 received from Investigation Directorate, Kolkata it reveals no adverse facts, details and evidences are not found in the reports in respect of Share application money and share premium received from M/s Sangam Distributors Pvt. Ltd. and M/s Teac Consultants Pvt. Ltd. as mentioned in para 4.4.7 above my findings are as follows:-

5.1 As discussed in para 4.4.7 above, in respect of the investors namely M/s Sangam Distributors Pvt. Ltd. and M/s Teac Consultants Private Limited adverse findings along with eloquent evidences in the form of statement on oath of relevant entry operators are not visible in the reports dated 28.11.2017 and 06.12.2017 from Investigation Directorate, Kolkata and therefore it could not be treated as shell company.

5.2 As far as the lender companies namely, M/s Sangam Distributors Pvt. Ltd and M/s Teac Consultants Private Limited is concerned, it is evident from the documents placed on record that Notice was issued by DDIT, Kolkata u/s 131 to these companies which was duly complied with and relevant documents were filed. There is no fact on record that the notices remained unserved or these companies were not found existent on the given addresses. Furthermore, Affidavit of the directors were also submitted

wherein the Directors confirmed investment in shares of the Appellant and source of providing the said. Also, it is evident from the assessment Order that no statement/evidence has been relied upon or provided by the AO for substantiating that these companies are controlled by the so-called Entry Operators.

5.3 For this investor namely, M/s Sangam Distributors Pvt. Ltd. and M/s Teac Consultants Private Limited, the Appellant in discharge of its onus u/s 68 of the Act has filed confirmation of accounts as well as bank statement reflecting the transactions with other substantiating documents along with assessment orders in case of investor companies, which are available at Page no. 292 to 389 of PB. From these documentary evidences placed on record, identity, creditworthiness and genuineness of transactions is established. There is no gain saying that the onus squarely lies on the appellant to prove the identity, creditworthiness and genuineness of the cash credits. In the case of Addl. CIT v. Bahri Bros. (P) Ltd. [1985] 154 ITR 244 (Pat), the Hon'ble Patna High Court has held "*if the loans are given by an account paying cheque, it amounts to identification of the parties and discharge of burden by the borrower.*" In view of the above, it is clear that Appellant discharged its burden u/s 68 of the Act. Even otherwise, there is no adverse finding of any investigation conducted by the department in relation to these companies. Therefore, in the absence of any independent inquiry and any adverse findings to rebut the evidences filed by the Appellant, I find that the addition in respect of Share application and Share premium from M/s Sangam Distributors Pvt. Ltd. and M/s Teac Consultants Private Limited amounting to Rs. 1,05,00,000/- is unjustified; firstly, on

the ground that no inquiries were made to rebut the evidences filed by the Appellant and secondly, on the ground that Appellant duly discharged its burden casted upon u/s 68 of the Act to explain nature and source of the transactions by proving the identity, creditworthiness of creditor and genuineness of the transaction. In particular, none of the material or statements have been provided in the Assessment Order wherein names of the said companies are mentioned. Notably, the transactions with the company are duly verifiable from confirmation of accounts placed at Page no. 296 and 351 of PB with supporting bank statements placed at Page no. 295 and 352 of PB and have been carried out through banking channels only and thus, appellant has duly proved the identity, creditworthiness and genuineness of the transactions.

5.4 Furthermore, from the perusal of documentary evidences submitted by the Appellant, it is seen that transactions have been done through banking channels and on the date of making of loans, there is balance available in the accounts of the borrowers, which proves the creditworthiness and genuineness of the transactions. There is no case of any cash deposition in the account of any of the investor at the time of issuing cheques/RTGS in favour of the Assessee. Therefore, in view of the settled judicial precedent in case of CIT V. VARINDER RAWLLEY [2014] 366 ITR 232 (PUNJAB & HARYANA), CIT V. VIJAY KUMAR JAIN [2014] 221 TAXMAN 180, CIT v. Victor Electrodes Ltd. [2010] 329 ITR 271, Addl. CIT v. Bahri Bros. (P) Ltd. [1985] 154 ITR 244 (Pat) and others as referred by the Appellant, I am of the considered view that Appellant duly discharged its burden casted upon it u/s 68 of the Act. It is further

seen that M/s Sangam Distributors Pvt. Ltd and M/s Teac Consultants Private Limited duly replied to the notices issued by DCIT/DDIT(Inv.), Kolkata in respect of commission, these facts remain uncontroverted by the AO.

5.5 The AO during assessment proceedings took negative inference from the statement of Shri Rajendra Agarwal recorded during search u/s 132(4) wherein he made disclosure in respect of Long Term Capital Gain in his individual hands. I have gone through the statement of Shri Rajendra Agarwal and his disclosure made in his statement, Notably, the disclosure made was in his personal capacity only and with respect to LTCG only and not in respect of any other transactions be it be receipt of unsecured loans. Further, Rajendra Agarwal and appellant are separate legal entity. Therefore, I find that in the absence of any nexus of the Statement of Shri Rajendra Agarwal with the appellant or its total income, this basis of addition adopted by the AO is farfetched & cannot be concurred.

5.6 It is further seen that AO has not brought any specific defect / discrepancies in the direct evidence brought on record by the Appellant. The AO has observed that on the date of debit in the account statement of investor, there is corresponding credit entry of equal amount, however, this observation of the AO is itself not sufficient to prove beyond doubt that Appellant routed its unaccounted income by these companies rather it proves the source in the hands of the Appellant. It is usual business practice, while making investment, funds are required to be arranged by the investor, therefore reflection of such entries in bank statement doesn't lead to draw any adverse inference against the Appellant.

Needless to say that Appellant is not required to prove source of the source u/s 68 of the Act in view of the settled judicial precedents.

5.7 In my considered view, mere not believing an explanation cannot lead to a conclusion that the invested amount is the income of the assessee from some undisclosed sources while in the present case, no evidences of any generation of undisclosed income or their utilization in the form of share application and share premium has been found and brought on record.

5.8 Similarly, I find that various observations of the AO on balance sheet / ITR of the lender companies are misconstrued, misconceived and are factually incorrect. I further find that the various other allegations / observations of the AO are misconceived and premature only and in view the appellant's submission made in para 10 as reproduced in Para No. 4.2 of this order, the same does not lead any where to draw any adverse inference against the Appellant. Further, the various case laws relied upon by the AO are distinguishable from the facts of the present case as categorically countered by the Appellant in his written submissions as reproduced in Para No. 4.2 above.

5.9 It is settled judicial precedents that under the income tax law primary burden u/s 68 of the Act is on the Appellant and once this burden is discharged u/s 68 of the Act, no addition u/s 68 of the Act is justifiable in the hands of the Assessee in view of the judgments in case of Shree Barkha Synthetics Ltd. V/s Assistant Commissioner of Income-tax (2006) 155 TAXMAN 289 (RAJ.), COMMISSIONER OF INCOME-TAX, JAIPUR -II V. MORANI

AUTOMOTIVES (P.) LTD. [2014] 264 CTR 86 (RAJASTHAN-HC), CIT v. Orissa Corpn. (P.) Ltd. [1986] 159 ITR 78/25 Taxman 80F (SC), Commissioner of Income-tax v/s Mark Hospitals (P.) Ltd. [2015] 373 ITR 115 (Madras)(MAG.), Commissioner of Income-tax, Ajmer v. Jai Kumar Bakliwal [2014] 366 ITR 217 (Rajasthan), CIT v/s. Creative World Telefilms Ltd (2011) 333 ITR 100 (Bom), Commissioner of Income-tax-I v. Patel Ramniklal Hirji [2014] 222 Taxman 15 (Gujarat)(MAG.), Principal Commissioner of Income-tax-4 v. G & G Pharma India Ltd. [2016] 384 ITR 147 (Delhi) referred above which have been also been followed recently by Hon'ble Delhi Tribunal in case of ITO vs. Softline Creations (P) Ltd. in ITA No. 744/Del/2012 vide its order dated 10.02.2016. Further, Hon'ble Apex Court as well as High Court has held that once the identity of creditor is established, the department is free to reopen the assessment of creditor and no addition can be made in the hand of borrower as rightly held in case of CIT v/s Lovely Exports Pvt. Ltd. [2008] 216 CTR 195 (SC), Commissioner of Income-tax v. Rock Fort Metal & Minerals Ltd. [2011] 198 TAXMAN 497 (Delhi), Divine Leasing & Finance Limited [2008] 299 ITR 268 (Delhi) CIT v. Orissa Corporation (P.) Ltd. [1986] 159 ITR 78/25 Taxman 80F (SC) and others on this question of law.

5.10 Further, power to call for information/production of evidences or enforcing attendance under the law is given to the income tax authorities only and therefore, in view of the judgment CIT v/s Victor Electrodes Ltd. [2010] 329 ITR 271, the Appellant cannot be fastened upon the burden to produce the investors

before the assessing authorities though in the instance case, appellant has cooperated in assessment by showing his willingness to produce the directors of investor companies and some directors/officer were also produced before the AO. Thus, in view of the judicial precedents referred above, under the facts and circumstances of the present case it is untenable to make any addition for alleged non-appearance by the concerned person before the authorities though they complied with the notices/summon issued to them.

5.11 In the present case in hand, I find that AO asked Assessee to produce investor companies without verifying the facts of investing money from respective jurisdiction assessing officer and without verifying their returns of income and balance sheet wherein these transactions are reported, accordingly the AO has not followed the principles laid down under section 68 of the Act. The Hon'ble Gujrat High Court in the case of Commissioner of Income-tax v. Ranchhod Jivabhai Nakhava [2012] 21 taxmann.com 159 (Guj.) has held that:-

Once the assessee has established that he has taken money by way of account payee cheques from the lenders who are all income tax assessees whose PAN have been disclosed, the initial burden under section 68 was discharged. It further appears that the assessee had also produced confirmation letters given by those lenders. [Para 15]

Once the Assessing Officer gets hold of the PAN of the lenders, it was his duty to ascertain from the Assessing Officer of those lenders, whether in their respective returns they had shown existence of such amount of money and had further shown that those amount of money had been lent to the assessee. If before verifying of such fact from the Assessing Officer of the lenders of the assessee, the Assessing Officer decides to examine the lenders and asks

the assessee to further prove the genuineness and creditworthiness of the transaction, the Assessing Officer does not follow the principle laid down under section 68. [Para 16]

In the instance case before me , the AO has not followed the due procedure of law u/s 68 of the Act. Therefore, requiring the Assessee to produce the directors of the lender company was not legally tenable in view of the judgment of Gujarat High Court (supra).

5.12 It is noted that no clinching evidences has been brought on record that any unaccounted income was routed through Share application and share premium by the Appellant as no evidences as to receipt/payment of cash for receipt of share application and share premium were found during search in case of the Appellant. Mere suspicion howsoever strong cannot take place of evidence. Thus, in the absence of any incriminating material found during search to rebut the evidences filed by the Appellant, the impugned addition made in respect of Share application & Share premium u/s 68 of the Act is legally untenable and unjustified.

5.13 In view of the above discussion of relevant facts and following the several ratios on the subject from Hon'ble Apex Court, High Courts including jurisdictional High Courts, Tribunals including jurisdictional Tribunals, the impugned addition in respect of Share Application and Share premium received from M/s Sangam Distributors Pvt. Ltd. and M/s Teac Consultants Private Limited totalling to Rs. 1,05,00,000/- is not sustainable and hence the same stands deleted. In view of above

the ground No. 2, 13 to 18 and 20 of appeal is allowed to the extent mentioned above.”

Accordingly, in view of the above discussion as well as facts and circumstances of the case the AO has made the addition based on the report of the Investigation Wing Kolkata whereas the assessee has produced all the relevant documentary evidence to establish the identity, creditworthiness and genuineness of the transactions. Hence in the absence of any discrepancy or otherwise any material or record to show that the assessee's own unaccounted/undisclosed income has routed through the share applicants, the addition made by the AO is not justified. Accordingly, we do not find any error or illegality in the impugned order of the Id. CIT (Appeals) in deleting the addition.”

19. Similarly in respect of loan taken from M/s Teac Consultants Pvt. Ltd. of Rs. 15.00 lacs on account of share capital and premium, this issue is also covered by the decision of the Coordinate Bench in the case of Kota Dall Mill Vs. DCIT (supra) order dated 31/12/2018 for the A.Y. 2010-11 to 2012-13 at page 92 to 102 and in the case of DCIT Vs. M/s Baran Roller Flour Mills Pvt. Ltd. (supra) at page 11 to 23, which has already been reproduced and discussed in earlier paragraphs of this order.

20. In respect of share application from M/s ISIS Mercantile Pvt. Ltd. amounting to Rs. 1.20 crores, we found that exactly similar issue has been dealt in the decision of group concern in the case of DCIT Vs. M/s

Baran Roller Flour Mills Pvt. Ltd. (supra) for the A.Y. 2011-12. The précised observation of the Tribunal in the case of M/s Baran Roller Flour Mills Pvt. Ltd. (supra) are from page No. 24 and 25 as reproduced under:

- “7. For the assessment year 2011-12, the addition was made in respect of the share capital and premium of Rs. 90,00,000/- received from M/s. ISIS Mercantile Pvt. Ltd. The other facts regarding this issue remain identical as for the assessment year 2010-11. The AO has made the addition based on the report of the Investigation Wing Kolkata. However, except the said information received from the Investigation Wing, the AO was not having any other evidence or material to show that the transaction is a bogus entry provided by the share applicant. The assessee produced the following documentary evidence in support of the claim :-

M/s ISIS Mercantile Pvt. Ltd.

S. No.	Particulars	PB Page No./ AY 2011-12
1	Copy of Ack. of ITR of AY 2011-12 along with computation sheet.	430-432
2	Copy of Balance sheet of AY 2011-12 along with enclosures.	433-450
3	Copy of relevant page of bank statement showing the entry of payment made to assessee.	451-454
4	Confirmation of account showing the transaction with Assessee Company, along with ledger account from the books of share applicants	455-456
5	Copy of share allotment advice	457
6	Copy of share application form of equity share along with Form 2	458-468

7	Copy of affidavit of Mrs Babita Kriplani director of company.	469-472
8	Copy of order passed by Calcutta High Court regarding amalgamation of other companies in this company	473-495
9	Copy of balance sheet of company of 31.03.2010, 31.03.2011, 31.03.2012, and 31.03.2013.	496-499
10	Copy of assessment order passed in the case of above named company for AY 2006-07, AY 2013-14 and 2014-15.	500-513
11	Copy of ROC master data.	514-515
12	Copy of PAN card.	516
13	Certificate of Incorporation.	517
14	Copy of summon no. 1444 dated 13.10.2017 and reminder summon No. 1584 dated 31.10.2017 issued by DDIT (Investigation), Unit-1(3), Kolkata u/s 131 of Income Tax Act, 1961 to M/s ISIS Mercantiles Pvt. Ltd.	518-521
15	Copy of reply in response to such summon along with dispatch proof.	522-524

Further, the assessee also produced the master data of ROC showing the status of the said company as **"Amalgamated"**. The amalgamation was duly approved by the Hon'ble High Court. The financial status and capacity to invest in the shares of the assessee was also proved by showing the share capital of the said company raised in the financial year 2005-06 of Rs. 15.42 crores, in the financial year 2010-11 of Rs. 2.5 crores and in the financial year 2012-13 of Rs. 12.9 crores. The assessment orders for all these years except assessment year 2011-12 were also passed under section 143(3) of the IT Act and, therefore, the availability of the funds as well as the investment made by the said company in the shares of the assessee were not disturbed by the department while completing the scrutiny assessment. Hence in view of our finding on this issue for the assessment year 2010-11 and an identical finding of the Id. CIT

(Appeals) for the assessment year under consideration, we do not find any error or illegality in the impugned order of the Id. CIT (A) for the assessment year 2011-12.”

21. Grounds taken by the assessee in its appeal for the A.Y. 2010-11 and 2011-12 pertaining to no addition in case of not abated assessment, when no incriminating material is found, is covered by the decision of the Tribunal in the case of M/s Kota Dall Mills Vs. DCIT (supra) for the A.Y. 2010-11 to 2013-14 at page 12 to 36 are reproduced as under:

“6. We have considered the rival submissions as well as the relevant material on record. Undisputedly, the assessments for the assessment years 2010-11 to 13-14 were not pending on the date of search on 2nd July, 2015. Even in some of the assessment years orders under section 143(3) were passed and in other cases the assessment was completed under section 143(1) of the Act. Thus the assessments for the assessment years 2010-11 to 13-14 were not got abated by virtue of search under section 132 on 2nd July, 2015 and the AO would reassess the total income of the assessee as per the provisions of section 153A in respect of these four assessment years i.e. 2010-11 to 13-14. The proceedings under section 153A in respect of these four assessment years would be in the nature of reassessment and not in the nature of assessment as in the cases of the remaining two assessment years i.e. 2014-15 and 15-16 those were got abated by virtue of search and seizure action under section 132 of the Act on 2nd July, 2015. It is a settled proposition of law that the assessment or reassessment under section 153A in respect of the assessment years which have already been completed and assessment orders have been

passed determining the assessee's total income, the addition to the income that has already been assessed can be made only on the basis of incriminating material. In the absence of any incriminating material the completed assessment can only be reiterated. The provisions of section 132 read with section 153A of the Act stipulate two types of situations – one where the assessment of any assessment year falling within six assessment years is pending on the date of initiation of search under section 132 or making of requisition under section 132A of the Act. Therefore, the assessment under section 153A in respect of those assessment years which stand abated due to the reason of pending on the date of initiation of search or requisition shall be the original/first assessment. In the second category where the assessment or reassessment has already been completed on the date of initiation of search or making of requisition as the case may be, the assessment under section 153A would be in the nature of reassessment. The Hon'ble Delhi High Court in the case of CIT vs. Kabul Chawla while analyzing the provisions of section 153A read with section 132 of the Act has observed in para 37 and 38 as under :-

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

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

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

- iv. Although Section 153 A does not say that additions should be strictly made on the basis of evidence found in the course of the search, or other post-search material or information available with the AO which can be related to the evidence found, it does not mean that the assessment "can be arbitrary or made without any relevance or nexus with the seized material. Obviously an assessment has to be made under this Section only on the basis of seized material."
- v. In absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made. The word 'assess' in Section 153 A is relatable to abated proceedings (i.e. those pending on the date of search) and the word 'reassess' to completed assessment proceedings.
- vi. Insofar as pending assessments are concerned, the jurisdiction to make the original assessment and the assessment under Section 153A merges into one. Only one assessment shall be made separately for each AY on the basis of the findings of the search and any other material existing or brought on the record of the AO.
- vii. Completed assessments can be interfered with by the AO while making the assessment under Section 153 A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment.

Conclusion

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

Thus the Hon'ble High Court has held that in the absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made. The Hon'ble High Court has also referred the term used in section 153A as "assess" which is relatable to abated proceedings and the word "reassess" related to completed assessment proceedings. Therefore, the completed assessments can be interfered with by the AO while making the assessment under

section 153A only on the basis of some incriminating material unearthed during the course of search or requisition of document or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment. The Hon'ble Delhi High Court has reiterated its view in case of Principal CIT vs. Kurele Paper Mills (*supra*) in para 1 to 3 as under :-

"1. The Revenue has filed the appeal against an order dated 14.11.2014 passed by the Income Tax Appellate Tribunal (ITAT) in 3761/Del/2011 pertaining to the Assessment Year 2002-03. The question was whether the learned CIT (Appeals) had erred in law and on the facts in deleting the addition of Rs. 89 lacs made by the Assessing Officer under Section 68 of the Income Tax Act, 1961 ('ACT') on bogus share capital. But, the issue was whether there was any incriminating material whatsoever found during the search to justify initiation of proceedings under Section 153A of the Act.

2. The Court finds that the order of the CIT(Appeals) reveals that there is a factual finding that "no incriminating evidence related to share capital issued was found during the course of search as is manifest from the order of the AO." Consequently, it was held that the AO was not justified in invoking Section 68 of the Act for the purposes of making additions on account of share capital.

3. As far as the above facts are concerned, there is nothing shown to the court to persuade and hold that the above factual determination is perverse. Consequently, after considering all the facts and circumstances of the case, the Court is of the opinion that no substantial question of law arises in the impugned order of the ITAT which requires examination."

The SLP filed by the revenue against the said decision of Hon'ble Delhi High Court was dismissed by the Hon'ble Supreme Court vide order dated 7th December, 2015. In a subsequent decision, the Hon'ble Delhi High Court in the case of Principal CIT vs. Meeta Gutgutia has again analyzed this issue in para 55 to 71 as under :-

"55. On the legal aspect of invocation of Section 153A in relation to AYs 2000-01 to 2003-04, the central plank of the Revenue's submission is the decision of this Court in *Smt. Dayawanti Gupta (supra)*. Before beginning to

examine the said decision, it is necessary to revisit the legal landscape in light of the elaborate arguments advanced by the Revenue.

56. Section 153A of the Act is titled "Assessment in case of search or requisition". It is connected to Section 132 which deals with 'search and seizure'. Both these provisions, therefore, have to be read together. Section 153A is indeed an extremely potent power which enables the Revenue to re-open at least six years of assessments earlier to the year of search. It is not to be exercised lightly. It is only if during the course of search under Section 132 incriminating material justifying the re-opening of the assessments for six previous years is found that the invocation of Section 153A *qua* each of the AYs would be justified.

57. The question whether unearthing of incriminating material relating to any one of the AYs could justify the re-opening of the assessment for all the earlier AYs was considered both in *Anil Kumar Bhatia (supra)* and *Chetan Das Lachman Das (supra)*. Incidentally, both these decisions were discussed threadbare in the decision of this Court in *Kabul Chawla (supra)*. As far as *Anil Kumar Bhatia (supra)* was concerned, the Court in paragraph 24 of that decision noted that "we are not concerned with a case where no incriminating material was found during the search conducted under Section 132 of the Act. We therefore express no opinion as to whether Section 153A can be invoked even under such situation". That question was, therefore, left open. As far as *Chetan Das Lachman Das (supra)* is concerned, in para 11 of the decision it was observed:

"11. Section 153A (1) (b) provides for the assessment or reassessment of the total income of the six assessment years immediately preceding the assessment year relevant to the previous year in which the search took place. To repeat, there is no condition in this Section that additions should be strictly made on the basis of evidence found in the course of the search or other post-search material or Information available with the Assessing Officer which can be related to the evidence found. This, however, does not mean that the assessment under Section 153A can be arbitrary or made without any relevance or nexus with the seized material. Obviously an assessment has to be made under this Section only on the basis of seized material."

58. In *Kabul Chawla (supra)*, the Court discussed the decision in *Filatex India Ltd. (supra)* as well as the above two decisions and observed as under:

"31. What distinguishes the decisions both in *CIT v. Chetan Das Lachman Das (supra)*, and *Filatex India Ltd. v. CIT-IV (supra)* in their application to the present case is that in both the said cases there was some material unearthed during the search, whereas in the present case there admittedly was none. Secondly, it is plain from a careful reading of the said two decisions that they do not hold that additions can be validly made to income forming the subject matter of completed assessments prior to the search even if no incriminating material whatsoever was unearthed during the search.

32. Recently by its order dated 6th July 2015 in ITA No. 369 of 2015 (*Pr. Commissioner of Income Tax v. Kurele Paper Mills P. Ltd.*), this Court declined to frame a question of law in a case where, in the absence of any incriminating material being found during the search under Section 132 of the Act, the Revenue sought to justify initiation of proceedings under Section 153A of the Act and make an addition under Section 68 of the Act on bogus share capital gain. The order of the CIT (A), affirmed by the ITAT, deleting the addition, was not interfered with."

59. In *Kabul Chawla (supra)*, the Court referred to the decision of the Rajasthan High Court in *Jai Steel (India) v. Asstt. CIT [2013] 36 taxmann.com 523/219 Taxman 223*. The said part of the decision in *Kabul Chawla (supra)* in paras 33 and 34 reads as under:

'33. The decision of the Rajasthan High Court in *Jai Steel (India), Jodhpur v. ACIT (supra)* involved a case where certain books of accounts and other documents that had not been produced in the course of original assessment were found in the course of search. It was held where undisclosed income or undisclosed property has been found as a consequence of the search, the same would also be taken into consideration while computing the total income under Section 153A of the Act. The Court then explained as under:

"22. In the firm opinion of this Court from a plain reading of the provision along with the purpose and purport of the said provision, which is intricately linked with search and requisition under Sections 132 and 132A of the Act, it is apparent that:

- (a) the assessments or reassessments, which stand abated in terms of II proviso to Section 153A of the Act, the AO acts under his original jurisdiction, for which, assessments have to be made;
- (b) regarding other cases, the addition to the income that has already been assessed, the assessment will be made on the basis of incriminating material; and
- (c) in absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made."

34. The argument of the Revenue that the AO was free to disturb income *de hors* the incriminating material while making assessment under Section 153A of the Act was specifically rejected by the Court on the ground that it was "not borne out from the scheme of the said provision" which was in the context of search and/or requisition. The Court also explained the purport of the words "assess" and "reassess", which have been found at more than one place in Section 153A of the Act as under:

"26. The plea raised on behalf of the assessee that as the first proviso provides for assessment or reassessment of the total income in respect of each assessment year falling within the six assessment years, is merely reading the said provision in isolation and not in the context of the entire section. The words 'assess' or 'reassess'-have been used at more than one place in the Section and a harmonious construction of the entire provision would lead to an irresistible conclusion that the word assess has been used in the context of an abated proceedings and reassess has been used for completed assessment proceedings, which would not abate as they are not pending on the date of initiation of the search or making of requisition and which would also necessarily support the interpretation that for the completed assessments, the same can be tinkered only based on the incriminating material found during the course of search or requisition of documents."

60. In *Kabul Chawla (supra)*, the Court also took note of the decision of the Bombay High Court in *CIT v. Continental Warehousing Corpn (Nhava Sheva) Ltd.* [[2015\] 58 taxmann.com 78/232 Taxman 270/374 ITR 645 \(Bom.\)](#) which accepted the plea that if no incriminating material was found during the course of search in respect of an issue, then no additions in respect of any issue can be made to the assessment under Section 153A and 153C of the Act. The legal position was thereafter summarized in *Kabul Chawla (supra)* as under:

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

- i.* Once a search takes place under Section 132 of the Act, notice under Section 153 A (1) will have to be mandatorily issued to the person searched requiring him to file returns for six AYs immediately preceding the previous year relevant to the AY in which the search takes place.
- ii.* Assessments and reassessments pending on the date of the search shall abate. The total income for such AYs will have to be computed by the AOs as a fresh exercise.
- iii.* The AO will exercise normal assessment powers in respect of the six years previous to the relevant AY in which the search takes place. The AO has the power to assess and reassess the 'total income' of the. aforementioned six years in separate assessment orders for each of the six years. In other words there will be only one assessment order in respect of each of the six AYs "in which both the disclosed and the undisclosed income would be brought to tax".
- iv.* Although Section 153 A does not say that additions should be strictly made on the basis of evidence found in the course of the search, or other post-search material or information available with the AO which can be related to the evidence found, it does

not mean that the assessment "can be arbitrary or made without any relevance or nexus with the seized material. Obviously an assessment has to be made under this Section only on the basis of seized material."

- v. In absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made. The word 'assess' in Section 153 A is relatable to abated proceedings (i.e. those pending on the date of search) and the word 'reassess' to completed assessment proceedings.
- vi. Insofar as pending assessments are concerned, the jurisdiction to make the original assessment and the assessment under Section 153A merges into one. Only one assessment shall be made separately for each AY on the basis of the findings of the search and any other material existing or brought on the record of the AO.
- vii. Completed assessments can be interfered with by the AO while making the assessment under Section 153 A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment."

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

'15. On a plain reading of section 153A of the Act, it is evident that the trigger point for exercise of powers thereunder is a search under section 132 or a requisition under section 132A of the Act. Once a search or requisition is made, a mandate is cast upon the Assessing Officer to issue notice under section 153A of the Act to the person, requiring him to furnish the return of income in respect of each assessment year falling within six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made and assess or reassess the same. Since the assessment under section 153A of the Act is linked with search and requisition under sections 132 and 132A of the Act, it is evident that the object of the section is to bring to tax the undisclosed

income which is found during the course of or pursuant to the search or requisition. However, instead of the earlier regime of block assessment whereby, it was only the undisclosed income of the block period that was assessed, section 153A of the Act seeks to assess the total income for the assessment year, which is clear from the first proviso thereto which provides that the Assessing Officer shall assess or reassess the total income in respect of each assessment year falling within such six assessment years. The second proviso makes the intention of the Legislature clear as the same provides that assessment or reassessment, if any, relating to the six assessment years referred to in the sub-section pending on the date of initiation of search under section 132 or requisition under section 132A, as the case may be, shall abate. Sub-section (2) of section 153A of the Act provides that if any proceeding or any order of assessment or reassessment made under sub-section (1) is annulled in appeal or any other legal provision, then the assessment or reassessment relating to any assessment year which had abated under the second proviso would stand revived. The proviso thereto says that such revival shall cease to have effect if such order of annulment is set aside. Thus, any proceeding of assessment or reassessment falling within the six assessment years prior to the search or requisition stands abated and the total income of the assessee is required to be determined under section 153A of the Act. Similarly, sub-section (2) provides for revival of any assessment or reassessment which stood abated, if any proceeding or any order of assessment or reassessment made under section 153A of the Act is annulled in appeal or any other proceeding.

16. Section 153A bears the heading "Assessment in case of search or requisition". It is "well settled as held by the Supreme Court in a catena of decisions that the heading or the Section can be regarded as a key to the interpretation of the operative portion of the section and if there is no ambiguity in the language or if it is plain and clear, then the heading used in the section strengthens that meaning. From the heading of section 153. the intention of the Legislature is clear, viz., to provide for assessment in case of search and requisition. When the very purpose of the provision is to make assessment In case of search or requisition, it goes without saying that the assessment has to have relation to the search or requisition, in other words, the assessment should connected With something round during the search or requisition viz., incriminating material which reveals undisclosed income. Thus, while in view of the mandate of sub-section (1) of section 153A of the Act, in every case where there is a search or requisition, the Assessing Officer is obliged to issue notice to such person to furnish returns of income for the six years preceding the assessment year relevant to the previous year in which the search is conducted or requisition is made, any addition' or disallowance can be made only on the basis of material collected during the search or requisition, in case no incriminating material is found, as held by the Rajasthan High Court in the case of *Jai Steel (India) v. Asst. CIT(supra)*, the earlier assessment would have to be reiterated, in case where pending assessments have abated, the Assessing Officer can pass assessment orders for each of the six years determining the total income of the assessee which

would include income declared in the returns, if any, furnished by the assessee as well as undisclosed income, if any, unearthed during the search or requisition. In case where a pending reassessment under section 147 of the Act has abated, needless to state that the scope and ambit of the assessment would include any order which the Assessing Officer could have passed under section 147 of the Act as well as under section 153A of the Act.

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

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

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

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

63. Even this Court has in *Mahesh Kumar Gupta (supra)* and *Ram Avtar Verma (supra)* followed the decision in *Kabul Chawla (supra)*. The decision of this Court in *Kurele Paper Mills (P.) Ltd. (supra)* which was referred to in *Kabul Chawla (supra)* has been affirmed by the Supreme Court by the dismissal of the Revenue's SLP on 7th December, 2015.

The decision in Dayawanti Gupta

64. That brings us to the decision in *Smt. Dayawanti Gupta (supra)*. As rightly pointed out by Mr. Kaushik, learned counsel appearing for the Respondent, that there are several distinguishing features in that case which makes its ratio inapplicable to the facts of the present case. In the first place, the Assessee there were engaged in the business of Pan Masala and Gutkha etc. The answers given to questions posed to the Assessee in the course of search and survey proceedings in that case bring out the points of distinction. In the first place, it was stated that the statement recorded was under Section 132(4) and not under Section 133A. It was a statement by the Assessee himself. In response to question no. 7 whether all the purchases made by the family firms, were entered in the regular books of account, the answer was:

"We and our family firms namely M/s. Assam Supari Traders and M/s. Balaji Perfumes generally try to record the transactions made in respect of purchase, manufacturing and sales in our regular books of accounts but it is also fact that some time due to some factors like inability of accountant, our busy schedule and some family problems, various purchases and sales of Supari, Gutka and other items dealt by our firms is not entered and shown in the regular books of accounts maintained by our firms."

65. Therefore, there was a clear admission by the Assessee in *Smt. Dayawanti Gupta (supra)* there that they were not maintaining regular books of accounts and the transactions were not recorded therein.

66. Further, in answer to Question No. 11, the Assessee in *Smt. Dayawanti Gupta (supra)* was confronted with certain documents seized during the search. The answer was categorical and reads thus:

"Ans:- I hereby admit that these papers also contend details of various transactions include purchase/sales/manufacturing trading of Gutkha, Supari made in cash outside Books of accounts and these are actually unaccounted transactions made by our two firms namely M/s. Asom Trading and M/s. Balaji Perfumes."

67. By contrast, there is no such statement in the present case which can be said to constitute an admission by the Assessee of a failure to record any transaction in the accounts of the Assessee for the AYs in question. On the contrary, the Assessee herein stated that, he is regularly maintaining the books

of accounts. The disclosure made in the sum of Rs. 1.10 crores was only for the year of search and not for the earlier years. As already noticed, the books of accounts maintained by the Assessee in the present case have been accepted by the AO. In response to question No. 16 posed to Mr. Pawan Gadia, he stated that there was no possibility of manipulation of the accounts. In *Smt. Dayawanti Gupta (supra)*, by contrast, there was a chart prepared confirming that there had been a year-wise non-recording of transactions. In *Smt. Dayawanti Gupta (supra)*, on the basis of material recovered during search, the additions which were made for all the years whereas additions in the present case were made by the AO only for AY 2004-05 and not any of the other years. Even the additions made for AYs 2004-05 were subsequently deleted by the CIT (A), which order was affirmed by the ITAT. Even the Revenue has challenged only two of such deletions in ITA No. 306/2017.

68. In para 23 of the decision in *Smt. Dayawanti Gupta (supra)*, it was observed as under:

"23. This court is of opinion that the ITAT's findings do not reveal any fundamental error, calling for correction. The inferences drawn in respect of undeclared income were premised on the materials found as well as the statements recorded by the assessee. These additions therefore were not baseless. Given that the assessing authorities in such cases have to draw inferences, because of the nature of the materials - since they could be scanty (as one habitually concealing income or indulging in clandestine operations can hardly be expected to maintain meticulous books or records for long and in all probability be anxious to do away with such evidence at the shortest possibility) the element of guess work is to have some reasonable nexus with the statements recorded and documents seized. In tills case, the differences of opinion between the CIT (A) on the one hand and the AO and ITAT on the other cannot be the sole basis for disagreeing with what is essentially a factual surmise that is logical and plausible. These findings do not call for interference. The second question of law is answered again in favour of the revenue and against the assessee."

69. What weighed with the Court in the above decision was the "habitual concealing of income and indulging in clandestine operations" and that a person indulging in such activities "can hardly be accepted to maintain meticulous books or records for long." These factors are absent in the present case. There was no justification at all for the AO to proceed on surmises and estimates without there being any incriminating material *qua* the AY for which he sought to make additions of franchisee commission.

70. The above distinguishing factors in *Smt. Dayawanti Gupta (supra)*, therefore, do not detract from the settled legal position in *Kabul Chawla (supra)* which has been followed not only by this Court in its subsequent decisions but also by several other High Courts.

71. For all of the aforementioned reasons, the Court is of the view that the ITAT was justified in holding that the invocation of Section 153A by the

Revenue for the AYs 2000-01 to 2003-04 was without any legal basis as there was no incriminating material *qua* each of those AYs.”

The Hon’ble Delhi High Court has concurred with the view as taken in case of Kabul Chawla (supra) as well as the decision of Hon’ble Jurisdictional High Court in the case of M/s. Jai Steel India Ltd. vs. ACIT (supra). Even on the issue of addition made by the AO in the proceedings under section 153A in respect of the assessment year which was already completed on the date of search, the Hon’ble High Court has held that in the absence of any material which was subsequently unearthed during the search and was not already available to the AO, the additions made by the AO on account of security deposits were rightly deleted by the Id. CIT (A). The relevant observations of the Hon’ble High Court in case of Principal CIT vs. Meeta Gutgutia (supra) are in para 53 as under :-

'53. At this stage, it is also to be noticed that an elaborate argument was made by Mr. Manchanda on the aspect of the security deposits accepted by the Assessee. These were of two kinds - one was of refundable security deposits and the other for non-refundable security deposits. As far as the refundable security deposits were concerned, the AO himself in his remand report accepted them as having been disclosed. This has been noticed by the CIT (A) in para 7.2.1 of his order for AY 2004-05. As regards non-refundable security deposit, the CIT (A) accepted the AO's findings that treating the sum as 'goodwill written off on deferred basis' was not correct, hence the addition of Rs. 5,09,343 was held to be justified and correct. It was duly accounted for under 'liabilities' and transferred to income in a phased manner. This was not done by manipulating the account books of the Assessee as alleged by the Revenue. This would have been evident had the return been picked up for scrutiny under Section 143(3) of the Act. This, therefore, was not material which was subsequently unearthed during the search which was not already

available to the AO. Consequently, the additions sought to be made by the AO on account of security deposits were rightly deleted by the CIT (A)."

Thus the essential corollary of these decisions is that no addition can be made in the proceedings under section 153A in respect of the assessments which were completed prior to the date of search except based on some incriminating material unearthed during the search which was not already available to the AO. It is pertinent to note that the SLP filed by the revenue against the decision of Hon'ble Delhi High Court in case of Principal CIT vs. Meeta Gutgutia was dismissed vide order dated 2nd July, 2018. There are series of decisions on this issue including the decision of Hon'ble Jurisdictional High Court in case of M/s. Jai Steel India vs. ACIT (supra) wherein the Hon'ble High Court has held in para 23 to 30 as under :-

"23. The reliance placed by the counsel for the appellant on the case of *Anil Kumar Bhatia (supra)* also does not help the case of the assessee. The relevant extract of the said judgment reads as under:—

"19. Under the provisions of Section 153A, as we have already noticed, the Assessing Officer is bound to issue notice to the assessee to furnish returns for each assessment year falling within the six assessment years immediately preceding the assessment year relevant to the previous year in which the search or requisition was made. Another significant feature of this Section is that the Assessing Officer is empowered to assess or reassess the "total income" of the aforesaid years. This is a significant departure from the earlier block assessment scheme in which the block assessment roped in only the undisclosed income and the regular assessment proceedings were preserved, resulting in multiple assessments. Under Section 153A, however, the Assessing Officer has been given the power to assess or reassess the 'total income' of the six assessment years in question in separate assessment orders. This means that there can be only one assessment order in respect of each of the six assessment years, in which both the disclosed and the undisclosed income would be brought to tax.

20. A question may arise as to how this is sought to be achieved where an assessment order had already been passed in respect of all or any of those six assessment years, either under Section

143(1)(a) or Section 143(3) of the Act. If such an order is already in existence, having obviously been passed prior to the initiation of the search/requisition, *the Assessing Officer is empowered to reopen those proceedings and reassess the total income, taking note to the undisclosed income, if any, unearthed during the search.* For this purpose, the fetters imposed upon the Assessing Officer by the strict procedure to assume jurisdiction to reopen the assessment under Sections 147 and 148, have been removed by the non obstante clause with which sub-section (1) of Section 153A opens. The time-limit within which the notice under Section 148 can be issued, as provided in Section 149 has also been made inapplicable by the non obstante clause. Section 151 which requires sanction to be obtained by the Assessing Officer by issue of notice to reopen the assessment under Section 148 has also been excluded in a case covered by Section 153A. The time-limit prescribed for completion of an assessment or reassessment by Section 153 has also been done away with in a case covered by Section 153A. With all the stops having been pulled out, the Assessing Officer under Section 153A has been entrusted with the duty of bringing to tax the total income of an assessee whose case is covered by Section 153A, by even making reassessments without any fetters, if need be.

21. Now there can be cases where at the time when the search is initiated or requisition is made, the assessment or reassessment proceedings relating to any assessment year falling within the period of the six assessment years mentioned above, may be pending. In such a case, the second proviso to sub-section (1) of Section 153A says that such proceedings "shall abate". The reason is not far to seek. Under Section 153A, there is no room for multiple assessment orders in respect of any of the six assessment years under consideration. That is because the Assessing Officer has to determine not merely the undisclosed income of the assessee, but also the 'total income' of the assessee in whose case a search or requisition has been initiated. Obviously there cannot be several orders for the same assessment year determining the total income of the assessee. In order to ensure this state of affairs namely, that in respect of the six assessment years preceding the assessment year relevant to the year in which the search took place there is only one determination of the total income, it has been provided in the second proviso of sub-Section (1) of Section 153A that any proceedings for assessment or reassessment of the assessee which are pending on the date of initiation of the search or making requisition "shall abate". Once those proceedings abate, the decks are cleared, for the Assessing Officer to pass assessment orders for each of those six years determining the

total income of the assessee which would include both the income declared in the returns, if any, furnished by the assessee as well as the undisclosed income, if any, unearthed during the search or requisition. The position thus emerging is that the search is initiated or requisition is made, they will abate making way for the Assessing Officer to determine the total income of the assessee in which the undisclosed income would also be included, but in case where the assessment or reassessment proceedings have already been completed and assessment orders have been passed determining the assessee's total income and such orders subsisting at the time when the search or the requisition is made, there is no question of any abatement since no proceedings are pending. In this latter situation, the Assessing Officer will reopen the assessments or reassessments already made (without having the need to follow the strict provisions or complying with the strict conditions of Sections 147, 148 and 151) and determine the total income of the assessee. *Such determination in the orders passed under Section 153A would be similar to the orders passed in any reassessment, where the total income determined in the original assessment order and the income that escaped assessment are clubbed together and assessed as the total income.* In such a case, to reiterate, there is no question of any abatement of the earlier proceedings for the simple reason that no proceedings for assessment or reassessment were pending since they had already culminated in assessment or reassessment orders when the search was initiated or the requisition was made." (Emphasis supplied)

24. The said judgment also in no uncertain terms holds that the reassessment of the total income of the completed assessments have to be made taking note of the undisclosed income, if any, unearthed during the search and the income that escaped assessments are required to be clubbed together with the total income determined in the original assessment and assessed as the total income. The observations made in the judgment contrasting the provisions of determination of undisclosed income under Chapter XIVB with determination of total income under Sections 153A to 153C of the Act have to be read in the context of second proviso only, which deals with the pending assessment/reassessment proceedings. The further observations made in the context of de novo assessment proceedings also have to be read in context that irrespective of the fact whether any incriminating material is found during the course of search, the notice and consequential assessment under Section 153A have to be undertaken.

25. The argument of the learned counsel that the AO is also free to disturb income, expenditure or deduction de hors the incriminating material, while making assessment under Section 153A of the Act is

also not borne out from the scheme of the said provision which as noticed above is essentially in context of search and/or requisition. The provisions of Sections 153A to 153C cannot be interpreted to be a further innings for the AO and/or assessee beyond provisions of Sections 139 (return of income), 139(5) (revised return of income), 147 (income escaping assessment) and 263 (revision of orders) of the Act.

26. The plea raised on behalf of the assessee that as the first proviso provides for assessment or reassessment of the total income in respect of each assessment year falling within the six assessment years, is merely reading the said provision in isolation and not in the context of the entire section. The words 'assess' or 'reassess' have been used at more than one place in the Section and a harmonious construction of the entire provision would lead to an irresistible conclusion that the word 'assess' has been used in the context of an abated proceedings and reassess has been used for completed assessment proceedings, which would not abate as they are not pending on the date of initiation of the search or making of requisition and which would also necessarily support the interpretation that for the completed assessments, the same can be tinkered only based on the incriminating material found during the course of search or requisition of documents.

27. The Allahabad High Court in *Smt. Shaila Agarwal's (supra)* has held as under:—

"19. The second proviso to Section 153A of the Act, refers to abatement of the pending assessment or re-assessment proceedings. The word 'pending' does not operate any such interpretation, that wherever the appeal against such assessment or reassessment is pending, the same along with assessment or reassessment proceedings is liable to be abated. The principles of interpretation of taxing statutes do not permit the Court to interpret the Second Proviso to Section 153A in a manner that where the assessment or reassessment proceedings are complete, and the matter is pending in appeal in the Tribunal, the entire proceedings will abate.

20. There is another aspect to the matter, namely that the abatement of any proceedings has serious causes and effect in as much as the abatement of the proceedings, takes away all the consequences that arise thereafter. In the present case after deducting bogus gifts in the regular assessment proceedings, the proceedings for penalty were drawn under Section 271(1)(c) of the Act. *The material found in the search may be a ground for notice and assessment under Section 153A of the Act but that would not efface or terminate all the consequence, which has arisen out of the regular assessment or reassessment resulting into the demand or proceedings of penalty.*" (Emphasis supplied)

The said judgment which essentially deals with second proviso to Section 153A of the Act also supports the conclusion, which we have reached hereinbefore.

28. It has been observed by the Hon'ble Supreme Court in *K.P. Varghese v. ITO* [1981] 131 ITR 597/7 Taxman 13 that "it is well recognized rule of construction that a statutory provision must be so construed, if possible that absurdity and mischief may be avoided."

29. The argument of the counsel for the appellant if taken to its logical end would mean that even in cases where the appeal arising out of the completed assessment has been decided by the CIT(A), ITAT and the High Court, on a notice issued under Section 153A of the Act, the AO would have power to undo what has been concluded up to the High Court. Any interpretation which leads to such conclusion has to be repelled and/or avoided as held by the Hon'ble Supreme Court in the case of *K.P. Varghese (supra)*.

30. Consequently, it is held that it is not open for the assessee to seek deduction or claim expenditure which has not been claimed in the original assessment, which assessment already stands completed, only because a assessment under Section 153A of the Act in pursuance of search or requisition is required to be made."

In the case in hand, the transactions of unsecured loans as well as introduction of capital by the partners were duly recorded in the books of account and available with the AO. Further, during the course of search under section 132 of the Act on 2nd July 2015 no material much less incriminating material was either found or seized to disclose any undisclosed income on account of unsecured loans or partners' capital received by the assessee firm. The AO has proposed to make the addition on account of unsecured loans and partners' capital under section 68 being unexplained cash credit solely on the basis of the information received from Investigation Wing Kolkata. It is pertinent to note that the said information was available with the AO prior to the search conducted under section 132 of the Act in case of the assessee on 2nd July, 2015. Therefore, even the sole basis of assessments framed under section 153A of the Act is the information received from Investigation Wing Kolkata and

statement of one Shri Anand Sharma, who is stated to be an entry operator and managed various concerns/companies including M/s. Royal Crystal Dealers, one of the loan creditors of the assessee. Except the said statement and report of the Investigation Wing Kolkata, the AO has neither referred to or was having in possession of any material to indicate that the unsecured loans shown in the books of accounts as well as partners' capital received by the assessee are nothing but assessee's own unaccounted and undisclosed income routed back in the garb of unsecured loans and partners' capital. There is no dispute that these transactions of unsecured loans and partners' capital contribution are duly recorded in the books of accounts and disclosed in the return of income which were already completed as the assessments for these four assessment years were not pending on the date of search, therefore, it is manifest from the record that during the course of search and seizure under section 132 of the Act in the case of the assessee no material much less the incriminating material was unearthed or any undisclosed income which was not disclosed in the books of accounts was detected or found. The only incriminating material which was referred by the AO is pages 21 to 26 of Annexure AS-1 in respect of long term capital gain earned by Shri Rajendra Agarwal and his family members. The said long term capital gain was disclosed by Shri Rajendra Agarwal in his statement under section 132(4) and, therefore, it was surrendered and offered to tax by Shri Rajendra Agarwal and his family members in the year of search. The AO himself has not made any addition in the hand of the assessee on account of long term capital gain which was found during the course of search and seizure. Thus, except the material disclosing the long term capital gain in the hand of Shri

Rajendra Agarwal, no other incriminating material either found or referred or is the basis of the addition made by the AO while framing the assessment under section 153A of the Act for the assessment years 2010-11 to 13-14. It is appropriate to refer relevant part of the assessment order in para 12 pages 48 to 50, para 19 page 83 and para 22 page 86 as under :-

" 12. Submissions made on behalf of the assessee firm have been duly considered. However, even the very elaborate and case laws loaded submissions of the assessee are totally off the mark. Against the self-speaking facts of the very nature of the activities of the so called partner's providing huge partner's capital in the most uninterested manner and providing huge unsecured loans without any collateral or other security, the emphasis of the assessee firm in its submissions has been on seeking protection under various judicial decisions even without having any fact coherence. The submissions made by the assessee are completely devoid of merit in the light of the following facts and circumstances;

a. The department has very sound basis to treat, the receipts of unsecured loan and partner's capital from the above mentioned companies as bogus and in genuine. The findings of this office and Investigation report of the Investigation Directorate Kolkata are not based on any presumption, assumption, guess or bare suspicion. Where the nature and source of a receipt, whether it be of money or other property, cannot be satisfactorily explained by the assessee, it is open for the revenue to hold that it is the income of the assessee and no further burden lies on the revenue to show that the

income is from any particular source as enumerated the Hon'ble Supreme Court in the case of Roshan Di Hatti v. CIT (1977) 107 ITR 938 (SC) and Kale Khan Mohammad Hanif v. CIT (1963) 50 ITR 1 (SC).

Prima facie onus is always on the assessee to prove the cash credit entry found in the books of account of the assessee. In landmark cases like Kale Khan Mohammad Hanif v CIT (1963) 50 ITR 1 (SC), Roshan Di Hatti v CIT (1977) 107 ITR (SC) it has been held that the law is well settled that the onus of proving the source of a sum of money found to have been received by an assessee, is on him. Where the nature and source thereof cannot be explained satisfactorily, it is open to the revenue to hold that it is the income of the assessee and no further burden is on the revenue to show that the income is from any particular source. It may also be pointed out that the burden of proof is fluid for the purposes of Section 68. Once assessee has submitted basic documents relating to identity, genuineness of transaction and creditworthiness then AO must do some inquiry to call for more details to invoke Section 68.

- b. The assessee firm has filed confirmation letters and this office has carried out further enquiry to examine the reality of the transactions. An enquiry was sent to the Investigation Directorate Kolkata and it has been established that these investor or lender Companies are controlled by the entry operators. The statements of various entry operators are sufficient evidence to show that the unsecured loan and partner's capital are assessee's own undisclosed income brought into the books of the assessee under the garb of unsecured loan and partner's capital.*
- c. The department has carried out search over the assessee group and during the course of search action u/s 132 of the I.T. Act, 1961, the incriminating documents seized during*

search proceedings vide pg no. 21 to 26 of Annexure AS-1 of Party B-1, wherein the details of year-wise LTCCG earned by Shri Rajendra Agrawal and his family members, is maintained, which during search action has been accepted to be bogus by all family members in their respective statements.”

"19. In view of above facts of the case and in the light of above judicial decision, it is established that genuineness of the transaction has not been proved. Section 68 of the I.T. Act provides for charging to income tax on any sum credited in the books of the assessee maintained for any previous year if the assessee offers no explanation about the nature and source thereof or the explanation offered is not, in the opinion of the Assessing Officer, satisfactory. It places no duty upon the Assessing Officer to point to the source from which the money was received by the assessee. Where an assessee fails to prove satisfactorily the source and the nature of certain amount of credit during the accounting year, the Income-tax Officer is entitled to draw the inference that the receipt are of an assessable nature. Thus, the assessee is unable to discharge its burden of proof by failing to establish lender's identity, forget the genuineness of transactions and creditworthiness of the lender. Hence, the unsecured loans and partner's capital shown to have been received from various Kolkata Based Companies and other Companies remained unexplained. In the circumstances, I am left with no option than to tax the entire unexplained credits by way of partner's capital and Unsecured loans received from the persons mentioned in para 5 above as unexplained cash credits

u/s 68 of the Income Tax Act, chargeable to tax as income of the assessee firm for the respective assessment years."

" 22. After examination of the information and details placed on record and discussion with the assessee, the total income of the assessee is computed as under :-

<i>Returned income as per ITR u/s 153A of the Act.</i>	<i>Rs. 2,82,83,460/-</i>
<i>Additions Unexplained cash credits u/s 68 of the Act in the form of unsecured loan and partner's capital</i>	<i>Rs. 67,20,14,999/-</i>
<i>Assessed income</i>	<i>Rs. 70,02,98,459/-</i>
<i>R/o</i>	<i>Rs. 70,02,98,459/-</i>

The total income of the assessee in the status of Firm for Assessment Year 2010-11 relevant to Previous Year 2009-10 is assessed at Rs. 70,02,98,459/- u/s 153A read with section 143(3) of I.T. Act, 1961. The form ITNS-150 showing calculation of tax and interest chargeable, if any, is attached herewith and forms a part of this Order. A notice of demand u/s 156 of the Act and challan for payment of tax, if payable, is hereby issued. Penalty notice u/s 274 rws 271(1)(c) is issued separately."

The entire finding of the AO is based on the information received from the Investigation Wing Kolkata and statement of Shri Anand Sharma. The Id. CIT (A) though has not disputed the legal proposition on this issue, however, the contention of the assessee was turned down merely on the ground that the SLPs filed by the revenue in the cases of Kabul Chawla (supra) and M/s. All Cargo Global Logistics (supra) etc. have been admitted for decision by the Hon'ble Supreme Court. The relevant part of the finding of

the Id. CIT (A) in para 3.2.2 and 3.2.4 at pages 35 and 36 are as under :-

"3.2.2 As per the provisions of this section where a search is initiated u/s 132 of the Act, the A.O shall issue a notice requiring the person searched to furnish his return of income in respect of each assessment year falling within six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made. Once such returns are filed, the AO has to assess or reassess the total income of such six assessment years.(emphasis supplied by me). (*The decisive words used in the provisions are to 'assessee or reassess the total income'*). The A.O. is thus duty bound to determine the 'total income' of the assessee for such six assessment years and it is obvious that 'total income' refers to the sum total of income in respect of which a person is assessable. The total income therefore will cover not only the income emanating from declared sources or any material placed before the Assessing Officer but from all sources including the undisclosed ones, or based on the unplaced material before the AO.

3.2.3 The concept of '*assess or reassess*' and '*shall abate*' as contemplated u/s 153A is under hot judicial debate. I find that legally, this issue is very contentious in view of the divergent views of the various authorities. The appellant has tried to highlight most of them. However, it is equally pertinent to mention here that the Department has not accepted the decisions of Hon'ble Mumbai High Court in the case of M/s All Cargo Global Logistics as well as Continental Warehousing (Nhava Sheva) Ltd., and SLP has been filed before the Hon'ble Supreme

Court. The Hon'ble Supreme Court has granted leave vide order dated 12.10.2015 as reported in 64 taxmann.com 34 (S.C.). Similarly, in the case of Kabul Chawla SLP has also been filed.

3.2.4 In view of SLPs admitted in case of *Kabul Chawla*, M/s All Cargo Global Logistics as well as Continental Warehousing (Nhava Sheva) Ltd., (supra), assessee's contention cannot be accepted. **Moreover, in any case**, the additions are to be adjudicated on merits as per relevant ground of appeal, the issue raised in this ground for present remains for academic discussion only. Accordingly, issue raised in ground no. 12 is dismissed.”

Therefore, neither in the assessment order nor in the order of the Id. CIT (A) there is any mention or finding that the additions have been made by the AO on the basis of any incriminating material found during the course of search and seizure in the case of the assessee. The AO has solely relied upon the report of the Investigation Wing Kolkata and statement of one Shri Anand Sharma recorded by the Investigation Wing during the survey under section 133A of the Act. Therefore, even if the information/report of the Investigation Wing Kolkata is considered as a relevant evidence, the same cannot be regarded as incriminating material unearthed during the course of search and seizure under section 132 of the IT Act in case of the assessee. The requirement for making the addition under section 153A in the assessment years where the assessment was not pending on the date of search and the proceedings are in the nature of reassessment is essentially the incriminating material disclosing undisclosed income which was not disclosed by the assessee. In the case in hand, the AO himself has not claimed any

incriminating material found during the search and seizure in the case of the assessee. Accordingly, in the facts and circumstances of the case and in view of the binding precedents on this issue in which the SLP filed by the revenue was also dismissed by the Hon'ble Supreme Court, the additions made by the AO while passing the assessment orders under section 153A for the assessment years 2010-11 to 13-14 are not sustainable and accordingly the same are liable to be deleted. We order accordingly."

22. Similarly in the case of DCIT Vs. Baran Roller Flour Mills Pvt. Ltd. (supra) for the A.Y. 2010-11, the relevant observation of the Tribunal with the issue are contained at page Nos. 33 to 54 as under:

"14. We have considered the rival contentions as well as the relevant material on record. In pursuant to the same search and seizure action under section 132 carried on 2nd July, 2015, an identical issue was considered and decided by us in the case of group concern, namely, M/s. Kota Dall Mill in ITA Nos. 997 to 1002/JP/2018 and 1119/JP/2018 and others vide order dated 31st December, 2018 as under :-

"6. We have considered the rival submissions as well as the relevant material on record. Undisputedly, the assessments for the assessment years 2010-11 to 13-14 were not pending on the date of search on 2nd July, 2015. Even in some of the assessment years orders under section 143(3) were passed and in other cases the assessment was completed under section 143(1) of the Act. Thus the assessments for the assessment years 2010-11 to 13-14 were not got abated by virtue of search under section 132 on 2nd July, 2015 and the AO would reassess the total income of the assessee as per the

provisions of section 153A in respect of these four assessment years i.e. 2010-11 to 13-14. The proceedings under section 153A in respect of these four assessment years would be in the nature of reassessment and not in the nature of assessment as in the cases of the remaining two assessment years i.e. 2014-15 and 15-16 those were got abated by virtue of search and seizure action under section 132 of the Act on 2nd July, 2015. It is a settled proposition of law that the assessment or reassessment under section 153A in respect of the assessment years which have already been completed and assessment orders have been passed determining the assessee's total income, the addition to the income that has already been assessed can be made only on the basis of incriminating material. In the absence of any incriminating material the completed assessment can only be reiterated. The provisions of section 132 read with section 153A of the Act stipulate two types of situations – one where the assessment of any assessment year falling within six assessment years is pending on the date of initiation of search under section 132 or making of requisition under section 132A of the Act. Therefore, the assessment under section 153A in respect of those assessment years which stand abated due to the reason of pending on the date of initiation of search or requisition shall be the original/first assessment. In the second category where the assessment or reassessment has already been completed on the date of initiation of search or making of requisition as the case may be, the assessment under section 153A would be in the nature of reassessment. The Hon'ble Delhi High Court in the case of CIT vs. Kabul Chawla while analyzing the provisions of section 153A read with section 132 of the Act has observed in para 37 and 38 as under :-

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

- i. Once a search takes place under Section 132 of the Act, notice under Section 153 A(1) will have to be mandatorily issued to the person searched requiring him to file*

returns for six AYs immediately preceding the previous year relevant to the AY in which the search takes place.

- ii. Assessments and reassessments pending on the date of the search shall abate. The total income for such AYs will have to be computed by the AOs as a fresh exercise.
- iii. The AO will exercise normal assessment powers in respect of the six years previous to the relevant AY in which the search takes place. The AO has the power to assess and reassess the 'total income' of the aforementioned six years in separate assessment orders for each of the six years. In other words there will be only one assessment order in respect of each of the six AYs "in which both the disclosed and the undisclosed income would be brought to tax".
- iv. Although Section 153 A does not say that additions should be strictly made on the basis of evidence found in the course of the search, or other post-search material or information available with the AO which can be related to the evidence found, it does not mean that the assessment "can be arbitrary or made without any relevance or nexus with the seized material. Obviously an assessment has to be made under this Section only on the basis of seized material."
- v. In absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made. The word 'assess' in Section 153 A is relatable to abated proceedings (i.e. those pending on the date of search) and the word 'reassess' to completed assessment proceedings.
- vi. Insofar as pending assessments are concerned, the jurisdiction to make the original assessment and the assessment under Section 153A merges into one. Only one assessment shall be made separately for each AY on the basis of the findings of the search and any other material existing or brought on the record of the AO.
- vii. Completed assessments can be interfered with by the AO while making the assessment under Section 153 A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment.

Conclusion

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

Thus the Hon'ble High Court has held that in the absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made. The Hon'ble High Court has also referred the term used in section 153A as "assess" which is relatable to abated proceedings and the word "reassess" related to completed assessment proceedings. Therefore, the completed assessments can be interfered with by

the AO while making the assessment under section 153A only on the basis of some incriminating material unearthed during the course of search or requisition of document or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment. The Hon'ble Delhi High Court has reiterated its view in case of Principal CIT vs. Kurele Paper Mills (supra) in para 1 to 3 as under :-

"1. The Revenue has filed the appeal against an order dated 14.11.2014 passed by the Income Tax Appellate Tribunal (ITAT) in 3761/Del/2011 pertaining to the Assessment Year 2002-03. The question was whether the learned CIT (Appeals) had erred in law and on the facts in deleting the addition of Rs. 89 lacs made by the Assessing Officer under Section 68 of the Income Tax Act, 1961 ('ACT') on bogus share capital. But, the issue was whether there was any incriminating material whatsoever found during the search to justify initiation of proceedings under Section 153A of the Act.

2. The Court finds that the order of the CIT(Appeals) reveals that there is a factual finding that "no incriminating evidence related to share capital issued was found during the course of search as is manifest from the order of the AO." Consequently, it was held that the AO was not justified in invoking Section 68 of the Act for the purposes of making additions on account of share capital.

3. As far as the above facts are concerned, there is nothing shown to the court to persuade and hold that the above factual determination is perverse. Consequently, after considering all the facts and circumstances of the case, the Court is of the opinion that no substantial question of law arises in the impugned order of the ITAT which requires examination."

The SLP filed by the revenue against the said decision of Hon'ble Delhi High Court was dismissed by the Hon'ble Supreme Court vide order dated 7th December, 2015. In a subsequent decision, the Hon'ble Delhi High Court in the case of Principal CIT vs. Meeta Gutgutia has again analyzed this issue in para 55 to 71 as under :-

"55. On the legal aspect of invocation of Section 153A in relation to AYs 2000-01 to 2003-04, the central plank of the Revenue's submission is the decision of this Court in *Smt. Dayawanti Gupta (supra)*. Before beginning to examine the said decision, it is necessary to revisit the legal landscape in light of the elaborate arguments advanced by the Revenue.

56. Section 153A of the Act is titled "Assessment in case of search or requisition". It is connected to Section 132 which deals with 'search and seizure'. Both these provisions, therefore, have to be read together. Section 153A is indeed an extremely potent power which enables the Revenue to re-

open at least six years of assessments earlier to the year of search. It is not to be exercised lightly. It is only if during the course of search under Section 132 incriminating material justifying the re-opening of the assessments for six previous years is found that the invocation of Section 153A *qua* each of the AYs would be justified.

57. The question whether unearthing of incriminating material relating to any one of the AYs could justify the re-opening of the assessment for all the earlier AYs was considered both in *Anil Kumar Bhatia (supra)* and *Chetan Das Lachman Das (supra)*. Incidentally, both these decisions were discussed threadbare in the decision of this Court in *Kabul Chawla (supra)*. As far as *Anil Kumar Bhatia (supra)* was concerned, the Court in paragraph 24 of that decision noted that "we are not concerned with a case where no incriminating material was found during the search conducted under Section 132 of the Act. We therefore express no opinion as to whether Section 153A can be invoked even under such situation". That question was, therefore, left open. As far as *Chetan Das Lachman Das (supra)* is concerned, in para 11 of the decision it was observed:

"11. Section 153A (1) (b) provides for the assessment or reassessment of the total income of the six assessment years immediately preceding the assessment year relevant to the previous year in which the search took place. To repeat, there is no condition in this Section that additions should be strictly made on the basis of evidence found in the course of the search or other post-search material or Information available with the Assessing Officer which can be related to the evidence found. This, however, does not mean that the assessment under Section 153A can be arbitrary or made without any relevance or nexus with the seized material. Obviously an assessment has to be made under this Section only on the basis of seized material."

58. In *Kabul Chawla (supra)*, the Court discussed the decision in *Filatex India Ltd. (supra)* as well as the above two decisions and observed as under:

"31. What distinguishes the decisions both in *CIT v. Chetan Das Lachman Das (supra)*, and *Filatex India Ltd. v. CIT-IV (supra)* in their application to the present case is that in both the said cases there was some material unearthed during the search, whereas in the present case there admittedly was none. Secondly, it is plain from a careful reading of the said two . decisions that they do not hold that additions can be validly made to income forming the subject matter of completed assessments prior to the search even if no incriminating material whatsoever was unearthed during the search.

32. Recently by its order dated 6th July 2015 in ITA No. 369 of 2015 (*Pr. Commissioner of Income Tax v. Kurele Paper Mills P. Ltd.*), this Court declined to frame a question of law in a case where, in the absence of any incriminating material being found during the search under Section 132 of the Act, the Revenue sought to justify initiation of proceedings under Section 153A of the Act and make an addition under Section 68 of the Act on bogus share capital gain. The order of the CIT (A), affirmed by the ITAT, deleting the addition, was not interfered with."

59. In *Kabul Chawla (supra)*, the Court referred to the decision of the Rajasthan High Court in *Jai Steel (India) v. Asstt. CIT [2013] 36 taxmann.com 523/219 Taxman 223*. The said part of the decision in *Kabul Chawla (supra)* in paras 33 and 34 reads as under:

'33. The decision of the Rajasthan High Court in *Jai Steel (India), Jodhpur v. ACIT (supra)* involved a case where certain books of accounts and other documents that had not been produced in the course of original assessment were found in the course of search. It was held where undisclosed income or undisclosed property has been found as a consequence of the search, the same would also be taken into consideration while computing the total income under Section 153A of the Act. The Court then explained as under:

"22. In the firm opinion of this Court from a plain reading of the provision along with the purpose and purport of the said provision, which is intricately linked with search and requisition under Sections 132 and 132A of the Act, it is apparent that:

- (a) the assessments or reassessments, which stand abated in terms of II proviso to Section 153A of the Act, the AO acts under his original jurisdiction, for which, assessments have to be made;
- (b) regarding other cases, the addition to the income that has already been assessed, the assessment will be made on the basis of incriminating material; and
- (c) in absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made."

34. The argument of the Revenue that the AO was free to disturb income *de hors* the incriminating material while making assessment under Section 153A of the Act was specifically rejected by the Court on the ground that it was "not borne out from the scheme of the said provision" which was in the context of search and/or requisition. The Court also explained the purport of the words "assess" and "reassess", which have been found at more than one place in Section 153A of the Act as under:

"26. The plea raised on behalf of the assessee that as the first proviso provides for assessment or reassessment of the total income in respect of each assessment year falling within the six assessment years, is merely reading the said provision in isolation and not in the context of the entire section. The words 'assess' or 'reassess'-have been used at more than one place in the Section and a harmonious construction of the entire provision would lead to an irresistible conclusion that the word assess has been used in the context of an abated proceedings and reassess has been used for completed

assessment proceedings, which would not abate as they are not pending on the date of initiation of the search or making of requisition and which would also necessarily support the interpretation that for the completed assessments, the same can be tinkered only based on the incriminating material found during the course of search or requisition of documents."

60. In *Kabul Chawla (supra)*, the Court also took note of the decision of the Bombay High Court in *CIT v. Continental Warehousing Corpn (Nhava Sheva) Ltd.* [[2015\] 58 taxmann.com 78/232 Taxman 270/374 ITR 645 \(Bom.\)](#) which accepted the plea that if no incriminating material was found during the course of search in respect of an issue, then no additions in respect of any issue can be made to the assessment under Section 153A and 153C of the Act. The legal position was thereafter summarized in *Kabul Chawla (supra)* as under:

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

- i. Once a search takes place under Section 132 of the Act, notice under Section 153 A (1) will have to be mandatorily issued to the person searched requiring him to file returns for six AYs immediately preceding the previous year relevant to the AY in which the search takes place.
- ii. Assessments and reassessments pending on the date of the search shall abate. The total income for such AYs will have to be computed by the AOs as a fresh exercise.
- iii. The AO will exercise normal assessment powers in respect of the six years previous to the relevant AY in which the search takes place. The AO has the power to assess and reassess the 'total income' of the. aforementioned six years in separate assessment orders for each of the six years. In other words there will be only one assessment order in respect of each of the six AYs "in which both the disclosed and the undisclosed income would be brought to tax".
- iv. Although Section 153 A does not say that additions should be strictly made on the basis of evidence found in the course of the search, or other post-search material or information available with the AO which can be related to the evidence found, it does not mean that the assessment "can be arbitrary or made without any relevance or nexus with the seized material. Obviously an assessment has to be made under this Section only on the basis of seized material."
- v. In absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made. The word 'assess' in

Section 153 A is relatable to abated proceedings (i.e. those pending on the date of search) and the word 'reassess' to completed assessment proceedings.

- vi. Insofar as pending assessments are concerned, the jurisdiction to make the original assessment and the assessment under Section 153A merges into one. Only one assessment shall be made separately for each AY on the basis of the findings of the search and any other material existing or brought on the record of the AO.
- vii. Completed assessments can be interfered with by the AO while making the assessment under Section 153 A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment."

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

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

section 132A, as the case may be, shall abate. Sub-section (2) of section 153A of the Act provides that if any proceeding or any order of assessment or reassessment made under sub-section (1) is annulled in appeal or any other legal provision, then the assessment or reassessment relating to any assessment year which had abated under the second proviso would stand revived. The proviso thereto says that such revival shall cease to have effect if such order of annulment is set aside. Thus, any proceeding of assessment or reassessment falling within the six assessment years prior to the search or requisition stands abated and the total income of the assessee is required to be determined under section 153A of the Act. Similarly, sub-section (2) provides for revival of any assessment or reassessment which stood abated, if any proceeding or any order of assessment or reassessment made under section 153A of the Act is annulled in appeal or any other proceeding.

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

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19. On behalf of the appellant, it has been contended that if any incriminating material is found, notwithstanding that in relation to the year under consideration, no incriminating material is found, it would be permissible to make additions and disallowance in respect of an the six assessment years. In the opinion of this court, the said contention does not merit acceptance, inasmuch as. the assessment in respect of each of the six assessment years is a

separate and distinct assessment. Under section 153A of the Act, assessment has to be made in relation to the search or requisition, namely, in relation to material disclosed during the search or requisition. If in relation to any assessment year, no incriminating material is found, no addition or disallowance can be made in relation to that assessment year in exercise of powers under section 153A of the Act and the earlier assessment shall have to be reiterated. In this regard, this court is in complete agreement with the view adopted by the Rajasthan High Court in the case of *Jai Steel (India) v. Asst. CIT (supra)*. Besides, as rightly pointed out by the learned counsel for the respondent, the controversy involved in the present case stands concluded by the decision of this court In the case of *CIT v. Jayaben Ratilal Sorathia (supra)* wherein it has been held that while it cannot be disputed that considering section 153A of the Act, the Assessing Officer can reopen and/or assess the return with respect to six preceding years ; however, there must be some incriminating material available with the Assessing Officer with respect to the sale transactions in the particular assessment year.'

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

"6. once an assessment has attained finality for a particular year, i.e., it is not pending then the same cannot be subject to tax in proceedings under section 153A of the Act. This of course would not apply if incriminating materials are gathered in the course of search or during proceedings under section 153A of the Act which are contrary to and/or not disclosed during the regular assessment proceedings."

63. Even this Court has in *Mahesh Kumar Gupta (supra)* and *Ram Avtar Verma (supra)* followed the decision in *Kabul Chawla (supra)*. The decision of this Court in *Kurele Paper Mills (P.) Ltd. (supra)* which was referred to in *Kabul Chawla (supra)* has been affirmed by the Supreme Court by the dismissal of the Revenue's SLP on 7th December, 2015.

The decision in Dayawanti Gupta

64. That brings us to the decision in *Smt. Dayawanti Gupta (supra)*. As rightly pointed out by Mr. Kaushik, learned counsel appearing for the Respondent, that there are several distinguishing features in that case which makes its ratio inapplicable to the facts of the present case. In the first place, the Assessee there were engaged in the business of Pan Masala and Gutkha etc. The answers given to questions posed to the Assessee in the course of search and survey proceedings in that case bring out the points of distinction. In the first place, it was stated that the statement recorded was under Section 132(4) and not under Section 133A. It was a statement by the Assessee himself. In response to question no. 7 whether all the purchases made by the family firms, were entered in the regular books of account, the answer was:

"We and our family firms namely M/s. Assam Supari Traders and M/s. Balaji Perfumes generally try to record the transactions made in respect of purchase, manufacturing and sales in our regular books of accounts but it is also fact that some time due to some factors like inability of accountant, our busy schedule and some family problems, various purchases and sales of Supari, Gutka and other items dealt by our firms is not entered and shown in the regular books of accounts maintained by our firms."

65. Therefore, there was a clear admission by the Assesseees in *Smt. Dayawanti Gupta (supra)* there that they were not maintaining regular books of accounts and the transactions were not recorded therein.

66. Further, in answer to Question No. 11, the Assessee in *Smt. Dayawanti Gupta (supra)* was confronted with certain documents seized during the search. The answer was categorical and reads thus:

"Ans:- I hereby admit that these papers also contend details of various transactions include purchase/sales/manufacturing trading of Gutkha, Supari made in cash outside Books of accounts and these are actually unaccounted transactions made by our two firms namely M/s. Asom Trading and M/s. Balaji Perfumes."

67. By contrast, there is no such statement in the present case which can be said to constitute an admission by the Assessee of a failure to record any transaction in the accounts of the Assessee for the AYs in question. On the contrary, the Assessee herein stated that, he is regularly maintaining the books of accounts. The disclosure made in the sum of Rs. 1.10 crores was only for the year of search and not for the earlier years. As already noticed, the books of accounts maintained by the Assessee in the present case have been accepted by the AO. In response to question No. 16 posed to Mr. Pawan Gadia, he stated that there was no possibility of manipulation of the accounts. In *Smt. Dayawanti Gupta (supra)*, by contrast, there was a chart prepared confirming that there had been a year-wise non-recording of transactions. In *Smt. Dayawanti Gupta (supra)*, on the basis of material recovered during search, the additions which were made for all the years whereas additions in the present case were made by the AO only for AY 2004-05 and not any of the other years. Even the additions made for AYs 2004-05 were subsequently deleted by the CIT (A), which order was affirmed by the ITAT. Even the Revenue has challenged only two of such deletions in ITA No. 306/2017.

68. In para 23 of the decision in *Smt. Dayawanti Gupta (supra)*, it was observed as under:

"23. This court is of opinion that the ITAT's findings do not reveal any fundamental error, calling for correction. The inferences drawn in respect of undeclared income were premised on the materials found as well as the statements recorded by the assesseees. These additions therefore were not baseless. Given that the assessing authorities in such cases have to draw inferences, because of the nature of the materials - since they could be scanty (as one habitually concealing income or indulging in clandestine operations can hardly be expected to maintain meticulous books or records for long and in all probability be anxious to do away with such evidence at the shortest possibility) the element of guess work is to have some reasonable nexus with the statements recorded and documents seized. In tills case, the differences of opinion between the CIT (A) on the one hand and the AO and ITAT on the

other cannot be the sole basis for disagreeing with what is essentially a factual surmise that is logical and plausible. These findings do not call for interference. The second question of law is answered again in favour of the revenue and against the assessee."

69. What weighed with the Court in the above decision was the "habitual concealing of income and indulging in clandestine operations" and that a person indulging in such activities "can hardly be accepted to maintain meticulous books or records for long." These factors are absent in the present case. There was no justification at all for the AO to proceed on surmises and estimates without there being any incriminating material *qua* the AY for which he sought to make additions of franchisee commission.

70. The above distinguishing factors in *Smt. Dayawanti Gupta (supra)*, therefore, do not detract from the settled legal position in *Kabul Chawla (supra)* which has been followed not only by this Court in its subsequent decisions but also by several other High Courts.

71. For all of the aforementioned reasons, the Court is of the view that the ITAT was justified in holding that the invocation of Section 153A by the Revenue for the AYs 2000-01 to 2003-04 was without any legal basis as there was no incriminating material *qua* each of those AYs."

The Hon'ble Delhi High Court has concurred with the view as taken in case of Kabul Chawla (supra) as well as the decision of Hon'ble Jurisdictional High Court in the case of M/s. Jai Steel India Ltd. vs. ACIT (supra). Even on the issue of addition made by the AO in the proceedings under section 153A in respect of the assessment year which was already completed on the date of search, the Hon'ble High Court has held that in the absence of any material which was subsequently unearthed during the search and was not already available to the AO, the additions made by the AO on account of security deposits were rightly deleted by the Id. CIT (A). The relevant observations of the Hon'ble High Court in case of Principal CIT vs. Meeta Gutgutia (supra) are in para 53 as under :-

'53. At this stage, it is also to be noticed that an elaborate argument was made by Mr. Manchanda on the aspect of the security deposits accepted by the Assessee. These were of two kinds - one was of refundable security deposits and the other for non-refundable security deposits. As far as the refundable security deposits were concerned, the AO himself in his remand report accepted them as having been disclosed. This has been noticed by the CIT (A) in para 7.2.1 of his order for AY 2004-05. As regards non-refundable

security deposit, the CIT (A) accepted the AO's findings that treating the sum as 'goodwill written off on deferred basis' was not correct, hence the addition of Rs. 5,09,343 was held to be justified and correct. It was duly accounted for under 'liabilities' and transferred to income in a phased manner. This was not done by manipulating the account books of the Assessee as alleged by the Revenue. This would have been evident had the return been picked up for scrutiny under Section 143(3) of the Act. This, therefore, was not material which was subsequently unearthed during the search which was not already available to the AO. Consequently, the additions sought to be made by the AO on account of security deposits were rightly deleted by the CIT (A)."

Thus the essential corollary of these decisions is that no addition can be made in the proceedings under section 153A in respect of the assessments which were completed prior to the date of search except based on some incriminating material unearthed during the search which was not already available to the AO. It is pertinent to note that the SLP filed by the revenue against the decision of Hon'ble Delhi High Court in case of Principal CIT vs. Meeta Gutgutia was dismissed vide order dated 2nd July, 2018. There are series of decisions on this issue including the decision of Hon'ble Jurisdictional High Court in case of M/s. Jai Steel India vs. ACIT (supra) wherein the Hon'ble High Court has held in para 23 to 30 as under :-

"23. The reliance placed by the counsel for the appellant on the case of Anil Kumar Bhatia (supra) also does not help the case of the assessee. The relevant extract of the said judgment reads as under:—

"19. Under the provisions of Section 153A, as we have already noticed, the Assessing Officer is bound to issue notice to the assessee to furnish returns for each assessment year falling within the six assessment years immediately preceding the assessment year relevant to the previous year in which the search or requisition was made. Another significant feature of this Section is that the Assessing Officer is empowered to assess or reassess the "total income" of the aforesaid years. This is a significant departure from the earlier block assessment scheme in which the block assessment roped in only the undisclosed income and the regular assessment proceedings were preserved, resulting in multiple assessments. Under Section 153A, however, the Assessing Officer has been given the power to assess or reassess the 'total income' of the six assessment years in question in separate assessment orders. This means that there can be only one

assessment order in respect of each of the six assessment years, in which both the disclosed and the undisclosed income would be brought to tax.

20. A question may arise as to how this is sought to be achieved where an assessment order had already been passed in respect of all or any of those six assessment years, either under Section 143(1)(a) or Section 143(3) of the Act. If such an order is already in existence, having obviously been passed prior to the initiation of the search/requisition, *the Assessing Officer is empowered to reopen those proceedings and reassess the total income, taking note to the undisclosed income, if any, unearthed during the search.* For this purpose, the fetters imposed upon the Assessing Officer by the strict procedure to assume jurisdiction to reopen the assessment under Sections 147 and 148, have been removed by the non obstante clause with which sub-section (1) of Section 153A opens. The time-limit within which the notice under Section 148 can be issued, as provided in Section 149 has also been made inapplicable by the non obstante clause. Section 151 which requires sanction to be obtained by the Assessing Officer by issue of notice to reopen the assessment under Section 148 has also been excluded in a case covered by Section 153A. The time-limit prescribed for completion of an assessment or reassessment by Section 153 has also been done away with in a case covered by Section 153A. With all the stops having been pulled out, the Assessing Officer under Section 153A has been entrusted with the duty of bringing to tax the total income of an assessee whose case is covered by Section 153A, by even making reassessments without any fetters, if need be.

21. Now there can be cases where at the time when the search is initiated or requisition is made, the assessment or reassessment proceedings relating to any assessment year falling within the period of the six assessment years mentioned above, may be pending. In such a case, the second proviso to sub-section (1) of Section 153A says that such proceedings "shall abate". The reason is not far to seek. Under Section 153A, there is no room for multiple assessment orders in respect of any of the six assessment years under consideration. That is because the Assessing Officer has to determine not merely the undisclosed income of the assessee, but also the 'total income' of the assessee in whose case a search or requisition has been initiated. Obviously there cannot be several orders for the same assessment year determining the total income of the assessee. In order to ensure this state of affairs namely, that in respect of the six assessment years preceding the assessment year relevant to the year in which the search took place there is only one determination of the total income, it has been provided in the second proviso of sub-Section (1) of Section 153A that any proceedings for assessment or reassessment of the assessee which are pending on the date of initiation of the search or making requisition "shall abate". Once those proceedings abate, the decks are cleared, for the Assessing Officer to pass assessment orders for each of those six years determining the total income of the assessee which would include both the income declared in the returns, if any, furnished by the assessee as well as the undisclosed income, if

any, unearthed during the search or requisition. The position thus emerging is that the search is initiated or requisition is made, they will abate making way for the Assessing Officer to determine the total income of the assessee in which the undisclosed income would also be included, but in case where the assessment or reassessment proceedings have already been completed and assessment orders have been passed determining the assessee's total income and such orders subsisting at the time when the search or the requisition is made, there is no question of any abatement since no proceedings are pending. In this latter situation, the Assessing Officer will reopen the assessments or reassessments already made (without having the need to follow the strict provisions or complying with the strict conditions of Sections 147, 148 and 151) and determine the total income of the assessee. *Such determination in the orders passed under Section 153A would be similar to the orders passed in any reassessment, where the total income determined in the original assessment order and the income that escaped assessment are clubbed together and assessed as the total income.* In such a case, to reiterate, there is no question of any abatement of the earlier proceedings for the simple reason that no proceedings for assessment or reassessment were pending since they had already culminated in assessment or reassessment orders when the search was initiated or the requisition was made." (Emphasis supplied)

24. The said judgment also in no uncertain terms holds that the reassessment of the total income of the completed assessments have to be made taking note of the undisclosed income, if any, unearthed during the search and the income that escaped assessments are required to be clubbed together with the total income determined in the original assessment and assessed as the total income. The observations made in the judgment contrasting the provisions of determination of undisclosed income under Chapter XIVB with determination of total income under Sections 153A to 153C of the Act have to be read in the context of second proviso only, which deals with the pending assessment/reassessment proceedings. The further observations made in the context of de novo assessment proceedings also have to be read in context that irrespective of the fact whether any incriminating material is found during the course of search, the notice and consequential assessment under Section 153A have to be undertaken.

25. The argument of the learned counsel that the AO is also free to disturb income, expenditure or deduction de hors the incriminating material, while making assessment under Section 153A of the Act is also not borne out from the scheme of the said provision which as noticed above is essentially in context of search and/or requisition. The provisions of Sections 153A to 153C cannot be interpreted to be a further innings for the AO and/or assessee beyond provisions of Sections 139 (return of income), 139(5) (revised return of income), 147 (income escaping assessment) and 263 (revision of orders) of the Act.

26. The plea raised on behalf of the assessee that as the first proviso provides for assessment or reassessment of the total income in respect of each assessment year falling within the six assessment years, is merely reading the said provision in isolation and not in the context of the entire section. The

words 'assess' or 'reassess' have been used at more than one place in the Section and a harmonious construction of the entire provision would lead to an irresistible conclusion that the word 'assess' has been used in the context of an abated proceedings and reassess has been used for completed assessment proceedings, which would not abate as they are not pending on the date of initiation of the search or making of requisition and which would also necessarily support the interpretation that for the completed assessments, the same can be tinkered only based on the incriminating material found during the course of search or requisition of documents.

27. The Allahabad High Court in *Smt. Shaila Agarwal's (supra)* has held as under:—

"19. The second proviso to Section 153A of the Act, refers to abatement of the pending assessment or re-assessment proceedings. The word 'pending' does not operate any such interpretation, that wherever the appeal against such assessment or reassessment is pending, the same along with assessment or reassessment proceedings is liable to be abated. The principles of interpretation of taxing statutes do not permit the Court to interpret the Second Proviso to Section 153A in a manner that where the assessment or reassessment proceedings are complete, and the matter is pending in appeal in the Tribunal, the entire proceedings will abate.

20. There is another aspect to the matter, namely that the abatement of any proceedings has serious causes and effect in as much as the abatement of the proceedings, takes away all the consequences that arise thereafter. In the present case after deducting bogus gifts in the regular assessment proceedings, the proceedings for penalty were drawn under Section 271(1)(c) of the Act. *The material found in the search may be a ground for notice and assessment under Section 153A of the Act but that would not efface or terminate all the consequence, which has arisen out of the regular assessment or reassessment resulting into the demand or proceedings of penalty.*" (Emphasis supplied)

The said judgment which essentially deals with second proviso to Section 153A of the Act also supports the conclusion, which we have reached hereinbefore.

28. It has been observed by the Hon'ble Supreme Court in *K.P. Varghese v. ITO* [1981] 131 ITR 597/7 Taxman 13 that "it is well recognized rule of construction that a statutory provision must be so construed, if possible that absurdity and mischief may be avoided."

29. The argument of the counsel for the appellant if taken to its logical end would mean that even in cases where the appeal arising out of the completed assessment has been decided by the CIT(A), ITAT and the High Court, on a notice issued under Section 153A of the Act, the AO would have power to undo what has been concluded up to the High Court. Any interpretation which leads to such conclusion has to be repelled and/or avoided as held by the Hon'ble Supreme Court in the case of *K.P. Varghese (supra)*.

30. Consequently, it is held that it is not open for the assessee to seek deduction or claim expenditure which has not been claimed in the original assessment, which assessment already stands completed, only because a assessment under Section 153A of the Act in pursuance of search or requisition is required to be made.”

In the case in hand, the transactions of unsecured loans as well as introduction of capital by the partners were duly recorded in the books of account and available with the AO. Further, during the course of search under section 132 of the Act on 2nd July 2015 no material much less incriminating material was either found or seized to disclose any undisclosed income on account of unsecured loans or partners’ capital received by the assessee firm. The AO has proposed to make the addition on account of unsecured loans and partners’ capital under section 68 being unexplained cash credit solely on the basis of the information received from Investigation Wing Kolkata. It is pertinent to note that the said information was available with the AO prior to the search conducted under section 132 of the Act in case of the assessee on 2nd July, 2015. Therefore, even the sole basis of assessments framed under section 153A of the Act is the information received from Investigation Wing Kolkata and statement of one Shri Anand Sharma, who is stated to be an entry operator and managed various concerns/companies including M/s.Royal Crystal Dealers, one of the loan creditors of the assessee. Except the said statement and report of the Investigation Wing Kolkata, the AO has neither referred to or was having in possession of any material to indicate that the unsecured loans shown in the books of accounts as well as partners’ capital received by the assessee are nothing but assessee’s own unaccounted and undisclosed income routed back in the garb of unsecured loans and partners’ capital. There is no dispute that these transactions of unsecured loans and partners’ capital contribution are duly recorded in the books of accounts and disclosed in the return of income which were already completed as the assessments for these four assessment years were not pending on the date of search, therefore, it is manifest from the record that during the course of search and seizure under section 132 of the Act in the case of the assessee no material much less the incriminating material was unearthed or any undisclosed income which was not disclosed in

the books of accounts was detected or found. The only incriminating material which was referred by the AO is pages 21 to 26 of Annexure AS-1 in respect of long term capital gain earned by Shri Rajendra Agarwal and his family members. The said long term capital gain was disclosed by Shri Rajendra Agarwal in his statement under section 132(4) and, therefore, it was surrendered and offered to tax by Shri Rajendra Agarwal and his family members in the year of search. The AO himself has not made any addition in the hand of the assessee on account of long term capital gain which was found during the course of search and seizure. Thus, except the material disclosing the long term capital gain in the hand of Shri Rajendra Agarwal, no other incriminating material either found or referred or is the basis of the addition made by the AO while framing the assessment under section 153A of the Act for the assessment years 2010-11 to 13-14. It is appropriate to refer relevant part of the assessment order in para 12 pages 48 to 50, para 19 page 83 and para 22 page 86 as under :-

" 12. Submissions made on behalf of the assessee firm have been duly considered. However, even the very elaborate and case laws loaded submissions of the assessee are totally off the mark. Against the self-speaking facts of the very nature of the activities of the so called partner's providing huge partner's capital in the most uninterested manner and providing huge unsecured loans without any collateral or other security, the emphasis of the assessee firm in its submissions has been on seeking protection under various judicial decisions even without having any fact coherence. The submissions made by the assessee are completely devoid of merit in the light of the following facts and circumstances;

d. The department has very sound basis to treat, the receipts of unsecured loan and partner's capital from the above mentioned companies as bogus and in genuine. The findings of this office and Investigation report of the Investigation Directorate Kolkata are not based on any presumption, assumption, guess or bare suspicion. Where the nature and source of a receipt, whether it be of money

or other property, cannot be satisfactorily explained by the assessee, it is open for the revenue to hold that it is the income of the assessee and no further burden lies on the revenue to show that the income is from any particular source as enumerated the Hon'ble Supreme Court in the case of Roshan Di Hatti v. CIT (1977) 107 ITR 938 (SC) and Kale Khan Mohammad Hanif v. CIT (1963) 50 ITR 1 (SC).

Prima facie onus is always on the assessee to prove the cash credit entry found in the books of account of the assessee. In landmark cases like Kale Khan Mohammad Hanif v CIT (1963) 50 ITR 1 (SC), Roshan Di Hatti v CIT (1977) 107 ITR (SC) it has been held that the law is well settled that the onus of proving the source of a sum of money found to have been received by an assessee, is on him. Where the nature and source thereof cannot be explained satisfactorily, it is open to the revenue to hold that it is the income of the assessee and no further burden is on the revenue to show that the income is from any particular source. It may also be pointed out that the burden of proof is fluid for the purposes of Section 68. Once assessee has submitted basic documents relating to identity, genuineness of transaction and creditworthiness then AO must do some inquiry to call for more details to invoke Section 68.

- e. The assessee firm has filed confirmation letters and this office has carried out further enquiry to examine the reality of the transactions. An enquiry was sent to the Investigation Directorate Kolkata and it has been established that these investor or lender Companies are controlled by the entry operators. The statements of various entry operators are sufficient evidences to show that the unsecured loan and partner's capital are assessee's own undisclosed income brought into the books of the assessee under the garb of unsecured loan and partner's capital.*
- f. The department has carried out search over the assessee group and during the course of search action u/s 132 of the I.T. Act, 1961, the incriminating documents seized during search proceedings vide pg no. 21 to 26 of Annexure AS-1 of Party B-1, wherein the details of year-wise LTCCG earned by Shri Rajendra*

Agrawal and his family members, is maintained, which during search action has been accepted to be bogus by all family members in their respective statements."

"19. In view of above facts of the case and in the light of above judicial decision, it is established that genuineness of the transaction has not been proved. Section 68 of the I.T. Act provides for charging to income tax on any sum credited in the books of the assessee maintained for any previous year if the assessee offers no explanation about the nature and source thereof or the explanation offered is not, in the opinion of the Assessing Officer, satisfactory. It places no duty upon the Assessing Officer to point to the source from which the money was received by the assessee. Where an assessee fails to prove satisfactorily the source and the nature of certain amount of credit during the accounting year, the Income-tax Officer is entitled to draw the inference that the receipt are of an assessable nature. Thus, the assessee is unable to discharge its burden of proof by failing to establish lender's identity, forget the genuineness of transactions and creditworthiness of the lender. Hence, the unsecured loans and partner's capital shown to have been received from various Kolkata Based Companies and other Companies remained unexplained. In the circumstances, I am left with no option than to tax the entire unexplained credits by way of partner's capital and Unsecured loans received from the persons mentioned in para 5 above as unexplained cash credits u/s 68 of the Income Tax Act, chargeable to tax as income of the assessee firm for the respective assessment years."

" 22. After examination of the information and details placed on record and discussion with the assessee, the total income of the assessee is computed as under :-

<i>Returned income as per ITR u/s 153A of the Act.</i>	<i>Rs. 2,82,83,460/-</i>
<i>Additions Unexplained cash credits u/s 68 of the Act in the form of unsecured loan and partner's capital</i>	<i>Rs. 67,20,14,999/-</i>
<i>Assessed income</i>	<i>Rs. 70,02,98,459/-</i>
<i>R/o</i>	<i>Rs. 70,02,98,459/-</i>

The total income of the assessee in the status of Firm for Assessment Year 2010-11 relevant to Previous Year 2009-10 is assessed at Rs. 70,02,98,459/- u/s 153A read with section 143(3) of I.T. Act, 1961. The form ITNS-150 showing calculation of tax and interest chargeable, if any, is attached herewith and forms a part of this Order. A notice of demand u/s 156 of the Act and challan for payment of tax, if payable, is hereby issued. Penalty notice u/s 274 rws 271(1)(c) is issued separately."

The entire finding of the AO is based on the information received from the Investigation Wing Kolkata and statement of Shri Anand Sharma. The Id. CIT (A) though has not disputed the legal proposition on this issue, however, the contention of the assessee was turned down merely on the ground that the SLPs filed by the revenue in the cases of Kabul Chawla (supra) and M/s. All Cargo Global Logistics (supra) etc. have been admitted for decision by the Hon'ble Supreme Court. The relevant part of the finding of the Id. CIT (A) in para 3.2.2 and 3.2.4 at pages 35 and 36 are as under :-

"3.2.2 As per the provisions of this section where a search is initiated u/s 132 of the Act, the A.O shall issue a notice requiring the person searched to furnish his return of income in respect of each assessment year falling within six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made. Once such returns are filed, the AO has to assess or reassess the total income of such six assessment years.(emphasis supplied by me). (The decisive words used in the provisions are to 'assessee or reassess the total income'). The A.O. is thus duty bound to determine the 'total income' of the assessee for such six assessment years and it is obvious that 'total income' refers to the sum total of income in respect of which a person is assessable. The total income therefore will cover not only the income emanating from declared sources or any material placed before the Assessing Officer but from all sources including the undisclosed ones, or based on the unplaced material before the AO.

3.2.3 The concept of 'assess or reassess' and 'shall abate' as contemplated u/s 153A is under hot judicial debate. I find that legally, this issue is very

contentious in view of the divergent views of the various authorities. The appellant has tried to highlight most of them. However, it is equally pertinent to mention here that the Department has not accepted the decisions of Hon'ble Mumbai High Court in the case of M/s All Cargo Global Logistics as well as Continental Warehousing (Nhava Sheva) Ltd., and SLP has been filed before the Hon'ble Supreme Court. The Hon'ble Supreme Court has granted leave vide order dated 12.10.2015 as reported in 64 taxmann.com 34 (S.C.). Similarly, in the case of Kabul Chawla SLP has also been filed.

3.2.4 In view of SLPs admitted in case of *Kabul Chawla*, M/s All Cargo Global Logistics as well as Continental Warehousing (Nhava Sheva) Ltd., (supra), assessee's contention cannot be accepted. Moreover, in any case, the additions are to be adjudicated on merits as per relevant ground of appeal, the issue raised in this ground for present remains for academic discussion only. Accordingly, issue raised in ground no. 12 is dismissed."

Therefore, neither in the assessment order nor in the order of the Id. CIT (A) there is any mention or finding that the additions have been made by the AO on the basis of any incriminating material found during the course of search and seizure in the case of the assessee. The AO has solely relied upon the report of the Investigation Wing Kolkata and statement of one Shri Anand Sharma recorded by the Investigation Wing during the survey under section 133A of the Act. Therefore, even if the information/report of the Investigation Wing Kolkata is considered as a relevant evidence, the same cannot be regarded as incriminating material unearthed during the course of search and seizure under section 132 of the IT Act in case of the assessee. The requirement for making the addition under section 153A in the assessment years where the assessment was not pending on the date of search and the proceedings are in the nature of reassessment is essentially the incriminating material disclosing undisclosed income which was not disclosed by the

assessee. In the case in hand, the AO himself has not claimed any incriminating material found during the search and seizure in the case of the assessee. Accordingly, in the facts and circumstances of the case and in view of the binding precedents on this issue in which the SLP filed by the revenue was also dismissed by the Hon'ble Supreme Court, the additions made by the AO while passing the assessment orders under section 153A for the assessment years 2010-11 to 13-14 are not sustainable and accordingly the same are liable to be deleted. We order accordingly."

Since the facts involved as well as the contentions of both the parties for both the assessment years are same, therefore, our finding in the case of Kota Dall Mill on this issue is applicable in this case also. Accordingly, the addition made by the AO without any material much less the incriminating material is not sustainable in law. Further, the report of the Investigation Wing Kolkata is also not a material or document either found or detected during the search and seizure action in case of the assessee but it pertains to the investigation carried out by the Investigation Wing Kolkata in a separate matter. Therefore, the said report will not partake the character of incriminating material found or seized during the course of search and seizure action in the case of the assessee. Hence the additions made by the AO while framing the assessment under section 153A of the Act are deleted for want of incriminating material."

23. With respect to issue taken for not providing opportunity to cross examination, therefore, no addition is sustainable. The issue is covered by the decision of the Tribunal in the case of M/s Kota Dall Mill Vs. DCIT (supra) for the A.Y. 2010-11 and 2015-17, which has already been discussed in earlier paragraphs of this order.

25. Similarly in the case of DCIT Vs. M/s Baran Roller Flour Mills P. Ltd. (supra), the Tribunal has dealt the identical issue from pages 57 to 91 as under:

"17. We have considered the rival contentions as well as the relevant material on record. An identical issue has been considered and decided by us in the case of group concern, namely, M/s. Kota Dall Mill in ITA Nos. 997 to 1002/JP/2018 and 1119/JP/2018 and others vide order dated 31st December, 2018 in para 11 and 11.1 as under :-

"11. We have considered the rival submissions as well as the relevant material on record. For the assessment year 2010-11, the assessee has challenged the addition sustained by Id. CIT (A) in respect of unsecured loan from M/s. Jalsagar Commerce Pvt. Ltd. The other additions made by the AO on account of unsecured loans as well as partners' capital for the assessment year 2010-11 were deleted by the Id. CIT (A) on the ground that the AO was not having in his possession even the statement of the concerned persons in support of his finding that the alleged loan and partners' capital is nothing but bogus accommodation entries. Therefore, the revenue has challenged that part of the order in the cross appeal. The Id. A/R of the assessee has pointed out that for the assessment year 2010-11 there was no loan from the company controlled by Shri Anand Sharma, M/s. Royal Crystal Dealers Pvt. Ltd. but the assessee took the loan from M/s. Jalsagar Commerce Pvt. Ltd. which is not the company owned or controlled by Shri Anand Sharma. The Id. CIT (A) has sustained the addition in respect of loan from M/s. Jalsagar Commerce Pvt. Ltd. in para 5.1 to 5.12 as under :-

"5.1 In this respect, I find that Shri Anand Sharma whose statement is reproduced at Page 56 of the Assessment Order has clearly accepted that M/s Jalsagar Commerce Pvt. Ltd. is beneficiary company like Kota Dal Mill and both of these were provided bogus loans/advances by Royal Crystal Dealer Pvt. Ltd which is a paper company controlled by him. He further stated that the beneficiary

party such i.e, M/s Jalsagar Commerce Pvt. Ltd. gave him cash in lieu of which cheques was given by him for some commission income. He also admitted that some paper companies have sold to beneficiary parties. Though, in the initial report dated 28.11.2017, M/s Jalsagar Commerce Pvt. Ltd. was treated a party in Rajasthan, in later report dated 06.12.2017 the entry operator Shri Anand Sharma was linked with M/s Jalsagar Commerce Pvt. Ltd. as per the data base prepared by Directorate of Investigation Kolkata The relevant part of the said statement as reproduced on page no.57 of the assessment order is as under: -

provided to Aradhana Estate Pvt Ltd. In the entire process the beneficiary party gave me cash in lieu of which I gave them cheque for some commission income. Some paper companies have been sold to beneficiary parties. A total of Rs. 54.48 Crores respectively have been given as accommodation entry.

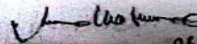
Pages 72 and 73 consist of ledger copy of Rajgharana Vyapaar Pvt Ltd through which bogus / accommodation share application money has been provided to Apeksha Securities Ltd. In the entire process the beneficiary party gave me cash in lieu of which I gave them cheque for some commission income. Some paper companies have been sold to beneficiary parties. A total of Rs. 31.31 Crores have been given as accommodation entry.

Page 71 is ledger copy of Ranjeet Retrail Garments Trading Pvt Ltd through which bogus / accommodation share application money has been provided to Umra Securities Pvt Ltd. In the entire process the beneficiary party gave me cash in lieu of which I gave them cheque for some commission income. Some paper companies have been sold to beneficiary parties. A total of Rs. 20.00 Crores respectively have been given as accommodation entry.

Pages 67 to 70 consist of ledger copies of bogus loans / advance given to Jalsagar Commerce Pvt Ltd, Kota Dall Mill by Royal Crystal Dealer Pvt Ltd which is a paper company controlled by me. In the entire process the beneficiary party gave me cash in lieu of which I gave them cheque for some commission income. Some paper companies have been sold to beneficiary parties. A total of Rs. 39.62 and Rs.47.585 Crores respectively have been given as bogus loans respectively to the above mentioned party.

Pages 61 to 66 consist of ledger copy of Swaraswati Commodities Pvt Ltd through which bogus / accommodation share application money has been provided to Mansi Commodities Pvt Ltd, Gupta Corporation Ltd. In the entire process the beneficiary party gave me cash in lieu of which I gave them cheque for some commission income. Some paper companies have been sold to beneficiary parties. A total of Rs. 1.50 and Rs. 45.55 Crores respectively have been given as accommodation entry.

Pages 51 to 60 consist of ledger copy of Satyam Financial Advertising Pvt Ltd through which bogus / accommodation share application money has been provided to Anmol Biscuits Pvt Ltd, Anmol Stainless Pvt Ltd, Baid Holding Pvt Ltd and Osho Gears & Pinions Ltd. In the entire process the beneficiary party gave me cash in lieu of which I gave them cheque for some commission income. Some paper companies have been sold to beneficiary parties. A total of Rs. 4.99, Rs. 12.4225, Rs. 12.10 and Rs. 1.17 Crores respectively have been given as accommodation entry. A bogus loan of Rs.


(DEPONENT) 06/02/19

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5.2 However, it is the submission of the Appellant that no notice under Section 131 or 133(6) of the Act was issued to this company, either by the Ld.

AO or by the concerned AO or by the DDIT (Inv.) Kolkata. Also, on bare perusal of the assessment order, it is evident that the name of the said companies does not appear in the statement of any of the entry operators as reproduced by the AO in the Assessment Order. However, the relevant documents including the Ledger a/c showing the transactions with appellant company, Source sheet of funds of transactions made with the Appellant, Copy of bank statement showing the transactions, etc. stand submitted for confirmation of the transaction of loan with the Appellant.

5.3 In my considered view, as the name of M/s Jalsagar Commerce Pvt. Ltd. is clearly mentioned as beneficiary company in the statement of Shri Anand Sharma, and Shri Anand Sharma is mentioned that some of such paper company are sold to beneficiary party, in view of fact that name of M/s Jalsagar Commerce Pvt. Ltd. Is mentioned in the reports as discussed in para 4.4.7 above, a genuine doubt is raised on the identity and genuineness of company. Further, the adverse facts pointed out in the reports as discussed in para 4.4.7 above for established background of all these share holders / depositors being the puppet in the hand of one or other accommodation entry providers, layering the transaction by cheque deposit on the same day or preceding day of share application / deposits, the assertions of the AO for no-creditworthiness or in-adequate creditworthiness of the so-called shareholders / depositors holds fields. During the appellate proceeding before me, though paper books for relevant AY and common Paper Books have been submitted, the same does not adduce any evidence to rebut the adverse factual finding made by the AO in the assessment order as mentioned by me in Para 4.1 above and categorically mentioned in the reports as discussed in para 4.4.7 above. Under these adverse background of appellant employing modus-operendi of resorting accommodation entry provider to build-up share capital / unsecured loans by foul means, what the AO is vehemently making the case for is the law on the issue-section 68 of Income-tax Act has to be applied by evolving perceptions for the law on the issue and not on the basis of routine perceptions on the law on the issue that is losing their relevance.

5.4 With all due respect to authorities cited by the appellant for canvassing his stand point, I am not able to persuade my conscience to agree with appellants arguments. In my considered opinion, under the adverse background of appellant employing modus-operendi of resorting

accommodation entry provider to build-up unsecured loans as established in the assessment order as briefly highlighted in Para 4.1 above, and armed with several authorities on the issue cited by the AO, I fully agree with the view taken by AO. However, to fortify the finding of the AO and to highlight the guiding principle on adjudicating non-genuine unsecured loans raised through accommodation entry proviers, I place further reliance on few more case laws with underlining the similarity of adverse facts prevailing in the present case as follows:-

5.5 In case of Suman Gupta V/s. Income Tax Officer ITAT, Agra Bench (2012) 138 ITD 0153 held as under:-

The AO discussed each and every creditor in the assessment order and the crux of the findings of the AO had been that there were very small bank balances in the bank accounts of the creditors and they were having meager income and as such, they were not men of means to advance any loan to the assessee. It is well settled law that burden is upon the assessee to prove ingredients of section 68 of the Act by proving identity and creditworthiness of the creditors and genuineness of the transactions. The assessee has, however, failed to prove the creditworthiness of the creditors who were having only meager income. No details of their savings have been filed. The assessee has never shown his willingness to produce the remaining creditors for examination before the AO. Therefore, the genuineness of the transaction could not have been examined by the AO. The smallness of the bank balance in the bank accounts of the creditors prior to issue of cheques would clearly reveal that they were not having any source and it was the money of the assessee which was routed through the bank accounts of the creditors for the purpose of giving credits to the assessee. These were, therefore, accommodation entries only and as such, could not be considered as genuine transactions. Merely because the loans have been received through banking channel, is not sacrosanct to make a non-genuine transaction as genuine transaction.

On consideration of the facts of the case in the light of above discussion and decision, there is no justification to interfere with the order of the ld. CIT(A). The assessee has failed to prove the creditworthiness of all the creditors and no source of their income has been filed. At the best the assessee is able to

prove identity of the creditors, but the assessee failed to prove the genuine credit in the matter. All the creditors have been rightly found to be men of meager means and no source of income have been filed to prove that they were having sufficient funds or savings in order to give loans to the assessee. On verification of the bank account of the depositors, it was specifically found that there were no sufficient funds available in their bank account and they were having only small bank balance, which was even not sufficient to meet out their household expenses or day-to-day requirements. Therefore, it is unbelievable to accept the contention of the assessee that said persons were having creditworthiness to advance any loan to the assessee. CIT(A) was justified in confirming the addition u/s. 68 of the IT Act. In the present case, the assessee has not adduced any sufficient evidence before the authorities below to prove the creditworthiness of the creditors and genuineness of the transactions in the matter. Therefore, the assessee has not satisfied the essential ingredients of section 68 of the IT Act.

Conclusion:

Merely because the loans have been received through banking channel, is not sacrosanct to make a non-genuine transaction as genuine transaction.

The above decision is confirmed by Hon'ble Allahabad High Court vide their judgment in ITA No.680/12 vide judgment dated 07.08.2012 and SLP of assessee was dismissed before the Hon'ble Apex Court as reported in 2013-LL-0122-69

5.6 Hon'ble High Court of Delhi in case of Commissioner of Income Tax V/s. Navodaya Castles Pvt. Ltd. reported at (2014) 367 ITR 0306 involving exactly similar facts observed in Para 2, 3 then Para 2 as under:-

2. The appeal arises out of the impugned order dated 31st October, 2011, passed by the Income Tax Appellate Tribunal, upholding the order passed by the Commissioner of Income Tax (Appeals) deleting addition of Rs.54,00,000/- made under Section 68 of the Income Tax Act, 1961 (Act, for short), by the Assessing Officer on account of share application.

3. The assessee, a company, had filed their return of income for the assessment year 2002-03 declaring loss of Rs.1,58,035/- on 20th October, 2002, which was processed under Section 143(1) of the Act. Subsequently, on

the basis of a report submitted by the Investigation Wing that the assessee was a recipient of accommodation entries in form of share application money/share capital/share premium, notice under Section 147 read with Section 148 of the Act was issued and served on 25th March, 2009.....

...

7. Summons under Section 131 of the Act were sent to the alleged shareholders and they were asked to furnish details on 10th December, 2009. Directors/Principal officers were required to personally come and depose. The summonses, as per the assessment order, were received back unserved. At the same time, the assessee filed details and confirmations of the alleged share capital. Earlier on 8th December, 2009, a detailed show cause notice was issued, fixing the hearing on 14th December, 2009. The assessee was asked to produce the shareholders along with their books of accounts to substantiate its claim of genuineness of the cash credits. In fact on 10th December, 2009, authorized representative had appeared and he was apprised that the summons issued to the shareholders under Section 131 had been received back unserved in five cases and he was requested to provide the present postal address of the parties. In the meanwhile, the Assessing Officer managed to get hold of the bank statements of the shareholders, who had allegedly made deposits by way of cheques and pay orders. The assessment order specifically records that huge cash deposits in lacs were being regularly deposited in the said accounts and then pay orders/cheques were issued to the respondent assessee.

8. On 14th December, 2009, authorized representative appeared and stated that the assessee was unable to produce directors or principal officers of the six shareholder companies pleading that they were not shareholders now and seven years had passed since the transactions took place. The assessment order records and mentions about the transactions recorded in the bank accounts of the shareholder/entry operator companies to show and establish that there was immediate deposit of cash and then issue of cheques. It was further mentioned that these companies were under control of one Mahesh Garg and his group, who were operating various accounts. The Assessing

Officer made addition of Rs.54,00,000/- under Section 68 of the Act and Rs.1,08,000/- as commission paid for procuring the said shares being 2% of Rs.54,00,000/-.

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11. We have heard the Senior Standing counsel for the Revenue, who has relied upon decisions of the Delhi High Court in Commissioner of Income Tax Vs. Nova Promoters and Finlease (P) Ltd. [2012] 342 ITR 169 (Delhi), Commissioner of Income Tax Vs. N.R. Portfolio Pvt. Ltd., 206 (2014) DLT 97 (DB) (Del) and Commissioner of Income Tax-II Vs. MAF Academy P. Ltd., 206 (2014) DLT 277 (DB) (Del). The aforesaid decisions mentioned above refer to the earlier decisions of Delhi High Court in Commissioner of Income Tax Vs. Sophia Finance Ltd., [1994] 205 ITR 98 (FB)(Delhi), CIT Vs. Divine Leasing and Finance Limited [2008] 299 ITR 268 (Delhi) and observations of the Supreme Court in CIT Vs. Lovely Exports P. Ltd. [2008] 319 ITR (St.) 5 (SC).

12. The main submission of the learned counsel for the assessee is that once the assessee had been able to show that the share holder companies were duly incorporated by the Registrar of Companies, their identity stood established, genuineness of the transactions stood established as payments were made through accounts payee cheques/bank account; and mere deposit of cash in the bank accounts prior to issue of cheque/pay orders etc. would only raise suspicion and, it was for the Assessing Officer to conduct further investigation, but it did not follow that the money belonged to the assessee and was their unaccounted money, which had been channelized.

13. As we perceive, there are two sets of judgments and cases, but these judgments and cases proceed on their own facts. In one set of cases, the assessee produced necessary documents/evidence to show and establish identity of the shareholders, bank account from which payment was made, the fact that payments were received thorough banking channels, filed necessary affidavits of the shareholders or confirmations of the directors of the shareholder companies, but thereafter no further inquiries were conducted. The second set of cases are those where there was evidence and material to

show that the shareholder company was only a paper company having no source of income, but had made substantial and huge investments in the form of share application money. The assessing officer has referred to the bank statement, financial position of the recipient and beneficiary assessee and surrounding circumstances. The primary requirements, which should be satisfied in such cases is, identification of the creditors/shareholder, creditworthiness of creditors/shareholder and genuineness of the transaction. These three requirements have to be tested not superficially but in depth having regard to the human probabilities and normal course of human conduct.

14. Certificate of incorporation, PAN number etc. are relevant for purchase of identification, but have their limitation when there is evidence and material to show that the subscriber was a paper company and not a genuine investor. It is in this context, the Supreme Court in CIT vs. Durga Prasad More [1971] 82 ITR 540 (SC) had observed:-

“Now we shall proceed to examine the validity of those grounds that appealed to the learned judges. It is true that the apparent must be considered real until it is shown that there are reasons to believe that the apparent is not the real. In a case of the present kind a party who relies on a recital in a deed has to establish the truth of those recitals, otherwise it will be very easy to make self-serving statements in documents either executed or taken by a party and rely on those recitals. If all that an assessee who wants to evade tax is to have some recitals made in a document either executed by him or executed in his favour then the door will be left wide open to evade tax. A little probing was sufficient in the present case to show that the apparent was not the real. The taxing authorities were not required to put on blinkers while looking at the documents produced before them. They were entitled to look into the surrounding circumstances to find out the reality of the recitals made in those documents.”

15. Summarizing the legal position in Nova Promoters and Finlease (P) Ltd.(supra), and highlighting the legal effect of section 68 of the Act, the Division Bench has held as under:-

“32. The tribunal also erred in law in holding Assessing Officer ought to have proved that the monies emanated from the coffers of the assessee-company and came back as share capital. Section 68 permits the Assessing Officer to add the credit appearing in the books of account of the assessee if the latter offers no explanation regarding the nature and source of the credit or the explanation offered is not satisfactory. It places no duty upon him to point to the source from which the money was received by the assessee. In A. Govindarajulu Mudaliar v CIT, (1958) 34 ITR 807, this argument advanced by the assessee was rejected by the Supreme Court. Venkatarama Iyer, J., speaking for the court observed as under (@ page 810):-

“Now the contention of the appellant is that assuming that he had failed to establish the case put forward by him, it does not follow as a matter of law that the amounts in question were income received or accrued during the previous year, that it was the duty of the Department to adduce evidence to show from what source the income was derived and why it should be treated as concealed income. In the absence of such evidence, it is argued, the finding is erroneous. We are unable to agree. Whether a receipt is to be treated as income or not, must depend very largely on the facts and circumstances of each case. In the present case the receipts are shown in the account books of a firm of which the appellant and Govindaswamy Mudaliar were partners. When he was called upon to give explanation he put forward two explanations, one being a gift of Rs. 80,000 and the other being receipt of Rs. 42,000 from business of which he claimed to be the real owner. When both these explanations were rejected, as they have been it was clearly upon to the Income-tax Officer to hold that the income must be concealed income. There is ample authority for the position that where an assessee fails to prove satisfactorily the source and nature of certain amount of cash received during the accounting year, the Income-tax Officer is entitled to draw the inference that the receipt are of an assessable nature. The conclusion to which the Appellate Tribunal came appears to us to be amply warranted by the facts of the case. There is no ground for interfering with that finding,

and these appeals are accordingly dismissed with costs.”(emphasis supplied)

Section 68 recognizes the aforesaid legal position. The view taken by the Tribunal on the duty cast on the Assessing Officer by section 68 is contrary to the law laid down by the Supreme Court in the judgment cited above. Even if one were to hold, albeit erroneously and without being aware of the legal position adumbrated above, that the Assessing Officer is bound to show that the source of the unaccounted monies was the coffers of the assessee, we are inclined to think that in the facts of the present case such proof has been brought out by the Assessing Officer. The statements of Mukesh Gupta and Rajan Jassal, the entry providers, explaining their modus operandi to help assessee’s having unaccounted monies convert the same into accounted monies affords sufficient material on the basis of which the Assessing Officer can be said to have discharged the duty. The statements refer to the practice of taking cash and issuing cheques in the guise of subscription to share capital, for a consideration in the form of commission. As already pointed out, names of several companies which figured in the statements given by the above persons to the investigation wing also figured as share-applicants subscribing to the shares of the assessee-company. These constitute materials upon which one could reasonably come to the conclusion that the monies emanated from the coffers of the assessee-company. The Tribunal, apart from adopting an erroneous legal approach, also failed to keep in view the material that was relied upon by the Assessing Officer. The CIT (Appeals) also fell into the same error. If such material had been kept in view, the Tribunal could not have failed to draw the appropriate inference.

*16. In the said case, the Division Bench had also examined the decision of the Supreme Court in *Lovely Exports P. Ltd.* (supra) and other cases in which the assessee had succeeded. It was noticed that in the case of *Lovely Exports P. Ltd.* affidavits/confirmations of shareholders were filed and income tax record numbers of the shareholders were made available, but the Assessing Officer, who had sufficient time, failed to carry out inquiry and examination. reference*

was made to the observations in Divine Leasing (supra) to the effect that there cannot be two opinions on the aspect that the pernicious practice of conversion of unaccounted money through the masquerade or channel of investment as share capital must be firmly excoriated by the Revenue, but when there is preponderance of evidence to show absence of culpability, the assessee should not be harassed by the Revenue. A delicate balance must be maintained between the two interests. In Divine Leasing (supra), the following proposition was elucidated:-

“In this analysis, a distillation of the precedents yields the following propositions of law in the context of Section 68 of the IT Act. The assessed has to prima facie prove (1) the identity of the creditor/subscriber; (2) the genuineness of the transaction, namely, whether it has been transmitted through banking or other indisputable channels; (3) the credit worthiness or financial strength of the creditor/subscriber. (4) If relevant details of the address or PAN identity of the creditor/subscriber are furnished to the Department along with copies of the Shareholders Register, Share Application Forms, Share Transfer Register etc. it would constitute acceptable proof or acceptable Explanation by the assessed. (5) The Department would not be justified in drawing an adverse inference only because the creditor/subscriber fails or neglects to respond to its notices; (6) the onus would not stand discharged if the creditor/subscriber denies or repudiates the transaction set up by the assessed nor should the AO take such repudiation at face value and construe it, without more, against the assessed. (7) The Assessing Officer is duty-bound to investigate the creditworthiness of the creditor/subscriber the genuineness of the transaction and the veracity of the repudiation.”

17. Nova Promoters and Finlease (P) Ltd. (supra) after referring to the dismissal of SLP against Divine Leasing case (supra) observed as under:-

“.....So understood, it will be seen that where the complete particulars of the share applicants such as their names and addresses, income tax file numbers, their creditworthiness, share application forms and share holders’ register, share transfer register etc. are

furnished to the Assessing Officer and the Assessing Officer has not conducted any enquiry into the same or has no material in his possession to show that those particulars are false and cannot be acted upon, then no addition can be made in the hands of the company under sec.68 and the remedy open to the revenue is to go after the share applicants in accordance with law. We are afraid that we cannot apply the ratio to a case, such as the present one, where the Assessing Officer is in possession of material that discredits and impeaches the particulars furnished by the assessee and also establishes the link between self-confessed “accommodation entry providers”, whose business it is to help assesseees bring into their books of account their unaccounted monies through the medium of share subscription, and the assessee. The ratio is inapplicable to a case, again such as the present one, where the involvement of the assessee in such modus operandi is clearly indicated by valid material made available to the Assessing Officer as a result of investigations carried out by the revenue authorities into the activities of such “entry providers”. The existence with the Assessing Officer of material showing that the share subscriptions were collected as part of a pre-meditated plan – a smokescreen – conceived and executed with the connivance or involvement of the assessee excludes the applicability of the ratio. In our understanding, the ratio is attracted to a case where it is a simple question of whether the assessee has discharged the burden placed upon him under sec.68 to prove and establish the identity and creditworthiness of the share applicant and the genuineness of the transaction. In such a case, the Assessing Officer cannot sit back with folded hands till the assessee exhausts all the evidence or material in his possession and then come forward to merely reject the same, without carrying out any verification or enquiry into the material placed before him. The case before us does not fall under this category and it would be a travesty of truth and justice to express a view to the contrary.”

18. *Lovely Exports Pvt. Ltd.(supra) was also considered and distinguished in N.R. Portfolio Pvt. Ltd. (supra) and it was held that the entire evidence*

available on record has to be considered, after relying upon CIT Vs. Nipun Builders and Developers, [2013] 350 ITR 407 (Delhi), wherein it has been held that a reasonable approach has to be adopted and whether initial onus stands discharged would depend upon facts and circumstances of each case. In case of private limited companies, generally persons known to directors or shareholders, directly or indirectly, buy or subscribe to shares. Upon receipt of money, the share subscribers do not lose touch and become incommunicado. Call money, dividends, warrants, etc. have to be sent and the relationship remains a continuing one. Therefore, an assessee cannot simply furnish some details and remain quiet when summons issued to shareholders remain un-served and uncomplied. As a general proposition, it would be improper to universally hold that the assessee cannot plead that they had received money, but could do nothing more and it was for the Assessing Officer to enforce shareholders' attendance in spite of the fact that the shareholders were missing and not available. Their reluctance and hiding may reflect on the genuineness of the transaction and creditworthiness of the creditor. It would be also incorrect to universally state that an Inspector must be sent to verify the shareholders/subscribers at the available addresses, though this might be required in some cases. Similarly, it would be incorrect to state that the Assessing Officer should ascertain and get addresses from the Registrar of Companies' website or search for the addresses of shareholders themselves. Creditworthiness is not proved by showing issue and receipt of a cheque or by furnishing a copy of statement of bank account, when circumstances requires that there should be some more evidence of positive nature to show that the subscribers had made genuine investment or had, acted as angel investors after due diligence or for personal reasons. The final conclusion must be pragmatic and practical, which takes into account holistic view of the entire evidence including the difficulties, which the assessee may face to unimpeachably establish creditworthiness of the shareholders.

19. In *N.R. Portfolio Pvt. Ltd.* (supra), it has been held as under:-

“18. In the remand report, the Assessing Officer referred to the provisions of Section 68 of the Act and their applicability. The word “identity” as defined, it was observed meant the condition or fact of a

person or thing being that specified unique person or thing. The identification of the person would include the place of work, the staff, the fact that it was actually carrying on business and recognition of the said company in the eyes of public. Merely producing PAN number or assessment particulars did not establish the identity of the person. The actual and true identity of the person or a company was the business undertaken by them. This according to us is the correct and true legal position, as identity, creditworthiness and genuineness have to be established. PAN numbers are allotted on the basis of applications without actual de facto verification of the identity or ascertaining active nature of business activity. PAN is a number which is allotted and helps the Revenue keep track of the transactions. PAN number is relevant but cannot be blindly and without considering surrounding circumstances treated as sufficient to discharge the onus, even when payment is through bank account.

19. On the question of credit worthiness and genuineness, it was highlighted that the money no doubt was received through banking channels, but did not reflect actual genuine business activity. The share subscribers did not have their own profit making apparatus and were not involved in business activity. They merely rotated money, which was coming through the bank accounts, which means deposits by way of cash and issue of cheques. The bank accounts, therefore, did not reflect their creditworthiness or even genuineness of the transaction. The beneficiaries, including the respondent-assessee, did not give any share-dividend or interest to the said entry operators/subscribers. The profit motive normal in case of investment was entirely absent. In the present case, no profit or dividend was declared on the shares. Any person, who would invest money or give loan, would certainly seek return or income as consideration. These facts are not adverted to and as noticed below are true and correct. They are undoubtedly relevant and material facts for ascertaining creditworthiness and genuineness of the transactions.

30. What we perceive and regard as correct position of law is that the court or tribunal should be convinced about the identity, creditworthiness and genuineness of the transaction. The onus to prove the three factum is on the assessee as the facts are within the assessee's knowledge. Mere production of incorporation details, PAN Nos. or the fact that third persons or company had filed income tax details in case of a private limited company may not be sufficient when surrounding and attending facts predicate a cover up. These facts indicate and reflect proper paper work or documentation but genuineness, creditworthiness, identity are deeper and obtrusive. Companies no doubt are artificial or juristic persons but they are soulless and are dependent upon the individuals behind them who run and manage the said companies. It is the persons behind the company who take the decisions, controls and manage them.”

20. Now, when we go to the order of the tribunal in the present case, we notice that the tribunal has merely reproduced the order of the Commissioner of Income Tax (Appeals) and upheld the deletion of the addition. In fact, they substantially relied upon and quoted the decision of its coordinate bench in the case of MAF Academy P. Ltd., a decision which has been overturned by the Delhi High Court vide its judgment in C.I.T vs. MAF Academy P. Ltd [(2014) 206 DLT 277]. In the impugned order it is accepted that the assessee was unable to produce directors and principal officers of the six shareholder companies and also the fact that as per the information and details collected by the Assessing Officer from the concerned bank, the Assessing Officer has observed that there were genuine concerns about identity, creditworthiness of shareholders as well as genuineness of the transactions.

21. In view of the aforesaid discussion, we feel that the matter requires an order of remit to the tribunal for fresh adjudication keeping in view the aforesaid case law. The question of law is, therefore, answered in favour of the Revenue and against the respondent-assessee, but with an order of remit to the tribunal to decide the whole issue afresh.

As reported at 2015-TIOL-314-SC-IT, in the above case, the Hon'ble Supreme Court observed to effect that 'merely because the assessee has been able to show that the shareholder companies were duly incorporated and their identity & genuineness stands established, there were deposits of cash in the bank accounts prior to issue of cheque or pay orders, the same would raise suspicion and addition can be made on such account'

5.7 It may be mentioned that as reported at 2016-TIOL-207-SC-IT, the Hon'ble Supreme Court dismissed SLP by Rick Lunsford Trade & Investment Ltd in case of Rick Lunsford Trade & Investment Ltd Vs CIT 'upholding that it is open to the Revenue Department to make addition on account of alleged share capital u/s 68, where the assessee company has failed to show genuineness of its shareholders.'

5.8 Hon'ble Delhi High Court in case of Commissioner of Income Tax-II V/s MAF Academy Pvt. Ltd. involving exactly similar facts in ITA 341/2012 dated 28th November, 2013 observed in Para 33 to 36 as under:

33. The Assessee company is a private limited company and had not come out with any public issue nor made any advertisement for issuance of share capital. However, in one year there is infusion of share capital including premium of Rs.4,35,00,000/-, out of which only Rs.92,00,000/- was infused from the Directors/family members of the Directors. The remaining share capital had been infused from parties which were completely unrelated either to the Assessee or to any of its Directors. In a private limited company, normally the investment of shares is from parties or persons who are friends or relatives of Promoters/Directors.

34. It is noticed that the shares had face value of Rs.100 /- and were allotted at a premium of Rs.100 /- to Rs.200/- and were then subsequently purchased by the Promoters/Directors, who had originally transferred these shares at Rs.35 /- per share.

35. It is really surprising that a person who had purchased shares at a premium of Rs.100 /- to Rs.200/- per share i.e. at a price of Rs.200 /- to Rs.300/- per share, sold the shares at Rs.35 /- per share i.e. at a substantial loss. Another surprising factor is that the entire investment

happened during a short span of time and re-transfer of the shares to the four Promoters/Directors of the company at Rs.35/- per share by different parties also happened during a short span of few days. The modus operandi and the manner in which cash is deposited in a bank and then utilized by way of an account payee cheque for purchase of shares for a premium of Rs.100/- to Rs.200/- per share and then the sale of shares at a loss clearly establishes that the said transaction was a camouflage transaction. The Assessee has clearly attempted to camouflage the accommodation entries and tried to give it a colour of purchase of share capital and then sale of the same at a loss. Thus the Assessee's capital increased or was enhanced by a substantial figure through these dubious transactions. This should be and has to be checked.

36. Out of Rs.4.35 crores received as share capital including premium, only Rs.92 lacs has been received from the directors or their family members and the remaining amount has been received from parties totally unrelated to the Assessee. Notices to some of the investors could not be served and even the Inspector who was deputed to serve the summons stated that none of the addresses could be found. The authorised representative of the Assessee refused to produce the parties who had invested in the share capital on the ground that they were not in a position to produce them. The fact that the Assessee failed to produce the persons who had invested towards share capital shows that these were people who were completely unrelated to the Assessee and as such, all the entries were merely accommodation entries. Otherwise, in a private limited company, it would not have been difficult on the part of the Assessee to produce persons who were investing substantial amount of money in the company towards share capital.

37. The Assessing Officer in his order has as a sample referred to the entries in the account of some of the share holders noticing that there are cash deposits of the exact amount for which cheque is subsequently issued to the Assessee. Perusal of the bank statements clearly establishes that these parties were depositing cash and immediately either on the same day or in the near future withdrawing

the same through a cheque which was issued in favour of the Assessee.

Then Hon'ble Delhi High Court held in Para 53 to 54 as under:-

53. In contrast to the above judgments, in the present case, the Assessee is a private limited company and in the factual matrix, we have held that the Assessee has not been able to discharge the initial onus and has not been able to establish the identity, creditworthiness of the share applicants and the genuineness of the transaction. Though, in our considered opinion, none of the above judgments, referred to by the Assessee respondent, are applicable in the facts of the present case and in view of the findings recorded by us hereinabove.

54. In view of the above, we are of the view that the Assessee has not discharged the onus satisfactorily and the additions made by the Assessing Officer were justified and sustainable.

5.9 Hon'ble Income Tax Appellate Tribunal Delhi Bench: 'B' in case of M/s. Amtrac Automotive India Pvt. Ltd. Versus ACIT, Circle 1(1), involving exactly similar facts in their appellate order ITA No.2920/Del/09 for A.Y. 2005-06 dated 31.12.2009 observed in Para 3 & then Para 2 as under:-

3. The assessee company is engaged in share trading in the year under consideration. In the course of scrutiny, the assessing officer noted that the appellant has introduced fresh share capital to the tune of Rs. 15,00,000/- at a share premium of Rs. 1,35,00,000/-.....

.....

...

2.1 The AO asked the appellant to furnish details of such share holders mentioning their identity, genuineness of transaction and credit-worthiness. Appellant produced confirmation of deposit from directors of the respective company, copies of income tax return filed and copies of bank statement reflecting the above transactions. In order to verify the entire transactions in the Asstt. year 2005-06 light of genuineness and creditworthiness, he issued

summons u/s 131 of the Act to all the above 15 persons. They were asked to produce the copies of return for AY. 2005-06 and their ledger accounts from which the source of above share application money could have been verified. All the above summons were returned unserved with the comments from the postal authorities as "no such person in the above address". The AO accordingly brought this fact to the notice of the counsel of the assessee vide order sheet entry dated 18.12.2007 and he was given an opportunity to produce the functional directors of the above companies for verification. As mentioned in the assessment order, after certain adjournments, a letter was finally filed from the appellant mentioning that it is no in touch of the above share holders and their present whereabouts are not known to it. The appellant, however, relying upon the decision of Hon'ble Delhi High Court in the case of [CIT vs. Sophia Finance Ltd. In](#) which the powers of the Assessing Officer was not precluded from making enquiries in share application money, submitted that no addition can be made.

2.1.1 The AO however was not convinced with the submission of the appellant. He observed that that it was only in the course of enquiry that he tried to examine the above share applicants. Since the summons issued to such persons remained unserved, it became the duty of the appellant either to produce them for verification or to state their correct addresses. It appears to be highly improper that in a Private Ltd. Company, the assessee is not in a position to state the exact whereabouts or fail to produce the persons who collectively hold more than 25% of its total share holding. He also observed that mere filing of Asstt. year 2005-06 confirmation letters do not absolve the appellant from its onus to prove the credit entries reflected in its books of accounts as has been held by Hon'ble Calcutta High Court in the case of [CIT vs. United Commercial & Industrial Co. \(P\) Ltd.](#)[1991] 187 ITR 596. He further observed that the facts that the amount were paid by account payee cheques do not make it satisfactory as held in [CIT vs. Precision finance Pvt. Ltd.](#) 208 ITR 465 (Cal.). Even income -tax file particulars, where the share holder is assessed to tax is not sufficient as found in [CIT vs. Korlay Trading Co. Ltd.](#) 232 ITR 820 (Cal.)

2.1.2 The AO also referred the enquiry initiated by investigation wing of the Department in August 2003 which culminated into detection of many entry operators who are operating number of accounts in the same bank/branch or

in different branches, in the names of companies, firms, proprietary concerns and individuals. For the operations of these bank accounts, filing income tax returns etc. persons are hired. Like any other business it does requires manpower according to the scale of operation. Except for two or three persons who are required regularly to visit banks and do other spade work like collection of cash etc., most of the other persons involved are on part time basis. The part time employees are called as and when required to sign documents, cheque books etc. Some of the entry operators have also roped in their own relatives for operation of entry accounts and filing the income tax returns. Interestingly most of these concerns / individuals have obtained PAN from the department and are filing returns as well. What is shown in the returns is not the actual state of affairs. For example with one PAN several bank accounts are simultaneously Asstt. year 2005-06 operated and only one account might be shown for the purpose of audit and filing income tax returns. The entry operators provide entry in the garb of share application money, gifts, loans etc. through these accounts, in lieu of cash, to any person who is having unaccounted money.

2.1.2.1 The AO observed that some of the companies show above by the appellant as its share holders were found to have stated before investigation wing that they were mere name lender for advancing money. To quote some of them, Shri Rajesh Bansal, Director of M/s. Rubicon Associates Pvt. Ltd., Shri Mahesh Garg, Director of M/s. S.J. Hosiery Pvt. Ltd. Etc. have categorically stated before the Investigation wing, in their statement taken on oath, that they used to take the amount in cash and give entries to different concerns as gift, loan or share application money. According to AO, to enquire into this aspect also, the appellant was asked to produce the functional directors of such share holders.

2.1.3. In view of these facts and circumstances, the Assessing Officer concluded that the credit in the name of these shareholders are not genuine and represents unexplained cash credits. Accordingly he made addition of Rs. 1.50 lakhs to the returned income.

Then Hon'ble Income Tax Appellate Tribunal Delhi Bench: 'B' held in Para 6 as under:

6. As regards ground No. 2, we find that the assessee has stated to have received fresh share capital to the tune of Rs. 15 lacs and share premium of Rs.1,00,35,000/- i.e. a share of face value of Rs. 10/- each issued at a premium of Rs. 90/- totaling to Rs. 100/-. When the AO asked the appellant to furnish the details the assessee produced share application forms and other details like bank statement, copy of acknowledgment of return etc. However when the AO conducted inquiry at the stated address, summons were received back unserved with the postal remark "no such person in the above address". This fact was Asstt. year 2005-06 brought to the notice of assessee also. Thereafter the assessee except producing the papers could not prove existence or availability of the respective share applicants. When the identity of the person is required to be proved so as to examine whether in fact they have applied for allotment of shares, the existence itself is not proved. The existence of a person is not merely on paper. Particularly when the AO required the assessee to produce the share applicants and particularly when at the stated address the share applicants do not found to be existing, it cannot be said that the amount received by assessee is proved to be towards share capital. The transaction cannot be proved merely on paper. Neither before AO nor before Ld. CIT (A) the assessee could make the share applicants available. Therefore when the identity of the person itself is not proved, the amount received by assessee cannot be considered to be genuinely received.

6.1. It is also to be noted that the assessee company is stated to have issued shares at premium 9 times its face value. The assessee is a private limited company. It has not issued prospectus for issue of shares nor under the [Companies Act](#) 1956, it can invite the public to apply for and allot the shares. The company is prohibited from making any invitation for allotment of shares. How the premium was fixed is not forth coming. Looking to the balance sheet or past history of assessee, the assessee company has never declared dividend in the past. The company has no business plans which can raise its profitability in the near future. The income declared by the assessee is only by way of short term capital gain and the assessee do not seem to have carried on any business.

Asstt. year 2005-06 In such circumstances the share premium is not found to be justified by any of the act on the part of assessee. These facts are revealing more than the apparent shown on the paper. All these facts put together reveal that neither the identity of the share applicants are proved nor justification for share premium has been proved. In such circumstances the court cannot put blinker on the eye and look only at the papers presented before it. There is something more than that meets the eye. As rightly contended by Ld. DR in such situation the observation of Hon'ble Supreme Court in the case of CIT Vs. Durga Prasad More 82 ITR 540 and in the case of Sumati Dayal Vs. CIT 214 ITR 801 are apt for application. We therefore do not find any reason to hold that the share capital receipts by assessee were from persons whose identity is established and the amount is genuinely received towards share capital.

5.10 In a recent decision in case of Principal Commissioner Of Income vs Bikram Singh in ITA 55/2017, the Hon'ble High Court of Delhi held on 25 August, 2017 as under:-

25. The law applicable to transactions of this nature is well settled by this Court in Divine Leasing (supra). Both parties have referred to and relied upon this judgment. This Court, after analyzing the entire law on the subject in the context of [Section 68](#) of the Act, held as under:

"...16. In this analysis, a distillation of the precedents yields the following propositions of law in the context of [Section 68](#) of the IT Act. The assessee has to prima facie prove (1) the identity of the creditor/subscriber; (2) the genuineness of the transaction, namely, whether it has been transmitted through banking or other indisputable channels; (3) the creditworthiness or financial strength of the creditor/subscriber. (4) If relevant details of the address or PAN identity of the creditor/subscriber are furnished to the Department along with copies of the Shareholders Register, Shared Application Forms, Share Transfer Register etc. it would constitute acceptable proof or acceptable explanation by the assessee. (5) The Department would not be justified in drawing an adverse inference only because the creditor/subscriber fails or neglects to respond to its notices; (6)

the onus would not stand discharged if the creditor/subscriber denies or repudiates the transaction set up by the assessee nor should the AO take such repudiation at face value and construe it, without more, against the assessee. (7) The Assessing Officer is duty-bound to investigate the creditworthiness of the creditor /subscriber the genuineness of the transaction and the veracity of the repudiation...."

26. In *Divine Leasing (supra)*, on the question of burden of proof, the Court relied upon [CIT v. Musaddilal Ram Bharose](#), (1987) 165 ITR 14, to hold that the initial burden is upon the Assessee to show the absence of fraud and this is not discharged by the Assessee tendering an incredible and fantastic explanation. The Court also held that every explanation given by the Assessee need not be accepted.

27. In *Kamdhenu (supra)*, this Court categorically held that the initial burden lies on the Assessee to establish the identity of the shareholders, the genuineness of the transaction and the creditworthiness of the shareholders. It is only after the initial burden is discharged that the onus shifts to the Revenue. This Court in *Kamdhenu (supra)* referred to [CIT v. Sophia Finance](#), 205 ITR 98 which had held to the same effect. The *Divine leasing (supra)* and *Sophia Finance (supra)* judgments were reiterated by this Court in *Dwarkadhish (supra)*. Thus, the law in relation to [Section 68](#) is well settled.

.....

43. *The transactions in the present appeal are yet another example of the constant use of the deception of loan entries to bring unaccounted money into banking channels. This device of loan entries continues to plague the legitimate economy of our country. As seen from the facts narrated above, the transactions herein clearly do not inspire confidence as being genuine and are shrouded in mystery, as to why the so-called creditors would lend such huge unsecured, interest free loans - that too without any agreement. In the absence of the same, the creditors fail the test of creditworthiness and the transactions fail the test of genuineness.*

5.11 In my considered view, the technical objections raised by the Appellant in respect of loan from M/s Jalsagar Commerce Pvt. Ltd. are of no avail to the appellant due to following undisputed facts:-

i. It is undisputed fact that the Income Tax Department has made tremendous investigations in such shell companies of Kolkata, Mumbai and Delhi providing accommodation entry and statements made by several accommodation entry providers have become virtually in public domain. It is no argument that the AO did not provide such statement before the assesment or in any of the notices. These facts were well known to the appellant group and ignorance is mere pretence.

ii. Moreover, such statements are so vocal and undeniable that as mentioned in some of the case laws above, cross-examination of such accommodation entry provides by thousands of beneficiaries across India is neither practicable nor viable and therefore uncalled for.

iii. It is undisputed fact that in the statement dated 06.02.2014 Shri Anand Sharma had admitted to be one of such accommodation entry providers. The sum and substance of the said statement is that the concern M/s Jalsagar Commerce Pvt. Ltd. was engaged in the activities of providing accommodation entries and the appellant happened to be one of such beneficiary of such concern. It is also admitted fact that Shri Anand Sharma had been running the affair of the said company.

v. The statement of Shri Anand Sharma in which name of M/s Jalsagar Commerce Pvt. Ltd. cannot be completely ignored solely on the legal grounds raised by the Appellant.

5.12 In view of above discussion, it is clear that the incriminating material had been found during the course of search of accommodation entry provider. Further incriminating material had been gathered by issuing commission to DDIT (Inv.) Kolkata, during the assessment proceedings and all such material have been shared with the appellant at least during the remand report proceeding. In view of nation-wide known scam by the accommodation entry providers of Kolkata and elsewhere burst by the Income Tax Department, there was no need to provide opportunity for cross-examination of same accommodation entry providers. Any way in the rejoinder submission to remand report the appellant is absolutely slient on cross-examination and by such conduct he has forgone his right to cross-examine. Therefore, the principles of natural justice have been followed. As discussed in preceding paras, under the facts and circumstance of the case, it could not be said that AO did not

followed the binding decision of the Hon'ble Supreme Court and the Hon'ble jurisdiction Court. Therefore, in view of above facts discussed in Para 4.1 & 4.4.7, 5.1 to 5.3 and legal position apprised in Para 5.5 to 5.11 above, it is held that the addition made by the AO on account of unsecured loans amounting to Rs. 12,36,49,999/- from M/s Jalsagar Commerce Pvt. Ltd. sustainable and the same is confirmed."

Thus the addition was confirmed based on the report of the DDIT (Inv.) Kolkata. We find that the report of the DDIT (Inv.) Kolkata is also based on the statements of various persons recorded during their investigation and the statement of Shri Anand Sharma was also sent along with the report of the AO. The Id. CIT (A) has confirmed the addition because of the reason that the statement of Shri Anand Sharma was very much in the possession of the AO who has admitted in his statement that M/s. Jalsagar Commerce Pvt. Ltd. was engaged in the activity of providing accommodation entry. However, we find that M/s. Jalsagar Commerce Pvt. Ltd is not managed or controlled by Shri Anand Sharma, rather the company M/s. Royal Crystal Dealers Pvt. Ltd. was stated to have been owned by Shri Anand Sharma and in his statement dated 6th February, 2014 Shri Anand Sharma has stated to have been providing entries from M/s. Royal Crystal Dealers Pvt. Ltd. to M/s. Jalsagar Commerce Pvt. Ltd. Therefore, there is no allegation or any admission in the statement of Shri Anand Sharma that he has provided bogus loan entry to the assessee or any group concerns of the assessee. Since the name of M/s. Jalsagar Commerce was crepted in his statement, the AO has presumed that the loan provided by M/s. Jalsagar Commerce Pvt. Ltd is nothing but the bogus accommodation entry provided by Shri Anand Sharma through M/s. Royal Crystal Dealers Pvt. Ltd. The AO has tried to establish the nexus of the loan received by the assessee through the statement of Shri Anand Sharma where he has purported to have provided the alleged entry. Since there is no direct allegation or admission of providing loan by Shri Anand Sharma to the assessee through M/s.Royal Crystal Dealers Pvt. Ltd., then even if there is a possibility of bogus accommodation entry routed through another intermediary company M/s.Jalsagar Commerce Pvt. Ltd., it requires a definite link of the transactions from M/s.Royal Crystal Dealers Pvt. Ltd. to M/s.Jalsagar Commerce Pvt. Ltd. and then the loan to the assessee. Once the

chain of transactions and flow of money from one entity to another entity and finally to the assessee has not been established, then the addition made merely on suspicion, how so strong it may be, is not sustainable. On the contrary, when the assessee produced all the relevant record which contains their financial statements, bank accounts statement of loan creditor, return of income, assessment orders framed under section 143(3), confirmation of the loan creditor, then a proper examination could have very well established the link, if any, in providing the accommodation entry from one entity to another and finally to the assessee. However, no such link was found in the documents and financial statements of these companies, rather in the bank account statement of loan creditor M/s. Jalsagar Commerce Pvt. Ltd. there was no suspicious transaction of receiving any entry or any deposit of an equal amount prior to giving the loan to the assessee. The assessee has paid interest to the creditor, which was duly accepted by the AO as business expenditure. Undisputedly, the assessee has produced the income-tax record of the loan creditor, bank statement, financial statements including Balance Sheet, copy of ROC master data showing the status of loan creditor company as "active", confirmation of loan given to the assessee. Further, the AO issued summons and also got the summons served through DDIT Kolkata under section 131 of the IT Act which were duly responded by the loan creditor. Except the statement of Shri Anand Sharma and the report of the Investigation Wing Kolkata, the AO has not brought on record any other material to controvert or disprove the documentary evidence produced by the assessee. It is pertinent to note that the loan creditor was assessed to tax and the AO completed the assessment under section 143 (3) for various assessment years which are relevant for the assessment year under consideration. The AO in case of loan creditor has not disturbed the transactions of loan given by this company to the assessee. From the financial statements of the loan creditor it is apparent that the loan creditor was having sufficient funds to advance the loan amount to the assessee and once the said financial statements were not disturbed, then the creditworthiness of the loan creditor cannot be doubted when it was accepted in the assessment order passed under section 143(3) of the IT Act. We

further note that the AO insisted the assessee to produce the directors of the loan provider company. The assessee produced the affidavit, and the notices issued by the AO under section 131 and 133(6) of the Act were duly complied with by the creditor. The statement of the Director of M/s. Royal Crystal Dealers Pvt. Ltd. was also recorded by the AO wherein the Director has confirmed the transaction of loan. There are various reports of the DDIT Kolkata which are placed at pages 406 to 422 of the paper book. We find that all these reports are based on the statements recorded during the investigation but no documentary evidence was either gathered or has been referred in these reports. Therefore, even if these reports are to be taken into consideration, these are nothing but narration of the statements of various persons taken during the investigation. It is well settled principle as well as the directions of the CBDT issued under the Circulars that during the course of investigation, the department should concentrate and focus on collecting documentary evidence disclosing undisclosed income instead of obtaining the statement and then support of their claim merely on the basis of the statement. Therefore, the statements recorded by the DDIT Kolkata are also not based on any documentary evidence so as to have an evidentiary value for sustaining the additions made by the AO. The entire report of the Investigation Wing is based on statements recorded during survey and search. Once the assessee has produced the documentary evidence and particularly the financial statements of the loan creditors, their bank account statement, then in the absence of any discrepancy or fault in these financial statements or in the bank account statement to reflect that the transactions in question are nothing but bogus accommodation entries, the addition made by the AO is not sustainable as it is merely on the basis of surmises and conjectures and not on any tangible material disclosing the non-genuineness of the transactions. The AO has not disputed the transactions routed through banking channel having sufficient funds which is also supported by the financial statements and further the assessments of the loan creditor were completed under section 143(3). The details of loans taken from M/s. Jalsagar Commerce Pvt. Ltd., interests credited/paid and repayment of loan amount as well as closing balance are as under :-

Name of Company	AY	Opening Balance	Loan taken during the year	Interest credited in loan a/c during the year	Interest credited in interest Paid /payable a/c	Loan repayment/ TDS/transfer in partner capital during the year	Closing balance
Jalsagar Commerce Private Ltd	10-11	41,298	34,70,40,000	13,96,176	12,56,558	34,21,15,916	51,05,000
Jalsagar Commerce Private Ltd	11-12	51,05,000	77,18,70,000	16,71,599	15,04,439	77,18,37,160	53,05,000
Jalsagar Commerce Private Ltd	12-13	53,05,000	78,95,00,000	1,07,08,434	96,37,591	31,72,80,655	47,85,95,188
Jalsagar Commerce Private Ltd	13-14	47,85,95,188	2,76,31,50,000	0	0	2,97,53,40,000	26,64,05,188
Jalsagar Commerce Private Ltd	14-15	26,64,05,188	97,34,50,000	0	0	1,24,03,55,188	(5,00,000)
Jalsagar Commerce Private Ltd	15-16	0	1,34,89,00,000	49,00,600	44,10,540	1,34,93,90,060	0
Jalsagar Commerce Private Ltd	16-17	0	87,11,00,000	1,67,23,178	1,50,50,860	87,27,72,318	0

All these details were before the AO as all these assessment years were passed by the AO pursuant to the search and seizure action under section 132 of the IT Act. Thus it is clear that for the assessment year 2015-16 there was Nil balance on account of loan taken from M/s. Jalsagar Commerce Pvt. Ltd. and the entire loan was already repaid by the assessee. We further note that it is not the case of repayment of loan after the search action on 2nd July, 2015 but there is a regular repayment of loan for each year as it is evident from the details reproduced above. Therefore, the transactions of taking loan and repayment cannot be treated as bogus once the assessee has been regularly repaying the loan amount and small balance was there at the end of the year. Once there was no balance at the end of the year on the loan account, then the addition cannot be made by treating the loan taken and repaid as bogus transaction. Apart from these facts, the assessee has also made the payment of interest which was also subjected to TDS. This shows the genuineness of the transactions and all these transactions have taken place prior to the date of search and duly recorded in the books of accounts and also subjected to assessment under section 143(3) for some of the assessment years. Therefore, even as per the evidence produced by the assessee, the alleged suspicion of the AO was got dispelled and in the

absence of any contrary evidence except the statement which is not even a conclusive proof of transaction of bogus entry to the assessee, the additions made by the AO are not sustainable.

11.1. Even otherwise, the assessment order is solely based on the report of the Investigation Wing Kolkata which in turn is nothing but the narration of the statements recorded during the investigation and the AO was having in possession the statement of only Shri Anand Sharma. Therefore, all these proceedings conducted by the Investigation Wing Kolkata were at the back of the assessee and hence the statement which is the foundation of the report of the Investigation Wing Kolkata as well as the assessment order cannot be accepted in the absence of giving an opportunity of cross examination to the assessee. We find that the assessee has insisted for cross examination during the assessment proceedings and further during the appellate proceedings. The Id.CIT(A) even called for a remand report and directed the AO to allow cross examination to the assessee. However, the AO has expressed his inability to allow the assessee cross examination of the witnesses due to the reason that the witnesses belong to Kolkata and it is not possible for AO to make such arrangement. The Id. CIT(A) has finally denied the cross examination to the assessee by giving his finding in para 5.11 at page 188 already reproduced in the earlier part of this order and, therefore, the only reason for denial of cross examination by the Id.CIT(A) is that the statements are so vocal and undeniable that cross examination of such accommodation entry provided by thousands of beneficiaries across India is neither practicable nor viable and therefore uncalled for. We find that the assessee has demanded the cross examination only in respect of the alleged transactions of loans and not for the entire business of the entry providers providing the bogus entries. Undisputedly, the statement of Shri Anand Sharma was recorded by the Investigation Wing Kolkata at the back of the assessee, even the proceedings by the Investigation were conducted at the back of the assessee, therefore, the said statement of Shri Anand Sharma cannot be the sole basis of assessment without giving an opportunity of cross examination to the assessee. The Hon'ble Supreme Court in the case of Andaman Timber Industries vs. CCE (supra) while dealing with the issue of violation of

principles of natural justice for not providing the opportunity of cross examination of the witnesses whose statements were relied on by the AO has held in para 6 to 9 as under :-

6. *“According to us, not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the appellant themselves to explain as to why their ex-factory prices remain static. It was not for the Tribunal to have guess work as to for what purposes the appellant wanted to cross-examine those dealers and what extraction the appellant wanted from them”.*

7. *As mentioned above, the appellant had contested the truthfulness of the statements of these two witnesses and wanted to discredit their testimony for which purpose it wanted to avail the opportunity of cross-examination. That apart, the adjudicating authority simply relied upon the price list as maintained at the depot to determine the price for the purpose of levy of excise duty. Whether the goods were, in fact, sold to the said dealers, witnesses at the price which is mentioned in the price list itself could be the subject-matter of cross-examination. Therefore, it was not for the adjudicating authority to presuppose as to what could be the subject-matter of the cross-examination and make the remarks as mentioned above. We may also point out that on an earlier occasion when the matter came up before this court in CCE v. Andaman Timber Industries Ltd., order dated 17.3.2005 was passed remitting the case back to the Tribunal with the directions to decide the appeal on merits giving its reasons for accepting or rejecting the submissions.*

8. *In view of the above, we are of the opinion that if the testimony of these two witnesses is discredited, there was no material with the Department on the basis of which it could justify its action, as the statement of the aforesaid two witnesses was the only basis of issuing the show-cause notice.*

9. *We, thus, set aside the impugned order as passed by the Tribunal and allow this appeal. No costs.”*

Once the assessee has disputed the correctness of the statement and wanted to cross examine the witness which was not given by the AO as well as Id. CIT (A), then the orders passed based on such statement are not sustainable in

law. The Hon'ble Delhi High Court in case of CIT vs. Ashwani Gupta, 322 ITR 396 (Delhi) while dealing with the issue of not providing the opportunity to cross examine the witnesses has held in para 5 to 7 as under :-

"5. Secondly, in fact, a rectification application being MA 264/Delhi/2008 under section 254(2) of the Income-tax Act, 1961 had been filed by the revenue before the said Tribunal. In that also, in paragraph (g) of the Miscellaneous Application, the revenue had submitted as under:—

"(g) Because, although findings of the Tribunal are factually correct but the decision of the Tribunal is not acceptable because violation of the canons of natural justice in itself is not fatal enough so as to jeopardize the entire proceedings. In the interest of justice, the Tribunal could have set aside the assessment order with the limited purpose of offering assessee an opportunity to cross-examine Shri Manoj Aggarwal before completing the proceedings." [Emphasis supplied]

6. A reading of the said paragraph (g) makes it clear that the revenue had accepted the findings of the Tribunal on facts as also the position that there had been a violation of principles of natural justice. However, the revenue's plea was that the violation of principles of natural justice was not fatal so as to jeopardize the entire proceedings. The said miscellaneous application was also rejected by the Tribunal by its order dated 28-11-2008.

7. In view of the foregoing circumstances, we feel that no interference with the impugned order is called for. The Tribunal has correctly understood the law and applied it to the facts of the case. Once there is a violation of the principles of natural justice inasmuch as seized material is not provided to an assessee nor is cross-examination of the person on whose statement the Assessing Officer relies upon, granted, then, such deficiencies would amount to a denial of opportunity and, consequently, would be fatal to the proceedings. Following approach adopted by us in *SMC Share Brokers Ltd.'s case (supra)*, we see no reason to interfere with the impugned order. No substantial question of law arises for our consideration."

Thus the Hon'ble High Court has held that once there is a violation of principles of natural justice inasmuch as seized material is not provided to the assessee nor is cross examination of the person on whose statement the AO relied upon, granted, then, such deficiencies would amount to denial of opportunity and consequently would be fatal to the proceedings. The Hon'ble Bombay High Court in the case of H.R. Mehta vs. ACIT, 387 ITR 561 (Bombay) has also considered the issue of not providing opportunity of cross examination in para 11 to 17 as under :-

"11. We have therefore proceeded to hear and decide the matter unassisted by the revenue. In the course of his submissions Mr. Tralshawala had pressed into service inter alia the decision of the Calcutta High Court in *Mather &*

Platt (India) Ltd.(supra) and submitted that merely because a person is not found at an address after several years it cannot be held that he is non-existent and that the assessee had discharged his primary onus by identifying the source of the amount paid. The Court observed that once the primary onus is discharged, the onus shifted to the revenue to verify genuineness of the transaction. In the present case no such effort was made by the revenue. We find that in *S. Hastimal (supra)* the Madras High Court observed that after a lapse of several years the assessee should not be placed upon the rack and called upon to explain not only merely, the origin and source of his capital contribution but the origin of origin and the source of source as well. In yet another case of *Bahri Brothers (P) Ltd. (supra)* the Division Bench of Patna High Court observed that where the assessee upon whom the initial burden lies, produces bank certificate to establish that the transaction was carried out through account payee cheques thus disclosing the identity of the creditors as also the source of income, the burden shifts on to the department and the department cannot add the cash credits to his income from undisclosed source.

12. The Hon'ble Supreme Court in *Nemi Chand Kothari (supra)* observed that in order to establish the receipt of a cash credit, the assessee must satisfy three conditions i.e. identity of the creditor, genuineness of the transaction and creditworthiness of the creditor. In the instant case by virtue of the fact that the transaction was completed by cheque payments, the appellant has contended that it had satisfied all the three tests.

13. In *Kishanchand Chellaram (supra)* wherein the Supreme Court observed that the revenue authorities had not recorded the statement of the Manager of the bank and it was difficult to appreciate as to why it was not done and why the matter was not probed further by the revenue.

14. The Delhi High Court in *Ashwani Gupta (supra)* held that once there is a violation of the principles of natural justice inasmuch as when its seized material was not provided to an assessee nor was he permitted to cross-examine a person on whose statement the Assessing Officer relied, it would amount to deficiency, amounting to a denial of opportunity and therefore violation of principles of natural justice. In that case CIT (A) had deleted addition made by the Assessing Officer since the Assessing Officer had failed to provide copies of seized material to the assessee nor had he allowed the assessee to cross-examine the party concerned. The Division Bench held that once there is violation of the principles of natural justice inasmuch as seized material was not provided to the assessee nor was given opportunity of cross-examining the person whose statement was being used against the assessee the order could not be sustained.

15. In *Andaman Timber Industries (supra)* the Supreme Court found that the Adjudicating Authority had not granted an opportunity to the assessee to cross-examine the witnesses and the tribunal merely observed that the cross-examination of the dealers in that case, could not have brought out any material which would not otherwise be in possession of the appellant-assessee. The Supreme Court set aside the impugned order and observed that it was not for the Adjudicating Authority to presuppose as to what could be the subject matter of the cross-examination and make the remarks such as was done in that case.

16. In the instant case although the appellant assessee has called upon us to draw an inference that the burden shifted to the revenue in the present case once it was established that the payments were made and repaid by cheque we need not hasten and adopt that view after having given our thought to various issues raised and the decisions cited by Mr. Tralshawalla and finding that on a very fundamental aspect, the revenue was not justified in making addition at the time of reassessment without having first given the assessee an opportunity to cross examine the deponent on the statements relied upon by the ACIT. Quite apart from denial of an opportunity of cross examination, the revenue did not even provide the material on the basis of which the department sought to conclude that the loan was a bogus transaction.

17. In our view in the light of the fact that the monies were advanced apparently by the account payee cheque and was repaid vide account payee cheque the least that the revenue should have done was to grant an opportunity to the assessee to meet the case against him by providing the material sought to be used against assessee in arriving before passing the order of reassessment. This not having been done, the denial of such opportunity goes to root of the matter and strikes at the very foundation of the reassessment and therefore renders the orders passed by the CIT (A) and the Tribunal vulnerable. In our view the assessee was bound to be provided with the material used against him apart from being permitting him to cross examine the deponents. Despite the request dated 15th February, 1996 seeking an opportunity to cross examine the deponent and furnish the assessee with copies of statement and disclose material, these were denied to him. In this view of the matter we are inclined to allow the appeal on this very issue.”

Thus the denial of opportunity to cross examine was considered by the Hon'ble High Court which goes to the root of the matter and strikes at the very foundation of the assessment and, therefore, renders the assessment order passed by the AO not sustainable. The Id. A/R has submitted that Coordinate Bench of this Tribunal in the case of DCIT vs. Shri Prateek Kothari vide order dated 16th December, 2012 in ITA No. 159/JP/2016 has considered this issue in para 2.8 to 2.11 as under :-

“2.8 We have heard the rival contentions and perused the material available on record. The transaction under question relates to unsecured loans taken by the assessee amounting to Rs 1 Crores from M/s Mehul Gems Pvt Ltd during the impugned assessment year and not accepting the said loan transaction as a genuine transaction by the Assessing officer and the resultant addition made under section 68 of the Act. Undisputedly, the primary onus to establish genuineness of the loan transaction is on the assessee. In the instant case, the assessee has provided the necessary explanation, furnished documentary evidence in terms of tax filings, affidavits and confirmation of the Directors, bank statements of the lender,

balance sheet of the lender company, and an independent confirmation has also been obtained by the Assessing officer to satisfy the cardinal test of identity, creditworthiness and genuineness of the loan transaction. However, the Assessing officer has not given any finding in respect of such explanation, documentary evidence as well as independent confirmation. Apparently, the reason for not accepting the same is that the Assessing officer was in receipt of certain information from the investigation wing of the tax department as per which the transaction under consideration is a bogus loan transaction. The said information received from the investigation wing thus overweighed the mind of the Assessing officer. The Assessing officer stated that the primary onus is on the assessee to establish the genuineness of the transaction claimed by it and if the investigation done by the department leads to doubt regarding the genuineness of the transactions, it is incumbent on the assessee to produce the parties alongwith necessary documents to establish the genuineness of the transaction. In response, the assessee submitted that Shri Bhanwarlal Jain is not known to him and regarding various incriminating documentary evidences seized during the course of search and statements recorded of Shri Bhanwarlal Jain and other persons, he specifically requested the AO to provide copies of such incriminating documents and statement of all various persons recorded in this regard and provide an opportunity to the assessee to cross examine such persons. However, the AO didn't provide to the assessee copies of such incriminating documents and statements of various persons recorded and allow the cross-examination of any of these persons. While doing so, the AO stated that "in his statements, Bhanwarlal Jain had described that they are indulged in providing accommodation entries of bogus unsecured loans and advances through various Benami concerns (70) operated and managed by them. This admission automatically makes all the transactions done by them as mere paper transactions and in these circumstances, further as per the information name and address of assessee and the Benami Concern through which accommodation entry of unsecured loans was provided is appearing in the list of beneficiaries to whom the said Group has provided. This admission is sufficient to reject the contentions of the assessee." Further, regarding cross examination, the AO stated that "the right of cross examination is not an absolute right and it depends upon the circumstances of each case and also on the statute concerned. In the present case, no such circumstances are warranted as in the list of beneficiaries to whom accommodation entries were provided by the said group categorically contains the name and address of the assessee. Further the group has categorically admitted to providing of accommodation entries of unsecured loans through various benami concerns." The AO further relied upon the decision of Hon'ble Supreme Court in the case of C.

Vasantlal & Co. Vs. CIT 45 ITR 206(SC) and Hon'ble Rajasthan High Court in case of Rameshwarlal Mali vs. CIT 256 ITR 536(Raj.) among others. In this regard, it was submitted by the assessee that if the entries and material are gathered behind the back of the assessee and if the AO proposes to act on such material as he might have gathered as a result of his private enquiries, he must disclose all such material to the assessee and also allow the cross examination and if this is not done, the principles of natural justice stand violated.

2.9 *In light of above discussions, in our view, the crux of the issue at hand is that whether the principle of natural justice stand violated in the instant case. In other words, where the AO doesn't want to accept the explanation of the assessee and the documentation furnished regarding the genuineness of the loan transaction and instead wants to rely upon the information independently received from the investigation wing of the department in respect of investigation carried out at a third party, can the said information be used against the assessee without sharing such information with the assessee and allowing an opportunity to the assessee to examine such information and explain its position especially when the assessee has requested the same to the Assessing officer.*

2.10 *In this regard, the Hon'ble Supreme Court in the case of Dhakeswari Cotton Mills Ltd. v. CIT (1954) 26 ITR 775 (SC) (Copy at Case Law PB 812-818) has held that "The rule of law on this subject has been fairly and rightly stated by the Lahore High Court in the case of Seth Gurmukh Singh where it was stated that while proceeding under sub-section (3) of section 23, the Income-tax Officer, though not bound to rely on evidence produced by the assessee as he considers to be false, yet if he proposes to make an estimate in disregard of that evidence, he should in fairness disclose to the assessee the material on which he is going to find that estimate; and that in case he proposes to use against the assessee the result of any private inquiries made by him, he must communicate to the assessee the substance of the information so proposed to be utilized to such an extent as to put the assessee in possession of full particulars of the case he is expected to meet and that he should further give him ample opportunity to meet it." It was held in that case that "In this case we are of the opinion that the Tribunal violated certain fundamental rules of justice in reaching its conclusions. Firstly, it did not disclose to the assessee what information had been supplied to it by the departmental representative. Next, it did not give any opportunity to the company to rebut the material furnished to it by him, and lastly, it declined to take all the material that the assessee wanted to produce in support of its case. The result is that the assessee had not had a fair hearing."*

The Hon'ble Supreme Court in case of C. Vasantlal & Co. Vs. CIT 45 ITR 206 (SC) has held that "the ITO is not bound by any technical rules of the law of evidence. It is open to him to collect material to facilitate assessment even by private enquiry. But, if he desires to use the material so collected, the assessee must be informed about the material and given adequate opportunity to explain it. The statements made by Praveen Jain and group were material on which the IT authorities could act provided the material was disclosed and the assessee had an opportunity to render their explanation in that regard."

The Hon'ble Supreme Court in case of Kishinchand Chellaram v. CIT (1980) 125 ITR 713 (SC) (Copy at Case Law PB 585-591) has held that "whether there was any material evidence to justify the findings of the Tribunal that the amount of Rs. 1,07,350 said to have been remitted by Tilokchand from Madras represented the undisclosed income of the assessee. The only evidence on which the Tribunal could rely for the purpose of arriving at this finding was the letter, dated 18-2-1955 said to have been addressed by the manager of the bank to the ITO. Now it is difficult to see how this letter could at all be relied upon by the Tribunal as a material piece of evidence supportive of its finding. In the first place, this letter was not disclosed to the assessee by the ITO and even though the AAC reproduced an extract from it in his order, he did not care to produce it before the assessee or give a copy of it to the assessee. The same position obtained also before the Tribunal and the High Court and it was only when a supplemental statement of the case was called for by this Court by its order, dated 16-8-1979 that, according to the ITO, this letter was traced by him and even then it was not shown by him to the assessee but it was forwarded to the Tribunal and it was for the first time at the hearing before the Tribunal in regard to the preparation of the supplemental statement of the case that this letter was shown to the assessee. It will, therefore, be seen that, even if we assume that this letter was in fact addressed by the manager of the bank to the ITO, no reliance could be placed upon it, since it was not shown to the assessee until at the stage of preparation of the supplemental statement of the case and no opportunity to cross examine the manager of the bank could in the circumstances be sought or availed of by the assessee. It is true that the proceedings under the income-tax law are not governed by the strict rules of evidence and, therefore, it might be said that even without calling the manager of the bank in evidence to prove this letter, it could be taken into account as evidence. But before the income-tax authorities could rely upon it, they were bound to produce it before the assessee so that the assessee could controvert the statements contained in it by asking for an opportunity to

cross examine the manager of the bank with reference to the statements made by him.”

- 2.11 *In light of above proposition in law and especially taking into consideration the decision of the Hon'ble Supreme Court in case of C. Vasantlal & Co. (supra) relied upon by the Revenue and which actually supports the case of the assessee, in the instant case, the assessment was completed by the AO relying solely on the information received from the investigation wing, statement recorded u/s 132(4) of Shri Bhanwarlal Jain and others, and various incriminating documentary evidence found from the search and seizure carried out by Investigation Wing, Mumbai on the Shri Bhanwarlal Jain group on 03.10.2013. It remains undisputed that the assessee was never provided copies of such incriminating documents and statements of Shri Bhanwarlal Jain and various persons and an opportunity to cross examine such persons though he specifically asked for such documents and cross examination. On the other hand, the burden was sought to be shifted on the ITA No. 159/JP/16 The ACIT, Central -2, Jaipur vs. M/s Prateek Kothari, Jaipur 21 assessee by the A.O. It is clear case where the principle of natural justice stand violated and the additions made under section 68 therefore are unsustainable in the eye of law and we hereby delete the same. The order of the Id CIT(A) is accordingly confirmed and the ground of the Revenue is dismissed.”*

Thus when the assessee has specifically asked for cross examination of the witnesses whose statements were relied upon by the AO, then the denial of the opportunity to cross examine would certainly in violation of principles of natural justice and consequently renders the assessment order based on such statement as not sustainable in law. Hence in view of the facts and circumstances of the case where the assessee has repeatedly requested and demanded the cross examination of the witnesses whose statements were relied upon by the AO in the assessment order and further the report of the DDIT Investigation Kolkata is also based on the statement of such person then the denial of cross examination by the AO as well as Id. CIT (A) despite the fact that the assessee was ready to bear the cost of the cross examination of the witnesses is a gross violation of principles of natural justice. Thus the additions made by the AO on the basis of such statement without any tangible material is not sustainable in law and liable to be deleted. Accordingly the

addition made by the AO is also deleted on merits apart from the legal issue decided in favour of the assessee."

Both the parties have fairly admitted that the fact as well as the issue is identical in both the cases. Therefore, in view of our finding on this issue in the case of Kota Dall Mill (supra), we decide this issue in favour of the assessee."

26. Similarly grounds No. 3 to 5 of the appeal with regard to unsecured loan taken from Jalsagar Commerce Pvt. Ltd. amounting to Rs. 67,85,000/- is covered by the order of the Tribunal in the case of M/s Kota Dall Mill Vs. DCIT (Supra) for the A.Y. 2010-11 to 2013-14, which has already been discussed in detail in earlier paragraphs of this order and decided in favour of the assessee and against the revenue.

27. Ground No. 6 of the assessee's appeal for the A.Y. 2010-11 is with regard to peak credit. The issue is covered by the decision of the Coordinate Bench in the case of M/s Kota Dall Mill vs. DCIT(Supra) for the A.Y. 2010-11 to 2015-16 at page 87 of the order.

28. We have considered the rival contentions and carefully gone through the orders of the authorities below and found that all the issues involved in the appeals have been dealt by the Tribunal in the group cases threadbare and after meeting all the objections of the A.O., Id. CIT(A) and the department, the Tribunal have confirmed the order of the Id. CIT(A) with respect of the share application money accepted at

premium from following three concerns namely M/s Sangam Distributors Pvt. Ltd., M/s Teac Consultants Private Limited and M/s ISIS Mercantiles Pvt. Ltd. Similarly we found that the unsecured loan taken from M/s Jalsagar Commerce Pvt. Ltd. have also been dealt by the Tribunal after dealing threadbare in the case of M/s Kota Dall Mill Vs. DCIT (supra) pages 71 to 76 for the assessment years 2010-11 to 2015-16. As the facts and circumstances during both the assessment years are same as have elaborately discussed by the Tribunal in the above years, respectfully following the same, we do not find any merit in the addition so made with respect to unsecured loan taken from M/s Jalsagar Commerce Pvt. Ltd. and share application money with premium from M/s Sangam Distributors Pvt. Ltd., M/s Teac Consultants Private Limited and M/s ISIS Mercantiles Pvt. Ltd.

29. During the course of assessment proceedings, the Assessing Officer also made disallowance U/s 14A of the Act amounting to Rs. 53,523/- for the A.Y. 2010-11 and Rs.1,98,478/- for the A.Y. 2011-12. By the impugned order, the Id CIT(A) deleted the addition after observing as under:

“12.3.1 In my considered view, the AO has legally erred in directly applying the provision of section 14A of the Act, without recording any satisfaction as to the correctness of the claim made by the Appellant. In the assessment order, there is no satisfaction recorded by the AO as required by section 14A (1) of the Act before

proceeding further to make any disallowance u/s 14A of the Act. Further, it is seen that AO has mechanically applied the Rule 8D as amended w.e.f. 02.06.2016, which was not even applicable to relevant assessment year. In my considered view, the law cannot be applied mechanically and that too retrospectively. It is seen that AO has not established any nexus of investment with borrowed funds, rather availability of sufficient interest free funds justifies the case of the Appellant that disallowance u/s 14A of the Act is unwarranted. Further, it is seen that AO has neither pointed out nor given any specific findings in the assessment order that any exempt income was earned during the relevant assessment year. Therefore, in the relevant cases also wherein section 14A of the Act is applicable, only the relevant portion of expenditure is required to be disallowed and not the complete expenses, which in the instance case, the AO has done without making any case for disallowance u/s 14A of the Act. Therefore, in view of the non-fulfillment of such statutory requirement as laid down in various judicial precedents and Circulars as relied upon by the A/R in his submission, in my considered view, the disallowance u/s 14A of the Act of Rs. 53,523/- is unwarranted. Accordingly, the same is deleted. In view of the above, addition of Rs. 53,523/- is deleted and these grounds of appeals are allowed."

30. Similarly for the A.Y. 2011-12, the addition made U/s 14A was deleted by the Id. CIT(A) after observing as under:

"8.3.1 In my considered view, the AO has legally erred in directly applying the provision of section 14A of the Act, without recording any satisfaction as to the correctness of the claim made by the Appellant. In the assessment order, there is no satisfaction recorded by the AO as required by section 14A(1) of the Act before proceeding further to make any disallowance u/s 14A of the Act. Further, it is seen that AO has mechanically applied the Rule 8D as amended w.e.f. 02.06.2016, which was not even applicable to relevant assessment year. In my considered view, the law cannot be applied mechanically and that too retrospectively. It is seen that AO has not established any nexus of investment with borrowed funds, rather availability of sufficient interest free funds justifies the case of the

Appellant that disallowance u/s 14A of the Act is unwarranted. Further, it is seen that AO has neither pointed out nor given any specific findings in the assessment order that any exempt income was earned during the relevant assessment year. Therefore, in view of the non-fulfillment of such statutory requirement as laid down in various judicial precedents and Circulars as relied upon by the A/R in his submission, in my considered view, the disallowance u s 14A of the Act of Rs. 1,98,478/- is unwarranted. Accordingly, the same is deleted and the ground NO. 3 to 10 of the appeal are allowed.”

31. We have gone through the orders of the authorities below and found that the disallowance was made by the Assessing Officer U/s 14A of the Act without recording any satisfaction as to the correctness of the claim made by the assessee. The Id. CIT(A) has deleted the addition by observing that the Assessing Officer has mechanically applied the Rule 8D as amended w.e.f. 02/6/2016, which was not even applicable to the relevant assessment years under consideration. Further finding of fact was recorded by the Id. CIT(A) to the effect that the Assessing Officer has not established any nexus of investment with the borrowed funds, rather availability of sufficient interest free funds justifies the case of the assessee that the disallowance U/s 14A is unwarranted. Detailed findings were recorded by the Id. CIT(A) are as per material on record which do not require any interference on our part. Accordingly, grounds taken by the revenue in both the years with regard to the disallowance U/s 14A of the Act are dismissed.

32. The cross objection filed by the assessee has become infructuous, therefore, dismissed.

33. In the result, appeal of the assessee is allowed and appeals of the revenue are dismissed.

Order pronounced in the open court on 27th March, 2019.

Sd/-
(विजय पाल राव)
(VIJAY PAL RAO)
न्यायिक सदस्य / Judicial Member

Sd/-
(रमेश सी शर्मा)
(RAMESH C SHARMA)
लेखा सदस्य / Accountant Member

जयपुर / Jaipur
दिनांक / Dated:- 27th March, 2019

*Ranjan

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- M/s Agrasen Agro Industries Pvt. Ltd., Kota.
2. प्रत्यर्थी / The Respondent- The DCIT, Central Circle, Kota.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त(अपील) / The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA No. 1053, 1188 & 1205/JP/2018 & C.O. 48/JP/2018)

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar