

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. 1121/JP/2018
निर्धारण वर्ष / Assessment Year :2015-16

M/s Rajasthan Cable Industries Limited, 4 and 12, 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.: AACCR 2599 G		
अपीलार्थी / Assessee		प्रत्यर्थी / Respondent

आयकर अपील सं./ ITA No. 1189/JP/2018
निर्धारण वर्ष / Assessment Year :2016-17

Deputy Commissioner of Income Tax, Central Circle, Kota.	बनाम Vs.	M/s Rajasthan Cable Industries Pvt. Limited, 4 & 12, Large Scale Industrial Area, Kansua Road Kota.
स्थायी लेखा सं./ जीआईआर सं./ PAN/GIR No.: AACCR 2599 G		
अपीलार्थी / Assessee		प्रत्यर्थी / Respondent

आयकर अपील सं./ ITA No. 1052/JP/2018
निर्धारण वर्ष / Assessment Year :2016-17

M/s Rajasthan Cable Industries Limited, 4 and 12, 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.: AACCR 2599 G		
अपीलार्थी / Assessee		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 : 23/01/2019
उदघोषणा की तारीख / Date of Pronouncement : 27/03/2019

आदेश / ORDER

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

These are the appeals and cross appeals by the assessee and the revenue for the A.Y. 2015-16 and 2016-17 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 appeals and in the cross appeals by the assessee and revenue are as under:

Grounds of assessee's appeal for the A.Y. 2015-16

- “1. 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.
2. 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.

3. *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.*

4. *On the facts and in the circumstances of the case and in law the Id. CIT(A) erred in confirmation the addition of Rs. 1,50,50,000/- made by Id. AO u/s 68 of Income Tax Act, 1961 on account of unsecured loans taken from following parties 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>Name of alleged entry operator whose statement were relied</i>
<i>Jalsagar Commerce Pvt. Ltd</i>	<i>1,50,50,000</i>	<i>Shri Anand Sharma</i>

5. *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.*

6. *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. 2016-17

On the facts and in the circumstances of the case, I am directed to file an appeal in the above mentioned case before the Hon'ble 1TAT, Jaipur on the following grounds.

- "1. Whether on the facts and circumstances of the case and in law, the CIT(A) was justified in deleting the addition of Rs. 1,40,00,000/- made by the AO u/s 68 of the IT Act on account of unexplained unsecured loans allegedly obtained by the assessee from M/s Competent Securities 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 unsecured loans by observing that the alleged lender company M/s Competent Securities Pvt. Ltd. is not shell company without considering the financial statements of this 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 Competent Securities 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 Competent Securities Pvt. Ltd. despite the fact that the director or Principal Officer of this 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 Competent Securities 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 assessee 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.*

The Assessee 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 appeal for the A.Y. 2016-17

- "1. *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.*
2. *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.*
3. *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.*
4. *On the facts and in the circumstances of the case and in law the Id.CIT(A) erred in confirmation the addition of Rs. 4,55,00,000/- made by Id. AO u/s 68 of Income Tax Act, 1961 on account of unsecured loans taken from following parties 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>Name of alleged entry operator whose statement were relied</i>
<i>Jalsagar Commerce Pvt. Ltd</i>	<i>4,55,00,000</i>	<i>Shri Anand Sharma</i>

5. *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.*
6. *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.”*

2. As the common grounds are involved in both the years under consideration, as taken by the assessee and the revenue, therefore all

the appeals 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 a search and seizure operation u/s 132 of the Act was carried out at the business premises of the assessee from 02.07.2015 to 04.07.2015. In compliance to notice U/s 153A of the Act, the assessee filed return of income on 16/7/2016 for the A.Y. 2015-16 declaring total return loss of Rs. 2,83,866/-. During the course of assessment proceedings, the Assessing Officer observed that the assessee had received unsecured loan from registered NBFC and other companies. The AO issued show cause notice to assessee, contents of which were reproduced by AO in Assessment order at page 5-17/AY 2015-16. The assessee filed detailed reply of the show cause notice of the Id AO, contents of which was reproduced by Id AO in assessment order at page 17-31/AY 2015-16. While completing assessment and making the impugned addition under Section-68 of the Act, the Ld. AO has relied upon some of the documents/information/details/third party information/statement recorded behind the back of the Assessee. 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 request of the assessee.

Ld. AO chose to pass the impugned assessment order in disregard to principles of natural justice and equity. Following additions were made in the assessment framed U/s 153A read with Section 153B/143(3) of the Act:

Assessment year	Nature of Addition	Description of addition	Addition made Amount	Total additions for the Assessment year
2015-16	Unsecured loan	M/s Jalsagar Commerce Private Limited	1,50,50,000	1,50,50,000
2016-17	Unsecured loan	M/s Jalsagar Commerce Pvt. Ltd	4,55,00,000	
	Unsecured loan	M/s Competent Securities Pvt. Ltd	1,40,00,000	5,95,00,000

4. Against the above additions, the assessee approached to the Id. CIT(A). During the course of proceedings, 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 Id 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 and flexible time frame. 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 and instantly available for cross-examination subject to prior information of one week.

5. The AO vide letter dated 07/05/2018 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 AO that the assessee is ready to bear the cost of cross-examination and it would like to cross-examine the witnesses at Kota.

6. 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. However, at this stage also, opportunity of cross-examination of witness was not given to the assessee. However, the A.O. asked the Id. CIT(A) to issue guidelines and procedure to be followed by him for conducting of cross examination.

7. By the impugned order, the Id. CIT(A) has partly allowed the appeal 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)
2015-16	Unsecured loan	M/s Jalsagar Commerce P. Ltd.	1,50,50,000		1,50,50,000
2016-17	Unsecured loan	M/s Jalsagar Commerce P. Ltd	4,55,00,000		4,55,00,000
	Unsecured loan	M/s Competent Securities P. Ltd	1,40,00,000	1,40,00,000	

8. Against the above order of the Id. CIT(A), the assessee is in appeal before us for the A.Y. 2015-19 whereas for the A.Y. 2016-17 both the revenue and the assessee are in appeals before us.

9. In the ground No. 1 of the assessee's appeal, the assessee has challenged the validity of assessment order on the ground that the AO has passed the assessment order 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.

10. We have heard the rival contentions and carefully gone through the orders of the authorities below. We have also deliberated on the judicial pronouncements referred by the lower authorities in their respective orders as well as cited by the Id AR and the Id. DR during the course of hearing before us in the context of factual matrix of the case. From the record we found that the assessee had filed an application for providing various documents/material/information/reports, relied upon by the Ld. AO for issuing show cause notice along with permission for cross-examination of witnesses, whose statements were recorded behind the back of the assessee and were being relied upon by the AO. The AO did not provide the copy of various documents/

material/information/reports relied upon by him. Further he did not provide the opportunity of cross examination of the witnesses whose statements were relied upon by him namely:-

S. No	Name of Person whose statement utilized	Name of company which was treated by AO as non genuine on the basis of statement
1.	Anand Sharma	(i) M/s Jalsagar Commerce Pvt. Ltd (ii) M/s Royal Crystal Dealers Pvt. Ltd (iii) M/s Doshi Management Pvt. Ltd
2.	Ankit Bagri	M/s VSG Leasing and Finance Co. Pvt. Ltd (No loan or deposit taken by assessee from this company)
3.	Shiv Shanker Banka	M/s VSG Leasing and Finance Co. Pvt. Ltd (No loan or deposit taken by assessee from this company)
4	Hanish Toshniwal	M/s Mangalgauri Vinimay Pvt Ltd M/s Quality Mercantile Pvt Ltd (No loan or deposit taken by assessee from these companies)

11. The Id CIT(A) vide letter dated 21-03-2018 called remand report from the AO and directed the 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 and flexible time frame. 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 and instantly available for cross-examination subject to prior information of one week.

12. 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 2016-17. However, at this stage also, opportunity of cross-examination of witness was not given to the assessee and the relevant report of the AO on this point asking Ld CIT(A) to issue detailed guidelines and procedure to be followed by him for conduct of cross-examination. Thus, it is clear that neither the Assessing Officer has given opportunity to cross examine the witnesses nor the Id. CIT(A) has given the same. The issue with regard to finalizing the assessment without giving the opportunity to cross examine have been elaborately discussed by the Coordinate Bench in its decision dated 31/12/2018 in the case of M/s Kota Dall Mill (in ITA 997/JPR/2018, for A.Y 2010-11).

13. From the record we found that the show cause notice was issued by the Ld. AO to the Assessee on 06.12.2017. Under the said show cause notice, the Assessee was called upon to submit explanation, in respect of proposed action u/s 68 of the Act by the Ld. AO. A copy of the said show cause notice is placed at the Page No. 64-75 of the PB-I/A.Y 2015-16. On 11.12.2017, the Assessee filed an application PB-I page 125-128/A.Y2015-16 for providing various documents/material /information, relied upon by the Ld. AO for issuing show cause notice

along with permission for cross-examination of witnesses, whose statements were recorded behind the back of the Assessee and were being relied upon by the Ld. AO. However, Ld. AO neither provided any of the documents sought by the Assessee nor granted permission for cross-examination of the witnesses. All the inquiries or material if any was gathered behind the back of the assessee, therefore, the same cannot be used against the assessee if the opportunity of examine and confront the same not provided to the assessee. If the Assessing Officer proposes to act on such material as he might have gathered as a result of his private enquiries behind the back of the assessee.

14. That non-providing the material relied upon by the Ld. AO for rebutting the same and also not affording opportunity for cross-examination of witnesses by assessee is violation of principle of natural justice. The purpose of appeal would also frustrated if violation of the principle of natural justice is taken place during initial proceedings of assessment itself.

15. With regard to merit of the addition, the Id AR of the assessee has submitted that the assessee had submitted ample documents during assessment proceedings to prove the identity, genuineness and creditworthiness of the Unsecured loan and in such documents no

defects were pointed by Id. AO and the same were rejected only on suspicious, surmises, conjectures and replying solely on the statements of some parties.

16. As per Id. AR, 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 was explained by the Id A.R. 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 Assessee 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 Assessee, 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 was submitted that the reliance placed by the Ld. AO on the judgment of Hon'ble Apex Court in case of Dhakeswari (supra) is misconceived.

17. With regard to reliance placed by the A.O. on the decision of Hon'ble Supreme Court in the case of Roshan Di Hatti Vs CIT (1977) 107 ITR 938 and Kale Khan Mohammed Hanif Vs CIT (1963) 50 ITR 1 (SC), it was submitted by the Id AR that in the present case of the Assessee,

Assessee 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 Id. AO could not point out any defects in the documents or material so furnished by the assessee. 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 Assessee or respective lenders. 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 Assessee is squarely covered under the aforesaid finding of Hon'ble Apex Court. The Judgment of Kale Khan Mohammed Hanif (ibid) is distinct from the case of Assessee and has no applicability to the Assessee. 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 dealt 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'.

As the Id. A.R. the documentary proof substantiating the identity, credit worthiness and genuineness of the transaction, furnished by the Assessee, remained undisputed by the Ld. AO. Thus, placing reliance to the said judgment with that of the case of Assessee is a misconceived interpretation of the Ld. AO.

18. As per the Id AR, the Assessing Officer has wrongly applied the proposition of law laid down in the case of CIT Vs. Durga Prasad More (1971) 82 ITR 540 (SC), it was contended that the 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 Sumiti 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, 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 assessee, all the documentary evidences were produced before Ld. AO both by the assessee 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 assessee group, however, 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 assessee as reality of the transactions carried out by the assessee 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.

19. With regard to the Assessing Officer's reliance on the decision of Hon'ble Delhi High Court in the case of Cit Vs. Independent Media (P) Ltd. 210 Taxmann 14 (Delhi) (2012), it was the contention of the Id AR that 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 assessee. As per the Id AR the ratio of the aforesaid judgment rather supports the contention of the Assessee and proves its case and not the case made out by the Ld. AO.

20. The Id AR also distinguished the facts laid down in the case of A. Govindarajulu Mudaliar Vs CIT (1958) 34 ITR 807 (SC), G.R. Siri Ram Vs

CIT (1975) 98 ITR 337 (P&H), CIT Vs. Kishore Lal & Santoshi Lal (1995) 216 ITR 9 (Raj). The detailed submissions filed in this regard is placed on record.

21. With regard to various documentary evidences placed on record, the Id AR has relied on the decision of the Coordinate Bench in the case of M/s Kota Dall Mill A.Y 2010-11, AY 2011-12, AY 2012-13, AY 2013-14, AY 2014-15, AY 2015-16 and AY 2016-17 Assessee's appeal (ITA No. 997 to 1002 and 1119/JPR/2018) and departmental appeal (ITA No. 1057 to 1062 and 1210/JPR/2018), wherein the unsecured loan taken by assessee from various companies was deleted by Hon'ble ITAT by passing order dated 31/12/2018. In view of the findings of Hon'ble ITAT in the main group case M/s Kota Dall Mill, it was submitted that impugned addition made by Ld. AO and confirmed by Id CIT(A) is not legally tenable.

22. As per Id. AR, so as to discharging of the burden u/s 68 of the Act, the following cash creditor are covered by submission for other group case of the assessee tabulated as under:-

Name of Cash Creditors	Covered by
M/s Jalsagar Commerce Pvt. Ltd.	Covered Kota Dall Mill AY 2010-11, 2012-13, 2013-14

23. The Id AR also submitted that the impugned addition u/s 68 of the Act is not legally tenable in view of the following:

- i. Assessee duly discharged its burden casted u/s 68 of the Act by providing identity, creditworthiness and genuineness of the transactions.
- ii. Documentary evidences produced by the Assessee and/or submitted by the lender company remained uncontroverted by the lower authorities during assessment/appeal proceedings, thus veracity of the documentary evidences forming part of the record of the department was not doubted.
- iii. The Ld. AO has relied upon statements recorded behind the back of assessee much before the date of the search in some other proceedings. Further, opportunity of cross examination was not given either at assessment stage or appeal stage.
- iv. Further, Shri Anand Sharma has stated in the statement that accommodation entry was given to M/s Jalsagar Commerce Private Ltd by Royal Crystal Dealers Pvt Ltd. He nowhere has stated that Cash was given by the assessee or accommodation entry was given by M/s Jalsagar Commerce Pvt. Ltd. Further he has not admitted in the statement that he has controlling M/s Jalsagar Commerce Pvt. Ltd. The Ld AO has reproduced relevant of statement at Page 36 & 38 of his assessment order for AY 2015-16. Therefore, no

addition can be made in the hands of the assessee even on the basis of un-confronted statement of Shri Anand Sharma.

Ample documents filed to prove the identity, creditworthiness, and genuineness. During the course of assessment proceedings the assessee submitted the following documents to prove the identity, creditworthiness, and genuineness of transaction in respect of loans taken during the year from M/s Jalsagar Commerce Pvt. Ltd: -

AY 2015-16

S. No.	Particulars of Documents	S. No. of PB where documents annexed AY 2015-16/VOL- II
1	Copy of Ack. of ITR of AY 2015-16 along with computation sheet	420-422
2	Copy of Balance sheet of AY 2015-16 along with enclosures	423-436
3	Copy of relevant page of bank statement showing the entry of payment made to assessee.	437-443
4	Copy of Confirmation of accounts from the books of unsecured loan creditors	444
5	Copy of Ledger from the books of accounts of assessee	445
6	Copy of affidavit of Mrs Sangeeta Somani director of company.	446-449
7	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.	450-456
8	Copy of assessment order passed in the case of above named company for AY 2005-06, AY 2007-08, AY 2011-12. 2012-13 and 2014-15.	457-499
9	Copy of ROC master data.	500-501
10	Copy of PAN card.	502

11	Certificate of Incorporation.	503
12	Copy of Certificate of NBFC Registration.	504

A.Y 2016-17

S. No.	Particulars of Documents	S. No. of PB where documents annexed AY 2016-17/VOL- II
1	Copy of Ack. of ITR of AY 2016-17 along with computation sheet	384-386
2	Copy of Balance sheet of AY 2016-17 along with enclosures	387-396
3	Copy of relevant page of bank statement showing the entry of payment made to assessee.	397-443
4	Copy of Confirmation of accounts from the books of unsecured loan creditors	444-446
5	Copy of Ledger from the books of accounts of assessee	447-450
6	Copy of affidavit of Mrs Sangeeta Somani director of company.	451-454
7	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.	455-461
8	Copy of assessment order passed in the case of above named company for AY 2005-06, AY 2007-08, AY 2011-12. 2012-13 and 2014-15.	462-504
9	Copy of ROC master data.	505-506
10	Copy of PAN card.	507
11	Certificate of Incorporation.	508
12	Copy of Certificate of NBFC Registration.	509

All the loans were received through banks and verifiable from bank statement of assessee as well as bank statement of the party. The onus u/s 68 of the assessee is to prove the identity, capacity and genuineness of the transactions has been discharged which may be seen from the followings:-

i) Identity:-

The assessee proved the identity the company. The company was assessed by Income Tax Department u/s 143(3) of ITax Act for AY 2005-06, AY 2007-08, AY 2011-12, AY 2012-13 AND AY 2014-15. The details of assessment completed u/s 143(3) is as under

Assessment u/s 143(3)

Name of Company	Assessment year	Income Assessed	Assessment Order u/s 143(3) at PB A.Y 2015-16
M/s Jalsagar Commerce Pvt. Ltd	2005-06	46,890	462-464/PB-II)
M/s Jalsagar Commerce Pvt. Ltd	2007-08	14,36,430	472-473/PB-II)
M/s Jalsagar Commerce Pvt. Ltd	2011-12	40,17,339	476-480/PB-II)
M/s Jalsagar Commerce Pvt. Ltd	2012-13	9,64,69,110	484-491/PB-II)
M/s Jalsagar Commerce Pvt. Ltd	2014-15	38,20,430	497/PB-II)

Copy of Master Data of ROC

Name of Company	Status of Company	PB pg
M/s Jalsagar Commerce Pvt. Ltd	Active	500/Vol-II/A.Y 2015-16

Further by filing the confirmation, their ITR, Bank statement and balance sheets, the identity of the cash creditor is proved.

24. Reliance was placed by the Id AR on the decision of the Hon'ble Rajasthan High Court in the case of Aravali Trading Co V/s ITO (2008) 8 DTR (Raj) 199 wherein it was held that once the existence of the creditors is proved and such persons own the credits, the assessee's onus stands discharged and the assessee is not required to prove the

source from which the creditors could have acquired the money deposited with him. Hon'ble jurisdictional High Court has held that merely because the depositors' explanation about the sources of money was not acceptable to the AO, it cannot be presumed that the deposit made by the creditors is money belonging to the assessee itself.

ii) Creditworthiness

In order to prove the creditworthiness of the cash creditor, the assessee has submitted the following documents before the lower authorities.

S.No	Description	PB 2015-16 Vol II page no.	Remarks
1	Assessment Order u/s 143(3) of the lender company Act for AY 2005-06, AY 2007-08, AY 2011-12, AY 2012-13 AND AY 2014-15.	457-499	Assessed Income for AY 2012-13 is Rs. 9,64,69,110
2.	Bank statement of lender company	437-443 (for AY 2015-16) and 397-443 (for AY 2016-17)	Bank statement shows the huge transactions in bank. There is no cash deposit in any of the company prior to the loan given to the assessee
3	Income Tax return for AY 2015-16	420-422	Lender Company declared total income of Rs. 1,48,15,240/-
4	Income Tax return for AY 2016-17	384-386/A.Y 2016-17	Lender Company declared total income of Rs. 1,72,95,720/-
5	Affidavit of Director	446-449	

Further, the company has raised share capital in various years which was accepted by Income Tax department in scrutiny assessment u/s 143(3) of I.Tax Act, shown as under:-

Assessment Year	Share capital raised	Assessment Order u/s 143(3) at PB A.Y 2015-16
1995-96	33,00,000	
1996-97	16,50,000	
2005-06	7,94,00,000	462-464/PB-II)
2008-09	2,79,54,863	
2010-11	1,91,00,000	
2011-12	1,39,00,000	476-480/PB-II)
2012-13	1,96,00,000	484-491/PB-II)
2014-15	11,05,00,000	497/PB-II)
2015-16	7,71,29,500	

There is sufficient source of funds with the company to give the Unsecured Loan to the assessee. The chart showing the amount given on Unsecured Loan to the assessee viz a viz own funds with the companies are as under: -

AY 2015-16

Name of the lender company	Unsecured Loan Received	Share capital, application and reserve & surplus Lender company as on 31.03.2015	Share capital, application and reserve & surplus Lender company as on 31.03.2014
Jalsagar Commerce Pvt Ltd	1,50,50,000/-	38,10,50,840/-	27,44,00,650/-

AY 2016-17

Name of the Investor company	Amount given to assessee (Maximum Balance)	Source of funds with Investor companies as on 31.03.2016		Source of funds with Investor companies as on 31.03.2015	
		Share capital and reserves	Loans	Share capital and reserves	Loans
Jalsagar Commerce Pvt. Ltd	9,55,50,000	39,25,96,232	7,63,93,062	38,10,50,841	12,71,18,590

From the above chart, it is clear that the cash creditor company was having its own share capital, Reserve & surplus, which were more than to the amount given to the assessee. Apart from the Unsecured Loan given to the assessee, this company was also having investments in shares of other companies or loans & advances to parties, therefore from the bank statement as well as financials statements of the companies their creditworthiness is duly proved. Further once the assessee able to establish that he has in fact received money from third party, it can't be burdened with a further onus of establishing the source from which such third party had been able to obtain the money.

Reliance is placed on the following decisions: -

- (i) Sideways Investment Pvt. Ltd. Vs DCIT 24 Tax World 146 (JP ITAT)
 - (ii) CIT Vs. Daulat Ram Rawatmal 87 ITR 349 (SC)
 - (iii) Saraogi Credit Corp. Vs. CIT 103 ITR 344 (PAT)
- iii) Genuineness
- a) The assessee submitted the confirmation of lender (PB pg 444/Vol-II/A.Y 2015-16 and PB Pg 444-446/Vol-II/A.Y 2016-17).
 - b) The assessee has submitted the affidavit of the director of the cash credit company (PB pg 446-449/Vol -II/ A.Y 2015-16 and PB Pg 451-454/Vol-II/AY 2016-17).
 - c) Further the company is repaying the loans. The major repayment of loan was made in AY 2016-17. Further, the

company paid interest to the lender company which the Id AO treated as genuine payment as he made no disallowance against the interest payment. When the interest payment is genuine the loan cannot be treated as in genuine.

REPAYMENT OF LOAN AND INTEREST PAYMENT

Name of Company	AY	Opening Balance	Loan taken during the year	Interest credited in a/c during the year	Loan repayment during the year	Closing balance
M/s Jalsagar Commerce Pvt. Ltd	15-16	Nil	1,50,50,000	1,66,253	Nil	1,50,50,000
	16-17	1,50,50,000	11,93,00,000	41,30,597	12,98,50,000	45,00,000

d) Furthermore, the department has carried out intensive search operations over the assessee and no any incriminating material was found to show that the money against unsecured loan was own undisclosed money of the company. No any entry in books of account or document was found showing payment of cash to these investor company in lieu of receipt of cheques from these company against unsecured loan. Therefore the genuineness of the transactions cannot be doubted.

Further, the transactions are reflecting in the bank accounts of respective Investor Company as well as bank account of Assessee. Thus, the genuineness of the transactions cannot be doubted merely on the basis of guess, assumptions and presumptions, without having any other corroborative evidences.

e) As regard the alleged discrepancy on account of statement of Shri Anand Sharma who said that accommodation entry was given to M/s Jalsagar Commerce Pvt Ltd by Royal Crustal Dealers Private Ltd, the necessary addition has been

made in the hands of Jalsagar Commerce Pvt Ltd for AY 2012-13. (Kindly see PB pg 484-491/Vol- II/AY 2015-16) treating the amount as income of M/s Jalsagar Commerce Pvt Ltd. From the relevant portion of statement of Shri Anand Sharma reproduced by Id AO at Pg 36 & 38 of his assessment order A.Y 2015-16 it appears that Shri Anand Sharma has no where stated that he is controlling M/s Jalsagar Commerce Pvt. Ltd or M/s Jalsagar Commerce Pvt. Ltd has given accommodation entry to the assessee company. Therefore, the statement of Shri Anand Sharma is irrelevant so far as the loan from M/s Jalsagar Commerce Ltd to assessee.

Source of source was explained by submitting the bank statement of creditors:-

The Id AR also submitted that investors are corporate entity and are maintaining proper books of accounts, which are subjected to Statutory Audit by Independent Auditors and audited balance sheet, and profit and loss account along with the income tax returns were filed before the Assessing Officer. Therefore, the proof of their existence is available as demonstrated by the Registrar of Companies records and there is no allegation or observations by the Ld. AO that cash was deposited in the bank account of the investor or companies or have been routed through the assessee. A perusal of Bank statements of Investor's Companies reveal that the "source" of "source" was also explained and was through banking transaction. The deposits in the Creditors' bank accounts were

by bank transfers. Thus, in the case under appeal, the creditworthiness of the Creditors was fully established and there can be no preponderance of probabilities that these loans were in fact accommodation entries. Thus in the case of assessee the source of source is also available with the department.

No concealed source of income as a result of search and survey:-

During the course of search carried out over the assessee group no document or evidence was found to show that the assessee company was having some undisclosed income. From the record we found that the assessee company was not having any undisclosed income. During the course of search proceedings over assessee Group carried as well as post search investigation and assessment proceedings no material was found by the department against the assessee to prove that the assessee company had channelized its unaccounted monies in form of unsecured loans . There is no any deposit of cash or suspicious funds in account of investor companies. The entire unsecured loan was invested by the investor company out of funds owned by it which is supported by the bank statements of the respective company, affidavits of their directors etc. The bank statements of the investor company clearly demonstrate that there is no cash deposit in bank a/c of lender

Company. The investor company were incorporated much prior to investment made in assessee company and having their sufficient net worth. Thus in the case of search assessments no additions can be made without having corroborative material and evidences as a result of search.

Allegation of shell companies without material

In the light of submission, as aforesaid, it was submitted that the allegation pertaining to that the investments were received from shell companies is without basis, material, evidence and purely based on surmises, conjectures, irrelevant material. No any positive material was brought on record to show that these Investor Companies are shell company. The company is registered company under the Companies Act and is having an independent identity under the Companies Law. Therefore the Investor Company cannot be alleged as Shell Company without having any corroborative evidences and the same are genuine company having genuine affairs. Assessment of the investor company was completed u/s 143(3) of I.Tax Act, and the AO of the investor company assessed the company as regular company- not as shell company. The ROC has also not categorized the investor company as "shell company" but categorized as "Active" company "

Non production of directors for personal appearance before the Assessing Officer.

Further to submissions made above, the crux of the allegation and basis of the addition as made out by the Ld. AO is that since Assessee could not produce Directors of the Investor Company, which proves that this Company is "Shell" Company and all the investment made by this Company fall under the unexplained credit of the Assessee. In this respect, at the outset it is submitted that it is a unique theory propounded by Ld. AO without having any force of law. Ld. AO has made this obligation mandatory beyond the provisions of the Section-68 by expanding the onus on the Assessee, beyond the expectations of Parliament. The assessee has no statutory power to enforce the personal presence of the parties. If power to call the witness and examine him are not exercised judicially than the deposit cannot be considered as undisclosed income. Reliance is placed on the following decisions.

- 1) *Nathu Ram Premchand Vs CIT (1963) 49 ITR 561 (All);*
- 2) *E.M.C. Works P Ltd Vs ITO (1963) 49 ITR 650 (All)*

25. As per the Id AR, the assessee has discharged its onus laid down u/s 68:-

Under section 68, the onus is on the assessee to offer explanation where any sum is found credited in the books of account and if the assessee offers no explanation or the explanation offered is not in the opinion of the AO, satisfactory, then such cash credit is liable to be charged to income tax as income of the assessee of that relevant previous year. This is not the case where assessee has not provided relevant details. In this case the assessee discharged its onus by filing the documents for which the AO has not pointed any discrepancy. There is no material with the Id. AO to prove the funds received by the assessee as non-genuine and the belief of the Id. AO is solely based on some reports of the investigation wings or some statements of the parties which are not any way concerned with the assessee.

However, before embarking on the allegation of the Ld. AO, the Id. AR submitted his submissions on merits in case of the lender company in respect of whom addition was made, which reads as follows:

- a) M/s Jalsagar Commerce Pvt. Ltd. As we understand and on the basis of details/information available with assessee no summon/notice under Section 131 or 133 (6) of the Act was issued to M/s Jalsagar Commerce Pvt. Ltd., either by the Ld. AO or by the concerned AO or by the DDIT (Inv.) Kolkata, which shows that Ld. AO had no doubt regarding the veracity of the documents furnished by the Assessee as nothing had been done by the Ld. AO. Thus, addition of unsecured loan, provided by M/s Jalsagar Commerce Pvt. Ltd. is unreasonable, untenable, without any basis and bad in law on this count itself.

26. After considering the rival contentions, we found that on the following three reasons, the Assessing Officer has not accepted the unsecured loans received by the assessee as genuine.

- i) Personal non attendance of directors of the companies from whom the assessee received loan.
- ii) Report of the Investigation Directorate reveling that transaction of Kolkata based Companies in the form of unsecured loan with the Assessee are not genuine.
- iii) Statements of various entry Operators wherein they admitted to managing the Companies from whom the assessee received loan.

In this regard we may observe as under: -

- i) Personal presence of directors:
We have discussed this issue hereinabove
- ii) Reports of the Investigation Directorate
 - a) The inquiries on which the Id. AO is replying and on the basis of which the huge addition was made in the income of the assessee cannot be taken as evidences in the case of the assessee as the same was not conducted in the case of the assessee. The Id AO made the huge addition just relying upon such inquiries reports without having in possession the material in support of such inquiries and making independent inquiries in this regard. It is well settled position of law that the Id. AO cannot be guided for his decisions by what the officer preparing the report says. As per section 119 (1) (a) even the CBDT cannot

issue directions or instructions to an AO so as to require any income tax authority to make a particular assessment or to dispose of a particular case in a particular manner. The SC in the case of Rajesh Kumar vs DCIT (2006) 157 Taxman 168 (SC) has said that an assessment order is the result of a judicial proceedings. According to the Apex Court, an assessment proceeding is a judicial proceeding. Obviously, no one can have influence or say in the course of judicial proceedings that a particular decision should be taken in a particular way or manner affecting the independence of the decision-making authority. The AO must decide the issue before him on a proper appreciation of evidence adduced during the course of assessment proceedings and not to be swayed and carried away under some report. Hon'ble Apex Court has held in the case of Dakeshwari Cotton Mills Ltd Vs CIT 26 ITR 775-"that one who hears must decide the case."

- b) Perusal of assessment order shows that A.O. has referred to report of investigation wing. The A.O. has to pass the assessment order on the basis of his own opinion and application of mind. There should have been independent application of facts after perusing the evidences and information. Report itself cannot be a ground to make addition Reliance is placed on the decision of Hon'ble Delhi High Court in CIT V Fair Finvest Ltd. 357 ITR 146.
- c) Information of Investigation Directorate:-
On bare perusal of the documents relied upon and provided by the Ld. AO, it is needless to say that Ld. AO only reproduced the information of Investigation

Directorate without conducting any independent enquiry and drawing any conclusion on the same and even the information obtained under the aforesaid letters have not been appreciated in the right perspective and in toto, which shows distorted approach of Ld. AO towards the aforesaid documents as well. Thus, without having any documents in support of the contents of documents, relied upon by Ld. AO, as aforesaid, are not acceptable and not tenable at all.

- d) Reports of the Investigation Directorate: -
- (i) Sharing of information letter of ACIT/CC-2(1)/Sharing of Information/Kol/2016-17 dated 09.03.2017: (PB-I pg 385-386/A.Y 2015-16)

This report is totally irrelevant for the assessee as nothing has been said in the report about the assessee company.

Under the aforesaid letter, a copy of the ledger is stated to have been enclosed wherein two entries of Rs. 37,53,50,000 for the FY 2010-11 and Rs. 10,05,00,000 for the FY 2011-12 is stated to have been bogus accommodation entries, as per the statement of Mr. Anand Kumar Sharma. It is further stated in the letter that since the above entry is bogus entry hence all the transactions entered into between the above mentioned entities and the beneficiary are bogus accommodation entries in nature.

Merely on the basis statement of a third person, who is not having any capacity (promoter or director or principle officer or share holder or CEO/ manager) in the company, genuine transactions cannot be held as accommodation entry.

Furthermore, the statement of Mr. Anand Kumar Sharma is not admissible in law inasmuch as the opportunity for cross examination of the witness was not provided even after repeated request of the assessee. The reliance is placed upon the judgment 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)**:

Further, the assessment of M/s Jalsagar Commerce Pvt. Ltd has been carried out by the department u/s 143(3) of I.Tax Act for various assessment years and no where this company was assessed as entry operator.

(ii) Information received from the ITO (Inv.), U-3, Kolkata of Investigation Directorate of Kolkata, vide letter number ITO (Inv.)/U-3, Kol./FIU/2015-16/6470/dated 30.03.2016. (PB-I pg 387-388/ A.Y 2015-16)

Under the aforesaid letter, ITO has informed the Ld. AO that during the FY 2011-12 huge loan being Rs. 29.47 crore was advanced by M/s Magnet Capital Market Ltd. to M/s Kota Dall Mill.

It is humbly submitted that the aforesaid letter mainly pertains STR (suspicious transaction report) relating to M/s Magnet Capital Market Ltd.

The assessee company has no transaction with M/s Magnate Capital Market Ltd, hence this report is totally irrelevant for the case of assessee.

(iii) Information received from the Deputy Director of Income Tax (Inv.), U-1(2), Kolkata of Investigation director of Kolkata vide letter number DDIT(Inv.)/U-1(2), KOL/16-17/4499 date 24.03.2017. (PB-I pg 389-390/ A.Y 2015-16)

The aforesaid letter pertains to Cash deposit in the Account of M/s Ajay Traders and transfer of funds from M/s Ajay Traders to M/s Sangam Distributors Pvt. Ltd.

The assessee company has no transaction with M/s Sangam Distributors Pvt. Ltd, hence this report is totally irrelevant for the case of assessee.

(iv) Investigation report of the DDIT (Inv.), Unit-1(3) Kolkata vide letter number DDIT (Inv)/ Unit-1(3)/ KOI/ Jaipur/ Commission/ 2017-18/1867 dated 28.11.2017. (PB pg 391-399/Vol-I/A.Y 2015-16).

Submission:

Silent features of the report are as under:-

- **Admitted in the report that no notice remained unserved.** It is humbly submitted that DDIT (Inv) in the

aforesaid letter has admitted that no notice returned un-served by the postal authorities i.e. all the notices, issued by the DDIT (Inv) were duly served upon the respective creditors/investors companies, which proves their identity.

- **Admitted that all details filed -Tab I** It is also admitted fact that all the creditors/investors companies duly responded to the notices of DDIT (Inv) by submitting all the requisite documents to prove identity, creditworthiness and genuineness of the transactions.
 - **Tab -II** held paper company based on statement, neither copy of these statements except 4 was provided to the assessee nor opportunity of cross examination/confrontation was given to assessee.
 - **Tab -II (PB-I pg 394/A.Y 2015-16)** No name of entry operator/dummy directors mentioned against this company M/s Jalsagar Commerce Pvt. Ltd. Sr no. 1.
 - **In table III at PB-I Pg 397-399/A.Y 2015-16** Name of entry operator mentioned and dummy directors mentioned **but the name of M/s Jalsagar Commerce Pvt. Ltd is not appearing in Table III**
- (v) **Investigation report of the DDIT (Inv.), Unit-1(3), Kolkata vide letter number DDIT (Inv)/Unit-1(3)/Kol/Jaipur/Commission/2017-18/1924 dated 06.12.2017.**
(PB pg 400-401/Vol-I/A.Y 2015-16).

Submission:

In this letter dated 06.12.2017 the database data of entry operator prepared by the Directorate of Investigation Wing has been shared with Ld. AO.

At Table 1st at **PB-I pg 400** name of two companies viz VSG Leasing & Finance Company Ltd and Denim Developers Ltd mentioned. The assessee has no transaction with these two companies. Here also name of M/s Jalsagar Commerce Pvt. Ltd not appearing.

At Table II at **PB-I pg 401** name of five companies mentioned. The assessee had unsecured loan from M/s Jalsagar Commerce Pvt. Ltd. The assessee has no concern with other Four companies. In this report it has been mentioned that Deepa Kriplani is director of M/s Jalsagar Commerce Pvt. Ltd and Mr. Anand Sharma/Janardhan Chokhani is entry operator of this company. The Ld AO has provided of copy of statement

of Shri Anand Sharma dated 06-01-2014 (**PB Pg 76-81/Vol- I/A.Y 2015-16**) and dated 06-02-2014 (**PB Pg 82-85/Vol-I/A.Y 2015-16**) . In both the statements he has no where stated that M/s Jalsagar Commerce Pvt. Ltd was providing accommodation entries.

Further, the entire data base is based on the statement recorded behind the back of the assessee at different occasions. The opportunity of cross examination was not given to the assessee, therefore, the statement of alleged entry operator cannot be utilized for adverse inference against the assessee.

It is humbly submitted that no conclusion, whatsoever it may be, has been drawn by the authorities and it is merely a sharing of information by the internal authority and without having any cogent evidences for any of the relevancy with the assessee, the same cannot be relied upon.

(iii) Statement of 4 alleged entry operators

As regard the statement of 4 alleged entry operators, we submit as under:-

- a) **Mr. Anand Sharma** - The statement of Mr. Anand Sharma was recorded on 06.01.2014 and 06.02.2014. **PB-I Pg 76-81 & 82-95 /A.Y 2015-16** respectively He has no where stated that M/s Jalsagar Commerce Pvt. Ltd has provided accommodation entry to the assessee company. The statement of Mr. Anand Sharma is totally irrelevant for the case of assessee. Further the opportunity for cross examination was not given to the assessee, therefore, the statement of Shri Anand Sharma cannot be used against the assessee.
- b) **Mr. Hanish Toshniwal** – The statements were recorded on 11.05.2015, wherein a list of 207 Companies has been given. Name of M/s Jalsagar Commerce Pvt.Ltd is not appearing in the list. The statement of Shri Hanish Toshniwal is totally irrelevant for the case of assessee. However, data-base by the Directorate of Investigation Wing, Kolkata is itself contradictory. Furthermore, the statements were not recorded in the case of assessee. Further the opportunity for cross examination was not given to the assessee, therefore, the statement of Shri Hanish Toshniwal cannot be used against the assessee.

- c) **Mr. Shiv Shanker Banka** – The statement of Mr. Shiv Shankar Banka was recorded on 15.07.2014, in which he indicated company M/s VSG Leasing and Finance Co. *Pvt* Ltd. It is pertinent to mention that no transaction has been carried out by the assessee with this company. Therefore the statement of Mr. Shiv Shankar Banka is totally irrelevant for the case of assessee. Further the opportunity for cross examination was not given to the assessee, therefore, the statement of Shri Shiv Shankar Banka cannot be used against the assessee.
- d) **Mr. Ankit Bagri-** The statement of Mr. Bagri was recorded on 03.07.2014, wherein he has deposed about the company namely M/s Caplin Dealcom Pvt. Ltd. It is pertinent to mention that no transaction has been carried out by the assessee with this company. Therefore the statement of Mr. Ankit Bagri is totally irrelevant for the case of assessee. Further the opportunity for cross examination was not given to the assessee, therefore, the statement of Shri Ankit Bagri cannot be used against the assessee.

Affidavit submitted:-

It is also to be appreciated that besides submitting substantive documents with the reply by respective lender as well as by the Assessee, Assessee, in order to make his case, submitted Affidavits of directors M/s Jalsagar Commerce Pvt. Ltd. (Copy at PB-II Page no. 446-449/A.Y 2015-16), wherein they confirmed the following major facts: -

- (i) Information regarding business activity of the company.
- (ii) Board of Directors is not working under any external influence and not appointed by any external person.
- (iii) Address of jurisdiction AO.
- (iv) Information regarding issuance of share capital by the Lender Company and detailed of assessment carried out by the respective AOs.
- (v) Confirmation in affidavit regarding providing unsecured loan and detail thereof.
- (vi) Detail regarding source of funds of the Company.

Though, the Ld. AO has mentioned a very generalized statement in the show cause notice as well as in the assessment orders and failed to substantiate its contention inasmuch as the unsecured loan from NBFCs. Yet the Assessee dealt with the each and every allegation of the Ld. AO elaborately to show that even generalized statements, observations and allegations leveled against the Assessee Company are baseless, untenable, factually incorrect and having no any force of law, so as to not acceptable against the Assessee Company considering the principle of equity and law.

Receipt of payment against unsecured loan through banking channel

As already submitted during assessment proceedings, unsecured loan invested by NBFC to the Assessee Company through RTGS/Account Payee Cheque. The payments credited in the Bank account of the Assessee Company. Therefore, the Assessee has explained the nature and source of the credit entry and discharged the onus to prove the genuineness of the transactions. The aforesaid contention of the Assessee finds support from the following judicial pronouncements:

i) CIT V. VARINDER RAWLLEY [2014] 366 ITR 232 (PUNJAB & HARYANA)

“Where assessee received and returned amount in question by way of account payee cheques and transaction was reflected in bank accounts of assessee as well as creditor who was an income-tax assessee, assessee had sufficiently explained nature and source of credit entry and in such case entry could not be treated as assessee's income when department failed to prove to contrary.”

ii) CIT V. VIJAY KUMAR JAIN [2014] 221 TAXMAN 180

“Where it was apparent from material on record that lenders had granted loan to assessee through account payee cheques

and they had got sufficient balance in their account before issuing those cheques, loan amount could not be added to assessee's taxable income under section 68 merely on ground that lenders were engaged in providing accommodation entries also.”

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.

10. 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.

11. 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.

12. 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 assessee 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 assessee wanted to cross-examine those dealers and what extraction the assessee 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.”

13. 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:

(ii) **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 Assessee 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 Assessee, Id. 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.

(iii) **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 Assessee, Assessee 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 assessee. 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 Assessee, the burden of proof for identity, creditworthiness and genuineness of the transaction was duly discharged by the Assessee 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 Assessee 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 Assessee 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 Assessee and has no applicability to the Assessee. 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 Assessee, remained undisputed by the Ld. AO. Thus, placing reliance to the said judgment with that of the case of Assessee is a misconceived interpretation of the Ld. AO.

(iv) **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 assessee, all the documentary evidences were produced before Ld. AO both by the assessee 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 assessee 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 assessee as reality of the transactions carried out by the assessee 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 assessee.

(v) **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 Assessee. It is humbly submitted that ratio of the aforesaid judgment rather supports the contention of the Assessee and proves its case and not the case made out by the Ld. AO.

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

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

the Ld. AO. In that case the Assessee did not prove his version that the gift was alleged to have been made by the Assessee 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 Assessee 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 Assessee.

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

The case is also not relevant to the case of Assessee inasmuch as in this case the Assessee 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 Assessee is not relevant to the facts, mentioned above. In the instant case of Assessee-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 Assessee, the aforesaid judgment, relied upon by the Ld. AO has no relevancy.

(viii) **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 Assessee, Ld. AO has acted in utter disregard to the principle of natural justice and neither considered documentary evidences nor considered the explanation of the Assessee. 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 Assessee ample documentary evidences were submitted by the Assessee 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.

- (ix) **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 Assessee. 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 Assessee, the Assessee 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 Assessee 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 Assessee case falls under (1) above, the case relied upon by the Ld. AO is distinct and not applicable to the case of the Assessee. 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.

(x) **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”.

14. In view of above, it was contended that the cases cited by AO are entirely distinguished from those the assessee's 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 Assessee case. However, most of the cases, cited by the AO are supporting the contention of the Assessee.

15. On the other hand, the Id. CIT-DR has vehemently argued that the amount of unsecured loan and share capital was taken from the shell company and the department has evidences in the form of statement of Shri Anand Sharma wherein he has stated that all these companies are involved in providing accommodation entries, accordingly, the A.O. was justified in making the addition with respect to the amount received as unsecured loan from M/s Jalsagar Commerce Pvt. Ltd. as well as M/s Competent Securities Pvt. Ltd. He has further contended that the Id. CIT(A) was not justified in deleting the addition made in respect of loan taken from M/s Competent Securities Pvt. Ltd.

16. We have considered the rival contentions and carefully gone through the orders of the authorities below. 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. From the record we found that during the assessment year 2015-16 and 2016-17 the assessee has taken unsecured loan of Rs. 1,50,500/- and

Rs. 4,55,00,000 respectively from M/s Jalsagar Commerce Pvt. Ltd.. In A.Y. 2016-17, the assessee has taken unsecured loan of Rs. 1.40 crores from M/s Competent Securities Pvt. Ltd.. The loan so taken was paid within the same financial year alongwith interest. However, the A.O. has allowed the interest expenditure but the added the amount of loan taken from M/s Competent Securities Pvt. Ltd. which has been deleted by the Id. CIT(A) after giving detailed finding. So far as the amount of loan taken from M/s Jalsagar Commerce Pvt. Ltd. is concerned, we found that the Coordinate Bench in its decision dated 31/12/2018 in the case of Kota Dall Mill Vs. DCIT for the A.Y. 2010-11 to 2015-16 have deleted the similar addition made with respect to the amount taken from M/s Jalsagar Commerce Pvt. Ltd.. The Tribunal have dealt with the issue threadbare and after controverting each and every finding/observation of the A.O. and the Id. CIT(A), deleted the addition. The précised observation of the Tribunal was as under:

“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 ld 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.”

17. We had carefully gone through the above order of the Tribunal in the case of Kota Dall Mill Vs. DCIT (supra) with respect to the very same search and seizure action taken with respect to the amount taken from M/s Jalsagar Commerce Pvt. Ltd. After having similar observation as in the instant case before us, the A.O. has made the addition which has been confirmed by the Id. CIT(A). We found that the Tribunal have dealt with the issue threadbare and after controverting each and every objection of the Assessing Officer and the Id. CIT(A) have confirmed the addition and also dealing with all the judicial pronouncements referred by the Id. CIT(A) deleted the addition so made with respect to the loan taken from M/s Jalsagar Commerce Pvt. Ltd.. As the facts and circumstances during the both the assessment year under consideration i.e. A.Y. 2015-16 and 2016-17 are pari material, respectfully following the order of the Tribunal in the group cases, we do not find any merit in

the addition so made in respect of loan taken from M/s Jalsagar Commerce Pvt. Ltd.

18. In the result, appeals of the assessee in both the years are allowed.

19. In the appeal for the A.Y. 2016-17, the revenue is aggrieved for deleting the addition made on account of unexplained unsecured loan taken from M/s Competent Securities Pvt. Ltd..

20. We have considered the rival contentions and carefully gone through the orders of the authorities below and found that during the year under consideration, the assessee has also taken loan from M/s Competent Securities Pvt. Ltd. amounting to Rs. 1.40 crores. We found that the loan was repaid in full to the lender during the same financial year. We also found that the A.O. has allowed the interest expenditure claimed by the assessee in respect of the loan taken from M/s Competent Securities Pvt. Ltd. which was repaid by 02/3/2016 with interest. The books of account of the assessee was clearly showing loan taken on interest payment and repayment of loan with interest. After having the following observation, the Id. CIT(A) has deleted the addition by holding as under:

"5. *Coming to the second class containing loans from M/s Competent Securities Private Limited and where adverse facts, details and evidences are not found in the reports dated 28.11.2017 and 06.12.2017 from Investigation Directorate, Kolkata as mentioned in para 3.4.8 mentioned above, my findings are as follows:-*

5.1 *As far as the lender companies namely, M/s Competent Securities 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 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.*

5.2 *For the unsecured company namely, M/s Competent Securities 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 company, which are available at page no. 400-436 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 balance addition in respect of unsecured loans company namely M/s Competent securities Private Limited totalling to Rs. 1,40,00,000/- 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 said company is duly verifiable from confirmation placed at page no. 405 of PB with supporting bank statements placed at page no. 402-404 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.

- 5.3 *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 loan, there is balance available in the accounts of the lender, 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 M/s Competent Securities Private Limited have duly replied to the notices issued by DCIT/DDIT(Inv.), Kolkata in respect of commission, these facts remain uncontroverted by the AO.

5.4 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 director in the Appellant company. Therefore, I find that in the absence of any nexus of the Statement of Shri Rajendra Agarwal with the appellant company or its total income, this basis of addition adopted by the AO is farfetched & cannot be concurred.

5.5 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 loan, 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.

- 5.6 *In my considered view, mere not believing an explanation cannot lead to a conclusion that the unsecured loan received by the assessee 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 unsecured loan has been found and brought on record.*
- 5.7 *Similarly, I find that various observations of the AO on balance sheet / ITR of the 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 ii) & 14 as reproduced in Para No. 3.2 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 No. 3.2 above.*
- 5.8 *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.

5.9 *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. 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.*

5.10 *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 assesseees 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).

- 5.11 *It is noted that no clinching evidences has been brought on record that any unaccounted income was routed through unsecured loan by the Appellant as no evidences as to receipt/payment of cash for receipt of loan 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.*

5.12 *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 loan from M/s Competent Securities Private Limited totalling to Rs 1,40,00,000/- is not sustainable and hence the same stands deleted. Thus, ground No. 2 of appeal is partly allowed."*

21. The revenue is in further appeal before us against deletion of addition made on account of loan taken from M/s Competent Securities Pvt. Ltd..

22. We have considered the rival contentions and carefully gone through the orders of the authorities below. 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. We found that the Coordinate Bench in the case of group concern namely M/s Kota Dall Mill (supra) vide its order 31/12/2018 deleted the similar addition made in the assessment year 2015-16 and 2016-17. The précised observation of the Tribunal was as under:

"30. In the Revenue's cross appeal the issue on account of unsecured loans from two partners, namely, M/s. Competent Securities and M/s. Intellectual Builders for the assessment years 2015-16 and 16-17 were deleted by the Id. CIT (A) on the ground that the AO has not brought any material or documentary evidence to establish that the transactions are bogus accommodation entries as there was no

statement of any person of alleged entry operator having control over these companies or managing these companies.

31. *An identical issue was involved in all the assessment years of the revenue wherein the Id. CIT (A) has deleted the additions for want of any documentary evidence or any other material in support of the finding of the AO. Therefore, in view of our finding on this issue in assessment year 2010-11, the finding of the Id. CIT (A) is upheld.”*

23. We had also gone through the findings recorded by the Id. CIT(A) in deleting the addition and found that no clinching evidence was brought on record by the Assessing Officer for holding that the loan given by the M/s Competent Securities Pvt. Ltd. was bogus. The assessee proved the identity the company. The company was assessed by Income Tax Department u/s 143(3) of ITax Act. The details of assessment completed u/s 143(3) is as under

a) **Assessment u/s 143(3)**

Name of Company	Assessment year	Income Assessed	Assessment Order u/s 143(3) at PB 2016-17 pg-Vol-II
M/s Competent Securities Pvt Ltd	2009-10	94,600	538-539
M/s Competent Securities Pvt Ltd	2010-11	2,08,099	544
M/s Competent Securities Pvt Ltd	2014-15	9,06,648	547-550

b) **Copy of Master Data of ROC**

Name of Company	Category of company as per Master data of ROC	PB A.Y 2016-17
M/s Competent Securities	Active	554/Vol-II

Pvt Ltd		
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ii) **Creditworthiness**

In order to prove the creditworthiness of the cash creditor, the assessee has submitted the following documents before the lower authorities.

M/s Competent Securities Pvt. Ltd

S.No	Description	PB 2016-17 Vol II page no.	Remarks
1	Assessment Order u/s 143(3) of the lender company Act for AY 2009-10, AY 2010-11, & AY 2014-15	537-553	Assessed Income for AY 2014-15 is Rs. 9,06,648/-
2.	Bank statement of lender company	521-523	Bank statement shows the huge transactions in bank. There is no cash deposit in any of the company prior to the loan given to the assessee
3	Income Tax return for AY 2016-17	510-512	Income declared for A.Y 2016-17 Rs. 1,92,28,760/-
4	Affidavit of Director	526-529	

Further, the company has raised share capital in various years which was assessed by Income Tax department in scrutiny assessment u/s 143(3) of ITax Act, shown as under:-

M/s Competent Securities Pvt. Ltd.

Assessment Year	Financial Year	Share capital raised	Assessment Order u/s 143(3) at PB pg
1994-95	1993-94	3,00,000	-
2000-01	1999-00	24,50,000	-
2009-10	2008-09	98,36,50,000	538-539/Vol-II/AY 2016-17

There is sufficient source of funds with the company to give the unsecured loan to the assessee. The chart showing the amount given on unsecured loan to the assessee viz a viz own funds with the companies are as under: -

Name of the Investor company	Amount given to assessee (Maximum Balance)	Source of funds with Investor companies as on 31.03.2016		Source of funds with Investor companies as on 31.03.2015	
		Share capital and Reserves	Loans	Share capital and Reserves	Loans
Competent Securities Pvt. Ltd	1,40,00,000	100,12,04,52 2	47,00,000	98,83,92,562	50,00,000

From the above chart, it is clear that the cash creditor company was having its own share capital, Reserve & surplus, which were more than to the amount given to the assessee.

iii) Genuineness

a) The assessee submitted the confirmation of lender (PB pg 524/Vol-II/A.Y 2016-17.

b) The assessee has submitted the affidavit of the director of the cash credit company (PB pg 526-529/Vol –II/ A.Y 2016-17.

c) Repayment of loan:-

Further the company is repaying the loans. The entire loan was squared up during the year itself.

d) Interest payment treated as genuine by Id AO

Further, the company paid interest to the lender company which the Id AO treated as genuine payment as he made no disallowance against the interest payment. When the interest payment is genuine the loan cannot be treated as in genuine.

REPAYMENT OF LOAN AND INTEREST PAYMENT

Name of Company	AY	Opening Balance	Loan taken during the year	Interest credited in a/c during the year	Loan repayment during the year	Closing balance
M/s Competent Securities Pvt. Ltd	16-17	Nil	1,40,00,000	4,96,721	1,40,00,000	Nil

e) Furthermore, the department has carried out intensive search operations over the assessee and no any incriminating material was found to show that the money against unsecured loan was own undisclosed money of the company. No any entry in books of account or document was found showing payment of cash to these investor company in lieu of receipt of cheques from these company against unsecured loan. Therefore the genuineness of the transactions cannot be doubted.

Further, the transactions are reflecting in the bank accounts of respective Investor Company as well as bank account of Assessee. Thus, the genuineness of the transactions cannot be doubted merely on the basis of guess, assumptions and presumptions, without having any other corroborative evidences.

The following documents were furnished by the respective Investor Company to the DDIT (Inv.) Unit-1(3), Kolkata:

- (i) Copy of Certificate of Incorporation, PAN Card
- (ii) Assessment Order passed under Section 143(3).
- (iii) Copy of acknowledgement of Income Tax Returns and Audited Accounts for the period from Assessment year 2010-11 to Assessment year 2016-17
- (iv) Details pertaining to the transactions carried out with M/s KDM Group concerns along with copies of Ledger account, Share allotment advice and Loan confirmation, share sale letter along with share transfer form pertaining to the aforesaid transactions.
- (v) Sheet showing details regarding sources of fund along with highlighted bank statement reflecting the transactions with KDM Group.

Source of source was explained by submitting the bank statement of creditors:-

We also observe that investor is corporate entity and is maintaining proper books of accounts, which are subjected to Statutory Audit by Independent Auditors and audited balance sheet, and profit and loss account along with the income tax returns were filed before the Assessing Officer. Therefore, the proof of their existence is available as demonstrated by the Registrar of Companies records and there is no allegation or observations by the Ld. AO that cash was deposited in the bank account of the investor or companies or have been routed through the assessee. A perusal of Bank statements of Investor's Companies reveal that the "source" of "source" was also explained and was through banking transaction. The deposits in the Creditors' bank accounts were by bank transfers. Thus, in the case under appeal, the creditworthiness of the Creditors was fully established and there can be no preponderance of probabilities that these loans were in fact accommodation entries. Thus in the case of assessee the source of source is also available with the department.

We also found that M/s Competent Securities Pvt. Ltd. had also filed confirmation of account as well as bank statement reflecting the transaction with other substantiating documents alongwith assessment orders. After considering the various documents placed on record, the Id. CIT(A) recorded a finding to the fact that the identity, creditworthiness and genuineness is duly established. Detailed finding so recorded by the Id. CIT(A) are as per material on record which has not been controverted by the Id CIT-DR, accordingly, we do not require any interference on our part. Accordingly, we uphold the finding of the Id. CIT(A)

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

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 Assessee- M/s Rajasthan Cable Industries Limited, 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. 1121, 1189 & 1052/JP/2018)

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar