

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

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER

ITA Nos.7971 & 7972/Del/2018
Assessment Years: 2009-10 & 2011-12

Shri Rathi Steel Ltd.,
J-1/202, DDA Flats,
Kalkaji,
New Delhi. – 110 019.
PAN: AAACS4554L

Vs ACIT,
Central Circle-16,
New Delhi.

ITA Nos.7973 & 7974/Del/2018
Assessment Years: 2009-10 & 2011-12

Shri Rathi Steel (Dakshin) Ltd.,
J-1/202, DDA Flats,
Kalkaji,
New Delhi. – 110 019.
PAN: AAACB1192M

ACIT,
Central Circle-16,
New Delhi.

(Appellant)

(Respondent)

Assessee by : Shri Ved Jain, Advocate
Revenue by : Shri Sanjay Goyal, CIT, DR
Date of Hearing : 27.03.2019
Date of Pronouncement : 31.05.2019

ORDER

PER R.K. PANDA, AM:

ITA No.7971/Del/2018 filed by the assessee is directed against the order dated 3rd October, 2018 of the CIT(A)-26, New Delhi, relating to assessment year 2009-10.

ITA Nos.7972 & 7974/Del/2018 filed by the respective assesseees are directed against the separate orders dated 5th October, 2018 of the CIT(A)-26, New Delhi, relating to assessment year 2011-12. ITA No.7973/Del/2018 filed by the assessee is directed against the order dated 5th October, 2018 of the CIT(A)-26, New Delhi, relating to assessment year 2009-10.

2. Since identical grounds are involved in all these appeals, therefore, these were heard together and are being disposed of by this common order for the sake of convenience.

ITA No.7971/Del/2018 (A.Y. 2009-10) – Shri Rathi Steel Ltd.

3. Facts of the case, in brief, are that the assessee is a company and is engaged in the business of manufacturing of TMT bars having a manufacturing facility at Ghaziabad. It filed its return of income on 28th September, 2009 declaring total income of Rs.1,72,95,890/-. The Assessing Officer completed the assessment u/s 143(3) on 29th December, 2011 determining the total income at Rs.1,74,70,890/- wherein he made an addition of Rs.1,75,000/- being fees paid to the RoC for increase in authorized share capital. A search and seizure action u/s 132 of the IT Act was conducted in the different business and residential premises of Rathi group of cases on 20th January, 2015. The case of the assessee company was also covered as one of the group companies and various incriminating papers/documents were found and seized during the course of search and seizure operation in this case. In response to notice u/s 153A of the IT Act, 1961, the assessee filed its return of income for the impugned

assessment year on 22nd April, 2016 declaring total income of Rs.1,71,16,922/-. The Assessing Officer issued statutory notices u/s 142(1) and 143(2) to which the assessee complied by filing requisite details from time to time. During the course of assessment proceedings, the Assessing Officer noted from the balance sheet of the assessee that the assessee company has raised share capital including share premium of Rs.6 crores from three companies, the details of which are as under:-

Sl.No.	Name of the investing company	No. of shares allotted	Face value/ Premium	Total Investment in Rs.
1.	M/s Murli Manohar Trade (P) Ltd.	80000	10/15	2,00,00,000/-
2.	M/s Radhey Tradelink (P) Ltd.	60000	10/15	1,50,00,000/-
3.	M/s Neelkanth Tradelink (P) Ltd.	100000	10/15	2,50,00,000
Total				600,00,000/-

4. He asked the assessee to produce the directors of the above companies along with statements of accounts, copy of return and audit report for the relevant previous year, minute books and relevant bank statement with bank book of the investing companies to substantiate their claim of investment, so that the existence, genuineness and credit worthiness of the investing company can be examined. He also asked the assessee to inform the directors to produce their personal Profit & Loss Account or Income & Expenditure Account, balance sheet and personal bank statement for the relevant year. The assessee filed various details such as:

- a) Assessment particulars including PAN and ward/Circle where assessed to income tax (income tax return)

- b) Copy of ledger account of the Investor Companies in the books of Assessee for the relevant year under consideration
- c) Copy of Bank statement of Investor Companies
- d) Copy of Audited Financial Statements of Investor Companies
- e) Confirmations provided by Investor Companies.

5. On the basis of the various details furnished by the assessee establishing the identity and credit worthiness of the investor companies and the genuineness of the transactions, it was argued that the assessee has discharged the onus coast on it. Relying on various decisions, it was submitted that no addition is called for.

6. However, the Assessing Officer was not satisfied with the explanation given by the assessee. He noted that the assessee company had raised share capital including share premium of Rs.6 crores and the share capital was raised at a premium of Rs.15 for share of face value of Rs.10/-. Further, the companies which invested in the shares of the assessee company at such a high rate were hardly having any business activities of their own. The earning of these companies were so meager that it is highly improbable that these companies had their own funds to invest in the assessee company. To testify the availability of the share capital available with the companies who invested in the investing companies, he made inquiries by issuing summons through the Directorate of Income-tax (Inv.). The Assessing Officer noted that provisions of section 68 have been amended by Finance Act, 2012 w.e.f. 01.04.2013 whereby the onus is on the assessee to prove the source of source in the case of the

receipt of share subscription to the satisfaction of the Assessing Officer. He referred to the decision of the Kolkata Bench of the Tribunal in the case of M/s Subhlakshmi Vanijya Pvt. Ltd. vs. CIT (2015) 60 taxmann.com 60 wherein the Tribunal has held that the amendment to section 68 of the Act is clarificatory and, hence, retrospective. According to the Assessing Officer, the provisions of section 68 of the Act casts onus on the assessee to satisfy all the ingredients of section 68 to establish the identity as well as credit worthiness of the creditors and to establish the genuineness of the transaction. The argument of the assessee that the Assessing Officer cannot verify the source of the source was rejected by the Assessing Officer. Relying on various decisions including the decision of the Hon'ble Delhi High Court in the case of CIT vs. Nipun Builders & Developers Pvt. Ltd. and CIT vs. N.R. Portfolio Pvt. Ltd. and plethora of other decisions, the Assessing Officer held that the assessee failed to prove the genuineness of transactions as well as credit worthiness of the investing companies as well as investors of the investing companies. He, accordingly made addition of Rs.6 crores to the total income of the assessee under the provisions of section 68 of the IT Act.

7. In appeal, the Id.CIT(A), after considering the remand report of the A.O. and rejoinder of the assessee to such remand report, upheld the action of the Assessing Officer in making addition of Rs.6 crores to the total income of the assessee u/s 68 of the IT Act, 1961.

7.1. Aggrieved with such order of the CIT(A), the assessee is in appeal before the Tribunal by raising the following grounds:-

“1. That the Commissioner of Income-tax (Appeals) erred on facts and in law in upholding addition of Rs.6,00,00,000/-made by the assessing officer under section 68 of the Income- tax Act, 1961 (“the Act”), not appreciating that the appellant has rightly discharged the primary onus by proving the identity, genuineness and creditworthiness of the entities by submitting plethora of evidences.

1.1 That the Commissioner of income-tax (Appeals) erred on facts and in law in not appreciating that the aforesaid addition has been made by the assessing officer de-hors any material found/ seized during the course of search in the premises of the appellant and is not sustainable in law.

1.2 That the Commissioner of Income-tax (Appeals)erred on facts and in law on confirming the addition which was merely on the basis of information received from the Investigation Unit of Income tax department without even an iota of evidence or adverse document in context to the same.

1.3 That the Commissioner of Income-tax (Appeals) erred on facts and in law in not appreciating that the Appellant had submitted all the relevant information and documents to prove the identity, genuineness and creditworthiness of share applicants.

1.4 That the Commissioner of Income-tax (Appeals) erred on facts and in law in holding that information received in pursuant to the remand report is deficient in establishing the capacity of the investor and genuineness of the share capital subscription transactions.

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

8. The ld. counsel for the assessee, at the outset, referring to pages 23 to 31 of the paper book, submitted that the assessee had already been assessed by the Assessing Officer u/s 143(3) of the Act vide order dated 29th December, 2011 i.e., much prior to the date of search determining the total income of the assessee at Rs.1,74,70,890/- wherein he had made addition of Rs.1,75,000/- on account of fees paid to RoC for increase in authorized share capital. He submitted that in the instant case, the

additions were made by the Assessing Officer in the order passed u/s 153A/143(3) only on the basis of the balance sheet filed during the course of assessment proceedings and not on the basis of any incriminating material found during the course of search conducted on the assessee. Referring to the decision of the Hon'ble Delhi High Court in the case of *CIT vs. Kabul Chawla reported in 380 ITR 573*, he submitted that the Hon'ble High Court in the said decision has held that in absence of any incriminating material found during the course of search, no addition can be made in an order passed u/s 153A. Referring to the decision of the Hon'ble Delhi High Court in the case of *DCIT vs. Meeta Gutgutia reported in 395 ITR 526*, he submitted that the Hon'ble High Court has reiterated the settled position of law that the Assessing Officer cannot proceed to make an assessment u/s 153A without there being any incriminating material *qua* the assessment year for which the Assessing Officer wants to make assessment. He submitted that the SLP filed by the assessee against the decision of the Hon'ble Delhi High Court in the case of *Meeta Gutgutia* was dismissed by the Hon'ble Supreme Court.

9. Referring to the decision of the Hon'ble Supreme Court in the case of *CIT vs. Sinhgad Technical Education Society, vide Civil Appeal No.11080 of 2017, order dated 29th August, 2017*, he submitted that an issue had arisen as to whether the Assessing Officer is entitled to make addition without there being any incriminating material relating to the assessment year in case of search in respect of assessment year which has not abated. He submitted that the Hon'ble Supreme Court upheld the order of the High Court confirming the order of the ITAT quashing the assessment making

the addition in respect of the year which was within the block year, but, there was no incriminating material pertaining to this assessment year. He also relied on the following decisions and submitted that where the addition made by the Assessing Officer is not based on any incriminating material found during the course of search, no addition can be made by the Assessing Officer in the order passed u/s 153A:-

- i) PCIT vs. RSA Digi Prints 2017(9) TMI 530;
- ii) PCIT vs. M/s Salasar Stock Broking Limited 20167(8) TMI 1131 ;
- iii) Pr. CIT vs. Best Infrastructure (India) Pvt. Ltd. 2017 397 ITR 82;
- iv) Pr. CIT vs. Baba Global Ltd., 2017 (2) TMI 346
- v) Pr. CIT vs. Dharampal Premchand Ltd. 2017 (8) TMI 958
- vi) CIT vs. Jakson Engineers Ltd., 2015 TMI 1523;
- vii) ACIT vs. Sameer Gupta (ITA No.514,515/Del/2017);
- viii) Sharp Mint Ltd. vs. DCIT (ITA No.3623/Del/200;
- ix) Moon Beverages Ltd. and Hindustan Aqua Ltd. vs. ACIT (ITA No.7374/Del/2017 & 7567/Del/2017).

10. He accordingly submitted that no addition in the instant case can be made since no incriminating material was found during the course of search.

11. So far as the merit of the case is concerned, he submitted that the assessee has filed full particulars giving the PAN and assessment particulars of the investor companies, their bank statements, copy of audited financial statements, confirmations provided by the investor companies and copy of ledger account of the investor

companies in the books of the assessee for the relevant year under consideration. Even during remand proceedings, summons were issued to the investors of the of the investing companies and the investors of the investing companies have also filed the requisite details. Thus, the assessee, in the instant case, has not only proved the source, but also the source of the source. The assessee has discharged the onus cast on it in terms of section 68 of the Act. Referring to the decision of the Hon'ble Delhi High Court in the case of *PCIT vs. M/s Goodview Trading Pvt. Ltd. 2016 (12) TMI 617*, he submitted that under identical circumstances the Hon'ble Delhi High Court has dismissed the appeal filed by the Revenue against the order of the Tribunal where the Tribunal has deleted the addition of an amount of Rs.25,00,96,500/- made by the Assessing Officer u/s 68 of the IT Act. He accordingly submitted that both legally and factually, no addition can be made in the instant case.

12. The ld. DR, on the other hand, heavily relied on the order of the CIT(A) and also referred to the following decisions:-

- i) PCIT vs. NRA Iron and Steel (2019) 103 taxmann.com 48 (SC);
- ii) NDR Promoters Pvt. Ltd. (2019-TIOL-172-HC-DEL-IT)
- iii) Prem Castings (P) Ltd. vs. CIT (2017) 88 taxmann.com 189 (All);
- iv) Prem Castings (P) Ltd. vs. CIT 2018-TIOL-274-SC-IT;
- v) CIT vs. MAF Academy (P) Ltd., 361 ITR 258 (Del);
- vi) CIT vs. Navodaya Castle Pvt. Ltd. (2014) 367 ITR 306 (Del);
- vii) Konark Structural Engineering (P) Ltd. vs. DCIT (2018) 96 taxmann.com 255 (SC);

- viii) Konark Structural Engineering (P) Ltd. vs. DCIT (2018) 90 taxmann.com 56 (Bom);]
- ix) Pratham Telecom India Pvt. Ltd. vs. DCIT (2018-TIOL-1983-HC-MUM-IT);
- x) JJ Development Pvt. Ltd. vs. CIT (2018-TIOL-395-SC-IT);
- xi) DRB Exports (P) Ltd. vs. CIT (2018) 93 taxmann.com 490 (Cal);
- xii) CIT vs. Nipun Builders & Developers (P) Ltd., 30 taxmann.com 292;
- xiii) CIT vs. Nova Promoters & Finlease (P) Ltd., 18 taxmann.com 217;
- xiv) CIT vs. Ultra Modern Exports (P) Ltd., 40 taxmann.com 458;
- xv) CIT vs. Frostair (P) Ltd., 26 taxmann.com 11;
- xvi) CIT vs NR Portfolio Pvt. Ltd. (2014) 42 taxmann.com 339;
- xvii) CIT vs. Empire Builtech (P) ltd., 366 ITR 110;
- xviii) CIT vs. Focus Exports (P) Ltd., 51 taxmann.com 46 (Del);
- xix) PCIT vs. Bikram Singh (2017) 85 taxmann.com 104 (Del);
- xx) Rick Lunsford Trade & Investment Ltd. vs. CIT (2016) 385 ITR 399 (Cal);
- xxi) Rick Lunsford Trade & Investment Ltd. vs. CIT [2016-TIOL-207-SC-IT (SC)];
- xxii) M/s Synergy Finlease Pvt. Ltd., ITA no.4778/Del/2013, A.Y. 2006-07, order dated 08.03.2019.

13. He submitted that the facts of the case of assessee are identical to the facts of judgement delivered by Hon'ble Supreme Court in *PCIT vs. NRA Iron and Steel [2019] 103 taxmann.com 48 –dated 05.03.2019*, and judgement delivered by Hon'ble Delhi High Court in *NDR Promoters Pvt. Ltd. (2019-TIOL-172-HC-DEL-IT)*. The enquiries carried out during search revealed that these investor companies were not even found existing at their registered address and all these companies were controlled by one or two persons and the directors were only name lenders. There is a categorical admission by the person controlling the investor companies that cash was accepted by him before issuing cheques to beneficiaries for investing in those beneficiary companies in the form of share application money and in turn he received commission of 0.5% on total amount. He has also admitted that he was regularly providing such accommodation entries from number of years. Further, during the course of assessment proceedings, the directors failed to appear before AO with the relevant books of accounts and documents even on being provided such opportunity twice. He submitted that all the investor companies, who had purchased shares of assessee companies at huge premium, investing several crores of rupees in the share capital and premium paid to assessee companies were themselves returning absolutely meager income in ITRs filed by them. He accordingly submitted that the additions made by the Assessing Officer and upheld by the CIT(A) should be sustained.

14. We have considered the rival arguments made by both the sides, perused the orders of the authorities below and the paper book filed on behalf of the assessee. We

have also considered the various decisions cited before us. We find the original assessment in the instant case was completed u/s 143(3) of the Act vide order dated 29th December, 2011 assessing the total income at Rs.1,74,70,890/- as against the returned income of Rs.1,72,95,890/- wherein addition of Rs.1,75,000/- was made on account of RoC fees paid for increase on authorized share capital. A search and seizure operation u/s 132 of the Act was conducted in the case of the assessee on 20th January, 2015. The Assessing Officer completed the assessment u/s 153A/143(3) on 30th December, 2016 determining the total income at Rs.7,71,16,920/- wherein he has made addition of Rs.6 crores u/s 68 of the IT Act on account of share capital and share premium received by the assessee during the year from three companies, the details of which are given at para 3 of this order. It is an admitted fact that the addition of Rs.6 crores made by the Assessing Officer is not based on any incriminating material, but, on the basis of the balance sheet filed by the assessee according to which the assessee has raised share capital including share premium of Rs.6 crores. Under the above factual circumstance, it has to be seen as to whether the addition of Rs.6 crores made by the Assessing Officer vide order passed u/s 153A/143(3) of the IT Act can be sustained in absence of any incriminating material found during the course of search.

15. As mentioned earlier, the addition of Rs.6 crores made by the Assessing Officer on account of increase in the share capital/share premium is based on the balance sheet filed by the assessee during the course of assessment proceedings and nowhere from the assessment order or of the order of the CIT(A) it comes out that the said addition is

based on incriminating material found during the course of search. Even the Id. DR also could not point out that the addition is based on any incriminating material. The Hon'ble Delhi High Court in the case of Kabul Chawla (supra) while deciding an identical issue has observed as under:-

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

i. Once a search takes place under Section 132 of the Act, notice under Section 153 A (1) will have to be mandatorily issued to the person searched requiring him to file returns for six AYs immediately preceding the previous year relevant to the AY in which the search takes place.

ii. Assessments and reassessments pending on the date of the search shall abate. The total income for such AYs will have to be computed by the AOs as a fresh exercise.

iii. The AO will exercise normal assessment powers in respect of the six years previous to the relevant AY in which the search takes place. The AO has the power to assess and reassess the 'total income' of the aforementioned six years in separate assessment orders for each of the six years. In other words there will be only one assessment order in respect of each of the six AYs “in which both the disclosed and the undisclosed income would be brought to tax”.

iv. Although Section 153 A does not say that additions should be strictly made on the basis of evidence found in the course of the search, or other post-search material or information available with the AO which can be related to the evidence found, it does not mean that the assessment “can be arbitrary or made without any relevance or nexus with the seized material. Obviously an assessment has to be made under this Section only on the basis of seized material.”

v. In absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made. The word 'assess' in Section 153 A is relatable to abated proceedings (i.e. those pending on the date of search) and the word 'reassess' to completed assessment proceedings.

vi. Insofar as pending assessments are concerned, the jurisdiction to make the original assessment and the assessment under Section 153A merges into one. Only one assessment shall be made separately for each AY on the basis of the findings of the search and any other material existing or brought on the record of the AO.

vii. Completed assessments can be interfered with by the AO while making the assessment under Section 153 A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment.

Conclusion

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

39. The question framed by the Court is answered in favour of the Assessee and against the Revenue.”

16. The Hon'ble Delhi High Court in the case of Meeta Gutgutia (supra) has again held that the Assessing Officer cannot proceed to make an assessment u/s 153A without there being any incriminating material *qua* the assessment year for which the Assessing Officer wants to make assessment. It is pertinent to mention here that the SLP filed by the Revenue against the order of the Hon'ble Delhi High Court in the above decision was dismissed by Hon'ble Supreme Court. Similar view has been taken by the Hon'ble Delhi High Court in the case of Pr. CIT vs. Best Infrastructure (India) Pvt. Ltd.(supra); Pr. CIT vs. Baba Global Ltd. .(supra); Pr. CIT vs. Dharampal Premchand Ltd. (supra); and CIT vs. Jakson Engineers Ltd. (supra) by following its earlier decision in the case of Kabul Chawla (supra). The various other decisions relied on by the ld. counsel for the assessee also supports the case of the assessee.

17. We find the coordinate Bench of the Tribunal in the case of *Moon Beverages Ltd. and Hindustan Aqua Ltd. vs. ACIT, ITA No.7374/Del/2017 & 7567/Del/2017*, order dated 7th June, 2018, has decided an identical issue and held as under:-

“35. Before deciding the issue on merit, we would first like to decide the legal ground raised by the assessee challenging the validity of the assumption of jurisdiction u/s 153A in absence of any incriminating material found during the course of search when the assessment was not pending as per ground of appeal

no.1 to 1.2. It is an admitted fact that the original return of income was filed on 12.09.2013 which was accepted u/s 143(1) vide intimation dated 18.04.2014. The period for issue of notice u/s 143(2) expires on 30.09.2014 i.e. the notice u/s 143(2) could not have been served on the assessee after the expiry of six months from the end of the financial year in which the return is furnished. Therefore, in absence of issue of any notice u/s 143(2) and since no other proceedings are pending, therefore, it had attained the finality much prior to the date of search on 28.03.2015. Under these circumstances, the finding of the Id. CIT(A) that the assessment proceedings were pending at the time of search and was abated is factually incorrect.

36. We find the Id. CIT(A) at para 5 page 11 of his order has observed as under :-

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

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

38. The Hon'ble Delhi High Court in the case of CIT vs. Best Infrastructure (India) (P) Ltd. reported in 397 ITR 82 has held that statements recorded u/s 132(4) of the I.T. Act do not by themselves constitute incriminating material. The relevant observation of the Hon'ble High Court reads as under :-

"38. Fifthly, statements recorded under Section 132 (4) of the Act of the Act do not by themselves constitute incriminating material as has been explained by this Court in Commissioner of Income Tax v. Harjeev Aggarwal (supra). Lastly, as already pointed out hereinbefore, the facts in the present case are different from the facts in Smt. Dayawanti Gupta v. CIT (supra) where the admission by the

Assessees themselves on critical aspects, of failure to maintain accounts and admission that the seized documents reflected transactions of unaccounted sales and purchases, is non-existent in the present case. In the said case, there was a factual finding to the effect that the Assessees were habitual offenders, indulging in clandestine operations whereas there is nothing in the present case, whatsoever, to suggest that any statement made by Mr. Anu Aggarwal or Mr. Harjeet Singh contained any such admission.

39. For all the aforementioned reasons, the Court is of the view that the ITAT was fully justified in concluding that the assumption of jurisdiction under [Section 153A](#) of the Act qua the Assessees herein was not justified in law."

39. We find the Hon'ble Delhi High Court in the case of [CIT vs. Harjeev Aggarwal](#) reported in 290 CTR 263 has observed as under :-

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

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

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

41. In the light of the above decisions, statements recorded u/s 132(4) of the [I.T. Act](#), 1961 cannot constitute as incriminating material.

42. As mentioned earlier, the addition of Rs.11,85,00,000/- was not made on the basis of any incriminating material but is based on statements recorded during the search u/s 132(4) and post-search enquiries. It has been held in various decisions that completed assessments cannot be disturbed u/s 153A in absence of any incriminating material.

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

44. The Hon'ble Delhi High Court again in the case of [Pr.CIT vs. Lata Jain](#) reported in 384 ITR 543 has held that in absence of any incriminating material found as a result of search, assumption of jurisdiction u/s 153A was not in accordance with law. The various other decisions relied on by the Id. counsel for the assessee also supports his case. The Hon'ble Supreme Court in the case of [CIT vs. Sinhgad Technical Education Society](#) reported in 397 ITR 344 has upheld the decision of Hon'ble Bombay High Court wherein the Hon'ble High Court had upheld the decision of the Tribunal holding that the incriminating material which was seized has to pertain to the assessment years in question and it is an undisputed fact that the documents which were seized did not establish any co-relation, document-wise, with these four assessment years.

45. Since in the instant case addition of Rs.11,85,00,000/- was made on the basis of statements recorded u/s 132(4) and post-search enquiry and no incriminating material was found/seized during the course of search, therefore, following the decisions cited (supra), we hold that no addition could have been made u/s 153A since the assessment was not abated in the instant case. In view of the above, we hold that the Id. CIT(A) was not justified in upholding the action of the Assessing Officer in assuming jurisdiction u/s 153A [of the I.T. Act](#). Accordingly, the addition made by the Assessing Officer and upheld by the Id. CIT(A) in the 153A assessment proceedings being void ab-initio are deleted.

46. Since the assessee succeeds on this legal ground, arguments made by the Id. counsel for the assessee on merit are not adjudicated being academic in nature.”

18. Since the addition in the instant case was not based on any incriminating material found during the course of search, but, on the basis of balance sheet filed by the assessee in the return of income, therefore, respectfully following the decisions cited (supra) we hold that the addition made by the Assessing Officer u/s 68 of the IT Act on account of increase in share capital which has been upheld by the CIT(A) is not justified. Accordingly, the order of the CIT(A) is set aside and the Assessing Officer is directed to delete the addition.

19. Since the assessee succeeds on this legal ground, the addition on merit is not being adjudicated being academic in nature.

20. In the result, the appeal filed by the assessee is allowed.

ITA No.7972/Del/2018, A.Y. 2011-12 (Shri Rathi Steel Ltd.)

21. The grounds of appeal raised by the assessee read as under:-

“1. That the Commissioner of Income-tax (Appeals) erred on facts and in law in upholding addition of Rs.1,76,20,000/-made by the assessing officer under section 68 of the Income- tax Act, 1961 (“the Act”), not appreciating that the appellant has rightly discharged the primary onus by proving the identity, genuineness and creditworthiness of the entities by submitting plethora of evidences.

1.1 That the Commissioner of income-tax (Appeals) erred on facts and in law in not appreciating that the aforesaid addition has been made by the assessing officer de-hors any material found/ seized during the course of search in the premises of the appellant and is not sustainable in law.

1.2 That the Commissioner of Income-tax (Appeals)erred on facts and in law on confirming the addition which was merely on the basis of information received from the Investigation Unit of Income tax department without even an iota of evidence or adverse document in context to the same.

1.3 That the Commissioner of Income-tax (Appeals) erred on facts and in law in not appreciating that the Appellant had submitted all the relevant information and documents to prove the identity, genuineness and creditworthiness of share applicants.

1.4 That the Commissioner of Income-tax (Appeals) erred on facts and in law in holding that information received in pursuant to the remand report is deficient in establishing the capacity of the investor and genuineness of the share capital subscription transactions.

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

22. After hearing both the sides, we find the above grounds are identical to grounds raised in ITA No.7971/Del/2018. We have already decided the issue and the grounds raised by the assessee have been allowed. Following similar reasonings, the grounds raised by the assessee are allowed.

ITA No.7973/Del/2018, A.Y. 2009-10 (Shri Rathi Steel (Dakshin) Ltd.)

23. The grounds of appeal raised by the assessee read as under:-

“1. That the Commissioner of Income-tax (Appeals) erred on facts and in law in upholding addition of Rs.4,00,00,000/-made by the assessing officer under section 68 of the Income- tax Act, 1961 (“the Act”), not appreciating that the appellant has rightly discharged the primary onus by proving the identity, genuineness and creditworthiness of the entities by submitting plethora of evidences.

1.1 That the Commissioner of income-tax (Appeals) erred on facts and in law in not appreciating that the aforesaid addition has been made by the assessing officer de-hors any material found/ seized during the course of search in the premises of the appellant and is not sustainable in law.

1.2 That the Commissioner of Income-tax (Appeals)erred on facts and in law on confirming the addition which was merely on the basis of information received from the Investigation Unit of Income tax department without even an iota of evidence or adverse document in context to the same.

1.3 That the Commissioner of Income-tax (Appeals) erred on facts and in law in not appreciating that the Appellant had submitted all the relevant

information and documents to prove the identity, genuineness and creditworthiness of share applicants.

1.4 That the Commissioner of Income-tax (Appeals) erred on facts and in law in holding that information received in pursuant to the remand report is deficient in establishing the capacity of the investor and genuineness of the share capital subscription transactions.

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

24. After hearing both the sides, we find the above grounds are identical to grounds of appeal in ITA No.7971/Del/2018. We have already decided the issue and the grounds raised by the assessee have been allowed. Following similar reasonings, the grounds raised by the assessee are allowed.

ITA No.7974/Del/2018, A.Y. 2011-12 (Shri Rathi Steel (Dakshin) Ltd.)

25. The grounds of appeal raised by the assessee read as under:-

“1. That the Commissioner of Income-tax (Appeals) erred on facts and in law in upholding addition of Rs.50,00,000/-made by the assessing officer under section 68 of the Income- tax Act, 1961 (“the Act”), not appreciating that the appellant has rightly discharged the primary onus by proving the identity, genuineness and creditworthiness of the entities by submitting plethora of evidences.

1.1 That the Commissioner of income-tax (Appeals) erred on facts and in law in not appreciating that the aforesaid addition has been made by the assessing officer de-hors any material found/ seized during the course of search in the premises of the appellant and is not sustainable in law.

1.2 That the Commissioner of Income-tax (Appeals)erred on facts and in law on confirming the addition which was merely on the basis of information received from the Investigation Unit of Income tax department without even an iota of evidence or adverse document in context to the same.

1.3 That the Commissioner of Income-tax (Appeals) erred on facts and in law in not appreciating that the Appellant had submitted all the relevant information and documents to prove the identity, genuineness and creditworthiness of share applicants.

1.4 That the Commissioner of Income-tax (Appeals) erred on facts and in law in holding that information received in pursuant to the remand report is deficient in establishing the capacity of the investor and genuineness of the share capital subscription transactions.

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

26. After hearing both the sides, we find the above grounds are identical to grounds of appeal in ITA No.7971/Del/2018. We have already decided the issue and the grounds raised by the assessee have been allowed. Following similar reasonings, the grounds raised by the assessee are allowed.

27. In the result, all the appeals filed by the assessee are allowed.

The decision was pronounced in the open court on 31.05.2019.

Sd/-

(SUCHITRA KAMBLE)
JUDICIAL MEMBER

Sd/-

(R.K. PANDA)
ACCOUNTANT MEMFBER

Dated: 31st May, 2019

dk

Copy forwarded to

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asstt. Registrar, ITAT, New Delhi