IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'E', NEW DELHI

BEFORE SH. R. K. PANDA, ACCOUNTANT MEMBER
AND
SH. KULDIP SINGH, JUDICIAL MEMBER

ITA No.7348/Del/2018
Assessment Year: 2009-10

Mannat Hospitality (P) Ltd. 325, Jagirit Enclave, Delhi-110092 PAN No.AAGCM0506Q	Vs	Income Tax Officer Ward – 16 (2) New Delhi
(APPELLANT)		**(RESPONDENT)**

Appellant by	Sh. Repudaman Thakur, CA
Respondent by	Ms. Rinku Singh, Sr DR

Date of hearing:	11/03/2019
Date of Pronouncement:	07/06/2019

ORDER

PER R.K. PANDA, AM:

This appeal filed by the assessee is directed against the order dated 10.09.2018 of the CIT(A)-6, Delhi relating to A. Y. 2009-10.

2. Facts of the case, in brief, are that the assessee is a company which was incorporated on 05/01/2009 and for the A.Y. 2009-10, no return of income was filed. The reasons to believe that income escaped assessment in the said case

emanated from a search/seizure operation under section 132 which was conducted at the residential and business premises of Shri Surendra Kumar Jain and Shri Virendra Jain by the Investigation Wing, New Delhi which resulted in seizure of a large number of incriminating documents. During the search and post search investigation it was established that Shri S .K. Jain and Shri Virendra Jain were in the business of providing accommodation entries through cheque in lieu of cash. Accommodation entries were provided to various beneficiary companies/ entities through a number of papers/dummy companies. Cash received from the beneficiaries was routed through paper companies and these dummy companies were managed and controlled by Shri S.K.Jain and Shri Virendra Jain. The accommodation entries were provided by way of share capital, share application money and commission charged was from beneficiaries for providing such accommodations entries. The Investigation Report detailing the modus operandi adopted by the entry operators has been reproduced by the AO in the assessment order which gives complete details showing receipt of accommodation entry by the assessee from entry providing

companies, amount of entries, bank account and cheque details and money of middle men instrumental in managing the entries for the beneficiaries, i.e., the assessee.

3. As per information provided by investigation wing, the Assessing Officer noted that the assessee has obtained accommodation entries amounting to Rs.56,00,000/- from S. K. Jain group of companies as below :-

MANNAT HOSPITALITY P. LTD. CHEQUE BOOK ENTRIES						
Date	From	To	Bank	Mode of payment	Amount	Remarks
12.01.2009	Manimala Delhi Properties P. Ltd.	Mannat Hospitality	Axis Bank	PLO No.026127	16,00,000	A-27 Page 33
13.02.2009	Virgin Capital Services P. Ltd	Mannat Hospitality	Axis Bank	PLO No.026633	20,00,000	A-26 page 61
13.02.2009	Virgin Capital Services P. Ltd.	Mannat Hospitality	Axis Bank	PLO No.026633	20,00,000	A-26 Page 61
				Total	56,00,000	

He further noted that on the basis of seized documents seized from Jain brothers, it has been noticed that Jain brothers had received Rs.56,00,000/- in cash from intermediary Chawla Ji in lieu of accommodation entry to the instant assessee (as well as other beneficiaries). This cash has been received during the same period when the accommodation entry has been given to the instant assessee, the details of which are as under :-

MANNAT HOSPITALITY P. LTD. INTERMEDIARY (CHAWLA JI) CASH BOOK ENTRIES			
Date	Amount	Intermediary	Remarks
12.01.2009	16,00,000	Chawla Ji	A-27 page 10 Back
13.02.2009	40,00,000	Chawla Ji	A-26 Page 21

4. In response to the show cause notice the assessee submitted that the share capital had been raised from two parties namely Virgin Capital Services Pvt. Ltd. and Manimala Delhi Properties Pvt. Ltd. Confirmation letter etc were filed alongwith share application form, board resolution affidavit of director of company, bank statement, copy of acknowledgement, etc.

5. However, the Assessing officer was not satisfied with the arguments advanced by the assessee. Relying on various

decisions the Assessing officer made addition of Rs.56 lacs u/s. 68 of the IT Act by observing as under :-

> *11.1 To sum up, a sum of Rs. 56,00,000/- has been found credited in the books of account of the assessee. The immediate source of this amount has been found to be M/s. Virgin Capital Services Pvt:. Ltd., and M/s. Manitnaia Delhi Properties Pvt. Ltd. out of the entities controlled by Jain brothers as discussed in para 6 above.*
>
> *11.2 It is indeed surprising to note that the assessee has made unsuccessful efforts to prove that these transactions were genuine. It is quite possible that the assessee could have succeeded in its scheme but for the: search in the case of Jain Brothers where complete evidence of scheme of tax: evasion used by the assessee were seized. The incriminating seized documents are selfspeaking and give graphic picture of the modus operandi adopted by the parties involved. It is quite disturbing to note the ease with which the assessee has been conducting its affair by laundering its unaccounted money at: into regular transactions. The law allows the Assessing Officer to lift the corporate veil to unmask the real from the apparent and also to go behind the transaction to understand their true import. The law also allows the authorities to test the transactions on a touches tone of human probability to arrive at a conclusion which the rationale mind would arrive at. After going behind the transactions on paper and*

after lifting the corporate veil, as discussed in earlier paragraphs, it has been proved that the apparent was not real.

11.3 I conclude therefore, in view of the foregoing discussion that a sum of Rs.56,00,000/- credited in the books of account of the assessee fails to pass the test of genuineness within the meaning of Section 68 of the Act and is held to be the income of the assessee u/s 68 of the Income Tax Act, ***1961*** *and is added to its income.*

(Addition of Rs. 56,00,000/-)

6. The Assessing officer further made addition of Rs.1,00,800/- being the expenses incurred for arranging this unexplained investment being 1.8% of the accommodation entry. Thus the Assessing officer completed the assessment determining the total income of Rs.57,00,800/-.

7. Before CIT(A) the assessee apart from challenging the addition on merit challenged the validity of the reassessment proceedings. It was argued that the Assessing officer instead of issuing the notice u/s. 153C of the Act has initiated the proceedings u/s. 147 which is legally not correct.

8. So far as the merit of the case is concerned it was submitted that full details were given regarding the identity and

creditworthiness of the share applicants and the genuineness of the transaction. Therefore, the addition made by the Assessing Officer is not justified.

9. However, the Ld. CIT(A) was not satisfied with the arguments advanced by the assessee. So far as the validity of the reassessment proceedings are concerned the Ld. CIT(A) rejected the arguments advanced by the assessee on the ground that the Assessing officer received information regarding accommodation entries in respect of share capital from the investigation wing which constituted new information. The Assessing Officer examined the information received and verified it from records and noted that no return of income had been filed for the assessment year under consideration by the assessee. Only after he was satisfied that the information received could not be verified from records in his office, he recorded his own satisfaction, took necessary approval from the competent authorities and reopened the assessment. He further noted that the assessee did not challenge the assumption of jurisdiction u/s. 148 either at the beginning of the assessment or reassessment proceedings or during the course of assessment / reassessment

proceedings. Therefore, in view of the provisions of section 292BB, the assessee is precluded from taking any objection to the said notice u/s.148 .

10. So far as the arguments of the assessee that only 153 C proceedings could have been taken and not u/s. 147, the Ld. CIT (A) relying on the decisions of the Ahemdabad Bench of the Tribunal in the case of Shailesh S. Patel Vs. ITO vide ITA No.3063/Ahem/2016 held that the Assessing Officer is justified in initiating reassessment proceedings u/s.147 of the IT Act, since the Assessing Officer of the assessee (person other than the search person) cannot be compelled to pursue the remedy u/s. 153C of the IT Act.

11. So far as the addition on merit of the case is concerned, the Ld. CIT(A) also upheld the action of the Assessing Officer by observing as under :-

> *5.2 The revised ground of appeal No. 3 challenges the addition of Rs. 56,00,000/- under section 68. The revised ground of appeal No. 4 challenges the addition of Rs. 1,08,000/- o account of commission paid. Since these grounds of appeal are interlinked, these are being adjudicated together.*

5.2.1 On the issue of addition under section 68 on account of unexplained credit of Rs 56,00,000/- and commission at the rate of 1.8%, I have considered the facts of the case, the basis of addition made by the AO and the submissions of the appellant. As noted above, the reason to believe that income has escaped assessment in this case emanates from a search/seizure action under section 132 which was conducted at the residential and business premises of Shri S.K. Jain and Shri Virendra Jain by Investigation Wing, New Delhi resulting into seizure of a large number of incriminating documents during the course of search operation. During the course of search and post search investigation it has been evidently established that Shri S.K. Jain and Shri Virendra Jain were in the business of providing accommodation entries through cheque in lieu of cash. Accommodation entries were provided to various beneficiary companies/entities through a number of paper/dummy companies and cash received from beneficiaries was routed through paper companies which were managed and controlled by Shri S.K. Jain and Shri Virendra Jain. These accommodation entries are provided by way of share capital, share application money and/or unsecured loans etc. and commission was charged

from beneficiaries for providing such accommodation entries. The essence of submission of the appellant is that it is only presumption that the share application money is an accommodation entry as all the details were filed during the assessment proceedings which have not been considered by the AO.

5.2.2 It is noted that a very specific information, as noted in para 3.1 above, was received regarding credit in the account of the assessee. Since the name of the appellant appeared in the seized documents and it was known to the appellant that Shri S.K. Jain and Shri Virendra Jain provided accommodation entry, the onus was on the appellant to prove beyond doubt that the transaction was genuine in which the appellant has failed miserably. It has been emphasized that the share application money was received through banking channel and in support of the credit worthiness it has been submitted that the net worth of Manimala Delhi Properties Pvt. Ltd. and Virgin Capital Services Pvt. Ltd. was substantially high in view of share capital and reserve & surplus. It was stated that the appellant has discharged its onus under section 68 so as to prove the identity, creditworthiness and genuineness of the said company, for which copy of

audited Balance Sheet alongwith annexures, copy of ITR for that year and copy of bank statement evidencing debit in favour of the appellant have been furnished.

5.2.3 On examination of the issue it is seen that during the appellate proceedings, no further documentary evidence, whatsoever, has been produced to prove the genuineness of the transaction. Apart from written submission, the appellant has produced copies of documents produced, which as per the appellant, were before the AO. These documents has been examined and it is seen that instead of supporting the case of appellant, these documents only reinforce the findings of the AO which are based on the facts and circumstances of the case alongwith deep and wide Investigation carried out by the Department in the case of Shri S.K. Jain and Shri Virendra Jain group of cases as these documents are in tune with modus-operandi through which accommodation entries have been provided by the said group.

5.2.4 From the analysis of their financial statements it is apparent that the companies which have given share capital to the appellant company are dummy companies having substantial share capital & reserve created by manipulations with the

sole motive of providing accommodation entries, bank statements of the companies clearly show that huge amount of money is transferred to the company only to be immediately transferred to the bank accounts of the beneficiaries. For instance, from the bank statement of Manimala Delhi Properties Pvt. Ltd. (page 28 of the paper book) it is seen that an amount of Rs. 16,03,000/- was received from Tulika on 12/01/2009 and on the same day, i.e., on 12/01/2009, an amount of Rs. 16,00,000/- is shown to have been transferred for PO issue. Prior to receiving the said credit, the balance in the account was Rs. 1,52,914.57 as on 12/01/2009 and after giving the said credit, the balance in the account was again Rs. 1,53,914.57. Similarly, from the bank statement of Virgin Capital Services Pvt. Ltd. (page 54 of the paper book) it is seen that two credit entries of Rs. 72,00,000/- and Rs. 40,02,000/-were received from Tulika Securities and Tulikas respectively on 13/02/2009 and on the same day, i.e., on 13/02/2009, an amount of Rs. 40,00,000/- is shown to have been transferred for PO issue. Prior to receiving the said credits, the balance in the account was Rs. 37, 373.97 as on 13/02/2009. It is also to be noted that in both the cases credit entries were received from Tulika Securities, which is

concern known to be managed and controlled by Shri S.K. Jain and Shri Virendra Jain. This in itself demonstrates that the transactions through banks were the deliberate steps taken by the entry providers with the sole motive of imparting a colour of genuineness and to camouflage the real nature of transaction and hence a heavier onus is cast on the appellant to prove the genuineness of such transactions by adducing evidences and giving explanations, which are capable of proving beyond any doubt that its transactions of share money are distinctly genuine and different from those who have been found to be involved in aforesaid modus-operandi of tax evasion, particularly, when the details of transactions of the appellant found during Search operation appear prominently in seized documents. The insistence of the appellant on the genuineness of transactions based on such documents fails to mitigate the severities of strong incriminating evidences found in the form of seized documents in which its name appears as a beneficiary and the company giving the loan is found to be an entry provider.

5.2.5 *In a recent decision, on similar facts and on analysis of bank statements of the entities giving share application money, the Hon'ble IT AT, Delhi in*

the case of Pee Aar Securities Ltd. vs. DCIT, Circle-14(l), New Delhi[(2018) 96 taxmann.com 602 (Delhi - Trib.)] have held as under:

20.0. *28. We are unable to lay hands on any of the decisions of Hon'ble jurisdictional High Court which is contrary to the approach so adopted in this judicial precedent. Let us, in this light, revert to the facts of the case before us. The assessee before us is a private limited company which is, by law, prohibited from offering its securities for subscription by general public. It cannot, therefore, be really open to the assessee to say that we have no clue about who the subscribers to the share capital are; these cannot be rank outsiders or walk in subscribers- as perhaps in the cases of public limited companies. Yet, all that the company has to offer, to establish genuineness of transactions of subscribing to the shares, are the bank statements. The assessee is not able to produce the brains behind these companies and the documents with respect to the their financials either. As for the other documents, these documents have to be there for issuance of share capital anyway- genuine subscription or not so genuine subscription. Genuineness of a transaction cannot be demonstrated on the basis of these documents. The assessee has not been able to produce the principal officers of these entities, but then, given the way the facts about*

these entities have unfolded, the reasons for the limitations of the assessee are not difficult to seek. As per decisions of this Tribunal filed by the assessee on his own, these entities, as indeed other entities in Tarun Goyal group, were never involved in any genuine business anyway and were only in the business of providing accommodation entries. The shell entities, like these two entities before us, have every semblance of a genuine business- its legal ownership by persons in existence, statutory documentation as necessary for a legitimate business and a documentation trail as a legitimate transaction would normally follow. The only thing which sets it apart from a genuine business entity is lack of genuineness in its actual operations. The operations carried out by these entities, are only to facilitate financial manoeuvring for the benefit of its clients, or, with that predominant underlying objective, to give the colour of genuineness to these entities. These shell entities, which are routinely used to launder unaccounted monies, are a fact of life, and as much a part of the underbelly of the financial world, as many other evils. Even a layman, much a Member of this specialized Tribunal, cannot be oblivious of these ground realities. It would, therefore, not really be appropriate for us to be swayed by the documents like PAN cards, board resolutions passed by these entities, copies of distinctive share certificates, copies of letter from these two entities confirming the fact of share subscriptions and extracts from

the minutes of meeting of the directors. As for the bank statements of these companies, as rightly pointed out by the learned Departmental Representative, these statements show the lack of genuineness. So far as Mahanivesh's bank statement with IDBI Batik is concerned, what is filed before us is the page containing entries from 1st Tune 2004 to 30th June 2004. On 1st June, this bank statement shows a credit balance of Rs 46,681. On 1st June, there is a credit of Rs 60,000 and the immediately following day, there is a withdrawal of Rs 50,000. On 8th June, there is a credit of Rs. 10,00,000 and on the same day a debit of the same amount is also made. On 11th June, there are deposits of Rs credit of Rs.20,00,000 and on the same day, a debit of Rs.20,00,000 is given showing payment to the assessee. On 22nd June, there are credits there credits of Rs.19,97,995/- and, on the same day a debit of Rs.20,00,000 and on the same day a debit of Rs.20,00,000 is given showing payment to some other company. On 25th June and 28th June , it is the same story again though the amounts or debits and credits are Rs 15,00,0000 and Rs 10,00,000 respectively. As regards the other bank account of Geefcee in ABN Amro Bank is concerned, the situation is no better. On 3rd June, i.e. opening day of this bank statement, there is a credit balance of Rs *5,742.32. On June 9, there are deposits of Rs 20,10,000 and, on the same day, a payment* of Rs *20,15,000 is made leaving a balance of less than Rs 1,000.*

On 11th June, there are deposits of Rs. 10,00,000 and on the same day, there is a payment of Rs *10,00,000. On 16th June again, it is the same story but the amount is now Rs 20,00,000. On other dates in the ABN Amro Bank statement, as given to us, is the same story. What do we conclude from these statements? The overnight balance in the bank accounts are of small amounts and the payments made from these accounts are almost at the time of making payment are transferred front other sources, for which no explanation is available. This is typical of a situation in which the bank accounts are used as a conduit to launder the ill gotten money. It is impossible for even a layman, leave aside Members of this specialized Tribunal, to come to the conclusion that these transactions represent bonafide investment transactions.lt is also important to note that there is nothing else about the genuine business activities, even if any, of the investor companies, about the backdrop of the promotors about the relationship these people had with the companies, and we are to take the call on genuineness only on the basis of these two bank statements for a limited period. We are unable to come to a positive conclusion about the bonafides of the investors on the basis of these bank statement, and quite to the contrary to the claim made by the assessee, these statements show lack of bonafides. Hon'ble Supreme Court has, in the case of Durga Prasad More (supra), observed that "human minds may differ as to the*

reliability of a piece of evidence but in that sphere the decision of the final fact finding authority is made conclusive by law". This faith in the Tribunal by Hon'ble Courts above makes the job of the Tribunal even more onerous and demanding and, in our considered view, it does require the Tribunal to take a holistic view of the matter, in the light of surrounding circumstances, preponderance of probabilities and ground realities, rather than being swayed by the not so convincing, but apparently in order, documents and examining them, in a pedantic manner, with the blinkers on. We may also add that the phenomenon of shell entities being subjected to deep scrutiny by tax and enforcement officials is rather recent, and that, till recently, little was known, outside the underbelly of financial world, about modus operendi of shell entities. There were, therefore, not many questions raised about genuineness of transactions in respect of shell entities. That is not the case any longer. Just because these issues were not raised in the past does not mean that these issues cannot be raised now as well, and, to that extent, the earlier judicial precedents cannot have blanket application in the current situation as well. As Hon'ble Supreme Court has observed in the case in Mumbai Kamgar Sabha v. Abdulbahi Faizullabhai AIR 1976 SC 1455 "It is trite, going by Anglophonic principles that a ruling of a superior court is binding law. It is not of scriptural sanctity but of ratio-wise luminosity within the edifice of facts where the judicial lamp

plays the legal flame. Beyond those walls and de hors the milieu we cannot impart eternal vernal value to the decisions, exalting the precedents into a prison house of bigotry, regardless of the varying circumstances and myriad developments. Realism dictates that a judgment has to be read, subject to the facts directly presented for consideration and not affecting the matters which may lurk in the dark". Genuineness of transactions thus cannot be decided on the basis of inferences drawn from the judicial precedents in the cases in which genuineness did come up for examination in a very limited perspective and in the times when shell entities were virtually non-existent. As the things stand now, genuineness of transactions is to be examined in the light of the prevailing ground realities, and that is precisely what we have done. We are of the considered view that there is nothing to establish genuineness of the share subscription transactions on the facts of this case. The assessee does not know anything about these companies or these persons. The assessee has no documents about their financial activities or their balance sheets. The assessee is a private limited company and these entities could not have therefore been rank outsiders like walk in investors and yet the assessee does not throw enough light on these entities. A lot of emphasis is placed on bank transactions, on PAN cards and on board resolutions but all these factors have to be present in the cases of shell companies involved in money laundering

as well. Nothing, therefore, turned on these documents so far as genuineness aspect is concerned. It is also a settled legal position that the onus of the assessee, of explaining nature and source of credit, does not get discharged merely by filing confirmatory letters, or demonstrating that the transactions are done through the banking channels or even by filing the income tax assessment particulars. In the case of CIT v. United Commercial and Industrial Co (P.) Ltd [1991] 187ITR 596/56 Taxman 304 (Cal) , Hon'ble Calcutta High Court has held that "it was necessary for the assessee to prove prima facie the identity of creditors, the capacity of such creditors and lastly the genuineness of transactions". Similarly, in the case of CIT v. Precision Finance (P.) Ltd [1994] 208 ITR 465/[1995] 82 Taxman 31 (Cal), it was observed that "it is for the assessee to prove the identity of creditors, their creditworthiness and genuineness of transactions". There is thus no escape from proving genuineness of a transaction. The assessee has failed to do so. We, therefore, confirm the addition in respect of alleged share subscriptions received from these two companies- namely Mahanivesh and Geefcee. As. regards the addition in respect of commission, we have seen that there is a categorical finding that these entities were arranging the accommodation entries on the basis of 2.5% commission. We, therefore, confirm this addition as well.

(Emphasis supplied by me)

5.2.6 Since the appellant claimed that the share application money was genuine, the onus was on the appellant under section 101 of the Evidence Act, 1972 to produce the directors/principal officers of share applicant companies as its own witness for cross examination by the Revenue. The appellant should have discharged its duty as a taxpayer by producing the directors of these companies particularly in a scenario in which the company has given share application money to the appellant. In this connection, the following observation of Hon'ble ITAT of Ahmat Bench in the case of Nakoda Fashion Pvt. Ltd. in ITA No. 1716/ Ahd./2012 dated 18.08.2i relevant, wherein it has been held as under:-

"19. From going through all the above judgments and decision, we find that along with evidence surrounding circumstances, human probability and intentional acts are also to be taken note off accepting the identity, creditworthiness and genuineness of the cash creditors which in this case is the applicants. In the case before us we observe that assessee is trying to assert again and again upon the PAN, IT returns, bank statement and confirmations of the impugned 5 parties but has nowhere tried to clarify disclose the fact which has embedded in the financial statement of these 5 parties which speaks in itself they are paper companies. Further if it has been genuine transaction and assessee company is asked to produce the new share holders who have been allotted a substantial portion of equity shares, he would have easily ca upon the investors. The investors could have come along with all the financial documents and could h clarified about his intention to make investment in the equity shares of the company because every investor wants to earn income from investment in the form of dividend as well as expects appreciation in the valuation, of shares with the growth of business. If this has been the situation, then there would have been no doubt on, genuineness of the transactions. On the contrary in the instant case assessee completely fails to prove the same

20. It is well settled that in order to discharge the onus the assessee must prove the following

i. The identity of the cash creditor;

ii. Capacity of the cash creditor to advance money towards capital.

iii. Genuineness of the transaction.

If the assessee has adduced evidences to establish the prima facie, the aforesaid onus shifts to the Department However, mere furnishing of particulars or the mere fact of payment by account payee cheque or the men submission of confirmation letter by the share applicant is by itself, not enough to shift the onus to the Department although these facts may, along with other facts be relevant in establishing the genuineness of the transaction. As held by Hon. Supreme Court in the case of CIT vs. N. Tarika Properties Investment (2014) 51 taxmann.com 387(SC) that "PAN cannot be treated as sufficient disclosure of identity of the person. PANs are allowed on the basis of application without actual de facto clarification of identity or ascertainment of activities, nature of business activity and are just as to facilitate the Revenue to keep track of transactions and thus PAN cannot be blindly and without consideration of surrounding circumstances treated as sufficient disclosing the identity of individual".

21. We further observe that Hon. Delhi High Court in the case of CIT V Empire Biotech P Ltd 361 ITR 258 (Del), has held that when Asst. Year 2009-10 assessee does not produce evidence or tries to avoid the appearance before the Assessing authority it necessarily creates difficulties and prevents ascertainment of the truth and correct facts as the Assessing Officer is denied the advantage of the attendance or factual assertion by the assessee before him. If an assessee deliberately and intentionally fails to produce evidence before the Assessing Officer with the desire to prevent enquiry or investigation an adverse opinion should be drawn. The assessee had not discharged the initial onus to establish the identity, creditworthiness of the share applicants and the genuineness of the transactions. The additions made by the Assessing Officer were justified and sustainable.

22. We are, therefore, of the view that in the given facts and circumstances of the case and respectfully following the judgments of Hon. Supreme Court,

High Court and the decision of Co-ordinate Bench as discussed above, we are of the confirmed view that assessee has been able to just prove the identity of the company but unable to prove the genuineness & creditworthiness of the impugned 5 parties. In the result, the sum of Rs.3.5 crores has rightly been treated as unexplained money u/s 68 of the Act by the Id. Assessing Officer. We set aside the order of Id. CIT (A) and restore that of the Assessing Officer. We set aside the order of Ld. CIT(A) and restore that of the Assessing Officer. In the result ground no. (i) of Revenue is allowed."

5.2.7 Reliance is also placed on the decision of the Hon'ble Delhi High Court in the case of CIT vs. Navodaya Castles Pvt. Ltd. dated 25/08/2014 in [(2014) 367 ITR 306 (Delhi)], in which SLP filed by the assessee was dismissed[(2015) 230 Taxman 268 (SC)],where it has been held that:

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

"Now we shall proceed to examine the validity of those grounds that appealed to the learned judges. It is true that the apparent must be considered real until it is shown that there are reasons to believe that the apparent is not the real. In a case of the present kind a party who relies on a recital in a deed has to establish the truth of those recitals, otherwise it will be very easy to make self-serving statements in documents either executed or taken by a party and rely on those recitals. If all that an assessee who wants to evade tax is to

have some recitals made in a document either executed by him or executed in his favour then the door will be left wide open to evade tax. A little probing was sufficient in the present case to show that the apparent was not the real. The taxing authorities were not required to put on blinkers while looking at the documents produced before them. They were entitled to look into the surrounding circumstances to find out the reality of the recitals made in those documents."

5.2.6 *In this order, relevant para of the decision of Delhi High Court in the case of N. R. Portfolio Pvt. Ltd. [(2014) 264 CTR 258 (Delhi)] has also been reproduced as under:-*

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

18. *In the remand report, the Assessing Officer referred to the provisions of Section 68 of the Act and their applicability. The word "identity" as defined, it was observed meant the condition or fact of a person or thing being that specified unique person or thing. The identification of the person would include the place of work, the staff, the fact that it was actually carrying on business and recognition of the said company in the eyes of public. Merely producing PAN number or assessment particulars did not establish the identity of the person. The actual and true identity of the person or a company was the business undertaken by them. This according to us is the correct and true legal position, as identity, creditworthiness and genuineness have to be established. PAN numbers are allotted on the basis of applications without actual de facto verification of the identity or ascertaining active nature of business activity. PAN is a number which is allotted and helps the Revenue keep track of the transactions. PAN number is relevant but cannot be blindly and without considering surrounding circumstances treated as sufficient to discharge the onus, even when payment is through bank account.*

19. *On the question of creditworthiness and genuineness, it was highlighted that the money no doubt was received through banking channels, but did not reflect actual genuine business activity. The share subscribers did not have their own profit making apparatus and were not involved in business activity. They merely rotated money, which was coming through the bank accounts, which means deposits by way of cash and issue of cheques. The bank accounts, therefore, did not reflect their creditworthiness or even genuineness of the transaction.*

The beneficiaries, including the respondent-assessee, did not give any share- dividend or interest to the said entry operators/subscribers. The profit motive normal in case of investment, was entirely absent. In the present case, no profit or dividend was declared on the shares. Any person, who would invest money or give loan would certainly seek return or income as consideration. These facts are not adverted to and as noticed below are true and correct. They are undoubtedly relevant and material facts for ascertaining creditworthiness and genuineness of the transactions.

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

5.2.9 In CIT v. Nova Promoters and Firilease (P.) Ltd. [(2012) 342 ITR 169 (Delhi)] it was observed as under-

"The ratio of a decision is to be understood and appreciated in the background of the facts of that case. So understood, it will be seen that where the complete particulars of the share applicant$ such as their names and addresses, Income-tax file numbers, their creditworthiness, share application forms and shareholders' register, share transfer register, etc., are furnished to the Assessing Officer and the Assessing Officer has not conducted any enquiry into the same or has no material in his possession to show that those

particulars are false and cannot be acted upon, then no addition can be made in the hands of the company under section 68 and the remedy open to the Revenue is to go after the share applicants in accordance with law. We are afraid that we cannot apply the ratio to a case, such as the present one, where the Assessing Officer is in possession of material that discredits and impeaches the particulars furnished by the asses see and also establishes the link between self-confessed 'accommodation entry providers', whose business it is to help assessees bring into their books of account their unaccounted monies through the medium of share subscription, and the assessee . . . The existence with the Assessing Officer of material showing that the share subscriptions were collected as part of a premeditated plan-a smoke screen - conceived and executed with the connivance or involvement of the assessee excludes the applicability of the ratio."

5.2.10 Section 102 of Indian Evidence Act makes it clear that initial onus is on person who substantially asserts a claim. If the onus is discharged by him and a case is made out, the onus shifts on to deponent. It is pertinent to mention here that the phrase "burden of proof" is used in two distinct meanings in the law of evidence viz, 'the burden of establishing a case', and 'the burden of introducing evidence'. The burden of establishing a case remains throughout trial where it was originally placed, it never shifts. The burden of evidence may shift constantly as evidence is introduced by one side or the others. In this case, once the evidence that assessee has obtained accommodation entry was introduced by the AO, the burden of evidence shifted to the assessee. During the assessment proceeding and even during the appellate proceeding, the assessee has failed to produce any evidence to prove that the money introduced in its books as share money was genuine transaction in the facts and circumstances of the case.

5.2.11 The legal principles laid down in a number of cases, a few of which have been quoted above, are squarely applicable to the facts and circumstances of the present case. It is obvious from these judicial decisions that -

- *Mere documentary evidences are not sufficient to establish the genuineness of transactions in all situations.*
- *Creditworthiness was not proved by mere issue of a cheque or by furnishing a copy of statement of bank accounts. Circumstances might require that there should be some evidence of positive nature to show that the share application money given was genuine, given after due diligence or for personal reasons.*

- *Where there is admission before the investigation wing of the department that the loan was from bogus entry operators, creditworthiness must be proved and these factual aspects and circumstances as proved before investigation wing cannot be simple to ignore.*
- *Documents must also stand the tests of human conduct, surrounding circumstances and preponderance of probability.*
- *When surrounding circumstances and attending facts predicate a cover-up, the taxing authorities cannot put on blinkers while looking at documents but are required to go beyond documents to look into surrounding circumstances to segregate the real from apparent.*

5.2.12 Once the appellant was made aware of the result of investigation which proved that share application money transaction was not genuine, the onus was on the assessee to prove the genuineness of transaction under section 101 of the Indian Evidence Act, 1972 as it is the assessee who is asserting a claim that it has received genuine share money. It is relevant to note here that Hon'ble Supreme Court in the case of Shri Charan Singh versus Chandra Bhan Singh AIR 1988 SC 637 has clarified that the burden of proof lies on the party who substantially asserts the affirmative of the issue and not upon the party who denies it. It has been further held that the party cannot, on failure to establish a prima facie case, take advantage of the weakness of his adversary's case. The party must succeed by the strength of his own right and the

clearness of his own proof. He cannot be heard to say that it was too difficult or virtually impossible to prove the matter in question. Since in this case the appellant had made the claim that it had received genuine share application money, all the facts were especially within its knowledge.

5.2.12 In the present case, as discussed above, there is overwhelming evidence that the transaction on which adverse view has been taken was a pre-arranged transaction under taken with the sole motive to evade tax. All these above-mentioned cases are also applicable to the facts and circumstances of the present case in which the various judicial authorities have decided the cases in favour of revenue after going through the entirety of the facts and circumstances. Hence, in view of the facts and circumstances of the case and legal precedents as discussed above, I am of the view that documents submitted as evidences to prove the genuineness of the transactions are themselves found to serve as smoke screen to cover up the true nature of the transactions. Accordingly, in view of the above discussion and judicial precedents, it is held that AO was justified in making addition of Rs.56,00,000/- as income of the assessee from undisclosed sources under section 68. Since arranging such accommodation entry necessarily entails payment of commission to entry providers, the action of the AO in quantifying and adding such unexplained investment towards taking of such accommodation entry at Rs. 1,00,800/-is also upheld. Accordingly, entire addition amounting to Rs. 57,00,800/- is confirmed. Grounds of appeal nos. 3 and 4 are dismissed.

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

On the facts and in the circumstances of the case and in law the action of the CIT(A) -- 6, Delhi, is ***arbitrary, fallacious and illegal*** *on the following grounds and, therefore,* ***merits to be quashed*** *with directions for* ***appropriate relief to the assessee-***

i *That CIT(A) failed to appreciate that:*

ii *The Assessing Officer* ***reopened the assessment u/s. 147*** *and formed the opinion based on the findings of the* ***search and seizure*** *operation, result of* ***post search enquiry,*** *careful scrutiny of the* ***incriminating document seized*** *during the course of search in case of* ***S.K. Jain Group;***

iii *Reassessment pursuant to* ***material found in search can be*** *done through recourse to* ***section*** *153C* ***only*** *and not by invoking provisions of section 147/148. The provisions of* ***section*** *153C* ***are over-riding in nature*** *and contain* ***non- obstante clause*** *for sections 139, 147, 148, 149, 151 and 153;*

iv *Section 147 and 153C are* ***not interchangeable*** *but are mutually exclusive sections. It is* ***not the choice of the revenue*** *to* ***invoke either*** *of the two sections at its whims. The* ***scope of the two sections*** *have been legislated differently with a definite purpose;*

v *Assessing Officer has* ***no jurisdiction*** *to make assessments u/s. 143(3) r.w.s. 148 of the Act in respect of those 6 assessment years immediately preceding the assessment year in which search is conducted or requisition is made. The period under consideration falls within the exclusive domain of Section 153C r.w.s 153A(1)(b) and 1st Proviso to Sec. 153A(1) of the Act;*

the impugned assessment order passed u/s 143(3), r.w.s. 148 of the Income tax Act, 1961 is illegal, arbitrary and without any jurisdiction.

1 *That CIT(A) failed to appreciate that the* ***addition was made*** *u/s. 68 of the Income-tax Act on account of share application money of* ***Rs.56,00,000/-*** *despite :*

i *the same is fully explained with reference to the all ingredients as to the identity, credit worthiness and genuineness of the same as required by law by producing credible and verifiable evidences;*

ii *proviso to Sec. 68 is applicable from A.Y. 20113-14 & onwards only, i.e. no retrospective effect;*

and as such the addition made by the Assessing Officer is purely on surmises and conjectures.

That the CIT(A) erred in confirming an addition of Rs.1,08,000/- ***as unexplained investment despite the fact that*** *Assessing Officer* **has completely** *failed in bringing out any specific material in record* ***for the justification of his*** *assumption for expenditure;*

That *the CIT(A) failed to appreciate that Assessing Officer erred* **in** *charging* ***interest u/s 234A / 234B / 234C and 234D*** *of the Act.*

That CIT(A) erred in not dismissing the ground of initiating penalty proceedings u/s 271 (1)(c) of the Act.

That the appellant crave leave to take additional ground or grounds of appeal or to alter or vary any or all the grounds of appeal before or at the time of hearing of the appeal.

Total Tax Effect

13. The Ld. Counsel for the assessee referring to the decision of the coordinate bench of the Tribunal in the case of Rajat Subhra Chaterjee vide ITA No.2430/Del/2015 order dated 20.05.2016 for A. Y. 2007-08 and various other decision submitted that the provisions of section 153 C of the IT Act were applicable in the present case for framing the assessment, if any, which excludes the application of section 147 of the Act. Therefore, the notice issued u/s. 148 of the Act and assessment framed in furtherance there to u/s. 147 r/w 143 (3) of the Act are void ab initio.

14. So far as the addition on merit is concerned, he submitted that the Principle of natural Justice was violated as cross examination was not allowed by the Assessing Officer. There was nothing on record to show that money belonged to assessee itself. Referring to the various pages of the paper book he submitted that in the instant case the assessee during the course of

assessment proceedings had furnished the following documents regarding the two share applicants namely :-

1. Confirmation letter
2. Share Application Form
3. List of directors
4. Affidavit of Director of the Company
5. Bank Statement
6. Copy of ITR and acknowledgement
7. Copy of Audit Report and Audited Balance Sheet

15. Referring to various decisions he submitted that the assessee in the instant case has filed sufficient evidence to show that the share holders do exist and identity of the share holders was proved by filing documents such as name, address and PAN etc. Therefore, the assessee has discharged the initial onus cast on it and the onus has shifted to the revenue. Therefore, the addition on merit is also not sustainable. The Ld. Counsel for the assessee also relied on a series of decisions and filed copies of the same.

16. The Ld. DR on the other hand heavily relied on the order of the CIT(A) in confirming the validity of the reassessment proceedings as well as the addition on merit.

17. So far as the addition on merit is concerned, the Ld. DR referring to various decisions submitted that the assessee has

failed to substantiate the identity and creditworthiness of share applicants and the genuineness of the transaction. Therefore, the order of the CIT(A) should be upheld.

18. Referring to the latest decision of Hon'ble Supreme court in the case of PCIT Vs. NRA Iron & Steel Private Limited, reported in 103 Taxmann.com 48, he submitted that the Hon'ble Apex court in the said decision has held that the practice of conversion of un-accounted money through cloak of Share Capital/ Premium must be subjected to careful scrutiny especially in private placement of shares. Filling primary evidence is not sufficient. The onus to establish credit worthiness of the investor companies is on the assessee. The assessee is under legal obligation to prove the receipt of share capital/ premium to the satisfaction of the AO, failure of which, would justify addition of the said amount to the income of the assessee.

19. Referring to the decision of Hon'ble Delhi High court in the case of PCIT Vs. NDR Promoters Private Limited reported in 410 ITR 379, he submitted that the Hon'ble Delhi High Court in the said decision has held that where the transaction in question is sham and make believe with paper work to camouflage the bogus nature, the transaction is to be treated as unexplained credit u/s. 68 of the IT Act. He accordingly submitted that the order of the CIT(A) be upheld both legally and factually. So far as the arguments of the assessee that opportunity of cross-examination

was not given he submitted that no such ground has been taken by the assessee. Further it is not fatal to the assessment order where no opportunity is given. The addition in the instant case has been made on the basis of information received from the investigation wing and the assessee had not filed return of income. Therefore, at best the matter may be set aside to the file of the Assessing Officer. The assessment order cannot be quashed for non granting of opportunity of cross-examination.

20. We have considered the rival arguments made by both the sides and perused the orders of the authorities below. We have also considered the various decisions cited before us. It is an admitted fact that in the instant case the information was passed on by the DDIT (Investigation) and not by the Assessing officer of the S. K. Jain Group i.e. the Assessing Officer of the searched person. No documents belonging to the asesssee was found and S. K. Jain Group had never stated that the documents so seized from their premises do not belong to them. We find the coordinate bench of the Tribunal in the case of Surya Financial Services Limited Vs. PCIT in ITA No.28915/Del/2017 order dated 08.01.2018 while deciding an identical issue on the validity of reassessment proceedings u/s. 147 as against 153C on the basis of the same S. K. Jain Dairies entries has observed as under :-

> *"6.2 Now coming to the one of the main contention raised by the Id. counsel of the assessee that the proceedings under section 147 of the Act was itself bad in*

law and therefore, proceedings u/s 263 of the Act could not have been invoked. The reasons given for this proposition is that, here in this case, material on the basis of which proceedings for reopening the assessment has been sought to be initiated u/s 147 of the Act has been found from the search conducted at the premises cf third party and if material found from the premises of the searched person is being utilized, then in such a situation the law provides that proceedings should have been initiated under section 153C of the Act, which has not been done and, therefore, the entire proceedings under section 147 of the Act gets vitiated and is bad in law. In support of this proposition Ld. Counsel, has relied upon certain decisions, firstly on the point that validity of reassessment or assessment order can be challenged in the revisionary proceeding under section 263; and secondly, if any material has been found pertaining to the assessee in the case of person searched or covered u/s 153A of the Act, then only recourse was to initiate proceedings under section 153C of the Act and not under section 147 of the Act. At the outset, we do not. find any quarrel to the proposition that the validity of assessment or reassessment cannot be challenged in the revisionary proceedings u/s 263, however, on the facts of the present case, the ratio laid down in such judgments would not be applicable at all, because here in this case no document or material belonging to the assessee was found in the course of search proceedings in the case of S.K. Jain group, albeit assessee's name appears as one of the beneficiaries of accommodation entries in the books of account maintained by one of the concern of S.K. Jain group. The entries in the books of account of S.K. Jain group cannot be reckoned as any material or document belonging to the assessee so as to constitute document or asset seized or requisitioned in the case of person searched in terms of scope of section 153C of the Act. If certain documents or asset: or books of account belonging to the assessee would have been found during the course of search proceedings of S.K. Jain and his group concerns, then perhaps it would have been held that the provisions of section

153C of the Act would have been invoked. But here in this case what has been found, is the regular entries in the books of account of the concerns of S.K. Jain group, in which name of the assessee is appearing. Such entries in the cash books depicting the details of cheques issued in favour of the assessee as well as cash deposit through intermediates on various dates cannot be reckoned as document or books of account of the assessee. This fact has been noted by the Pr. CIT in the impugned order, wherein the entries pertains to the assessee for a sum. of Rs.25 lacs. Thus, the contention raised by the Id, counsel on this point is out rightly rejected that the proceedings under section 153C of the Act: should have been initiated instead c f under section 147 of the Act."

21. Further in the instant case it can be seen that no material belonging to the assessee was found from the residence of Shri S. K. Jain and only evidence of accommodation entries given by Sh. S. K. Jain Group of cases, through their various shell companies was found during the course of search and post search enquiries. The information was passed on to the Assessing Officer of the assessee by the investigation wing and no material belonging to the assessee was either found from the residence of this S. K. Jain or handed over to the Assessing Officer of the assessee by the Assessing Officer of the searched person. Therefore, the Assessing Officer in the instant case has rightly invoked jurisdiction u/s. 147 and not u/s 153C of the IT Act,1961. The ground appeal No. 1 by the assesee is accordingly dismissed.

22. So far as the ground No.2 relating to the addition on merit is concerned, we find subsequent to order of the CIT(A) decisions

on the issue of bogus share capital and share premium were decided by the Hon'ble Delhi High court in the case of CIT Vs. NDR Promoters and by Hon'ble Supreme Court in the case of CIT Vs. NRA Iron & Steel (P) Limited. Neither the assessee nor the Assessing Officer or the CIT(A) had the benefit of the various observations made by the Hon'ble Apex Court and Hon'ble Delhi High Court in the above mentioned cases regarding the taxability of such share capital and share premium received in the hands of the assessee. Further it is also an admitted fact that the assessee was not provided with the copy of the statement given by Sh. S. K. Jain / Virender K. Jain which has been utilized against the assessee. Considering the totality of the facts of the case and in the interest of justice we deem it proper to restore this issue to the file of the Assessing Officer with a direction to grant one more opportunity to the assessee to substantiate with evidence to his satisfaction regarding the identity and creditworthiness of the share applicants and the genuineness of the transactions. The Assessing Officer shall decide the issue as per fact and law after giving due opportunity of being heard to the assessee. Further while doing so the Assessing Officer shall keep in mind the decision of Hon'ble Supreme Court in the case of M/s. NRA Iron & Steel (P) Limited (supra) and the decision of Hon'ble Delhi High Court in the case of NDR Promoters Limited (supra). The ground of appeal No.2 is accordingly allowed for statistical purpose.

23. So far as the ground of appeal No.3 is concerned in view of our decision in ground of appeal No.2 restoring the issue to the file of the Assessing Officer for fresh adjudication, the above ground is also restored to the file of the Assessing Officer for fresh adjudication. Accordingly this ground is allowed for statistical purpose.

24. So far as ground of appeal No.4 is concerned the same relates to levy of interest u/s. 234 A, 234B and 234 C of the IT Act, 1961. Levy of interest under the above provisions is mandatory and consequential in nature. Accordingly this ground is dismissed.

25. Ground of appeal No.5 being general in nature is dismissed.

26. In the result, the appeal filed by the assessee is partly allowed for statistical purposes.

Order pronounced in the open court on 07.06.2019.

Sd/-	Sd/-
(KULDIP SINGH)	**(R.K PANDA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Neha
Date:- 07.06.2019

Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

Date of dictation	03.06.2019
Date on which the typed draft is placed before the dictating Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for Pronouncement	
Date on which the fair order comes back to the Sr. PS/ PS	07.06.2019
Date on which the final order is uploaded on the website of ITAT	10.06.2019
Date on which the file goes to the Bench Clerk	
Date on which file goes to the Head Clerk.	
The date on which file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	