आयकर अपीलीय अधीकरण, **खंडपीठ गुवाहाटी** ,

IN THE INCOME TAX APPELLATE TRIBUNAL
GUWAHATI BENCH, GUWAHATI

Before **Shri S.S.Godara, Judicial Member** and
Dr. A.L. Saini, Accountant Member

ITA No.91, 69, 76 & 77/Gau/2017
Assessment Years :2006-07, 207-08, 2012-13 & 2013-14

DCIT, Circle-3, 7th Floor, Aayakar Bhawan, G.S. Road, Christian Basti, Guwahati-781005	**V/s**.	M/s SMS Smelters Ltd. NH 52A, Lekhi Village, Naharlagun, Dist. Papumpare, Arunachal Pradesh [**PAN No.AABCN 7147 D**]
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

ITA No.93-96/Gau/2017
Assessment Years :2009-10, 2010-11, 2012-13 & 2013-14

M/s SMS Smelters Ltd. NH 52A, Lekhi Village, Naharlagun, Dist. Papumpare, Arunachal Pradesh [**PAN No.AABCN 7147 D**]	**V/s**.	DCIT, Circle-3, 7th Floor, Aayakar Bhawan, G.S. Road, Christian Basti, Guwahati-781005
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

आवेदक की ओर से/By Assessee	Shri R.P. Agarwalla, Sr. Advocate Shri Ramesh Goenka, Sr. Advocate & Shri Amit Goenka, Advocate
राजस्व की ओर से/By Respondent	Shri Rabindro Singh, JCIT-DR
सुनवाई की तारीख/Date of Hearing	04-07-2019

ITA No.39-40/Gau/2017
Assessment Years 2006-07 & 2008-09:

JUD Cement Limited N..H. 44, Lumpshong, Wahiajier, Dist. Jaintia Hills, Meghalaya [**PAN No.AABCJ 7312 C**]	**V/s.**	ACIT, Circle-Shillong
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

आवेदक की ओर से/By Assessee	Shri J.P.Gupta, FCA
राजस्व की ओर से/By Respondent	Shri Rabindro Singh, JCIT-DR
सुनवाई की तारीख/Date of Hearing	04-07-2019
घोषणा की तारीख/Date of Pronouncement	06-09-2019

आदेश /O R D E R

PER BENCH:-

The instant batch of ten case(s) pertains to two assessees M/s SMS Smelters Ltd. & JUD Cement Ltd. The Revenue's four appeal(s) ITA Nos 91, 69, 76-77/Gau/2017 for assessment year(s) 2006-07 to 2007-08 and 2012-13 to 2013-14 alongwith former assessee's cross appeal(s) ITA No. 95-96/Gau/2017 in latter two assessment year(s) arise against the Commissioner of Income Tax (Appeals)-2, Guwahati's separate orders; all dated 23.02.2017 passed in case No.Guwa-181/182/2015-16 (assessment year-wise). This former taxpayer's two more appeal(s) ITA Nos. 93-94/Gau/2017 for assessment year(s) 2009-10 to 2010-11 are directed against the very CIT(A)'s order of the same date in case Nos.Guwa-178/179/2015-16 (assessment year-wise); respectively. Latter assessee's two appeal(s) ItA Nos.39-40/Gaua/2017 for assessment year(s) 2006-07 & 2008-09 arise from the CIT(A)-Shillong's separate orders all dated 20.10.2016 passed in case No.Shill-25/24/2014-15. Relevant proceedings in all these assessment year(s) are u/s 143(3) r.w.s. 153A r,.w,s 147 of the Income Tax Act, 1961; in short 'the Act'.

We have heard these appeal(s) together since involving identical issues. Case file(s) perused.

2. Learned senior counsel states at bar that the first assessee M/s SMS Smelters Ltd. no more wishes to press for its four appeals **ITA No..93-96/Gau/2017**. The Revenue has not raised any objection. These four assessee's appeal(s) are dismissed as withdrawn therefore.

3. We now advert to Revenue's appeal(s) ITA No.91, 69, 76 and 77/Gau/2017 for assessment year(s) 2006-07, 2007-08, 2012-13 & 2013-14; respectively in first assessee's case.

4. Coming to assessment year 2006-07, we find that CIT(A) has deleted sec. 68 addition of share capital amounting to ₹1,02,50,000/- made by Assessing Officer vide following detailed discussion:-

"5.1 The appellant, apart from relying upon the facts, has raised a legal contention stating that the addition of Rs.1,02,50,000/- made on account of share capital was beyond the scope and ambit of section 147 of Income Tax Act, 1961. According to the appellant in the reasons recorded for re-opening of its case, the only reason given is that the appellant company received transport subsidy amounting to Rs.6,97,84,511/- for the period from 01.04.2005 to 31.03.2016 which according to the assessing officer escaped the assessment. No other reason was recorded for reopening of the appellant's case. According to the appellant, while making the re-assessment U/s.143(3)/147 of the Income Tax Act, 1961, the Assessing Officer has also added the share application money of Rs.1,02,50,000/- received from Mr. C.N. Lyngdoh, which was not a part of the reasons recorded for re-opening of the case. The appellant has submitted that the issue regarding transport subsidy has since been settled by Hon'ble Apex Court in the case of CIT Vs. Meghalaya Steels Ltd. (383 ITR. 217) wherein the Hon'ble Apex Court has held that the transport subsidy had a direct nexus with the profits and gains of the business of an industrial undertaking and, therefore, it was eligible for deduction U/s.80lB / 80IC of the Income Tax Act, 1961. It is argued by the appellant that in view of the aforesaid judgment of the Hon'ble Apex Court the reasons recorded by the Assessing Officer for re-opening of the appellant's case ceased to survive. Consequently, no addition made on account of share application money of Rs.1,02,50,000/- could survive. In support of its contention the appellant has relied upon the following case laws:

i) CIT Vs. Jet airways (I) Ltd 331 ITR. 236 (Bombay)
ii) Ranbaxy Ltd. Vs. CIT 336 ITR. 136 (Delhi)

5.2 Apart from the above legal submissions, the appellant has filed account confirmation from Mr. C.N. Lyngdoh and has stated that Mr. C.N. Lyngdoh was a coal trader and the appellant had regular business dealing with him. According to the appellant, the above details was brought to the notice of the Assessing Officer. The appellant has further submitted that it had regular transactions with Mr. C.N. Lyngdoh and all the transactions were through cheques and, therefore, there cannot be any doubt about the share application money received from Mr. C.N. Lyngdoh. However, the confirmation from Mr. C.N. Lyngdoh could not be submitted at the time of

assessment. The appellant has, therefore, made a prayer under Rule 46A of the Income Tax Rules, 1962. The assessing officer in his remand report has also not objected to the admission of any fresh or additional evidence if it is considered to be relevant for disposal of the issue. Considering the facts and circumstances of the case, I admit the additional evidence as prayed for by the appellant.

5.3 As far as the legal contention raised by the appellant is concerned, I find that at the time when the appellant's case was re-opened u/s.147 of the Income Tax Act, 1961 as well as when the assessment was made u/s.143(3)/147 of the Income Tax Act, 1961 on 31.03.2013, the judgment of the Hon'ble Apex Court in the case of M/s. Meghalaya Steels Ltd (supra) was not available to the Assessing Officer. Therefore, in my view there was no bar for the Assessing Officer in making addition on any other issue apart from the issue of transport subsidy on the basis of which the appellant's case was re-opened u/s.147 of the Income Tax Act, 1961. Therefore, the ratio of the judgment of Jet Airways (I) Ltd. (supra) and Ranbaxy Ltd. (supra) are not applicable to the facts of the present case.

5.4 Coming to the facts of the case I find that Mr. C.N. Lyngdoh, from whom the appellant had received Rs.1,02,50,000/- as share application money, had regular transactions with the appellant. All these transactions were made through bank and are duly recorded in the books of accounts of the appellant company. I also find that the Assessing Officer has accepted all other transactions appearing in the account confirmation of Mr. C.N. Lyngdoh except closing balance of Rs.1,02,50,000/- which was converted into share application money. There does not seem to be any justification before the assessing officer for not accepting the closing balance of Rs.1,02,50,000/- appearing in the account of Mr. C.N. Lyngdoh as genuine and treating it as unexplained u/s.68 of the Income Tax Act, 1961 while accepting all other transactions appearing the account of Mr. C.N. Lyngdoh. The appellant has furnished the full address of Mr. C.N. Lyngdoh who was a coal dealer and had regular transactions with the appellant. Further, Mr. C.N. Lyngdoh being a member of Schedule Tribe, was exempted from income tax u/s.10(26) of the Income Tax Act, 196. In view of the above, I delete the addition of Rs.1,02,50,000/- made by the Assessing officer. This ground of appeal is, therefore, allowed."

5. Learned Departmental Representative vehemently contends during the course of hearing that the Assessing Officer had rightly treated the assessee's share capital credited in the impugned assessment year amounting to Rs.1,02,50,000/- as unexplained cash credits u/s 68 of the Act. He has taken pains to invite our attention to the fact that the assessee's investors / subscribers, Mr. C.N.Lyngdoh is an exempt assessee u/s 10(26) of the Act not filing any return of income and all this sufficiently indicates that the share application / premium amount in question lacks genuineness / creditworthiness. He further states that the assessee has not filed any documentary evidence as per the Assessing Officer as well. We find no merit in Revenue's instant arguments. It has come on record that this assessee before us had filed all the details of the exempt share applicant during the

course of assessment. The Assessing Officer had not issued any process either sec. 131 or sec. 133(6) of the Act to assessee's investor(s). We therefore quote hon'ble apex court's landmark decision in *CIT vs. Orissa Corporation Pvt. Ltd.* (2001) 159 ITR 78 (SC) that an assessee can only file all of its supportive documents in favour of its claim proving genuineness and creditworthiness of the investor parties. We further reiterate that there is also no denial to the CIT(A)'s clinching finding that the department has itself accepted all other transactions in Mr. Lyngdoh's case.

6. Mr. Singh at this stage quotes hon'be apex court's very recent decision in *Pr.CIT vs. NRA Iron & Steel Co.* (2019) 412 ITR 161 (SC) restoring similar addition made by the Assessing Officer treating the concerned taxpayer's share application money as unexplained cash credits. We find that the said decision does not apply in the facts of the instant case since the assessee before us has already discharged its onus before the Assessing Officer. The mere fact that its investor is an exempt assessee u/s 110(36) does not give the impugned share application money the colour of unexplained cash credits. We accordingly confirm the CIT(A)'s action deleting the impugned unexplained share application money of Rs.1,02,50,000/-. The Revenue's instant first appeal ITA No.91/Gau/2017 is dismissed.

7. Next comes Revenue's appeal ITA No.69/Gau/2017 for assessment year 2007-08. The CIT(A)'s order under challenge has deleted share capitals share premium and share application money addition of Rs.6,69,71,870/-, 11,95,78,050/- and Rs.7,24,50,080/-; respectively vide following detailed discussion:-

> "5.2 I have considered the submissions made by the appellant before me. I have also perused the assessment order as well as the remand report sent by the Assessing Officer on this issue. In his remand report the Assessing Officer has simply stated that the addition was made on the basis of findings recorded in the assessment order. He has further stated that he has no objection to the admission of any fresh or additional evidence if it is considered to be relevant for disposal of the issue. Apart from this, the Assessing Officer has not given any comment on certain legal issues raised by the appellant in its written submissions.
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> 5.3 In its written submissions the appellant has raised a legal issue regarding the nature of additions that could be made in an assessment that is to be made

u/s.153A/153C read with section 143(3) of the Income Tax Act, 1961 in the case of a "**non abated assessment**".

According to the appellant it is now a well settled proposition that in respect of non-abated assessment, i.e. where the proceedings have reached finality, the assessments u/s.153A read with Section 143(3) of the Act, has to be made as was originally made/assessed and in case where certain incriminating documents have been found indicating undisclosed income, then the addition shall only be restricted to those documents/incriminating material and clubbed only to the assessment framed originally. It is submitted that the appellant's assessment for the year under appeal had already attained finality and hence it was a "**non abated assessment**". Hence, the addition should have been confined to any incriminating material found during the search. In support of its contention, the appellant has relied upon the following case laws:-

i) All Cargo Global Logistics Ltd. V/s. DCIT (2012) 137 I.T.D. 287 (Mumbai)(S.B.)
(ii) C.I.T. Vs. Continental Warehousing Corpn. (Ngava Sheva) Ltd. (2015) 374 ITR 645 (Bom.)
(iii) Marigold Merchandise Pvt. Ltd. V/s. D.C.I.T. (2014)164 TTJ 448 (Delhi "F" Bench)
(iv) Jai Steel (India) V/s. A.C.I.T. (2013) 259 CTR 281 (Rajasthan)
(v) A.C.I.T. Vs. Pratibha Industries Ltd. (2013) 141 I.T.D. 151 (Mumbai)
(vi) A.C.I.T. Vs. Kamal Kumar S. Agarwal (2010) 133 TTJ 818 (Nagpur)
(vii) C.I.T. Vs. Kabul Chawla (2016) 380 I.T.R. 573 (Del.)
(viii) Jaipuria Infrastructure Developers (P) Ltd. V/s. A.C.I.T. I.T.A. Nos. 5522 & 5523/Del/2015 decided by Hon'ble ITAT, Delhi Bench "B", Delhi on 27-06-2016
(ix) Principal C.I.T. Vs. Kurele Paper Mills (P) Ltd. (2016) 380 I.T.R. 571 (Delhi) (SLP filed by the Department against this judgment dismissed (2016) 380 I.T.R. St.64)

It is further submitted by the appellant that no incriminating document/material relating to the share capital/share premium was found and/or seized in the case of the appellant. The Assessing Officer has neither referred to nor relied upon any such document while making the assessment.

5.4 As far as merits of the case is concerned, the appellant has submitted the following documents with a prayer under Rule 46A of the Income Tax Rules 1962 for admission of these documents as additional evidences:

(i) Chart showing name and address of the shareholders/applicants, No. of shares applied for/allotted face value of shares, premium paid, mode of payment, PAN No., CIN Nos. of the applicant companies.
(ii) Copies of the appellants statements with the following banks showing the receipt of share capital/application money:
(a) HDFC Bank, H.B. Road, Guwahati
(b) HDFC Bank, Guwahati
(c) Standard Chartered Bank, Guwahati
(iii) Copies of Memorandum & Articles of Association and audited balance sheet in respect of corporate shareholders/applicants.
(iv) Copies of returns of allotment filed by the appellant in respect of shares allotted during the previous year relevant to the assessment year under appeal.

The appellant has also pointed out that out of the total share capital Rs.6,69,71,870/-, which was added in the total income of the appellant, an amount of Rs.5,40,00,000/-

was received by the appellant in the earlier year, as will be evident from the details submitted. Hence, the Assessing Officer erred in law as well as on facts in making the addition of this amount of Rs.5,40,00,000/- in the assessment year under appeal.

5.5 A perusal of the case laws relied upon by the appellant show that in the case of a non-abated assessment i.e. where the assessment proceedings have reached finality, the assessments u/s.153A/153C read with Section 143(3) of the Income Tax Act, 1961 has to be made as was originally made/assessed and in case where certain incriminating documents have been found indicating undisclosed income, then the addition shall only be restricted to those document/incriminating material and clubbed to the assessment made originally. Thus, the scope of additions to be made in the case of a non-abated assessment is well defined.

5.6 In the case of C.I.T. V/s. Kabul Chawla (supra), Hon'ble Delhi High Court held as follows:

At page 589, 590

"Summary of the legal position

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."

While so holding, Hon'ble Delhi High Court has taken note of the judicial pronouncements made in All Cargo Global Logistics Ltd. V/s. DCIT (supra), C.I.T. V/s. Continental Warehousing Corpn. (Ngava Sheva) Ltd. (supra), Jai Steel (India) V/s. ACIT (supra) and Principal C.I.T. V/s. Kurele Paper Mills (P) Ltd. (supra) and a number of other case laws.

5.7. In the case of Principal C.I.T. V/s. Kurele Paper Mills (P) Ltd. (supra), Hon'ble Delhi High Court held as follows:-
At page 572

> 1. The Revenue has filed the appeal against an order dated 14.11.2014 passed by the Income Tax Appellate Tribunal (ITAT) in 3761/Del/2011 pertaining to the Assessment Year 2002-03. The question was whether the learned CIT (Appeals) had erred in law and on the facts in deleting the addition of Rs.89 lacs made by the Assessing Officer under Section 68 of the Income Tax Act, 1961 ('ACT') on bogus share capital. But, the issue was whether there was any incriminating material whatsoever found during the search to justify initiation of proceedings under Section 153A of the Act.
> 2.The Court finds that the order of the CIT (Appeals) reveals that there is a factual finding that "***no incriminating evidence related to share capital issued was found during the course of search as is manifest from the order of the AO.***" Consequently, it was held that the AO was not justified in invoking Section 68 of the Act for the purposes of making additions on account of share capital.
> 3. As far as the above facts are concerned, there is nothing shown to the court to persuade and hold that the above factual determination is perverse. Consequently, after considering all the facts and circumstances of the case, the Court is of the opinion that no substantial question of law arises in the impugned order of the ITAT which requires examination.
> 4.The appeal is, accordingly, dismissed."

Hon'ble Supreme Court has dismissed the special leave petition filed by the Department against this judgment as reported at (2016) 380 I.T.R. (St.) 64.

5.8 In the case of Jaipuria Infrastructure Developers (P) Ltd. V/s. ACIT (I.T.A. Nos. 5522 & 5523/Del/2015) which was decided by Hon'ble ITAT, Bench "B" Delhi on 27-06-2016, Hon'ble Tribunal has held as follows:-

> "21. However, in the backdrop of aforesaid undisputed facts discussed in the preceding paras and law laid down by Hon'ble jurisdictional High Court in the case cited as Kabul Chawla (supra), we are of the considered view that completed assessment interfered with by the AO u/s.153A and confirmed by the ld. CIT (A) are not sustainable in the eyes of law for the following reasons:-
>
> (i) that in the instant case, undisputedly the AO has not made assessment on the basis of incriminating material unearthed during search and seizure operation conducted u/s.132 rather proceeded u/s 153A of the Act on the basis of some pre-search enquiries to make an addition as has specifically been recorded in para 6 of the assessment order that, "Pre search enquiries revealed that MIS Jaipuria Infrastructure Developers Pvt. Ltd., the flagship company involved in the real estate business of the S.K. Jaipuria group is indulged in inflating the cost of the project by debiting bogus expenses by raising bills from the non-existing parties or the entry providers."

(ii) that the ratio of the judgment in case of Kabul Chawla (supra) is required to be extracted by perusing the judgment in entirety and not by picking up the favourable sentences and by ignoring the unfavorable one. Highlighted portion of Para 37 (iv), (v), (vi) & (vii) of Kabul Chawla (supra) is crux of the issue involved which is applicable to the facts and circumstances of the case;

(ii) that the ratio of the judgment Kabul Chawla (Supra) is that in all circumstances, completed assessment can be interfered with by the AO u/s 153A only on the basis of incriminating material unearthed during the course of search;

(iv) that not on this, the addition in this case has been made by the AO u/s 153A on the sole ground that assessee has failed to produce the parties with whom the assessee company has transacted during the year under assessment who have failed to turn up despite the issue of notice u/s 133 (6) of the Act;

(v) that the contention of the Id DR that the assessment qua the AY 2006-07 was pending as on date of search as mere issuances of acknowledgement by the ministerial staff does not imply that assessment has been completed, is not tenable in the face of undisputed fact that when within the prescribed period, no notice u/s 143 (2) has been issued prior to the date of search, assessment is deemed to be completed;

(vi) that there is not an iota of material with the AO to initiate proceedings u/s 153A what to talk of incriminating seized material;

(vii) that the Id. CIT (A) affirmed the assessment order by relying upon the decisions relied upon by Hon'ble jurisdictional High Court in the case cited as Filatex India Ltd. Vs. CIT-IV - (2014) 49 Taxman.com 465 (Delhi) which has been distinguished in the Kabul Chawla (supra) on the ground that in the said case, there was some material unearthed during the search whereas in the instant case there is admittedly no incriminating material unearthed during the search to proceed u/s 153A.

In view of what has been discussed above, we are of the considered view that without entering into the merits of this case, addition made in both the cases u/s 153A read with section 143(3) is not sustainable in the eyes of law, hence deleted. Consequently, both the appeals filed by the assessee are hereby, **allowed**."

5.9 An analysis of the above case laws relied upon by the appellant clearly show that the completed assessments i.e. the non-abated assessments can be tinkered with only on the basis of any incriminating material found during the course of search and not otherwise. In view of what has been discussed above, I am of the considered view that the additions of Rs.6,69,71,870/-, Rs.11,95,78,050/- and Rs.7,24,50,080/- made on account of share capital, share premium and share application respectively are not sustainable in the eyes of law. Hence, these are deleted.

5.10 Even on the merits also, I find that the addition made by the Assessing Officer is not sustainable.

5.11 I find that the appellant had submitted the details of share capital and share premium in course of the assessment proceedings vide its letter dated 18.02.2015. This fact has been noted by the Assessing Officer in para 11(a) of his order. The appellant could not submit the documents in support of

share capital/premium as these were not readily traceable at the time of assessment proceedings. The appellant has further contended that it was not given proper and meaningful opportunity of being heard to produce the documents in support of share capital/premium. The appellant has submitted before me the following details/documents in support of the share capital /premium: -

(i) Chart showing name & address of the shareholders/applicants, No. of shares applied for/allotted face value of shares, premium paid, mode of payment, PAN No., CIN Nos. of the applicant companies.
(ii) Copies of the appellant's statements with the following banks showing the receipt of share capita [/application money: -

(a) HDFC Bank, Guwahati
(b) HDFC Bank, Guwahati
(c) Standard Chartered Bank, Guwahati

(iii) Copies of Memorandum & Articles of Association and audited balance sheets in respect of corporate shareholders/applicants, bank statements etc.
(iv) Copies of returns of allotment filed by the appellant in respect of shares allotted during the previous year relevant to the assessment year under appeal.

A prayer under Rule 46A of the Income Tax Rules, 1961 was made by the appellant for admission of these documents as additional evidence. These documents were sent to the assessing officer while calling for his remand report. As stated above, the Assessing Officer has not objected to the admission of these additional evidences. Considering the facts and circumstances of the case, I admit the additional evidences now produced by the appellant as these are required to be admitted for doing substantial justice in the matter.

5.12 The appellant has filed complete details of shareholder companies viz. - their names & addresses, No. of shares applied for/allotted, face value of shares, premium paid, mode of payment, their PAN No., CIN No., copies of Memorandum & Articles of Association, audited balance sheets and copy of return of allotment. A perusal of the bank statements filed by the appellant show that all the transaction have taken place through banking channels. On examination of these details/documents, I do not find any reason to doubt the identity of the share holders, their credit worthiness and the genuineness of the transactions.

It is settled law that once an assessee provides details regarding identity of the share applicants/holders, their permanent account numbers, bank details, balance sheets, A/D receipt in support of filing of income tax returns, copies of Memorandum & Articles of Association etc., the share application money/capital cannot be treated as unexplained in the hands of the assessee. This view has been taken in the following cases:
(i) Principal CIT. V/s. Soft-line Creations Pvt. Ltd. (2016) 387 ITR 636 (Delhi)
(ii) C.I.T. V/s. Kamdhenu Stel & Alloys Ltd. (2014) 361 ITR 220 (Delhi)
(iii) C.I.T. V/s. Lovely Exports Pvt. Ltd. (2009) 319 ITR (St.) 5 (S.C.)
(iv) C.I.T. V/s. Sameer Bio-Tech Pvt. Ltd. (2010) 325 ITR 294 (Delhi)
(v) C.I.T. V/s. Five Vision Promoters Pvt. Ltd. (2016) 380 ITR 289 (Delhi)
(vi) C.I.T. V/s. Dwarkadhish Investment Pvt. Ltd. (2011) 330 ITR 298 (Delhi)
(vii) C.I.T. V/s. Divine Leasing & Finance Ltd. (2008) 299 ITR 268 (Delhi)

> In view of the above also, the addition made in respect of share capital and share premium cannot be sustained. This ground of appeal is, therefore, allowed."

8. It is therefore clear that the CIT(A) has quashed the impugned assessment(s) on the ground that the department had not found or seized any incriminating material against the assessee during the course of search in issue. Various high court(s) in *CIT vs Kabul Chawla* (2016) 380 ITR 573 (del), *PCIT vs. M/s Salasar Stock Broking Ltd* in **GA No. 1929/2016 ITAT No.264 of 2016** dated 24.08.2016 (Cal), *PCIT vs Dipak J Panchal* (2017) 397 ITR 153 (Guj) support the assessee's case *qua* the instant legal aspect. Mr. Singh has quoted *E.N. Gopakumar vs. CIT* (2017) 390 ITR 131 (Ker) and *CIT vs. Kesarwani Zarda Bhander* Income-tax Appeals No.270/2014 dated 06.09.2016 (Allahabad) that the purpose of the impugned sec. 153A proceedings is to assess total income of the searched taxpayer rather than that based on incriminating material only. Hon'ble jurisdictional high court has admittedly not adjudicated upon the instant legal issue as informed by the learned senior counsel as well as the department. We therefore quote hon'ble apex court's decision in *CIT vs. M/s Vegetable Products Ltd*. (1973) 88 ITR 192 (SC) that the view favouring the assessee / taxpayer has to be adopted in such a backdrop involving conflicting judicial opinions of various hon'ble high courts and accordingly hold that the CIT(A) has rightly quashed the impugned assessment since not based on any incriminating material found or seized during the curse of search. That being the case, the Revenue's pleading on merits are rendered infructuous. Its appeal **ITA No. 69/Gau/2017** is rejected.

9. Next come the last two assessment years 2012-13 and 2013-14 in Revenue's appeal(s) ITA No.76 & 77/Gau/2017. We notice that CIT(A) has granted telescoping benefit to the assessee regarding the income disclosed during the course of search whilst deleting the addition amount of Rs.1,34,40,00/- to the extent of Rs.76 lac in former and Rs.89,60,000/- in the latter assessment year. The Revenue is fair enough in not disputing the fact that there is no evidence on record indicating this amount forming part of

assessee's undisclosed income. The CIT(A)'s detailed discussion qua the instant identical issue reads as under:-

> "*7.1 Before me the appellant vide its written submission dated 02.02.2016 has contended as follows:*
>
> "5. Ground No.5 (Addition on account of alleged undisclosed expenditure Rs.1,34,40,000/-):
> (i) While making the assessment the Assessing Officer has added an amount of Rs.1,34,40,000/- in the total income of the appellant on account of alleged unexplained expenditure.
> (ii) The relevant facts are that in the course of search & seizure operations conducted at the office cum factory premises of appellant at lekhi Village, Nahadagun, Arunachal Pradesh, books of accounts marked., as "HD-4" (hard drive) was seized vide annexure "A" to the panchnarna dated 07.12.2012. The aforesaid seized material marked as "HD-4" contained a tally account named "SSI" containing balance sheet and profit and loss account for the F.Y. 2011-11 In the aforesaid seized material a debit entry of Rs.1,34,40,000/- was claimed a expenditure which according to the Assessing Officer did not appear in any of the disclosed account of the group. He therefore treated the said amount as undisclosed expenditure of the appellant.
> (iii) it is respectfully submitted that the aforesaid seized material appears to be combined accounts of the various group/concern. In the absence of supporting document/details which had been misplaced, we are unable to reconcile the above transactions.
> However, for this assessment year, we have made a disclosure of Rs.36,00,000/-, We therefore, request that, we should be allowed the benefit of set off to the extent Rs,76,00,000/- .against the aforesaid addition.
>
> *7.2 I have considered the submissions made before me. I have also perused the assessment order as well as the remand report sent by the Assessing Officer on this issue.*
> *In its written submission the appellant has made a general submission to the effect that the seized material "**HD-4**" appeared to be a combined account of various group concerns. The appellant has further submitted that in the absence of supporting document/details, which was misplaced, the appellant was unable to reconcile the above transactions. The appellant has however prayed for allowing the benefit of set off of the disclosure of Rs.76,00,000/- made by the appellant in the return submitted u/s.153A of the income Tax Act, 1961.*
>
> *I find that in para 11 of the assessment order the Assessing Officer has categorically mentioned that the appellant has shown additional income of Rs,76,00,000/- in its return of income, which was disclosed by Sri Ratan Sharma during the course of search. From the assessment order I find that though the Assessing Officer has included the disclosure of additional income of Rs.76,00,000/- in the total income of the appellant, he has not allowed the benefit of set off of this amount against the additions made by him in the total income of the appellant. It is a settled proposition that the income disclosed by an assessee is available to him for the purpose of explaining other additions/investment. This view has been taken by the Hon'ble ITAT "**Indore Bench**" in the case of Eagle Seeds & Biotech ltd. V/s. ACIT - 100 ITD 300, by the Hon'ble ITAT (Pune Bench) in the case of Kantilal & Brothers V/s. AC1T 52 ITD 412 and Hon'ble Madras High Court in the case of CIT V/s. K.S. Guruswamy Nadar & Sons - 149 ITR 127 (Madras). I, therefore direct the Assessing Officer to allow the benefit of the set off of Rs.76,00,000/- to the appellant against the addition of Rs,1,34,40,000/-. The appellant thus gets relief of Rs.76,00,000/- and the balance*

*addition of Rs.54,40,000/- is sustained. This ground of appeal is, therefore, **partly allowed**.*"

10. We find no substance in Revenue's instant grievance as the purpose of telescoping is to avoid double addition qua the very income in the hands of taxpayer as held by the hon'ble apex court's landmark decision in *Anantharam Veerasinghaiah and Co. vs. CIT* (1980) 123 ITR 457 (SC). Coupled with this, the assessee's disclosure of its twin undisclosed income(s) stands accepted by the department itself. We conclude in these facts denied of the impugned telescoping benefit to the assessee would amount to a double addition. More so when its book treatment thereof under business income head has attained finality. These two Revenue's appeals ITA No.76 & 77/Gau/2017 fail accordingly.

11. Same order to follow in latter assessee JUD Cement Ltd's two appeals ITA No.39-40/Gau/2017 challenging correctness of both the lower authorities action adding similar share application money(ies) of Rs.20 lac and Rs.36 lac; assessment-wise, respectively not based on any incriminating material found or seized during the course of search in issue dated 21.03.2013. These two assessee's appeals are allowed in view of our foregoing detailed discussions.

12. To some up, first assessee's four appeal(s) 93-96/Gau/2017 are dismissed as **withdrawn.** The Revenue's as many appeal(s) ITA No.91,69, 76 & 77/Gau/2017 are dismissed. Latter assessee's appeals ITA No.39-40/Gau/2017 are allowed. Ordered accordingly. ***A copy of this order be placed in the respective case files***.

Order pronounced in accordance with Rule 34(3) of the ITAT Rules by putting on Notice Board on 06/09/2019

Sd/-	Sd/-
(लेखा सदस्य)	(न्यायिक सदस्य)
(A.L.Saini)	(S.S.Godara)
(Accountant Member)	(Judicial Member)

Guwahati,
*Dkp
दिनांकः- 06/09/2019 **गूवाहाठी ।**

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. आवेदक/Assessee-M/s SMS Smelters Ltd. NH 52A, Lekhi Village, Naharlagun Dist. Papumpare, Arunachal Pradesh/JUD Cement Ltd. N.H.44, Lumpshong, Wahiajier, Dist. Jaintia Hills, Meghalaya
2. राजस्व/Revenue-DCIT, Cir-3, 7th Fl, Aayakar Bhawan, G.S. Road, Christian Basti, Guwahati-781005, Assam/ACIT, Circle-Shillong
3. संबंधित आयकर आयुक्त गृवाहाठी / Concerned CIT Guwahati
4. आयकर आयुक्त- अपील / CIT (A) Guwahati/Shillong
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, गूवाहाठी खंड्पीठ / DR, ITAT, Guwahati
6. गार्ड फाइल / Guard file.

By order/आदेश से,

/True Copy/

Sr. Private Secretary (on tour)
आयकर अपीलीय अधिकरण,
गूवाहाठी ।