



**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "C", MUMBAI**

**BEFORE SHRI R.C. SHARMA, ACCOUNTANT MEMBER AND
SHRI PAWAN SINGH, JUDICIAL MEMBER**

ITA NO. 3808/MUM/2017 : A.Y : 2009-10

ACIT, Central Circle-3, Thane (Appellant) vs. M/s. Credential Equities Pvt. Ltd.
Ground floor, Bhairav Shrusthti,
150 feet Road, Bhayander (W).
PAN : AACCC0112C
(Respondent)

**Assessee by : Shri Rakesh Joshi
Revenue by : Shri Awungshi Gimson**

**Date of Hearing : 09/09/2019
Date of Pronouncement : 28/11/2019**

ORDER

PER R.C. SHARMA, ACCOUNTANT MEMBER

This is an appeal filed by the Revenue against the order of CIT(A) for assessment year 2009-10 in the matter of order passed under Section 143(3)/153A of the Act.

2. In this appeal, Revenue is aggrieved for deletion of addition of Rs.1,75,00,000/- made under Section 68 of the Act.

3. Rival contentions have been heard and records perused. Facts in brief are that the assessee is a company engaged in the business of development of property and investment in real estate. The assessee filed its original return of income on 28/08/2009 under Section 139(1) of Act, declaring total income of Rs.36,42,643/-. The assessment under Section 143(3) was completed on 31/10/2011 accepting the returned income. The business premises of the

Assessee company as well as residential premises of directors were covered under search action as a part of search and seizure conducted on 'Leena Group' under Section 132 of the Act on 12/09/2012. The Assessing Officer completed the 153A assessment making an addition of Rs.1,75,00,000/- on account of share capital.

4. By the impugned order, CIT(A) deleted the addition after making the following observations :-

"13. The facts of the appellant's case can be examined on the touchstone of the above cited decisions. In the appellant's case the original asst had been completed u/s 143(3). The original assessment thus would not abate because of the search conducted subsequently. In such circumstances the AO could have made addition only on those issues which arose from the search material. The impugned share capital was duly recorded in the books and would have been so at the time of original asst. Thus mere disclosure of the impugned share capital in the appellant's balance sheet of the relevant asst year does not amount to any implicating finding of the search. The asst order does not mention any other search material which could indicate or establish that the appellant had introduced unaccounted money in its books as bogus share capital. In the course of the asst proceedings the appellant filed PAN, Balance sheet, bank statement etc of the alleged investor companies. This also per se cannot be considered as an incriminating finding. Apart from these facts no other enquiry is done by the AO. The asst order does not mention any enquiry by the investigation wing done in the case of the four investor companies relevant to this asst year. In the asst order for the asst year 2010-11 in the appellant's own case there is a mention of a statement of shri Rahul Zununwala recorded u/s 131 of the Act. Whatever may be the significance of that statement, the statement as reproduced in the asst order for asst year 2010-11 does not name any of the four investor companies relevant to this asst year. Thus it can be concluded that there was no incriminating material found during the search or during the 153A asst proceedings which can be considered as the basis of the impugned addition made by the AO.

14. Further it is to be noted that the AO has passed stereo type orders in all the cases of the Leena group. It is apparent from the AO's order that he had treated the entire share capital/share application money/loans etc appearing in the books of different concerns of this group as bogus. The AO probably had information in some of such cases. Information was received in other cases during post assessment enquiries as in the case of Prabhav Industries etc, And in some cases the AO did not have any specific information to make such a disallowance but he still proceeded with the additions in spite of the appellant having filed all the required details.

15. The present case falls in the last category. It is clear from the discussion in the asst order that when asked, the appellant had submitted following details to substantiate the genuineness of the share capital received during the year:

- a. Copy of the application for issue of share capital.
- b. Copy of the board resolution of the investor company.
- c. Copy of the acknowledgement of return filed by the investor company.
- d. Copy of the financial statement of the investor company.
- e. Copy of the form no. 2 submitted to ROC.
- f. Copy of the bank statement of the investor party.

16. The AO did not make any further enquiry, but disregarded the above information for three reasons:

- A. The investors did not reply to the notice send to them Under Section 133(6) of the Income Tax Act'1961.
- B. All the above companies did not possess enough credit worthiness to introduce their funds in the assessee company.
- C. The assessee company has not proved its worth enough to attract such shares capital.

17. Apart from the above, the AO has also sent a letter 14.03.2016 stating that a search took place in the case of one Shirish Shah on 9/04/2013. Shri Shah in his statement recorded during the search admitted Prabhav Industries was one of the bogus companies operated by him to give accommodation entries. The appellant is also one of the

beneficiaries of such accommodation entry. However it is noticed that the AO in the case of Shirish Shah - the Dy. CIT Central Cir 1(1) Abad in his letter dated 24.02.2013 had categorically mentioned only asst year 2010-11, the year in which the appellant had received share application money from Prabhav Industries. In the asst year under appeal i e asst year 2009-10, the appellant has not received any share money from Prabhav Industries and thus the information gathered in the case of shirish shah is of no relevance as far as this asst year is concerned.

18. The appellant has argued that as he had furnished all the pertinent details such as name address of the parties, their PAN, their IT returns, their bank accounts and confirmation letter and so on, it was incumbent on the AO to make further enquiries if he did not believe the details furnished by the appellant. The appellant has relied upon various case laws and the same have been reproduced above. As regards the assessee's onus to explain the share capital appearing in his books, various courts in the recent decisions have held as under:

19. The honourable Rajasthan High Court in the case of V T C Leasing and Finance Ltd ITA No 551/2008 decision dated 27/01/17 has observed as under:

"1. By way of this appeal, the appellant has challenged the judgment & order of the Tribunal whereby the Tribunal has partly allowed the appeal preferred by the assessee and modified the order of the AO.

2. This Court while admitting the matter framed the following question of law:-

"i) Whether the Tribunal was justified in deleting the addition of Rs. 85,00,000/- made by the Assessing Officer on account of unexplained hare capital under Section 68 of the Act, even when the assessee failed to discharge the primary onus casted upon it to prove the identify, genuineness and creditworthiness of the investors?"

3. However, in view of the judgment of the Hon'ble Supreme Court in the case of Commissioner of Income Tax vs. Lovely Exports (P) Ltd., reported in (2008) 299 ITR 268 (SC), wherein It has been held as under:

"If the share application money is received by the assessee-company from alleged bogus shareholders,

whose names are given to the Assessing Officer, then the department is free to proceed to re-open their individual assessments in accordance with law. Hence, we find no infirmity with the impugned judgment. "

4. In view of the above, the issue is decided in favour of the assessee and against the department. The appeal stands dismissed.

20. Similarly the honourable Delhi High Court has held as under in the case of *Five Vision Promoters Pvt Ltd* ([2016] 65 taxmann.com 71 (Delhi):

"28. Before proceeding to discuss the above submissions, a brief recapitulation of the legal position as regards Section 68 of the Act is necessary. Under Section 68 of the Act, the AO has jurisdiction to undertake enquiries with regard to the amount credited in the books of the accounts of an Assessee. This could be any sum whether in the form of sale proceeds or receipt of share capital money. First, the AO is to enquire whether the alleged shareholders in fact exist or not. The truthfulness of the assertion by the Assessee regarding the nature and the source of the credit in its books of accounts can be examined by the AO. Where the identity of the shareholders stands established and it is shown that they had in fact invested money in the purchase of the Assessee's shares, then the amount received would be regarded as capital. Where the Assessee offers no explanation at all or the explanation offered is unsatisfactory, the provision of Section 68 may be invoked.

29. A Full Bench of this Court in *Sophia Finance Ltd.* 's case (*supra*) held in the context of Section 68 of the Act that:

- (i) The Assessee has to prima facie prove "(1) the identity of the creditor/subscriber; (2) the genuineness of the transaction, namely, whether it has been transmitted through banking or other indisputable channels; (3) the creditworthiness or financial strength of the creditor/subscriber".
- (ii) If the relevant details of the address of PAN identity of the creditor/subscriber are furnished to the Department along with copies of the Shareholders Register, Share Application Forms, Share Transfer Register etc., it would constitute acceptable proof or acceptable explanation by the Assessee.

- (iii) *The Department would not be justified in drawing an adverse inference only because the creditor/subscriber fails or neglects to respond to its notices.*
- (iv) *The onus would not stand discharged if the creditor/subscriber denies or repudiates the transaction set up by the Assessee nor should the AO take such repudiation at face value and construe it, without more, against the Assessee.*
- (v) *The AO is duty-bound to investigate the creditworthiness of the creditor/subscriber, the genuineness of the transaction and veracity of the repudiation.*

30. *In the decision of Divine Leasing & Finance Ltd.'s case (supra), this Court held that if the Assessee had furnished relevant details of the subscribers and the shares were allotted as per the prevalent norms of the Stock Exchange, no addition could be made on account of unexplained cash credits. Where the Assessee had provided the relevant details it had discharged its onus and then it is for the Revenue to show that the subscribers were benamidars or any part of the share capital represented the Assessee's own income from undisclosed sources. In Divine Leasing & Finance Ltd.'s case (supra), the Supreme Court while affirming the order of this Court observed that "if the share application money is received by the Assessee company from bogus shareholders, whose names are given to the AO, then the Department is free to proceed to reopen their individual assessments in accordance with law."*

31. *Likewise in CIT v. Dolphin Canpack Ltd. [2006] 283 ITR 190 (Delhi) the Court held no substantial question of law arose since the ITAT found that the Assessee had disclosed to the AO during the course of enquiry "not only the names and the particulars of the subscribers of the shares but also their bank accounts and the permanent account numbers issued by the income tax department. Superadded to all this was the fact that the amount received by the company was all by way of cheques."*

32. *The law was reiterated in CIT v. Kamdhenu Steel & Alloys Ltd. [2012] 206 Taxman 254/19 taxmann.com 26 (Delhi). The Assessee there had given particulars of registration of the investing*

companies; confirmation from share applicants, their bank account details; and had shown payment through account payee cheques etc. In the circumstances, it was held that it could be said that the Assessee had discharged its initial onus and just because some of creditors/share applicants could not be found at the addresses given," would not give Revenue a right to invoke Section 68 without any additional material to support such a move." It was held likewise in Sarthak Securities Co. (P) Ltd. v. ITO [2010] 329 ITR 110/195 Taxman 262 (Delhi).

33. *In CIT v. Nipun Builders & Developers (P.) Ltd. [2013] 350 ITR 407/214 Taxman 429/30 taxmann.com 292 (Delhi) it was held that the point at which the initial onus on the Assessee to prove the unexplained credit would stand discharged depends upon the facts and circumstances of each case. It was observed:*

"Circumstances might require that there should be some evidence of positive nature to show that the said subscribers had made a genuine investment, acted as angel investors, after due diligence or for personal reasons. Thus, finding or a conclusion must be practicable, pragmatic and might in a given case take into account that the Assessee might find it difficult to unimpeachably establish creditworthiness of the shareholders."

34. *In CIT v. N.R. Portfolio (P.) Ltd. [2014] 222 Taxman 157 (Mag.)/42 taxmann.com 339 (Delhi) the Court reiterated the need of the Assessee to satisfy the AO about the "identity, creditworthiness and genuineness" of the creditors. It was observed that the "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."*

35. *Recently in jet Lite (India) Ltd. v. CIT [2015] 63 taxmann.com 62 (Delhi) this Court examined the entire case law and reiterated the settled legal position.*

Reasons and decision

36. *In the present case, there is a basic fallacy in the submission of the Revenue about the precise role of the Assessee, Five Vision. The broad sweeping allegation made is that "the Assessee being a developer is charging on money which is taken in cash". This, however, does not apply to the Assessee which appears to be involved in the construction of a shopping mall. In fact for the A Ys in question, the Assessee had not commenced any business. The construction of the mall was not yet complete during the A Ys in question. The profit and loss account of the Assessee for all the three A Ys, which has been placed on record, shows that only revenue received was interest on the deposits with the bank. The Assessee is, therefore, right in the contention that the basic presumption of the Revenue as far as the Assessee is concerned has no legs to stand. Correspondingly, the further allegation that such 'on money' was routed back to the mainstream in the form of capital has also to fail.*

37. *The other submission that the Assessee was itself being used as a conduit for routing the 'on money' or that the investment in the Assessee was also for routing such 'on money' has not even prima facie been able to be established by the Revenue. On the one hand there is an attempt to treat the cash credit found in the Assessee's books of account to be 'undisclosed income of the Assessee' by showing the investors to be 'paper companies'. On the other hand, the attempt is to show that this money in fact belongs to certain other entities whose source has not been explained by the Assessee. As noted by the ITAT in the assessment proceedings of the investor companies, the monies invested were sought to be added as income of those companies by the AOs. The said additions were deleted by the CIT(A) in their cases holding that the additions if at all should be made in the hands of the beneficiaries. The Revenue then filed appeals in the ITAT insisting on the additions being sustained. Thus there is no clarity in the stand of the Revenue in these cases.*

38. *Coming to the core issue concerning the identity, creditworthiness and genuineness of the investor companies, it is seen that as far as the Table I investors were concerned, only 9 were*

searched and in their cases, the ITAT on a very detailed examination was satisfied that they not only existed, but that the Assessee had discharged the primary onus of proving their creditworthiness and genuineness. They had responded to the summons issued to them. Directors of 14 of these companies appeared before the AO and produced their books of accounts.

39. In respect of four of the Table II companies, who invested Rs. 2 crores in the share capital of the Assessee for the A Y 2008-09, the CIT(A) observed: "I have carefully appreciated the contentions and do admit that at least these few companies do not seem to be having connection with the majority of the 'conduit' companies and their common directors and that their financial creditworthiness is on much better footing."

40. As regards Table-III companies, notices were issued under Section 131 of the Act to which many of them responded confirming having made investments. The Assessee had been asked by the CIT(A) to produce 7 directors of the Table III companies. 6 directors appeared and their statements were recorded. They had confirmed that they had subscribed to the share capital of the Assessee. These directors had not only produced the books of accounts but showed that the source of investment was duly recorded therein. The Revenue on the other hand did not produce any further evidence to dispute the above evidence produced by the Assessee. As far as Table II shareholders were concerned, if the Revenue was of the view that they were simply using the Assessee for parking their undisclosed income, then it was certainly open to the Revenue to make additions to the income of those Table-11 companies. As far as Table-1 shareholders was concerned, none of them denied having made the investment in the Assessee company. The AO does not appear to have undertaken any particular investigation into the affairs of the Table-I, II or Table III companies apart from issuance of the notices under Section 131 of the Act which were duly responded to.

41. Detailed findings have been given by the ITAT in the present cases after a thorough examination of the records. These have been

extracted hereinabove. The Court finds no reason to differ from the decision of the ITAT in its rejection of the very same contentions urged before the Court by the Revenue. In particular, the Court concurs with the ITAT that the mere fact that some of the investors have a common address is not a valid basis to doubt their identity or genuineness.

42. Also, the fact that the shares of the Assessee were subsequently sold at a reduced price is indeed not germane to the question of the genuineness of the investment in the share capital of the Assessee. The question of avoidance of tax thereby may have to be examined in the hands of the person purchasing the shares.

43. Some of the investor companies for e.g., (i) Quality Security Services Pvt. Ltd. (ii) United Head Hunters Pvt. Ltd. and (iii) Wellset Pharma & Drugs Pvt. Ltd. have been shown to be filing returns and being assessed on a regular basis. Some of them have been shown to be in existence even before the incorporation of the Assessee. Indeed the Revenue was unable to produce material to substantiate its case that the genuineness and creditworthiness of the investors and the source of the money received by the Assessee by way of investments in the AYs in question was not satisfactorily explained by the Assessee. Also, the ITAT rightly distinguished the decision in Nova Promoters & Finlease (P) Ltd.'s case (supra) in its application to the facts of the present case.

Conclusion

44. The Revenue has not been able to show that there is any legal infirmity in the impugned order of the ITAT as regards the analysis of the facts or the application of the law in relation to Section 68 of the Act.

45. Consequently, no substantial question of law arises for determination.

21. The Hon'ble Delhi High Court in the case of Oasis Hospitalities P Ltd (2011) 333 ITR 119 Del, after considering all the relevant decisions on the issue including the decision of the Hon'ble Supreme Court in the case of

Lovely Exports P Ltd (supra), decision of the Full Bench of the Hon'ble Delhi High Court in the case of Sophia Finance Ltd reported in 205 ITR 98 (Del)(FB) and the decision in the case of Divine Leasing & Finance Ltd (supra) observed as under:

"It is clear from the above that the initial burden is upon the assessee to explain the nature and source of the share application money received by the assessee. In order to discharge this burden, the assessee is required to prove:

- (a) the identity of shareholder;*
- (b) the genuineness of transaction; and*
- (c) the creditworthiness of shareholders.*

12. In case the investor/shareholder is an individual, some documents will have to be filed or the said shareholder will have to be produced before the Assessing Officer to prove his identity. If the creditor/subscriber is a company, then the details in the form of registered address or PAN identity, etc., can be furnished.

13. The genuineness of the transaction is to be demonstrated by showing that the assessee had, in fact, received money from the said shareholder and it came from the coffers of that very shareholder. The Division Bench held that when the money is received by cheque and is transmitted through banking or other indisputable channels, the genuineness of transaction would be proved. Other documents showing the genuineness of transaction could be copies of the shareholders register, share application forms, share transfer register, etc.

14. As far as creditworthiness or financial strength of the creditor/subscriber is concerned, that can be proved by producing the bank statement of the creditor/subscriber showing that it had sufficient balance in its accounts to enable it to subscribe to the share capital. This judgment further holds that once these documents are produced, the assessee would have satisfactorily discharged the onus cast upon him. Thereafter, it is for the Assessing Officer to scrutinize the same and in case he nurtures any doubt about the veracity of these documents to probe the matter

further. However, to discredit the documents produced by the assessee on the aforesaid aspects, there have to be some cogent reasons and materials for the Assessing Officer and he cannot go into the realm of suspicion. "

22. *The following decision of the Mumbai ITAT in the case of M/s. Whitemoon Trading Co. Pvt. Ltd, I.T.A. No.5470/Mum/2015 decision dated 10/02/2017 is also worth referring to on the subject:*

"From the record we found that the assessee is a private limited company engaged in the business of trading in shares & securities, during the year, the assessee company has received Rs. 15,00,000 from Bhagwan Krishan Investment & Trading Co. (P) Ltd. towards investment in preference shares of assessee company. 12. In respect of the share application money received from Bhagwan Krishan investment & Trading Co Pvt Ltd, assessee had furnished details such as copy of share application form, certified copy of memorandum & articles of association, certified copy of board resolution, certified copy of the auditors' report and balance sheet as on 31st March, 2005 and so on, in support of the genuineness of the transaction of share application money. AO made addition merely on the basis of statement of Pradeep Kumar. 13. The statements of Mr Pradeep Kumar (as supplied to the assessee) are not correct for the reason that the assessee has received share application money by cheque and no cash was given to Bhagwan Krishan Investment & Trading Co Pvt Ltd. The fact that no amount of cash was ever given to the company which is proved by the fact that the bank account of the investor-company Punjab National Bank, Azadpur Branch, (which was also furnished to the Assessing Officer - shows that there is no such cash deposit in the bank account of the said company and that the amount of share application money is received out of sale consideration of old investments.

14. *We also found that even after asking by the assessee the Assessing Officer has not issued any summons under section 131 or notice under section 133(6) to the Directors of Bhagwan Krishan Investment & Trading Co Pvt Ltd. and has concluded only on the basis of the statement of Mr Pradeep Kumar. We also found that*

Pradeep Kumar on whose statement AO has relied was not a director of M/s Bhagwan Krishan Investment from whom assessee company received share application money.

15. The Assessing Officer in the assessment order has merely relied upon the statement of a third party to hold that cash was given in order to issue cheque DO of the equivalent amount for subscribing to the share application of the assessee company without proving that cash was actually given to the investor-Company by either proving from their bank statement or otherwise, even though the assessee has proved from the bank statement of M/s.Bhagwan Krishan Investment and Trading Co Pvt Ltd that there was no such cash deposit made by the investor-company and the cheque was issued from the balance available in their bank account.

16. The Assessing Officer has also not allowed cross examination of Mr Pradeep Kumar, inspite of specific request by assessee and hence, his statement on oath has no evidentiary value and hence required to be ignored.

17. We found that Assessee Company has received application for allotment of preference shares, which have been allotted by the assessee company and identity of share applicant has also been proved by the assessee and hence, the share application money could not be added as income in the hands of the assessee company. In CIT v. Stellar Investment Ltd. (1991) 192 ITR 287, 288 (Del) it was held that "It is evident that even if it be assumed that the subscribers to the increased share capital were not genuine, nevertheless, under no circumstances, can the amount of share capital be regarded as undisclosed income of the assessee. It may be that there are some bogus shareholders in whose names shares had been issued and the money may have been provided by some other persons. If the assessment of the persons who are alleged to have really advanced the money is sought to be reopened, that, would have made some sense but we fail to understand as to how this amount of increased share capital can be assessed in the hands of the company itself. "The appeal filed by the Revenue against this decision was dismissed by the Supreme Court in CIT v. Steller Investment Ltd. (2001) 251 ITR

263 (SC) wherein the appeal filed against the ruling of the High Court was dismissed by refusing to refer the question of law. "

18 . In view of the above discussion we do not find any merit in the action of AO making addition of Rs. 15,00,000.

23. The Bombay High Court in the case of Creative World Telefilms Ltd. (in I. T. A. No. 2182 of 2009 decided on October 12, 2009) [2011] 333 ITR 100 had held that :-

"2. The question sought to be raised in the appeal was also raised before the Tribunal and the Tribunal was pleased to follow the judgment of the apex court in the case of CIT v. Lovely Exports (P.) Ltd. Application No. 11993 of 2007, dated 11-1-2008, wherein the apex court observed that if the share application money is received by the assessee-company from alleged bogus shareholders, whose names are given to the Assessing Officer, then the Department can always proceed against them and if necessary reopen their individual assessments. In the case in hand, it is not disputed that the assessee had given the details of name and address of the shareholder, their PAN/GIR number and had also given the cheque number, name of the bank. It was expected on the part of the Assessing Officer to make proper investigation and reach the shareholders. The Assessing Officer did nothing except issuing summons which were ultimately returned back with an endorsement "not traceable". In our considered view, the Assessing Officer ought to have found out their details through PAN cards, bank account details or from their bankers so as to reach the shareholders since all the relevant material details and particulars were given by the assessee to the Assessing Officer. In the above circumstances, the view taken by the Tribunal cannot be faulted. No substantial question of law is involved in the appeal. In the result, the appeal is dismissed in limine with no order as to costs."

24. The Calcutta Tribunal decided similar issue as follows in the case of M/s. The Calcutta Jute Mfg. Co. Ltd. I.T.A No. 689/Kol/2014 03.02.2017:

"16. After considering the rival submissions we are of the view that the conclusions drawn by CIT(A) do not call for any interference. As rightly held by CIT(A) there was no adverse material in respect of five companies and M/s. Clarity Mercantile (P)Ltd, M/s. Allworth Commodities (P)Ltd and M/s. Sugam Distributor (P)Ltd. By filing confirmation of the share subscribers and other details, the assessee has established satisfactorily the receipt of share capital from these five companies.

17. As far as the receipt of share from M/s. Clarity Mercantile (P)Ltd and M/s. Allworth Commodities (P)Ltd is concerned, as rightly held by CIT(A), the only basis of AO to make the addition is the statement of Shri Ajay Singh, The two statements referred to by the AO in the order of assessment did not make specific reference to the assessee. Besides the above the statements were retracted by Shri Ajay Singh. In these circumstances the addition made by the AO was rightly deleted by CIT(A).

18. As far as the receipt of share capital from M/s. Sugam Distributor (P)Ltd the conclusion drawn by the AO were purely based on the fact that Shri Rajesh Kumar Lath, who was the director of the said company had offered 2% commission income for providing accommodation entries in a search conducted in his case. There is not even a reference to the fact that the assessee was also a beneficiary of accommodation entry provided by M/s. Sugam Distributor (P)Ltd. In these circumstances the CIT(A) was right in concluding that the addition u/s 68 of the Act made by the A O cannot be sustained.

19. For the reasons given above we find no merits in the appeal by the revenue and the same is dismissed. "

25. In view of above legal position it can be held that once the appellant filed copy of PAN, Acknowledgement copy of the return of the investing company, their bank accounts statements for the relevant period; then the primary onus was discharged by the assessee. The Assessing Officer apparently had some doubts and suspicion about the whole transaction but he did not follow up this doubt with any enquiry. The assessing

officer has also not mentioned in the asst order any enquiry conducted by the investigation wing or any other agency regarding the four investor companies relevant in the present case. If the AO had any such information or material with him, he should have confronted the appellant with the same and should have mentioned the facts in the asst order. The AO has done nothing of this sort. He has also not established any direct or indirect link of assessee's own money flowing out and then again received by the assessee in the form of share capital and premium.

26. Thus the addition made by the AO is neither based on any seized material nor is supported by any enquiry conducted during the asst proceedings. Such an addition falls outside the ambit of section 153A as discussed above. Hence the addition is unsustainable in law. The AO is directed to delete the addition of Rs.1,75,00,000/- made on account of unexplained share capital.”

5. Against the above order of CIT(A), Revenue is in further appeal before us.
6. It was argued by the Id. CIT DR that CIT(A) was not justified in observing that no incriminating material was found, in so far as notings of the AO indicate that some material was found during search proceedings even though the Assessing Officer has not specifically mentioned the details. The detailed written submission was filed by the Id. CIT DR wherein it was mentioned that the Assessing Officer vide letter dated 15/04/2019 had submitted the copies of pages 3-16 of loose papers bundle No.16 seized from the office of Shri Dilip Porwal, a key person in the Leena Group, and the same are incriminating for making addition u/s.153A of IT Act. As per CIT DR, these are the share transfer forms which are relevant to indicate that the share application money so received by Leena Group of cases including the assessee company are not genuine. It was further submitted that the Assessing Officer in his letter dated 15/04/2019 has explained one of the findings of the search action, according to which Shri Dilip Porwal was routing his unaccounted income into the books of his business concerns.

7. It was further submitted by CIT DR that the CIT(A) was not correct in observing that no enquiries were conducted by the Assessing Officer, whereas the AO had categorically mentioned in the assessment order that in order to verify the identity, creditworthiness and genuineness of these transactions, notices u/s.133(6) of the Act were issued to the investor companies. He further submitted that in a query by the AO vide letter dated 07/11/2014, the assessee had submitted copy of application form for issue of share capital, copy of Board resolution of the investor company, copy of acknowledgement of return filed by the investor company, copy of financial statement of the investor company, copy of form No.2 submitted to ROC and copy of bank statement of investor company. He further submitted that these documents were examined by the AO but not found acceptable, therefore addition was made.

8. In reply to the return submission filed by the CIT DR, it was submitted that Id Assessing officer (AO) vide his report dated 15/04/2019 had objected CIT(A)'s order on the plea that CIT(A) has erred in stating that there is no incriminating documents seized during search. AO in para 3.1 page 4 of his report submitted that during the course of search in the office premises of Shri Dilip Porwal, share transfer forms were seized for each of the investor companies, as per page 3 to 16 of loose paper bundle No 16. AO also commented that these transfer deed were obtained at the time of share application subscription to ensure that these shares can be repurchased in case of any dispute. AO also enclosed copies of these transfer deeds alongwith his report. Ld. AR further submitted that perusal of these transfer deeds (TD) make it clear that none of the transfer deed belongs to assessee company, which is evident from these transfer deed. As per Ld. AR the contention of AO that these TDs were obtained at the time of subscription of shares application money is also not correct as the share application money was received in F Y 2006-07 to F Y 2008-09 whereas these TDs are dated 20/05/2010, when these shares were

actually repurchased from the original subscribers. This fact can be verified from the repurchase details given by the AO in his report at page 3 onwards. The assessee has also filed details of this transfer deeds to verify above contentions. As per Id. AR, Since none of the TD belongs to assessee company, hence contention of the AO in his letter dated 15/04/2019 as well as Ld CIT DR that incriminating document related to assessee company was found during the course of search, is not only incorrect but an attempt to mislead the Hon'ble Bench. Further the contention of revenue that these TDs were obtained at the time of receipt of share application money as a measure of security if any dispute arises these shares can be repurchased, is also not correct. In the case of assessee company the share application money was received in F Y 2008-09 and these TDs are dated 30/05/2010, which is actual date of purchase of these shares from the original subscriber and this fact can be verified from the chart given by AO on page 3 onwards of his report. Therefore it is very clear that revenue is alleging on his own whims and surmises by filing documentary evidences which are contrary to their contentions.

9. Ld. AR further contended that none of the grounds of appeal support contention of Id. CIT DR about existence of incriminating documents. As per Id. AR even in Ground No. (f) which is the only direct ground on this issue revenue claimed that it includes the assessment to be made relating to regular income and undisclosed income found as a result of search, however, there is wide difference between income found as a result of search and income found based on incriminating documents. Ld. AR also placed on record the order of ITAT-E Bench dated 04/10/2018 in the case of assessee's group concern M/s. Teena Housing Finance Pvt. Ltd in ITA No.3805/Mum/2017, wherein under similar facts and circumstances addition so made by the AO was deleted for want of incriminating materials. As per Id. AR facts and circumstances are same, therefore issue is covered by the order of ITAT in case of assessee's group concern.

10. We have considered rival contentions and carefully gone through the orders of the authorities below as well as detailed written submission filed by Id. CIT DR alongwith letter of AO dated 15/04/2019. We have also perused the rejoinder filed by Id. AR and various documents placed on record. From record we found that in this case Ld Commissioner of Income Tax (Appeal)(CIT(A)) has deleted addition on the plea that assessment U/s 143(3) already completed vide order dated 30/10/2011 before the date of search i.e. 12/09/2012, hence, the year under consideration is not an abated (pending) assessment as per section 153A of the Act. Therefore, no addition can be made without any incriminating material having been found during the course of search. Ld CIT(A) in his order has also discussed the matter on merits and held that once assessee has provided all the details to prove identity, genuineness and creditworthiness of the share application subscriber, no addition can be made u/s 68 of the Act without rebutting these evidences.

10.1. We first take the legal ground taken by the department that the Ld. CIT(A) failed to appreciate the fact that assessment proceedings u/s 153 A are in proceedings to frame assessment or reassessment of total income of the assessee relating to the years covered under search, It includes the assessment to be made relating to regular income and undisclosed income found as a result of search. In this regard we observe that the transfer deeds which were found during the course of search was alleged by the CIT DR as incriminating material. In this regard we observe that name of the assessee company is appearing as transferee of shares of other group companies on page 10,11,12 & 16 of seized paper, which shows that the assessee company has invested in shares of other group company which is not a matter of dispute. The matter of dispute is the allotment of shares to other corporate entities and no incriminating documents were brought on record neither at the time of assessment nor before the

Hon'ble Bench. Therefore, the contention of revenue that the addition is based on material found during the course of search, is baseless.

11. We also observe that the share application money was received by the assessee company in the F.Y.2008-09, whereas these transfer deeds are dated 30/05/2010, which is actual date of purchase of these shares from the original subscribers, which fact can be verified from the chart given by the AO himself on page No.3 onwards of his report. Thus the finding of fact recorded by the CIT(A) to the effect that no incriminating material was found during the course of search is as per material on record, therefore, following the decision of Hon'ble Bombay High Court in the case of All Cargo Ltd. 374 ITR 645, we do not find any infirmity in the order of CIT(A) holding that no addition can be made in case of assessment completed for which no incriminating material was found during the course of search. We had also carefully gone through the order of the Co-ordinate Bench in the case of group concerns of the assessee M/s. Teena Housing Finance Pvt. Ltd., dated 04/10/2018, wherein under the very same search conducted on 12/09/2012 on Leena Group, the addition was made by the AO while framing assessment u/s.153A in respect of share capital so received. The CIT(A) has deleted the addition and the order of CIT(A) was confirmed by the Tribunal after having the following observation:-

6. After hearing both the sides and going through the facts, it is clear that there is no seized material whatsoever to co-relate with this addition of share capital and share premium, which the assessee declared in the final accounts/ audited accounts filed with original return of income and filed on 21.08.2008 much before the date of search i.e. 12.09.2012. Hence, this issue is squarely covered by the decision of Hon'ble Bombay High Court in the case of Continental Warehousing Corporation (Nhava Sheva) Ltd. (supra) held as under:-

"31. We, therefore, hold that the Special Bench's understanding of the legal provision is not perverse nor does it suffer from any error of law apparent on the face of the record. The Special Bench in that regard held as under:-

“The provision under section 153A is applicable where a search or requisition is initiated after 31.5.2003. In such a case the AO is obliged to issue notice u/s 153A in respect of 6 preceding years, preceding the year in which search etc. has been initiated. Thereafter he has to assess or reassess the total income of these six years. It is obligatory on the part of the AO to assess or reassess total income of the six years as provided in section 153A(1)(b) and reiterated in the 1st proviso to this section. The second proviso states that the assessment or reassessment pending on the date of initiation of the search or requisition shall abate. We find that there is no divergence of views in so far as the provision contained in section 153A till the 1st proviso. The divergence starts from the second proviso which states that pending assessment or reassessment on the date of initiation of search shall abate. This means that an assessment or reassessment pending on the date of initiation of search shall cease to exist and no further action shall be taken thereon. The assessment shall now be made u/s 153A. The case of Ld. Counsel for the assessee is that necessary corollary to this provision is that completed assessment shall not abate. These assessments become final except in so far and to the extent as undisclosed income is found in the course of search. On the other hand, it has been argued by the Ld. Standing Counsel that abatement of pending assessment is only for the purpose of avoiding two assessments for the same year, one being regular assessment and the other being assessment u/s 153A. In other words these two assessments coalesce into one assessment. The second proviso does not contain any word or words to the effect that no reassessment shall be made in respect of a completed assessment. The language is clear in this behalf and therefore literal interpretation should be followed. Such interpretation does not produce manifestly absurd or unjust results as section 153A (i)(b) and the first proviso clearly provide for assessment or reassessment of all six years. It may cause hardship to some assesses where one or more of such assessments has or have been completed before the date of initiation of search. This is hardly of any relevance in view of clear and unambiguous words used by the legislature. This interpretation does not cause any absurd etc. results. There is no casus omissus and supplying any would be against the legislative intent and against the very rule in this behalf that it should be supplied for the purpose of achieving legislative intent. The submissions of the Ld. Counsels are manifold, the foremost being that the provision u/s 153A should be read in conjunction with the provision contained in section 132(1), the reason being that the latter deals with search and seizure and the former deals with assessment in case of search etc, thus, the two are inextricably linked with each other.

Before proceeding further, we may now examine the provision contained in sub-section (2) of section 153, which has been dealt with by Ld. Counsel. It provides that if any assessment made under subsection (1) is annulled in appeal etc., then the abated assessment revives. However, if such annulment is further nullified, the assessment again abates. The case of the Ld. Counsel is that this provision further shows that completed assessments stand on a different footing from the pending assessments because appeals etc. proceedings continue to remain in force in case of completed assessments and their fate depends upon subsequent orders in appeal. On consideration of the provision and the submissions, we find that this provision also makes it clear that the abatement of pending proceedings is not of such permanent nature that they cease to exist for all times to come. The interpretation of the Ld. Counsel, though not specifically stated, would be that on annulment of the assessment made u/s 153(1), the AO gets the jurisdiction to assess the total income which was vested in him earlier independent of the search and which came to an end due to initiation of the search.

The provision contained in section 132 (1) empowers the officer to issue a warrant of search of the premises of a person where any one or more of conditions mentioned therein is or are satisfied, i.e. - a) summons or notice has been issued to produce books of account or other documents but such books of account or documents have not been produced, b) summons or notice has been or might be issued, he will not produce the books of account or other documents mentioned therein, or c) he is in possession of any money or bullion etc. which represents wholly or partly the income or property which has not been and which would not be disclosed for the purpose of assessment, called as undisclosed income or property. We find that the provision in section 132 (1) does not use the word "incriminating document". Clauses (a) and (b) of section 132(1) employ the words "books of account or other documents". For harmonious interpretation of this provision with provision contained in section 153A, all the three conditions on satisfaction of which a warrant of search can be issued will have to be taken into account.

Having held so, an assessment or reassessment u/s 153A arises only when a search has been initiated and conducted. Therefore, such an assessment has a vital link with the initiation and conduct of the search. We have mentioned that a search can be authorised on satisfaction of one of the three conditions enumerated earlier. Therefore, while interpreting the provision contained in section 153A, all these conditions will have to be taken into account. With this, we proceed to literally interpret to provision in 153A as it exists and read it alongside the provision contained in section 132(1).

The provision comes into operation if a search or requisition is initiated after 31.5.2003. On satisfaction of this condition, the AO is under obligation to issue notice to the person requiring him to furnish the return of income of six years immediately preceding the year of search. The word used is "shall" and, thus, there is no option but to issue such a notice. Thereafter he has to assess or reassess total income of these six years. In this respect also, the word used is "shall" and, therefore, the AO has no option but to assess or reassess the total income of these six years. The pending proceedings shall abate. This means that out of six years, if any assessment or reassessment is pending on the date of initiation of the search, it shall abate. In other words pending proceedings will not be proceeded with thereafter. The assessment has now to be made u/s 153A (1)(b) and the first proviso. It also means that only one assessment will be made under the aforesaid provisions as the two proceedings i.e. assessment or reassessment proceedings and proceedings under this provision merge into one. If assessment made under sub-section (1) is annulled in appeal or other legal proceedings, then the abated assessment or reassessment shall revive. This means that the assessment or reassessment, which had abated, shall be made, for which extension of time has been provided under section 153B.

The question now is - what is the scope of assessment or reassessment of total income u/s 153A (1) (b) and the first proviso? We are of the view that for answering this question, guidance will have to be sought from section 132(1). If any books of account or other documents relevant to the assessment had not been produced in the course of original assessment and found in the course of search in our humble opinion such books of account or other documents have to be taken into account while making assessment or reassessment of total income under the aforesaid provision. Similar position will obtain in a case where undisclosed income or undisclosed property has been found as a consequence of search. In other words, harmonious interpretation will produce the following results: -

- a) In so far as pending assessments are concerned, the jurisdiction to make original assessment and assessment u/s 153A merge into one and only one assessment for each assessment year shall be made separately on the basis of the findings of the search and any other material existing or brought on the record of the AO.*
- (b) in respect of non-abated assessments, the assessment will be made on the basis of books of account or other documents not produced in the course of original assessment but found in the course of search, and undisclosed income or undisclosed property discovered in the course of search."*

7. Respectfully, following the Hon'ble Bombay High Court in Continental Warehousing Corporation (Nhava Sheva) Ltd. (supra), CIT(A) has rightly deleted the addition and we confirm the same. The appeal of Revenue is dismissed.

8. In the result, the appeal of Revenue dismissed.”

12. As the facts and circumstances during the year under consideration are perimetria as discussed by the Tribunal in the above order, respectfully following the order of the Tribunal, we do not find any infirmity in the order of CIT(A) for deleting the addition so made.

13. Further case law relied upon by the Ld CIT DR in his submission are on merits of the case, once the addition is not sustainable on legal and technical ground, the issue is merit is only academic, hence no rebuttal given on the same.

14. In the result, appeal of the Revenue is dismissed.

Order pronounced in the open court on this 28/11/2019

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

Sd/-
(R.C.SHARMA)
ACCOUNTANT MEMBER

Mumbai; Dated 28/11/2019
Karuna Sr.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

सत्यापित प्रति //True Copy//

(Asstt. Registrar)
ITAT, Mumbai

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