

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "F" NEW DELHI
(Through Video Conferencing)**

**BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
Dr. B.R.R. KUMAR, ACCOUNTANT MEMBER**

I.T.As. No.4049/DEL/2017
Assessment Years: 2008-09

ACIT, Central Circle-30, New Delhi.	Vs.	Rajni Sales (P) Ltd., Room No.91, 4 th Floor, 2B Grant Lane Kolkata.
TAN/PAN: AABCR3491C		
(Appellant)		(Respondent)

Assessee by:	Shri Ajay Wadhwa, Adv.		
Department by:	Shri Sushma Singh, CIT-D.R.		
Date of hearing:	12	04	2021
Date of pronouncement:	9	07	2021

ORDER

PER AMIT SHUKLA, JM:

The aforesaid appeal been filed by the Revenue against the order of Commissioner of Income Tax (Appeals) – XXX, New Delhi for the A.Y.2008-09, wherein the assessment has been quashed by the Commissioner of Income Tax (Appeals).

2. The grounds of appeal taken by the Department before us are reproduced under:

ITA No.4049/Del/2017

1 On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in law and on facts indirecting the A.O to delete the addition made

u/s 68 of the I.T. Act on account of unexplained cash credits amounting to Rs. 8,73,24,240/- on protective basis.

2 On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in law and on facts in directing the A.O to delete the addition of Rs. 4,36,621/- as unexplained expenditure on account of brokerage

3 On the facts and in the circumstances of the case, the Ld. CIT(A) had erred in law and on facts in holding that the initiation of action u/s 147 of the Act, is invalid and void ab-initio

4 That the grounds of appeal are without prejudice to each other

5. That the appellant craves leave to add, amend, alter or forgo any ground(s) of appeal either before or at the time of hearing of the appeal.”

3. The brief facts are that the assessee is engaged in the business of investment, sales and purchase of shares and has filed its return of income on 31.03.2009. The assessee's case was reopened u/s.148 by issuance of notice on 18.08.2015 on the following reasons recorded:-

M/s. Rajni Sales Pvt. Ltd.

A.Y. 2008-09

In this case, the return declaring income of Rs.3,469/- was e-filed on 31.03.2009 vide acknowledgment No.66842781310309. It was processed u/s.143(1) of the IT Act at returned income.

A search and seizure action in Surya Prakash Group of cases was carried out on 30.10.2012.

During search, in his statement recorded u/s.. 132(4) of the IT Act on 11.10.2012, chairman of M/s. Prakash Industries Ltd., Shri Ved Prakash Agarwal admitted that accommodation entries from Paper companies were received in various group companies including M/s. Rajni Sales Pvt. Ltd.

Statement of Shri Shiv Shankar Vanka was taken on 30.10.2012 during the search procedure in which he admitted that he provided the accommodation entry to M/s. Prakash Industries Ltd. group companies through Shri Ashok Aggarwal. Statement of Shri Shiv Shankar Banka, an entry operator is made part of reasons as annexure-III.

Shri Ved Prakash Aggarwal, the chairman of M/s. Prakash Industries Ltd. admitted that unaccounted cash was introduced in the books of account at share capital arranged through Shri. Ashok Aggarwal. Shri Ashok Aggarwal through affidavit dated 24th January, 2013 confirmed that he introduced Shrip PL Gupta employee/Director of M/s. Prakash Industries Ltd. with entry operator Shri Shiv Shankar Banka. Statement of Shri Ved Prakash Aggarwal, Chairman of M/s. Prakash Industries Ltd. is made part of reasons as Annexure-III.

Statement of Shri Ashok Kumar Aggarwal the erstwhile director of the company was also recorded u/s.131 of IT Act on 22.01.2013. He stated that he was director of Rajnil Sales Pvt. Ltd. from 2005 to 2009 and does not know about the nature of activities of the company. He also did not know about the share holding of the company. He was also asked about the manner in which the share capital of the company was raised. In response to that he stated that he did not know anything about this matter. He further stated that he simply signs whatever documents were given to him. He never visited the company office. He knew nothing about incorporation of company, auditor of company. He never involved in activities of company. He got Rs. 2 to 3000 per month from company for being signatory of documents. Statement of Shri Ashok Kumar Aggarwal, erstwhile director of M/s. Prakash Industries Ltd. as made part of reasons as annexure-III.

M/s. Rajnil Sales Pvt. Ltd. was a paper company without having any tangible assets and as investments were also in paper companies. As

such the share capital and share premium introduced in its books was bogus. The investments were made in paper companies which did not have any substantive business activities and some of them were found non existent at the addresses given. The fact has been admitted by the chairman of the group and the entry operator.

From the examination of records of company, it is found that the amount of Rs.8.32 crore has been invested in M/s. Prakash Industries Ltd. grou. The funds raised by assessee by way of share application and investments are shown to have been received from companies which are paper companies and run by entry operators. Hence the source of funds is non genuine. The said amount is liable to be taxed.

Therefore I have reason to believe that income of Rs.8.32 crore has escaped assessment for the Assessment Year 2008-09 by reason fo failure on part of assessee to disclose fully and truly all material facts necessary for its assessment. Therefore in my opinion it is a fit case for issue of notice u/s..148.”

4. Thereafter, assessee has filed detailed objection against initiation of proceedings which have been disposed of by the ld. Assessing Officer. In the assessment order, the Assessing Officer has made following additions.

- a. Unexplained cash credit under section 68 of the Act Rs. 8,73,24,240/- on protective basis.
- b. Unexplained expenditure on account of brokerage @ 0.5% i.e, Rs. 4,36,621/-

5. Ld. CIT (A) has quashed the assessment on the ground that the Assessing Officer has entertained reason to believe only for making

protective assessment which cannot be held. The relevant observation and finding is as under:-

“From the above, following facts emerged:

- *The Assessing Officer has recorded the ‘reason to believe’ that income of Rs.8.32 crore, has escaped assessment, on the basis of statement recorded u/s. 132(4) of the Act of Shri Ved Prakash Agarwal and Shri Shiv Shankar Banks, who has accepted that the accommodation entries have been taken, to introduce the unrecorded profits of M/s. Prakash Industries Ltd. / beneficiary company, through layering.*
- *In the case of appellant / investor company, as well as in the case of M/s Prakash Industries Ltd. / beneficiary company, It is clear that there is a suspicion in the mind of the A.O. regarding in whose hands, the alleged amount in question was to be assessed.*

From the above, it is clear tot to A.O. has simply relied upon on the information received from investigation wing and therefore, there is non application of mind by the A.O. Further, it is also clear, that the A.O. has resorted to Protective assessment only, which is against the spirit of section 147 of the Act since, having “reason to believe” that certain income has escaped assessment for to said A.Y., is sine qua non for assumption of jurisdiction to open the case u/s. 147 of the Act, is found missing in the case of appellant. Therefore, opening of assessment in the case of appellant u/s. 147 of the Act, is not correct. The facts of the appellant, are squarley covered by the above 2 decision of High Court Delhi (Supra).

In view of to above, I am of to considered opinion that to issue of notice u/s. 148 of to Act, is not done by following proper procedure of law and without application of mind, for recording reason u/s 147. In view of these facts and circumstances, 1 agree with the arguments of the appellant and therefore, the initiation of action u/s 147, is held to be invalid and void ab-intlio.

Accordingly, ground No. 1 to 3 are hereby allowed.”

6. Before us, ld. counsel for the assessee submitted that reopening has been done merely on the basis of statement given by Shri Ved Prakash Agarwal, Chairman of Prakash Industries Ltd. allegedly admitted that unaccounted cash was introduced in the books as share capital which according to the Assessing Officer constitutes material for reopening. First of all, he clarified that the share capital of Rs.8.32 crore was not received during the impugned assessment year, therefore, entire reasons to believe stands at a wrong footing and there is no escapement of income for this assessment year. He further submitted that the amount of Rs.8.32 crore is factually incorrect and is Rs.8.73 crore out of which Rs.4.36 crore was invested in Prakash Industries Ltd. during the relevant assessment year only. Even otherwise detail retraction was made by Shri Ved Prakash Agarwal in November, 2012 only and the reason to believe have been recorded on 18.02.2015 and there was no such confession by Shri Ved Prakash Agarwal as to the share capital being an accommodation entry. Most importantly Assessing Officer has sought to reopen only to make protective addition in the hands of the assessee which means that Assessing Officer was not sure in his reason to believe that in whose hand income sought to be assessed. Already substantive addition has been done in the hands of Prakash Industries Ltd. on 31.03.2016 in the assessment order passed in that case and before that only Assessing Officer has tried to reopen the case for making protective addition in his reason

recorded on 31.03.2015. In the written submissions, the assessee has made following submission.

Reasons to believe are factually and legally incorrect, vague and contain serious grave errors; reopening on the basis of incorrect reasons to believe not justified

1. At the very outset, we respectfully submit that the reasons are factually and legally incorrect and that there is no material in possession of the Department to even remotely suggest that the amount of Rs. 8.32 crores is the undisclosed income of the assessee company.

2. On perusal of reasons to believe recorded by the Ld. AO we find that at last para of the reasons he recorded that “From examination of accounts of the company, it is found that amount of Rs. 8.32 crores has been invested in Prakash Industries Ltd. group. The funds by way of share capital premium are shown to have been received from the companies which are paper companies and run by the entry operators. Hence the source of funds is non genuine. The said amount is liable to be taxed under I. Tax Act.

Therefore I have reasons to believe that income of Rs. 8.32 crores has been escaped assessment for the Asst. Year 2008-09 by reason of failure on part of assessee to disclose fully and truly all material facts necessary for its assessment.” **Refer page no. 19 of the paper book.**

3. First of all we wish to state that in the entire reasons to believe there is no reference of ITR filed by the assessee from where the Ld. AO found that the assessee had failed to disclose any material fact which led to reopening of assessment.

4. The statement of Ld. AO that assessee had failed to disclose all the fully and truly all material facts is not supported by any evidence on record. It is just a bald statement.

5. **Factual error: - Amount of Rs. 8.32 crores invested in M/s Prakash Industries.**— Which in fact is 8.73 crores. If the Ld. AO had recorded reasons after examining the books of account of the assessee and applying his mind, then he would have known that the total amount invested in M/s Prakash Industries during the year was Rs. 4.36 crores. This fact can be verified from the audited financials of the assessee **attached at page no. 2-9 of the paper book.**

Out of Rs. 8.32 crores, sum of Rs. 4.36 crores was invested in A.Y. 2007-08. Therefore Ld. AO did not proceed legally to add the entire amount in the relevant assessment year.

6. **Factual and legal error: -Rs. 8.32 crores has been escaped assessment for the assessment year 2008-09.**If the Ld. AO had recorded the reasons after examining the books of the assessee and applying his mind, then he would have known that the assessee did

not receive any share capital during the relevant assessment year. In fact during the year under consideration the assessee did not receive credit of Rs. 8.73 crores. The provisions of section 68 specifically states that the if any sum is found credited in the books for any previous year,....the sum so credited may be charged to the income tax as the income of assessee of that previous year.”

7. **Reasons are vague:**

i. The Ld. AO in the entire reasons to believe did not mention any material to corroborate his conclusion except for the retracted statements.

ii. In the reasons the Ld. AO mentioned that from examination of books it is found that Rs. 8.32 crores has been invested but the relevant page of from where he found such information is not provided.

iii. It is mentioned in the reasons that assessee had not disclosed truly and materially not disclosed material fact but did not mention which material fact is not disclosed in the ITR.

8. The statements on the basis of which reasons were recorded were retracted within the reasonable time by the persons and therefore such retracted statements without

any corroborating evidence cannot be made basis of reopening.

9. All these factual errors were mentioned by the assessee in his objection filed on 03.03.2015 attached at page no. 24-25 of the paper book.
10. The assessee had filed various credible evidences in its possession to establish that the total investment in Prakash Industries during the year was Rs. 4.36 crores and the source of funds of such amount were sale proceeds of shares. **Refer point no. IX on merits where the assessee explained each and every fact and the document relating to the transaction.**
11. Needless to add we are unable to understand how the genuine transaction of investment in shares of M/s Prakash Industries become in-genuine merely because of the retracted statements of some persons without any corroborating material.
12. All the above shows the lack of application of mind by the Ld. AO and incorrect belief while recording reasons.
13. It is settled law in the case of **CIT vs. Kelvinator of India Ltd. [2010] 320 ITR 561 (SC)** where Hon'ble Apex court has held that Assessing Officer has power to reopen, provided there is 'tangible material' to come to conclusion that there is escapement of income from assessment; reasons must have a live link with formation

of belief. Assessee also relies on the following judgements of the jurisdictional court:

14. **CIT vs. Ashian Needles (P.) Ltd.[2016] 384 ITR 144 (Delhi)**:Hon'ble Delhi High court has held that "6. The decision of the ITAT appears to have turned entirely on facts. It is observed by the ITAT that there was nothing on record before the AO even in the form of any specific information that the Assessee had converted black money into white through an entry provider. Further, while in the notice issued to the Assessee for four years, the AO had observed that Rs.27 lakhs, Rs.62 lakhs, Rs.4.80 crores and Rs.6.96 crores respectively had escaped assessment, the additions actually made for the respective years were Rs. 27lakhs, Rs.10 lakhs, Rs.1.5 crores and Rs. 10 lakhs respectively. This meant that the AO was himself "not sure that the entire amount which was mentioned in the report of the investigation was on account of the escaped income of the Assessee." This also showed that the AO had not applied his mind before issuing notice under Section 148 of the Act."

15. **Dr.Ajit Gupta v. ACIT (2016) 383 ITR 361 (Delhi) (HC)**: **It has been held by Hon'ble Delhi High Court that**

Thereasonforthereopeningoftheassessmentwasamistaken factualpremisethattheassessee had changed the system of accounting from mercantile to the cash system. It was more than adequately explained by the assessee that this

was an inadvertent error. The assessee has convincingly shown that he has consistently been following the mercantile system of accounting not only for assessment years in question but for the earlier and later assessment years as well. Hence, reassessment notice was to be quashed.

16. **CIT vs. Atul Jain [2007] 212 CTR 42 (Delhi):**
Hon'ble Delhi High Court has held that"17. Looked at in the light of the decisions placed before us and the law laid down therein, it is necessary to appreciate the information available with the Assessing Officer in the present case. The only information is that the assessee had taken a bogus entry of capital gains by paying cash along with some premium for taking a cheque of that amount. The information does not indicate the source of the capital gains (which in this case are shares). We do not know which shares have been transacted and with whom has the transaction taken place. There are absolutely no details available and the information supplied is extremely scanty and vague. Insofar as the basis for the reasons is concerned, even this is absent. The Assessing Officer did not verify the correctness of the information received by him but merely accepted the truth of the vague information in a mechanical manner. The Assessing Officer has not even recorded his satisfaction about the correctness or otherwise of the information or

his satisfaction that a case has been made out for issuing a notice under section 148 of the Act. Read in this light, what has been recorded by the Assessing Officer as his "reasons to believe" is nothing more than a report given by him to the Commissioner of Income-tax. As held by the Supreme Court in ChhugamalRajpal's case (supra) the submission of a report is not the same as recording of reasons to believe for issuing a notice. The Assessing Officer has clearly substituted form for substance and, therefore, the action of the respondent falls foul of the law laid down by the Supreme Court in ChhugamalRajpal's case (supra) which is clearly applicable to the facts of these appeals."

17. **Oriental Insurance Company Vs CIT (Delhi High Court) [2015] 378 ITR 421 (Delhi)**

It is not disputed that the reasons that led the Assessing Officer to reopen the assessment were factually incorrect. It is not disputed that the assessee was carrying on only one business - General Insurance Business, which is regulated under the Insurance Act, 1938. Indisputably, the insurers cannot carry on any business other than the insurance business or any prescribed business. The business of General Insurance is regulated and there is no allegation that the regulatory authority has found the assessee to be in default of any provisions of the Insurance Act, 1938. The revenue also did not dispute that the Assessing Officer's assumption that the assessee

was carrying on two streams of business was incorrect. Thus, this reason to believe that the Assessee's income had escaped assessment is clearly without any factual basis. [Para 11]

Before the Tribunal, the revenue had contended that the errors in the reasons recorded were minor errors, which did not detract from the fact that income had escaped assessment. This contention is without merit as reasons to believe that income had escaped assessment is a necessary pre-condition which enables the Assessing Officer to assume jurisdiction to proceed further. In the event such reasons are found to be erroneous, the Assessing Officer would not have the jurisdiction to make an assessment and any proceedings initiated on the basis of palpably erroneous reasons would be without authority of law. Therefore, even if it is assumed that, in fact, the assessee's income has escaped assessment, the Assessing Officer would have no jurisdiction to assess the same if his reasons to believe were not based on any cogent material. In absence of the jurisdictional pre-condition being met to reopen the assessment, the question of assessing or reassessing income under section 147 would not arise. Thus, the proceedings under section 147 are liable to be quashed as being without jurisdiction. [Paras 13 and 14]

18. **CIT vs. ChintooTomar [2015] 229 Taxman 260 (Delhi)**

“5....The reasons so recorded should have some basis or support and not a mere gossip. The reasons cannot be a mere pretence and should be held in good faith. The expression "reasons to believe" predicates a belief which is founded and induced by existence of palpable or cogent material or information. Reason to suspect cannot amount to reason to believe. As it is the beginning of the inquiry, having a prima facie opinion is sufficient; and irrebuttable conclusive evidence or finding is not required. But the prima facie formation of belief should be rational, coherent and not ex facie incorrect and contrary to what is on record. As noticed in paragraph 3 above, the facts recorded are incorrect. Secondly, the reasons must have live nexus and must disclose on what basis or evidence the Assessing Officer feels and has reason to believe that income chargeable has escaped assessment. The reasons must be germane and genuine. For grounds elucidated in paragraph 4 above, this requirement falters. The reasons recorded by the Assessing Officer do not meet and satisfy the said basic and limited pre-jurisdictional requirement. There is no rational connection between the reason recorded and the formation of belief that income had escaped assessment.”

I. Reasons to suspect cannot be equated with reasons to believe which is a necessary precondition for any action u/s 147

No action of reassessment u/s 147 of the Act is permissible for framing protective assessment in the absence of substantive assessment till the date of assumption of jurisdiction u/s 147 of the Act.

1. *The Assessing Officer can assume jurisdiction for reassessment proceedings if he has reasons to believe, but the same cannot be taken recourse to on the basis of reasons to suspect.*
2. *The Ld. AO recorded reasons that amount of Rs. 8.32 crores escaped assessment. However he made protective addition of Rs. 8.73 crores in the assessment order passed under section 147 of the Act.*
3. *The above itself shows the suspicion in the mind of the Ld. AO.*
4. *It is also important to note here that the assessment order in the case of the assessee was passed on 31.03.2015 by making protective addition of Rs. 8.73 crores whereas the substantive addition in the case of M/s Prakash Industries was made on 31.03.2016 date*

i.e, much after the date of assessment order passed in the case of assessee.

5. Your Honours, it is a trite law that no action of reassessment u/s 147 of the Act is permissible for framing protective assessment in the absence of substantive assessment till the date of assumption of jurisdiction u/s 147 of the Act.

6. **Hon'ble High Court of Bombay in the case of DHFL Venture Capital Fund Vs. ITO (34 taxmann.com 300) has explained that:**

“15. The jurisdictional requirement for reopening an assessment under Section 148 is the formation of a reason to believe by the Assessing Officer that income has escaped assessment. The formation of the reason to believe and the existence of that reason must be in the present. **Recourse can be taken to the provisions of Section 148 where the Assessing Officer has a reason in present, meaning thereby, a reason which is present to his mind when he forms his reason to believe, that income has escaped assessment. Recourse to Section 148 cannot be founded in law on a hypothesis of what would be the position in future should an appeal before the appellate authority, being the Tribunal or the High Court, result in a particular outcome. The statute does not**

contemplate the reopening of an assessment under Section 148 on such a hypothesis or a contingency which may emerge in the future. 16. The basis on which the Assessing Officer has purported to reopen the assessment is placed beyond any doubt by the affidavit which has been filed in reply to the Petition. As we have noted, there is no ambiguity whatsoever in the reasons which have been communicated to the assessee in the order dated 18 May 2012, but in the affidavit in reply, it has been stated that the income of Rs.32.83 Crores arising from the investment of contributions of the contributors to the Venture Capital Fund which has been claimed as exempt in the hands of the Petitioner should be assessed as income in the hands of the AOP of the contributors of the Petitioner "**on a protective basis**". Again it has been stated that the issue of taxing the AOP of the contributors of the Petitioner "has arisen from the submission of the Petitioner before the appellate authorities" where the Petitioner has contended that the transactions amount to a revocable transfer and that the income which would arise should be taxed in the hands of the individual contributors. **The reopening of an assessment under Section 148 on the basis of a submission which is raised before the appellate authority by the assessee is clearly impermissible because what Section 147 requires is a formation of a reason to**

believe by the Assessing Officer. In the present case, there is clearly a want of compliance with the jurisdictional condition. The Assessing Officer has not formed a reason to believe that income has escaped assessment since the reopening is based purely on a contingency that may arise upon a particular outcome before the appellate tribunal.”

7. Assessee also relies on the following decisions:

a. **Hon’ble ITAT Delhi in the case of G.K. Consultants Ltd. Vs. Income Tax Officer (1502/DEL/2013) has held that:**

“On the basis of foregoing discussion, we reach to a conclusion that the AO assumed jurisdiction to initiate and reopen reassessment u/s 147 of the Act on the basis of retracted statement of Shri Subodh Gupta which was recorded during the survey on Shri Subodh Gupta in his individual capacity and **the AO also proceeded to make a protective assessment/addition without any substantive assessment/addition and without making any further investigation and inquiry about the material and information before him at the time of recording reasons.**

23. Accordingly, we have no hesitation to hold that the AO assumed jurisdiction for reopening of assessment u/s 147 of the Act and for issuing notice u/s 148 of the Act on wrong premise and without

any justified, cogent and legal reason. We, therefore, further hold that there existed no good or sufficient ground or reason for reopening of the case and issuance of notices u/s 148 of the Act against the assessee company. We also hold that the condition precedent for valid initiation of reassessment is not being satisfied as the belief that income chargeable to tax has escaped assessment does not exist on the date of assuming jurisdiction u/s 147 of the Act. Therefore, all subsequent proceedings including issuance of notice u/s 148 of the Act were illegal and bad in law.

Accordingly, ground no. 2, 3 and 4 of the assessee are allowed and we hold that the CIT(A) has erred in confirming the action of the AO for assuming jurisdiction u/s 147 of the Act and issuing notice u/s 148 of the Act to the assessee for reopening of assessment and, thus, all proceedings u/s 147 and 148 of the Act to the assessee including notices are hereby quashed.

b. Hon'ble ITAT Mumbai in the case of M.P. Ramachandran Vs. DCIT (32 SOT 592) has held that:

"Thus, protective assessment is always successive to the substantive assessment. There may be a substantive assessment without any protective assessment, but there cannot be any protective

assessment without there being a substantive assessment. In simple words, there has to be some substantive assessment/addition first which enables the Assessing Officer to make a protective assessment/addition. Substantive addition/assessment is made in the hands of the person in whose hands the Assessing Officer prima facie holds the opinion that the income is rightly taxable. Having done so and with a view to protect the interest of the revenue, if the Assessing Officer is not sure that the person in whose hands he had made the substantive addition rightly, he should embark upon the protective assessment. **Thus, the protective assessment is basically based on the doubt of the Assessing Officer as distinct from his belief which is there in the substantive assessment. Obviously, there is no place for 'doubt' in the scheme of reassessment, as it has to be a belief of the Assessing Officer about the escapement of income, which is the foundation for assessment or reassessment under section 147. Even if for a moment, the departmental view is accepted that the protective addition is different from substantive addition and, hence, the reassessment proceedings be upheld, ultimately the same conclusion will follow if the substantive addition is struck down at a place where it was made. In such a scenario, the protective addition will get converted into**

substantive addition in the reassessment. That will also run contrary to the format of reassessment, being to tax an income which has escaped assessment. In that case again, it will tantamount to reopening assessment on the basis of an item of income or disallowance, which has already been made in block assessment of the assessee, thereby leaving no income escaping assessment. Under these circumstances, having made an addition of Rs. 527.85 lakhs in the block assessment, the Assessing Officer was not justified in forming the belief, either on substantive or protective basis, that the same income had escaped assessment in the instant year. Therefore, the initiation of reassessment proceedings on this count could not be upheld. [Para 22]

II. Addition made is without considering the facts of the case; non application of mind

1. The Ld. AO made addition of Rs. 8.73 crores without considering the facts of the case.
2. While making additions the Ld. AO stated that the “The funds raised by the assessee by way of share application and investments are shown to have been received from companies which are paper companies and run by entry operators. Hence the total source of funds is non genuine. All the shareholders changed during the year....” At para 18 he stated that the” amount of Rs. 8.73 shown in the books is treated as unexplained under section 68 of the Act”

3. He added the entire net worth of the company under section 68 without considering that the assessee did not raise any share capital during the year under consideration.

4. The Ld. AO did not even consider that during the year under consideration the assessee invested only Rs. 4.36 crores in M/s Prakash Industries.

5. The entire addition made is without appreciating the provisions of the law and without applying mind to the facts of the case.

III. The assessee had discharged its onus by furnishing all the documentary evidences to establish the identity, genuineness and creditworthiness of the share applicants

1. During the year under consideration the assessee did not issue any share capital or received any share application money from any person.

2. The assessee company has made investment in shares of M/s Prakash Industries Ltd. for Rs. 8.73 crores out of which Rs. 4.36 crores was paid as share application money in earlier years. **This fact can be verified from the financial statements of the assessee company attached at page no. 2-9 of the paper book.** From Schedule D it is apparent that amount of Rs. 4.36 crores were paid in the earlier years which is shown as share application money.

3. The assessee has paid only Rs. 4.36 crores for investment in shares of M/s Prakash Industries in the relevant assessment year. The sources of funds are the sale of shares.

4. To establish the sources of funds invested in M/s Prakash Industries the assessee had submitted the details of shares sold during the year under consideration which is **attached at page no. 61-62 of the paper book. The list contain name, address, PAN, of the party to whom shares have been sold and the name of script and no. of shares sold.**

5. The assessee has also furnished before the Ld. AO all the sale invoices raised by it on sale of shares which are **attached at page no. 63 to 77 of the paper book.** To establish the identity of the sellers the assessee has also submitted the ROC master data of each of the seller **attached at page no. 80-86 of the paper book.**

6. All the transaction of sale of shares were undertaken through the banking channel and the bank statement of the assessee reflecting credit in the bank account on sale of shares is **attached at page no. 78-79 of the paper book.**

7. The assessee has also furnished before the Ld. AO the details of opening and closing stock of shares for the F.Y. 2007-08 which is **attached at page no. 60 of the paper book.**

8. The assessee has furnished before the Ld. AO the share certificate of M/s Prakash Industries along with the ledger account and the bank statement highlighting entries of amount invested in Prakash. **Refer page no. 45-69 of the paper book.**

9. The assessee in response to the notice dated 13.03.2015 filed its reply on 20.03.2015 **attached at page no. 57-59 of the paper book** stated the name, address, PAN etc. are of each of the purchaser of shares have been given by the assessee and your good self may summon the parties under section 131/133(6) of the Act since the purchasers informed the assessee that they would provide information if the department directly ask them to produce.

10. However the Ld. AO did not undertake any exercise of summoning the parties himself but forced the assessee to produce the persons.

11. The Ld. AO did never point out any defect or controvert the evidences submitted by the assessee but rejected them and only emphasised on production of controlling persons the opportunity of which was also not provided in spite of the request of the assessee to directly summon such persons.

12. Further it is a trite law that the Ld. AO cannot reject the contemporary evidences submitted by the assessee without pointing any defects and non-production of parties cannot be a ground for making disallowance.

IV. All the allegations made by the Ld. AO are without any basis;the assessee had duly rebutted all the allegations of the Ld. AO- Refer page no. 37-39 of the assessment order

S. No.	Allegations of Ld. AO	Rebuttal of assessee
1.	Statement of entry operator Shiv Shankar Banka was recorded u/s 132(4) in which he has admitted to have provided accommodation entries to Prakash Group	1. The department has no corroborative evidence to support the content of the statement. 2. Mr. Shiv Shankar Banka has retracted this statement on 05.11.2012 i.e, within a week by stating that the statement was recorded under the extreme pressure and he was forced to state what is written in that statement. Refer page no. 80-81 of the common paper book.
2.	Statement of new directors (after taken over of the investor company by Prakash Group) of this Jamakharchi Company has been recorded and they have admitted that they have no knowledge of the affairs of these companies and they are acting on the instructions of Prakash Group management.	1. The statement recorded by the Ld. AO was not provided during the course of assessment proceedings in spite of specific request and was only provided with the assessment order. This is in <u>gross violation of principle of natural justice.</u> 2. Without prejudice to the above, On perusal of the statement of

		<p>directors it is quite evident that none of the director stated that the assessee company is a paper company. Mere because the directors are unaware of the working of the company it does not necessarily means that the company is a bogus company.</p>
3.	<p>Further, cheque books of the assessee company as well as investor companies were seized from the office premises of Prakash Group which clearly indicate that the company was controlled by Prakash Group.</p>	<p>1. At the very outset it is submitted that the seized cheque books were never provided to the assessee for filing its objections. <u>This is in gross violation of principles of natural justice.</u></p> <p>2. The directors of the investor companies were the employees of the Prakash Industries and the Shri. Agarwal is the promoter and substantial shareholder of the assessee company. Therefore presence of cheque book at the premises of Prakash where directors were sitting is not illegal and cannot be used against the assessee.</p> <p>The assessee respectfully submitted that the cheque books were lying at the office of the directors for the payment of statutory dues.</p> <p>3. Most importantly the cheque book is undated which does not pertain to any assessment year and on the basis of such document assessment under section 153C cannot be re-opened.</p> <p>Mere availability of certain documents does not prove that the documents were used for manipulating the accounts of the company.</p>
4.	<p>Enquiries revealed that affairs of these investor companies have been managed by entry operator who has given by statement on oath that the company has been floated and sold to Prakash Industries Group for a</p>	<p>1. Any such enquiry report backed by evidences which shows that the Prakash Group has purchased such companies on commission is never confronted to the assessee.</p> <p>2. All the Statements recorded by the department were retracted.</p>

	commission.	
5.	<p>The investor companies have meagre profits and only balance sheet based companies.</p> <p>The investor companies are situated at a table place not with any infrastructures which are required to conduct proper business operations.</p>	<p>1. The investor companies were dealing in shares and securities. It does not require infrastructure as in case of manufacturing company.</p> <p>2. It is also submitted that the earnings are not the criteria to decide whether the company is a bogus company.</p>
6.	<p>The directors who have said to be conducting the affairs of the companies are not traceable.</p> <p>The shareholder companies who have contributed to the assessee for share capital are also not traceable and bogus and only paper entities.</p> <p>The assessee has also failed to produce the people involved in running of the operations of Assessee Company as well as share capital contributing companies.</p>	<p>1. During the year no share capital was issued.</p> <p>2. Name, address, PAN of purchaser companies were given and request was made to issue summons to them.</p> <p>Refer page no. 4850 of the paper book.</p>
7.	<p>No register of minutes of meeting of board of directors have been produced of the assessee company so far. Only the single page having signature of one person cannot suffice.</p> <p>No register of allotment of shares of assessee company has been produced.</p>	<p>1. During the year no share capital was issued</p>
8.	<p>The investments of the assessee company before taken over by assessee group was in bogus paper company.</p>	<p>1. On perusal of enquiry report, it is no-where mentioned that the enquiries in respect of investments/loans/advances were also made. Refer page no. 366-368 of the</p>

	The shareholders of assessee company before taken over by assessee group were in paper companies.	<p>paper book.</p> <p>2. The allegation made by the Ld. AO is only on the basis of his assumptions.</p>
9.	Bank transaction trail prepared reveal that before the amounts credited in books of assessee there were multiple layering of transactions only to give colour of genuine transactions routed through bank	<p>1. It is submitted that the cash trail as alleged by the Ld. AO have never been provided to the assessee in spite of the specific request of the assessee vide letter attached at page no. 48-50 of the paper book..</p> <p>2. The Ld. AO has failed to establish that any cash has exchanged hands.</p> <p>In absence of any material to show that the cash was deposited by the assessee company the allegation made by the Ld. AO is baseless.</p>
10.	The chairman of beneficiary group has admitted that unaccounted money generated by the Prakash Industries was converted as share application money through various paper companies including that of assessee company. Admission of Sh. Ved Prakash Agarwal during statement recorded u/s 132(4) of I.T. Act proved the modus operandi used to convert unaccounted money into books of accounts.	<p>1. The statement cannot be relied as it was retracted by Shri. Ved Prakash Agarwal on 02.11.2014.</p> <p>2. Before using such statement the department has to bring on record the material corroborating such statement.</p>
11.	The transaction in the bank account were for the sake of rotation	<p>It is submitted that the cash trail as alleged by the Ld. AO have never been provided to the assessee.</p> <p>The Ld. AO has failed to establish that any cash has exchanged hands.</p> <p>In absence of any material to show that the cash was deposited by the assessee company the allegation made by the Ld. AO is baseless.</p>
12.	From investment list of this jamakharchi company it is evident	<p>1. The inspector report referred by the Ld. AO was never provided to the</p>

	<p>that the Kolkata based companies in which investments were made are also jamakharchi companies as seen from their addresses and verification made at some of those companies. Application form proved that same controlling persons are for most of share applicant companies.</p>	<p>assessee company for the rebuttal. This is in <u>gross violation of principle of natural justice.</u> The inspector report was provided to the assessee only at the time of proceedings before the CIT(A).</p> <p>2. On perusal of inspector report we found that the <u>name and designation of the inspector is nowhere mentioned in the inspector report neither it is mentioned that when the enquiries were conducted.</u></p> <p>3. The allegation made by the Ld. AO is completely baseless. In the enquiry report name of the Vanshi Farms is not mentioned anywhere. No enquiry was made in respect of the investor company.</p>
13.	<p><i>It is seen that most of the companies in which investment has been made by the Jama kharchi companies have bank accounts in the same bank and in the bank they are shown to be having common address.</i></p>	<p>1. Ld. AO never provided the copies of such enquiry report for rebuttal of the assessee.</p> <p>Hence the evidence gathered behind the back of the assessee cannot be used against the assessee.</p>
14.	<p><i>Shares of these Jamakharchi companies were allotted at a premium to the other jamakharchi companies, although the said jamakharchi companies had no net worth comparables to the price of its share.</i></p>	<p>The allegation is general. Assessee fails to understand in respect of which company the Ld. AO is alleging. Without any supporting evidence, a general allegation cannot be made a basis for addition.</p>
15.	<p><i>No dividend was ever provided by the assessee company and there is no justification of investment at huge premium.</i></p>	<p>Your Honours, the dividend is never the criteria of for receiving the share capital at huge premium.</p> <p>Further there is no law which held the non-dividend declarant company as bogus company.</p>
16.	<p><i>ITR of all new share applicants have been filed from the same IP</i></p>	<p>It is already submitted that the assessee company is a group company</p>

	Address. This shows that the documents of all paper company have been prepared at same place.	of the promoter group pf M/s Prakash Industries. Therefore it cannot be doubted if the ITRs have been filed from the same IP address.
17.	Prakash group have paid cash to the entry operator. The entry operator routes the cash through many bank accounts and the investment side of these companies the investments are replaced with cash/ bank or investment in group companies of Prakash Group.	<p>It is submitted that the cash trail as alleged by the Ld. AO have never been provided to the assessee.</p> <p>The Ld. AO has failed to establish that any cash has exchanged hands.</p> <p>In absence of any material to show that the cash was deposited by the assessee company the allegation made by the Ld. AO is baseless.</p>
18.	In F.Y. 2007-08 total shareholding was purchased by Prakash Group. It proves the company was specially formed for Prakash Group and cash was given by Prakash Group and cash was given by Prakash Group.	<p>1. Allegation of Ld. AO is baseless.</p> <p>2. The Ld. AO has made this allegation without referring to the trail of cash exchanging hands.</p> <p>3. The Ld. AO has failed to show the deposit of cash in the bank account of any of the company referred by him.</p>

On issue of brokerage:

The addition of brokerage is consequential to the main addition of share capital/investments and solely based on the statement of Shri. V.P. Agarwal. **Refer page no. 47-48 of the assessment order.** Since the addition of share capital made by the Ld. AO is baseless and Shri. VP Agarwal retracted his statement which was given under threat and coercion on the very next day. The consequential addition of brokerage deserves to be deleted.

7. Ld. CIT DR on the other hand relied upon the order of the Assessing Officer.

8. After considering the submissions and on perusal of the impugned order as well as material referred to before us at the time of hearing. From a bare perusal of the assessment order, it is seen that ld. Assessing Officer has sought to reopen the case u/s.147 by issuance of notice dated 22.02.2015 for making protective addition of Rs. 8,73,24,240/- and unexplained expenditure on account of brokerage at Rs.4,36,621/-. Apart from that, another glaring point is that the amount mentioned in the income escaping assessment is incorrect, because only Rs. 4.63 crore was invested in Prakash Industries Ltd. during the relevant assessment year, and therefore, entire addition Rs. 8,73,24,240/- could not have been made u/s. 68 in this year. Another intriguing point is that protective addition was made in the hands of the appellant vide order dated 31.03.2015 even before the substantive addition was made in the hands of Prakash Industries Ltd. in order passed on 31.03.2016. Thus, neither at the time of recording the reasons, nor at the time of framing the assessment, Assessing Officer was't sure about whose income has escaped assessment. Thus, we do not find any reason to interfere with the findings of the ld. CIT (A) that reopening for resorting to make protective assessment cannot be upheld. Further, Assessing Officer has also not even verified the records that the alleged escapement of income of Rs.8.32 crore was received in this assessment year or not. Thus, there is a fallacy in the reasons recorded itself, and therefore, we uphold the order of ld. CIT (A) in quashing the order passed by the Assessing Officer u/s.147.

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

Order pronounced in the Open Court on 9th July, 2021

Sd/-

[Dr. B.R.R. KUMAR]

[ACCOUNTANT MEMBER]

DATED: 9/07/2021

PKK:

Sd/-

[AMIT SHUKLA]

JUDICIAL MEMBER