आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर

IN THE INCOME TAX APPELLATE TRIBUNAL, INDORE BENCH, INDORE

BEFORE HON'BLE RAJPAL YADAV, VICE PRESIDENT
AND
SHRI MANISH BORAD, ACCOUNTANT MEMBER
VIRTUAL HEARING

ITA No.95/Ind/2018
Assessment Year: 2008-09
&
ITA No.94/Ind/2018
Assessment Year: 2009-10

M/s. Shivalika Realities Pvt. Ltd.
23,3-9, Sarv Mittal Toll Naka
Near Bombay Hospital,
Indore : Appellant
PAN:AALCS2447R
V/s
ITO 5(1),
Indore : Respondent

Appellant by	S/Shri Anil Kamal Garg, & Arpit Gaur, ARs
Respondent by	Shri S.S. Mantri, CIT-DR
Date of Hearing	02.08.2021
Date of Pronouncement	04.10.2021

O R D E R

PER MANISH BORAD, A.M

The above captioned appeal for A.Y. 2008-09 and appeal for A.Y. 2009-10 of the appellant are directed against the common order

of the Ld. Commissioner of Income-Tax (Appeals) - II, (in short 'Ld.CIT(A)'), Indore dated 27.11.2017 which are arising out of the order of ITO -5(1), Indore dated 28.03.2016.

2.Grounds of appeal raised by Assessee for AY 2008-09 in ITA-94/IND/2018

1. *That, on the facts and in the circumstances of the case, the learned CIT(A) grossly erred, both on facts and in law, in passing the Order without considering the written submissions made by the appellant on the legal ground and without giving any effective opportunity of being heard to the appellant on other grounds raised in the Appeal Memo before him.*

2a). *That, without prejudice to the above, the learned CIT(A) grossly erred, both on facts and in law, in confirming the action of the AO in issuing notice under s.148 of the Income-Tax Act, 1961 and framing the reassessment in the case of the appellant company without considering the material fact that the issuance of the notice under s.148 of the Act by the AO, itself, was bad-in-law and void ab initio.*

2b). *That, without prejudice to the above, the learned CIT(A) grossly erred, both on facts and in law, in confirming the action of the AO in issuing notice under s.148 of the Income-Tax Act, 1961 and framing the reassessment in the case of the appellant company without considering the material fact that having withdrawn the notice issued earlier under s.153C of the Act to the appellant, for the same assessment year, there was absolutely no justification for the AO to restart the assessment proceedings, earlier dropped, under the garb of the provisions of s.147 of the Act.*

2c). *That, without prejudice to the above, the learned CIT(A) grossly erred, both on facts and in law, in confirming the action of the AO in issuing notice under s.148 of the Income-Tax Act, 1961 and framing the reassessment in the case of the appellant company without considering the material fact that in the instant case, the Assessing Officer by himself had not formed any belief as regard to escapement of any income chargeable to tax in the hands of the appellant and instead, merely on the finding of some other Assessing Officer in some other case, for some other assessment year, had assumed the jurisdiction for issuance of notice under s.148 of the Act.*

2d). *That, without prejudice to the above, the learned CIT(A) grossly erred, both on facts and in law, in not considering the material fact that in the case of some other assessee namely Shri Mohanlal Chugh, which has been made the very basis for issuance of notice under s.148 of the Act to the appellant, the findings were not to the effect of payment or any unexplained investment by the appellant but, on the contrary, the findings were relating to the alleged receipt of money by the above named Shri Mohanlal Chugh on behalf of the appellant company thereby making the very foundation of belief, and, consequently, the notice issued under s.148, as bad-in-law and void ab initio.*

3. *That, without prejudice to the above, the learned CIT(A) grossly erred, both on facts and in law, in confirming the additions of Rs.12,13,37,500/- made by the AO in the appellant's income.*

4a). That, without prejudice to the above, the learned CIT(A) grossly erred, both on facts and in law, in confirming the addition of Rs.10,63,37,500/- made by the AO in the appellant's income, by passing a cryptic order, merely on guess work, surmises and conjectures, under the head unexplained investment, without considering and appreciating the material fact that all through, the allegation against the appellant company was unaccounted receipt of money and not unaccounted or unexplained investment.

4b). That, without prejudice to the above, the learned CIT(A) grossly erred, both on facts and in law, in confirming the addition of Rs.10,63,37,500/- made by the AO in the appellant's income, on account of alleged unexplained investment, without considering the material fact that during the course of the assessment proceedings, the learned AO could not rebut the submission of the appellant that during the year under consideration, it had not made any investment at all and further, the AO also failed to give any finding that the alleged investment was made by the appellant company during the year under consideration.

4c). That, without prejudice to the above, the learned CIT(A) grossly erred, both on facts and in law, in confirming the addition of Rs.10,63,37,500/- made by the AO in the appellant's income, without considering and appreciating the material fact that during the previous year under consideration, the appellant had neither made/ incurred any unexplained investment/ expenditure nor it had made any unaccounted receipts chargeable to tax.

5a). That, without prejudice to the above, the learned CIT(A) grossly erred, both on facts and in law, in confirming the addition of Rs.1,50,00,000/- made by the AO in the appellant's income, on account of alleged unexplained cash credit under s.68 of the Act in respect of certain unsecured loans appearing in the audited balance sheet of the appellant company for the relevant previous year, without considering and appreciating the material fact that such issue was not the subject matter of notice under s.148 of the Act and further, during the course of the assessment proceedings, there was no material before the AO from which he could have presumed that such cash credit represents the escaped income of the appellant.

5b). That, without prejudice to the above, the learned CIT(A) grossly erred, both on facts and in law, in confirming the addition of Rs.1,50,00,000/- made by the AO in the appellant's income, without invoking the provisions of s.68 of the Act and without considering and appreciating the material fact that the entire sum shown by the appellant was quite genuine having been received through banking channel from the persons whose identity and creditworthiness were beyond doubt.

6. That, the appellant further craves leave to add, alter or amend the foregoing ground of appeal as and when considered necessary.

3.Grounds of appeal raised by Assessee for AY 2009-10 in ITA-95/IND/2018

1. That, on the facts and in the circumstances of the case, the learned CIT(A) grossly erred, both on facts and in law, in passing the Order without considering the written submissions made by the appellant on the legal ground and without giving any effective opportunity of being heard to the appellant on other grounds raised in the Appeal Memo before him.

2a). That, without prejudice to the above, the learned CIT(A) grossly erred, both on facts and in law, in confirming the action of the AO in issuing notice under s.148 of the Income-Tax Act, 1961 and framing the reassessment in the case of the appellant company without considering the material fact that the issuance of the notice under s.148 of the Act by the AO, itself, was bad-in-law and void ab initio.

2b). That, without prejudice to the above, the learned CIT(A) grossly erred, both on facts and in law, in confirming the action of the AO in issuing notice under s.148 of the Income-Tax Act, 1961 and framing the reassessment in the case of the appellant company without considering the material fact that having withdrawn the notice issued earlier under s.153C of the Act to the appellant, for the same assessment year, there was absolutely no justification for the AO to restart the assessment proceedings, earlier dropped, under the garb of the provisions of s.147 of the Act.

2c). That, without prejudice to the above, the learned CIT(A) grossly erred, both on facts and in law, in confirming the action of the AO in issuing notice under s.148 of the Income-Tax Act, 1961 and framing the reassessment in the case of the appellant company without considering the material fact that in the instant case, the Assessing Officer by himself had not formed any belief as regard to escapement of any income chargeable to tax in the hands of the appellant and instead, merely on the finding of some other Assessing Officer in some other case, had assumed the jurisdiction for issuance of notice under s.148 of the Act.

2d). That, without prejudice to the above, the learned CIT(A) grossly erred, both on facts and in law, in not considering the material fact that in the case of some other assessee namely Shri Mohanlal Chugh, which has been made the very basis for issuance of notice under s.148 of the Act to the appellant, the findings were not to the effect of payment or any unexplained investment by the appellant but, on the contrary, the findings were relating to the alleged receipt of money by the above named Shri Mohanlal Chugh on behalf of the appellant company thereby making the very foundation of belief, and, consequently, the notice issued under s.148, as bad-in-law and void ab initio.

3a). That, without prejudice to the above, the learned CIT(A) grossly erred, both on facts and in law, in confirming the addition of Rs.10,63,37,500/- made by the AO in the appellant's income, by passing a cryptic order, merely on guess work, surmises and conjectures, under the head unexplained investment, without considering and appreciating the material fact that all through, the allegation against the appellant company was unaccounted receipt of money and not unaccounted or unexplained investment.

3b). That, without prejudice to the above, the learned CIT(A) grossly erred, both on facts and in law, in confirming the addition of Rs.10,63,37,500/- made by the AO in the appellant's income, on account of alleged unexplained investment, without considering the material fact that during the course of the assessment proceedings, the learned AO could not rebut the submission of the appellant that during the year under consideration, it had not made any investment at all and further, the AO also failed to give any finding that the alleged investment was made by the appellant company during the year under consideration.

3c). That, without prejudice to the above, the learned CIT(A) grossly erred, both on facts and in law, in confirming the addition of Rs.10,63,37,500/- made by the AO in the appellant's income, without considering and appreciating the material fact that

during the previous year under consideration, the appellant had neither made/ incurred any unexplained investment/ expenditure nor it had made any unaccounted receipts chargeable to tax.

4. That, the appellant further craves leave to add, alter or amend the foregoing ground of appeal as and when considered necessary.

4. Since, the issues involved in appeals of both these years relates the same assessee and are interlinked and interlaced, as agreed by both the parties we will take both these appeals and pass a common order for sake of convenience and brevity.

5. The brief facts of the case, as culled out from the records, are that the assessee is a private limited company incorporated under the then Companies Act, 1956 and is assessed to Income-Tax. The appellant company is engaged in the business of Real Estate Builders and Developers. Search and Seizure operations u/s. 132 of the Income-Tax Act, 1961 (in short "The Act"), were carried out on a group of asseessees namely 'Satellite Group' on 19.11.2019 and during the course of search in premises of M/s. Phoenix Devcons Pvt. Ltd. (in short 'PDPL'), one of the group companies of the Satellite Group, some loose papers, inventorized as Annexure A/3, containing the payment details, aggregating to a sum of Rs. 18,42,50,000/- made to Shri Mohanlal Chugh, one of the then directors of the appellant company, were found mentioned which were correlated with notings in one Diary inventoized as BS-8, which was also seized from the premises of the PDPL. Thereafter, the then Ld. Assistant Commissioner of Income-Tax – 3(1), Indore issued notices u/s. 153C of the Act for A.Y. 2008-09 and A.Y. 2009-10, both dated 14.11.2011. In

response to notices issued u/s. 153C, the appellant company, vide its two letters both dated 19.12.2011 intimated the AO that it had already furnished its returns of income u/s. 139 of the Act and further, made a request that the returns so furnished u/s. 139 be treated as the returns furnished in compliance to notices u/s. 153C. Thereafter, by way of two separate letters, both dated 19.12.2011, the Ld. ACIT-3(1) withdrew the earlier notices issued u/s. 153C of the Act for both the A.Y. 2008-09 & A.Y. 2009-10. Subsequently, the Ld. ACIT-5(1) issued a notice u/s. 148 of the Act to the appellant for A.Y. 2008-09 on 19.03.2015 and the ld. ACIT-3(1) issued a notice u/s. 148 of the Act to the appellant for A.Y. 2009-10 on 08.09.2014. In response to such notices, the appellant, vide its letters dated 02.04.2015 and 03.10.2014, objected the re-opening of its assessments and also made a request for supply of the reasons recorded before issuance of the notices. The reasons so recorded were provided to the appellant on 04-12-2015 for both the assessment years. Afterwards, through its letters dated 14.12.2015, the appellant raised its objections which were overruled by the AO by passing two separate orders i.e. on 23-12-2015 for A.Y. 2008-09 & on 29.12.2015 for A.Y. 2009-10. Subsequently, the cases of the appellant for both the assessment years were selected for scrutiny and notices u/s. 142(1) & 143(2) along with questionnaires were issued from time to time which got served upon the appellant company. In response to such notices, detailed submissions were filled by the appellant company along with various documentary evidences. After considering the same

the income of the appellant for A.Y. 2008-09 & A.Y. 2009-10 was assessed in the following manner:

For A.Y. 2008-09:

Income shown in the return		Rs. Nil
Add: (1)	Unexplained investment in purchase of land on substantive basis	Rs. 10,63,37,500/-
Add: (2)	Unexplained unsecured loans	Rs. 1,50,00,000/-
Total Assessed Income		Rs. 12,13,37,500/-
Rounded off		Rs. 12,13,37,500/-

For A.Y. 2009-10:

Income shown in the return		Rs. Nil
Add: (1)	Unexplained investment in purchase of land on substantive basis	Rs. 10,63,37,500/-
Total Assessed Income		Rs. 10,63,37,500/-
Rounded off		Rs. 10,63,37,500/-

6. Being aggrieved with the assessment orders for both the A.Y. 2008-09 and A.Y. 2009-10, the appellant company preferred appeals before the learned CIT(A)-2, Indore. During the course of the appellate proceedings, the appellant company furnished its written submissions, copies whereof have been furnished by the appellant, before us, in its paper books filed separately for A.Y. 2008-09 and A.Y. 2009-10.

7. Ld. CIT(A) dismissed the appeals of the appellant for both the A.Y. 2008-09 and A.Y. 2009-10 and thus, the appellant is in appeal before this Tribunal.

8. The appellant company has filed two separate paper books for A.Y. 2008-09 and A.Y. 2009-10, respectively containing 103 pages and 61 pages on 23.07.2019. Subsequently, vide its letter dated 17.01.2020, the appellant filed certain additional evidences

in form of a separate paper book running from page nos. 104 to 428 with a prayer of admission of such additional evidences under Rule 29 and Rule 18(4) of the Income-Tax (Appellate Tribunal) Rules, 1963. A copy of the paper book containing the additional evidences was also provided by the appellant to the Revenue. The bench had asked the CIT(DR) to furnish his comments/objections, if any, upon the admissibility of the additional evidences. In response, the office of the CIT(DR) filed a copy of the comments of the concerning assessing officer i.e. ITO-5(1), Indore dated 10.02.2021 along with its covering letter dated 23.02.2021 which are perused and placed on record.

9. Upon going through the comments of the concerning ITO, we find that the Revenue has conceded that the additional evidences so furnished by the appellant are already available on the record and many of these additional evidences were already considered by the AO while passing the assessment orders. Thus, we find no serious objection of the Revenue against furnishing of the additional evidences by the appellant and accordingly, the same are admitted.

10. <u>We will first take ground no. 1 for A.Y. 2008-09 and A.Y. 2009-10 relating to not providing opportunity of being heard</u>

During the course of the hearing, the appellant company has not pressed this ground for both the assessment years. Accordingly, the Ground No. 1 for A.Y. 2008-09 and A.Y. 2009-10 is <u>Dismissed.</u>

11. Ground Nos. 2(a), 2(b) & 2(c) for A.Y. 2008-09 & A.Y. 2009-10 – Issuance of Notice u/s. 148 of the Act

12. The brief facts relating to the grounds are that Search and Seizure operations u/s. 132 of the Act, were carried out on group of asseessee(s) namely 'Satellite Group' on 19-11-2019 and during the course of search at the premises of M/s. Phoenix Devcons Pvt. Ltd., one of the group companies of the Satellite Group, some loose papers, inventorized as Annexure A/3, containing the payment details, aggregating to a sum of Rs. 18,42,50,000/-, made to Shri Mohanlal Chugh, one of the then directors of the appellant company, were found mentioned which were correlated with notings in one Diary inventoized as BS-8, which was also seized from the premises of the PDPL. Thereafter, the then Ld. Assistant Commissioner of Income-Tax – 3(1), Indore issued notices u/s. 153C of the Act for A.Y. 2008-09 and A.Y. 2009-10, both dated 14.11.2011. In response to notices issued u/s. 153C, the appellant company, vide its two letters both dated 19.12.2011 intimated the AO that it had already furnished its returns of income u/s. 139 of the Act and further, made a request that the returns so furnished u/s. 139 be treated as the returns furnished in compliance to notices issued u/s. 153C. Thereafter, by way of two separate letters, both dated 19.12.2011, the Ld. ACIT-3(1) withdrew the earlier notices issued u/s. 153C of the Act for both the A.Y. 2008-09 & A.Y. 2009-10. Subsequently, the Ld. ACIT-5(1) issued a notice u/s. 148 of the Act to the appellant for for A.Y. 2008-09 on 19.03.2015 and the ld. ACIT-3(1) issued a notice u/s. 148 of the act to the appellant

for A.Y. 2009-10 on 08.09.2014. In response to such notices, the appellant vide its letters dated 02.04.2015 and 03.10.2014 objected the re-opening of its assessments and also made a request for supply of the reasons recorded before issuance of the notices. The reasons so recorded were provided to the appellant on 04-12-2015 for both the assessment years. Afterwards, through its letters dated 14.12.2015, the appellant raised its objections which were overruled by the AO by passing two separate orders i.e. on 23-12-2015 for A.Y. 2008-09 & on 29.12.2015 for A.Y. 2009-10.

13 Before the ld. CIT(A) also, the appellant company challenged the reopening of assessment u/s.148 by the AO, but the CIT(A) did not find any merit in the contention of the appellant. The Ld. CIT(A) has given a finding that the AO had categorically established that in the appellant's case, after recording the reasons and after taking due approval from his Range Head, the notices u/s. 148 were issued. The reasons were recorded to the effect that the income of the appellant had got escaped assessment in the form of receipt made by one of its directors, of a sum of Rs. 10,63,37,500/-, on behalf of the appellant company, which were not so recorded in the books of account of the appellant. The CIT(A) also found from the assessment records that the copies of the reasons so recorded were also provided to the appellant company on 04.12.2004 and according to the chronology of the events so recorded by the AO, clearly indicates that the appellant's objections were replied by the AO vide letters dated 15.01.2016. The ld. CIT(A) also found that the appellant was further issued the questionnaire and was supplied the

documents as asked by it. Thus, the CIT(A) found no merit in the grounds raised by the appellant challenging the issuance of the notice u/s. 148.

14. Before us, the appellant company has made a written submission in the form of a Synopsis. The relevant portion of the appellant's reply is being reproduced as under:

"***SUBMISSION[for Ground No. 2(a) & 2(c)]***

In this context, it is submitted as under:

1.00 ***FURNISHING OF ORIGINAL RETURNS OF INCOME BY THE APPELLANT***

In the instant case, the appellant had furnished its original return of income for the assessment years under consideration, i.e. A.Y. 2008-09 and A.Y. 2009-10, quite voluntarily under the provisions of s.139 of the Income-Tax Act, 1961 on 10-12-2008 [kindly refer PB Page No. 1 for A.Y. 2008-09] and on 19-0-2010 [kindly refer PB Page No. 1 for A.Y. 2009-10]. The returns so furnished were duly processed under s.143(1)(a) of the Act without making any adjustment in the returned income of the appellant.

2.00 ***FORMING OF BELIEF BY THE AO ON THE BASIS OF FINDING OF SOME OTHER AO IN THE CASE OF THE SOME OTHER ASSESSEE***

That, the learned AO, merely on the basis of some finding of some other assessing officer in the case of some other assessee, for some other assessment year, without carrying out any independent enquiry by himself, formed a belief that the income of the appellant, for the assessment years under consideration, escaped to assessment.

2.01 ***REASON TO BELIEVE SHOULD BE THAT OF THE AO HIMSELF AND NOT A BORROWED SATISFACTION OF SOME OTHER OFFICER***

It is a settled law that the reason to believe recorded by the Assessing Officer should be that of his own and not a borrowed satisfaction of some other Officer. In the instant case, the action of the learned AO in issuing the notice under s.148, after the expiry of four years from the end of the relevant assessment year, merely by acting mechanically upon the findings given by some other AO in the case of some other assessee without applying his own mind,is unjustified, unwarranted, illegal and bad-in-law. For such proposition, reliance is placed on the following judicial pronouncements:

i) CIT v. Kamdhenu Steel & Alloys Ltd. (2012) 248 CTR 33 (Del.HC)

ii) *CIT v. Multiplex Trading & Industrial Co Ltd (2015) 128 DTR 217 (Delhi)(HC)*

iii) *Pr. CIT v G. Pharma India Ltd.[2017] 384 ITR 147 (Delhi) (HC)*

iv) *CIT vs. Insecticides (India) Ltd. (2013) 357 ITR 300 (Del.)(HC)*

v) *CIT v/s Meenakshi Oversea's Pvt Ltd (2017) 395 ITR 677(Del) (HC)*

vi) *CIT vs. Fair Invest Ltd. (2013) 357 ITR 146 (Del.)(HC)*

vii) *Sarthak Securities Co. (P.) Ltd. vs. ITO (2010) 329 ITR 110*

viii) *PCIT v. Manzil Dineshkumar Shah[2018] 95 Taxmann.com 46 (Guj) HC)*

ix) *Amar Jewellers Ltd. v. Dy. CIT (2018) 254 Taxman 384 (Guj.)(HC)*

x) *Deepraj Hospital (P) Ltd. v. ITO, 41/AGRA/2017, AY: 2010-11 Dtd:01/06/2018 (Agra)(Trib)*

xi) *ITO v. Reliance Corporation (2017) 55 ITR 69 (SN) (Mum.) (Trib.)*

3.00 ***ENTIRE REASONS FOR RE-OPENING ARE BASED ON ADDITIONS MADE BY SOME OTHER AO IN SOME OTHER ASSESSEE***

That, from the statement of reasons recorded by the learned AO [kindly refer PB Page No. 18 & 19 for A.Y. 2008-09], it would be observed by Your Honours that the entire premises of the learned AO for issuance of the notice under s.148 was hovering around the additions made by some other AO in the case of some other assessee on protective basis. It is submitted that nowhere from the statement of reasons, it is discernible that the learned AO, at his own end, made any effort to verify the veracity of the findings of the AO of Shri Mohanlal Chugh. It is not the claim of the learned AO that he himself made any independent enquiry, for the alleged escapement of income of the appellant company before forming any belief.

4.00 ***INFORMATION RECEIVED FROM EXTERNAL SOURCE WITHOUT ANY INDEPENDENT APPLICATION OF MIND BY THE LD. AO ARE VOID-AB-INITIO***

It is submitted that the reassessment proceedings so initiated by the learned AO merely on the basis of the information received from external source without any independent application of mind by the ld. AO are void-ab-initio. For such proposition, reliance is placed on the following decisions:

- ITO Vs. M/s. Softline Creations (P) Ltd. (in ITA No. 744/DeI/2012)

- CIT Vs. Gangeshwari Metal Pvt. Ltd. (2014) 264 CTR 277 (Del HC)

- M/s. Khatri Projects Pvt. Ltd. Vs. ITO (I.T.A. no. 4353/Del/2016)

- M/s. Devansh Exports Vs. ACIT (I.T.A. No. 2178/Kol/2017)

- Moti Adhesive P. Ltd. Vs. ITO (ITA No. 3133/Del/20I8)

- CIT Vs. Oasis Hospitalities Pvt. Ltd. (2011) 333 ITR 119 (Del HC)

- CIT Vs. Fair Invest Ltd. (2013) 357 ITR 146 (Del HC)

- Sarthak Securities Co. Ltd. Vs. ITO 329 ITR 110 (Delhi HC)

- Deeparaj Hospital (P)Ltd. Vs. ITO, 41/Agra/2017 dt. 01.06.2018 (Agra Trib)

- ITO Vs. Reliance Corporation (2017) 55 ITR 69 (SN) (Mum) (Trib)

- PCIT Vs. RMG Polyvinyl (I) Ltd. (2017) 83 taxmann.com 348 (Delhi HC)

- PCIT Vs.Meenakshi Overseas(P)Ltd.(2017) 82 taxmann.com 300 (Delhi HC)

- Gee Cee Cycle Balls Pvt. Ltd. Vs. ITO, ITA No. 867/DeL2013 dt. 30.10.2015

- CIT Vs. Goel Songs Golden Estate Pvt. Ltd. ITA No. 212 2012 dt 11.04.2012

- CIT Vs.Vrindavan Farms(P)Ltd. ITA No. 71, 72, 85 DeL2015 dt. 12.08.2015

- Dwarka Gems Ltd. ITA No. 71/ Jp/2017 (ITAT Jaipur)

- Nirmala Agarwal Vs. ACIT (ITA No. 995 & 996 Jp/2016) (ITAT Jaipur)

5.00 ***WHAT COULD NOT HAVE BEEN DONE DIRECTLY WAS NOT PERMISSIBLE TO BE DONE OBLIQUELY***

It is submitted that the assessment in the case of the assessee for the relevant assessment years stood completed under section 143(1) of the Act and the time limit for issuing notice under section 143(2) of the Act stood expired as on the date of reopening of the assessment and that even if scrutiny assessment under section 143(3) of the Act was to be made, the same would not fulfill criteria laid down under section 142(2) of the Act since the AO had not conducted any such independent enquiry of his own but had merely relied on borrowed satisfaction. Therefore when none of the said material was independently examined by the AO so as to put such material to the assessee under section 142(3) or for that to even to sustain the addition under section 143(3) of the Act then how the same could have been utilized for reopening the assessment under section 148 of the Act in the assessee's case. It is submitted that what could not have been done directly was not permissible to be done obliquely, meaning thereby, whatever is prohibited by law to be done could not have been legally effected by an indirect and circuitous contrivance. Reliance is placed on the following judicial pronouncements:

i)CIT Vs. Kalvinator of India Ltd. (2002) 256 ITR 1 (Del)(FB)

ii)Windson Electronics (P) Ltd.& Anr.Vs.UOI&Ors (2004) 269 ITR 481 (Cal)

iii)Smt. Durgabati & Smt.Narmadabala Gupta Vs. CIT,(1956)30ITR 101(Pat);

iv)Raja Yadvendra Datt Dube Vs. State of Uttar Pradesh(1964)54ITR506 (All)

v) Babul Lath Vs. ACIT (2002) 83 ITD 691 (Mum)

6.00 ***REASONS RECORDED BY THE LEARNED AO WERE NOT REASONABLE AND THE SAME WERE VAGUE IN NATURE***

Without prejudice to the above, it is further submitted that as the third party material had no presumptive value with respect to Section 292C of the Act then the burden of proof lies with the Department which had not been discharged and thus the said third party departmental material / evidences first have to be proved to have some sort of live casual nexus with the undisclosed income of the appellant to sustain the addition under section 148 of the Act, especially when the scope of what constitutes a " full and true" disclosure of material facts is also well settled Law where the assessee is only required to disclose the primary facts and nothing more. It is further submitted that the learned AO was required to show that there existed a reason to believe (based on credible and tangible material) that the appellant has failed

to fully and truly disclose the primary facts required for the purposes of assessing his case and such "reason to believe" for the purposes of reopening the assessment under section 147 of the Act r.w.s 148 of the Act cannot be based on surmises, conjectures or occasioned by a change in opinion but must be based on cogent material which establishes a live casual nexus between the information and inference so drawn by the learned AO. For such proposition, reliance is placed on the judgment of the Hon'ble Delhi High Court in the case of CIT-II Vs. Multiplex Trading and Industrial Co. Ltd. [2015] 63 taxmann.com 170(Delhi). It is submitted that the reasons recorded by the learned AO were not reasonable and the same were vague in nature to establish that the income of the appellant had escaped assessment for reopening the assessment under section 148 of the Act. Therefore, the reassessment proceedings in the assessee's case were bad in law, void ab-initio and consequent addition were unwarranted, unsustainable and deserves to be quashed.

In such circumstances, in view of the pronouncement of the various judicial authorities, the very initiation of notice under s. 148 deserves to be held as invalid and consequently, the impugned assessment order so passed also deserves to be strucked down."

"SUBMISSION [for Ground No. 2(b)]

1.00 ***REASON FOR RE-OPENING IS FINDING OF LOOSE PAPERS DURING A SEARCH U/s. 132 IN THE PREMISES OF A THIRD PERSON***

In the instant case, according to the statement of reasons recorded by the learned AO before issuance of the Notices under s.148, the very reason for re-opening the case of the appellant company for the relevant assessment years is that a search and seizure operation under s.132 of the Act was carried out on a group of assessees namely 'Satellite Group' on 19-11-2009 and during the course of search in premises of M/s. Phoenix Devcons Pvt. Ltd., some loose papers inventorized as LPS A/3 were seized. On a perusal of the page No. 25, 20 & 21 of LPS A/3, the payment details made to Shri Mohanlal Chugh, one of the then directors of the appellant company, were found mentioned which were correlated with notings in the Diary BS-8 also seized from the premises of above named company. Further, as per the reasons, on a perusal of the details mentioned on page nos. 182, 184 & 186 of LPS A/3, some payments were made to Shri Mohanlal Chugh, Indore.

1.01 ***NOTICES U/s. 153C ISSUED TO THE APPELLANT***

On an earlier occasion, immediately after the aforesaid search, Notices under s.153C of the Act for the relevant assessment years were issued to the assessee company by the ld. ACIT-3(1), Indore on 14-11-2011 [kindly refer Paper Book (PB) Page No. 10 for A.Y. 2008-09]. In response to such Notices u/s. 153C, the appellant vide its letters dated 19-12-2011, intimated the AO that it had already furnished its returns under s.139 of the Act and also made a request that the returns so furnished under s.139 may be regarded as the returns furnished in compliance to the notices under s.153C.

1.02 ***WITHDRAWAL OF NOTICES ISSUED U/s. 153C***

That, subsequently, the aforesaid Notices so issued u/s. 153C for the relevant assessment years were withdrawn by the ld. ACIT-3(1), Indore vide his Letters both dated 19-12-2011 [kindly refer PB Page No. 11 for A.Y. 2008-09] and the proceedings initiated under the provisions of s.153C in the case of the assessee company were eventually dropped.

2.00 ***RE-OPENING OF THE CASE OF APPELLANT BY ISSUANCE OF NOTICES U/s. 148 AND FRAMING OF ASSESSMENTS***

That, the case of the appellant company for the relevant assessment years was re-opened by issuing notices under s. 148 on 08-09-2014 for the A.Y. 2009-10 [kindly refer PB Page No. 19 for A.Y. 2009-10] and on 19-03-2015 for the A.Y. 2008-09 [kindly refer PB Page No. 12 for A.Y. 2008-09] and the assessments have been framed upon the appellant company under the provisions of s.147 of the Act.

3.00 ***PROCEEDINGS ONCE INITIATED UNDER S.153C OF THE ACT AND SUBSEQUENTLY DROPPED, THEREAFTER, ON THE SIMILAR GROUNDS, THE PROVISIONS OF S.147/148 CANNOT BE INVOKED***

In the above background, it would be observed that in pursuance of the loose papers seized during the search operations carried out under s.132 of the Act in the case of a third person, the correct course of action would have been to proceed against the appellant company under the provisions of s.153C of the Act. It is a settled law that the applicability of the provisions of s.153C of the Act would exclude the application of the provisions of s.147/148 of the Act. It would be appreciated by Your Honours that if the proceedings are initiated under s.153C of the Act and subsequently dropped, thereafter, on the similar grounds, the provisions of s.147/148 are not liable to be invoked.

3.01 *On the similar issue, the Hon'ble Delhi High Court in the case of CIT Vs. Kalvinator of India Ltd. (2002) 256 ITR 1 (Del) observed at page no. 15 that "it is well settled principle of law that what cannot be done directly cannot be done indirectly".*

3.02 *On the similar issue, the Hon'ble ITAT Mumbai in the case of Shri Mohan Thakur vs. ACIT 2020 (1) TMI 558 (ITAT Mumbai) has held that the proceedings under s.153C have been initiated and subsequently dropped, then, the notice under s.148 so issued was unjustifiable and the assessment order is not liable to be sustainable in the eyes of law. A copy of the judgment is being enclosed herewith for kind perusal and record of Your Honour, as Exhibit P-1.*

3.03 *Hon'ble ITAT Delhi Bench "A" in the case of Shri Adarsh Aggarwal Delhi Vs. ITO, Ward-61, Delhi in ITA No. 777/Delhi/19 for the A.Y. 2010-11 vide order dt. 14/01/2020 by following the decisions of Hon'ble ITAT Bench Visakhapatnam in the case of G. Koteswar Rao and the Hon'ble ITAT Amritsar Bench in the case of ITO Vs. Arun Kumar Kapoor (2011)140 TTJ 249 (Asr) held in para 8.2 as under:*

> *"8.2. Since Shri Naresh Sabharwal has retracted from the fact of taking any loan from assessee and genuineness of the agreement is itself in doubt which was found during the course of search and is not corroborated by any evidence or material on record, therefore, such photo copy of the agreement cannot be relied upon by the A.O. for the purpose of initiating the re-assessment proceedings in the case of the*

assessee. It is an admitted fact that in the present case the agreement in question was found during the course of search in the case of Shri Naresh Sabharwal and proceedings under section 153A have been initiated against him. Therefore, the agreement in question have been transferred by A.O. of the person searched to the A.O. of the assessee for the purpose of taking remedial action in the matter. It is well settled Law that in the case of assessment made on assessee consequent to the search in another case, A.O. is bound to issue notice under section 153C and thereafter proceed to assess the income under section 153C and if A.O. had proceeded with re-assessment under section 147/148 of the I.T. Act and passed the Order under section 143(3)/148 of the I.T. Act, the same would be illegal and arbitrary and without jurisdiction. We rely upon the Order of ITAT, Visakhapatnam Bench in the case of G. Koteswara Rao (supra). In the case of ITO vs., Arun Kumar Kapoor [2011] 140 TTJ 249 (ASR-ITAT) [Paper Book at Page71], the ITAT, Amritsar Bench held as under :

"On a perusal of section 153C, it would be clear that the provisions of this section are applicable which supersedes the applicability of provisions of sections 147 and 148. In the instant case, the documents were seized during the search under section 132 and the same were sent to the Assessing Officer of the assessee and, thus, the Commissioner (Appeals) has correctly observed that only the provision in which any assessment could be made against the assessee was section 153C, read with section 153A. It was also apparent from the record that the officer in the case of 'T' Ltd. had mentioned in his letter that the necessary action may be taken as per law under section 153C/148. Hence, notice issued under section 148 and proceedings under section 147 by the Assessing Officer were illegal and void ab initio. In view of the provisions of section 153C, section 147/148 stands ousted.

In the instant case, the procedure laid down under section 153C has not been followed by the Assessing Officer and, therefore, assessment has become invalid. The Commissioner (Appeals) was justified in following the ratio laid down by the Supreme court in the case of Manish Maheshwari v. Asstt. CIT [2007] 289 ITR 341 / 159 Taxman 258 wherein it has been held that if the procedure laid down in section 158BD is not followed, block assessment proceedings would be illegal. The Commissioner (Appeals) has correctly observed that the provisions of section 153C are exactly similar to the provisions of section 158BD in block assessment proceedings. Thus, considering the entire facts and the circumstances of the case, the Commissioner (Appeals) was fully justified in quashing the reassessment order."

8.3. The other decisions relied upon by the Learned Counsel for the Assessee are on the same proposition. Considering the facts of the case in the light of above decisions, it is clear that loan agreement was found during the course of search in the case of Shri Naresh Sabharwal which is handed-over to the A.O. of the assessee and addition is made only on that basis. Therefore, there was no

justification for the A.O. to have been initiated proceedings under section 147/148 of the I.T. Act. The correct course of action would have been to proceed against the assessee under section 153C of the I.T. Act. Therefore, initiation of re-assessment proceedings under section 147/148 of the I.T. Act is wholly invalid, void and bad in Law. Since the correct procedure have not been adopted by the A.O. and there is no justification to initiate the re-assessment proceedings against the assessee, we set aside the Orders of the authorities below and quash the reopening of the assessment. Resultantly, all additions stands deleted."

A copy of the aforesaid judgment is being enclosed herewith for kind perusal and record as Exhibit P-2.

3.04 Hon'ble ITAT Delhi in the case of Nawal Oils and Containers Pvt. Ltd. vs. ITO (2020) 58 CCH 218 (DelTrib) has held that once the assessment proceedings was initiated on the basis of incriminating material found in search of third party then provisions of s.153C were applicable which exclude application of section 147 & 148 and notice u/s. 148 and proceedings u/s. 147 are illegal and void ab initio. A copy of the judgment is being enclosed herewith for kind perusal and record of Your Honour, as Exhibit P-3.

3.05 Hon'ble ITAT Hyderabad in the case of Sri Suryadevara Avinash vs. DCIT 2019 (9) TMI 898 (ITAT Hyd.) has held that since the assessment proceedings were initiated mainly on the information found during the search proceedings and it was found that assessee is a party to the transactions and the same material was brought on record to complete the assessment u/s.147 of the Act, however, jurisdiction lies to initiate proceedings u/s.153C of the Act and not u/s.148 of the Act. The Hon'ble Bench quashed the assessment made by the AO u/s. 143(3) r.w.s. 147. A copy of the judgment is being enclosed herewith for kind perusal and record of Your Honour, as Exhibit P-4.

3.06 Hon'ble ITAT Chandigarh in the case of Shri Sanjay Singhal (HUF) vs. DCIT 2020 (9) TMI 338 has held that if any material was found relating to the assessee during the course of search on third parties then the correct course of action would have been to proceed against the assessee under s.153C of the Act and there was no justification for the AO to initiate proceedings under s.147 r.w.s. 148 of the Act. A copy of the judgment is being enclosed herewith for kind perusal and record as Exhibit P-5.

3.07 Hon'ble ITAT Delhi in the case of Saurashtra Color Tones P.Ltd.vs.ITO 2020(4)TMI289(ITAT Delhi)has also held the same view. Copy is being enclosed herewith for kind perusal and record as Exhibit P-6.

In view of the above facts and circumstances of the case, it would be appreciated having withdrawn the notice issued earlier under s.153C of the Act to the appellant, for the same assessment years, there was absolutely no justification for the AO to restart the assessment proceedings, earlier dropped, under the garb of the provisions of s.147 of the Act and therefore, the assessment proceedings as well as the assessment order passed in pursuance thereof deserves to be knocked down on this legal count alone."

15. The gist of the appellant's submission for ground nos. 2(a) and 2(c) is that the appellant had furnished its original return of

income for both the assessment years under s. 139 of the Act and the returns so furnished were duly processed u/s. 143(1)(a) of the Act without any adjustment in the returned income of the appellant and therefore, without having any material to form a reason to believe that certain income for the relevant assessment years got escaped to assessment, no notice u/s. 148 could have been issued. It has further been contended by the AR of the appellant that in the instant cases, the AOs issued the notices u/s. 148 on the basis of borrowed satisfaction inasmuch the very basis for issuance of the notices were findings given by some other assessing officer while framing the assessment in the case of some other assessee i.e. Shri Mohanlal Chugh for A.Y. 2009-10. The AR further contended that the reasons recorded by the AO before issuance of the notices u/s. 148 were not reasonable and the same were vague in the nature. In support of his contention, the ld. AR relied upon various judicial pronouncements.

16. The gist of the appellant's submission for ground no. 2(b) is that in its case, as is evident from the reasons recorded by the AOs, notices u/s. 148 have been issued on the basis of certain documents seized during the course of search and seizure u/s. 132 of the Act from the premises of PDPL. According to the ld. AR of the appellant, when the documents were seized from the premises of some other person u/s. 132, then in such case the provisions of s. 153C only could have been invoked against the appellant and no notice u/s. 148 could have been issued. The AR further pointed out that in the case of the appellant, factually, such notices u/s. 153C were issued by the assessing officer but,

subsequently, such notices were withdrawn and later on, based on the same seized material, seized from the premises of a searched person, notices u/s. 148 have been issued, which are not legally sustainable. It has been contended that section 148 is not a substitute for the mandatory requirement of issuance of notice u/s. 153C. In support of his contention, the AR relied upon various judicial pronouncements.

17. The CIT(DR) vehemently argued that in the instant appeals, notices u/s. 148 have rightly been issued and further, the reassessment proceedings in pursuance of such notices have validly been carried out. The CIT(DR) also relied upon the findings given by the CIT(A) in the appellate order.

18. We have heard rival contentions and perused the records placed before us and duly considered the AO's order, the CIT(A)'s order, paper books filed by the appellant, the counter comments on the additional evidences filed by the AO and the oral arguments advanced by both the parties before us. We have also gone through the copies of the statements of reasons recorded by the AO before issuance of the notices u/s. 148 to the appellant. We find that in this case, a search was initiated in one group named and titled as 'Satellite Group' and during the course of the search in such group, from the premises of one of its companies, namely, PDPL, certain seized documents were found and inventorized by the search party and from such seized material, it got emanated that Shri Mohanlal Chugh had received certain payments on behalf of the appellant company against the sale of land of 'Phoenix Green Project'. Based upon such seized documents, we find that the assessing officer i.e. ACIT-3(1),

Indore framing the assessment u/s. 153A of the Act in the case of Shri Nilesh Ajmera, one of the group assesses of Satellite Group, on 30.12.2011, for A.Y. 2008-09, had reached to a conclusion that Shri Nilesh Ajmera, who happened to be one of the directors of some other company namely M/s. Phoenix Leisure and Lifestyle Pvt. Ltd. (in short 'PLLPL'), had made certain payments aggregating to a sum of Rs. 21,26,75,000/- to Shri Mohanlal Chugh on behalf of M/s. Shivalika Realities Pvt. Ltd., the appellant company here. The AO of Shri Nilesh Ajmera reached to the conclusion that the payment for the aforesaid sum of Rs. 21,26,75,000/- was made by Shri Nilesh Ajmera, in his individual capacity, in two assessment years viz. A.Y. 2008-09 and A.Y. 2009-10 and accordingly, an addition of Rs. 10,63,37,500/- was made by him in each of these two assessment years. We find that the assessing officer i.e. the ACIT -3(1), Indore, framing the assessment u/s. 153A r.w.s. 143(3) of the Act in the case of Shri Nilesh Ajmera on 30.12.2011 for A.Y. 2008-09 and A.Y. 2009-10, had also simultaneously passed one assessment order on 30.12.2011 in the case of Shri Mohanlal Chugh for A.Y. 2009-10 and while passing the assessment order in the case of Shri Mohanlal Chugh, the then AO had given a categorical finding that Shri Mohanlal Chugh had received certain payments on behalf of the appellant company which were not duly recorded in the books of the appellant. Accordingly, an addition of Rs. 10,63,37,500/- was proposed to be made by the AO of Shri Mohanlal Chugh in the hands of the appellant company, on substantive basis and the similar addition was made in the total income of Shri Mohanlal Chugh for A.Y. 2009-

10 on protective basis. We find that the basis for proposing the addition in the hands of the appellant company on substantive basis was the subject land, against which Shri Nilesh Ajmera made the payments, was owned by the appellant company only and therefore, the same was proposed to be added in the hands of the appellant company on substantive basis. We further find that despite giving a finding by the assessing officer of Shri Mohanlal Chugh in the assessment order for A.Y. 2009-10, the proposed addition in the hands of the appellant company on account of payment received by it from Shri Nilesh Ajmera, through Shri Mohanlal Chugh, could not be made. Thus, upon noticing such escapement of income, the AOs in the present case rightly issued the notices u/s. 148 of the Act to the appellant after recording the necessary reasons to believe and also after obtaining the necessary approval. We noted that the notices for both the assessment years have been issued within the time limit prescribed u/s. 149 of the Act. We also find that after issuing the notices, upon request of the appellant, the copies of the reasons recorded were provided to the appellant and the objections raised by the appellant subsequently against such reasons were also disposed off by the AO by passing speaking orders. Thus, in our considered view, the assessing officer has duly complied with all the conditions as enjoined in the law and has also complied with the ratio laid down by the Apex Court in the case of *M/s. G.K.N. Driveshafts (India) Ltd. v/s. Income-Tax Offices and Ors., 259 ITR 19*. Accordingly, we do not find any substance in the ground nos. 2(a) & 2(c) raised by the appellant for both the assessment years and the same are hereby Dismissed.

19. Now, coming to the ground no. 2(b) raised by the appellant. We find that undisputedly, during the course of the search u/s. 132 in the case of the Satellite Group, certain documents were seized but, there is no finding by any of the authorities that the documents so seized were not belonging to the person who were so searched or from whose possession these were found. In particular, there is no finding that the documents so seized were belonging to the appellant company. We are conscious that in the pre-amended provisions of s. 153C of the Act, the provisions of s. 153C could have been invoked only if certain documents belonging to a person other than the person searched are found and seized u/s. 132 from the premises of the searched person. So, at the relevant time, the belongingness of the document seized to a third person was a *sine- qua-non* for invoking the provisions of s. 153C of the Act against such person. We find that the amendment in section 153C of the Act dispensing with the requirement of belongingness to any books of accounts or documents with the third person has come into force only by the Finance Act, 2015 w.e.f. 01.06.2015, and therefore, the amendment would not be applicable for the assessment years under consideration. We find that in absense of meeting the mandatory requirement of belongingness of the seized documents with the appellant, the AO was not within his power to invoke the provisions of s. 153C of the Act in the present cases and therefore, in our considered view, the AO rightly dropped the proceedings so initiated u/s. 153C and was statutorily correct in invoking the provisions of s. 148 of the Act. Thus, the Ground No. 2(b) raised by the appellant for both the years is also Dismissed.

20. Ground No. 2(d), 4(a), 4(b) & 4(c) for A.Y. 2008-09 & Ground No. 2(d), 3(a), 3(b) & 3(c) for A.Y. 2009-10 –

21. Since, all the ground nos. 2(d), 4(a), 4(b) and 4(c) for A.Y. 2008-09 and ground nos. 2(d), 3(a), 3(b) and 3(c) for A.Y. 2009-10 are interlinked and interlaced with each other and further, since, the crux of all these grounds is similar in the nature, the same are being adjudicated together.

22. The brief facts of the issue, as culled out from the records, are that in the instant cases, two different AOs recorded certain reasons for issuance of notice under section 148 of the Act to the appellant for two different assessment years. According to both the AOs, during the course of search in premises of one company namely M/s. Phoenix Devcons Pvt. Ltd., some loose papers inventorized as LPS A/3 were seized and on a perusal of the page Nos. 25, 20 & 21 of LPS A/3, the payment details made to Shri Mohanlal Chugh, one of the then directors of the appellant company, were found mentioned which were correlated with notings in the Diary BS-8 which was also seized from the premises of above named company. Further, on a perusal of the details mentioned on page nos. 182, 184 & 186 of LPS A/3, some payments were found to be made to Shri Mohanlal Chugh, Indore. The AO in the statement of reasons furnished to the appellant made a reference to the order passed u/s. 143(3) of the Act in the case of some other assessee namely Shri Mohanlal Chugh for A.Y. 2009-10 and reproduced the findings of the then AO passing the aforesaid order in the case of Shri Mohanlal Chugh for A.Y. 2009-10. As per the findings of the AO, passing the order in the case of Shri Mohanlal Chugh, M/s. Phoenix

Leisure and Lifestyle Pvt. Ltd., a company promoted by Shri Nilesh Ajmera had got itself engaged in a project referred with different names such as 'Pheonix Green', 'Phenox Grande', 'Zenith Tower' etc. and from the various loose papers found during the search it was seen that Shri Nilesh Ajmera, during the financial year relevant to A.Y.2009-10, had paid an aggregate amount of Rs. 10,63,37,500/- to Shri Mohanlal Chugh for acquiring land at Pipliyakumar. Accordingly, as per the AO of the appellant company, the then AO of Shri Mohanlal Chugh, passing order u/s. 143(3) of the Act for A.Y. 2009-10, made an addition of Rs. 10,63,37,500/- in the hands of Shri Mohanlal Chugh on protective basis and had also proposed the additions in the hands of the appellant company on substantive basis. The gist of the appellant company's submission before the AO was that no-where in the subject documents, the assessee's name is appearing and the opinion formed by the AO has no relevance with the assessee's case. The AO, in his assessment order, rebutted the contentions of the appellant by giving a finding that the structure of the appellant company during the period relevant to A.Y. 2008-09 and A.Y. 2009-10 was that the directors of the appellant company were at the helm of affairs of the appellant company and have acted for and on behalf of the assessee company. Finally, the AO formed his opinion that the assessee had parted with Rs. 10,63,37,500/- in cash, source of which has not been explained, and accordingly made an addition of Rs. 10,63,37,500/- in the income of the appellant company for A.Y.2008-09, by treating such amount as unexplained investment. Similar findings have been given by the AO in his

order for A.Y. 2009-10 as well and accordingly, the similar addition of Rs. 10,63,37,500/- has also been made in the income of the appellant for A.Y. 2009-10.

23. Aggrieved with such order of the AO, the appellant company preferred an appeal before the CIT(A) and contended the same argument that nowhere in the seized papers , there is mentioning of the name of the appellant company. The ld. CIT(A), in para (4.3) of his order gave a finding that the appellant company is a private limited company which is run on a family business style where its directors were running the company and all the decisions on behalf of the appellant company were being taken by Shri Mohanlal Chugh. The CIT(A) further observed that the land for which Shri Mohanlal Chugh had received the payment in cash pertained to the appellant company. Accordingly, the ld. CIT(A) upheld the view of the AO and confirmed the addition made u/s. 69 on this count.

24. Before us, the appellant company has made a written submission in the form of a Synopsis. The relevant portion of the appellant's reply is being reproduced as under:

> *"SUBMISSION [For Ground No. 2(d)]*
>
> *In this context, it is submitted as under:*
>
> *1.00 On a perusal of the statement of reasons as recorded by the learned AO before issuance of the Notice under s.148 [kindly refer PB Page No. 18 & 19 for A.Y. 2008-09], it would be observed that in the case of some other assessee namely Shri Mohanlal Chugh, which has been made the very basis for issuance of notice under s.148 of the Act to the appellant, the findings were not to the effect of payment or any unexplained investment by the appellant but, on the contrary, the findings were relating to the alleged receipt of money by the above named Shri Mohanlal Chugh on behalf of the appellant company.*
>
> *2.00 Even in the statement of reasons supplied to the appellant company, for issuance of notice under s.148 [kindly refer PB Page No. 18 & 19 for A.Y. 2008-09], by reproducing the abstract of the Assessment Order passed in the case of Shri Mohanlal Chugh, one of the directors of the appellant company, it*

has been averted that Shri Mohanlal Chugh has received certain payments on behalf of the appellant company which was not so recorded in the books of account of the appellant company.

3.00 It is submitted that the subject incriminating loose papers, as referred to by the ld. AO in his body of assessment order and which became the very basis for issuance of notice under s.148 of the Act to the appellant, were found during the course of the search and seizure operations under s.132 of the Act carried out in the case of Satellite/ Phoenix Group on 19-11-2009. By making a reference of such loose papers, the concerning Assessing Officer passing the assessment order under s.153A on 30-12-2011 for A.Y. 2008-09 and A.Y. 2009-10 in the case of Shri Nilesh Ajmera, one of the assessees of the Satellite/ Phoenix Group, had made additions amounting to Rs.10,63,37,500/- each in two assessment years viz. A.Y. 2008-09 and A.Y. 2009-10 by holding that Shri Nilesh Ajmera, a director of M/s. Phoenix Leisure & Lifestyle Pvt. Ltd., had paid the total sum aggregating to Rs.21,26,75,000/- to Shri Mohanlal Chugh, a director of M/s. Shivalika Realities Pvt. Ltd., the appellant [kindly refer Page No. 328 of the Additional Paper Book]. Thus, the case of the revenue all along is that Shri Nilesh Ajmera, one of the directors of M/s. Phoenix Leisure & Lifestyle Pvt. Ltd., made an unaccounted payment of a sum of Rs.21,26,75,000/- to Shri Mohanlal Chugh on behalf of M/s. Shivalika Realities Pvt. Ltd., the appellant.

4.00 Although the notice under s.148 was issued on the allegation of <u>receipts</u> of unaccounted money, but, the impugned assessment order has been passed by the ld. AO by taking a complete U-turn and by holding that the appellant company had made unaccounted <u>payments</u>. It is submitted that first of all, such a U-turn was not permissible in the law and secondly, even on the factual matrix, the assessment order so passed by the ld. AO by holding that the appellant company had parted with certain cash is patently wrong and based upon misappreciation of the facts on record. It is submitted that even the ld. CIT(A), at para (4.1), has given the finding that the appellant company through its director, had received the subject amount. It is submitted that by giving such finding, the ld. CIT(A) has exceeded his jurisdiction inasmuch the ground relating to the receipt of any amount by the appellant company was neither emerging from the body of the assessment order nor such a ground was taken by the appellant company. It is submitted that the ld. CIT(A) himself, at para (4.1), has stated that the ground no. 3 relates to the addition made under s.69 of the Act.

5.00 In view of the above submissions, it would be appreciated that the findings given by the ld. AO holding that the appellant company had made certain unaccounted payments are patently wrong and therefore, the ld. CIT(A) was not justified in upholding such a wrong findings given by the ld. AO."

<u>SUBMISSION[For Ground Nos. 4(a) to 4(c) for A.Y. 2008-09 & 3(a) to 3(c) for A.Y. 2009-10]</u>

In this regard, it is submitted as under:

1.00 <u>CORRESPONDING ADDITIONS IN THE CASES OF SHRI NILESH AJMERA AND M/s. PHOENIX LEISURE & LIFESTYLE PVT. LTD.</u>

Your Honours, on the basis of the seized loose papers, the corresponding additions were also made by the concerning AO, under s.153A/153C of the

Act, framing the Orders of Assessment in the cases of Shri Nilesh Ajmera and M/s. Phoenix Leisure & Lifestyle Pvt. Ltd.. Against such Assessment orders, both the above named assessees preferred appeals before the ld. CIT(A) and then, being unsuccessful, before this Hon'ble Bench of the Tribunal.

2.00 *<u>ORDER OF HON'BLE ITAT, INDORE BENCH IN THE CASE OF SHRI NILESH AJMERA AND FINDINGS OF THE HON'BLE BENCH</u>*

Your Honours, this Hon'ble Bench in its common Order, for A.Y. 2007-08 to A.Y. 2010-11, in Appeal Nos. IT(SS)A Nos. 182 to 184/Ind/2013 dated 11-05-2016, passed in the case of Shri Nilesh Kumar Ajmera, has at length, dwelt upon the issue. A copy of relevant abstract of the Order so passed by this Hon'ble Bench in the case of Shri Nilesh Ajmera, who was alleged to have made certain unaccounted payments to the appellant through its director Shri Mohanlal Chugh, is placed at Page No. 391 to 409 of the Additional Paper Book.

2.01 *Your Honours, this Hon'ble Bench, while adjudicating the Ground Nos. 2(a) & 2(b) of Shri Nilesh Ajmera for A.Y. 2008-09 against the addition of Rs.10,63,37,500/-, has given a detailed finding at internal Page Nos. 29 to 44 of the Order [kindly refer PB Page No. 394 to 409].*

2.02 *Your Honours, this Hon'ble Bench, while passing the Order in the hands of the other party to the alleged transactions, i.e. in the case of Shri Nilesh Ajmera, held that Shri Nilesh Ajmera had paid only a sum of Rs.7,80,00,000/- to Shri Mohanlal Chugh/ the appellant company and out of which, a sum of Rs.2,30,00,000/- was paid through explained sources and only, a sum of Rs.5,50,00,000/- was paid in cash [kindly refer Last few lines at the internal page no. 43 of the Order placed at page no. 408 of the Additional Paper Book].*

3.00 *<u>FINDINGS IN THE CASE OF SHRI NILESH AJMERA NOT BINDING UPON THE APPELLANT COMPANY</u>*

Your Honours, it is respectfully submitted that although the findings given by this Hon'ble Bench in the case of Shri Nilesh Ajmera are not binding upon the appellant company but, even if for the sake of arguments, such findings are accepted by the appellant company, then, the quantum of estimated receipt of on-money in the hands of the appellant company could not have been to the extent of Rs.21,26,75,000/- but it would get restricted to sum of Rs.5,50,00,000/- only.

4.00 *<u>LOOSE PAPERS AND OTHER PAPERS FOUND AND SEIZED FROM THE PREMISES OF SOME OTHER PERSONS CANNOT BE TAKEN AS AN EVIDENCE UNDER SECTION 292C OF THE ACT</u>*

Your Honours, first of all, the loose papers and other papers found and seized from the premises of some other persons cannot be taken as an evidence under s.292C of the Act against the appellant company. It is therefore, merely on the basis of findings given in the case of some other assessees, without conducting any independent enquiry in the appellant's own case, no addition was warranted.

5.00 <u>ALLEGED RECEIPT OF RS.5,50,00,000/- COULD BE REGARDED ONLY AS A LIABILITY IN THE HANDS OF THE APPELLANT COMPANY AND NOT AS AN INCOME</u>

Your Honours, without admitting that the appellant company had received any sum of Rs.5,50,00,000/- in cash from Shri Nilesh Ajmera, as held by this Hon'ble Bench while adjudicating the appeals in the case of Shri Nilesh Ajmera, it is submitted that such an alleged receipt of Rs.5,50,00,000/- could be regarded only as a liability in the hands of the appellant company and not as an income inasmuch such sum was received by Shri Nilesh Ajmera from the various customers as on-money for booking of the flats in a building proposed to be constructed, on ratio basis, on the land owned by the appellant company. It is submitted that once the ratio agreement with Shri Nilesh Ajmera through his company, with the appellant company, came to an end, Shri Nilesh Ajmera handed over the entire project on as-is-where-is basis and the appellant company was given the responsibility of repaying the on-money collected by Shri Nilesh Ajmera from various customers for making bookings of the flats in the project. It is submitted that it is not the case of the AO that the appellant company had made any sales of any flats in the proposed project during the relevant previous year and therefore, by no stretch of imagination, any alleged on-money can be subjected to tax in the hands of the appellant company for the year under consideration."

25. The gist of the appellant's submission is that the AO had recorded the reasons on the premises that Shri Mohanlal Chugh, on behalf of the appellant company, had received certain payments against the land of Phoenix Green Project, situated at Pipliyakumar, which was reflected in the various documents, seized and inventorized during the course of the search and seizure operations carried out in a group of assesses namely Satellite Group on 19.11.2009. In the reasons recorded, it has further been contended that during the course of the scrutiny assessment u/s. 143(3) of the Act in the case of Shri Mohanlal Chugh for A.Y. 2009-10 dated 30.12.2011, a clear finding was given as regard to the making of payment by Shri Nilesh Ajmera to Shri Mohanlal Chugh for acquiring certain land at Pipliyakumar. The AO also reproduced the relevant para of the assessment order for A.Y. 2009-10 passed in the case of Shri

Mohanlal Chugh, giving a clear finding that Shri Mohanlal Chugh had received the payment of Rs. 10,63,37,500/- on behalf of the appellant company which has not been so recorded in the books of account of the appellant company. The AO of Shri Mohanlal Chugh has further given a finding that the substantive addition of Rs. 10,63,37,500/- be made in the hands of the appellant company and the similar addition be made in the hands of Shri Mohanlal Chugh on protective basis for the relevant assessment year. Thus, according to the AR of the appellant company, the AO had recorded the reasons to believe on the basis that the appellant had made **receipts** of certain payments from Shri Nilesh Ajmera against sale of certain land at Pipliyakumar. But, in radical contrast to such recording of the reasons, while eventually passing the impugned assessment orders, the AO made the additions by giving a finding that the appellant had parted with a sum of Rs. 10,63,37,500/- in cash, the sources whereof have not been explained. Thus, the addition has been made by giving a finding of making of **payments** by the appellant. According to the ld. AR of the appellant, in these cases either the notices u/s. 148 were issued without any application of mind and without having any nexus with the material on record with the belief formed or the assessment order, giving a finding contrary to the reasons set-out for issuance of the notice u/s. 148, is erroneous and in either of the cases, the entire assessment order deserves to be annulled.

26. On merits, the AR of the appellant contended that in the case of the payer of the impugned sum i.e. Shri Nilesh Ajmera, this Bench in its common Order, for A.Y. 2008-09 and A.Y. 2009-

10, in Appeal Nos. IT(SS)A Nos. 183 & 184/Ind/2013 dated 11.05.2016, has held that Shri Nilesh Ajmera had paid only a sum of Rs.7,80,00,000/- to Shri Mohanlal Chugh on behalf of the appellant company and out of which, a sum of Rs.2,30,00,000/- was paid through explained sources and only, a sum of Rs.5,50,00,000/- was paid in cash. The appellant has also submitted that first of all, the findings given by this Bench in the case of Shri Nilesh Ajmera are not binding upon it but, even if for the sake of arguments, such findings are accepted by the it, then, the quantum of estimated receipt of on-money in the hands of the appellant company could not have been to the extent of Rs.21,26,75,000/- but it would get restricted to sum of Rs.5,50,00,000/- only. The appellant has also contended that since the loose papers and other papers were found and seized from the premises of some other persons, the same cannot be taken as an evidence against the appellant company u/s. 292C of the Act. Finally, the appellant company submitted that even if it is assumed that it had received any sum of Rs.5,50,00,000/- in cash from Shri Nilesh Ajmera, out of such receipts of Rs.5,50,00,000/-, receipts of on-money aggregating to Rs. 4,87,58,350/-, made by Shri Nilesh Ajmera on behalf of the appellant company has already been subjected to tax in the case of yet another company i.e. PLLPL as per the findings given by this Bench in the case of Shri Nilesh Ajmera (supra). It has further been contended that since, eventually, the entire project got aborted, the appellant had to subsequently refund the entire on-money to the respective customers and in such circumstances, the aforesaid receipts of Rs. 4,87,58,350/- could

be regarded only as a liability in the hands of the appellant company and not as an income. The AR of the appellant has pressed his reliance on the findings given by this Bench while adjudicating the appeals in the case of the payer of the impugned sum namely Shri Nilesh Ajmera whereby this Bench has held that the amount of Rs. 5,50,00,000/- only was given by Shri Nilesh Ajmera to the appellant company out of the advances received by him from various customers to whom certain residential units in various buildings constructed on the subject land, owned by the appellant company, were sold by him. It has been contended by the appellant that the appellant company had entered into a joint development agreement for construction of certain residential units on certain land owned by the appellant company situated in Pipliyakumar on ratio basis. It has further been contended that due to certain disputes, eventually, the ratio agreement in respect of the subject land entered into between Shri Nilesh Ajmera and the appellant company had pre-maturely come to an end and consequently, Shri Nilesh Ajmera handed over the incomplete project to the appellant on 'as is where is' basis and as a result thereof, the advance amount received by Shri Nilesh Ajmera from various customers and already handed over to the appellant company had to be refunded by the appellant company to various customers. In such circumstances, according to the appellant, nothing could come to the hands of the appellant company in the form of income.

27. Per Contra, the ld. CIT(DR) supported the orders passed by the authorities below. However, he could not specifically controvert the contention of the ld. AR of the appellant. He

further argued that the mistake committed by the AO in respect of making the addition on account of unexplained expenditure instead of unaccounted income, was in the nature of a curable defect and immunity as conferred u/s. 292B can be said to be available to the Revenue in respect of the present assessment orders. Alternatively, the ld. CIT(DR) argued that if due to such errors, additions could not be sustained in the hands of the appellant then the same should be directed to be made in the hands of Shri Mohanlal Chugh who had received the payments from Shri Nilesh Ajmera. According to the ld. CIT(DR), the Income-Tax Appellate Tribunal has got wide powers u/s. 254 of the Act and it would be within its statutory powers to give any such direction.

28. We have heard rival contentions and perused the records placed before us, duly considered the orders of both the lower authorities and paper books filed by the appellant. We have also gone through the copies of the statements of reasons recorded by the AO before issuance of the notices u/s. 148 to the appellant. We find that in the instant cases, two different AOs have issued two separate notices u/s. 148 of the Act to the appellant for two different assessment years under appeal. However, from a perusal of the copies of the statements of reasons recorded as placed in the paper book for A.Y. 2008-09 at page no. 18&19 and for A.Y. 2009-10 at page no. 25 & 26, we find that the contents as well as the language recorded by both the AOs are exactly the same. We also find that for both the assessment years, the concerning AOs have reproduced some abstract of an assessment order passed u/s. 143(3) of the Act in the case of Shri Mohanlal

Chugh for A.Y. 2009-10 on 30.12.2011. From the abstract of the assessment order in the case of Shri Mohanlal Chugh for A.Y. 2009-10, it is discernible that the AO of Shri Mohanlal Chugh had given a finding to the effect of receipt of a sum of Rs. 10,63,37,500/- by Shri Mohanlal Chugh on behalf of the appellant company which remained to be recorded in the books of account of the appellant company. We find that solely on the basis of the assessment order passed in the case of Shri Mohanlal Chugh, notices u/s. 148 have been issued to the appellant company to bring back those receipts made by the appellant company which were not recorded in its books of account. However, we find that for both the assessment years, the assessments have been made on altogether a different ground by holding that the appellant had made unaccounted payments of Rs. 10,63,37,500/- in each of the two assessment years under appeal viz. A.Y. 2008-09 and A.Y. 2009-10 for purchase of land at Pipliyakumar and by categorically giving a finding that such land at Pipliyakumar had gone to the coffers of the assessee, during the financial years under consideration, which was purchased by Chughs and Ajmeras for and on behalf of the appellant company. Here it would be apt to reproduce the relevant findings given by the AO in his assessment order passed for A.Y. 2008-09 as under:

> *" The assessee reply is basically objecting the proceedings and the addition proposed. The assessee has not furnished any evidence in support of its contentions. Due consideration have been given to the reasons recorded by the ACITs, documents referred in the reasons recorded u/s. 148(2), assessment order of Shri Mohanlal Chugh for the Assessment Year 2009-10 as well as the submissions made by the assessee in the shape of objection to notice u/s. 148 and submission against notice u/s. 142(1). It is seen that the assessee is trying to deny*

the transaction of cash payment against purchase/proposed purchase of land. The assessing officer of Shri Mohanlal Chugh has examined the issue at length in the assessment order u/s. 143 (3) for the A.Y. 2009-10. His findings have been reproduced by the ACITs in the reasons recorded u/s. 148(2).

As regards legality of the proceedings u/s. 148, the issue stands already addressed by me in the speaking order passed on 15.01.2014. On the question of merits, the assessee's objection is that its name does not figure in the documents referred to in the reasons recorded. This is an argument for the sake of argument only. The structure of the company during the period relevant to the A.Y. 2008-09 and 2009-10 was such that (Name of directors) were at the helm of affairs of the company, who have acted for and on behalf of the assessee company. In the proposed purchase of land and payment of cash in part consideration thereof. So far as the argument that the assessee did not purchase any land during these two periods is concerned: it is an immaterial factor. The crucial issue was whether the land was purchased or not during the period and ultimately who utilized this land. From the face of record it is evident that ultimately the land under reference has gone to the coffers of the assessee which was apparently purchased by Chughs and Ajmeras for and on behalf of the assessee.

As regard the plea raised by the assessee relating to the seeking of approval from Town and Country Planning Department: it is again an argument without merits. Application for approval by Town and Country Planning can be made when raw land is in the possession of a person. Therefore, even if approval has been obtained in the year 10-11, it does not mean that the assessee was not in possession of land prior to that or for that matter it was not proposed to be purchased for and on behalf of the assessee company and cash component of consideration was not paid prior to the above period.

The assessee has put-forth another argument that the recommendation of the assessing officer of Shri Mohanlal Chugh is unlawful. This is again an argument without any basis. Since, the land has ultimately become the property of the assessee, it is appropriate to assess the unexplained investment substantively in the assessee's case and protectively in the case of the person from whose possession documents were recovered.

In view of the above, it is clear that the assessee has parted Rs. 10,63,37,500/- in cash, source of which has not been explained. It is therefore added to the assessee's total income. Penalty proceedings u/s. 271(1)(c) are initiated separately. (emphasis supplied)

Addition:- Rs. 10,63,37,500/-"

29. Thus, we find that there is no correlation between the basis taken for issuance of notices u/s. 148 and the findings given in the assessment orders passed. In our opinion, rather the basis taken in the notices and findings given in the assessment orders are in complete contradiction to each other inasmuch the notices have been issued on the basis that certain receipts made by the appellant against certain land had got escaped assessment whereas, eventually the assessments have been made on the basis that the appellant had made certain payments for purchase of certain lands which remained unaccounted for in the books of account of the appellant. In our considered view, the present is a situation where no addition has been made on the sole issue for which notices u/s. 148 were issued but, the additions have been made on some other grounds. In similar circumstances, the Hon'ble High Court of Punjab & Haryana in the case of Vipin Khanna vs. CIT (2002) 255 ITR 220 (P&H) was pleased to quash the entire additions made in an assessment framed in pursuance to a notice issued u/s. 148 of the Act. The similar views have been expressed by the *Hon'ble High Court of Kerala in the case of Travancore Cements Ltd. vs. ACIT & Anr. (2008) 305 ITR 170 (Ker.), Hon'ble Delhi High Court in the case of Ranbaxy Laboratories Ltd. vs. CIT (2011) 60 DTR 77 (Delhi), the Hon'ble High Court of Calcutta in the case of Hotel Regal International & Anr. Vs. ITO (2010) 320 ITR 573 (Cal.), the Hon'ble High Court of Patna in the case of Dy. CIT vs. Takshila Education Society (2016) 284 CTR 306 (Pat.), the Hon'ble Gujarat High Court in the case of CIT-II vs. Mohmed Juned Dadani (2013) 355 ITR 172 (GujHC), the Hon'ble Madras High Court in the case of Tractors and Farm*

Equipment Ltd. vs. ACIT 2018 (12) TMI 1217 (MadHC) and the Hon'ble Bombay High Court in the case of Pr. CIT vs. M/s. Lark Chemicals P. Ltd. 2018 (2) TMI 1780 (BomHC). Thus, on this legal plea, the addition of Rs. 10,63,37,500/- made by the AO in the income of the appellant for both the assessment years under appeal viz. A.Y. 2008-09 and A.Y. 2009-10 are not legally sustainable. However, in the present case we find that through the ground no. 2(d) for both the assessment years, the appellant has challenged the validity of the notices u/s. 148 of the Act and according to us, in this case although the assessment orders were not passed in accordance with the law, but, the notices were rightly issued on a correct premise and basis taken by the AOs. Further, while adjudicating the ground nos. 2(a), 2(b) and 2(c) for A.Y. 2008-09 and A.Y. 2009-10, we have already upheld, *supra*, the validity of the notices issued u/s. 148 and consequent reassessment proceedings carried out and therefore, the legal ground of appeal i.e. ground no. 2(d) for both the assessment years is hereby **Dismissed.**

30. Now, in the light of the discussions made above, we would adjudicate the ground nos. 4(a), 4(b) & 4(c) for A.Y. 2008-09 and ground nos. 3(a), 3(b) & 3(c) for A.Y. 2009-10.

31. We find that in the instant appeals, the AO has made the addition of Rs. 10,63,37,500/- in each of the assessment years under appeal by giving a finding that the appellant had made certain cash payments against purchases/proposed purchases of land. We find that during the course of the assessment proceedings, the AO had outrightly rejected the claim of the appellant that during the financial years under consideration it

had neither purchased any land nor had made any payment as advance for purchases of any land. We find that in the assessment orders, the AO has given a patently wrong finding that certain lands had gone to the coffers of the appellant during the years under consideration. We find that the AO could not properly appreciate the facts of the present case in the proper perspective and could not understand the whole deal. The AO went also wrong when claiming that the appellant had purchased the land from Chughs and Ajmeras. However, it is a matter on record that Chughs family were the owners of the appellant company at the relevant time and the appellant company did not purchase any land from Chughs. On the contrary, we find that the case of the Revenue since the day one when search operations took in the case of the Satellite Group was that Shri Mohanlal Chugh on behalf of the appellant company sold the land of the appellant company and received the payment from Shri Nilesh Ajmera or his company. Thus, the findings given by the AO in his assessment orders are patently wrong which has culminated into an absolutely absurd and unwarranted addition in the hands of the appellant company.

32. We are of the view that for making any addition in the hands of any assessee on the allegation of unexplained investment, either u/s. 69 or 69B of the Act, the onus lies on the Revenue first to establish that the assessee had made any investment during the year under assessment and only after establishing such investment, based upon the explanation regarding the sources of such investments, any addition can be made. Thus, finding of some investments in the year of

assessment is a *sine-qua-non* for invoking the provisions of s. 69 or 69B of the Act. However, in this case, although the assessing officer has made the addition on the basis that the appellant had parted with certain sum for purchase of some land at Pipliyakumar, but, such purchases or investments have not been established by him and no material to this effect has been brought by him on records. On the contrary, from the Audited Financial Statements of the appellant company for A.Y. 2008-09 and A.Y. 2009-10, as filed in the respective paper books by the appellant, we find that in the balance sheets for both the years investments in land have been shown as opening balances at Rs. 55,06,895/- and in none of the years, any purchases of any land or any advances against purchase of any land has been shown. Even from a table giving the details of land holding by the appellant company, given in the assessment orders itself, we find that even according to the AO, most of the lands were purchased by the appellant during the financial year 2006-07 only. In other words, the subject lands had already been purchased by the appellant company in earlier years and the same were duly recorded in its books of account. We find that in order to establish the purchases of the land in earlier years, the appellant had furnished the copies of the purchase deeds at page no. 53 to 58 of the paper book filed for A.Y. 2008-09 and as per such purchase deeds, the appellant had purchased such land during the financial year 2006-07 only. Thus, we find that during the financial year relevant to assessment years under consideration, the appellant had not made any investment either towards the purchases or towards the making of advances for purchases of

the land at Pipliyakumar and therefore, the findings given by the AO in the assessment orders to the effect that the appellant had parted with certain sum for making the investments for purchases of land are not factually correct.

33. We have also gone through the relevant abstract of the common order of this Bench, passed in the case of *Shri Nilesh Ajmera, dated 11.05.2016 in Appeal Nos. IT(SS)A 182 to 184/Ind/2013 and ITA No. 538/Ind/2013 for A.Y. 2007-08 to A.Y. 2010-11* as placed at page no. 391 to 420 of the paper book filled by the appellant for A.Y. 2008-09. We find that in such order, this Bench while adjudicating the assesee's (Shri Nilesh Ajmera) ground nos. 2(a) & 2(b) has given a clear finding that Shri Nilesh Ajmera had paid a sum of Rs. 7,80,00,000/- to the appellant through its director Shri Mohanlal Chugh in form of cash/cheque. The relevant findings of this Bench, as given in the case of Shri Nilesh Ajmera, at internal page no. 43 & 44 of its Order, is reproduced as under:

> *" The assessee had paid only a sum of Rs. 7,80,00,000/- in form of cash/cheque, out of which a sum of Rs. 2,30,00,000/- was paid through explained sources i.e. through cheques of the companies and remaining Rs. 5,50,00,000/- was paid in form of cash. Again out of Rs. 5,50,00,000/- a sum of Rs. 4,87,58,350/- was made out of the on money received against booking of flats in the project Phoenix Green for which separate additions have already been made by the AO in the hands of M/s. Phoenix Leisure & Lifestyle Pvt. Ltd. For remaining Rs. 62,41,650/- paid to Shri Mohan Chugh, the assessee has no concrete evidence or explanation. Finally the assessee could be said to have made unexplained investment to the extent of Rs. 73,41,650/- only [i.e. Rs. 11,00,000/- + Rs. 62,41,650/-] equally in two assessment years and to this extent only, addition is sustained. The remaining addition so made by the AO and confirmed by the CIT(A) is deleted."*

34. We thus find that in the case of Shri Nilesh Ajmera, the finding of this Bench was to the effect that the appellant had

received a sum of Rs. 5,50,00,000/- in cash from Shri Nilesh Ajmera and the finding was not to the effect of making of any payment by the appellant company to Shri Nilesh Ajmera or his company, as wrongly inferred and interpreted by the AO in the present appeals. Even otherwise, without going into the quantum of the unaccounted receipts in the hands of the appellant company from the order of this Bench passed in the case of Shri Nilesh Ajmera, it can safely be concluded that the total quantum of the payments by Shri Nilesh Ajmera to the appellant or to Shri Mohanlal Chugh was not to the extent of Rs. 21,26,75,000/- but, the same was restricted to a sum of Rs. 5,50,00,000/- only and again out of Rs. 5,50,00,000/-, a sum of Rs. 4,87,58,350/- was held to be in the form of on-money received by Shri Nilesh Ajmera from various customers against sale of various residential units in the residential project on the land owned by the appellant company. We find force in the contention of the appellant that since, the project had got aborted, the on-money so collected by the appellant through Shri Nilesh Ajmera had to be refunded and therefore, the same could not partake the character of any income in its hands. However, in any case, we find that in the present appeals, the question of quantification of income in the hands of the appellant has remained academic in the nature only for the reason that the AO has made the addition on altogether a different ground contrary to the facts on records. In our view, such an addition cannot be sustained in the eyes of the law.

35. We have also taken into consideration the arguments of the Ld.CIT(DR) that the mistake committed by the assessing officer in making the addition on the ground of unexplained investment in

place of unaccounted receipt, can be regarded as a curable defect as contemplated u/s. 292B of the Act. However, we find no substance in such an argument of the Ld.CIT(DR) for the reason that the mistake so committed by the AO is not a mistake or defect or omission as contemplated under the provisions of s. 292B of the Act. We find that the entire premises for making the addition of the AO is faulty and it cannot be said to be an ordinary mistake or defect or omission curable under s. 292B of the Act. In our view, the AO before making the addition on the allegation of making the unaccounted payment was duty bound to first bring on record the factum of investment by the appellant and if he was intended to make the addition on the basis of unaccounted receipts, then he ought to have given a clear finding to this effect in the assessment orders which in the present cases he utterly failed to do so. In our view, a judicial authority cannot altogether rewrite the assessment order passed by any revenue authority and it cannot base its decision on presumptions and assumptions but, would be required to restrict itself on the assessment orders, appellate orders of the authorities below and other records placed on record. We find that in this case, even the Ld.CIT(A) has not made any attempt to make the addition on the correct ground by exploring the possibilities of invoking the provisions of s. 251 of the Act.

36. We also do not find any merit in the contention of the ld. CIT(DR) that in the present case, if the addition could not be sustained in the hands of the appellant company, then, this Bench should make a direction for making the corresponding addition in the hands of Shri Mohanlal Chugh who made the

actual receipts of the funds. In our view, first of all, there is no maxim known to the law that for the mistakes committed by the AO of an assessee, the untaxed amount should be added in the hands of other assessee. Even otherwise, we find that the subject land in respect of which the payments were made by Shri Nilesh Ajmera are in the ownership of the appellant company and Shri Mohanlal Chugh was only one of the functionaries of the appellant company and therefore, any receipts by Shri Mohanlal Chugh from Shri Nilesh Ajmera has to be regarded only as the receipts of the appellant company and not that of Shri Mohanlal Chugh in his individual capacity.

37. In view of the findings given above, the additions of Rs.10,63,37,500/- made by the AO on the ground of unaccounted payment, for both the assessment years viz. A.Y. 2008-09 and A.Y. 2009-10 are hereby deleted. Consequently, the ground nos. 4(a), 4(b) and 4(c) of the appellant for A.Y. 2008-09 and ground nos. 3(a), 3(b) and 3(c) of the appellant for A.Y. 2009-10 are **Allowed.**

38. Ground No. 3 for A.Y. 2008-09 – General Ground

During the course of the hearing, the appellant company has not pressed this ground. Accordingly, the Ground No. 3 for A.Y. 2008-09 is **Dismissed.**

39. Ground No. 5(a) & 5(b) for A.Y. 2008-09 – UNEXPLAINED CASH CREDIT OF RS. 1,50,00,000/-

40. The brief facts relating to the issue are that during the course of the assessment proceedings for A.Y. 2008-09, the AO from the ITR of the appellant noticed that it had received certain

sum shown as unsecured loan aggregating to a sum of Rs. 1,50,00,000/- in its audited balance sheet. Accordingly, the AO issued a show cause notice on 18.03.2016 requiring the appellant as to show cause why the amount shown as unsecured loan be not added to income of the appellant u/s. 68 of the Act. According to the AO, the appellant did not furnish any explanation on this issue before him. Consequently, an addition of Rs. 1,50,00,000/- has been made by the AO in the income of the appellant for A.Y. 2008-09. Against such addition too, the appellant preferred appeal before the ld. CIT(A).

41. According to the CIT(A), even during the appellate proceedings, the appellant did not furnish any documentary evidences to establish the genuineness of the unsecured loans aggregating to a sum of Rs. 1,50,00,000/- shown in its return of income. Consequently, the CIT(A) confirmed the addition against which the appellant is in Appeal before us.

42. Before us, the appellant company has made a written submission in the form of a Synopsis. The relevant portion of the appellant's reply is being reproduced as under:

> *"SUBMISSION*
>
> *In this context, it is submitted as under:*
>
> *1.00 ISSUE OF UNSECURED LOANS WAS NOT A SUBJECT MATTER AT THE TIME OF RE-OPENING THE CASE OF APPELLANT*
>
> *At the outset, it is submitted that the ld. AO has made an addition of Rs.1,50,00,000/- on account of alleged unexplained unsecured loans which was not an issue before the learned AO at the time of reopening the case of the appellant. In other words, the AO has made an addition in the appellant's income on an issue which was not the subject matter of notice under s.148 of the Act and further, during the course of the assessment proceedings, there was no material before the AO from which he could have presumed that such cash credit represents the escaped income of the appellant. It shall be appreciated that the action of the AO in making an addition in the appellant's*

income on an issue which was not the subject matter for issuance of Notice under s. 148, is patently illegal, unwarranted and deserves to be knocked down on this legal count alone.

2.00 DETAILS OF UNSECURED LOANS

Without prejudice to the above, on merits, it is submitted that during the previous year relevant to A.Y. 2008-09, the appellant company has received fresh unsecured loans aggregating to a sum of Rs.1,50,00,000/- from two persons namely Shri Nilesh Ajmera at Rs.1,00,00,000/- and M/s. Phoenix Devcons Pvt. Ltd. at Rs.50,00,000/-. The complete details as regard to the unsecured loans are given through a separate statement placed at Page No. 421 of our Additional Paper Book.

2.01 DOCUMENTARY EVIDENCES IN SUPPORT OF THE UNSECURED LOANS

In order to establish the identity and creditworthiness of the loan creditors and as also, the genuineness of the loan transactions, the appellant company has furnished copies of confirmation letters duly signed by the loan creditors and copies of their income-tax returns for the A.Y. 2008-09. The copies of confirmation letters are placed at Page no. 422 & 423 of our Additional Paper Book and the copies of the income-tax returns of both the loan creditors are placed at page no. 424 to 428 of the Additional Paper Book.

2.02 IDENTITY & CREDITWORTHINESS OF THE LOAN CREDITORS AND GENUINENESS OF LOAN TRANSACTIONS

It would be worthwhile to note that in the case of the above mentioned loan creditors, search and seizure operations under s.132 of the Act were carried out by the Income-tax Department and therefore, the identity of the loan creditors cannot be doubted at all. Further, the entire loans aggregating to a sum of Rs.1,50,00,000/- have been given by the loan creditors through banking channels out of their explained and disclosed sources only. Furthermore, in the case of both the loan creditors, assessments for the relevant assessment year have got made under the provisions of s.153A/143(3) of the Act wherein the concerning AO has duly verified the receipts and payments in the hands of the loan creditors. Thus, the creditworthiness of the loan creditors also gets proved. Further, the genuineness of the loan transactions is duly established from the fact that both the loan creditors have duly given their confirmation in writing for grant of loan by them to the appellant company.

2.03 GENUINENESS OF LOAN TRANSACTIONS

The genuineness of the loan transactions is also established from the very vital fact that the loans aggregating to a sum of Rs.1,50,00,000/- have been by the loan creditors in pursuance of the ratio deal which was entered into by one of their group companies namely M/s. Phoenix Leisure & Lifestyle Pvt. Ltd. with the appellant company, as discussed in detail in the preceding paras. As has been stated in the preceding paras that this Hon'ble Bench, while passing the Order in the hands of the other party to the alleged transactions, i.e. in the case of Shri Nilesh Ajmera, held that Shri Nilesh Ajmera had paid only a sum of Rs.7,80,00,000/- to Shri Mohanlal Chugh / the appellant company and out of which, a sum of Rs.2,30,00,000/- was paid through explained sources

[kindly refer Last few lines at the internal page no. 43 of the Order placed at page no. 408 of the Additional Paper Book]. It is submitted that out of the aforesaid sum of Rs.2,30,00,000/-, an amount of Rs.1,50,00,000/- has been given by Shri Nilesh Ajmera/ his company in the form of the subject unsecured loans only.

In view of the above facts and circumstances of the case, it is submitted that the addition of Rs.1,50,00,000/- so made by the AO under s.68 of the Act deserves to be deleted in its entirety."

43. The crux of the appellant's submission it that the issue of unsecured loans, on which the subject addition of Rs. 1,50,00,000/- has been made by the AO was not a subject matter at the time of re-opening the case of appellant. The appellant has agitated that at the time of reopening its case, the AO did not have any material from which he could have presumed that the credits in the form of unsecured loans represents the escaped income of the appellant. The appellant has further contended that without making addition on the sole issue, on which the case of the appellant was reopened, the AO was not justified in making the addition on an altogether different ground. Further, on merits of the case, the appellant has contended that it had now, furnished all the necessary details such as complete name, address and PAN of the creditors and as also, certain documentary evidences to establish the identity, creditworthiness & genuineness of the loan creditors such as confirmation letters, income-tax returns etc. in its paper book. The appellant submitted that in the case of the loan creditors, search and seizure operations under s.132 of the Act were carried out by the Income-tax Department and therefore, the identity of the loan creditors cannot be doubted at all. As per the appellant, the entire loans have been given by the loan creditors through

banking channels out of their explained and disclosed sources only and in the case of both the loan creditors, assessments for the relevant assessment year have got made under the provisions of s.153A/143(3) of the Act wherein the concerning AO has duly verified the receipts and payments in the hands of the loan creditors, which proves the creditworthiness of the loan creditors. The appellant also submitted that the genuineness of the loan transactions gets established from the fact that the loans aggregating to a sum of Rs.1,50,00,000/- have been made by the loan creditors in pursuance of the ratio deal which was entered into by PDPL with the appellant company. The assessee submitted that this Bench, while passing the Order in the in the case of Shri Nilesh Ajmera, held that Shri Nilesh Ajmera had paid only a sum of Rs.7,80,00,000/- to Shri Mohanlal Chugh / the appellant company and out of which, a sum of Rs.2,30,00,000/- was paid through explained sources. It was submitted by the appellant that out of the aforesaid sum of Rs.2,30,00,000/-, an amount of Rs.1,50,00,000/- has been given by Shri Nilesh Ajmera/ his company in the form of the subject unsecured loans only.

43. Per Contra, the ld. CIT(DR) supported the orders passed by the authorities below. The CIT(DR) contended that nothing prevented the appellant from furnishing all the necessary documents relating to the acceptance of loan either before the AO or before the CIT(A). In such a situation, according to the CIT(DR), the action of the lower authorities were required to be confirmed.

44. We have heard rival contentions and perused the records placed before and carefully gone through the orders of both the lower authorities and paper book filed by the appellant. On perusal of the statement of the reasons recorded by the AO before issuance of notices u/s. 148 of the Act for the A.Y. 2008-09, it has been observed that the sole reason for reopening the case of the appellant was that Shri Mohanlal Chugh, on behalf of the appellant company had received a sum of Rs. 10,63,37,500/- from Shri Nilesh Ajmera for sale of land at Pipliyakumar. We find that nowhere in the statements of reasons recorded, the AO has pointed out that how the subject unsecured loan of Rs. 1,50,00,000/- has escaped assessment. Furthermore, we find that the addition made by the AO in the case of the appellant company for A.Y. 2008-09 is on an altogether different issue than the issue for which the reasons were recorded by the AO before issuing notice u/s. 148 of the Act. We further find that in the instant case, the notice u/s. 148 was issued on the basis of escapement of income in the hands of the appellant which was emanating in the form of making of unaccounted receipts in respect of some land at Pipliyakumar, but, eventually, we found that no addition has been made on such ground but, the addition has been made on an altogether different ground of making of the unexplained investment in purchase of the land. Although, the settled position of the law is that an assessee officer is eligible to make the addition on the issues in addition to the issue in respect of which the notice u/s. 148 was issued, but, the essential requirement remains that some addition on the core issue contained in the notice u/s. 148 must be made by the AO

before making the addition on other issues, which is. We find in the instant case. Thus, without going into the merits of the addition, we find no substance in the addition of Rs. 1,50,00,000/- made by the AO in the income of the appellant for A.Y. 2008-09 on account of unexplained unsecured loans and the same is deleted. Resultantly, the Ground Nos. 5(a) & 5(b) of the appellant for A.Y. 2008-09 are Allowed.

45. In the result of appeals of the assessee for AY 2008-09 and AY 2009-10 vide ITA no.94/Ind/2018 and ITA no.95/Ind/2018 are partly allowed as per terms indicated hereinabove.

The order pronounced as per Rule 34 of ITAT Rules, 1963 on 04.10.2021.

Sd/-	Sd/-
(RAJPAL YADAV)	(MANISH BORAD)
VICE PRESIDENT	ACCOUNTANT MEMBER

दिनांक /Dated : 04.10.2021
Patel/PS

Copy to: The Appellant/Respondent/CIT concerned/CIT(A) concerned/ DR, ITAT, Indore/Guard file.

By Order,
Asstt.Registrar, I.T.A.T., Indore