

**IN THE INCOME TAX APPELLATE TRIBUNAL (VIRTUAL COURT)
"G" BENCH, MUMBAI**

**BEFORE SHRI MAHAVIR SINGH, HON'BLE VICE PRESIDENT AND
SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER**

**ITA NOs. 581, 582, 583, 584, 585, 586 & 615/MUM/2021
(A.Ys: 2009-10, 2010-11, 2011-12, 2012-13, 2013-14, 2014-15 & 2015-16)**

M/s. Uma Polymers Ltd., C/o. G.P. Mehta & Co. CAS 807, Tulsiani Chambers Nariman Point Mumbai - 400021 PAN: AAACU0748E	v.	DCIT – Central Circle – 4(4) 19 th Floor, Air India Building Nariman Point, Mumbai – 400021
(Appellant)		(Respondent)

Assessee by	:	Shri Madhur Agarwal
Department by	:	Shri Rakesh Garg
Date of Hearing	:	29.10.2021
Date of Pronouncement	:	05.01.2022

ORDER

PER BENCH

1. These appeals are filed by the assessee against different orders of the Learned Commissioner of Income Tax (Appeals)–52, Mumbai [hereinafter in short "Ld.CIT(A)"] dated 23.02.2021 for the A.Ys. 2009-10 to 2015-16.

2. Brief facts relevant to the case are that, M/s. Uma Polymers Ltd., i.e. the Assessee herein, is an unlisted Public Company and is, *inter alia*, engaged in the business of manufacturing of laminated flexible packing material. Search and seizure action under section 132 of the Income-tax Act, 1961 (hereinafter referred to as the '**Act**') was conducted on 8th of May 2014 on the premises of the Assessee, its directors and other group companies. The Assessing Officer issued notices under section 153A of the Act for assessment years 2009-10 to 2014-15. In response Assessee filed the return of income for various years on 26.02.2015 and 27.02.2015 and acknowledgements submitted on 8th of June 2015 for the assessment years 2009-10 to 2014-15. The Assessee also filed a return of income for the assessment year 2015-16 on 24.09.2015. The Assessing Officer passed the assessment order dated 30.12.2016 under section 143(3) read with section 153A of the Act for the assessment year 2009-10 and 2014-15. The Assessing Officer also passed the assessment order for the assessment year 2015-16 on 30th December, 2016 under section 143(3) of the Act.

3. The Assessee submits that the findings in all the assessment orders are similar and the below mentioned findings are for the first assessment year i.e. 2009-10.

4. During the financial year 2008-09, relevant to the assessment year 2009-10, the Assessee had issued shares of face value of Rs. 10 per shares at the premium. The Assessee had, accordingly, received an amount of Rs. 8,12,00,000/- as share capital and premium during the relevant year. The Assessing Officer in the assessment order made the following additions –

5. Addition of Rs.8,12,00,000/- as income under section 68 of the Act – the Assessing Officer treated the amount of Rs. 8,12,00,000/- received by the Assessee as share capital and premium as unexplained amount of cash credit covered under section 68 of the Act. The Assessing Officer noted that the Assessee has raised the share capital through certain group companies which the Assessing Officer alleged as shell companies, which companies had in turn received funds from various alleged Kolkata based Jama Kharchi Companies. The Assessing Officer treated the receipt of share capital with premium as unexplained creditor under section 68 of the Act on the basis of the following findings:

6. The Assessing Officer referred to the report dated 12th June 2014 (**page 99 of the paper-book**) given by the Deputy Director of Income-tax (Investigation), Kolkata, wherein the Deputy Director has in turn referred to the inspector's report to allege that certain companies from whom the Assessee has received share capital are engaged only in the business of sale-purchase of various unquoted shares through the off market mode. Further, the net profit shown by these companies is not in comparison with its turnover and, therefore, *prima facie*, it can be said that the share capital and premium received by Uma Polymers Ltd., the Assessee herein, may be arranged for accommodation entry purposes.

7. The Assessing Officer further, analyzed the financial of the investee companies which had invested in the share capital of the Assessee and alleged that these companies do not have the credit worthiness to invest in the share capital of the Assessee-Company because, the investee companies do not have sufficient profit as per the profit and loss account.

8. The Assessing Officer further alleged that multiple companies are running from the address where the investee companies are registered, for example, 389 companies are operating from 71 Canning Street,

Kolkata; 157 companies are operating from 3, Mangolane, Kolkata, which shows that the investee companies are all allegedly shell companies.

9. Although the companies are registered in Kolkata, from the information available with the Assessing Officer, it come out that their return of income has been filed not from Kolkata, but from different places. The erstwhile directors in the companies through whom the Assessee had acquired the companies are acting as directors in multiple companies and, therefore, these factors indicates that investee companies are shell companies.

10. The Assessing Officer, accordingly, treated the whole amount of the share capital and premium received by the Assessee as the income of the Assessee under section 68 of the Act.

11. It is pertinent to mention that the Assessing Officer notes that post such inquiries revealed that there was no cash transaction in the account of the investee company. (**Page 19 of the assessment order**).

12. In respect to Addition with respect to scrape sales, during the search proceedings, certain loose papers (few slips of papers) were found from

'Abu Road' one of the units of the Assessee, which showed that the Assessee had received certain consideration in cash with respect to the sale of the scrap from the Abu Road units during the financial year 2014-15. Cash book was also found in the Abu Road Unit for a part of the period for financial year 2014-15. The Assessee had already offered as income, in the return of income for the assessment year 2015-16, the amount of unaccounted cash received by the Assessee on the basis of the loose paper found during the search.

13. The Assessing Officer observed that the loose papers found during the search, showed a cash component in scrap sales to total sales at 40.50%. The Assessing Officer, accordingly, held that in all transaction of scrap sales by the Assessee with respect to all its units and for all the years i.e. 2009-10 to 2015-16 has a cash component to the extent of 40.50%. Accordingly, the Assessing Officer made an addition of Rs.89,88,928/- in AY 2014-15 and Rs. 1,74,70,721/- in AY 2015-16 in respect to unaccounted income from scrap sales apart from similar additions made in the Asst Years from 2009-10 to 2013-14 which were subsequently deleted by the CIT(A).

14. On appeal before the Ld.CIT(A), the Ld.CIT(A) vide consolidated order dated 23rd February 2021, partly allowed the appeals filed by the Assessee for assessment years 2009-10 to 2015-16 and, *inter alia*, held as follows:

15. Addition of share capital under section 68 alleged to have been made on the basis of incriminating material found during search - The Commissioner of Income-tax (Appeals) observed that for assessment years 2009-10 to 2012-13, the assessment proceedings had not abated at the time of the search in view of the proviso to section 153A of the Act. Accordingly, this ground would be relevant only for assessment year 2009-10 to 2012-13. The Commissioner of Income-tax (Appeals) notes the legal position that the addition in the assessment proceedings for assessment years where the assessment has not abated, could only be made with respect to any incriminating material that was found during the course of the search, as has been held by the jurisdictional High Court in the case of Continental Warehousing Corporation Ltd. [58 taxmann.com 78]. After accepting the principles laid down by the High Court, the Commissioner of Income-tax (Appeals) held that the Assessee had received huge funds in the form of share capital / premium from various

entities which have been found to be non-existent and whose financial capacities have been found to be limited. The investigation unit has conducted sufficient inquiries and there are substantial materials available to demonstrate the above findings. The CIT(A) held that the documents / statements and overall findings of the search action are sufficient incriminating material to proceed under section 153A of the Act.

16. The Commissioner of Income-tax (Appeals) further held that incriminating material would include any book of accounts or document or any information unearthed during the course of search and which is having a bearing on the determination of total income as of a person. The Commissioner of Income-tax (Appeals) accordingly, held that incriminating material has been found in the case of the Assessee and, hence, the ground of the Assessee is dismissed.

17. In respect of Addition of Rs. 8,12,00,000/- under section 68 of the Act, the Commissioner of Income-tax (Appeals) confirmed the addition of Rs.8,12,00,000/- by holding that the Assessee has not been able to establish the genuineness and credit worthiness of the companies which have invested in the share capital of the Assessee and, therefore, the addition is required to be sustained. The Commissioner of Income-tax

(Appeals) in rejecting the ground of the Assessee relied on the findings given by the Assessing Officer. The Commissioner of Income-tax (Appeals) at paragraph 7.15 of the order notes that the issue is not the taint of these investee companies. The issue is of financial capacity to make investment in the Assessee.

18. Addition with respect to scrape sales, the Ld.CIT(A) partly allowed the relief to the Assessee by holding that the addition with respect to the unaccounted receipts on scrap sales should only be sustained for assessment years 2014-15 and 2015-16. The Commissioner of Income-tax (Appeals) held that as the loose paper was found for assessment year 2015-16, the addition for assessment year 2015-16 was justified. Further, as the cash book also found during the search had shown an opening balance as on 1st April 2014 and, therefore, the addition should be made for the assessment year 2014-15. Ld.CIT(A) held that for the other assessment years i.e. 2009-10 to 2013-14, there was no material to justify the addition, such addition was deleted by the Ld.CIT(A). The Ld.CIT(A) also gave a relief on the addition for assessment year 2014-15 and 2015-16 by reducing the addition by 25% on the value of addition made by the

Assessing Officer. Aggrieved assessee preferred appeal before ITAT against order of the Ld.CIT(A).

19. Assessee in all its appeals for the A.Y. 2009-10 to 2012-13 raised following identical grounds except for figures, grounds raised for the A.Y.2009-10 are as under:

"1. The orders passed by the learned lower authorities are bad in law and bad in facts.

2. The orders passed by the learned lower authorities are ab-initio void, inasmuch as, the assessment under appeal being an unabated assessment in terms of Sec. 153A of the Act, in the absence of any incriminating materials found as a result of search, no addition to 5 returned income could have been made. Consequently, addition of Rs. 8,12,00,000/is in excess of jurisdiction & contrary to the Statutory Provisions.

3. The learned lower authorities have grossly erred making an aggregated addition of Rs. 8,12,00,000/being the amount of share subscriptions received from two corporate entities, without bringing any material or evidence on record to support their assertions.

4. The learned lower authorities have grossly erred in holding that amended provisions of Sec. 68 were applicable in appellant's case, So it was the obligation of the appellant to prove genuineness source of source in support of Share Subscription money received at Rs. 8,12,00,000/from two corporate entities. The impugned addition is arbitrary, in contradiction of Statutory Provisions & wholly untenable in Jaw.

5. Having regard to the facts of the case and provisions of law & judicial propositions, the impugned addition of Rs. 8,12,00,000/is unsustainable in law, contrary to the settled legal position and in defiance of propositions laid down by the Hon'ble jurisdictional High Court.

6. The appellant may please be permitted to raise any additional or alternative ground on or before the hearing of appeal."

20. Assessee in all its appeals for the A.Y.2013-14 to 2015-16 raised following identical grounds except for figures, grounds raised for the A.Y.2013-14 are as under:

"1. The orders passed by the learned lower authorities are bad in law and bad in facts.

2. The learned lower authorities have grossly erred in making upholding an aggregated addition of Rs. 4,86,00,000 being the amount of share subscriptions received from corporate entities without appreciating the explanation given and without appreciating the evidences furnished in support of genuineness credit worthiness and identity of the Share Subscribers.

3. The learned Assessing Officer has grossly erred in alleging that the appellant gave cash in lieu of Share Subscription received, without establishing the cash trail and without bringing any material or evidences on record to support that Consequently, impugned addition made at Rs. 4,86,00,000/on the basis of unsubstantiated allegations is wholly untenable in law.

4. The learned Assessing Officer has relied on certain inquiries and gathered but never confronted the appellant with the said material prior to making addition of Rs. 4,86,00,000 by recourse to Sec. 68 of the I.T. Act, 1961.

5. Having regard to the facts of the case and provisions of law & judicial propositions, the impugned addition of Rs. 4,86,00,000/- is unsustainable in law, and deserves to be deleted in its entirety.

6. The appellant may please be permitted to raise any additional or alternative ground on or before the hearing of appeal."

21. At the time of hearing, Ld.AR submitted that, no addition can be made for the years where the assessment proceedings have not abated, when no incriminating material is found under section 153A of the Act, (ground relevant only for assessment years 2009-10 to 2012-13).

22. The Ld AR submitted that for A.Ys. 2009-10 to 2012-13, in view of the proviso to section 153A of the Act, the assessment proceedings had not abated at the time of the search. The Ld AR submitted that in case where the assessment proceedings have not abated, the jurisdiction of the Assessing Officer to make any addition is restricted only to issues where any incriminating material has been found during the course of the search, as held by the Special Bench in the case of All Cargo Logistics Ltd. v ACIT 137 ITD 287 (Mum) (SB) and as affirmed by the jurisdictional High Court in the case of Continental Warehousing Corporation Ltd. (*supra*). The Ld AR submitted that the decision of the Hon'ble Jurisdictional High Court has been consistently followed in subsequent case as below: -

- (i). Pr. CIT vs. Reynold Shirtings Ltd. (ITA No. 830 of 2017) (Bom)
- (ii). Pr. CIT vs. JWC Logistics Park Ltd. (ITA No. 465 of 2017) (Bom)
- (iii). JCIT vs. Benco Finance and Investments Pvt. Ltd. (ITA No.2071/Mum/2018) (Mum)

23. The Ld AR submitted that the jurisdictional High Court has held that incriminating material would be (i) books of account, other documents found in the course of search that were not produced in the course of the original assessment; and (ii) undisclosed income or property discovered in the course of search. The Assessee submits that in the facts of the present case, the books of account which recorded the transaction of

receipt of share capital and share premium were already disclosed before the Assessing Officer and the same were also produced during the assessment proceedings, for the years when there were scrutiny assessment. Further, there is no undisclosed income or property which was discovered during the course of the search which has any bearing on the issue of receipt of share capital and share premium by the Assessee from the investee companies in various years.

24. The Ld AR submitted that at page 6 of the assessment order, the Assessing Officer has made reference to few slips of papers as being the alleged seized material where the capital transfer is written to be split and distributed into group companies. The Assessee submits that such alleged seized material has not been referred to anywhere in the assessment order except for making this bald allegation. It is not even stated as to what is the alleged information in those loose papers and how the said information is an incriminating material and relevant for deciding as to whether the addition can be made under section 68 of the Act with respect to share capital and share premium received by the Assessee. Further, it is not even stated as to whether the information stated in those few slips is the same as what is stated in the balance-sheet of the Assessee or

anything beyond that. The Ld AR submitted that the Revenue has not even produced the alleged loose slips of paper before the Tribunal. Therefore, the Ld AR submitted that these alleged few slips are certainly not incriminating material which would justify the addition of share premium or share capital under section 68 of the Act.

25. Further Ld AR submitted by referring to page 15 of the assessment order, the Assessing Officer has further referred to the tally data contained in two folders of 'two financial entities' which were encrypted by means of vault password, which was revealed to the Assessing Officer only on 26th December 2016 at 4 p.m. by email. The Assessing Officer has alleged the same to be incriminating material. The Ld AR submitted that vide email dated 26th December 2016 (**page 434 of the paper-book**), the Assessee has explained that the information contained in the two folders, which are encrypted, is not new information. The first folder contained copies of the documents which were already available in tally and the second folder contained copies of the documents for two months of April and May 2011; whereas full year accounts for the said year were already available with the Assessing Officer. (**Refer page 438 of the paper-book**). Therefore, the Ld AR submitted that the alleged two folders of

tally data are certainly not an incriminating material which could justify any action for the years, for which the assessment proceedings have not abated.

26. The Ld AR submitted that the investigation wing report from Kolkata also cannot be regarded as incriminating material because the same is not a material which was found during the course of search, but it refers to data collected from third parties post the completion of the search and, therefore, it cannot be regarded as incriminating material so as to justify the addition in the hands of the Assessee.

27. The Ld AR submitted that the finding by the Commissioner of Income-tax (Appeals) that the material, as referred to above, will tantamount to incriminating material so as to justify the addition, is wholly erroneous and contrary to the decisions laid down by the Hon'ble Jurisdictional High Courts as well as other Courts. Therefore, the Assessee submits that the additions made under section 68 of the Act, for the A.Ys. 2009–10 to 2012 – 13 are liable to be deleted.

28. The Ld AR submitted that the original assessment for the A.Y. 2009-10 was completed u/s.143(3) wherein the issue of raising of share

subscription amount was duly considered by the then Assessing Officer as per the copies of the notice dt. 27.08.2010 appearing at **Page No 28-30 of Paper Book.**

29. Ld AR submitted that coming to the Addition under section 68 is bad in law, he submitted that the Assessing Officer has erred in invoking section 68 and the Ld.CIT(A) has erred in confirming the additions under section 68 with respect to share capital and share premium received by the Assessee. The Ld AR submitted that as the issue of jurisdiction under section 153A of the Act covers the assessment years 2009-10 to 2012-13, he submitted that the detailed submissions made herewith respect to assessment year 2013-14 and 2014-15 would be equally applicable for all assessment years, including assessment years 2009 – 10 to 2012 – 13 since in those assessment years also, the documentary evidences for the receipt of the share subscription amounts clearly establish the identity, creditworthiness and genuineness thereof and primary onus laid upon the Assessee u/s 68 stands duly discharged.

30. The Ld AR submitted that in the A.Y. 2013-14, the Assessee had received share application money of Rs. 4,86,00,000/- from two Companies viz., M/s. Patni Holdings Pvt. Ltd., amounting to

Rs.3,50,00,000/- and M/s. SMDS Trading Pvt. Ltd., amounting to Rs.1,36,00,000/-. The Assessee also received Rs. 25,00,000/- from SMDS Trading Pvt Ltd as share subscription money in AY 2014-15. M/S Patni Holdings Pvt Ltd is a very old NBFC company. The Assessee has given complete details with respect to the monies received by the Assessee from these two Companies. The Ld AR submitted the facts in the case of the assessee are that there is no allegation of cash deposits in any of the companies through whom the assessee has received share capital, this is also the findings given by the AO, further he submitted that the investments were made by the group companies, the share price issued are justified by the financials of the assessee company and it is running company.

31. The Ld AR submitted that during the course of hearing before the Assessing Officer, the Assessee had given complete details with respect to the issues of the shares by the Assessee at face value of Rs.10/- per share and the premium of Rs.40 per share. He submitted that genuineness of the investments cannot be doubted on the basis of the following submissions:

- a) The Assessing Officer at page 19 of the assessment order has accepted that post such inquiries had revealed that there was no 'cash' transaction in the accounts of the investee Companies.
- b) He submitted that both M/s. SMDS Trading Pvt. Ltd. and M/s. Patni Holdings Pvt. Ltd. are admittedly Group Companies of the Assessee, for example, (**page 77 of the paper-book for the assessment year 2013 – 14**) shows that the majority of the shares of M/s. SMDS Trading Pvt. Ltd. are held by the Assessee and its shareholders.
- c) The investee companies are not mere paper companies and have investments in intangible assets and are also in the activity of transactions of trading in derivatives. Both these Companies have investments in land in excess of Rs.50,00,000/-. (**Page 93 of the paper-book for assessment year 2013-14**) shows that M/s. Patni Holdings Pvt. Ltd. has investments in land in excess of Rs.1,00,00,000/-.
- d) The premium of Rs.40/- charged by the Assessee is completely justified, considering the net worth of the Assessee. The Assessee

is a fully operating Company which has turnover of more than Rs.100 Crores each year. The book value of the shares of the Assessee itself comes to Rs.59.60 per share when one considers the total share capital and reserve and surplus of the Assessee as at 31.03.2012. Therefore, the premium of Rs.40/- charged by the Assessee can, by no stretch of imagination, be treated as excessive or unreasonable.

32. Therefore, the Ld AR submitted that there is no question of doubting the genuineness of the transaction. He submitted that the credit worthiness of the investee companies also cannot be doubted as the annual accounts of these companies have been submitted at **page Nos. 71-122 of the paper-book for assessment year 2013-14.** The investments in the Assessee have clearly been reflected in the balance-sheets of these Companies.

33. Further, he submitted that the identity of the Company is no longer in doubt as the Ld.CIT(A) at page 7.15, page 15 of his order has stated *"The issue is not the taint of these companies. The issue is their financial capacity to make an investment"*. The Ld AR submitted that the Ld.CIT(A) is not disputing the identity of the Company, but is merely disputing the

credit worthiness and genuineness of the transaction. The Assessee submits that the Assessee has made submission with respect to the genuineness and creditworthiness of the transactions.

34. The Ld AR submitted that, the credit worthiness of a company cannot be decided merely looking at the profit earned by a company, but has to be decided by seeing the capacity of the company on the basis of its own capital reserves, borrowings, etc. to make investments. When one considers the capital and reserves of the investee companies, who have invested in the shares of the Assessee, it is clear that they have sufficient money to make such investments. Therefore, the Ld AR submitted that there is no question of applicability of section 68 to the investments made by the investee companies in the share capital of the Assessee.

35. The Ld AR submitted that the reference to the investigation wing report by the Assessing Officer and the Commissioner of Income-tax (Appeals) to justify the addition is wholly erroneous and incorrect. He submitted that the investigation wing report, which is at **page 99 of the factual paper-book for assessment year 2009-10**, is itself based on the report of the inspector, who was deputed to serve the summons to

the investee companies. When seeking a copy of the inspector's report by the Assessee, the Assessing Officer has accepted at paragraph 15.1 of the assessment order that the report of the inspector is a verbal report and not a written report. Further he submitted that no cognizance can be taken of a verbal report claimed to have submitted by the inspector as there is no basis to verify the correctness or authenticity of the report, so submitted. Further, at paragraph 3 of the report, the ADIT (Investigation), Kolkata, notes that one entity M/s. Riddhi-Siddhi Tie Up Pvt. Ltd. was operational from 3 Mango Lane, 1st Floor, South Block, Kolkata. However, from paragraph 5 of the report, it is stated that summons to M/s. Riddhi-Siddhi Tie Up Pvt. Ltd. was sent to some other address. That other address was occupied by C.A. Firm. The Ld AR submitted that from the aforesaid, it is clear that the investigation wing report cannot be relied upon to draw any adverse inference against the Assessee as there are contradictions in the report. Further, in paragraphs 2 and 8 of the report, DDIT (Investigation) Kolkata, notes that pursuant to the summons issued to the various investee companies, the investee companies have submitted balance-sheets, profit & loss accounts, bank statements, reflecting the transactions with the Assessee in response to the summons. Therefore, it is clear that all the investee companies have complied with

the summons and given the requisite details. Hence, he submitted that from the above, it is clear that the report, if at all, supports the case of the Assessee and does not, in any way, go contrary to the Assessee. therefore, he submitted that both the lower authorities were not justified in relying on the investigation wing's report to treat the share capital and share premium as unexplained cash credit under section 68 of the Act.

36. Ld AR submitted, the Assessing Officer has further alleged that various companies are registered at single address which gives a suspicion about the company being a genuine company, for example, 389 companies are operating from 71 Canning Street, Kolkata; 157 companies are operating from 3, Mango lane, Kolkata. He submitted that the Assessing Officer has not appreciated that the addresses referred to i.e. 71 Canning Street, Kolkata and 3, Mangoline, Kolkata, are addresses of a commercial complexes consisting of more than one building and not address of one office. These complexes have 100s of offices from which different companies run their business. Therefore, merely because there are multiple companies registered in these premises will not, in any way, lead to any adverse inference which ought to be drawn against the Assessee. The other allegations by the Assessing Officer except to the

return being filed not from Kolkata, but from some other premises, is not relevant as although the companies may be registered in Kolkata, but as they belong to the Assessee's Group, the return could very well be uploaded from where the returns of other Group Companies of the Assessee are uploaded.

37. The Ld AR submitted that mere reference to the profit and loss account to determine the credit worthiness of the investee companies is wholly erroneous and cannot be sustained.

38. On the other hand, Ld Department representative (Ld DR) submitted by referring to page 99 of the paper book that the inspectors were allocated with the job to verify the physical presence of these companies and accordingly physical verification was carried out, the report was also submitted. Since the physical verification was done, the report of the inspector has to be taken on the face value. Further he relied in the case of DCIT vs Leena Power Tech Engineers Pvt Ltd – 130 taxmann.com 341(Mum) and he brought to our notice para 15.3 of the assessment order (AY 2009-10). He also submitted the profiling of earlier directors clearly displays the suspicion in the transaction and he also submitted that the inspectors have found that so many companies are in

existence in the same address, hence these can be categorized as shell companies.

39. In rejoinder, Ld AR submitted that during the course of the hearing, the departmental representative had relied on the decision of the Tribunal in the case of **DCIT vs. Leena Power Tech Engineers Pvt. Ltd. – 130 taxmann.com 341**. The Ld AR submitted that this decision is completely distinguishable on the facts of the present case and submitted a detailed chart explaining difference in the facts of the Assessee's case with Leena Power Tech Engineers Pvt. Ltd. On the basis of the aforesaid chart, the Ld AR submitted that the Assessee has clearly explained the identity, genuineness and credit worthiness of the investee companies and, therefore, the addition made by the Assessing Officer and the Commissioner of Income-tax (Appeals) under section 68 of the Act with respect to the receipt of share capital and share premium ought to be deleted.

40. Ld AR submitted that during the course of hearing photocopies of statements of various alleged entry operators recorded behind the back of the Assessee were supplied which were used to hold that the various jamakharchi companies based in Kolkata were used to provide

accommodation entries by way of share subscription. It is submitted that even after a specific request for cross examination of these persons made, no opportunity thereof was given and therefore principle of natural justice stands altogether violated.

41. Further Ld AR submitted that the Assessing Officer himself had never conducted any enquiry to discredit the documentary evidences submitted to discharge the primary onus laid upon the Assessee and only relied upon the report of the investigation wing which itself was made in a cryptic manner and as submitted above, is unreliable. Even the Assessee during the course of the assessment proceedings, first appellate proceedings and now before the Tribunal, submitted details of source of the source for receipt of share subscription amount, the question of applicability of sec 68 is totally ruled out in the absence of any adverse finding of the lower authorities in this regard.

42. Considered the rival submissions and material placed on record. We observe from the record that the assessment for AY 2009-10 to 2012-13 are not abated at the time of search as per the provisions of sec.153A of the Act, the question before us is whether the investigation made by the investigation wing subsequent to the post search operation amounts to

incriminating material, it would be relevant to get into the observations made by the Hon'ble Jurisdictional High Court in the case of Continental Warehousing Corporation reported in 374 ITR 645 (Bom), wherein the expression 'incriminating material' has been explained as any evidence or material found during search which were not submitted or produced in the course of filing return of income / original assessment and any undisclosed income or property discovered during search. But in the given case, we observe that no such materials or income found during search but AO relied completely on the information forwarded by the investigation wing post search and he refers to few slips of papers being alleged seized materials where the capital fund transfers are written and which are to be split and distributed into group companies. These alleged seized papers were not referred to anywhere in the assessment order and further we enquired with the Ld DR, whether the above said seized papers exist in the assessment records. He, after verification submitted before us that no such papers exist. Considering the above facts on record, we do not see any reason to treat the assessment valid for the AY 2009-10 to 2012-13 since these were not abated at the time of search. By respectfully relying on the various decisions of the various courts on the subject of incriminating material, we hold that the assessment made by

the assessing officer under section 143(3) r.w.s 153A without any incriminating material is bad in law and accordingly no addition could be made thereon for the receipt of share capital and share premium.

43. Coming to AYs 2013-14 and 2014-15, we observe from the records submitted before that there is no involvement of any cash transactions in the form of cash deposits or otherwise, anywhere between the assessee and the group companies from whom assessee had received share capital and premium. Further we observe from the record that the investments were made by the group concerns in the assessment years under consideration. Therefore, in our considered view, the transactions are between the group companies, the requirement of sec 68 is already proved beyond doubt for the identity and with regard to credit worthiness, we observe from the financial statements and submissions made by the both the parties that both the sister concerns viz., Patni Holdings Pvt Ltd and SMDS Trading Pvt Ltd have sufficient source of funds to make investments in the assessee company, the assessing officer completely rest his findings on the issue of earning capacity of the group companies. In our view, in order to invoke provisions of the section 68, the capacity to make investment is relevant in the form of sufficient funds in the

company. In the given case, the assessee had submitted sufficient information before tax authorities that the sister companies have sufficient funds to make investments. The sister concerns having less or meagre income is of no relevance for the purpose of making investment in the assessee company. What is relevant is the availability of cash flow with the sister concerns to make investments in the assessee company. There is no requirement in the statute to make investment in another concern only out of income earned during the year. From the perusal of the audited financials of M/s Patni Holdings Pvt Ltd, it is found that the net owned funds as on 31.3.2013 and 31.3.2012 was Rs 9.15 crores which is very much sufficient to make investment of Rs 3.50 crores in assessee company in A.Y. 2013-14. Similarly from the perusal of the audited financials of M/s SMDS Trading Pvt Ltd, it is found that the net owned funds as on 31.3.2013 and 31.3.2012 was Rs 15 crores which is very much sufficient to make investment of Rs 1.36 crores in assessee company in A.Y. 2013-14 and Rs 25 lakhs in A.Y. 2014-15. Therefore, in our considered view, the assessee has also proved the credit worthiness.

44. With regard to genuineness of the transaction, we observe from the records that all the transactions relating to investments are made through

regular banking channel and the revenue authorities has acknowledged the fact that there is no cash deposits either by the assessee or the sister concerns or anywhere in the group. Further we observe that the investigation carried on by the investigation wing based on the few slips of papers being the alleged seized material where the capital transfer is written to be split and distributed into group companies were never part of the assessment record and this is mere suspicion and wishful interpretation rather than any relevance to facts. When the investments are made by the group companies and within group companies, it could be made based on the intrinsic value of the shares. In the given case, the assessee has submitted documents to prove that the net assets value of the shares of the assessee is Rs.59.60 per share whereas assessee has issued the shares @ of Rs.50 per share (including premium of Rs.40 per share). It is no body's case that the source of source from which the concerned group company had received monies had made certain cash deposits in their bank account and issued cheque / draft to the sister concerns. In our view, the assessee had clearly proved even the source of source in the instant case. In the given case, it is already proved that there is no involvement of cash anywhere in this transaction and all the transactions are routed only through bank. The tax authorities have not

brought on record any evidence to prove otherwise. We observe from the record that the AO merely relied on the inspector report as per which all the companies are in one address and return of income are filed in different places than the registered office. It is brought to our notice that the companies are operated from 71, Canning Street and 3, Mango Lane, Kolkata are address of whole complex which consist of several floors where several offices are situated. Merely because the returns are filed from a different location other than the registered office, as alleged by the AO, the same cannot be the reason to draw adverse inference on the genuineness of the transactions. Therefore, in our considered view, the assessee has complied and proved the onus rest on them. The oral report of the inspector also cannot be relied on for deciding the genuineness unless there is proper evidence on record. Therefore, in our considered view, the additions made by the AO is on the basis of unsubstantiated facts. Therefore, we direct AO to delete the additions made u/s 68 of the Act.

45. At the time of hearing, Ld DR relied in the case of Leena Power Tech Engineers Pvt Ltd (supra), we observe that there are several

distinguishable facts compared to the present case, these are given below:

a). Information was received that huge cash deposits were made in one of the branches of ICICI Bank, aggregated to Rs.241.50 Crores (referred to as layer-1 account). These accounts were closed within a very short span of time and the amounts therein were transferred to other account. The cash deposit ultimately found its way through at least four layers to the assessee-company. (Page-2 of the order). Whereas in the present case before us, there is no allegation of cash deposits in any of the Companies through whom the assessee has received share capital. In fact, the Assessing Officer, at page-19 (line-4) gave a categorical finding that post search inquiry revealed that there was no cash transaction in the accounts of these companies.

b). The investee Company, i.e. RVPL. which had invested in the Appellant therein, did not acquire any participation in the management of the company therein. There is no idea about persons behind RVPL. The Tribunal held that making such huge investments without any management participation in the entities in which investments are made, is very unusual. The assessee is stated

to be not connected with RVPL in any manner, which is unusual. [Page 20, 21; Paras 16, 17 & 18]. Whereas in the present case before us, the investment has been made in the assessee by group companies of the assessee. For example, a shareholding of SMDS Trading Pvt. Ltd. would show that [Page 77 of Paper Book] the majority of the shares is held by the assessee and its shareholders. Similarly, Patni Holdings (P) Ltd. was also a group company. Therefore, in the present case, the investee Company is a group Company of the assessee and has, accordingly, made investments in the assessee.

c). The valuation of shares of the assessee at 900% premium is not justified and the Tribunal held that the valuation report submitted by the assessee cannot be relied upon on the basis of various reasons given by the Tribunal in paragraphs 19 to 22 thereon [page 21-22 of the Paper Book]. Whereas in the present case before us, the assessee has issued shares of face value of Rs.10/- each at premium of Rs.40/- per share. The assessee submits that from the balance sheet of the assessee, at page 105 of PB, premium of Rs.40 received by the assessee is completely justified. The assessee is an operating company, having turnover

of more than 100 crores. The total shareholders' fund, i.e. share capital and reserve & surplus, is Rs.59,08,24,557/-. As stated earlier, the net asset value per share of the assessee is Rs. 59.60; whereas the assessee has issued shares at Rs.50 per share. Hence, the premium of Rs.40 per share, can, by no stretch of imagination, be said to be unreasonable.

d). The investee companies do not have any activity or assets in the balance sheet and there are no revenues except bank interest. (Paras 14 to 16 of decision). Whereas in the given case, Patni Holdings (P) Ltd., being a very old NBFC, apart from investment in equity, has investment in land in excess of Rs. One Crore and apart from earning interest income, the company is also engaged in trading in derivatives and also has income from dealing in currency. Similarly, SMDS Trading Pvt. Ltd. has investment in land of Rs.74 Lakhs and is also engaged in derivative transactions.

From the above observations, the case of Leena Power Tech Engineers Pvt Ltd (supra) relied by the Ld DR is not applicable to present case.

**Addition with respect to cash estimate on account of scrap sale
(relevant to assessment year 2014-15 and 2015-16),**

46. Ld. AR submitted that this issue arises only in the assessment years 2014-15 and 2015-16. He submitted that during the course of the search, certain loose slips of pages were found at one of the units of the Assessee which reflected receipt of cash on transaction of scrap sale. The Assessee submits that to the extent of the material found during the course of the search, the Assessee has already offered the undisclosed income in the return of income for the assessment year 2015 – 16. The Ld AR submitted that as no other material was found during the course of the search, the addition with respect to all other scrap sales made by the Assessing Officer during the assessment years 2014-15 and 2015-16 for whole of these years on the basis of loose slips of paper is completely unjustified. He relied in the case of PCIT v Supreme Cylinders Pvt. Ltd. (ITA No. 76 of 2018). The Ld AR submitted that no other incriminating evidence or material was found to support the presumption of the assessing officer that in all transactions of scrap sales, the Assessee has earned additional cash consideration. He submitted that merely because the Assessee had accepted receipt of cash in a very few transactions, it cannot be presumed

that cash could have been received in all other transactions undertaken by the Assessee. Therefore, he submitted that the addition made by the Assessing Officer ought to be deleted.

47. Without prejudice, the Ld AR submitted that, if at all, the addition needs to be sustained, then the same should be sustained only with respect to the scrap sales made in the 'Abu Road Unit', as admittedly, loose papers reflecting cash receipt were only found at the Abu Road Unit and no such material was found in any of the other units of the Assessee. Therefore, if at all, the addition is made, it will only be reflected to the scrap sales on Abu Road Unit. The Assessee has already filed details of the scrap sales by all the units of the Assessee before tax authorities below.

48. On the other hand, Ld. DR submitted that he relies on the order passed by Ld CIT(A) and he brought to our notice page 59 of the appellate order to submit that Ld CIT(A) has already given substantial relief to the assessee.

49. Considered the rival submissions and material placed on record. We noticed that certain loose papers were found from Abu Road, one of the

unit of the assessee, which showed that assessee had received certain consideration in cash relating to sale of scrap during financial year 2014-15 and the cash book was also found in Abu Road unit. Accordingly, assessee had offered as income in the AY 2015-16. However, AO held that in all transaction of scrap sales made by the assessee in all the units belongs to the assessee, for all the AYs 2009-10 to 2015-16, which has a cash component to the extent of 40.50%. Accordingly, he made addition in AY 2009-10 to AY 2015-16. We observe that Ld CIT(A) has deleted the addition made in AY 2009-10 to 2013-14. For AY 2014-15 and 2015-16, Ld CIT(A) has reduced the addition by 25% on the value of addition made by the AO. Since the addition made by the AO on the scrap sale of all the units even though the evidence found only in Abu Road unit. Aggrieved, the assessee is in appeal before.

50. After considering the submissions and material placed on record, we noticed that AO applied presumption and assumptions to bring cash components in the scrap sale of all the units even though nothing was found during search in other units, which are part of search operation. In our considered view, the AO and CIT(A) has sustained the addition merely on assumptions without their any evidence to show that assessee has not

declared the cash sales in all the units. Therefore, we are directing AO to sustain the addition made only on the scrap sales recorded in the Abu Road unit only for the AYs 2014-15 and 2015-16. Accordingly, the grounds raised by the assessee are partly allowed.

51. In the result, appeals filed by the assessee are partly allowed.

Order pronounced on 05.01.2022 as per Rule 34(4) of ITAT Rules by placing the pronouncement list in the notice board.

Sd/-
(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Mumbai / Dated 05.01.2022
Giridhar, Sr.PS

Sd/-
(MAHAVIR SINGH)
VICE PRESIDENT

Copy of the Order forwarded to:

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

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum