

IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "G", MUMBAI

BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER AND  
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER

ITA No. 6489/Mum/2019 (A.Y. 2011-12)

ITA No. 6490/Mum/2019 (A.Y. 2012-13)

ITA No. 4105/Mum/2019 (A.Y. 2013-14)

ITA No. 4096/Mum/2019 (A.Y. 2014-15)

ITO-22(3) (2),  
Mumbai.

..... Appellant

Vs.

M/s Sai Everest Building & Developers,  
12/B, 4<sup>th</sup> Floor, Silver Apartments,  
Datta Mandir Road, Santacruz (East),  
Mumbai- 400055.

**PAN: ABLFS0449M**

..... Respondent

|                       |   |                          |
|-----------------------|---|--------------------------|
| Appellant by          | : | Sh. Hoshang B. Irani, DR |
| Respondent by         | : | Sh. Prakash Jhunjhunwala |
| Date of hearing       | : | 04/04/2022               |
| Date of pronouncement | : | 18/05/2022               |

**ORDER**

**PER GAGAN GOYAL, A.M.:**

These four appeals by the Revenue are directed against the order of Commissioner of Income Tax (Appeals)-34, Mumbai [hereinafter referred to as 'the CIT (A)'] vide common order dated 11.07.2019 for the Assessment Years (AY) 2011-12, 2012-13, 2013-14 & 14-15 respectively. The Revenue has raised the common grounds in all the AYs except variation of amounts in figure. Facts and grounds being identical, we take appeal no. ITA No. 6489 / Mum / 2019 (A.Y.

2011-12) as lead case and ratio will be applied for all the years. The assessee has raised the following grounds of appeal in AY 2011-12:

*“1. On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in deleting the addition made on account of bogus unsecured loan of Rs. 1,74,00,000/- as the investigation wing of Kolkata establishes that the loan creditors are accommodation entry provider.*

*2. On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in deleting the addition made on account of bogus unsecured loan ignoring the facts brought out by AO in the assessment order.*

*3. On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in deleting the addition relying upon the judgement of various courts which are distinguishable on facts, however has overlooked the judgement of Hon'ble Indore Bench of ITAT in case of Agrawal Coal Corporation (P) Ltd. vs Asst. CIT 63 DTR 201 and judgement of Delhi High Court in case of CIT vs N R Portfolio Pvt. Ltd (Delhi High Court) wherein the Hon'ble courts have held that merely because the companies were registered with ROC, were filing return of income , having PAN/Bank accounts etc. did not establish their identity as these companies might have been existing on papers or in real sense at the time of registration but were specifically found to be non-existent, and despite the submission of above details addition u/s 68 is valid —if the lender concerns do not respond summons.*

*4. On the facts and in the circumstances of the case and in law, the Ld.CIT(A) deleted the addition ignoring the report of DDIT (Inv.) Kolkata & Statements given by Shri Praveen Agarwal and Beni Prasad Lahoti that they had these paper concerns only for providing accommodation entry for commission.*

*5. on the facts and in the circumstances of the case and in law, the Ld. CIT (A) erred in, deleting the disallowance made by the AO on account of interest expenses of Rs. 20, 81,858/- claimed to have paid to the concerns which are accommodation entry providers, ignoring the findings of AO in the assessment order.*

*6. On the facts and in the circumstances of the case and in law, the Ld.CIT (A) erred in estimating the profit @10% of on money, when the assessee had already claimed its entire expenses in P&L account and on money is over and above what has been shown in the books of account.*

*7. The appellant prays that the order of Ld. CIT (A) on the above grounds be set-aside and that of the assessing officer be restored.*

2. The assessee company is engaged in the business of real estate developers filed his return of income on 28.09.1011 declaring total income at Nil. The return of income was processed u/s 143(1) of the Income Tax Act, 1961 ('the Act'). The case was selected for scrutiny after recording of reasons u/s 148 of the Act. On the issue of re-opening under section 148 of the Act, there is no grievance of the assessee. We are reproducing grounds of appeal for the year under consideration with their facts emanated from the records of the authorities below along with assessee's submission. Ground No.1, 2, 3 & 4 are interlinked, hence discussed and disposed together.

3. The appellant is partnership firm engaged in the business of real estate development and construction activities. During impugned years, the appellant filed its return of income on disclosing the total income for AY: 2010-11 of Rs. Nil, A.Y 2011-12 of Rs. Nil, A.Y2012-13 of Rs. Nil and A.Y2015-16 of Rs.92,65,200/-. A Survey u/s.133A was conducted at the business premises of the appellant on 24/08/ 2015 wherein certain incriminating material were found and statements of the partners were also recorded. The documents found during course of survey revealed that various on-monies representing undisclosed consideration on sale of flats were received by the appellant and also the noting of bills, vouchers, etc relating to expenses were found during course of survey. The statement of the partners Mr. Ghanshyam Sompura and Mr. Govind Patel were recorded wherein such partners denied of having received any undisclosed on-money on sale of flats. During course of assessment, the AO issued the show cause notice on proposing to make the addition of the on-money representing undisclosed sale consideration on the flats sold by the appellant. The AO also observed that the appellant has received the unsecured loans from Kolkata based companies which

had been held as non-genuine in the assessment order for A.Y-2013-14 and proposed to make the addition of the unsecured loans and consequential disallowance of interest on the loans. The appellant furnished the submissions and documentary evidences before the AO to dispute the allegations of the AO. However, AO was not satisfied with the reply of the appellant and accordingly made the addition of the unsecured loans received during the years and also made the disallowance of interest on such loans. The AO also made the addition u/s.69A of the on-money on sale of flats.

4. Ld. CIT (A) in his observation discussed the facts and various judicial decisions to support the case of the assessee, which is being reproduced as under:

“4.1 I have carefully considered the facts of the case, documents produced before me and submissions filed by the AR. I have also considered the case laws filed by AR of the appellant. I have also gone through the basis of additions and disallowances made by the AO in the assessment orders. As the issues involved in all appeals involve common issues and identical facts, accordingly the appeals are decided together in understated manner.

4.2 The Ground No.1.0 and 1.1 in the appeal for A.Y-2015-16 relate to the addition made u/s.68 of unsecured loans received of Rs.35,00,000/-. The AO had made the addition of unsecured loans received from the parties which had been held as non-genuine in the assessment order related to A.Y 2013-14. The AO had reproduced the report of DDIT (Inv.) Kolkata which stated that the lender parties are controlled by entry operators named Shri Praveen Agarwal and Shri Beni Prasad Lahoti and were not found in existence. On the other hand, the appellant had submitted the documentary evidences such as name address and PAN of lender parties, PAN card and AO details of the lenders, CIN master data (ROC) of lender companies, confirmation of account, I.T. acknowledgement receipts, Balance sheet, bank statement of the lenders and TDS certificates in form no.16A of interest payments. The AO had not pointed any fault in the above stated documentary evidences furnished by the appellant. The AR relied on the appeal orders passed by me in the appellant's case related to assessment years 2013-14 and 2014-15 wherein the

addition of the loans had been deleted. The AR also relied on several judicial decisions to support the case of the appellant.

4.3. I have carefully considered the facts of the case, contention of the AO and arguments of the AR. The similar issue had been decided by me in the appellant's case in the appeal orders related to A.Ys 2013-14 and 2014-15. The relevant operating Para of the orders related to A. Ys 2013-14 and 2014-15 are as under:

*"5.4 I have carefully considered the facts of the case, contention of AO and arguments advanced by Ld. AR. On perusing the documents filed on record, it is observed that the appellant had furnished the PAN, AO details, CIN master data (ROC) to prove the identity of the lenders. The appellant had filed the copies of ledger account, confirmation of account, TDS certificates and own bank statements to justify the genuineness of the loans. The appellant had filed the copies of I.T acknowledgement receipts, balance-sheets and bank statement of the lenders to prove the credit worthiness of the lenders. The appellant had also filed the copies of the TDS certificate issued u/s 194A to justify the interest paid on such loans. The tabular chart filed on record discloses the receipt of the loans through Banking channel and the appellant had even repaid such loans through banking channel along with interest payment after TDS u/s 194A deduction. The appellant had reasonably discharged its onus on furnishing the above stated documentary evidences, thereby proving the identity and credit-worthiness of the lenders and genuineness of the loans. The bank statement of the lenders does not disclose any cash deposits supporting to the loans advanced by such lenders to the appellant. It is observed that AO had not pointed any fault in the above stated documents filed by the appellant on record. The AO had not issued any notice u/s. 133(6) to the banker of the lenders to verify the source of their funds and had not brought any credible evidence to prove that the undisclosed funds belonging to the appellant had been routed to source the disputed loans. The AO had relied on the report of DDIT (Inv), Kolkata wherein the lenders are stated as belonging to an accommodation entry provider named Mr. Praveen Agarwal. However, in the judicial decisions relied by Ld. AR, it has been decided that the addition cannot be made relying on the statement of 3rd parties. It is a settled law that the addition cannot be made solely on the basis of the statements of 3rd parties in particularly when the appellant was not allowed an opportunity of cross examination. The AO and DDIT (Inv) had not pointed out any material to justify the allegation and had not brought any evidence to disprove the loans. There is also a force in the arguments of AR that the loans cannot be held as non-genuine only for the reason that the summon u/s 131 are not served to the lenders. **The Ld.***

***AR had furnished the copies of evidence of service of request letters dispatched by the appellant who had been served to certain lenders by postal department and documentary evidences furnished by the lenders. It is observed that AO had not rejected the books of account u/s 145(3) of the Act. The AO had not issued the notice u/s 133(6) to the banker of the lenders to verify the source of the lenders funds and had not pointed any defect in the documentary evidences furnished by the appellant. It is a settled law that the appellant is not required to explain the source of source of funds. As the appellant had discharged its onus on furnishing the PAN, AO details, CIN master data (ROC), ledger account, confirmation of account, TDS u/s 194A certificates, own bank statement, LT acknowledgement receipt of the lenders, Bank statement of the lenders and balance sheet of the lenders, which establishes the identity, credit-worthiness of lenders and genuineness of the loans, thus the addition made by the AO cannot be sustained and is hereby deleted.***

*The various case laws relied by the AR also supports the case of the appellant. The Hon'ble Jurisdictional High Court in the case of Pr. CIT v. Veedhata Tower Put Ltd (ITA no. 819 of 2015) and H. R Mehta (ITA no. 58 of 2001) had decided that the source of payer's funds may not be proved. The operating Para of the Hon'ble Bombay High Court's decision is reproduced as under:*

*"In our view in the light of the fact that the monies were advanced apparently by the account payee cheque and was repaid vide account payee cheque the least that the revenue should have done was to grant an opportunity to the assessee to meet the case against him by providing the material sought to be used against assessee in arriving before passing the order of reassessment. This not having been done, the denial of such opportunity goes to root of the matter and strikes at the very foundation of the reassessment and therefore renders the orders passed by the CIT (A) and the Tribunal vulnerable. In our view the assessee was bound to be provided with the material used against him apart from being permitting him to cross-examine the deponents. Despite the request dated 15th February 1996 seeking an opportunity to cross examine the deponent and furnish the assessee with copies of statement and disclose material, these were denied to him. In this view of the matter we are inclined to allow the appeal on this very issue."*

*Also, Hon'ble Apex Court in the case of Pr. CIT us, Vaishno devi Refoils & Sol vex reported in 96 Taxmann.com 469 had dismissed the SLP and affirmed the decision of Hon'ble Gujarat High Court on holding that the*

*source of funds of the lender may not be proved by the assessee. The operating Para of Hon'ble Apex Court decision is reproduced as under:*

*"For relevant year, Assessing Officer made addition to income of assessee firm under section 68 on account of capital introduction by one partner of firm-He was of view that creditworthiness of partner who introduced capital had not been proved High Court in impugned order noted that amount received by assessee-firm had been duly reflected in books of account maintained by concerned partner and that assessee had furnished details with regard to source of capital introduced in firm and concerned partner had also confirmed such contribution then it is concluded that assessee had duly discharged onus cast upon it - Further, court noted that if Assessing Officer was not convinced about creditworthiness of partner who had made capital contribution, inquiry had to be made at end of partner and not against firm."*

*In the case of Pr. CIT vs. Hi-Tech Residency (P.) Ltd reported in 96 Taxmann.com 403, Hon'ble of Supreme Court decided that:*

*"Section 68 addition was made in hands of assessee on ground that assessee company was not able to produce any of director, shareholders or principal officer of companies to whom shares were allotted and lenders from whom unsecured loans was taken - High Court deleted said addition holding that assessee had discharged its onus of establishing identity, genuineness and creditworthiness of both investors as well as lenders - Whether, on facts, SLP against said order was to be dismissed — Held; yes."*

*In the case of CIT vs. Jai Kumar Bakliwal reported in 366 ITR 217, Hon'ble High Court of Rajasthan decided that:*

*"It had been claimed by AO that in most of cases, though amount was received by account payee cheque and most of creditors were assessed to Income Tax Act and had even provided their permanent account number but on desire of AO of producing said parties, none of parties were able to prove source of amount advanced to assessee Thus, AO made addition u/s 68 as income from undisclosed sources CIT(A) deleted addition holding that source of cash creditors was not required to be proved by assessee once identity, capacity and genuineness stands proved ITAT dismissed revenue's appeal Held, all cash creditors had affirmed in their examination that they had advanced money to assessee from their own respective bank accounts Therefore, when there was categorical finding even by AO that money came from respective bank accounts of creditors, which did not flow in shape of money, then, such addition could not be sustained and had been rightly*

*deleted by both two appellate authorities There was no clinching evidence in present case nor AO had been able to prove that money actually belonged to none but assessee himself Action of AO was based on mere suspicion.”*

*In the case of DCIT vs. Rohini Builders reported in 256 ITR 360, Hon’ble High Court of Gujarat decided that:*

*“Assessee furnished complete addresses of all the creditors along with GIR numbers/PAN as well as confirmations along with copies of assessment orders passed in the cases of individual creditors, wherever available, and copies of returns filed by the creditors in the remaining cases—All loans were received and repaid by assessee by account payee cheques along with interest—Tribunal deleted the addition.”*

*In the case of CIT v. Avant Grade Carpets Lid reported in 90CCH 462, Hon’ble High court of Allahabad decided that:*

*“CIT (A) observed that balance sheet of lender as of 31 March 2009 had been placed on record—Assessee had placed all bank accounts of lender and confirmatory certificates in respect of borrowings made by lender Company—CIT (A) held that identity of lender, its creditworthiness and genuineness of transaction had been established—ITAT affirmed finding of CIT(A) Held, On perusing records, it appeared that finding that Assessee was rerouting its own funds was based on surmise—CIT(A) had benefit of considering balance sheet of lender as well as confirmatory certificates in respect of advances which lender in turn had received. There was no material to establish that Assessee was engaged in transaction for routing its own funds—View which had been taken by Tribunal was possible view to take and no material on record for this Court to hold that view of Tribunal suffered from any perversity—Appeal would not give rise to any substantial question of law—Assessee's Appeal disposed of.”*

*In the case of CIT v. Ranchhod Jivabhai Nakhava reported in 208 Taxman 35, Hon’ble High Court of Gujarat decided that:*

*“Once the AO got hold of the PAN of the lenders, it was his duty to ascertain from the AO of those lenders, whether in their respective return they had shown existence of such amount of money and had further shown that those amounts of money had been lent to the assessee. If before verifying of such fact from the AO of the lenders of the assessee, the AO decides to examine the lenders and asks the assessee to further prove the genuineness and creditworthiness of the transaction, then it was held that the AO did not follow the principle laid down under Section 68 of the Income Tax Act... It was further held that the Tribunal rightly set-aside the deletion made by the*

*AO, based on erroneous approach by wrongly shifting the burden again upon the assessee without verifying the Income Tax return of the creditors. The position, however, would have been different if those creditors were not income tax assessee or if they had not disclosed those transactions in their income tax returns or if such returns were not accepted by their AOs.”*

*In the case of CIT vs. Varinder Rawlley reported in 366 ITR 232, Hon’ble High Court of Punjab & Haryana decided that:  
It has come on record that the Assessee-respondent received the amount by way of an account payee cheque. The amount was returned by way of an account payee cheque. The transactions were reflected in the bank accounts of the Assessee as well as the creditor. It appears that no enquiry was made by the Assessing Authority. If the Assessing Officer had any doubts about the entry, instead of drawing any inference, the Assessing Officer could have summoned the proprietor of the firm. No attempt was made by the Assessing Officer to ascertain the factum of clearance of cheque from the bank and subsequent refund of the amount. Once it is so, in Court’s view the Assessee had sufficiently discharged the burden which lay upon it to explain the nature and source of the credit entry appearing in its accounts and the burden clearly shifted in the present case on to the department to prove to the contrary and hold that in spite of the Assessee’s explanation, the entries could still be held to represent the Assessee’s income. Tribunal had rightly concluded that it was sufficient to delete the addition.”*

*Thus, respectfully following the Judicial decisions cited supra and considering the fact the loans had been received through banking channel, repayment of such loans made through banking channel, interest payments made after TDS u/s 194A deduction and other documentary evidences such as PAN, AO details, CIN master data (ROC), ledger account, confirmation of account, TDS u/s 194A certificates, own bank statement, I.T acknowledgement receipt of the lenders, Bank statement of the lenders and balance sheet of the lenders which establishes the identity, credit-worthiness of lenders and genuineness of the loans and in absence of direct contrary evidence brought on record by the AO, I hold that the AO is not justified in treating such loan as non-genuine and thus the addition made u/s.68 cannot be sustained and is hereby deleted. I direct the AO to delete the addition made in A.Y 2013-14 of Rs.2, 51, 50,000/-.*

*Accordingly, ground no. 1 & 1.1 for A.Y-2013-14 are hereby allowed.”*

5. We have gone through the assessment order, order of the Id. CIT (A) and submissions made by the assessee both before the AO and Id. CIT (A). We have respectfully considered the judicial decisions of various Courts and Tribunal relied upon by the assessee.

6. It is noticed that from the documents relating to the lenders, as produced by the assessee, it was noticed that the amount advanced was not commensurate and consistent with their returned income, the company did not even have an office, whereas the lender companies (Essar (India) Limited) and (Sustha Distributors Pvt. Ltd.) had to press 7.57 crore and 14.76 Crores worth of investment and loans and advances, from the bank statement, the entries are only circulating in nature.

7. During the course of the assessment proceedings, it was observed from the balance-sheet that assessee has accepted unsecured loans from Kolkata parties on perusal of the ITR, Audit report, bank statement of the lender parties it was observed that all the entities are involved in similar activities of share trading and investments with negligible or zero/negative profit. As mentioned supra despite of having capital base of Rs. 7.57 cr. and 14.76 cr. there are no reserve and surplus arising out of operations of the entities. Whatever may be the reserves and surplus are there in the balance-sheet of lender entities, arisen out of share premium which amounts for 90% of the total capital base. This fact itself creates a serious doubt about the genuineness and creditworthiness of the lender company where they fetch huge premium along with equity share capital but of no use except deploying them into loans and advances. Out of these loans and advances there is no reasonable income in any form being generated by them?

Looking at the facts and surrounding circumstances "A commission u/s 131 of the Act was issued to DDIT (Inv), Kolkata to enquire into the creditworthiness of the said concerns and genuineness of the transactions of unsecured loans advanced to the assessee.

4.4 The DDIT (inv), Kolkata vide a detailed report dated 14.12.2015 stated as follows:

"A COMMISSION U/S 131(1) (d) of the Income Tax Act, 1961 dated 14/10/2015 was received by this office to enquire about the genuineness and existence of 22 (twenty two) corporate entities as per the enclosure to your above mentioned letter in connection with the survey conducted u/s 133A in the case of Sai Everest Builders and Developers. Out of the 22 companies mentioned in the list, one company named Manmade Fibers Pvt Ltd. mentioned at S. No. 11 has its address in Mumbai and, therefore, does not fall under the jurisdiction of this charge.

The ITIs were deputed to serve the summons issued u/s 131 upon the Principal Officers of the rest 21 (Twenty One) companies asking them to produce the requisite documents in support of points of enquiry as referred by you. After visiting the spot and conducting elaborate local enquiries by the departmental inspectors it was found that the existence of all 21 companies was not there at the given address.

Thus the summons could not be served in case of the above companies as the Inspector Mr. Suniti Kumar Gayen and Jayanta Sarkar entrusted with the job could not trace any of the companies mentioned at the given address. They have submitted their report which has been placed on record.

However, it has been found on perusal of database of entry operators mentioned with the Investigation Wing, Kolkata that 15 companies out of the total 21 are identified paper/shell/bogus companies of known Accommodation Entry Operators who are engaged in providing accommodation entry in different forms in lieu of commission to various beneficiaries. The names of such entities along with the names of the entry operators who control them are given in the following table.

| Sl.No. | Name of the entity/Company      | PAN        | Name of the Entry Operator |
|--------|---------------------------------|------------|----------------------------|
| 1      | Alishan Estate Pvt Ltd          | AAFCA2673K | Praveen Agarwal            |
| 2      | Barsopurti Exim Pvt Ltd         | AACCB3632Q | -do-                       |
| 3      | Esquire Enclave Pvt Ltd         | AACCE7065J | -do-                       |
| 4      | Joypriti Hotel Pvt Ltd          | AAVCJ4408R | -do-                       |
| 5      | Khusboo Complex Pvt Ltd         | AADCK5299L | -do-                       |
| 6      | Limestone Property Pvt Ltd      | AACCL0133G | -do-                       |
| 7      | Link Point Infra. Pvt Ltd       | AAACT9890Q | -do-                       |
| 8      | Nilmani barter Pvt Ltd          | AACCN4445R | Beni Prasad Lahoti         |
| 9      | Oleandar Mfg. & Credit Ltd      | AAACO3452D | -do-                       |
| 10     | Pushpanjali Comm. Pvt Ltd       | AAECP9727C | Praveen Agarwal            |
| 11     | Shirdhan Jewellery              | AAJCS1020N | -do-                       |
| 12     | Shiv Shakti Comm. Pvt. Ltd.     | AAMCS8171R | -do-                       |
| 13     | S K Stock Dealer Pvt. Ltd.      | AADCS7365Q | Beni Prasad Lahoti         |
| 14     | Skylight Distributors Pvt. Ltd. | AAMCS8390J | Praveen Agarwal            |
| 15     | Sustha Distributors Pvt. Ltd.   | AAICS3474R | -do-                       |

Statements of all the above entry operators and the persons who acted as dummy director controlled by the above entry operators have been recorded earlier in which they have accepted that they are in the business of providing different forms of accommodation entries on commission to various beneficiaries using the network of numerous bogus/ paper companies. Statements of the said accommodation entry operators are being enclosed for your perusal and necessary action. Names of 10 (ten) paper/shell/bogus companies out of the above 15 (fifteen) are reflected in the Said statements which are now available with us. The statements reflecting the names of other 5 (five) companies — Joypriti Hote! Pvt Ltd, Shirdhan Jewellery, Shiv Shakti Comm. Pvt Ltd, Skylight Distributors Pvt Ltd and Sustha Distributors Pvt Ltd are not readily available at this end. However, these five companies are also paper/shell/bogus companies as per the database of Kolkata Investigation Wing. The necessary enquiry

may be conducted at your end by checking the list of companies in which different identified dummy directors of the said entry operator are/ have been one of the directors in the case of remaining five companies. The names of such persons who have acted as directors of various paper/shell/bogus companies as per the instructions of the accommodation entry operators Praveen Agarwal are given below:

1. PINKY AGARWAL
2. PRAMOD RAMDIN SHARMA
3. UMESH SINGH
4. NEERAJ KEDIA
5. PULAK BAGCHI
6. PRAKASH JAIN
7. AJAY YADAV
8. VIJAY YADAV
9. CHARANJIT MAHANTA
10. VISHAL SHARMA

It has been further noticed that there are similarities between the above identified paper companies and a few of the rest. For example, in the case of Welon Advisory Serv. Pvt Ltd., the address thereof is the same as that of identified paper company of Beni Prasad Lahoti. In another case, the PAN of 'Simpro Vanijya Pvt Ltd.' shows the name as 'Simpro Vanijya Ltd' and as per MCA database its address is 7/1, Grant Lane, Kolkata which is used in a paper company of Beni Prasad Lahoti.

Observations made in the course of investigation clearly indicate that none of these companies has any physical existence and most of them are identified paper/shell/bogus companies.”

7.6 It is also pertinent to mention that in the recorded statements of the directors of the concerns, it has been specifically established that loans given to the assessee firm are bogus. The enquiry report reproduces the statement of Sh. Praveen Agarwal recorded u/s 131 of the Act in which Sh. Praveen Agarwal accepted that the main business of the concerns is to provide accommodation entries in the form of Bogus Share Capital, unsecured loans etc. and the said concerns are formed only for this purpose and the said concerns are not engaged in any other activity. The relevant statements of the operators/dummy directors with the enquiry report of DIT, Kolkata

(Inv.) have been provided to the assessee during the course of assessment proceedings vide letter dated 15.12.2017.

7.7 (a) In response to the show-cause notice issue, assessee has submitted the letter dated 19.12.2017 for cross examination of one of the companies and their authorized representative in case of M/s Sustha Distributors Pvt. Ltd. only in the interest of justice and to allow witness to be questioned and to allow evidence and cross examination on the same. Therefore, the summons u/s 131 dated 19.12.2017 was issued to assessee for giving an opportunity for cross examination along with relevant evidences on 22.12.2017.

(b) Mr. Kartikey Shelat, Director of M/s Sustha Distributors Pvt Ltd. attended and his statement of oath was recorded u/s 131 of the I.T. Act. In his statement recorded, it was stated by him that though the company was incorporated in 2004, the company's existence in Maharashtra is from November, 2016 only. This fact proves that the outcome of enquiry as discussed in Para in the case of Sustha Distributors made by the DIT Kolkata (Inv,) in FY, 2015-16 was appropriate and proper. It will not be out of place to mention again that the name of M/s Sustha Distributors Pvt Ltd bearing CIN - U51909WB2004PTC098191 appears at Sl. No. 9605 in the list of Shell Companies issued by competent authority.

Apparent could not be considered as real and that when there was no reason to believe that the apparent was not real, the Taxing Authorities were entitled to look into the surrounding circumstances to find out the reality and the matter had to be considered as per such a finding. Accordingly, the entire unsecured loan money was brought to tax by the assessment order.

Assessing Officer was entitled to conduct a full-fledged enquiry for ascertaining the true nature and source of any credit appearing in the books of accounts of the assessee and also brought out on facts as to how the creditworthiness of the persons, who were said have brought in the unsecured loan was not established and accordingly made the addition u/s. 68 of the Act.

There is no, and there cannot be any, dispute on the fundamental legal position that the onus is on the assessee to prove '*bonafide*' or '*genuineness*' of the unsecured loan credited in his books of account. This approach finds support from the scheme of section 68, which provides that where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income tax as the income of that assessee for that previous year. The burden is thus on the assessee to prove the nature and source thereof, to the satisfaction of the Assessing Officer. Everything thus hinges on the explanation given by the assessee and on how acceptable is the explanation so given by the assessee. It is also a settled legal position that the onus of the assessee, of explaining nature and source of credit, does not get discharged merely by filing confirmatory letters, or demonstrating that the transactions are done through the banking channels or even by filing the income tax assessment particulars. The genuineness of the transaction as a whole is thus a very important and critical factor in the examination of explanation of the assessee, as required under section 68, with respect to the share application monies received by an assessee. Onus is on the assessee to prove '*bonafides*' or '*genuineness*' of the loan money credited in his books of accounts and that is the call to be taken in the light of instant facts and the ground realities of the commercial world. On proceeding to deal with the genuineness aspect, it is also important to bear in mind the fact that what is genuine and what is not genuine is a matter of perception based on facts of the case *vis-à-vis* the ground realities. The facts of the case cannot be considered in isolation from the ground realities. The allegation of the revenue is that the assessee has received loan money through shell entities and multiple layering of the transfers from one company to another. It will, therefore, be useful to understand as to how the shell entities, which the lenders are alleged to be, typically function, and then compare these characteristics with the facts of the case and in the light of well settled legal principles. A shell entity is generally an entity without any significant trading, manufacturing or service activity, or with high volume low margin transactions to give it colour of a normal business entity, used as a vehicle for various financial manoeuvres. A shell entity, by itself, is not an

illegal entity, but it is their act of abatement of, and being part of, financial manoeuvring to legitimise illicit monies and evade taxes, that takes it actions beyond what is legally permissible. These entities have every semblance of a genuine business its legal ownership by persons in existence, statutory documentation as necessary for a legitimate business and a documentation trail as a legitimate transaction would normally follow. The only thing which sets it apart from a genuine business entity is lack of genuineness in its actual operations. The operations carried out by these entities, are only to facilitate financial manoeuvring for the benefit of its clients, or, with that predominant underlying objective, to give the colour of genuineness to these entities. These shell entities, which are routinely used to launder unaccounted monies, are a fact of life, and as much a part of the underbelly of the financial world, as many other evils.

The phenomenon of shell entities being subjected to deep scrutiny by tax and enforcement officials is rather recent, and that, till recently, little was known, outside the underbelly of the financial world, about *modus operandi* of shell entities. There were, therefore, not many questions raised about the genuineness of transactions in respect of shell entities. That is not the case any longer. Just because these issues were not raised in the past does not mean that these issues cannot be raised now as well, and, to that extent, the earlier judicial precedents cannot have blanket application in the current situation as well. Genuineness of transactions thus cannot be decided on the basis of inferences drawn from the judicial precedents in the cases in which genuineness did come up for examination in a very limited perspective and in the times when shell entities were virtually non-existent.

8. Even if a layman analyzed the financials of loan lenders namely Essar India Ltd. picture is very absurd and full of contradictions, for example with a net worth of around 6.58 Cr. company is at loss of Rs. 9.23 lacs, in Schedule-IV company showing Plant & Machinery whereas in the Profit & Loss A/c there is no income from production and sales rather company is dealing with shares and securities. This fact is further corroborated with Schedule-V of the Balance-sheet where

shares has been shown as stock-in-trade. There is no raw-material or finished goods are lying for which Plant & Machinery is required. As per Schedule-IX, there is a phenomenal change in the figure of advance received from Rs. 2.5 lacs to Rs. 3.03 Cr. On the other hand, as per Schedule-VIII against there is phenomenal change in the figures of unsecured loans given from Rs. 4.91 Cr. to Rs. 9.31 Cr.

9. Similar are the facts of Sustha Distributors Pvt. Ltd. with a net worth of Rs. 14.76 Cr. company has a loss of Rs. 82,620/-. To divert the attention unsecured loans given shown under the head of "Sundry Debtors" figure of sales shown exponential growth from Rs. 2.45 lacs to Rs. 6 Cr., the figures shown in the balance-sheet clearly demonstrates that these are not the real balance-sheets reflecting true and fair view, rather manufactured one.

10. In closely held companies/firm where unsecured loan is raised from close knit circles mostly known to partners/owners, onus required under section 68 is very heavy on such firms to prove identity as well as creditworthiness of lenders and genuineness of transaction; mere submission of name and address of creditor, income tax returns, Balance Sheet/statement of affairs of creditor and bank statement of creditor is not sufficient.

"Where lender companies immediately after receiving share capital with huge share premium from several entities in its bank account gave further huge amount of loans and advances to several companies with/without charging any interest and lender companies could not prove financial viabilities of their decisions, it could be said that lender companies are shell companies engaged in money laundering by providing bogus accommodation entries through a web of bank accounts, thus, addition under section 68, in the hand of loan taker has to be justified."

11. On perusal of the bank account of the lenders it is revealed that average bank balance maintained by lender in its aforesaid bank account is a very meagre amount. Thus average bank balance maintained by lenders in the aforesaid bank account are very meagre sum, while huge amounts of money suddenly comes into this bank accounts which immediately finds its exit into some other bank accounts, which is another peculiar feature of a shell company engaged in laundering money by providing bogus accommodation entries through a web of shell companies and bank accounts. The orders of the authorities below have been carefully gone through and the assessee is not able to discharge its onus as is casted under section 68 as the assessee could not prove genuineness of the unsecured loan taken and underneath sources for making these investments. The assessee no doubt has produced bank statement/confirmation of the entities from which the money found its place in the bank account of the assessee to be further used in its business but the genuineness of these transactions could not be proved as the assessee did not bring on record cogent evidences to substantiate the unsecured loans taken. Merely bringing confirmations and showing that the payments were made through banking channel is not sufficient.

As discussed above about the specifics of lender's financials it can be reasonably concluded that out of three essential ingredients, i.e. Identity of Creditor, Genuineness of the Transaction and Creditworthiness of the lender, only Identity can be assumed to be established. Rest of the 2 essential elements, i.e. Genuineness and Creditworthiness not established. **Hence Addition made by AO u/s. 68 of the Act upheld and order of Ld. CIT (A) is set-aside. Accordingly, ground no.1 to 4 of the Revenue is allowed.**

12. Ground No.5, this ground raised by Revenue emanates/related to the ground no.1 to 4 (supra). Merits of this ground have a direct nexus with the

findings given with reference to ground no.1 to 4 above and consequential in nature. Hence, as held above as the assessee failed to establish genuineness of the transactions and creditworthiness of the lenders, interest paid to lenders amounting to Rs. 20, 81,858/- also held to be disallowed.

13. In the result, this ground of revenue is allowed and order of AO is sustained and order of Ld. CIT (A) is set-aside.

14. Ground No. 6 pertains to the addition made by the AO u/s 69A of Rs. 67, 60,000/- of the on-money received on sale of flats by the appellant. During course of Survey u/s. 133A conducted at premises of the appellant on 24.08.2015, a small diary inventoried as "A-3" was found and impounded. The AO had scanned and reproduced the relevant pages of the impounded diary in the assessment order. The AO held that the contents of such pages contained in the impounded diary discloses the entries with the contents "Ch", "Cas" and "Ca" along with the dates and amounts against each such entry. The AO held that the entries recorded in the impounded pages represent the on-money received by the appellant' in Lakhs on sale of the flats. The working partners Mr. Govind Patel and Mr. Ghanshyam Sompura were confronted with the contents of the diary and such partners, in statement recorded u/s.131, stated that the entries in impounded diary relate to the extra work such as of Grill changes, wall changes, bathroom, etc undertaken in the flat of the buyers. The AO prepared a tabular chart wherein the entries corresponding to "Ch" were matching with the cheque payments received by the appellant, in its bank account, for sale of flats. Accordingly, AO held that the entries corresponding to "Ca" and "Cas" represents the on-money received on sale of flats. The AO issued the show cause notice on proposing to make the addition u/s.69A of the "Ca" and "Cas" entries recorded in

the impounded diary found during course of Survey as on-money received on sale of flats. In response, the appellant disputed the proposed addition under the reason that no cash amount was found during course of Survey and the entries recorded in the impounded diary contained of the extra work, labour payments and does not represent as the on-money on sale of flats. However, AO rejected the contention of the appellant and held that the figures corresponding to the entries "Ca" and "Cas" are in Lakhs and are the on-monies received by the appellant on sale of flats. Thus, AO on following the assessment order for A.Y-2013-14 held that the appellant had received the on-money on sale of flats and accordingly made the addition u/s.69A of Rs.67,60,000/-;

15. On the other hand, AR submitted that the pages of the impounded diary scanned and reproduced by the AO in the assessment order are the dump documents since such diary was found in the custody of the partner Shri. Ghanshyam Sompura, who was handling the construction activities and was not looking after the sales activities. The AR submitted that no undisclosed cash belonging to the appellant was found during course of survey and thus it cannot be presumed that the appellant had received and retained the on-money on sale of flats. The AR argued that the entries of the impounded page do not disclose about the actual receipt of undisclosed case and such entries relate to the estimates and recoverable amounts from the flat buyers and also discloses the sum relating to the extra work done in the flats of the respective flat buyers. The AR submitted that the AO had not verified the payments of the disputed on-money from the flat buyers and accordingly, in absence of corroboration, the addition made by the AO is not justified. The AR also submitted that the heavy onus is cast on the AO to conclusively prove the allegation of the on-money received by the appellant, however AO had not carried any sort of investigation

and even had not issued the notice u/s 133(6) to the buyers of the flats and since AO had not brought any credible evidence on record, thus the addition made in assessment is not justified. The AR also relied on the statements recorded on oath u/s 131 during course of survey of the partners Shri. Ghanshyam Sompura and Shri. Govind Patel wherein the said partners had stated that the entries in impounded diary represents the extra work done for the customers, labour payments, etc. The AR submitted that even if it is assumed that the appellant had received the undisclosed cash as recorded in impounded diary, still such undisclosed receipts cannot be brought to tax in hands of the appellant since such amounts are in the nature of reimbursements for undertaking the extra work on behalf of the flat buyers. In support, AR pointed that the entries recorded in the pages of the impounded diary discloses the sum received /receivable from the flat buyers for carrying the extra work whose expenses are to be borne by the respective flat owners and such receipts are in the nature of reimbursements.

16. The AR, in alternative manner, submitted that the addition of entire undisclosed cash receipts cannot be brought to tax and utmost the real profit embedded in the undisclosed transaction could be brought to tax. The AR pleaded to adopt the concept of real income and made a prayer to reasonably estimate the profit on the undisclosed consideration. In support, AR relied on the statements of the partners Shri. Ghanshyam Sompura and Shri. Govind Patel who had stated that the entries recorded in the impounded pages pertain to the extra work done for the customers, labour payments, etc. The AR submitted that the entries recorded in impounded diary discloses the gross monies received from the flat buyers for carrying the extra work whose expenses are to be borne by the appellant and such receipts are in mere nature of reimbursements. The AR argued that there cannot be a case of only receipts without payments and since there is

no undisclosed cash found during course of survey, thus it is required to be presumed that the appellant would have incurred the expenses corresponding to undisclosed receipts and therefore only the net profit corresponding to such receipts could utmost be brought to tax. The AR submitted that the impounded diary and documents found during survey and statements of the partners proves that the expenses had also been incurred by the appellant which is sufficient to hold that the gross receipts does not represent the undisclosed income of the appellant. In end, AR pleaded to adopt the concept of real income and made a prayer to estimate the income on reasonable basis on the undisclosed consideration. AR further relied on following judicial decisions of Hon'ble jurisdictional High Court

In the case of CIT vs. Prime Developers (ITA No.2452 of 2013), Hon'ble Jurisdictional High Court of Bombay decided that:

“(i) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in directing the Assessing Officer to work out the taxable pro us of the Project ‘Prime Mall’ by adopting net profit of 17.08 % of the total gross sales?

We find that the Revenue seeks to substitute the estimated net profit arrived at by the Tribunal with a new figure of net profit. This without in any manner showing that the estimating arrived at by the Tribunal in the impugned order is perverse. It is a settled position of law that in estimated net profit arrived at by the authorities is a question of fact and if the material on record does support the estimate arrived at by the Tribunal then it does not give rise to any substantial question of law (see CIT v/s Piramal Spinning and Weaving Mills Ltd. 124 ITR 408). In this case, we find that the net profit estimated at 17.08% is a very possible view of the facts founds”

In the case of Wall Street Construction Ltd. vs. Dy. CIT reported in 71 ITD 47 Hon'ble ITAT decided that:

“While, the application of the rates of 12 per cent on the unrecorded turnover has to be upheld, we are of the opinion that the results shown by the assessee in the books of account have to be accepted. There is no dispute that the cash receipts of ‘on money’ for this year is Rs, 35, 00,000/- approximately. We are, therefore, of the opinion that on this turnover, a rate of 12 per cent should be applied following the order of the Tribunal for assessment year 1991-92. As far as the balance of the turnover is concerned, the rate as shown 12 per cent by the assessee should be accepted.”

In the case of Mehroo Irani vs. ACIT reported in 75 taxmann123 Hon’ble Mumbai ITAT decided that:

“The totality of the facts, if considered in a dispassionate manner, could lead to a conclusion that the assessee in fact had received ‘on money’ and had also incurred expenditure out of the same. An estimated addition to the total income based on the ground realities would be a better way out. In doing so, one should take into consideration the net profit disclosed by the assessee and also the net profit that would be reflected after the additions finally sustained were taken into consideration. In the instant case, having regard to the totality of the facts and circumstances of the case, a net addition of 5 per cent of the gross receipts exclusive of receipts on account of garages and installation of generator would meet the ends of Justice. Moreover, no separate addition of ‘on money’ would be necessary in regard to sale of garages which were nothing but parking spaces. In the result, appeal was partly allowed.”

The other judicial decisions relied by AR also supports the case of the appellant. Thus, Ld. CIT (A) respectfully following the judicial decisions cited supra and considering the fact that no undisclosed cash belonging to the appellant was found during course of survey and on considering the statements recorded during course of survey u/s 131 of the working partners Shri Ghanshyam Sompura and Shri. Govind Patel who had stated of having incurred the labour payments, extra work, etc and on considering the other documents related to expenses found during survey, hold that it would be fair and reasonable to estimate the profit.

The AR, in respect of estimation of income, submitted that the appellant had disclosed the profit @ 5.47% on the housing project comprising of 14 flats and such housing project is of re-development project wherein the land is not owned by the appellant and the appellant is required to provide various amenities free of cost to the existing occupants and thus the profit margin in redevelopment project is very low in comparison to the normal housing projects. The AR further submitted that the appellant's housing project was very small comprising of only 14 flats, thus there is no possibility of earning high profits. It is observed that in the case of Mehroo Irani vs. ACIT reported in 75 Taxmann.com 123, Hon'ble Mumbai ITAT had estimated the profit @ 5% of on-money/undisclosed receipts. Accordingly, on considering the fact that the appellant's housing project is of re-development project of 14 flats and since no undisclosed cash was found during course of survey and on considering the profit disclosed by the appellant on housing project of 5.47%, Ld. CIT (A) hold that it would be reasonable to estimate the profit @ 10 % on the on-money/undisclosed consideration.

17. We have gone through the order of AO, Submissions of the assessee before AO and Ld. CIT (A) and findings derived by the Ld. CIT (A). We also concurred with the findings arrived at by the Ld. CIT (A) by respectfully following the decision of Hon'ble Jurisdictional High Court mentioned (supra).

18. Accordingly this ground of revenue is dismissed and findings of Ld. CIT (A) are confirmed.

19. In the result, appeals of revenue for the A.Y. 2011-12 to 2014-15 are partly allowed.

Order pronounced in the open court on 18<sup>th</sup> day of May, 2022.

Sd/-  
(VIJAY PAL RAO)  
JUDICIAL MEMBER

Sd/-  
(GAGAN GOYAL)  
ACCOUNTANT MEMBER

Mumbai, Dated: 18/05/2022  
SK, Sr.PS

**Copy of the Order forwarded to:**

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

//True Copy//

BY ORDER,

(Dy. /Asstt. Registrar)  
**ITAT, Mumbai**