आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES,"A" JAIPUR

डा॰ एस. सीतालक्ष्मी, न्यायिक सदस्य एवं श्री राठोड कमलेश जयन्तभाई, लेखा सदस्य के समक्ष
BEFORE: DR. S. SEETHALAKSHMI, JM & SHRI RATHOD KAMLESH JAYANTBHAI, AM

आयकर अपील सं./ITA No. 26/JPR/2020
निर्धारण वर्ष/Assessment Year : 2015-16

The Assistant Commissioner of Income-tax, Central Circle-04, Jaipur	बनाम Vs.	M/s Mahalaxmi Brokerage India Pvt. Ltd., 211, Laxmi Complex, M. I. Road, Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AAECM 1381 K		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

आयकर अपील सं./ITA No. 154/JPR/2020
निर्धारण वर्ष/Assessment Year : 2012-13

The Assistant Commissioner of Income-tax, Central Circle-04, Jaipur	बनाम Vs.	Shri Mukut Behari Agarwal 211, Laxmi Complex, M. I. Road, Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: ABSPA 1121 H		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/Assessee by : Sh. Manish Agarwal, CA
राजस्व की ओर से/Revenue by: Sh. P. R. Meena, PCIT

सुनवाई की तारीख/Date of Hearing : 24/08/2022
उदघोषणा की तारीख/Date of Pronouncement: 26/09/2022

आदेश/ORDER

These two appeals are filed by the revenue aggrieved from the order of the Commissioner of Income Tax (Appeal)- 4, Jaipur [Here in after referred as Ld. CIT(A)] passed on 16.10.2019 & 1.11.2019 for the

assessment years 2015-16 & 2012-13 which in turn arises from the order passed by the DCIT, Central Circle - 04, Jaipur passed under Section 143(3) r.w.s 153A of the Income tax Act, 1961 (in short 'the Act') dated 29.12.2017.

2. As the issues involved in the present appeals are common and inextricably interlinked or in fact interwoven and of the same group of assessee. Therefore, the parties argued them together and are disposed off by this common order. As it is seen that for both these appeals grounds are similar, facts are similar and arguments were similar and were heard on the same day. Therefore, we consider the facts and ground taken from the folder of M/s Mahalaxmi Brokerage India Pvt. Ltd. in ITA No. 26/JP/2020 and this case is taken as lead case. In this appeal the revenue has raised following grounds:-

> "1. Whether on the facts and in the circumstances of the case and in law, the CIT(A)-4, Jaipur, is justified in deleting the addition 4,00,00,000/- made by the unexplained cash credits u/s 68 of I.T. Act, towards unsecured loans made by the AO.
> 2. Whether on the facts and in the circumstances of the case and in law, the CIT(A)-4, Jaipur is justified."

3. The brief facts of the case as culled out from the records is that a search and seizure actions u/s. 132 of the Act and/or survey action u/s.

133A of the Act was carried out by the Income Tax Department on the members of the Marverick Group, Jaipur on 22.07.2015 of which the assessee is one of the members. During the course of the above referred actions, cash jewellery, valuables, stock in trade, documents, books of account and / or loose papers found and or seized from the premises of the Maverick Group Jaipur of which one such member happens to be the assessee. In this case original return of income was filed on 27.09.2015 declaring total income at Rs. 1,23,700/-. On account of search jurisdiction over the cases was assigned to Central Circle -4, Jaipur vide order u/s. 127 of the Act. In compliance to the notice u/s. 153A of the Act, return of income e-filed on 25.11.2015 declaring total income at Rs. 1,23,710/-. After filling return u/s. 153A, the notices u/s. 143(2) along with the questionnaire were issued. The assessee filed the details in the search related assessment proceedings. The assessee engaged in the business of stocks and share broking and derivatives, custodial services, depository services, registrars to the issue of securities, share transfer agents and earned income from business or profession and other sources during the year under consideration.

4. During the course of assessment proceedings, it is seen that assessee has taken unsecured loans from various companies and Individuals. Assessee was asked to furnish the confirmations of the loans taken and also asked to establish the credit worthiness and genuineness of these loan creditors. In response the assessee filed the confirmations of all the loan creditors. From the details so filed by the assessee following 7 companies are found to be Kolkatta based companies:

S. No.	Name of company	Amount taken
1	M/s Vendure Agents Pvt. Ltd.	80,00,000/-
2	M/s Solty Financial Consultants Pvt. Ltd.	35,00,000/-
3	M/s Positive View Commercial Pvt. Ltd.	50,00,000/-
4	Prabhukripa Infra Nirman Cons. Pvt. Ltd.	50,00,000/-
5	Star Rose Suppliers Pvt. Ltd.	25,00,000/-
6	Southopen Infranirman Pvt. Ltd.	60,00,000/-
7	Helpful Vintrade Pvt. Ltd.	1,00,00,000/-
	Total	4,00,00,000/-

5. In respect of the these all loan creditors the ld AO has observed in his assessment order which is reiterated here in below :

> "From the details so filed by the assessee 7 companies are found to be Kolkatta based companies. Therefore, assessee was again asked to establish the genuineness of the transaction and to prove the creditworthiness of these Kolkatta based companies. In response the assessee has filed the copy of return of income and also filed the copy of their Balance Sheets downloaded from the official site of Ministry of Corporate affairs department. Assessee further claimed that the transactions was done through payees account cheque which was duly

reflected in the bank account of such companies and in support of the same has filed the copy of their bank statements. On examination of the details and Balance sheets it is seen that all the seven companies from whom the loans were taken by the assessee company are declaring very low income or declared loss in their return of income filed for the year under consideration, which raised doubts about the creditworthiness of these companies. It is surprising that a company having total income of around 25000/- has given unsecured loan to the assessee of Rs. 80.00 lacs. It has been claimed by the assessee that all these companies are having sufficient share capital and reserves & surpluses which can be verified from their Balance sheet filed by assessee. This contention of the assessee is considered but also not found satisfactory from the fact that all these companies have very nominal business activities during the year and merely engaged in providing loans/ share application money. This fact clearly proves that these companies are merely Jamakharchi companies engaged in providing bogus accommodation entries in the shape of unsecured loans or Share capital. On perusal of the bank accounts provided by assessee, it is seen that prior to the issue of cheques to the assessee company there are transfer entries of similar amounts, source of which is neither explained nor acceptable in the absence of necessary details.

Department has carried out investigations in case of various such type of Kolkatta based companies. Investigation revealed that these lender companies are of no means and had been filing income on very low or negligible income. The high value banking transactions could not be co-related with any actual or tangible business activity. It was found that merely completing the paper formalities and using banking channels to route the money does not make these transactions ipso facto genuine. At best it qualifies them to be a paper shell companies attempting to cloak the accommodation entries as genuine business transactions. The modus operandi followed by all these companies is that they issued share capital at a large premium which is subscribed by other companies of similar nature. After receiving the funds, companies started distributing accommodation entries in the form of unsecured loans to various beneficiaries and assessee company is one of such beneficiary who has received the unsecured loans from these companies. It is also contended by the assessee that the loans were repaid in the year and thus real and genuine one, also not dissolve the assessee from its liability of establishing the creditworthiness of the loan creditors whose credentials are doubtful in view of the facts as narrated above. The assessee has failed to establish the creditworthiness and genuineness of the transactions made with these companies and as such

assessee has failed to comply all the conditions as enumerated in section 68 of the Income tax Act, 1961 in respect to these loan transactions.

Taking all the facts into consideration, it is clear that unsecured loans received from these 7 Kolkatta based companies is nothing but a sham transaction. It is also clear that above unsecured loan represents the unaccounted income of the assessee who in earlier years also found indulged into activities of bogus client code modification. It is clear that the assessee in connivance with a Jamakharchi tries to convert its unaccounted money under the grab of unsecured loans.

In support of the above findings and the conclusion drawn from them, the following case laws are being relied upon:

1. The payment by cheque does not make the transaction genuine. Th hon'ble ITAT, Jaipur in the case of M/s Kanchwala Gems Vis JCIT, ITA No. 134/JP/02 dt. 10.12.2003 and affirmed by hon'ble Supreme Court in 288 ITR 10 (SC) has held that even payment by account payee cheque is not sufficient to establish the genuineness of the purchasers.

2. In case of CIT V/s Nova Promoters & Finlease (P) Ltd.[2012] 18 Taxmann.com0217 (Delhi) which is of immense relevance as in this case important observations have been made by the hon. Delhi high court as to the burden of proof and shifting of onus in the cases of cash credits u/s 68 of the Act. It was held that..... We afraid that we cannot apply the ratio to a case such as the present one, where the Assessing officer is in possession of material that discredits and impeaches the particulars furnished by the assessee by the assessee and also establishes the link between self-confessed "accommodation entry providers", whose business is to help assesses bring into their books of account their unaccounted monies through the medium of share subscription, and the assessee. The ratio is inapplicable to a case again such as the present one, where the involvement of the assessee in such modus operandi is clearly indicated by valid material available to the AO as a result of investigation carried out by the revenue authorities into the activity of such entry provided.

In view of the above unexplained cash credits of Rs. 4,00,00,000/- towards unsecured loans from 7 companies as tabulated above is treated as unexplained cash credit u/s 68 of the Income Tax Act, 1961 and added to the total income of the assessee company for the year under consideration.

6. The assessee aggrieved from the said order of the assessment preferred an appeal before the ld. CIT(A). The ld. CIT(A) has granted relief to the assessee and thus, the revenue aggrieved from the said order of the ld. CIT(A) has raised this appeal before us. The relevant findings of the ld. CIT(A) is extracted here in below for the sake of brevity:

> "5. I have perused the written submissions submitted by the Ld. A/R and the order of the AO. I have also gone through various judgments cited by the Ld. A/R and those contained in the order of AO. I have also gone through all the evidences placed in the APB form pages 1-139.
> 5.2 In the present case the Ld. AO had certain information on his possession wherein the appellant had taken loan from so called 'shell companies' of Kolkatta. The Ld. AO issued a show cause. In response to the SCN the appellant filed all the evidences which are as under:-

S. No.	Particulars			Page Nos.
1	Copy of details of unsecured loans:			
	A	M/s Vendure Agents Pvt. Ltd.		
		(a)	Copy of Acknowledgement of ROI filed u/s 139(1)	22
		(b)	Copy of confirmation of Accounts	23
		(c)	Copy of Bank Statement	24-25
		(d)	Copy of Audited Financial Statement	26-38
	B)	M/s Solty Financial Consultants Pvt. Ltd.		
		a)	Copy of Acknowledgement of ROI filed u/s 139(1)	39
		b)	Copy of confirmation of Accounts	40
		c)	Copy of Bank Statement	41-42
		d)	Copy of Audited Financial Statement	43-45
	C)	M/s Positive View Commercial Pvt. Ltd.		
		a)	Copy of Acknowledgement of ROI filed u/s 139(1)	56
		b)	Copy of confirmation of Accounts	57
		c)	Copy of Bank Statement	58-59
		d)	Copy of Audited Financial Statement	60-72
	D	Prabhukripa Infra Nirman Cons. Pvt. Ltd.		

		a)	Copy of Acknowledgement of ROI filed u/s 139(1)		73
		b)	Copy of confirmation of Accounts		74
		c)	Copy of Bank Statement		75-76
		d)	Copy of Audited Financial Statement		77-82
	E)	Star Rose Suppliers Pvt. Ltd.			
		a)	Copy of Acknowledgement of ROI filed u/s 139(1)		83
		b)	Copy of confirmation of Accounts		84
		c)	Copy of Bank Statement		85-86
		d)	Copy of Audited Financial Statement		87-99
	F)	Southopen Infranirman Pvt. Ltd.			
		a)	Copy of Acknowledgement of ROI filed u/s 139(1)		100
		b)	Copy of confirmation of Accounts		101
		c)	Copy of Bank Statement		102-106
		d)	Copy of Audited Financial Statement		107-119
	G)	Helpful Vintrade Pvt. Ltd.			
		a)		Copy of Acknowledgement of ROI filed u/s 139(1)	120
		b)		Copy of confirmation of Accounts	121
		c)		Copy of Bank Statement	122-123
		d)		Copy of Audited Financial Statement	124-136
4.	Copy of Acknowledgement of ROI filed u/s 153A and Computation of Total income for AY 2015-16.				137-139

5.3 The Ld. AO observed that most of the lender companies have meager income or have declared losses, thus the credit worthiness of the company is in doubt. The Ld. AO also rejected the contention of the Ld. A/R that there are sufficient surplus and reserves in the balance sheet which can be perused. The Ld. AO however based criteria on returned income as yard stick for creditworthiness and rejected the contention of the Ld. A/R and invoked Sec. 68 of the Act.

5.4 I am not in agreement with the Ld. AO. The Ld. A/R has provided all the possible evidences in his possession to prove 2 ingredients of Sec. 68. Such evidence have not been controverted, instead Ld. AO on a hypothetical premises that return income s meager added substantial sum u/s 68. Even Ld. A/R contention that Balance Sheet of the lender have substantial reserves and surplus is not refuted with.

5.5 Section 68 is attracted where an entry relating to a sum is found to have been credited in the books kept by the appellant, which thus implies, existence of books and recording of a sum which the AO considers as doubtful. The AO then starts enquiry, specifically to satisfy himself of the source of such credit. If during the enquiry, he is satisfied that the entries are not genuine, them he will have every right to add the said sum represented by such credit entry as income of the appellant. The satisfaction of the assessing officer is the basis of invocation of his powers under Sec. 68 of the Act. However, such satisfaction must not be illusory or imaginative but must have been derived from relevant facts and factors, and is on the basis of proper enquiry of all material before him but also to which he has commanded. Therefore u/s 68, the onus is on the appellant to offer explanation where any sum is found credited in the books of account and if the appellant offers no explanation or the explanation offered is not in the opinion of the AO. satisfactory, then such cash credit is liable to be charged to the income tax as income of the appellant. In this case the appellant discharged its onus by filing the documents for which the AO has not pointed any discrepancy.

Hon'ble Rajasthan High Court and other Hon'ble Courts held that appellant cannot be asked to explain the source of the source. The relevant portions of the verdicts given by Hon'ble High Courts in the following cases are as under:

(i) In the case of CIT vs Jai Kumar Bakliwal (2014) 366 ITR 217 (Raj): Held, dismissing the appeal, that all the cash creditors were assessed to Income-tax and they provided a confirmation as well as their permanent account number. They had their own respective bank accounts which they had been operating and it was not the claim of the Assessing Officer that the assessee was operating their bank accounts. Most of the cash creditors appeared before the Assessing Officer and their statements under section 131 of the Income-tax Act, 1961, were also recorded on oath. There was no clinching evidence nor had the Assessing Officer been able to prove that the money actually belonged to none but the assessee. The addition of Rs. 17,27,250 under section 68 was not justified.

(ii) In the case of Nemi Chand Kothari vs CIT (2003) 264 ITR 254 (Gau): Held that it is not the business of the assessee to find out the source or sources from where the creditor had accumulated the amount which he had advanced in the form of loan to the assessee and section 68 cannot be read to show that in the case of failure of sub-creditors to prove their creditworthiness the amount advanced as loan to the ossessee by the creditor shall have to be read as corollary as the income from undisclosed source of the assessee himself.

(iii) in the case of Shankar Industries vs CIT (1978) 114 ITR 689 (Cal.): Observed that that mere establishing identity of the creditor and nothing more is not sufficient and something more is to be proved by the assessee

and in the aforesaid case, the assessee was unable to prove beyond identity and, therefore, the Calcutta High Court upheld the findings of the Tribunal. However, in the present case, I notice that not only the identity of the creditor has been proved but from the facts which have been culled out, the assessee has been able to prove the genuineness also.

(iv) In the case of Kanhailal Jangid vs ACIT (2008) 217 CTR 354 (Raj): Held that the burden does not go beyond to put the assessee under an obligation to further prove that where from the creditor has got or procured the money to be deposited or advanced to the assessee. The fact that the explanation furnished by the creditor about the source from where he procured the money to be deposited or advanced to the assessee is not relevant for the purposes of rejecting the explanation furnished by the assessee and make additions of such deposits as income of the assessee from undisclosed sources by invoking section 68 unless it can be shown by the Department that source of such money comes from the assessee himself or such source could be traced to the assessee itself.

(v) In the case of Aravali Trading Co. vs ITO (2008) 220 CTR (Raj): Observed that the fact that the explanation furnished by the four creditors about the sources where from they acquired the money was not acceptable by the Revenue could not provide necessary nexus for drawing inference that the amount admitted to be deposited by these four persons belonged to the assessee. The assessee having discharged his burden by proving the existence of the depositors and the depositors owing their deposits, he was not further required to prove source of source.

(vi)in the case Commissioner of Income-tax, Jaipur-II Versus Morani Automotives (P) Ltd. No. D.B. IT Appeal No. 619 of 2011 Dated October 23, 2013 Hon'ble Rajasthan High Court held that:

5.6 The points as sought to be raised by the appellant-revenue in the present case are all the matters relating to appreciation of evidence. The relevant factors have been taken into account and considered by the appellate authorities before returning the findings in favour of the assessee. Even as regards the three referred share capital contributors, it is noticed that they are existing assessees having PA numbers; and are being regularly assessed to tax. The appellate authorities cannot be said to have erred in deleting the additions in their regard too at the hands of assessee-company.

Ultimately, the question as to whether the source of investment or of credit has been satisfactorily explained or not remains within the realm of appreciation of evidence; and the Courts have consistently held that such a matter does not give rise to any substantial question of law. In the case of CIT v. Orissa Corpn. (P.) Ltd. [1986) 159 ITR 78 (SC), the Hon'ble Supreme Court held as under:

".....In this case, the assessee had given the names and addresses of the alleged creditors. It was in the knowledge of the Revenue that the said creditors were income-tax assessees. Their index numbers were in the file of the Revenue. The Revenue, apart from issuing notices under s. 131 at the instance of the assessee, did not pursue the matter further. The Revenue did not examine the source of income of the said alleged creditors to find out whether they were credit-worthy or were such who could advance the alleged loans. There was no effort made to pursue the so-called alleged creditors. In those circumstances, the assessee could not do any thing further. In the premises, if the Tribunal came to the conclusion that the assessee has discharged the burden that lay on him, then it could not be said that such a conclusion was unreasonable or perverse or based on no evidence. If the conclusion is based on some evidence on which a conclusion could be arrived at, no question of law as such arises....."

In the case of CIT v. Chandra Prakash Rana [2001] 48 DTR 271 (Raj.), this Court noticed similar nature grounds urged on behalf of the revenue and found the same not leading to any substantial question of law. This Court noticed, observed, and held as under:

> "7. Learned counsel for the appellant (Revenue) contended that firstly Tribunal erred in accepting the explanation offered by assessee in relation to source of income. His second submission was that what was offered by assessee was no explanation and hence should not have been accepted and lastly learned counsel made sincere attempt on his part after taking us through factual scenario of the explanation and contended that it can never be taken as satisfactory explanation for deleting the addition made by AO. We do not agree to this submission for more than one reason.
>
> 8. In the first place, it is a pure question of fact, what to say question of law, much less substantial question of law. Secondly, this Court cannot again in this appeal undertake the examination of factual issues nor can draw factual inferences on the basis of explanation offered by assessee. Thirdly, once the explanation is accepted by the two appellate Courts i.e. CIT(A) and Tribunal in this case, then in such event a concurrent finding recorded on such explanation by two appellate Courts is binding on the High Court.
>
> 9. Perusal of impugned finding quoted supra would go to show that Tribunal did examine the explanation offered by assessee in detail and then recorded a finding for its acceptance. Such finding when challenged does not constitute a substantial question of law within the meaning of s. 260A ibid in an appeal arising out of such order.
>
> 10. In our opinion, therefore, once the CIT(A) and Tribunal accepted the explanation of assessee and accordingly, deleted certain additions made by AQ holding the transaction of shares to be genuine, then it would not

involve any substantial issue of law as such. In other words, this Court in its appellate jurisdiction under s. 260A ibid, would not again de novo hold yet another factual inquiry with a view to find out as to whether explanation offered by assessee and which found acceptance to the CIT(A) and Tribunal is good or bad, or whether it was rightly accepted, or not. It is only when the factual finding recorded had been entirely de hors the subject, or that it had been based on no reasoning, or based on absurd reasoning to the extent that no prudent man of average judicial capacity could ever reach to such conclusion, or that it had been found against any provision of law, then a case for formulation of substantial question of law on such finding can be said to have been made out.

11. In our view, no such error could be noticed by us in the impugned order because as observed supra, the Tribunal did go into the details of explanation offered by assessee and then accepted the explanation by placing reliance on the documents filed by assessee. As a consequence thereof, the additions made by AQ came to be deleted"

13 In OT v. Shree Barkha Synthetics Ltd. [2004] 270 ITR 477 (Raj Jin a similar nature matter, this Court observed that the Tribunal having found that the companies from which the share application money had been received by the assessee-company, were genuinely existing and the identity of the individual investors were also established and they had confirmed the fact of making investment, the finding that assessee had discharged initial burden and addition under Section 68 could not be sustained, was essentially a finding of fact. This Court said, "19. A perusal of the aforesaid finding goes to show that deletion has been made on appreciation of evidence, which was on record Finding that there was existence of investors and their confirmation has been obtained, were found to be satisfactory. All these conclusions are conclusions of fact based on material on record and, therefore, cannot be said to be perverse so as to give rise to question of law, which may be required to be considered in this appeal under s.260A of the IT Act."
14. The ratio of the decisions aforesaid directly applies to the present case too. Herein, as noticed, the appellate authorities have returned the findings of fact in favour of the assessee after due appreciation of the evidence on record, on relevant considerations, and on sound reasonings. These findings have neither been shown suffering from any perversity nor appear absurd nor are of such nature that cannot be reached at all. Thus, no case for interference in the findings of the appellate authorities is made out.

In the result, the appeal fails and is, therefore, dismissed."

6. Taking into consideration the facts and circumstances of the case and case laws relied on (supra), the identity, creditworthiness and genuineness of

transactions of these companies cannot be held doubtful and AO is not justified in making the addition of Rs. 4,00,00,000/- more so when as a result of search, post search and assessment proceedings no incriminating material or evidence was gathered to show that impugned loans represents to undisclosed income of the appellant. On the facts and in the circumstances of the case, thus the AO is directed to delete the addition of Rs. 4,00,00,000/-. Appellant gets a relief in Ground No.1."

7. The ld. AR appearing on behalf of the assessee has placed their written submission which is reiterated here in below;

"Brief facts of the case are that the assessee is a private limited company and is having income from Business & Profession by dealing in shares and securities and Income from other sources. A search u/s 132 of the Income Tax Act, 1961 was conducted on 22.07.2015 in case of Maverick group to which assessee belongs. Return of income for the year under appeal was filed u/s 139(1) on 27.09.2015 declaring the total income at Rs. 1,23,700/- (APB 1-3). Thereafter in response to notice issued u/s 153A return of Income was filed on 25.11.2015 declaring total income of Rs.1,23,710/- (APB 137-139) which was the same as declared in the return filed u/s 139(1) of the Act. The assessment was completed u/s 143(3) r.w.s. 153A of the Act at the total income of Rs.4,01,23,710/- wherein addition of Rs. 4,00,00,000/- was made by holding certain Unsecured Loans of the assessee as being unexplained and bogus. Assessee preferred appeal before ld. CIT(A) against additions made in assessment order, which was decided vide order dated 13.11.2019 in appeal no. 442/17-18, whereby entire addition made in assessment was deleted and appeal of assessee was allowed. Present appeal is filed by the department against the order passed by ld.CIT(A).

<u>Departmental Ground of Appeal Nos. 1:</u>

Under this ground, the department has challenged the relief granted by ld.CIT(A) in respect of addition of Rs. 4,00,00,000/- made by the ld.AO arbitrarily by treating certain unsecured loans as being unexplained and bogus without considering the documentary evidences filed during the assessment proceedings and also without appreciating the date of receipt of loans.

Brief facts pertaining to these grounds of appeal are that assessee had obtained unsecured loans from various parties, out of which ld. AO has picked below mentioned 7 parties on the plea that these are Kolkatta based parties and treated the loan from them to be non-genuine on presumption and surmises. The details of these 7 parties are as under :-

S. No.	Name of Party	Amount of Loan (in Rupees)	Date on which loan taken	Documentary Evidences at APB
(i)	M/s Vendure Agents Pvt.	80,00,000/-	15.10.2015	22-38

	Ltd.			
(ii)	M/s Solty Financial Consultants Pvt. Ltd.	35,00,000/-	13.07.2015	39-55
(iii)	M/s Positive View Commercial Pvt. Ltd.	50,00,000/-	29.07.2015	56-72
(iv)	Prabhukripa Infra Nirman Cons Pvt. Ltd	50,00,000/-	30.10.2014	73-82
(v)	Star Rose Suppliers Pvt Ltd	25,00,000/-	13.10.2015	83-99
(vi)	Southopen Infranirman Pvt. Ltd.	60,00,000/-	13.07.2015 & 13.10.2015	100-119
(vii)	Helpful Vintrade Pvt. Ltd.	1,00,00,000/-	15.10.2015 & 17.10.2015	120-136
	Total:	4,00,00,000/-		

At the outset it is submitted that from the perusal of above, it is evident that ld. AO passed assessment order in very casual manner as loans from as much as six parties totalling to Rs. 3,50,00,000/-, out of above seven parties were not credited in the books of accounts during the year under consideration and therefore any addition u/s 68 in respect of such loans amounting to Rs 3,50,00,000/- is totally unwarranted and unjustified.

Without prejudice to above, it is also submitted that during the course of assessment proceedings, assessee had furnished all the documentary evidences supporting identity, creditworthiness and genuineness of transactions of all the seven parties mentioned above, which comprised:

- duly signed confirmations obtained from the said parties
- copies of Income Tax Returns
- copies of bank statements of the assessee showing credits in the name of above parties, and
- copies of audited Financial statements of said concerns
- On perusal of above details, it is clearly evident that all the entities were holding valid PANs as well as sufficient funds for making advances. Further, loans were obtained through banking channels and entries were duly credited in bank statements.

However, ld. AO without considering the explanation/ evidences adduced by the assessee and without carrying out any further enquiries and only based on some investigations carried out by the Income Tax department, Kolkata, in the case of some unknown/ unrelated parties alleged that the loans taken by the assessee were not genuine and treated the same as bogus. The ld.AO further arbitrarily observed that these parties had shown a meager income during the year which raised doubts regarding genuineness and creditworthiness of these loans. In reply to this, the assessee explained that the above companies were genuine companies, which were duly registered under the Companies Act, had valid

PANs and had enough Capital and surplus to make advances, and thus established their creditworthiness and also the loans have been received through banking channels and hence the same are genuine. The ld.AO without making any further enquiries, or considering the documents filed by the assessee held the above loans as being unexplained and bogus, without bringing anything on records to substantiate his suspicions.

At this juncture, kind attention of your goodself is invited to provisions of section 68, which read as under:

68. Where any sum is found credited in the books[78] 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 [79][Assessing] Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year:

On perusal of above, it is evident that assessing officer can make addition u/s 68 only under two circumstances, i.e.:

(i) assessee does not offer any explanation about nature and source of such credit or

(ii) explanation offered by assessee is not upto the satisfaction of AO.

In other words, whenever assessee tenders explanation, before rejecting the same AO has to record dissatisfaction as to why the explanation furnished by assessee is not acceptable and documents/ explanation furnished cannot be rejected arbitrarily.

In the instant case, assessee has not only offered explanation regarding nature and source of credits but also substantiated the same with documentary evidences in the shape of ITRs, Confirmations and bank statements. Further, Ld. AO has not pointed out any discrepancy in the details furnished, rather has made addition solely on the basis of some investigations carried out in some other unrelated/ unknown parties, and it was alleged that the loans taken by assessee are bogus and accordingly addition was made u/s 68 of the Act. Apart from above investigation of some unknown parties there was no material available with the Ld. AO or referred to by him in the assessment order found as a result of search or gathered during the course of assessment proceedings in support of the impugned addition made by him. It is also a matter of fact that no report of the alleged investigation carried out in other cases were supplied to the assessee.

All the above facts were explained before ld.CIT(A) and it was submitted that the loans obtained by assessee are completely genuine, duly supported by necessary evidences and thus, could not have been held as bogus in view of the following:

i. The assessee has obtained loan through banking channels.
ii. Duly signed confirmations mentioning PAN were furnished.
iii. Financial Statements of lenders were furnished.
iv. Payment of interest was made through account payee cheque after deducting tax at source.

It was also stated that such unsecured loans were repaid alongwith interest through banking channels, which are recorded in regular books of accounts maintained by assessee and are thus out of disclosed sources of income.

All the above mentioned facts and evidences are undisputed which were submitted before the Assessing Officer also who failed to controvert any of these facts and evidences. Further the ld. AO relied on the decisions of the Hon'ble Delhi High Court in the case of Nova Promoters and Finlease (P) Ltd 18 Taxmann.com 0217 and Hon'ble ITAT Jaipur Bench in the case of Kanchwala Gems V/s JCIT which was later affirmed by the Supreme Court and treated the loans taken by assessee as unexplained cash credit and accordingly, made addition u/s 68 of the Income Tax Act, 1961.

In this regard it is humbly submitted that the decision of the Hon'ble Delhi High Court does not apply to the facts of the assessee, as in that case the AO had evidences that were contrary to or which discredited the explanation/ particulars furnished by the assessee. Also the evidences available with the AO established a link between the self-confessed statements of accommodation entry-providers and the assessee. It was under these circumstances, where involvement of the assessee in the modus operandi was clearly proved by valid material available with the ld. AO as a result of investigations carried out by revenue authorities, it was held that the burden of proof and shifting of onus onto the revenue was not discharged by the assessee by merely submitting the documentary evidences. However in the instant case of the assessee, the ld. AO had conducted no further investigations nor carried out any enquiries based on the evidences/ material supplied by the assessee. Also there was no any material found even during the result of search conducted at office premises of assessee company and residential premises of its directors or otherwise gathered by the ld. AO which could in any way indicate the flow of the money to the lenders had in any way emanated from the assessee himself. In the present case, the ld.AO relied merely on some investigations carried out on certain unrelated and unknown parties and simply borrowed the modus operandi established in those cases to the loans taken by the assessee, without trying to establish any link between the two. Ld.AO further alleged that assessee has brought its unaccounted income earned due to Client code modification. In this regard, it is submitted that such allegation of ld.AO is also completely arbitrary and without any basis more particularly when the addition on account of CCM was separately made without bringing on record any corroborative evidence and without rebutting documentary evidences furnished by assessee and therefore losses suffered by assessee are completely genuine.

Hon'ble Jaipur bench of ITAT in the case of M/s Kota Dall Mill vs. DCIT in ITA No. 997 to1002/JP/2018 & 1119/JP/2018, wherein addition was made u/s 68 on account of unsecured loans, has allowed the appeal of assessee (para 11 pages 72-87) by observing that:

- once the chain of transactions and flow of money from one entity to another and finally to the assessee has not been established, then the addition made merely on suspicion, how so strong it may be, is not sustainable. It is further observed that once the assessee has produced all the relevant record which

includes bank statement, financial statements including balance sheet, copy of ROC Master data showing the status of loan creditor company as "active", confirmation of loan given to the assessee.

- except the statement of Shri Anand Sharma and the report of the investigation Wing Kolkata, the AO has not brought on record any other material to controvert or disprove the documentary evidence produced by the assessee.
- in the absence of any discrepancy or fault in the financial statements or in bank accounts to reflect that the transactions in question are nothing but bogus accommodation entries, addition made by the AO is not sustainable as it is merely on surmises and conjectures and not on any tangible material disclosing the non genuineness of the transactions.
- not providing cross examination of witnesses, whose statements were relied upon amounts to denial of opportunity and consequently would be fatal to the proceedings.

Hon'ble ITAT Jaipur bench delivered in the case of M/s Choice Buildestate (P) ltd in ITA No. 431/JP/2016, held as under:

"*Where the assessee furnishes the documentation and necessary explanation, the AO should examine whether the documents so submitted and explanation so offered establishes the three ingredients i.e. identity of the investor company, creditworthiness of investor company and genuineness of the transaction. Whether explanation of the assessee is reliable or acceptable? If yes, no further action is required and the sum so credited may not be charged to income tax. If the explanation so offered by the assessee is not acceptable or reliable, the AO should give a detailed reasoning in the assessment order for not accepting the same. The order passed by the AO should be speaking one bringing on record all the facts, explanation furnished by the assessee in respect of nature and source of the credit in its books of accounts and reasons for not accepting the explanation of the assessee. In the instant case, we find that the AO has not taken any efforts to examine these documents so submitted by the assessee company during the course of assessment proceedings and has simply gone by his prima facie view formed at time of assumption of jurisdiction u/s 147 and such a prima facie view without further examination/investigation cannot be a basis for forming a final view of making the addition in the hands of the assessee company. It is a case where the AO was in receipt of material information from the Investigation Wing, Mumbai that the assessee company has received accommodation entries in form of share application/investment from seven companies who are not doing genuine business activities as divulged during the course of search and seizure operations in case of Praveen Jain group. In these situations, the Courts have held that the Assessing Officer cannot sit back with folded hands and then come forward to merely reject the explanation so made, without carrying out any verification or enquiry into the material placed before him by the assessee. If the Assessing Officer harbours any doubts of the legitimacy of any subscription he is empowered, nay duty-bound, to carry out thorough investigations. But if the Assessing Officer fails to unearth any wrong or illegal dealings, he cannot obdurately adhere to his suspicions and treat the subscribed*

capital as the undisclosed income of the Company. We therefore agree with the contentions of the ld AR that in absence of any falsity which have been found in the documents so submitted by the assessee company to prove the identity, creditworthiness and genuineness of the share transaction, these documents cannot be summarily rejected as has been done by the AO in the instant case. Further, we find that there is no action taken by the AO in terms of calling information from these companies under section 133(6) and/or issuing summons to directors of these companies under section 131 of the Act. In light of above discussions, we don't find any basis for making addition under section 68 of the Act."

Also, Hon'ble Rajasthan High Court in the case of Mangilal Agarwal v/s ACIT 300 ITR 372 has held that once assessee points out depositor from whom he has received money, who has owned advancement of money to the assessee, then the further enquiry into source cannot result in invoking provisions of S.68 of I.T. Act unless the existence of the person in whose name credit entry is found is not proved or he disowns having made such deposit. But once creditor is proved and existing as well as he admits having lent the money, money cannot be considered as assessee's income unless the revenue establishes by some evidence that it really flowed directly from assessee himself.
Similarly, Hon'ble Rajasthan High Court in another case of Kanhiyalal Jangid v/s ACIT 217 CTR 354 has held that while it was assessee's burden to furnish explanation regarding cash credit, this burden does not extend beyond proving the existence of the creditor and further proving that such creditor owns to have advanced amount credited in the accounts of assessee. However, burden does not go beyond to put assessee under an obligation to further prove that where from creditor has got or procured the money to be deposited or advanced to the assessee. The fact that explanation furnished by creditor about source from where he procured the money to be deposited or advanced to the assessee is not relevant for the purpose of rejecting explanation furnished by assessee and to make addition of such deposit as income from undisclosed source u/s 68 of I.T. Act unless it can be shown by department that source of such money comes from assessee himself or such source could be treated as being of the assessee himself. The fact that explanation furnished by creditor about source of advancing loan has not been accepted by revenue authority cannot lead to any presumption that source of such advance by creditor emanated from assessee.
This view has also been accepted by ITAT Jaipur Bench in the case of Raj Kumar Mehta v/s ITO Ward 3 Sikar in ITA No. 935/JP/08 and in case of I.T.O. Vs. Ratan Kanwar ITA No. 334/JP/2014 order dated 16-06-2017
Hon'ble Bombay High Court in the case of Pr. CIT vs M/s Paradise Inland Shipping Pvt. Ltd. TAX APPEAL NO. 66 OF 2016 has categorically held that *"once the Assessee has produced documentary evidence to establish the existence of such companies, the burden would shift on the Revenue- Appellants herein to establish their case. In the present case, the Appellants are seeking to rely upon the statements recorded of two persons who have admittedly not been subject to cross examination. In such circumstances, the question of remanding*

the matter for re-examination of such persons would not at all be justified. The Assessing officer, if he so desired, ought to have allowed the Assessee to cross examine such persons in case the statements were to be relied upon in such proceedings. Apart from that, the voluminous documents produced by the Respondents cannot be discarded merely on the basis of two individuals who have given their statements contrary to such public documents."

Further reliance is also placed on following cases:

CIT Vs. Anurag Agarwal [2015] 54 taxmann.com 75/229 Taxman 532 (All.)-
Where in respect of credit entries, the assessee established identity of creditors by bringing on record their PAN and complete addresses and, moreover, transaction was made through proper banking channel, impugned addition made under section 68 was to be set aside.

ACIT Vs. Sanjay M. Jhaveri [2015] 61 taxmann.com 28/70 XOT 502/168 TTJ 751 (Mum.)

During assessment proceedings, the Assessing Officer found that the assessee had taken unsecured loans. He observed that the assessee had filed only confirmation letters and same could not prove creditworthiness of persons advancing loans. Accordingly, entire loan amount was assessed as his unexplained cash credit. The Commissioner (Appeals) held that the assessee had furnished necessary confirmations from all parties which were duly supported by their respective bank account statements, copies of acknowledgement of returns of income filed, balance sheets etc; all transactions were found recorded in contra bank account statements of the assessee as well as of respective creditors; that the assessee had duly discharged his burden as required under section 68; confirmations filed by the assessee were not disproved by the Assessing Officer, that no contrary evidences were brought on record to prove that creditors were non-genuine or bogus and that all transactions were made through regular banking channels. Held that said documents were sufficient to prove genuineness of transactions as well as creditworthiness of lenders. The Assessing Officer was not justified in invoking provisions of section 68.

CIT Vs. Apex Therm Packaging (P.) (Ltd.) [2014] 42 taxmann.com 473/222 Taxman 125 (Mag.) (Guj.)

When full particulars, inclusive of confirmation with name, address and PAN Number, copy of income tax returns, balance sheet, profit and loss account and computation of total income in respect of all the creditors/lenders were furnished and when it had been found that loans were furnished through the cheques and loan account were duly reflected in the balance sheet, the Assessing Officer was not justified in making the addition.

Reliance is further placed on the following decisions

- Harsh Macro Buildhome (P) ltd – ITA No. 1056/JP/2016 dated 27.09.2017
- Smilax Pharmaceuticals Ltd - ITA No. 208/JP/2014 dated 24.04.2016.
- 45 DTR 185 Shalimar Buildcon Pvt. Ltd. vs. Income Tax Officer (ITAT Jaipur)

- 137 TTJ (Jb) 82 Bharti Syntex Ltd. vs. Deputy Commissioner of Income Tax
- 84 DTR 449 (Raj.) CIT vs. Bhaval Synthetics (2013)
- (2015) 229 Taxman 62(Rajasthan) CIT vs. Supertech Diamond Tools Pvt. Ltd.
- 155 Taxman 239 (Raj.) Shri Barakha Synthetics Ltd. vs. ACIT (2006)
- 299 ITR 268 (SC) CIT vs. Diving Leasing and Finance Ltd.
- (2001) 251 ITR 263 (SC) CIT vs. Steller Investment Ltd.
- (2008) 216 CTR (SC) 195 CIT vs. Lovely Export (P) Ltd.

Based on above, it was submitted before ld. CIT(A) that, the assessee has filed confirmation with complete address & PAN from all loan creditors and other supporting documents such as copy of ITR acknowledgement, copy of Balance Sheet etc. and loans were received through banking channels and so genuineness of transaction are proved and the credits are satisfactorily explained. Further in the case of assessee, no material was found which could support the allegation of the Ld. AO that the loans obtained were bogus or assessee has converted his undisclosed money in the guise of Unsecured Loans. The allegations of the ld.AO are merely on suspicions which are not at all corroborated with any material/ evidences. The ld.AO did not try to corroborate his suspicions, by conducting any sort of further enquiries or even issuing summons u/s 131 of the Act to the lenders.
After considering the submission so made, ld. CIT(A) deleted the addition made by ld.AO merely on some suspicions without considering and rebutting the documentary evidences filed by the assessee, it is prayed before the Hon'ble bench that order passed by ld.CIT(A) deserves to be upheld.

8. In addition to the above written submission the ld. AR of the assessee submitted that the ld. CIT(A) order after considering the detailed submission deleted the addition of Rs. 4,00,00,000/- made by the ld. AO. In addition, the ld. AR of the assessee submitted that the while making the assessment the ld. AO has proceeded in very causal manner as loans from as much as six parties totaling to Rs. 3,50,00,000/- out of seven parties were not credited in the books of accounts during the year under consideration and

therefore any addition u/s. 68 in respect of such loans amounting to Rs. 3,50,00,000/- is totally unwarranted and unjustified and deserves to be deleted. The ld. AR also submitted that primary onus casted upon the assessee is already discharged by filling the documentary evidences supporting identity, creditworthiness and genuineness of the transaction for all the parties. All these evidences are also placed in the assessee's paper book filed at page 22 to 148.

9. Per contra, the ld. DR submitted that during the search, assesses have accepted that they have taken accommodation entries by way of bogus entries share transactions through penny stocks and claiming long term capital gain through various brokers on payment of commission. In some cases, assessee routed unsecured loan in it's books through jamakharchi companies who's creditworthiness, identity and transactions are not genuine. The assessing officer has discussed the issues in great length in the assessment order. I hereby rely on the reasons mentioned in assessment order for such additions supported the findings of the ld. AO and submitted that the ld. CIT(A) has deleted the addition without seeing the merits of the case and checking the creditworthiness of each of loan creditors and their financial worthiness is totally bad in law. The transaction

with these companies is not real as per the detailed findings recorded by the ld. AO and thus, he supported the order of the ld. AO. He has filed the common submission in this Marvik Group search cases and his submission is also extracted here in below:

> A Search and seizure action under section 132 (1) of the Income Tax Act was carried out by the Income Tax Department on the persons/ members of the Maverick group, Jaipur on 22nd July 2015. In this group, in some cases department as well is assessee's are in appeal against the order of CIT (A). The main grounds of appeals have been briefly mentioned in the table above.
> The CIT (A) has deleted the addition on the ground that additions are not based on incriminating evidences seized during the search. Without verifying the facts, Ld. CIT appeal has deleted additions on legal ground based on various judgements.
> It is to be noted here that during the search, assesses have accepted that they have taken accommodation entries by way of bogus entries share transactions through penny stocks and claiming long term capital gain through various brokers on payment of commission. In some cases assessee routed unsecured loan in it's books through jamakharchi companies who's creditworthiness, identity and transactions are not genuine. The assessing officer has discussed the issues in great length in the assessment order. I hereby rely on the reasons mentioned an assessment order for such additions. Further, I would like to submit following as under:
> 1.1 The language of section 153A makes it very clear that there is no explicit or intended requirement of seizure of any incriminating material during the search under section 132(1) before issuing the notice under section 153A. The jurisdiction of section 153A is automatic from the moment a search is initiated. There is no requirement of examination of seized material or recording any satisfaction with respect to availability of seized material before issue of notice under section 153A. The intention of legislature in allowing so could be that the initiation of search itself is subject to recording of satisfaction under section 132(1) by the PDIT(Inv.) on grounds that:
> (i) upon issue of summons under section 131(1) the assessee has failed to produce or would not produce the books of accounts or other documents so requisitioned or
> (ii) the assessee is in possession of money, bullion, jewellery, article or thing which represents wholly or partly income has not been or would not be disclosed for the purpose of the act.
> Hence a conjoint reading of section 153A and 132(1) would clearly imply that a satisfaction to issue notice under section 153A is already deemed to be imported from the satisfaction recorded by PDIT(Inv) at the time of issuing warrants under

section 132(1). The existence of satisfaction recorded by PDIT(Inv) is liable to be challenged before courts. Hence, until such satisfaction for issue of warrants under section 132(1) are held invalid by any court, the satisfaction recorded by PDIT(Inv) continued to hold the fort for purpose of 153A also and it is for this reason there is no further requirement of recording any belief of satisfaction by AO for issue of notice under section 153A.

As may be noted from the conditions of recording the satisfaction of PDIT(Inv), one of the conditions is regarding books or other documents which were not produced or would not have been produced on issue of summons. Thereby implying that post search, while the AO is making assessment, it has to examine the correctness of income disclosed not only based on what material has been gathered during search but also based on these books or documents which in the opinion of PDIT(Inv) would not have been produced upon issue of summons, whether or not such books of accounts or documents have been actually found during search. In fact, there are numerous instances when even the books of accounts as per already filed audit reports are not found at any of the premises during search, more so when the searched entities represent only the shell companies. Similarly, there is a requirement of satisfaction by PDIT(Inv) in respect of income being fully or partly not disclosed for the purposes of the Act. Hence, even if some income/ entry is disclosed in books or audited accounts, the AO is mandated to examine whether such income / entry was disclosed fully or partly and/ or represents its real nature and source for the purposes of the Act. This inter alia would mean that even the entries disclosed in accounts which might represent income fully or partly would in itself be an incriminating material for which a search was initiated. When the non-production of books or other documents can give rise to a belief for initiating search u/s 132(1), then it may be counterproductive to conclude that the power of AO is restricted to assessment based only on incriminating material found in search, irrespective of any other item of income which might have remained fully or partly undisclosed for the purposes of the Act, based upon the entries already appearing in such books, if any.

1.2 It is the 'assessment of total income' which is required to be made under section 153A. The total income is defined under section 2(45) would be the total income computed as per section 5 of the act. The word 'assessment' cannot have a different meaning for different purposes under the same act unless restricted by specific provisions. The process of assessment for the purposes of the act is wide enough to include every kind of enquiry/ examination for discovery, quantification and assessment of the income wholly or partly for the purposes of the act. Hence, the process of' assessment of total income' u/s 153A can neither be restrictive nor have a different connotation for assessment under section 153Avisa-vis143(3) or 147. As per the scheme under the Act, the satisfaction recorded u/s132(1) and the results of search are intended to be brought to a logical conclusion by initiating the proceedings u/s153A without any further act of the AO. Hence it is in the scheme of the Act that after issuance of notice u/s153A, the next action of the AO must follow the examination of all aspects for which a search has been initiated. Hence, it cannot be said that the

AO u/s 153A cannot proceed to examine the books of accounts or documents, entries which were produced before him subsequently, wherein might also represent income wholly or partly, which has not been disclosed for the purposes of the Act. Hence, it may be contrary to the scheme of the provisions of 132(1) r/w 153A, if it were to be held that power of AO is restricted only to make assessment the evidence found during search. The provisions of 153A not only require assessment of undisclosed income but total income also. The expression 'total income' would include the income emanating from disclosed items, income emanating from partly or wrongly disclosed items as well as income emanating from undisclosed items. U/s153A, no distinction is made for assessment of total income in the cases which were earlier completed u/s 143(1), the cases which were earlier completed u/s 143(3)/147 or the cases where no return was filed prior to search. Thus, in all the three categories, it is as per the scheme of the Act that the total income of the assessee as defined u/s2(45) needs to be assessed for all the 6AYs for which the AO is mandated to issue notice u/s153A.

1.3 Further u/s153A, there is a provision for abatement of pending assessments whether or not any evidences were found for that year. There can also be a situation where neither any regular assessments were made earlier nor any proceedings were pending, which could be abated. The section also envisages the issue of notice u/s153Awhether or not any evidences were found for that year. It is also implicit that u/s 153A, the items of total income which could be assessed u/s153A in abated proceedings cannot be different for the cases which could not be abated such as:

i)where no proceedings were pending; or

ii)where earlier assessments were completed u/s 143(3)/147; or

iii) where earlier assessments were not made at all.

The only caveat could be that before making any addition to the total income, the AO must bring on the record how such items are falling in to the category of total income for the purposes of the Act. Thus, if it were to be held that no addition can be made without any incriminating material in respect of the years covered by section 153A, then it would lead to an absurd consequence whereby the powers granted to issue notices u/s 153A would be rendered otiose in cases which got abated for any particular AY. In the absence of any seized material, AO may not be able to proceed to make any assessment of any other item of total income implying that the process of making assessment of total income as envisaged in section153A fails in abated cases. However, a statute can never be interpreted in a manner to make it redundant.

1.4 Section 153A does not say that additions should be strictly made on the basis of evidence found in the course of search, or on the basis of any other post-search material or information available with the AO though such assessment cannot be arbitrary. The provisions of section 147 and section 153A, though have different conditions to assume jurisdiction but both operate to make the assessment of total income only. The Memorandum explaining the provisions of Finance(No.2) Bill of 2009 while inserting explanation 3 to section 147 reads as under:

"Some courts have held that the Assessing Officer has to restrict the reassessment proceedings only to issues in respect of which the reasons have been recorded for reopening the assessment. He is not empowered to touch upon any other issue for which no reasons have been recorded. The above interpretation is contrary to the legislative intent.
Therefore to articulate the legislative intent clearly, explanation 3 has been inserted in section 147 to provide that assessing officer may examine, assess or reassess any issue relevant to income which comes to his notice subsequently in the course of proceedings under this section, notwithstanding that the reasons for such issue has not been included in the reasons recorded under subsection(2)ofsection148".
Hence, even in absence of any explanation u/s 153A also similar to the explanation 3 u/s 147, the intention of the legislature and the scheme of the Act for making assessment u/s 153A where search u/s 132 is initiated, is same i.e. in order to make assessment of total income, after having assumed the jurisdiction to assess total income, the powers of AO shall not remain restricted to mere those material which were seized during search but shall also include the assessment of income based on any entry already recorded prior to search or any claim/relief allowed prior to search, which has been found to be erroneous during the proceedings u/s 153A.
1.5 There is divergence of judicial opinion on the question of whether assessment u/s153A can be restricted to only the incriminating material seized during the search or whether the AO can also take a view based on something which might be noticed otherwise during the course of assessment proceedings u/s 153A? Some of the conflicting opinions expressed in judicial verdicts are as under:
(a) Allahabad High Court in Raj Kumar Arora 367 ITR 517 has held that there is no requirement of incriminating material for invoking provisions of 153A.
(b) The Delhi High Court in Kabul Chawla 380 ITR 573(Del) held that assessment u/s 153A on an issue could not have been made unless backed by some incriminating material found during the search. The department has not accepted the decision in case of Kabul Chawla and the SLP was filed was subsequently withdrawn due to low tax effect.
(c) However, the same Delhi High Court in case of Dayawanti Gupta Vs CIT 390 ITR 496(Del) in para16 has observed that:
"Section 153A, which provides for an assessment in case of search, and was introduced by the Finance Act, 2003 with effect from 1-6-2003, does not provide that a search assessment has to be made strictly on the basis of evidence found as a result of search or other documents and such other materials or information as are available with the Assessing Officer and relatable to the evidence found. The earlier section 158BB which is not applicable in case of a search conducted after 31-5-2003, provided that the computation of the undisclosed income can only be on the basis of the evidence found as a result of search or other documents and materials or information as are available with the Assessing Officer, provided they are related to the materials found. Section 153A(1)(b) requires assessment or reassessment of total income of the six assessment

years immediately preceding the assessment year relevant to the previous year in which the search took place. This, however, does not mean that the assessment under section153A can be arbitrary or made without any relevance or nexus with the seized material…..".

Filatex India Ltd Vs CIT-IV 229 Taxman 555(Delhi)

Whether during assessment under section153A, additions need not be restricted or limited to incriminating material found during course of search and, hence, argument of assessee that addition under section115JB was not justified in order under section 153A as no incriminating material was found concerning said addition had to be rejected -Held, yes.

Sunny Jacob jewellers and wedding center Vs DCIT3 62 ITR 664(Ker)

Whether there is no requirement under provisions of Act requiring department to collect information and evidence for each and every year for six previous years in order to initiate proceedings under section 153A–Held, yes.

CIT Vs Anil Kumar Bhatia 352 ITR 493(Delhi)

Whether even if assessment order had already been passed in respect of all or any of those six assessment years, either under section143(1)(a) or section143(3) prior to initiation of search/ requisition, still Assessing Officer is empowered to reopen those proceedings under section 153A without any fetters and reassess total income taking note of undisclosed income, if any, unearthed during search- Held, yes

CIT-II Vs continental warehousing corporation 235 Taxman 568(SC)

The High Court by impugned order held that no addition can be made in respect of assessments which have become final if no incriminating material is found during search or during 153A proceeding - Whether Special Leave Petition filed against impugned order was to be granted- Held, yes

Principal Commissioner of Income-tax, Delhi-2 v. Best Infrastructure (India) (P.) Ltd. 256 Taxman 63(SC)

High Court by impugned order held that where during search proceeding one of directors of assessee-company surrendered a certain sum as undisclosed income only for assessment year in question and not for each of six assessment years preceding year of search, said submission could not be said to be incriminating material qua each of preceding assessment years and, consequently, assumption of jurisdiction under section 153A and consequent additions made by Assessing Officer on said basis were not justified-Whether SLP against said impugned order was to be allowed- Held, yes.

The dismissal of SLP by supreme court in case of PCIT vs Meeta Gutgutia wherein also the same views were expressed as in Kabul Chawla, would also not lead to conclusion that the question decided by Delhi High court against the revenue in Meeta Gutgutia is settled because the SLP has already been admitted by SC for hearing on the same question in several other cases such as Continental warehousing, Best Infrastructure(supra).

Further, Supreme Court in Sinhgad Tech Edu Society 397 ITR 344(SC) held that no notice u/s 153C could be invoked unless there was incriminating material is also of no consequence as the provisions of section 153C has been amended

w.e.f 1/4/2005 and that the decision of Sinhgad Tech Edu society was for period prior to1/4/2005.

1.6 The sum and substance of all the decisions above could only indicate that the question of whether the AO has powers u/s 153A to assess total income as defined u/s2(45) dehors the incriminating material also, has not at all become final and the same is yet pending final adjudication before the SC in SLPs admitted.

2. **Incriminating material:**

(i) The incriminating material for the purpose of making an assessment of total income u/s153A?

(ii)Whether the mere fact that an entry has been considered in any earlier proceedings or that the entry/ income is recorded in accounts in the manner which is later found to be different from its true nature and source could take away its character of being incriminating for the purpose of making an assessment u/s153A?

2.1 The 'incriminating material' can be in any form such as evidence in the nature of

i) a document, content of any document;

ii)an entry in books of account;

iii) an asset;

iv)a statement given on oath;

v) absence of any fact claimed earlier but coming to notice during search;

vi) absence of books being found during search; or

vii) absence of the office /business premises as claimed during returns filed or any other documents, etc.

In short, any fact/ evidence which could suggest that the documents/ transactions claimed or submitted in any earlier proceedings were not genuine, being only a device/ make belief based on non-existent facts or suppressed /mis represented facts, would constitute an incriminating material sufficient to make assessment for the purposes of the Act. A mere statement u/s 132(4) is an evidence for making an assessment as also held by apex court in B Kishore Kumar Vs DCIT 234 Taxman 771(SC) as under:

High Court by impugned order held that since assessee him self had stated in sworn statement during search and seizure about his undisclosed income, tax was to be levied on basis of admission without scrutinizing documents -Whether Special Leave Petition filed against impugned order was to be dismissed-Held, yes

Hence even a statement u/s 132(4) shall also constitute incriminating material to dislodge any earlier finding for the purpose of making an assessment u/s153A.

2.2 Since the proceedings under the Act are civil in nature, even the circumstantial evidences based on preponderance of probability will constitute incriminating material enough to make an assessment of income and fasten the tax liability as held by in Sumati Dayal Vs CIT 214 ITR 801(SC). It will therefore include any circumstantial material also, which directly or indirectly ,proves that the earlier evidence submitted was only a make belief and such new material has a bearing on the assessment of total income of any assessee, even if such

income was earlier admitted as correct in absence of any such adverse facts available at the time of earlier assessment.

The requirement of incriminating material is not specifically mentioned in the Act. However, w.e.f. 1/4/2005 the provisions of section 153C have been amended so as to allow the invocation of proceedings u/s153C if any document, an entry or an asset is found in relation or pertaining to a person other than the searched person, which has a bearing on the assessment of total income as per the provisions of the I T Act. Hence the word “incriminating”, as used by the courts in context of section 153C, needs to be applied in the context of section 153A also which has to be seen as something which can have a bearing on the assessment of correct total income u/s2(45) as per provisions of the Act.

2.3 The expression 'have a bearing on determination' as used u/s 153C also has a wide connotation which implies that the nexus of the seized documents/ assets to income should only be a logical nexus to the ultimate process of determination of total income and that such evidence need not be in the nature of direct hard evidence. Applying the same principles, the incriminating material for the purposes of section 153A also has to be necessarily construed to be in the nature of a prima facie evidence only (including a circumstantial evidence) and not a hard evidence. The use of the expression 'books of accounts' u/s 153C again suggests that even the entries recorded in the books of accounts, which have not been correctly recorded or camouflaged would also par take the character of incriminating material, if the same has a bearing on the determination of income which has not beena lready disclosed in the return filed, ifa ny. Hence, the entries in the regular books of accounts would also trigger the assessment u/s 153A /C, if there is some prima-facie evidence that the entry recorded there in is camouflaged, or incorrect, wholly or partially, and such entries have a bearing on determination of total income of such person. The definition under clause(ii)of 271AAB(c) also defines undisclosed income as “any income based on entry in books of accounts wholly or partly false and would not have been found to be so, had the search not been conducted”. This clearly implies that any entry even recorded in the books, which is found to be wholly or partly false along with having a bearing on determination of income based on evidence gathered during search, would also be in the nature of incriminating material. Further, recently introduced section 270A, which is also applicable to search assessments for AYs other than specified years, mandates to levy penalty even in cases where the expenses had been claimed in the books without any evidence or where the entries recorded in the books were found to be false. This also supports the contention that mere recording of an entry in the books of accounts does not take away its incriminating character, if such entry was without evidence or had been falsely recorded in the books of accounts. The same principle will also hold good for the documents submitted earlier in relation to entries recorded in the books but later found that the documents were not genuine or manipulated or camouflaged. Supreme Court in Sinhgad Tech Edu Society or Delhi High Court in Kabul Chawla never considered the implication of section 270A and 271AAB as explained above while considering as to what

material would constitute incriminating for the purposes of assessment of total income under section153A /C.

2.4 The provisions of section 153A/153C are not the normal assessment provisions like 143(3); rather they are curative provisions to plug the mischief of evasion of taxable income based on evidences found in pursuance to search. Hence, if on account of search, the facts and circumstances suggest that any entry already appearing in books or accepted in earlier assessments based on documents submitted at that point of time, are camouflaged or manipulated or reflected to be in the nature or from a source which is different from the real nature or source as appearing from the evidences found during a subsequent search, then such material/ facts coming to fore now will definitely constitute an incriminating material. In consequence of the same the earlier recorded entries /earlier admitted documents and evidence shall have no force as genuine evidence. If it were held not to be so, then the purpose of 153A would be defeated as it would fail to prevent the mischief, which it sought to prevent just because the entries were already recoded in the books or some documents had already been accepted. Hence applying the Hayden's rule of mischief, the mere fact that such entries are recorded in the books of accounts or some fabricated or colourful documents have already been accepted as correct, will not prevent such material or entry from being incriminating, if the circumstances suggest other wise. The Hayden's rule of mischief has been judicially accepted and applied by Calcutta High Court in Reckitt Colman of India Ltd. vs. ACIT (2001) 252 ITR 550(Cal).
The incriminating material can be from the search or even from subsequent surveys or any other enquiries. Recently in CIT Chennai vs Aji S Kumar 93 Taxman.com 294(SC), the court in the context of section158BB has upheld the use of information collected in a survey in case of connected person carried along with search in other person for the purpose of making assessment u/s158BB. Provisions of 158BB are Pari Materia to section153A.

*The Delhi High court in **PCIT Vs Kabul Chawla** in para37(iv)observed as under:*

*"iv. Although Section 153A **does not say** that additions should be strictly made on the basis of evidence found in the course of the search, or other post-search material or information available with the AO which can be related to the evidence found, it does not mean that the assessment "can be arbitrary or made without any relevance or nexus with the seized material. Obviously, an assessment has to be made under this Section only on the basis of seized material."*

The Delhi High court has thus explained the underlying principle that though the assessment may not be based on seized evidence only but the addition cannot be arbitrary. There can be no dispute on this proposition. It has to be based on evidences found during search, or **post search or information available with the AO which can be related to the evidence found.** Thus, any entry already recorded in the books which is not true in its nature or source and any

information even coming to the AO post search shall constitute incriminating material for the purpose of making an assessment u/s153A.

3. Even if it is accepted that the AO does has powers to consider other aspects which were not directly emanating from seized material or that the AO had some basis to disturb earlier findings, it would still be necessary to seek answers to the following questions:

(i) Whether the change of opinion based on material is permissible while making assessment?

(ii) What are the conditions and to what extent the AO can dislodge the claims already accepted/ claimed / allowed, etc in earlier proceedings?

(iii) Whether u/s 153A, the AO can disturb the findings arrived on an issue, whether explicitly or otherwise, in earlier assessments concluded u/s 147/143(3) when it is found that the AO has been misled by placing evidences due to suppression or misrepresentation of facts, which were subsequently found to be doubtful based on evidences gathered?

3.1 There is a distinction between a **mere change of opinion and a change of opinion based on fresh facts.** The later would imply that the earlier conclusions of the AO were misled by placing evidence on suppression or misrepresentation of material facts. An order passed by the AO relying upon such make belief documents, suppressed or misrepresented facts, which were later found to be not true, shall become void or voidable, as the case may be. **Under such circumstances, the acceptance of any claim, relief etc in any earlier order shall also have no binding force in any subsequent proceedings and the change of opinion would be permissible.** The Courts have accepted the principle that any fraud practice is always a ground for vacating the judgment, as where the court is deceived or misled as to material circumstances, or its process is abused, resulting in the rendition of a judgment, which would not have been given if the whole conduct of the case had been fair".

The Madras High Court in case of **L. Mohanamvs Mohamed Idris** on 24 June,2011 in O.S.A.No.310 of 2010 has observed as under:

19. In support of his contention, the learned senior counsel for the appellant /plaintiff relied on the decision of the Hon'ble Supreme Court in Hamza Haji V. State of Kerala and another reported in (2006) 7S CC 416, wherein it has been observed that a decision obtained by playing a fraud on Court is liable to be setaside on the basic principle that the party who secured such a decision by fraud cannot be allowed to enjoy its fruits. The learned senior counsel also relied on the observation of the Hon'ble Supreme Court in State of Andhra Pradesh and another Vs. T.Suryachandra Rao reported in (2005) 6 SCC 149 to the effect that the fraud vitiates every solemn Act and fraud and justice never dwell together. In A.V.Papayya Sastry and Others Vs. Govt.Of Andhra Pradesh and others reported in (2007) 4 Supreme CourtCases 221 also, the Hon'ble Supreme Court has observed that fraud vitiates all judicial acts whether in rem or in personam and that a judgment, decree or order obtained by fraud has to be treated as non-estand nullity, whether by the

Court of first instance or by the final Court and that the same can be challenged in any Court, at any time, in appeal, revision, writ or even in collateral proceedings. In North Eastern Railway Administration, Gorakhpur Vs. Bhagwan Das (dead) ByLrs reported in (2008) 8 Supreme Court Cases 511, the Hon'ble Supreme Court has again reiterated the point that a judgment or decree obtained by fraud either in the first court or in the highest Court, is anullity in the eye of law.

Section 44 of the Evidence Act also enables a party other wise bound by a previous adjudication to show that it was not final or binding because it is vitiated by fraud. The provision therefore gives jurisdiction and authority to a Court to consider and decide the question whether a prior adjudication is vitiated by fraud.

Thus, the above propositions of law abundantly make clear that the AO also being a quasi-judicial authority, while functioning under the Act, shall also be bound by similar principles of jurisprudence. **Hence, for the purposes of assessment of total income u/s 153A also, any findings given in respect of any claim /relief in earlier proceedings shall stand vacated by operation of legal principles (as held byth eApex court above), where it is found that in earlier proceedings the AO has been misled by suppression or misrepresentation of material factsor by producing only make belief documents, which were not found to be genuine subsequently based on emergence of new facts during enquiries. Hence the view that the AO cannot rescind from accepting the documents admitted earlier is not a gospel truth which can be applied in each and every circumstance.**

3.2 Further the Apex court in **ITO Vs. Techspan India (P.) Ltd.** 92 taxmann.com 361(SC) observed as under:

Whether before interfering with proposed re-opening of assessment on ground that same is based only on a change of opinion, Court ought to verify whether assessment earlier made has either expressly or by necessary implication expressed an opinion no matter which is basis of alleged escapement of income that was taxable; if assessment order is non-speaking, cryptic or perfunctory in nature, it may be difficult to attribute to Assessing Officer any opinion on questions that are raised in proposed re-assessment proceedings- Held, yes

-Whether every attempt to bring to tax income that has escaped assessment, cannot be absorbed by judicial intervention on an assumed change of opinion even in cases where order of assessment does not address itself to a given aspect sought to be examined in re-assessment proceedings- Held, yes

In view of the above, applying the same principle in the present context also, it can be safely concluded that in the absence of any categorical finding on the genuineness of a claim in an earlier assessment having being accepted on make belief documents/ evidences only, it cannot be said that the A.O. has expressed any opinion on the correctness or otherwise of the items/ entries disclosed in the return of income already filed prior to the search. The judicial view is very clear where in it has been held that the mere submission of some documents proving identity or bank account, affidavits in contrast to the other

evidences suggesting the transaction to be suspicious cannot be accepted to have established the genuineness of transaction. **Hence, if any earlier finding has been found to be vitiated or incorrect based on material found subsequently, the AO shall have powers to review such findings based on any tangible material coming to his notice, while exercising power of assessment of total income u/s153A.**

In view of the above, I is clear that if there is some material noticed subsequently whether found during search or otherwise, the findings of earlier assessments can be dislodged, irrespective of whether such earlier assessmentwasunder143(1)or143(3)/147.

4. It is worthwhile to mention here that in the case of Suman Poddar Vs ITO in ITA No. 841/2019 vide judgement dated 17.09.2019, it has been held by the Hon'ble High Court of Delhi that:

> *"7. Thus, the Tribunal has in depth analyzed the balance sheets and the profit and loss accounts of Cressanda Solutions Ltd. which shows that the astronomical increase in the share price of the said company which led to returns of 491% for the Appellant, was completely unjustified. Pertinently, the EPS of the said company was Rs. 0.01/- as in March 2016, it was Rs. -0.01/- as in March 2015 and -0.48/- as in March 2014. Similarly, the other financials parameters of the said company cannot justify the price in excess of Rs. 500/- at which the Appellant claims to have sold the said shares to obtain the Long Terms Capital Gains. It is not explained as to why anyone would purchase the said shares at such high price. The Tribunal goes on to observe in the impugned order as follows:*
>
> *"10. With such financials and affairs of business, the purchase of share of face value Rs. 10/- at the rate of Rs.491/- by any person and the assessee's contention that such transaction is genuine and credible and arguing to accept such contention would only make the decision of the judicial authorities a fallacy.*
> *11. The evidences put forth by the Revenue regarding the entry operation fairly leads to a conclusion that the assessee is one of the beneficiaries of the accommodation entry receipts in the form of long-term capital gains. The assessee has failed to prove that the share transactions are genuine and could not furnish evidences regarding the sale of shares except the copies of the contract notes, cheques received against the overwhelming evidences collected by the Revenue regarding the operation of the entire affairs of the assessee. This cannot be a case of intelligent investment or a simple and straight case of tax planning to gain benefit of long-term capital gains. The earnings @ 491% over a period of 5 months is beyond human probability and defies business logic of any business enterprise dealing with share transactions. The net worth of the company is not known to the assessee. Even the brokers who coordinated the transactions were also unknown to the assessee. All these facts give credence to the unreliability of the entire transaction of shares giving rise to such capital gains. The ratio*

laid down by the Hon'ble Supreme Court in the case of SumatiDayal vs. CIT, 214 ITR 801 is squarely applicable to the case. Though the assessee has received the amounts by way of account payee cheques, the transactions cannot be treated as genume in the presence of the overwhelming evidences put forward by the Revenue. The fact that in spite of earning such steep profits, the assessee never ventured to involve himself in any other transaction with the broker cannot be a mere coincidence of lack of interest. Reliance is placed on the judgment in the case of Nipun Builders and Developers Pvt. Ltd. (supra), where it was held that it is the duty of the Tribunal to scratch the surface and probe the documentary evidence in depth, in the light of the conduct of assessee and other surrounding circumstances in order to see whether the assessee is liable to the provisions of section 68 or not. In the case of NR Portfolio, it was held that the genuineness and credibility are deeper and obtrusive. Similarly, the bank statements provided by the assessee to prove the genuineness of the transactions cannot be considered in view of the judgment of Hon'ble court in the case of Pratham Telecom India Pvt. Ltd., wherein, it was stated that bank statement is not sufficient enough to discharge the burden. Regarding the failure to accord the opportunity of cross examination, we rely on the judgment of Prem Castings Pvt. Ltd. Similarly, the Tribunal in the case of Udit Kalra, ITA No. 6717/Del/2017 for the assessment year 2014-15 has categorically held that when there was specific confirmation with the Revenue that the assessee has indulged in non-genuine and bogus capital gains obtained from the transactions of purchase and sale of shares, it can be a good reason to treat the transactions as bogus. The differences of the case of Udit kalra attempted by the Ld. AR does not add any credence to justify the transactions. The Investigation Wing has also conducted enquiries which proved that the assessee is also one of the beneficiaries of the transactions entered by the Companies through multiple layering of transactions and entries provided. Even the BSE listed this company as being used for generating bogus LTCG. On the facts of the case and judicial pronouncements will give rise to only conclusion that the entire activities of the assesseeis a colourable device to obtain bogus capital gains. The Hon'ble High Court of Delhi in the case of Udit Kalra, ITA No. 220/2009 held that the company had meager resources and astronomical growth of the value of the company's shares only excited the suspicion of the Revenue and hence, treated the receipts of the sale of shares to be bogus. Hon'ble High Court has also dealt with the arguments of the assessee that he was denied the right of cross examination of the individuals whose statements led to the enquiry. The ld. AR argument that no question of law has been framed in the case of Udit Kalra also does not make any tangible difference to the decision of this case. Since the additions have been confirmed based on the enquiries by the Revenue, taking into consideration ratio laid down by the various High Courts and Hon'ble Supreme Court, our decision is equally applicable to the

receipts obtained from all the three entities. Further, reliance is also placed on the orders of various Courts and Tribunals listed below.

- *MK. Rajeshwari vs. ITO in ITA No.17231Bangl2018, order dated 12.10.2018.*
- *Abhimanyu Soin vs. ACIT in ITA No. 9511Chdl2016, order dated 18.04.2018.*
- *Sanjay Bimalchand Jain vs. ITO 89 taxmann.com 196.*
- *Dinesh Kumar Khandelwal, HUF vs. ITO in ITA No. 58 & 591Nagl2015, order dated 24.08.2016.*
- *Ratnakar M Pujari vs. ITO in IT A No. 9951Muml2012, order dated 03.08.2016.*
- *Disha N. Lalwani vs. ITO in ITA No. 6398 I Mum I 2012, order dated 22.03.2017.*
- *ITO vs. Shamim. M Bharwoni [20 16] 69 taxmann.com 65.*
- *Usha Chandresh Shah Vs ITO in ITA No. 6858 I Mum I 2011, order dated 26.09.2014.*
- *CIT vs. Smt. Jasvinder Kaur 357 ITR 638.*

12. The facts as well as rationale given by the Hon 'ble High Court are squarely applicable to the case before us. Hence, keeping in view the overall facts and circumstances of the case that the profits earned by the assessee are a part of major scheme of the accommodation entries and keeping in view the ratio of the judgments quoted above, we, hereby decline to interfere in the order of the Ld. CIT(A).”

8. From the above extract, it would be seen that the Cressanda Solutions Ltd. was in fact identified by the Bombay Stock Exchange as a penny stock being used for obtaining bogus Long Term Capital Gain. No evidence of actual sale except the contract notes issued by the share broker were produced by the assessee. No question of law, therefore arises in the present case and the consistent finding of fact returned against the Appellant are based on evidence on record.
9. In the aforesaid facts and circumstances, we do not find any merit in the present appeal and the same is dismissed.”

It may be mentioned that in the above referred case, the Hon’ble High Court has given due cognizance to the circumstantial evidences and the human probability over the evidences filed by the assesee.
It is further submitted that the SLP filed by the assessee in the above case was dismissed by the Hon’ble Apex Court vide its order dated 22.11.2019 SLP (C) No. 26864/2019.

5. Evidentiary value of admission of statement recorded u/s. 132(4):

The Hon’ble Rajasthan High Court in the case of CIT vs Ravi Mathur held that the statement recorded u/s. 132(4) of the Act have great evidentiary value and it can not be discarded in a summary and cryptic manner, by simply observing that the assessee retracted from his statement. In the case of

BannalalJat Construction (P.) Ltd vs ACIT (2019) 106 Taxmann.com 128 (SC) where high court upheld addition made by authorities below relying uppn statement made in course of search proceedings by director of assessee company, since assessee failed to discharge its burdon that admission made by director in his statement was wrong and said statement was recorded under duress and coercion, SLP filed against of High Court was to be dismissed.
In the present group cases admission made by assessee's under 132(4) of the Act are squarely covered with the judgement.
6. In the appellant cases the penny stock script for accommodation entry traded was "SPLASH MEDIA" MIDLAND POLYMERS LIMITED, SULABH ENGINEERING, FIRST FINANCIAL SERVICES LIMITED, EINS EDUTEC LIMITED FACT ENTERPRISE for LTCG is the main script which has been identified as penny stock by the Investigation Report prepared by Directorate of Investigation, Kolkata dated 27.4.2015. In the recent judgement of Kolkata High Court in the case of PCIT vs. Swati Bajaj & others, Hon'ble High Court has accepted the Investigation report and based on which the bogus LTCG claimed by various persons have been rejected and judgement made in favour of Revenue. In appeals of the Mevrick group cases main penny stock where accommodation entries were through brokers obtained was "Splash Media". These assessees have claimed bogus LTCG in the same script where Kolkata High Court has treated the script as penny stock on the basis of Investigation report. During search assessees has also accepted in their statement recorded u/s.132(4) of Act that they earned bogus LTCG by accommodation entry in script "Splash Media ". The copy of Kolkata High Court judgment and "Investigation report" is submitted for kind consideration."

10. We have considered the rival contentions, perused the material available on record and also gone through the findings of the lower authorities recorded in their respective orders. We have also gone through the various judicial ruling placed before us by both the parties to drive home to their contentions. The bench noted that there is no incriminating material unearth in the search proceeding to substantiate the addition as made in the assessment order. Not only that even though the assessee filed the confirmation, bank statement, ITR, Balance Sheet of these companies and

AO failed to point out any error on these evidences filed by the assessee. He has in his order merely without any evidence concluded that these companies are merely Jamakharchi Companies engaged in providing bogus accommodation entries in the shape of unsecured loans or share capital. He on perusal of bank statement noted that prior to the issue of cheque to the assessee company there are transfer entries of similar amounts, source of which neither explained not acceptable in the absence of necessary details. He has purely based on these allegation and companies being Kolkatta based companies, has not considered the documentary evidence filed by the assessee company and made the addition without giving any findings of the documents filed by the assessee company in the assessment proceedings. It is held by various courts and Tribunals that when the assessee has primarily discharged the initial onus casted upon them in terms of section 68 by providing details to establish genuineness of transaction, identity and creditworthiness of depositors then the assessee is not expected to prove the source of credits in his books of account but not the source of source. The ld. DR has also not controverted the arguments of the ld. AR of the assessee that out of the total addition of Rs. 4,00,00,000/-, only Rs. 50,00,000/- pertains to the year under consideration. We found from the paper book of the assessee company that

they have filed the copy of accounts, confirmation, bank statement and ITR of the loan creditors. We have further noted that assessee has paid the interest to these loan creditors and have also deducted tax at appropriate rate while crediting the interest to all these loan credits. The said interest is considered as allowable in the assessment proceeding and there is no discussion or reference as to how such contradictory view is taken by the AO while completing the assessment. The DR also did not controvert these basic facts. In the case Dy. CIT v. Rohini Builders [2003] 127 Taxman 523/[2002] 256 ITR 360 (Guj.), the Hon'ble Gujarat High Court held that when the assessee has primarily discharged the initial onus laid on him in terms of section 68 by providing details to establish genuineness of transaction, identity and creditworthiness of depositors then the assessee is not expected to prove genuineness of cash deposited in bank account of those creditors because under the law the assessee can be asked to prove the source of credits in his books of account but not the source of source. The assessee had furnished all the documentary evidences supporting identity, creditworthiness and genuineness of transactions of all the seven parties mentioned above, which comprised:

- duly signed confirmations obtained from the said parties
- copies of Income Tax Returns

- copies of bank statements of the assessee showing credits in the name of above parties, and
- copies of audited Financial statements of said concerns
- On perusal of above details, it is clearly evident that all the entities were holding valid PANs as well as sufficient funds for making advances. Further, loans were obtained through banking channels and entries were duly credited in bank statements.

However, ld. AO without considering the explanation/ evidences adduced by the assessee and without carrying out any further enquiries. Only based on some investigations carried out by the Income Tax department, Kolkata, in the case of some unknown/ unrelated parties alleged that the loans taken by the assessee were not genuine and treated the same as bogus without confronting the said investigation finding to the assessee. The ld.AO further arbitrarily observed that these parties had shown a meager income during the year which raised doubts regarding genuineness and creditworthiness of these loans. In reply to this, the assessee explained that the above companies were genuine companies, which were duly registered under the Companies Act, had valid PANs and had enough Capital and surplus to make advances, and thus established their creditworthiness and also the loans have been received through banking channels and hence the same cannot be considered as non-genuine. The ld. AO without making any further enquiries, or considering the documents

filed by the assessee held the above loans as being unexplained and bogus, without bringing anything on records to substantiate his suspicions. Thus, we refer the provision of section 68, which read as under:

> *68. Where any sum is found credited in the books[78] 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 [79][Assessing] Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year:*

Based on the said provision it is evident that assessing officer can very well make addition u/s 68 but for that two circumstances/condition must be satisfied i.e.:

- assessee does not offer any explanation about nature and source of such credit or
- explanation offered by assessee is not upto the satisfaction of AO.

In other words, whenever assessee tenders explanation, before rejecting the same AO has to record dissatisfaction as to why the explanation furnished by assessee is not acceptable and while doing so documents/ explanation furnished cannot be rejected arbitrarily and summarily without commenting upon it.

11. In the instant case, assessee has not only offered explanation regarding nature and source of credits but also substantiated the same with

documentary evidences in the shape of ITRs, Confirmations and bank statements. Further, Ld. AO has not pointed out any discrepancy in the details furnished, rather has made addition solely on the basis of some investigations carried out in some other unrelated/ unknown parties, and it was alleged that the loans taken by assessee are bogus and accordingly addition was made u/s 68 of the Act. Apart from above investigation of some unknown parties there was no material available with the Ld. AO or referred to by him in the assessment order found as a result of search or gathered during the course of assessment proceedings in support of the impugned addition made by him. It is also a matter of fact that no report of the alleged investigation carried out in other cases were supplied to the assessee. To support the arguments raised by the ld. AR of the assessee he has relied on the following judicial pronouncements to support his view:

Hon'ble Jaipur bench of ITAT in the case of M/s Kota Dall Mill vs. DCIT in ITA No. 997 to1002/JP/2018 & 1119/JP/2018, wherein addition was made u/s 68 on account of unsecured loans, has allowed the appeal of assessee (para 11 pages 72-87) by observing that:

- once the chain of transactions and flow of money from one entity to another and finally to the assessee has not been established, then the addition made merely on suspicion, how so strong it may be, is not sustainable. It is further observed that once the assessee has produced all the relevant record which includes bank statement, financial statements including balance sheet, copy of ROC Master data showing the status of loan creditor company as "active", confirmation of loan given to the assessee.
- except the statement of Shri Anand Sharma and the report of the investigation Wing Kolkata, the AO has not brought on record any other material to controvert or disprove the documentary evidence produced by the assessee.

- in the absence of any discrepancy or fault in the financial statements or in bank accounts to reflect that the transactions in question are nothing but bogus accommodation entries, addition made by the AO is not sustainable as it is merely on surmises and conjectures and not on any tangible material disclosing the non genuineness of the transactions.
- not providing cross examination of witnesses, whose statements were relied upon amounts to denial of opportunity and consequently would be fatal to the proceedings.

Hon'ble ITAT Jaipur bench delivered in the case of M/s Choice Buildestate (P) ltd in ITA No. 431/JP/2016, held as under:

"*Where the assessee furnishes the documentation and necessary explanation, the AO should examine whether the documents so submitted and explanation so offered establishes the three ingredients i.e. identity of the investor company, creditworthiness of investor company and genuineness of the transaction. Whether explanation of the assessee is reliable or acceptable? If yes, no further action is required and the sum so credited may not be charged to income tax. If the explanation so offered by the assessee is not acceptable or reliable**, the AO should give a detailed reasoning in the assessment order for not accepting the same. The order passed by the AO should be speaking one bringing on record all the facts, explanation furnished by the assessee in respect of nature and source of the credit in its books of accounts and reasons for not accepting the explanation of the assessee. In the instant case, we find that the AO has not taken any efforts to examine these documents so submitted by the assessee company during the course of assessment proceedings and has simply gone by his prima facie view formed at time of assumption of jurisdiction u/s 147 and such a prima facie view without further examination/investigation cannot be a basis for forming a final view of making the addition in the hands of the assessee company.** *It is a case where the AO was in receipt of material information from the Investigation Wing, Mumbai that the assessee company has received accommodation entries in form of share application/investment from seven companies who are not doing genuine business activities as divulged during the course of search and seizure operations in case of Praveen Jain group. In these situations, the Courts have held that the Assessing Officer cannot sit back with folded hands and then come forward to merely reject the explanation so made, without carrying out any verification or enquiry into the material placed before him by the assessee.* ***If the Assessing Officer harbours any doubts of the legitimacy of any subscription he is empowered, nay duty-bound, to carry out thorough investigations. But if the Assessing Officer fails to unearth any wrong or illegal dealings, he cannot obdurately adhere to his suspicions and treat the subscribed capital as the undisclosed income of the Company.*** *We therefore agree with the contentions of the ld AR that in absence of any falsity which have been found in the documents so submitted by the assessee company*

to prove the identity, creditworthiness and genuineness of the share transaction, these documents cannot be summarily rejected as has been done by the AO in the instant case. ***Further, we find that there is no action taken by the AO in terms of calling information from these companies under section 133(6) and/or issuing summons to directors of these companies under section 131 of the Act****. In light of above discussions, we don't find any basis for making addition under section 68 of the Act."*

Also, **Hon'ble Rajasthan High Court** in the case of **Mangilal Agarwal v/s ACIT 300 ITR 372** has held that once assessee points out depositor from whom he has received money, who has owned advancement of money to the assessee, then the further enquiry into source cannot result in invoking provisions of S.68 of I.T. Act unless the existence of the person in whose name credit entry is found is not proved or he disowns having made such deposit. But once creditor is proved and existing as well as he admits having lent the money, money cannot be considered as assessee's income unless the revenue establishes by some evidence that it really flowed directly from assessee himself.

Similarly, **Hon'ble Rajasthan High Court** in another case of **Kanhiyalal Jangid v/s ACIT 217 CTR 354** has held that while it was assessee's burden to furnish explanation regarding cash credit, this burden does not extend beyond proving the existence of the creditor and further proving that such creditor owns to have advanced amount credited in the accounts of assessee. However, burden does not go beyond to put assessee under an obligation to further prove that where from creditor has got or procured the money to be deposited or advanced to the assessee. The fact that explanation furnished by creditor about source from where he procured the money to be deposited or advanced to the assessee is not relevant for the purpose of rejecting explanation furnished by assessee and to make addition of such deposit as income from undisclosed source u/s 68 of I.T. Act **unless it can be shown by department that source of such money comes from assessee himself or such source could be treated as being of the assessee himself. The fact that explanation furnished by creditor about source of advancing loan has not been accepted by revenue authority cannot lead to any presumption that source of such advance by creditor emanated from assessee**.

This view has also been accepted by **ITAT Jaipur Bench** in the case of **Raj Kumar Mehta v/s ITO Ward 3 Sikar** in **ITA No. 935/JP/08** and in case of **I.T.O. Vs. Ratan Kanwar** ITA No. 334/JP/2014 order dated 16-06-2017

Hon'ble Bombay High Court in the case of Pr. CIT vs M/s Paradise Inland Shipping Pvt. Ltd. TAX APPEAL NO. 66 OF 2016 has categorically held that

*"**once the Assessee has produced documentary evidence to establish the existence of such companies, the burden would shift on the Revenue-Appellants herein to establish their case.** In the present case, the Appellants are seeking to rely upon the statements recorded of two persons who have admittedly not been subject to cross examination. In such circumstances, the question of remanding the matter for re-examination of such persons would not at all be justified. The Assessing officer, if he so desired, ought to have allowed the Assessee to cross examine such persons in case the statements were to be relied upon in such proceedings. Apart from that, the voluminous documents produced by the Respondents cannot be discarded merely on the basis of two individuals who have given their statements contrary to such public documents."*

Further reliance is also placed on following cases:

CIT Vs. Anurag Agarwal [2015] 54 taxmann.com 75/229 Taxman 532 (All.)- *Where in respect of credit entries, the assessee established identity of creditors by bringing on record their PAN and complete addresses and, moreover, transaction was made through proper banking channel, impugned addition made under section 68 was to be set aside.*

ACIT Vs. Sanjay M. Jhaveri [2015] 61 taxmann.com 28/70 XOT 502/168 TTJ 751 (Mum.)

During assessment proceedings, the Assessing Officer found that the assessee had taken unsecured loans. He observed that the assessee had filed only confirmation letters and same could not prove creditworthiness of persons advancing loans. Accordingly, entire loan amount was assessed as his unexplained cash credit. The Commissioner (Appeals) held that the assessee had furnished necessary confirmations from all parties which were duly supported by their respective bank account statements, copies of acknowledgement of returns of income filed, balance sheets etc; all transactions were found recorded in contra bank account statements of the assessee as well as of respective creditors; that the assessee had duly discharged his burden as required under section 68; confirmations filed by the assessee were not disproved by the Assessing Officer, that no contrary evidences were brought on record to prove that creditors were non-genuine or bogus and that all transactions were made through regular banking channels. Held that said documents were sufficient to prove genuineness of transactions as well as creditworthiness of lenders. The Assessing Officer was not justified in invoking provisions of section 68.

CIT Vs. Apex Therm Packaging (P.) (Ltd.) [2014] 42 taxmann.com 473/222 Taxman 125 (Mag.) (Guj.)

When full particulars, inclusive of confirmation with name, address and PAN Number, copy of income tax returns, balance sheet, profit and loss account and computation of total income in respect of all the creditors/lenders were furnished and when it had been found that loans were furnished through the cheques and loan account were duly reflected in the balance sheet, the Assessing Officer was not justified in making the addition.

Reliance is further placed on the following decisions

- Harsh Macro Buildhome (P) ltd – ITA No. 1056/JP/2016 dated 27.09.2017
- Smilax Pharmaceuticals Ltd - ITA No. 208/JP/2014 dated 24.04.2016.
- 45 DTR 185 Shalimar Buildcon Pvt. Ltd. vs. Income Tax Officer (ITAT Jaipur)
- 137 TTJ (Jb) 82 Bharti Syntex Ltd. vs. Deputy Commissioner of Income Tax
- 84 DTR 449 (Raj.) CIT vs. Bhaval Synthetics (2013)
- (2015) 229 Taxman 62(Rajasthan) CIT vs. Supertech Diamond Tools Pvt. Ltd.
- 155 Taxman 239 (Raj.) Shri Barakha Synthetics Ltd. vs. ACIT (2006)
- 299 ITR 268 (SC) CIT vs. Diving Leasing and Finance Ltd.
- (2001) 251 ITR 263 (SC) CIT vs. Steller Investment Ltd.
- (2008) 216 CTR (SC) 195 CIT vs. Lovely Export (P) Ltd.

12. Based on the facts and detailed submission as discussed here in above and based on the judicial decision cited by the ld. AR of the assessee, we see that all these aspects was very well considered by the ld. CIT(A) and it was held by him that the addition made was not justifiable. We do not find to deviate the view taken by the ld. CIT(A) after carefully considering the facts of the case as discussed here in above and undisputed fact that the assessee proved that for these loans they have obtained through banking channels, filed duly signed confirmations mentioning PAN were furnished, Financial Statements of lenders were

furnished, Payment of interest was made through account payee cheque after deducting tax at source which is considered as allowable in the assessment and is not disputed by the AO, then when all these facts were known to the ld. AO his action of making the addition without giving cogent contrary finding on the evidence filed and addition is arbitrary against the provision of law and the same has been rightly deleted by the ld. CIT(A) we do not see any reason to deviate from the said findings as ld. DR did not demonstrate as to which of part of the findings of the ld. CIT(A) is incorrect not only that none of the evidence filed by the ld. AR of the assessee were alleged to be not correct.

13. Thus, based on this finding we do not find any merits in the grounds of appeal raised by the revenue and thus the same are dismissed.

14. The fact of the case in ITA No. 154-JP-2020 is similar to the case in ITA No. 26-JP-2020 and we have heard both the parties and persuaded the materials available on record. The bench has noticed that the issues raised by the revenue in this appeal No. 154/JP/2020 is equally similar on set of facts and grounds. Therefore, it is not imperative to repeat the facts and various grounds raised by both the parties. Hence, the bench feels that the

decision taken by us in ITA No. 26/JPR/2020 for the Assessment Year 2015-16 shall apply mutatis mutandis in the case of Sh. Mukut Behari Agarwal in ITA No. 154-JP-2020 for the Assessment Year 2012-13.

In the result, both appeals of the revenue are dismissed.

Order pronounced in the open court on 26/09/2022.

Sd/-	Sd/-
(डा॰ एस. सीतालक्ष्मी)	(राठोड कमलेश जयन्तभाई)
(Dr. S. Seethalakshmi)	(Rathod Kamlesh Jayantbhai)
न्यायिक सदस्य / Judicial Member	लेखा सदस्य / Accountant Member

जयपुर / Jaipur
दिनांक / Dated:- 26/09/2022
*Ganesh Kr.
आदेश की प्रतिलिपि अग्रेशित / Copy of the order forwarded to:

1. The Appellant- ACIT, Central Circle-04, Jaipur
2. प्रत्यर्थी / The Respondent- M/s Mahalaxmi Brokerage India Pvt. Ltd., Jaipur
   Sh. Mukut Behari Agarwal, Jaipur
3. आयकर आयुक्त / The ld CIT
4. आयकर आयुक्त(अपील) / The ld CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA No. 26 & 154/JP/2020)

आदेशानुसार / By order,

सहायक पंजीकार / Asstt. Registrar