

**आयकर अपीलीय अधिकरण, रायपुर न्यायपीठ, रायपुर**  
**IN THE INCOME TAX APPELLATE TRIBUNAL RAIPUR BENCH, RAIPUR**  
श्री रविश सूद, न्यायिक सदस्य एवं श्री अरुण खोड़पिया, लेखा सदस्य के समक्ष ।  
**BEFORE SHRI RAVISH SOOD, JM & SHRI ARUN KHODPIA, AM**  
**आयकर अपील सं./ITA No.233 & 234/RPR/2019**

(निर्धारण वर्ष / Assessment Year :2009-2010 & 2011-2012)

ACIT-2(1), Bhilai	Vs	M/s Abis Poultry Private Limited, Baldeo Bag, Rajnandgaon
PAN No. : <b>AAECA 87411 E</b>		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

निर्धारिती की ओर से /Assessee by	:	Shri Amit M. Jain & Gagan Tiwari, Advs. & Shri Bikram Jain, CA
राजस्व की ओर से /Revenue by	:	Shri Debashish Lahiri, CIT-DR
सुनवाई की तारीख / <b>Date of Hearing</b>	:	05/01/2023
घोषणा की तारीख/ <b>Date of Pronouncement</b>	:	30/03/2023

**आदेश / O R D E R**

**Per Arun Khodpia, AM:**

The captioned two appeals have been filed by the revenue against the order passed by the CIT(A)-II, Raipur, dated 30.09.2019 for the assessment year 2009-2010 & 2011-2012.

2. The revenue in the appeal for A.Y.2009-2010 has raised the following grounds:-

1. *“Whether on points of law and on facts & circumstances of the case, the Ld.CIT (A) was justified in deleting the addition of Rs.2,05,00,000/-made by the AO who treated as unexplained cash credit u/s68 on account of credit appearing in the books of accounts by way of share application money and the same was unexplained during the course of assessment proceedings?”.*
2. *“Whether on points of law and on facts & circumstances of the case, the Ld.CIT(A) was justified in accepting that the share application money had already been surrendered before the Hon’ble ITSC, Kolkata whereas the concerned assessee had not approached the Hon’ble ITSC.*
3. *“Whether on points of law and on facts & circumstances of the case, the Ld.CIT(A) was justified by not appreciating the findings of the AO when the identity, creditworthiness and genuineness of transactions of the shell companies were proved to be fictitious.*

4. *“Whether on points of law and on facts & circumstances of the case, the Ld.CIT(A) was justified in deleting the addition of Rs.4,00,000/- made by the AO who treated the expenses debited under the heads in Trading & P/L account on account of dhan bhusa, packing material and diesel when some of the expenses were not supported by proper bills and were routed through internal vouchers and were not open for complete verification?”.*
  5. *“The order of Ld.CIT(A) is erroneous both in law and on facts”.*
  6. *“Any other ground that may be adduced at the time of hearing”.*
3. The revenue in the appeal for A.Y.2011-2012 has raised the following grounds:-
1. *“Whether on points of law and on facts & circumstances of the case, the Ld.CIT (A) was justified in deleting the addition of Rs.1,50,00,000/- made by the AO who treated as unexplained cash credit u/s 68 on account of credit appearing in the books of accounts by way of share application money and the same was unexplained during the course of assessment proceedings?”.*
  2. *“Whether on points of law and on facts & circumstances of the case, the Ld.CIT(A) was justified in accepting that the share application money had already been surrendered before the Hon’ble ITSC, Kolkata whereas the concerned assessee had not approached the Hon’ble ITSC.*
  3. *“Whether on points of law and on facts & circumstances of the case, the Ld.CIT(A) was justified by not appreciating the findings of the AO when the identity, creditworthiness and genuineness of transactions of the shell companies were proved to be fictitious.*
  4. *“Whether on points of law and on facts & circumstances of the case, the Ld.CIT(A) was justified in deleting the addition of Rs.10,00,000/- made by the AO who treated the expenses debited under the heads in Trading & P/L account on account of dhan bhusa, packing material and diesel when some of the expenses were not supported by proper bills and were routed through internal vouchers and were not open for complete verification?”.*
  5. *“The order of Ld.CIT(A) is erroneous both in law and on facts”.*
  6. *“Any other ground that may be adduced at the time of hearing”.*

4. Brief facts of the case are that the assessee company derives income from Poultry business and Layer Farming. Return of income was filed on 23.09.2009 through e-filing declaring total income at Rs.1,41,81,770/ - and agriculture income at Rs. 2,91,165/-. Later, a Search & Seizure operations u/s. 132 of the Act were conducted at the various premises of IB (ABIS) Group of cases on 17.09.2014. Some incriminating documents pertain to the assessee were seized during the above operations which in turn were forwarded to the office of AO by the ACIT, Central circle-2, Raipur vide his letter dated 23.11.2016. Verification of these documents reveals the fact that the assessee company has laundered its unaccounted money in the garb of share application and share premium through Kolkata based shell companies, to the tune of Rs. 3.55 crores in the financial years 2008-09 and 2010-11. For these reasons, proceedings u/s 153C of the Act were initiated by AO's predecessor in office on 5.12.2016 for the assessment years 2009-10 to 2014-15. In response to the notice issued u/ s 153C, the assessee filed returns of income through e-filing on 09.03.2017 for the AYs 2009-10 to 2014-15. Copies of Tax Audit Reports with its schedules were also found filed vide assessee's letter dated 10.03.2017. In this letter he has requested to provide the copies of seized documents which were subsequently provided. During post search investigation summons u/s. 131 (A) of the IT Act were issued by Registered Post in as many as 44 share Holder companies of Kolkata for enquiring the identity, genuineness and creditworthiness of the share holders which is inclusive of the

company Fountain Head Merchandise Pvt. Ltd., Kolkata. However, summons sent through Registered post have been returned back unserved by the postal department in respect of 30 share holder companies out of 44 companies noted above, as these companies were not found at the given address. Further from the remaining 14 share holder companies no reply has been received so far. Therefore, it is evident that the share applicant companies were nothing but shell/paper companies of Kolkata and they are not in physical existence. Accordingly, the AO found that on thorough enquiries that the above paper shell company has no means to invest such large amount by way of share application money with its assessee, its creditworthiness has become doubtful and it was the amount of the assessee only, received in the garb of share application money. After taking into consideration of all the facts and factors of the case, the AO noted that the credit appearing in the books of accounts by way of share application money at Rs.2,05,00,000/- (AY2009-10) and Rs.1,50,00,000/- (AY2011-12) is rejected and added to the assessee's total income u/s. 68 of the Act. Penalty proceedings u/s. 271 (1)(c) of the Act are separately initiated. Consequently, additions of Rs. 2,05,00,000/- for the AY 2009-10 and Rs. 1,50,00,000/- for the AY 2011-12 were made.

5. Against the assessment order, the assessee preferred appeal before the Id. CIT(A), wherein the appeal was partly allowed.

6. Now, the revenue is in further appeal against order of CIT(A).

7. In the beginning of appellate proceedings before us, Ld AR of the assessee drew our attention to the application filed under Rule 27 of the Income Tax Act (Appellate Tribunal) Rules, 1963. Copy of the said application was served upon the revenue also. Opportunity to counter the application filed by assessee was given to the department but have not objected to the same.

8. Ld. CITDR before us submitted that in the present case Ld AO has adjudicate the issue correctly, the additions made were justified and desires to be sustained. Ld CIT(A) has grossly erred while deciding the issue by deleting the additions, accepting the contentions of the assessee, which were factually incorrect. Further, Ld CITDR submitted that the decision of the Ld CIT(A) for deleting the additions cannot be accepted on the principle as during the assessment proceedings the assessee had filed various replies which were not convincing. Regarding, the practice of conversion of unaccounted money through the clock of share premium, the higher onus is placed on the assessee, since the information was within the personal knowledge of the assessee. The assessee is under a legal obligation to prove the genuineness of receipt of share application money to the satisfaction of AO, failure of which justified the addition of Rs. 2.05 Crore. It was further argued, that the assessee company did not file any application before the Hon'ble Income Tax Settlement Commission (ITSC). As in the decision, Hon'ble ITSC has decided in each and every case separately of the ABIS group, who all had filed looking to the genuineness and creditworthiness in their cases and

were taxed under section 69 of the IT Act. Since the assessee has not moved its application before on Hon'ble ITSC. Its income in question cannot be said as settled. According to Ld CITDR the Assessee had received a sum of Rs. 2.05 crore as share capital from Fountain Head Mercantile Private Limited who in turn had received Rs. 9.00 crore for AY 2009-10 as share application money from various Kolkata based shell companies. Ld AO had established through enquiries that the said paper companies have no means to invest large amounts, thus the amount received by the assessee was nothing but assessee's own money received back in the garb of share application money. With regard to addition of Rs. 4.00 Lac, Ld CIT(A) failed to appreciate the facts and findings of the AO that some of expenses were not supported by proper bills and were routed through internal vouchers and were not open for complete verification. It was also observed by the Ld AO that the maximum payments were made by the assessee in cash. It was therefor the submission of the Ld CITDR that the order passed by the Ld CIT(A) is erroneous both on law and facts needs to be set aside, the additions made by Ld AO with proper adjudication of the issue on facts, deleted by the Ld CIT(A) shall be restored.

9. In response, Id. Authorise Representative of the Assessee (AR) took us to page 11 para 5 of the assessment order and shown that the material found during the search and seizure operations u/s 132 of the Act on the premises of IB (ABIS) Group on 17.09.2014, based on which the addition made were (1) LPS-43 (1-33 pages) – Register of transfer of

shares and BS-24 (1-15 page) – Counter foils of share certificates, all pertains to Fountain Head Mercantile Private Limited (FHMP). Copies of the Material seized were placed in Assessee's Paper Book at page 15 to 70. It was the submission of the Ld AR that the documents referred by the AO in the assessment order does not pertains to the appellant, all these pertains to FHMP, which is also subjected to post search assessment, thus all the impugned documents can be used against the FHMP and not against the appellant assessee. It was also submitted that the statement of certain persons as mentioned in the assessment order are also not related to the assessee, the enquiries which made for share application money received by the Abis Export India Pvt. Ltd are not relevant to the assessee rather none on enquiries conducted by investigation wing during the course of search has any nexus with the appellant company. It is stated that none of the documents relied upon by the Ld AO can be termed as incriminating documents related to the appellant on the basis of which any addition can be imposed. On this contention Ld AR relied on the following judgments :-

*Hon'ble Supreme Court in the case of CIT vs. Sinhgad Technical education society (2017) 99 CCH0234 ISCC where it was held that "as per provisions of Section 153C of the Act, incriminating material which was seized had to pertain to Assessment Years in question and documents which were seized did not establish any co-relation, document-wise, with four Assessment Years then order passed for initiation of proceeding u/s. 153C should be quashed.*

*In the case of PCIT vs. Index securities Pvt. Ltd order passed by High court of Delhi (2017) 100 CCH 0004 Delhi where in it was held that "In order to justify assumption of jurisdiction u/s 153C documents seized must be incriminating and must relate to each of AYs whose assessments were sought to be reopened."*

*In the case of Pr.CIT vs Lata Jain (Delhi HC dated 29.04.2016) (2016) 384 ITR 0543 it was held that There had to be incriminating material recovered during the search qua the Assessee in each of the years for the purposes of framing an assessment under Section 153A of the Act.*

*In the case of (IT vs Kabul Chawla (2016) 380ITR 573 (Del) it was held that Assessment u/s.153A can be carried out only on the basis of seized material. Where no incriminating material was unearthed during the search, no additions could be made to the income already assessed.*

*In the case of PCIT vs. Best Infrastructure India (P) Ltd & Ors. (2017) 99 CCH 0169 Statements recorded u/s 132(4) did not by themselves constitute incriminating material and on the basis of same assumption of jurisdiction u/s.153A and consequent additions made by AO were not justified.*

*In the case of ACIT Vs Ram Mehar Garg & Anr. (2016) 47 CCH 0404 it was held that provisions .of section 153A and 153C are search related provisions and these provisions were applicable only, relating to any undisclosed income on basis of seized documents found in search.*

*In the case of Rawal Das Jaswani Vs. ACIT I (2015) 43 CCH 0606 I jurisdictional incriminating material found during the course of search based on which addition was made, then the AO had no jurisdiction to make addition in the assessment framed under s. 153A of the Act".*

10. Ld AR further agitated that, since, the above legal issue that, no incriminating material pertaining to the assessee was unearthed during the course of search and seizure, thus, the reopening of the case u/s 153C is bad in law, was adjudicated by the Ld CIT(A) in total contradiction of the facts and findings of the Ld AO, therefore the application U/R 27 of the Income Tax (Appellate Tribunal) Rules 1963 was filed. The application filed by the assessee for the both the appeals under adjudication is extracted here under: -

**BEFORE THE HON'BLE INCOME- TAX APPELLATE  
TRIBUNAL, RAIPUR  
BENCH, RAIPUR.**

ITA NOS. 233/RPR/2019

ITA NOS. 234/RPR/2019

*APPELLANT : Assistant Commissioner of Income Tax-2  
(1),Bhilai*

*V.*

*ASSESSEE /*

*RESPONDENT M/ s Abis Poultry Private Limited, Rajnandgaon*

*APPLICATION UNDER RULE 27 OF INCOME-TAX  
(APPELLATE TRIBUNAL) RULES, 1963*

*1. That grounds no.1 & 2 of the Memo of Appeal in form 35 filed by the Respondent Assessee before Hon'ble Commissioner of Appeals read as under:*

*1) "On the facts and in the circumstances of the case, the Ld. AO has erred in re-opening the case U/S 153C without having any incriminating material relating to the Assessee company. Thus the re-opening of the case u/s 153C is bad in law;*

*2) On the facts and in the circumstances of the case the additions / disallowance made by the Ld. AO has no nexus with the seized 'material and therefore beyond the scope of section 153C r.uxs section 153A. the addition being without authority is unjustified, unwarranted and uncalled for.*

*2. The Ld. CIT(A) while deciding the above legal issue as held as under (only operative portion extracted hereunder)*

*111 have considered the grounds of appeals, gone through the submissions of the Appellant and seen the order of the AO.*

*As per Section 153C, where a search is initiated u/s 132 or books of accounts documents or any assets are requisitioned U/S 132A., the documents if any pertains to other person referred to section 153A the AO shall assess or reassess the income of other person as per the provision of section 153A, if the AO is satisfied that the books of account or documents or assets seized have a bearing on. the determination of total income. Provision of section 153A should follow to the extent of any documents seized for any relevant assessment year and in any other year no case should be re-opened where there is no incriminating documents. In the assessment order the AO has mentioned that certain incriminating documents in respect of the assessee were found.*

*There is no other discussion on this legal Issue by Hon'ble CIT (A.)*

*3. That the finding given by the Ld. CIT(A) is his order is contrary to the finding given by the Ld. AO in his Assessment order. That the Ld. AO in his assessment order has given a finding that addition can be made in the hands of Assessee ₹01' unabated / completed assessment year also without having, incriminating documents found during Search 132 of the Act and the addition was in fact made qua share application money which was not at all based on incriminating documents as the investment was duly recorded in the books of account of searched person/investors Company. That the Ld., AO has made addition without having any incriminating documents and has also stated that there is no requirement of incriminating documents for making addition for unabated / completed assessment year u/s 153A and 153C of the Act. That the finding of Ld. CIT (A) while deciding the issue at Para 2:3 is totally contrary to the finding of Ld. AO and therefore the legal ground No. 1 & 2 decided by the Ld. CIT (A) by taking incorrect finding is without jurisdiction.*

*a) Sanjay Sawhney v. PCIT [2020J 116 Taxmann.com 701 (DelhiHC)*

*b) Sun Pharmaceutical Industries Ltd.(2017) 86 Taxmann.com 148 (Cul.HC) ;*

*c) CIT v. Jindal Polyester Ltd.(2017) 82 Taxmann.com 302 (All HC);*

*d) CIT vs. BPL Systems & Projects Ltd.(1997) 22TITR 779 (Ker HC)*

*e) Add1. CIT Range (5), New Delhi V Ranbaxy Laboratories Ltd., ITA No. 3799/Del/2009 order dated 29/07/2019 by ITAT D Bench Ahmedabad*

*4. That under rule 27 of the Income-tax (Appellate Tribunal) Rules, the respondent (present assessee) can support the order of Ld.CIT(A) on any of the grounds decided against him. For this, the respondent; assessee relies on the following case laws ;-*

*5. Rule 27 of the ITAT Rules reads as under:-*

*"27. The respondents, though he may not have appealed, may support the order appealed against on any of the grounds decided against him. "*

6, *From the above, it is clear that the present respondent-assessee can support the order of Id. CIT(A) on any ground decided against it. That grounds no. 1 & 2 raised by the Respondent I assessee before the CIT(A) have been in effect Indore decided against the respondent; assessee but relief has been granted by the CIT(A) qua the additions on merits. Against the deletion by CIT(A) the Department is in appeal before this Hon'ble Tribunal and has raised challenged the deletion of addition.*

7. *Thus in view of the aforesaid facts it is humbly prayed 'that this Hon'ble Tribunal be pleased to permit the respondent to support the order of CIT(A) on the following ground u/r 27 of ITAT rules:*

1. *whether the addition can be made in the absence of any incriminating document: in the unabated assessment 11 year U/s. 153C read with Section 153A of the Act for to which, no proceedings were pending on the date of search?*

2. *Whether the Assessment can be made U/S 158C in case of person other than searched person without having any incriminating document found during search which belongs to the other person and in the absence of any such satisfaction recorded by the AO?*

11. After discussing the aforesaid grounds raised in application made U/R 27 for a while, Ld AR has opted not to press the said grounds, therefore the same has become infructuous and thus, dismissed.

12. Afterwards, Ld AR has started advancing his arguments against the ground raised by the revenue in their appeal. On ground no 1 to 3 of both the appeals regarding the issue with respect to addition on account of Bogus share application money of Rs. 2.05 Crore for the AY 2009-10 and Rs. 1.50 Crore for AY 2011-12, Ld AR drew our attention to the submissions made before the Ld CIT(A), which reads as under: -

*2.6 In view of above provisions and various judicial pronouncement, if the powers u/s 143(2) has not been invoked in time because the A.O. had no reason to believe that any claim of loss, exemption,*

*deductions, allowances or relief made in return is inadmissible, the regular scrutiny cannot be conducted like u/s 143(3) merely because a search has been conducted. The post search assessment therefore should confine to the material surfaced during the search or on the basis of information gathered in course of search. The action which cannot be taken directly, cannot be taken indirectly which means that if case has not been selected for scrutiny u/s 143(2)/(3), the power vested under that section cannot be invoked u/s 153A/153C so as to enquire and assess the matters not arising out of search otherwise it will amount to reopening or reconsideration of whole assessment and issues not at all connected with the search material. The intent and purpose of section 153A/C do not extend the power of the A.O. to re look the concluded assessments without any material found during search merely because the search has been conducted.*

*2.7 In view of above fact the addition made by the AO on account of share capital without any material! evidence found during the course of search deserves to be deleted.*

*3.1 During the year under consideration the appellant company has received fresh share application money of Rs. 1,50,00,000/- from one share holder Le., from one group company namely Fountain Head Mercantile (P) Ltd (FHMP). Copy of ITR along with audited financial statement' of the appellant company' is enclosed herewith.(Page No19-40.j.*

*3.2 During the course of assessment proceedings the AO asked to furnish the ITR, Computation and Audit report of the share applicant company. In response to these the appellant submitted the ITR, Computation and Audit report of the share applicant company. Further the appellant also submitted before the A.O. that the above share subscriber is the group company of the appellant company and also one of the parties under search and is to be assessed u/s 153A before your honor. Thus the creditworthiness, identity and genuineness should not be questioned. It was also submitted before the AO that FHMP has filed an application before Hon'ble ITSC, Kolkata to settle his income for the A.Y. 2009--10 to 2015-16. and also stated that the Income of the FHMP have been settled. Copy of the ITSC order also submitted with the A.O. also stated that the same is duly accepted by the department. Further the appellant submitted that in A.V. 2011-12, The FHMP has received 21.96 crore as share application money from Shree Radhey Tea Plantation Pvt. ttd, Kolkata and the entire amount was added by Hon'ble ITSC while passing the order. The appellant submitted that out of said taxed income the share subscriber has transferred the fund. Thus Where once the source have been taxed then again taxing it on application will tantamount to double taxation hence no addition should be made in the case of the assessee. Further the appellant contended that where the income of the source company have been, settled by the Hon'ble ITSC, then no addition should be*

*made in the hands of the appellant. However, the AO did not consider the same and made the addition of Rs. 1.5 crore u/s 68 on account of share application money received from one share holder namely Fountain Head Mercantile (P). Ltd (FHMPIL).*

*3.3 The appellant object to the addition made by the A.O. The appellant submits that during the course of assessment proceeding the assessee submitted all the desired documents, as required u/s 68 in order to prove the identity, creditworthiness and genuineness of the transactions, such as Audited financial statement, ITR, Computation, Bank statement and Bank book of share applicant company i.e.FHMPL. The said documents are enclosed herewith for your kind perusal. (Page No. 41-66.) The above share applicant company named FMPHL is the group company of the assessee company and also a party covered under search. The said share applicant company, FHMPL had filed an, application before Hon'ble Income Tax Settlement Commission (ITSC) to settle the income, therefore the identity of the FMPHL was proved beyond any doubt. The bank statement and bank book of FHMPL for the relevant period was also furnished before the AO. Therefore, the genuineness of the transaction was also proved without any ambiguity. Further, as regards its source of share holder, the appellant has furnished the bank statement and bank book of Bank of India in the books of FHMPL which is enclosed herewith.(Page No 63-66. ). Perusal of bank statement and bank book reveals that FHMPL has received a share application money from various Kolkata Companies has on account of share application money which was already offered for taxation before the Hon'ble ITSC. For the AY 2011-12 the FHMPL has received a sum of Rs. 2 crore from Shree Radhey Tea Plantation Pvt. Ltd.. on 17.03.2011 on account of share application money and this fund was used for making investment in the assessee company on 24.03.2011. Therefore, the appellant has duly discharged its onus of "proving the identity, creditworthiness and genuineness of the transaction and therefore the provision of section 68 has wrongly been triggered by the AO.*

*3.4 It is further to submit before your honor that the case of the share holder Fountain Head Mercantile {P} Ltd {FHMPIL} was before Hon'ble ITSC, Kolkata and the income of the share applicant was duly settled by the ITSC, Kolkata. Copy of ITSC order is enclosed (Page No 67-133.) and further addition was made on account of share application money received from Shree Radhey Tea Plantation of Rs. 21.96 crore to the total income of the applicant i.e. FHMPL . When the share applicant company itself is a party under search and under same jurisdiction, then question regarding credit worthiness, genuineness, identity should not be doubted and even if there is any doubt regarding the transaction the assessing officer is free to make enquiry in the case of share applicant company. Further where the income of the applicant company i.e. Fountain Head Mercantile {P} Ltd have been settled by Hon'ble ITSC, Kolkata then the question with regard to source of the money received by the assessee company is self explanatory. Hence under*

*such circumstances where the income of the applicant company have been settled thereby accepting all its capital and income and the taxes has duly been paid by the company on income settled by Hon'ble ITSC, Kolkata then addition made by the A.O. under such circumstances in unjustified and not tenable as per law. The assessee company has duly discharged his onus by submitting all relevant documents and information before A.O. as required u/s 68. The appellant submitted all these fact before the A.O. as discussed supra, however the A.O. without considering the fact properly passed the order by making addition u/s 68. These events clearly reflect that the AO has not appreciated the facts of the case in proper manner and has tried to mislead the fact with a preconceive notion of making an addition for the reason best known to him. The said contention of the appellant finds support from the following decisions of various judicial authorities.*

*In the case of CIT Vs. Five vision Promoters (P) Ltd (2016) 131 DTR 0337 (Del HC) it was held that "Provisions of s 68 can be invoked only where assessee offers no explanation at all or explanation offered is unsatisfactory; and addition thereunder can be made only on that condition".*

*• In the case of CIT Vs. Pranav Foundation Ltd (2015) 117 DTR 0227 (Chennai HC) it was held that "Where the share applicants were registered companies and they had duly furnished the confirmations along with their IT Asst. details, the assessing officer ought to have accepted these contributions towards share capital as genuine and no addition was warranted u/s 68 in hands of assessee on account of share application money received".*

*• In case of CIT vs. Abdul Aziz (2012) 251 CTR 58 (Chhatrisgarh), the Jurisdiction High Court held that where AO had not made any independent enquiry to disprove creditworthiness of the creditors, as established by affidavits and statements of creditors disclosing source of income, addition made u/s 68 was rightly deleted. In this case also the rejection is based on no evidences and therefore raising of a presumption against the assessee does not arise. An explanation prima facie reasonable cannot be rejected on capricious or arbitrary grounds or on mere suspicion or on imaginary or irrelevant grounds. The AO has arbitrarily disbelieved the identity/creditworthiness without substantiating by any evidence and therefore the addition deserves to be deleted.*

13. On the basis of aforesaid submissions Ld AR has contended that the Id CIT(A) has rightly dealt with the issue and decided the same by deleting the addition which was unjustified for the reason that the onus of proving the Identity and Creditworthiness of the Share Holder as well as

genuineness of the transaction was completely discharged by the appellant. Thus, it was the prayer of Ld AR that order of Ld CIT(A) on this issue deserves to be upheld. Ld AR also drew our attention to the observations and findings in the order of Ld CIT(A), wherein the CIT(A) has held as under:-

*2.3 I have considered the grounds of appeal, gone through the submissions of the appellant and seen the order of the AO.*

*As per section 15JC, where a search is initiated u/s. J 32 or books of account, other documents or any assets are requisitioned u/s 132A, and the documents if any pertain to other person referred to section 153A the A.O. shall assess or reassess the income of other person as per the provision of Section 153A, if the AO is satisfied that the books of account or documents or assets seized have a bearing on the determination of total income. Provision of section 153A should follow to the extent of any documents seized for any relevant assessment year and in any other year no case should be reopened where there is no incriminating documents. In the assessment order the AO has mentioned that certain incriminating documents in respect of the assessee were found.*

*Addition has been made treating the share capital of the assessee as assessee's own income u/s 68. Facts are that the assessee company has received share premium amounting to Rs. 2,05,00,000/- from Fountain Head Mercantile (P) Ltd ( in short FHMPL), a Kolkata based company in the FY 2008-09. During the course of search and seizure operations as seen from the papers and documents detailed enquiries were conducted and after due verification from all corners, it was noticed that the ABIS group of cases have received large amount of share premiums from various Kolkata based companies which were found paper shell companies including the above name company PHNJPL Assessee has explained that group cases of ABIS and the above company FHMPL filed application before the Hon 'ble Settlement Commission and the order was also passed by the ITSC. MIs FHMPL is one of the Group companies of IB group who has also filed application before ITSC, Kolkata for settling its income for the AY s 2009-10 to 2015-16. The ITSC has passed the order and settled the issue in respect of FHMPL and hence the question with regard to source of the money received by the assessee*

*company is self explanatory and no addition needs to be made in the assessee's case on a/c. of share application money receipts. The AO has found the reply of the assessee not convincing. He has noted that assessee M/s Abis Poultry (P) Ltd has not filed any application before the Settlement Commission for settlement of its income. As per him the sources of such share capital are nothing but the unaccounted black money transferred to ABIS Group of Rajnandgaon, Chhattisgarh.*

*During post search investigation summons u/s. 131 of the IT Act were issued by Registered Post in as many as 44 share Holder companies of Kolkata for enquiring the identity, genuineness and creditworthiness of the share holders which is inclusive of the company Fountain Head Merchandise Pvt. Ltd Kolkata. Summons sent through Registered post have been returned back unserved by the posted department in respect of 30 share holder companies out of 41 companies noted above, as, these companies were not found at the given addresses. From the remaining 14 share holder companies no reply has been received so far. Therefore AO concluded that the share applicant companies are nothing but shell/paper companies of Kolkata and they are not in physical existence.*

*From these facts I find that if these companies have not replied or many of them were not found at the addresses on record, the implication of this finding will come on FHMPL and not on the assessee company. As far as FHMPL is concerned that company has already accepted the money from these companies as its income and has offered the same before the honourable ITSC which has been accepted. The assessee has received money as share application money from FHMPL out of the surrender made by the said company before the ITSC. The same amount cannot be added twice when the taxes have been duly paid by FHMPL. In order to add 8 credit amount in books of the assessee as income u/s 68, the AO must bring on record some positive material or evidence to indicate that the share holders were fictitious persons or that any part of share capital represented groups' own income from undisclosed income [ ACIT Vs. Pee Dee Kapur Stock (2012) 31 CCH 0345 (Del.Trib) 2012]. In the present case the Subscriber M/s. Fountain Head Mercantile Pvt. Ltd has already been assessed and its income has been settled by hon'ble Income tax Settlement Commission before which M/s. Fountain Head Mercantile Pvt, Ltd has received an amount of Rs. 9 crores in the A Y'-2009-10, Rs. 3 Crores in AY 2010-] and various amount in the subsequent years. On going*

*through the orders of the ITSC dated 3.5.2017 in the case of Abis Group it is seen that at para 2.2 of the order it has been accepted that out of the income offered sum of Rs. 9 Crores in AY 2009-10 and Rs. 3 Crores in AY 2010-11 and various amounts in subsequent years were utilized in introducing share capital. The said disclosure by the group including Rs. 9 Crores by M/s. FHMPPL has been accepted by the Hon'ble ITSC at para 6.10 as "In view of the above discussion and the detailed submission made by the AR we are of the opinion that no addition is required to be made to the income of the group on this ground".*

*The AO has stated that the assessee has laundered Rs. 3.55 Crores in FY 2008-09 ( AY 2009-10) and FY 2010-11 (AY 2011-12) in the garb of share application and share premium through M/s. Fountain Head Mercantile Pvt. Ltd., a Kolkatta based shell company. The AO has also mentioned that enquiries through summons u/s. 131 were made in the case of 44 share holder companies of the Abis Group but the summons were returned unserved. The assessee has informed that the group has gone to the ITSC and has offered substantial income commissioning the various issues including share application money. On going through the order of the ITSC it is seen that Shri Sultan Ali, Shri Bahadur Ali, M/s. Indian Agro and Food Industries Limited. M/s. Halifax Mercandise Pvt. Ltd, M/s. Fountain Head Mercantile Pvt. Ltd, M/s.t Abis Exports (I) Pvt. Ltd and M/s. Abis tHatcheries Pvt Ltd have surrendered the total income of Rs, 47,49,U~,UUU/- . Once M/s. Fountain Head Mercantile has surrendered the amount of Rs. 9 Crores as its income in the AY 2009-10 then in the subscription made to assessed companies share cannot be taxed again. Therefore it cannot be taxed in the hands of the assessee company if the identity and other details of share applicants are available, the share application money cannot be treated as undisclosed income in the hands of the assessee company. The addition, if at all to made, should be in the hands of the share applicants if their creditworthiness is not proved. Thus the decision given by Hon'ble Delhi High Court in the case of CfT vs. Brindavan Farms Pvt. Ltd in ITA No. 7112015 dated 12.8.2015 same view has been taken by the Hon'ble Supreme Court in the case of CIT vs. Lovely Exports Pvt. Ltd 216 CTR 195 SC 2008 and the jurisdictional High Court in the case of ACIT vs. Venkateshwar Ispat Pvt Ltd 319 ITR 393 (SC). In this decision the Hon'ble Supreme Court has held that " in case of share application money the assessee has to produce evidence regarding names, address etc and once the share holder has confirmed the investments, the department is free to proceed to reopen share holders*

*assessment in accordance with law it cannot be regarded as undisclosed income of the assessee company". In this case the subscriber company has not only confirmed having made a subscription but its sources of funding is also explained by way of surrender before the Hon'ble ITSC. Ld. AO has accepted that in page 5 of the assessment order. Sources of such shares capital are nothing but unaccounted application money transferred by Abis Group. The money of the group has been routed through various companies to the shares of the assessee company. Thus being so,' when the money of Rs. 9 Crores has been offered by the subscriber which is a group company, it is the amount of Rs. 1.5 Crores in the AY 2009-10 and Rs.2.05 Crores in the AY 2011-12 introduced in the shares of the assessee company out of that income has to be accepted as explained. In view of these facts the addition of Rs. 2.05 Crores in AY 2009-10 and Rs. 1.5 Crores in AY 2011-12 being made out of money already taxed in the hands of M/s. Fountain Head Mercantile Pvt. Ltd is deleted.*

14. We have considered the rival contentions, perused the material available on records and judicial pronouncements relied upon.

15. In the present case, the issue with respect to addition u/s 68 is decided on the basis of 3 factors: 1. Identity of the share applicant, 2. Creditworthiness of the share applicant, and 3. Genuineness of the Transaction.

16. The first factor i.e. identity has been duly proved by the assessee and admittedly both the revenue authorities has accepted that same. Identity of the Share applicant M/s Fountain Head Merchandise Pvt. Ltd. (FHMPPL) was further established when the same had took its matter before the Settlement Commission (ITSC) and an order was passed for the same.

17. Regarding second and third factor, creditworthiness of FHMPPL and Genuineness of transaction, on perusal of the order of ITSC, wherein FMHPL has offered an additional income under various assessment years

with a mention that the company FHMPPL was in receipt of additional income from "commodity speculations" other than its regular source of income. Relevant portions of the order of ITSC dated 31.05.2017 are reproduced hereunder for proper appreciation of the facts:-

<i>(3) M/s Fountain Head Mercantiles Pvt. Ltd.</i>			
<i>Asstt. Years</i>	<i>Additional amount disclosed in the S.A(Rs.)</i>	<i>Additional tax payable (Rs.)</i>	<i>Additional interest payable (Rs.)</i>
2009-10	9,00,000/-	3,05,92,673/-	2,96,90,189/-
2010-11	3,00,00,000/-	1,01,97,043/-	86,72,585/-
2011-12	34,00,000/-	10,50,600/-	7,67,463/-
2012-13	1,00,000/-	30,900/-	21,472/-
2013-14	1,00,000/-	30,900/-	20,554/-
2014-15	1,00,000/-	30,900/-	11,448/-
2015-16	1,00,000/-	30,900/-	6,504/-
<b>Total</b>	<b>12,38,00,000/-</b>	<b>4,19,63,916/-</b>	<b>3,91,90,215/-</b>

2.2 The applicant at Sl.(3) M/s Fountain Head Mercantiles Pvt. Ltd., is a Private Limited Company incorporated under Indian Companies Act, 1956 on 23.05.1991 having its registered office at 2, Sir Hariram Goenka Street, 5<sup>th</sup> Floor, Kolkata (W.B)-700007. The company is engaged in the business of non-banking finance and duly registered with Reserve Bank of India as NBFC company u/s.45IA of Reserve Bank of India. In the SOF, it has been further stated that the applicant company in addition to its regular sources of income, also earned income from commodity speculation which was kept outside books of account. However, since no proof of earning of such income has been preserved by the applicant company, it is offering such undisclosed income for taxation u/s.68/69 of the Income Tax Act, 1961. The additional income earned year wise amounted as under :-

<i>A.Y.</i>	<i>Additional Income Offered</i>
2009-10	9,00,00,000
2010-11	3,00,00,000
2011-12	34,00,000
2012-13	1,00,000
2013-14	1,00,000
2014-15	1,00,000
<b>Total</b>	<b>12,38,00,000</b>

Out of the aforesaid incomes, sums of Rs.9.00 crore in AY 2009-10 and Rs.3.00 Crore in AY 2010-11 were utilized in introducing Share Capital in benami names of Kolkata companies. The details are available in Cash Flow Statement which is enclosed in the Annexure to S.O.F.

V. FOUNTAINHEAD MERECANTILE PVT. LTD.

17. In this case, the Pr.CIT in his Rule 9 report has raised the following issues :

S. N	ISSUES	AMOUNT (Rs.)	A. Ys. involved
1	Share Capital Raised	9,00,00,000/- 3,00,00,000/- 21,96,00,000/- 33,96,00,000/-	2009-10 2010-11 2011-12
2	Balances of Mr. Satyanarayan Daga and Mr. Vinod Gupta	3,72,155/-	2013-14
3	Salary paid in cash	Quantum of the undisclosed income would be further quantified after analysis of seized documents	2009-10 To 2015-16
4	Transactions mentioned in pages 181 and 181A of BS 16:	1,05,00,000/-	2012-13
5	Details of transaction in seized documents	57,59,25,000/-	2011-12 subject to establishing the sources
	<b>Total undisclosed income:</b>	<b>92,63,97,155/-</b>	

17.1 Under the head share capital, following addition shall be made:

Name of Applicant	AY 2012-13	AY 2013-14	AY 2014-15	Total
Fountain Head Mercantile Pvt. Ltd.	21,96,00,000	--	--	21,96,00,000
Add. 2% Commission	43,92,000	--	--	43,92,000

As regards the remaining issues the Commission is of the view that no separate addition is warranted under these heads in view of the detailed submissions made by the applicant vide letter dated 15-02-2017, 05-05-2017, 16-05-2017 and 17-05-2017.

18. On perusal of the above contents from the order of ITSC, where in the entire Abis Group has surrendered for approx. 47.49 Crore before the ITSC. FHMPPL has also surrendered an amount of Rs. 9 Crore as its

income for the AY 2009-10. It was also brought to our knowledge that an amount of Rs. 45.37 Crore was surrendered for AY 2008-09 as share application/ money by the FHMLP under Vivad Se Vishwas Scheme (VSVS), to this effect a copy of form 5 was filed in Assessee's Paper book at page 158. On being questioned about the investment of funds by the subscriber FHMLP in the assessee company, that the same was out of the explained income of the subscriber, a chart showing flow of declared tax paid funds either under VSVS or before the ITSC by FHMLP to the Assessee Company was furnished by the Ld AR, the same is extracted as under:-

That during the course of hearing dated 03.01.2023, this Hon'ble Bench has directed to submit the detail of fund flow along with documentary evidences qua amount of Rs. 2.05 Crores invested by M/s Fountain Head Mercantile Pvt. Ltd. as Share capital in M/s Abis Poultry Pvt Ltd. The Fund Flow is as under:-

**Source and bifurcation of investment made in M/s Fountainhead Mercantiles Pvt. Ltd and its subsequent investment in M/s Abis Poultry during the A.Y. 2009-10**

- i. Out of total investment of Rs 2,05,00,000/-, Rs 1,50,00,000/- was part of Rs 9 cr. Which was offered before Settlement Commission by M/S Fountain Head Mercantile Pvt. Ltd. details as under:-

Investor	Date of Investment	Mode / Bank	Amount	Subsequent Investment			
				Invest in	Date	Amount	Remark
M/s Liberal Vincom Pvt. Ltd	20/01/2009	Cheque 001111 Federal Bank	30,00,000/-				
M/s Nilambus Commodities Pvt. Ltd	29/01/2009	Cheque 10001075 Federal Bank	35,00,000/-				
M/s Trimundra Vincom	30/01/2009	Cheque 000794 Federal Bank	12,00,000/-				
M/s Priority Vincom	02/02/2009	Cheque 001105 Federal Bank	45,00,000/-				
M/s Set Square Holding	04/02/2009	Cheque 10004849	2,50,000/-				

		Federal Bank					
M/s Set Square Holding	06/02/2009	Cheque 004853 Federal Bank	35,00,000/-				
M/s Set Square Holding	16/02/2009	Cheque RTGS	50,00,000/-				
M/s Set Square Holding	25/02/2009	Cheque 004871 Federal Bank	50,00,000/-	M/s Abis Poultry Private Limited	25/02/2009	25,00,000/- 25,00,000/-	On 25/02/09 M/s Fountain head Mercantiles received amount of Rs 50 Lk from M/s Set square (Part of 9 Crore) and same was invested in M/s Abis Poultry on 25/02/2009 in two parts each of Rs 25,00,000/-)
M/s Nilambur	27/02/2009	Cheque 002402 Federal Bank	48,00,000/-	M/s Abis Poultry Private Limited	27/02/2009	25,00,000/- 25,00,000/- 20,00,000/-	On 25/02/09 M/s Fountain head Mercantiles received amount of Rs 70 Lk from Two investors
M/s Priority Vincom	27/02/2009	Cheque 045412 Federal Bank	22,00,000/-				M/s Nilambur : Rs 48,00,000/- M/s Priority Vincom : Rs 22,00,000/-  Note : Both investment are part of 9 Cr.

							That total amount of Rs 70 Lk.  M/s Set square (Part of 9 Crore) and same was invested in M/s Abis Poultry on 25/02/2009 in two parts each of Rs 25,00,000/-)
M/s Set Square Holding	02/03/2009	Cheque 1023447 Federal Bank	51,00,000/-	M/s Abis Poultry Private Limited	02/03/2009	30,00,000/-	On 25/02/09 M/s Fountain head Mercantiles received amount of Rs 51 Lk from M/s Set square (Part of 9 Crore) and same was invested in M/s Abis Poultry on 25/02/2009 in two parts each of Rs 25,00,000/-)
M/s Set Square Holding	02/03/2009	Cheque 10023448 Federal Bank	49,00,000/-				
M/s Mahakal Shoppers	04/03/2009	Cheque 813922 Axis Bank	45,00,000/-				
M/s Mahakal Shoppers	05/03/2009	Cheque 813923	35,00,000/-				

		Axis Bank					
M/s Crystal Shoppers	05/03/2009	Cheque 813721 Axis Bank	35,00,000/ -				
M/s Padma Estates Pvt	06/03/2009	Cheque 818054 Axis Bank	85,00,000/ -				
M/s Atlantic Vincome Pvt. Ltd	09/03/2009	Cheque 088326 Axis Bank	10,00,000/ -				
M/s Puskar Tradeline Pvt. Ltd	09/03/2009	Cheque 088401 Axis Bank	5,00,000/-				
M/s Atlantic Vincom	10/03/2009	Cheque 088328 Axis Bank	15,00,000/ -				
M/s Economy Barter Pvt. Ltd	16/03/2009	Cheque 0883580 Axis Bank	11,00,000/ -				
M/s Set Square Holding	18/03/2009	Cheque 023467 Federal Bank	3,50,000/-				
M/s Exclusive Investment Consultants	23/03/2009	Cheque 089252 Axis Bank	19,00,000/ -				
M/s Ambition Investment Advisory Pvt. Ltd	23/03/2009	Cheque 089083 Axis Bank	25,00,000/ -				
M/s Alliance	24/03/2009	Cheque	39,00,000/				

Commodeal		088308 Axis Bank	-				
M/s Priority Vincom Pvt Ltd	24/03/2009	Cheque 814933	20,00,000/ -				
M/s Ambition Investment Advisory Pvt. Ltd	24/03/2009	Cheque 089084 Axis Bank	48,00,000/ -				
M/s Padma Estate Pvt Ltd	31/03/2009	Cheque 919025 Axis Bank	75,00,000/ -				
<b>Total</b>			<b>9,00,00,000/-</b>			<b>1,50,00,000/-</b>	

ii. Source of remaining Amount of Rs 55,00,000/- out of Rs 2,05,00,000/- is as under:-

Investment in	Date of Investment	Amount	Source of M/s Fountain head Books	Date of Sale	Amount	Source of Investment	A.Y	Payment	Remark
M/s Abis Poultry Private Limited	19/02/2009	30,00,000/-	Sale of investment in M/s Radial Tie-Up	19/02/09	30,00,000/-	Investment in M/s Radial Tie-Up	2008-09	1,62,50,000/-	The Investment made in these two companies was out share capital of Rs 45,37,75,000/- raised during the year and same was taxed under VSVS
M/s Abis Poultry Private Limited	23/02/2009	25,00,000/-	Sale of investment in M/s Shree Mahalaxmi Vinimay	20/02/09	25,00,000/-	Investment in M/s Shree Mahalaxmi Vinimay	2008-09	50,00,000/-	
<b>Total</b>		<b>55,00,000/-</b>			<b>55,00,000/-</b>				

19. In view of the above facts, since the income has been surrendered by the subscriber company FHMP L and also the taxes along with penalty and interest, if any, were settled under VSVS and as ordered by ITSC, genuineness and creditworthiness of FHMP L cannot be doubted.

20. Guidance can be taken from the judgment in the case of CIT Vs. Lovely Exports (P) Ltd reported in (2008) 216 CTR 0195 (SC), where in Hon'ble Apex Court has held that:

*"If the share application money is received by the Assessee company from alleged bogus shareholders, whose name are given to the AO, then department is free to proceed to reopen their individual assessments in accordance with law, but it cannot be regarded as undisclosed income of the assessee."*

21. In the present case since assessee had provided all the required information regarding the subscriber/shareholder FHMP L, who has already disclosed its income under VSVS and before ITSC and had paid the required taxes thus no further action can be taken against the assessee.

22. We do also find a relevance of the judgment in the case of PCIT Vs Sree Leathers (2022) 114 CCH 0180 (Kol HC), Hon'ble Kolkata High Court in this case has dealt with an addition u/s 68 and has quoted a decision of Hon'ble Supreme Court in the case of CIT Vs. Daulatram Rawat Mull, (1973) 87 ITR 349 (SC), where in it has been concluded that:

*"It is not enough for the assessing officer to brushed aside the explanation offered by the assessee but he should record reasons in writing as to why documents which were filed by the assessee along with the reply does not got to establish the identity of the lender or prove the genuineness of the transaction or establish the creditworthiness of the lender."*

23. Hon'ble Jurisdictional High Court of Chhattisgarh in the case of ACIT vs. Venkateshwar Ispat (P) Ltd. reported in 319 ITR

393(Chhatisgarh), which was referred by the coordinate bench of ITAT, Raipur in the case of Shree Radhey Infralogistics India Pvt. Ltd in ITA 51, 52 & 56/Raipur/2017 dated 16.04.2018 also, held that *“in respect of Share application money, department is free to proceed to reopen shareholder’s individual assessments in accordance with law, but it cannot be regarded as undisclosed income of the assessee company. The Hon’ble High Court further found that in subsequent year, the shareholders investment was confirmed during the assessment proceedings.”*

24. Considering the aforesaid facts, evidences and observations, apparently, the subscriber, FHMPPL, from whom the money of Rs. 3.55 Crore have been received by the assessee company in AY 2009-10 and 2011-12 as share capital or share premium, was out of the funds on which taxes were duly paid by FHMPPL, therefore the source of the fund is duly explained. It was also the admitted fact that the assessee company had discharged its onus to prove the identity of subscriber, genuineness of transaction and also the creditworthiness of the subscriber, this fact has been properly appreciated by the Ld CIT(A) and accordingly deleted the addition made by the Ld AO.

25. In light of the judicial precedence laid down by the Hon’ble Courts and followed by the coordinate bench of ITAT Raipur in the cases referred to supra, it is our considered view that Ld CIT(A) has rightly deliberated the issue and decided the justifiably. Since the revenue have not bring to our attention any substantial material to refute or to show any perversity in the order of Ld CIT(A) nor have brought on records any decision contrary

to the finding of facts and law by the Ld CIT(A), thus, no infirmity in the order of Ld CIT(A) was found, therefore, we are inclined to concur with the same and we do so. In the result Ground 1 to 3 of revenue in both the appeals under consideration stands dismissed.

26. Ground no 4 in both the appeals regarding deleting the addition of Rs. 4.00 Lac and Rs. 10.00 Lacs respectively for the AY 2009-10 and AY 2011-12 on account of “**dhan bhusa**” and lumpsum disallowance on packing material and diesel expenses.

27. On this ground Ld CITDR has vehemently supported the order and Ld AO and requested to set aside the order of Ld CIT(A).

28. With respect to disallowance of exp. deleted by the Ld CIT(A) on account of “**dhan bhusa**” and lumpsum disallowance on packing material and diesel expenses, submissions of the Ld AR before Ld CIT(A) were as under:-

4. Ground-2 & 3

*On: the facts and in the circumstances of the case, the Ld. Assessing Officer has erred in making disallowance of Rs. 10,00,000/- on account of Dhan Bhusa, Packing material and Diesel expenses on lumpsum basis. The addition is unjustified, unwarranted and uncalled for.*

*4.1 During the course of assessment proceeding, the appellant submitted that the case of the assessee is reopened u/s.153C, and the proceeding u/s.153C should be restricted to the extent of incriminating documents found during the course of search. No incriminating documents were furnished to the appellant during the proceeding with regard to expenses. The appellant also furnished various case laws which strengthened the contention of the appellant. However with considering the same the AO has erred in making addition on account of various expenses,*

*4.2 The appellant vehemently object to the disallowances made on account of various expenses in proceeding initiated u/s 153C. As per provision of section 153C, where' a search IS initiated u/s 132 or books of account, other documents or any assets are requisitioned u/s 132A, and the .documents if any pertains to other*

person referred to section 153A, The A.O. shall assess or reassess the income of other person as per the provision of Section 153A, if the AO is satisfied that the books of account or documents or assets seized have a bearing on the determination of total income. Provision of section 153A should follow to the extent of any documents seized for any relevant assessment year and in any other year no case should be reopened where there is no Incriminating documents.

Than as per the provision of section 153A the A.O. shall issue notice to furnish return of income in respect of each assessment year falling within six assessment year preceding to the assessment year relevant to previous year In which search in conducted or requisition is made. There after the AO shall assess or re-assess the total income in respect of those six assessment years. As per second proviso to section 153A the assessment or re-assessment if any relating to those six assessment year are pending on the date of initiation of the search, the same shall abate meaning thereby that the unabated assessment shall subsist. Thus the A.O. has to assess the total income in respect of pending/abated assessment years and has to re-assess the total income in' respect of un-abated assessment. This is the reason why the legislature has used the word assess or re-assess in sub section (b) to section 153A (1) and in proviso first and second.

4.3 In the present case of the assessee no incriminating documents were found during the course of search relating to expenses, Further during the assessment proceeding the A.O. has never furnished any incriminating document which suggest that the appellatant has inflated any such expenses.

4.4 It is therefore apparent that the addition was made arbitrary with out having any incriminating documents found during .search, Thus the .addition is unsustainable in the eyes of law. On the same sets of facts the Jurisdictional Bench of Income Tax Appellate Tribunal, in the recent judgment pronounced on 18.01.2018, has held in the case of DCIT Vs. R.R.Energy ltd (2018) 52 CCH 0052 that "In the absence of seized material found during search, addition made in an order passed u/s. 153A of the Act is not sustainable.

4.5 That on the similar sets of facts various Apex court and High Courts have also held that no addition can be made in respect of an unabated assessments which have become final, if no incriminating material is found during search. The applicants further rely on the following judgment:-

Hon'ble Supreme Court in the case of CIT vs. Sinhgad Technical education society (2017) 99 CCH0234 ISCC where it was held that "as per provisions of Section 153C of the Act, incriminating material which was seized -had to pertain to Assessment Years in question and documents which were seized did not establish any co-

*relation, document-wise, with four Assessment Years then order passed for initiation of proceeding u/s. 153C should be quashed."*

*In the case of PCIT vs. Index securities Pvt. Ltd order passed by High court of Delhi (2017) 100 CCH 0004 Del HC where in it was held that "In order to justify assumption of jurisdiction u/s 153C documents seized must be incriminating and must relate to each of AYs whose assessments were sought to be reopened."*

*In the case of Pr.CIT vs Lata Jain (Delhi HC dated 29.04.2016)(2016) 384 ITR 0541 it was held that "There had to be incriminating material recovered during the search qua the Assessee in each of the years for the purpose of framing an assessment under Section 153A of the Act."*

*In the case of CIT vs Kabul Chawla (2016) 380 HR 573 (Del) it was held that assessment u/s.153A can be carried out only on the basis of seized material. Where no incriminating material was unearthed during the search, no additions could be made to the income already assessed.*

*In the case of PCIT VS. Best Infrastructure Inida (P) ltd & Ors. (2017) 99 CCH 0169 Statements recorded u/s.132(4) did not by themselves constitute incriminating material and on basis of same assumption of jurisdiction' u/s 153 A and consequent additions made by AG were not justified. .*

*In the case of ACIT Vs Ram Mehar Garg & Anr. (2016) 47 CCH 0404 it was held that provisions of section 153A and 153C are search related provisions and these provisions were applicable, relating to any undisclosed income on basis of seized documents found in search.*

*In the case of Rawal Das Jaswani Vs. ACIT , (2015) 43 CCH 0606 , jurisdictional tribunal bench of Raipur have held that Where AO had not referred to any incriminating material found during the course of search based on which addition was made, then the AO had no jurisdiction to make addition in the assessment framed under s. 153A of the Act".*

*4.6 In view of above provisions and various judicial pronouncement, if the powers u/s 143(2) has not been invoked in time because the A.O.had no reason to believe that any claim of loss, exemption, deductions, allowances or relief made in return is inadmissible, the regular scrutiny cannot be conducted like u/s 143(3) merely because a search has been conducted. The post search assessment therefore should confine to the material surfaced during the search of on the basis of information gathered in course of search. The action which cannot be taken" directly, cannot be taken indirectly which means that if case has not been selected for scrutiny u/s 143(2)/{3}, the power under that section cannot be invoked as to enquire and assess the matters not arising out of*

*search otherwise it will amount to reopening or reconsideration of whole assessment and issues not at all connected with the search material. The intent and purpose of section 153A/C do not extend the power of the A.O. to relook the concluded assessments without any material found during search merely because the search has been conducted.*

*4.7 Without prejudice to above it is to submit that the observation of the A.O. is arbitrary based on conjectures and surmises. The books of accounts have been duly audited u/s 44AB of the Income Tax Act, 1961 by a Chartered Accountant and no defect has been pointed out by him. The finding of the A.O. is not supported by any instance of unverifiable expenses. When all the supporting were produced, the A.O. was obligated to refer or to point out a positive finding that some of the expenses are unverifiable rather than making a general observation. To disprove the claim of legitimate business expenditure entered in books of account and duly supported by vouchers/bills, which was produced for verification during assessment proceedings, the duty of A.O. is to bring some material on record to justify his observation which is absent in present case. The disallowances were made only on presumption basis. It has been held - by various judicial pronouncements that the disallowance of expenditure without pointing out any defects is bad in law as well as on facts and such arbitrary act on the part of A.O. cannot be approved. The A.O. has not pointed out any instance to support the observation that the expenses are not supported by vouchers. The observation of the A.O. is arbitrary based on conjectures and surmises. The appellant relies on following judgments:*

*4.8 In case of Simbholi Sugar Mills Vs. ACIT 17 SOT 90 (DEL), it was held by the ITAT Delhi "-E" Bench that Ad hoc disallowance for being excessive and unverifiable Validity-Books of account of the assessee audited and no defects found therein by the AO-No specific expenditure pointed out which could not be subjected to check and verification-Such disallowances never made in the past-Imputed ad hoc disallowances could not be upheld.*

*4.9 In recent case of INCOME TAX OFFICER vs. C.V. RAMNARAYANAN (2016) 46 CCH 0073 MumTrib, it was held that disallowance on ad-hoc basis of expenses could not be sustained when no defect had been pointed nor it proved that those were bogus -expenses.*

*4.10 In case of Monarch Foods Products (P) Ltd Vs. ACIT 54 TTJ 405, it was held by the ITAT AHMEDABAD BENCH that There is no justification for sustaining any adhoc or lump sum disallowance out of miscellaneous expenses where the accounts are audited and Assessing Officer has not pointed out a single instance of any such expense which is not supported by a voucher.*

4.11 In case of *Rajat Tradecom India (P) Ltd. vs. DCIT (2009) 124 TTJ (Ind) 53: (2009) 120 -04&: {2009} 23 -DTR 3.11: (2010) 33 ITR 321* it was held AO has not pointed out as to which of the expenditure is not verifiable. AO without mentioning anything specifically against the assessee made the routine disallowances. Further, there is no element of personal user out of telephone expenses, vehicle expenses, car insurance expenses and office expenses of the company. Disallowance was not therefore justified.

4.12 In case of *DEPUTY COMMISSIONER OF INCOME TAX vs. VIJAY SALES (2014) 33 ITR (Trib)*, it was held that for disallowing any expenditure AO had to establish that same was not –incurred for carrying out business for year under consideration or that expenses were not genuine. Merely because certain expenditure was incurred in cash could not be basis for making any disallowance. AO had not invoked provisions of Section - 40A(3) AO had not rejected books of accounts. Entire expenditure was not Incurred in cash majority of payments were by cheques as genuineness of expenditure was not in doubt.

4.13 in case of *CIT Vs. SSP(P} Ltd. (2011) 202 Taxman 386 (P&H)*, it was held by Hon'ble High court that Assessee having produced audited books of account alongwith vouchers, AO was not justified in making ad hoc disallowance of site expenses, telephone expenses and vehicle running and maintenance expenses without showing that the same were not incurred for purposes of business.

4.14 In case of *Inductotherm (India) Ltd. vs. DCIT 69 TTJ 753 (Ahd)*, it was held that w.e.f. 1.4.1998, the depreciation is allowable on block of assets and not on individual asset. If once single assets out of entire block has been discarded or not put to use by the assessee for its business! on the ground alone partial depreciation can not be disallowed.

4.15 In the case of *Hughes Escorts Communications Ltd. Vs. Joint Commissioner of Income Tax (2007) 106 TTJ (Del) 1065* it was held that AO having not pointed out any specific item of disallowable nature, miscellaneous expenses which were in the nature of legitimate business expenditure could not be disallowed. Ad hoc disallowance, therefore. was not- justified,

4.16 In the case of *Assistant Commissioner of Income Tax vs. Allied Construction (2007) 106 TTJ (Del) 616* it was held that Ad hoc disallowance of labour expenses could not be made simply on the basis that the vouchers were self-made and not reliable without making any test check and pinpointing which item of expenditure is not verifiable.

29. On this ground Ld CIT(A) has observed as under:-

3.3 1 have considered the grounds of appeal, gone through the submissions or the appellant and seen the order of the AO. The

*addition of Rs. 4 lakhs and Rs.10 lakhs respectively in the A Y 2009-10 and 2011-12 out of Dhan Bhusa expenses is on adhoc basis. AO has made adhoc disallowance on the basis of observation that many expenses are not supported by proper bills and vouchers. AO has not cited any single instance in support of his observation. The additions have been made on adhoc basis and without bringing any specific material on record. AO has based the disallowance on general observation. For petty expenses, vouchers are not obtained. It is not the case of the AO that all the expenses were not wholly and exclusively for purpose of business. Just for the absence of vouchers, the claim could not be disallowed. (Ashok Kurnar Haria 16 TTJ 493) . Where the AO disallowed the expenses found debited by way of self made vouchers and defect pointed out was general in nature such disallowance are to be deleted {Lahoti Medicare Pvt Ltd 33 ITC 76(2005). AO has been conferred wide powers to make inquiries, issue summons and record witnesses under the Act. He can use his powers to bring on record evidences and data and make additions. However without using these powers, making of adhoc additions cannot be appreciated. Therefore disallowances are hereby deleted.*

30. In view of the above findings of the Ld CIT(A) which were based on principles laid down in the case laws referred to, since Ld AO had not cited any single instance in support of his observation, the additions have been made on adhoc basis and without bringing any specific material on record. We do not see any reason to interfere in the above findings of the Ld. CIT(A), accordingly, we uphold the same and dismiss ground No.4 of both the appeals of the revenue for both the years under consideration.

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

Order pronounced in pursuance to the Rule 34(4) of ITAT Rules,1963 on 30/03/2023.

**Sd/-**  
**(RAVISH SOOD)**

न्यायिक सदस्य / JUDICIAL MEMBER

**Sd/-**  
**(ARUN KHODPIA)**

लेखा सदस्य / ACCOUNTANT MEMBER

रायपुर/Raipur; दिनांक Dated 30/03/2023

Prakash Kumar Mishra, Sr.P.S.

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant-
2. प्रत्यर्थी / The Respondent-
3. आयकर आयुक्त(अपील) / The CIT(A),
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, रायपुर/ DR, ITAT,  
Raipur
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

**(Assistant Registrar)**

आयकर अपीलीय अधिकरण, रायपुर/ITAT, Raipur