

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "B" MUMBAI

BEFORE SHRI VIKAS AWASTHY (JUDICIAL MEMBER)
AND
SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)

ITA Nos. 2005 & 2006, 2007, 2003, 2004/MUM/2022
Assessment Years: 2009-10, 2014-15, 2015-16, 2016-17

Shri Narendra S Shah (presently
Jurisdiction with DCIT, Central
Circle-2(2), Mumbai)
B-10, Blue Diamond, Chhatrapati
Sivaji Road No. 4, Dahisar (E),
Mumbai-400068.
PAN No. AANPS 0866 M
Appellant

Asst. CIT, Circle-32(2),
Kautilaya Bhavan, BKC,
Mumbai-400051.
Vs.
Respondent

ITA Nos. 2566, 2315/MUM/2022
Assessment Year: 2013-14, 2016-17

Dy. CIT, Central Circle-2(2),
Old CGO Building, 806, 8th
floor, M.K. Road,
Mumbai-400020.
PAN No.
Appellant

Shri Narendra S Shah,
A-10, Blue Diamond CHS, C.S.
Complex Road No. 4, Dahisar
(East), Mumbai-400068.
Vs.
AANPS 0866 M
Respondent

Assessee by : Karan Jain
Revenue by : Kamble Minal Mohan,

Date of Hearing : 06/06/2023
Date of pronouncement : 30/06/2023

ORDER

PER OM PRAKASH KANT, AM

These appeals by the assessee and the Revenue are directed against separate orders passed by the Ld. First Appellate Authority i.e.Ld Commissioner of Income-tax (appeals) for various assessment



years from 2009-10 to 2016-17. The appeals being connected to single assessee, same were heard together and disposed off by way of this consolidated order for convenience.

2. Firstly, we take up the appeal of the assessee in ITA No. 2006/Mum/2022 for assessment year 2009-10. This appeal is arising from the assessment order dated 31/12/2014 passed u/s 143(3) r.w.s. 147 of the Act. The grounds raised by the assessee are reproduced as under:

1. *On the facts and in the circumstances of the case and in law, the Hon'ble CIT(A) erred in upholding the assessment passed u/s 147 of the IT Act 1961 by the Ld AO without appreciating that the reopening is bad in law and the reason assigned for doing so are wrong and contrary to the Provisions of Income Tax Act and rules made there under.*
2. *On the facts and in the circumstances of the case and in law, the Hon'ble CIT(A) erred in upholding the addition of Rs.24,26, 156/- by not appreciating that the said provisions of section 40(a)(ia) of the IT Act 1961 are not applicable to facts of the case and the reason assigned for doing so are wrong and contrary to the Provisions of Income Tax Act and rules made there under.*
3. *On the facts and in the circumstances of the case and in law, the Hon'ble CIT(A) erred in upholding the penalty initiated by the Ld AO u/s. 271(1)(c) of the IT Act 1961 and the reason assigned for doing so are wrong and contrary to the provision of Income Tax Act and rules made there under.*

3. Briefly stated, facts of the case are that in the case of assessee, the assessment u/s 143(3) of the Act was completed on 29.12.2011 by the Assessing Officer at total income of



Rs.11,31,13,070/-,as against returned loss of Rs.2,12,78,495/- declared by the assessee in the return of income filed on 30.09.2009. The case of the assessee was reopened by way of issue of notice u/s 148 of the Income-tax Act, 1961 (in short 'the Act') dated 25.03.2014. In the reasons recorded, the Assessing Officer noted that tax was not deducted by the assessee on the interest payment to share broker namely 'M/s Sherkhan' despite the turnover of assessee during the assessment year 2008-09i.e. immediately earlier year, being more than the prescribed limit of Rs.40,00,000/-. The Assessing Officer accordingly disallowed the interest payment of Rs.24,26,156/- in terms of section 40(a)(ia) of the Act. On further appeal, the Ld. CIT(A) upheld the validity of the reassessment proceedings as well as merit of the disallowance. Aggrieved, the assessee is before the Tribunal by way of challenging validity of the reassessment as well as the disallowance on merit.

The ground No. 2 of the appeal being on merit, it was taken firstfor adjudication. The relevant finding of the Ld. CIT(A) on the issue in dispute is reproduced as under:

“6.2 Decision:- I have carefully considered the facts of the case, submissions of the Appellant, the observations of the A contained in the assessment order and the other materials on record on this issue. The only issue arises in this appeal of the appellant is regarding disallowances of interest paid u/s 40(a)(ia) of the Income Tax Act. The case was reopened u/s.147 of the Act for the reasons escapement of income of Rs. 24,26,156/-under section 40(a)(ia) of the IT Act 1961. The objection filed for reopening



of assessment was disposed of by AO vide speaking order dated 26/09/2014.

Further, in response to show caused by AO the appellant submitted about delayed payment to Share-khan as follows:

"According to your goodself the reopening is as per law and is based on evidence. Further your goodself has asked the assessee to furnish the reason why disallowance of interest should not be made by applying the provisions of section 40(la) of the IT Act, 1961. It is submitted that the said provisions are not applicable to the facts of the case in view of the following:

1. During the year under consideration assessee had traded as well as made investment in shares & securities through brokers. One such broker through whom assessee had bought share was M/s.Sharekhan. Since the assessee had incurred huge losses in share investment as well as F & O trading the financial position got deteriorated. Because of which he could not make the payment of obligation in time. This fact is supported by the annexed ledger A/c. as per Ex 'A' A perusal of which it is clear that assessee has made the payment belatedly.

2. For delaying he payment Ms. Sharekhan has charged compensation of Rs.21,68,826.41 from assessee and balance sun of Rs.2,60,530/- charged by Sundry loan Creditors. The details of which is submitted hereto as per Ex 'B'.

3. The fact that this details was disclosed to the predecessor La. AO please find herewith the details of delayed interest charged by M/s.Sharekhan as per Ex 'C' for you goodself perusal and consideration.

The assessee has inadvertently debited the said amount as delayed payment interest in P & L A/c instead of compensatory payment.

4. Since the assessee has already disclosed this fact the impugned action is mere change of opinion.



5. Without prejudice to the above we have to submit as under:

5.1 It is pertinent to mention that the said expenses are not covered by the provisions of section 40(a)(ia) hence no tax is deductible on the said payment.

5.2 In this regard your goodself attention is drawn to the decision of Hon'ble Supreme Court in the case of Mahalaxmi Sugar Mills Ltd, us

CIT 2008 TMI 5833 where in it is discussed that portion of interest paid on delayed payment is compensatory in nature. Hence it is akin to compensation and are allowable expenses. By virtue of the fact compensation is different from interest the provisions of section 40(a)(ia) are not applicable."

Hence, in view of the above the assessee was liable to deduct TDS u/S 1944 on the delayed payments made to M/s.ShareKhan as it is a payment made for fulfilling a contractual obligation with the broker ShareKhan during the normal course of business and the payment is in the nature of interest deduct TDS u/s 194A of I.T Ac 1961. "

6.3 During the appellate proceedings, same submission was filed before me as made before the AO wherein it has relied on some case laws. Basically the argument of appellant is that interest paid on delayed payment is compensatory in nature and are allowable expenses. The AO made the impugned order holding that the appellant was required to deduct tax at source. As regards the appellant it has traded as well made investment in shares and securities through one such broker M/s. Sharekhan. Further, the appellant could not make the payment of obligation in time for which on delayed payment M/s. Sharekhan charged compensation amount. In this respect the appellant stated that M/s. Sharekhan through whom assessee had bought shares and had incurred huge losses in share investment as well as F & O trading the financial position got deteriorated. Because of which he could not make the payment of obligation in time. From this it appears that, at one instance the appellant has admitted



that the obligation amount was not paid in time. Thus, the payment was delayed by appellant and it has further failed to deduct TDS on paid interest and thereby gave new name for interest paid contending that this payment is compensation amount. Definitely, the appellant has failed to deduct tax on interest paid which is required as per provisions of section 194A of the IT. Act.

6.4 In this respect the appellant has relied on some case-laws. It has relied on the judgement given by Hon'ble Supreme Court in the case of Mahalaxmi Sugar Mills Ltd W/s. CIT 2008 TMI 5833 and contended that in this order I Is discussed that portion of interest paid on delayed payment is compensatory I nature. fiowever, the contention of the appellant is not tenable. The Issue discussed in this judgement is based on the interest payable on arrears of cess under 8.3(3) of the Act and specific direction is given that the interest payable is in the nature of compensation paid to the Government for delay I the payment of cess. The facts of the case in present appeal is totally different and appellant cannot take shelter of this decision.

6.5 In the present case, the appellant has made delayed payment of interest for trading in, shares and securities. The claim of the appellant that to treat this payment as compensation amount cannot be accepted in the absence of any evidence. The A.O. has rightly treated it to be the payment of interest charges and invoked the provisions of section 1944 of the IT. Act. In any case it will be injustice to the department if the appellant does not pay TDS due to the government as per the provisions of section 1944 of the Income Tax Act by misinterpreting obligation money as compensation amount. However, it is worth mentioning that making submission on piece of paper cannot absolve the appellant from its responsibility in submitting necessary details. Since assessee has failed to deduct TDS on interest paid, the interest expense has been disallowed by the AO u/s. 40(a)(ia). At appellate stage the appellant has file submission as filed before the AO. However failed for compliance with the genuineness of the transactions and TDS provisions. Considering the above facts and the failure on part of the assessee to justify the genuineness of above transactions and compliance with TDS provisions, the



action of the AO is justifiable. Before me, in appellate proceedings, no evidence or explanation has been furnished by the assessee as to why the provisions of section 40(a)(ia) are not applicable or whether there were any inconsistencies to the contrary, I have no reason to deviate from the position taken by the AO. Therefore, the addition made by the AO is confirmed. Consequently, ground no. 2 stand Dismissed.”

4. We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. Before us, the Ld. Counsel of the assessee submitted that the payee ‘M/s Sher Khan’ has already paid taxes on the said receipt and therefore, assessee is no more assessee in default under the proviso to section 40(a)(ia) of the Act. The Ld. Counsel of the assessee submitted that the assessee is willing to furnish a certificate from an accountant in prescribed form to the effect that payee has furnished his return of income u/s 139 and taken into account said sum on interest while computing his return of income and also paid tax due on the income declared in the return of income as required under proviso to section 40(a)(ia) read with proviso to section 201(1) of the Act. In view of undertaking given by the Ld. Counsel of the assessee, we feel appropriate to restore this issue back to the file of the Ld. Assessing Officer for deciding afresh after verifying the certificate which will be filed by the assessee before him as per the proviso to section 40(a)(i) read with proviso to section 201(1) of the Act. The ground No. 2 of the appeal of the assessee is accordingly allowed for statistical purposes.



4.1 Since the ground on merit has been restored to the file of the Assessing Officer, the ground challenging validity of the reassessment is not being adjudicated at this stage being merely academic. The ground No.1 of the appeal is accordingly dismissed as infructuous.

5. In ground No. 3, the assessee has challenged initiation of penalty u/s 271(1)(c) of the Act. Since, penalty has not been levied , therefore proceedings u/s 271(1)(c) of the Act being premature at this stage, the grounds raised is dismissed as infructuous.

6. Now, we take up the appeal of the assessee having ITA No. 2005/Mum/2022 for assessment year 2009-10. This appeal is arising from the assessment order dated 30/03/2016 passed u/s 143(3) r.w.s. 254 of the Act. The grounds raised by the assessee are reproduced as under:

- 1. On the facts and in the circumstances of the case and in law, the Hon'ble CIT(A) erred in upholding the addition made of Rs. 19,55,340/- by wrongly treating unsecured loan as unexplained cash credit u/s 68 of the IT Act 1961 without assigning valid reason and the reason assigned for doing so are wrong and contrary to the Provisions of Income Tax Act and rules made there under.*
- 2. On the facts and in the circumstances of the case and in law, the Hon'ble CIT(A) erred in upholding the penalty initiated by the Ld AO u/s. 271 (1)(c) of the IT Act 1961 and the reason assigned for doing so are wrong and contrary to the provision of Income Tax Act and rules made there under.*



7. The brief facts qua the issue in dispute are that against the assessment order passed u/s 143(3) of the Act dated 29.12.2011, the assessee filed appeal before the Ld. CIT(A), however could not succeed. Against the order passed by the Ld. CIT(A), the assessee preferred appeal before the Income Tax Appellate Tribunal (ITAT). The ITAT in its order dated 06/08/2015 in ITA No. 6904/Mum/2012 restored the issue of addition u/s 68 of the Act alongwith other addition back to the Assessing Officer for deciding afresh after providing sufficient opportunity to the assessee. Consequently, the Assessing Officer has passed the impugned assessment order dated 30.03.2016, wherein he made various additions. On further appeal, the Ld. CIT(A) allowed part relief to the assessee. Against the finding of the Ld. CIT(A), the assessee is before only in respect of addition of Rs.19,55,340/- u/s 68 of the Act, which was made by the Assessing Officer for unsecured loans from seven parties. The relevant finding of the Assessing Officer in relation to addition is reproduced as under:

“c) Rs. 19,55,340/-

Pages 88 to 109 refers to addition of Rs. 19,55,000/- on account of unproved loans which are claimed to be from 7 persons. In whose case loan confirmation were not filed. Now atso the loan confirmation being the primary document also not filed in respect of Shri Dhiren Shah, Shri Lalit Motwani, M/s Shradha Carrier and pectaustrChorehanadna further evidence to prove the genuineness of loan has been filed. In case of, M/s Mangesh Construction loan confirmation and affidavits filed now. The assessce has not furnished the bank account to verify the genuineness of



transaction and creditworthiness of the loan creditors. In respect of Shri Kishor Mehta loan confirmation has been filed but no bank account details filed. The assessee has not furnished the bank account to verify the genuineness of transaction and creditworthiness of the loan creditors. In respect of Shri RamsahayNishabh the assessee has filed unsigned loan confirmation and also not furnished the bank account to verify the genuineness of transaction and creditworthiness of the loan creditors. Thus, the assessee has failed to prove the genuineness of unsecured loans of which the onus lies on the assessee to prove the identity of the person, genuineness of the transactions and credit worthiness of the loan creditors Considering the facts of the case, the addition made of Rs. 19,55,000/- is retained.”

Hence, after careful consideration of the submissions/ documents filed, the assessee's claim of genuineness of loan is not accepted and the addition made in the original assessment totaling to Rs. 1,03,86,340/- as unexplained cash credit u/s 68 on account of unproved loans is sustained.”

8. Further, the Ld. CIT(A) upheld the addition observing as under:

“6.2.5. Rs. 19,55,340/- on account of loan from 7 parties

The observation of the AO is in page no. 4 of the order. The appellant has commented that for making the addition, the AO has taken casual approach and neither tried further to ascertain the truthfulness of confirmation and other details filed nor issued notice us. 133(6) of the Act before arriving at the conclusion.

From the order, I find that the AO has concluded that no loan confirmation was filed for four persons. Also bank accounts are not filed with respect to the three persons, whose confirmations are filed. On verification of the additional evidences, I find that these lacunas still exist and the observations of the AO are correct. These are



primary documents to establish genuineness of transactions.

Hence, addition of Rs. 19,55,340/- is confirmed. Thus, ground of appeal No. 1 is partly allowed.”

9. We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. Before us, the Ld. Counsel of the assessee has filed a list of documents filed before lower authorities in respect of seven unsecured loan parties, which is reproduced as under:

C-1	Dhiren Shah	45340	45340	2008-09			Ledger
					45340	2009-10	
C-2	Kishor T Mehta		568000	Opening			Confirmation
		125000	125000	2008-09	693000	2009-10	PAN CARD
			693000		693000		Ledger
C-3	Late Lalit Motani Dev Ashish						Ledger Confirmation
		335000	335000	2008-09	255000	2009-10	He has expired
					80000	2010-11	
			335000		335000		
C-4	Mangesh Construction						Account Confirmation
		800000	800000	2008-09	307606	2009-10	Ledger
			-492394	2008-09			Affidavit
			800000		307606		
C-5	Ramshay Nisad						Unsigned Confirmation
		50000	50000	2008-09	50000	2009-10	Ledger
			50000		50000		
C-6	Shraddha Carrier	500000	500000	03/12/2 008	500000	01/12/2 008	Ledger
							Bank Statement
C-7	Samiullah Chaudhary	100000	100000	2008-09			
			175000	2009-10	275000	2009-10	Ledger
						Land Sale Income	ITR of AY 2010-11 Showing Part of Sale of land income
			275000		275000		
	Total	10386340					



9.1 On perusal of the documents filed in respect of 'Kishore T Mehta' amounting to Rs.1,25,000/-, we find that the said party has filed confirmation, PAN card etc. details, however no verification by way of inquiry u/s 133(6) or 131 has been carried out by the Assessing Officer. Similarly, in the case on unsecured loan from 'Magnesh Construction' amounting to Rs.8,00,000/-, the assessee has filed confirmation, affidavit and ledger account of the said party. The Assessing Officer has not carried out any inquiry in respect of said party, although verifiable details were available with him. In respect of other parties, the assessee has filed only ledger account without any PAN card or other verifiable information, therefore, to the extent of two parties namely Sh. Kishore T Mehta (Rs. 1,25,000/-) and Magnum Construction (Rs.8,00,000/-), we delete the addition sustained by the Ld. CIT(A). However, in respect of balance parties, finding of the Ld. CIT(A) is upheld. Accordingly, the ground of appeal of the assessee is allowed partly.

10. The ground No. 2 of the appeal being related to initiation of penalty, which being premature at this stage, same is dismissed as infructuous.

11. Now, we take up the appeal of the Revenue for assessment year 2013-14 in ITA No. 2566/Mum/2022. The grounds raised by the Revenue are reproduced as under:



1. *1 Whether the Ld. CIT(A) has erred both in law and on facts in deleting the addition 5,50,07,297/- for the AY 2013-14 Towards addition made on account of unexplained cash credit u/s 68 of the IT Act, 1961*
2. *2 Whether the Ld. CIT(A) has erred both in law and on facts in deleting the addition Rs. 25,54,440/- for the AY 2013-14 towards addition made on account of STCG.*
3. *3 Whether, the Ld. CIT(A) has erred both in law and on facts in failing to appreciate the findings of the assessing officer and overlooking the finding made during the assessment proceedings.*
4. *4 Whether the Ld. CIT(A) has failed to appreciate the details/justification given by the AO and therefore addition made and that the AO had established that transactions were not genuine and thus the addition made was correct by giving detailed clarification after through verification of the submission made by the assessee.*

12. The brief facts qua the ground No. 1 of the appeal of the Revenue are that the Assessing Officer alleged that assessee received accommodation entries in the form of unsecured loan from four parties, which were managed and operated by 'Shri Pravin Kumar Jain'. The Assessing Officer reopened the assessment and made the addition of Rs.5,50,07,297/- in respect of those four unsecured loan parties in assessment order dated 11/12/2017 passed u/s 147 read with section 143(3) of the Act. However, the Ld. CIT(A) in detailed finding deleted the addition observing as under:

"6.2 Appellate Decision: I have carefully considered the facts of the case, submissions of the assessee and material on record. It is relevant to mention here that the AO in his assessment order, in para 2, has discussed this issue.



Information was received that a search under Section 132 of the IT Act was conducted in the case of one Shri Pravin Kumar Jain and the search action resulted in collection of the evidence and other findings which led the AO to believe that Shri Pravin Kumar Jain was engaged in providing accommodation entries of various natures like unsecured loans, bogus share application/ capital and bogus sales and purchases to the beneficiaries spread throughout India. According to the AO, from the information and material received from Investigation Wing, Mumbai, it was found that the appellant is one of the beneficiaries and obtained accommodation entries in the form of bogus unsecured loan from M Olive Overseas Pvt Ltd, M/s Pragti Gems Pvt Ltd, M/s Nakshatra Business Pvt Ltd and M/s Atharv Business Pvt Ltd, concerns that are controlled and managed by Shri Pravin Kumar Jain.

6.3 It is mentioned in the assessment order that with a view to verify the identity, creditworthiness of the parties and genuineness of the transactions, summon u/s 131 of the Act dated 23-08-2017 was issued to the appellant, requiring his presence on 28-08-2017. In response to the same, the AO received a letter on 28-08-2017, requesting for short adjournment. Later on a statement was recorded under oath u/s 131 of the Act of the appellant Shri Narendra Shah. In the statement the appellant confirmed the factum of acceptance of loans from M/s Atharv Business Pvt. Ltd., M/s Olive Overseas Pvt. Ltd. and M/s Pragati Gems Pvt.Ltd. As regards the loans from M/s Nakshatra Business Pvt. Ltd., appellant stated that he did not remember exactly when had he accepted the loan from the said concern and failed to provide the requisite details. It is also mentioned in the assessment order that loan confirmation of M/s Nakshatra Business Pvt. Ltd. Have been found in the case records of original assessment proceedings completed u/s 143(3) of the Act. According to the AO, the appellant has failed to prove the identity, creditworthiness and genuineness of the said transaction casted upon him. Finally, addition of Rs. 5,50,07,297 /- is made on account loans being accepted from M/s Olive Overseas Pvt Ltd, M/s Prati Gems Pvt It, M/s Nakshatra Business Pt Ltd and M/s Atharv Business Pvt Ltd.



6.4 During the appellate proceedings, the Ld. AR has raised various arguments which are briefly summarized as under. He submitted that in the statement recorded pursuant to issue of summon, the AO never asked the appellant to produce these parties for verification. Moreover, the appellant has categorically stated during the deposition that he had availed the impugned loans through Shri HI M Tater. The documentary evidences produced before the AO clearly prove that the loans are genuine. Hence, there is no merit in the contention of the AO that the loans have been availed without any collateral security or without knowing the antecedents of the loaner and at a very less interest. According to the Ld. AR, for availing loan from third parties, it is not necessary to know the antecedents of the loaner. In fact, it is done by the loan giving party not by the party who is availing. Also, it is not necessary to give security. It depends upon the credibility of the loan availing party, which normally loan giving party ascertain from the market before advancing loan. Normally in business the loans are arranged through mediator or broker. Finally, when the loan has already been repaid, non-production of the broker after a gap of so many years cannot tantamount to genuine loans as non-genuine.

6.5 It is further explained by the Ld. AR that the appellant availed loans from the M/s Olive Overseas Pvt Ltd, M/s Pragti Gems Pvt It, M/s Nakshatra Business Pvt Ltd and M/s Atharv Business Pvt Ltd by way of a/c payee cheque. On the said loan appellant paid interest, on the said interest the appellant deducted tax at source at the prevailing rate. To prove identity, creditworthiness and genuineness appellant provided necessary confirmation, copy of bank statement highlighting the loan given by the party, copy of P&L, A/c and Balance sheet and Ack of ROI filed. Before the AO, the appellant has also provided retraction statement of Shri Pravin Kumar Jain. According to the Ld. AR, once the statement has been retracted, it has got no evidentiary value.

6.6 The Ld. AR has also explained that there is no evidence that appellant has given alleged undisclosed cash for availing the loans. Also, the AO, before coming to conclusion that the loans from Shri Pravin Kumar Jain are bogus, has



never provided the copy of statement recorded of Shri Pravin Kumar Jain by the Investigation Wing to rebut. He neither issued any summon to Shri Pravin Jain to verify the facts submitted by the appellant during the recording of statement pursuant to summon issued us 131, that whatever appellant submitted are true and correct or not. The AO has not provided any opportunity to cross examine Shri Pravin Kumar Jain which is against the principle of natural justice. Finally, the Ld.AR has relied upon the judgment of Hon'ble ITAT Mumbai in the case of ACIT vSShreedham Builders wherein the addition has been made on the statement of ShriPravin Kumar Jain was deleted by holding that when the assessee has provided all the plausible evidence proving that loans are not bogus and no evidence of having deposited cash in the accounts are found addition cannot be made us 68 of the IT act 1961. It is claimed that since the appellant's case is squarely covered by the aforesaid decision of jurisdictional Hon'ble Mumbai ITAT, the impugned addition made needs to be deleted. Reliance has also been placed on other judgments.

6.7On careful consideration, I find merit in the above arguments of the Ld. AR.The point for adjudication is whether the AO was justified in treating the unsecured loans of Rs. 5,50,07,297/- shown to have been taken by the appellant from aforesaid four companies owned, controlled and managed by Mr. Praveen Kumar Jain as bogus or non-genuine u/s 68 of the Act adding the same to the total income of the appellant. In this connection, it is well-established that the onus lies on the assessee to adduce necessary documentary evidence so as to prove all the three ingredients of section 68 viz, identity of the creditor, creditworthiness of the creditor and the genuineness of the transaction as the relevant facts are within the exclusive knowledge of the assessee. It has also been held that the evidences adduced by the assessee has to be examined not superficially but in depth and having regard to the test of the human probabilities and normal course of human conduct. Hon'ble ITAT, Mumbai Bench, Mumbai in the case of ITO v. Anant Shelters Pvt. Ltd 51 SOT 234 ITAs No. 193& 232/Mum/2018(Mum) has enumerated certain legal principles regarding cash credits us 68 as under:



1. Section 68 can be invoked when there is a credit of sum of money in the books maintained by the assessee during the previous year and either the assessee offers no explanation about the nature and source of such credits or the explanation furnished by the assessee in the opinion of the AO is not satisfactory.

2. The opinion of the AO for no accepting the explanation offered by the assessee as not satisfactory is required to be formed objectively with reference to the material on record.

3. Courts are of the firm view that that the evidence produced by assessee cannot be brushed aside in a casual manner.

4. The onus of proof is not static. The initial burden lies on the assessee to establish the identity and the creditworthiness of the creditor as well as the genuineness of transaction.

5. The identity of creditors can be established by either furnishing their PANs or assessment orders. The genuineness of the transaction can be proved if it was shown that the money was received by a/c payee cheque. Creditworthiness of the lender can be established by attending circumstances.

6.8 It is now to examine whether the appellant has been able to discharge the onus placed on him us 68 of the Act in light of the aforesaid legal principals or propositions. necessary confirmation, copy of bank statement highlighting the loan given by the party, copy of P&L. A/c and Balance sheet and Ack of ROI filed. All the lender companies had duly filed their returns for A.Y. under consideration. A perusal of bank accounts of the lender companies clearly reveals that there were no immediate cash deposits therein prior to the issuance of cheques towards unsecured loans to the appellant. It is noticed that the unsecured loans were received vide account payee cheques through normal banking channels. It is also noticed that interest was duly paid/ credited to lender companies and tax thereon was deducted in accordance with law. In these circumstances, it can by no means be said that the appellant had not discharged the initial onus cast upon him to establish the



identity and creditworthiness of the creditors as well as genuineness of the transactions. Therefore, the onus shifted to the AO. If the AO was not satisfied, she had the option of making inquiries from the lenders by summoning them. However, it is noticed that no independent verification was carried out by the AO with the lender companies. No summons u/s 131 was issued to the lender companies. In the statement recorded of the appellant, it is categorically claimed that loans were indeed taken. No evidence was brought on record by the AO to controvert the claims of the appellant. There is no finding by the AO that the evidences produced by the appellant were untrustworthy or lacked credibility. In other words, the AO has not discharged his burden of proof to rebut the evidences produced by the appellant or to bring any contrary material on record. Thus, it is found that the appellant had discharged onus of establishing the identity and creditworthiness of the lender companies and genuineness of the transactions with the help of relevant supporting evidences which could not be disproved by the AO.”

13. We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. We find that the assessee has filed all the details in respect of the parties including their profit and loss account, balance sheet and acknowledgement of return of income filed but no inquiry of any was carried out by the Assessing Officer either by way of notice u/s 133(6) or u/s 131 of the Act. Further, the Ld. CIT(A) has relied on the decision of the Tribunal in the case of **ITO v. Anant Shelters Pvt. Ltd.** 51 SOT 234 ITA No. 193/Mum/2018 and 230/Mum/2018 for assessment year 2010-11 and 2012-13, wherein identical circumstances loans received from those four parties have been deleted. The relevant finding of the Ld. CIT(A) is reproduced as under:



“6.9 Apart from the above, I find that Hon'ble Mumbai Tribunal in the case of ACIT vSAbaniSarbeswar Das (ITA No. 193/Mum/2018 and 232/Mum/2018) AYs. 2010-11 and 2012-13 vide order dated 15.05.2019, has examined identical issue of receiving loans from companies controlled by Shri Praveen Km. Jain on the basis of Investigation Wing report and Statement of Shri Praveen Km. Jain. It is also observed that one of the concerns M/s Olive Overseas Pvt. Ltd. Is common lender.

The Hon'ble Tribunal while dismissing the appeal of the Department has held as under-

11. We find that undisputedly the assessee has borrowed money by way of loan from three aforesaid four parties i.e. Tanika Commodities P. Ltd, Ansh Merchandise P. Ltd., Duke Business P. Ltd and Olive overseas Pvt. Ltd. from whom the assessee borrowed the money and total outstanding including the interest as on 31.3.2010 were amounting to ₹ 91,33,644/-. The case of the assessee was re-opened upon receiving the information from DGIT(Inv), Mumbai that the assessee was one of the beneficiary of the said accommodation entries provided by Praveen Kumar Jain and group. We find from the record that the assessee filed during the course of assessment proceedings all the details like loan confirmation letters from the creditors, PAN of the creditors, bank statements of the creditors and the assessee, form no.16 qua TDS on interest, profit and loss account and balance sheet including the ledger account of the creditors, and ITR etc. Moreover, the loan creditors also appeared before the AO in compliance to the notice issued under section 133(6) of the Act and filed confirmations before the AO that loans were actually given to the assessee. From all these details and facts on record, we find that the assessee has discharged its onus cast upon it by filing all the necessary details as called for by the AO to corroborate the transactions of borrowing the money and thereby satisfied all the three main ingredients i.e. creditworthiness of the creditors, genuineness of the transactions and identity of the creditors by filing all the details as discussed above which proved that the identity of the creditors, genuineness of the transactions and creditworthiness of the creditors have been established by the assessee. So much so that the



loan creditors in response to the notice issued under section 133(6) of the Act appeared before the AO and confirmed that they have given interest bearing loans to the assessee on which TDS have been deducted and paid and form no.16A issued to the loan creditors also filed before the AO. Once the assessee has filed all the necessary documents before the AO then the onus is shifted to the department to disprove the stand of the assessee, which department has failed to do so in the present case. The AO has merely proceeded and relied on the information received from the DGIT(Inv), Mumbai that the assessee is one of the beneficiary of the accommodation entries without bringing any material against the assessee on record by contrary to the defense put up by the assessee during the course of appellant proceedings. No cross examination was allowed to the assessee and information was used against the assessee causing violation of natural justice.

12. In view of the above facts and circumstances, we are of the view that the CIT(A) has rightly deleted the addition and we confirm the same.

6.10 Hon'ble Mumbai ITAT in the case of ACIT vs Shreedham Builders ITANO.5589/Mum/2017 AY 2012-13 date of Order-22.06.2018 had the occasion of examine the identical issue where lenders are the same i.e., M/s Olive Overseas Pvt.Ltd., M/s Nakshatra Business Pvt. Ltd. and M/s Atharv Business Pvt. Ltd. The finds of the Hon'ble Tribunal are as under-

The Ld. Assessing Officer treated Rs.4.70 crores, introduced by the assessee in its books as unsecured loans/unexplained credit and added under section 68 of the Act and some unexplained expenditure under section 69C of the Act and also disallowed interest of Rs.5,73,193/-, paid on unsecured loan and disallowed the same under section 37 of the Act. It is noted that at the conclusion of the survey, the assessee vide letter dated 28/10/2014 requested for copy of statement. As per the assessee, the Assessing Officer did not provide the copy. As per the assessee, the cross examination of Shri Pravin Jain was also not provided. The assessee filed loan confirmation, acknowledgments of ITRs, relevant bank statement of lenders, proof of re-payment of such loans and on the



summons issued to all the creditors and the brokers all of them furnished requisite details. It is noted that the financial statements and other loan creditors were never disclosed by the Ld. Assessing Officer and by implication accepted that the assessee in fact received loans. This has been observed even by the First Appellate Authority at page-10(para-4.13 of the impugned order). It is further noted that on 21/10/2014, the assessee requested the Assessing Officer to provide the copy of statement recorded during survey, evidence of filing retraction on 11/11/2014, evidence of filing of loan confirmations, acknowledgment of ITRs and bank statement of parties vide letter dated 28/12/2014, copy of its submission on unsecured loans dated 16/02/2015, retraction affidavit of Shri Pravin Kumar Jain, dated 15/05/2014, repayment details of unsecured loans and its submissions dated 16/02/2015, wherein, present address, details of directors and shareholding patterns of lenders companies were filed by the assessee before the Ld. Assessing Officer. It is noted that before the First Appellate Authority, the assessee challenged the validity of assessment by raising an additional ground as the assessee was not allowed opportunity to cross examine Shri Pravin Kumar Jain and other material used against the assessee, which was not confronted to it. The Ld. Commissioner of Income Tax (Appeal) vide letter dated 05/07/2016 asked the Ld.

Assessing Officer to handover the statements pertaining to Shri Pravin Kumar Jain or its staff members or dummy directors to allow the assessee an opportunity to cross examine Shri Pravin Kumar Jain. The Ld. Assessing Officer was also asked to provide the evidences found during the course of survey action or any evidence that payment was made for obtaining unsecured loans and also efforts so made to examine the loan creditors. The Assessing Officer was asked to conduct necessary enquiries with respect to genuineness of the unsecured loans. The Ld. Assessing Officer vide letter dated 07/01/2017, submitted the remand report as has been reproduced at page-10 onwards of the impugned order. It has been mentioned in para 6.3 of the impugned order that Shri Pravin Jain produced the ledger accounts of Shreedham Builders in the books of his companies alongwith bank statement reflecting all the



transactions and also audited balance sheet of last four year Shreedham Builders ITA No.5589/Mum/2017 along with the copy of the retraction of statement filed before CBDT. Nothing objectionable was found in the documents or statements. All the loan creditors were summoned and the statements of the directors were recorded, wherein, they have accepted of giving loan to the assessee. The Ledger copies of those companies reflecting loans given to the assessee were also produced. The Ld. Assessing Officer also provided the copy of statement recorded from Shri Pravin Kumar Jain under section 131 of the Act on 21/11/2006. In para 6.6 of the impugned order, there is an observation that the nature and source of business/amount was explained and the details of loan were also confirmed. All corroborative details were duly filed. From the record, we also note that the assessee also filed acknowledgment of filing of IT returns together with computation of total income (pages 1 & 2 of the paper book), audited annual accounts along with tax audit report for the year ending 31/03/2012 (pages 3 to 31 of the paper book), retraction of statement by Shri Ajay Maheshwari, partner, dated 10/11/2014 for the statement on oath recorded on 17/ & 18th October, 2014 (pages 32 to Shreedham Builders ITA No.5589/Mum/2017 37 of the paper book), remand report of the Assessing Officer dated 17/12/2016 filed before the Ld. Commissioner of Income Tax (Appeal) (pages 38 to 56 of the paper book), remand report of the Assessing Officer 04/01/2017 before the CIT(A) (pages 57 of the paper book), acknowledgment evidencing for filing of return for Assessment Year 2012-13, audited annual account for the year ending 31/03/2012, ledger confirmation, ledger account of the assessee in the books of the lender and bank statement of the lender (in the case of Athrav Business Pvt. Ltd. (page 58 to 72 of the paper book). Identically similar documents as a proof of evidence were filed from Casper Enterprises Ltd. (pages 71 to 83 of the paper book), Duke Business Pvt. Ltd. (J.P. K. Trading I. Pvt.Ltd.) (pages 84 to 96 of the paper book), Olive Overseas Pvt.Ltd. (pages 97 to 110 of the paper book), Viraj Mercantile Pvt.Ltd. (pages 111 to 119 of the paper book) and Nakshatra Business Pvt. Ltd. (Pages 120 to 131 of the paper book). All these documents neither disproved by the Ld. Assessing Officer nor any evidence was brought on record to falsify the claim of the assessee or the authenticity of these documents.



Thus, it can be said that the assessee discharged its onus as provided under section 68 of the Act. The interest was paid through banking channel by the assessee on such loans. It is also noted that so far as the disallowance of interest portion is concerned, the same was deleted by the ld. FAA and has not been challenged before this Tribunal by the Revenue further fortifies the case of the assessee. The loans were repaid along with interest before the date of survey i.e. 17/10/2014 and no cash was found during survey further fortifies the claim of the assessee. All the concerned parties appeared before the Ld. Assessing Officer during remand proceedings, the Ld. Assessing Officer recorded their statement and nothing adverse was pointed out even Shri Pravin Jain himself appeared before the Ld. Assessing Officer and even during remand proceedings enquiries were carried out and no adverse remark was made by the ld. Assessing Officer. The assessee as well as the other parties furnished all possible documents evidencing that the loans are not bogus. No cash was found deposited in the accounts of alleged six parties, thus, keeping in view, the totality of facts, attendant circumstances, human probabilities, and in the presence of plausible explanation by the assessee, relevant material, and requirement of fulfillment of ingredients, enshrined in section 68 of the Act, we find that onus cast upon the assessee has been duly discharged, therefore, the addition made u/s 68 of the Act, which is purely based upon presumption or the statement recorded and later on retracted by the concerned parties, therefore, we find infirmity in the conclusion of the Ld. Commissioner of Income Tax (Appeal), resultantly, the appeal of the Revenue is dismissed. Finally, the appeal of the Revenue is dismissed.”

13.1 Since the Ld. CIT(A) has followed a binding precedent of the Tribunal on the issue in dispute and no other decision of higher judicial forum contrary to the decision has been brought on record by the ld CIT(DR), therefore we do not find any error in the order of the Ld. CIT(A) on the issue in dispute. Accordingly, we uphold the



same. The ground No. 1 of the appeal of the Revenue is accordingly dismissed.

14. In the ground No. 2, the Revenue has challenged the deletion of the short-term capital gain of Rs.25,54,440/-. The brief facts qua the issue in dispute are that the assessee is in the business of buying and selling of the land, real estate properties etc. During the year, the assessee purchased property worth Rs.55,86,560/- which was sold on 14.12.2012 for consideration of Rs.1,61,41,400/- and the profit earned thereon of Rs.25,54,400/- was offered by the assessee as business income. The assessee shown said purchase and sale in profit and loss account however, the Assessing Officer disregarded the business income and treated as same as short term capital gain. It is the contention of the assessee that assessee was regularly engaged in sale and purchase of land and immovable properties in earlier as well as subsequent years. The Ld. Assessing Officer, however rejected the contention of the assessee and made addition of Rs.25,54,440/- as short-term capital gain. The Ld. CIT(A) however, deleted the addition observing as under:

“7.2 Appellate Decision: I have carefully considered the facts of the case, submissions of the Appellant, the observations of the AO contained in the assessment order and the other materials on record on this issue. In this ground the appellant has contended that the AO. In this respect the AO has observed as under:

"The assessee has been asked various times to provide the details of sale agreement and the working of capital gain,



but, no details have been furnished. Accordingly, a show cause notice has been issued to the assessee on 30-11-2017, asking him to show cause as to why an amount of Rs.25,54,440/-should not be brought to tax under the head 'capital gains'.

In response to the above, the assessee in the submissions filed in this office on 08-12-2017 has contended that no issue other than the reasons recorded for reopening of assessment could be seen by the AO. This contention of the assessee is not acceptable at all in view of the Explanation 3 to the provisions of section 147 of the IT Act, 1961:

"Explanation 3 - For the purpose of assessment or reassessment under this section, the Assessing Officer may assess or reassess the income in respect of any issue, which has escaped assessment, and such issue comes to his notice subsequently in the course of the proceedings under this section, notwithstanding that the reasons for such issue have not been included in the reasons recorded under sub-section (2) of section 148".

13.1 It is clear from the above explanation that the Assessing Officer is empowered to verify the issue comes to his notice in the course of the proceedings under this section, notwithstanding that the reasons for such issue have not been included in the reasons recorded under section 148.

There is no bar on the Assessing Officer to examine the issues noticed in connection with the reassessment proceedings. Thus, the objection raised by the assessee is hereby rejected.

13.2 Coming to the merits of the case, the assessee in his submissions has contended that he has purchased and sold the property immediately and his intention was not to make an investment and hence by no imagination the profit can be treated as capital gain. This contention of the assessee is also not acceptable. As per the section 45 of the Act, any profit or gains arising from the transfer of a capital asset affected in the previous year shall be chargeable to income tax under the head "Capital Gains" and shall be deemed to be income of the previous year in which the transfer took



place. Given the fact that the assessee has not produced any evidences in the form of purchase agreement and sale agreement."

7.3 From the assessment order it appears that the AO has formed his view only on the basis of section 45 of the IT Act, wherein the provision says that any profit or gains arising from the transfer of a capital asset affected in the previous year shall be chargeable to income tax under the head "Capital Gains" According to the AO, since the appellant did not produce evidences in the form of purchase agreement and sale agreement of the property, the impugned addition was made. I find the above observation of the AO lacks in merit. It appears that the AO has completely ignored the accounts of the appellant where such transactions (sale and purchase) in land, flats etc. are regularly done and profit from the same is offered through the profit and loss account in the preceding and seceding years. Just because the appellant has not produced purchase and sale agreements of the property, the AO is not entitled to change the head of the income. Considering the totality of the facts and circumstances of the issues involved, the addition of Rs.25,54,440/- under the head STCG is deleted. Therefore, this ground no. 3 of appeal is allowed."

15. We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. We find that the Assessing Officer has only changed the head of the income as income was already declared by the assessee as business profit. The Ld. Assessing Officer has not brought on record as how otherwise a business activity of the assessee can be held as short-term capital gain, ignoring the transactions of the assessee of purchase and sale in earlier as well as subsequent assessment years. In our opinion, the Ld. CIT(A) has correctly held that the Assessing Officer was not entitled to change the head of the income just because the assessee



had not produced purchase and sale agreement of the property. We do not find any error in the order of the Ld. CIT(A) on the issue in dispute and accordingly, we uphold the same. The ground No. 2 of the appeal of the Revenue is accordingly dismissed.

16. The ground No. 3 and 4 of the appeal of the Revenue being connected with the ground No. 1 and 2 of the appeal and therefore same are also dismissed.

17. Now, we take up the appeal of the assessee for assessment year 2014-15 having ITA No. 2007/Mum/2022. The grounds raised by the assessee are reproduced as under:

- 1. On the facts circumstances of the case and in law, the Hon'ble CIT(A) erred in upholding the assessment passed u/s 147 of the IT Act 1961 by the Ld AO without appreciating that the reopening is bad in law and the reason assigned for doing so are wrong and contrary to the Provisions of Income Tax Act and rules made there under.*
- 2. On the facts and in the circumstances of the case and in law, the Hon'ble CIT(A) erred in upholding the addition of Rs.5,23,00,000/- by wrongly treating unsecured loan availed from the company in which his wife is one of the directors by merely relying on the contention of the Ld AO that the name of the company has been struck off from the register of the companies without appreciating that the name has been removed for non-filing of financial statements and not because this is an accommodation providing company as held by the Ld AO as unexplained cash credit u/s 68 of the IT Act 1961 and the reason assigned for doing so are wrong and*



contrary to the Provisions of Income Tax Act and rules made there under.

3. *On the facts and in the circumstances of the case and in law, the Hon'ble CIT(A) erred in upholding the penalty initiated by the Ld AO u/s. 271(1)(c) of the IT Act 1961 and the reason assigned for doing so are wrong and contrary to the provision of Income Tax Act and rules made there under.*

18. In ground No. 1, the assessee has challenged validity of the reassessment proceedings, the issue of validity of the reassessment was also challenged by the assessee before the Ld. CIT(A). The Ld. CIT(A) dismissed the ground after analyzing facts of the case of the assessee and relying on the various decisions cited in the impugned order. The relevant finding of the Ld. CIT(A) is reproduced as under:

“6. Decision on Ground No. 1:

I have carefully considered the facts of the case, submissions of the Appellant, the observations of the A contained in the assessment order and the other materials on record on this issue. In this Ground the appellant has contended that the AO has not brought on record any valid reason initiation of reassessment proceedings. During the course of the appellate proceedings, it was submitted by the appellant there is no correlation between the reason for reopening and addition made by the AO.

6.1 I have taken note of the fact that the A.. has issued notice after duly recording the reasons and taking approval, as per the provisions of section 148 of the Act. Further, a copy of the reasons recorded has been provided to the Appellant, during the course of the assessment proceedings. Thus, there has not been any violation of the principles of natural justice by the AO. The AO has followed the due procedure and there is no technical lapse on the part of the AO in reopening of the assessment proceedings. The AO has clearly noted the reason for reopening of the case as under:



The reason for reopening in the case was recorded as under:

"An information has been received from ITO Ward 32(3)(2), Mumbai vide letter NO. IT032(3)(2)/Information/2018-19 dated 14.02.2019 that the bank statement of MsKalpanikVyapaar Pt Ltd (AADCK3638E) with ICICI Bank Ltd. (A/c no 003505500471), Dahisar Branch for the F.Y 2013-14 reveals payment to Shri Narendra Shah on various dates for the 1.4.2013 to 18.02.2014 amounting to Rs 4,14,00,000/-. M/ KalpanikVyapaar Pvt. Ltd having address 32, Ezra Street, 5th Floor, Kolkata has been declared a shell company by SEBI.

Enquiries have revealed that M/s KalpanikVyapar Pvt. Ltd. has been removed/ struck off from the register of Companies by the Registrar of Companies, Kolkota and the directors of the said company have also been declared as Disqualified Directors' under section 164(2)(a) of the Companies Act. It is pertinent to mention that the assessee is one of the Directors of the said company declared as disqualified director by ROC. Kolkota. On verification of the assessee's bank statement with ICICI Bank Ltd. (OD AC0156), it is seen that the total credits from M/s KalpanikVyapaar Ltd during the Fy 2013-14 amount to Rs.5,23,00,000/- As per the details available for A. Y 2015-16, a total amount of Rs. 13,33,21,520/ appears as unsecured loan from MsKalpanikVyapaar Pvt. Ltd. of which only an amount of Rs.7,44,71,520/- was received during the F.Y 2014-15 relevant to A.Y 2015-16. Hence, an amount of Rs.5,23,00,000/- has been received from M/s KalpanikWyapaar Pvt. Ltd as unsecured loan during F.Y 2013-14 relevant to A.Y 2014-15. It therefore, evident that the unsecured loan of Rs.5.23,00,000/ received by the assessee from M/s KalpanikVyupaar Pvt. Ltd is not genuine.

Thus, there was new tangible material on record of the AO on the basis of which the re-assessment proceedings has been initiated. Further, the assessee raised an objection on reopening of the case. Accordingly, Order disposing off the objection raised dated 27.09.2019 was sent to the assessee.

6.2 The Section 147 of the Act authorizes and permits the Assessing Officer to assess or reassess income chargeable to



tax, if he has reason to believe that income for any assessment year has escaped assessment. The word "reason" in the phrase "reason to believe" would mean cause or justification. If the Assessing Officer has cause or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the Assessing Officer should have finally ascertained the fact by legal evidence or conclusion. The function of the Assessing Officer is to administer the statute with solicitude for the public exchequer with an inbuilt idea of fairness to taxpayers.

6.3 At the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief. Whether the materials would conclusively prove the escapement is not the concern at that stage. At that stage, the final outcome of the proceeding is not relevant. In other words, at the initiation stage, what is required is "reason to believe", but not the established fact of escapement of income. This is so because the formation of belief by the Assessing Officer is within the realm of subjective satisfaction *ITO v. Selected Dalurband Coal Co. (P.) Ltd.* / 19961 217 ITR 597 (SC); *Raymond Woollen Mills Ltd, v. ITO* [1999] 236 ITR 34 (SC).

6.4 The Hon'ble Apex Court in the case of *ACIT vs. Rajesh Thaveri Stock Brokers Pvt. Ltd.* (2007) (291 IT 500) has categorically stated that "reason to believe" does not mean that the reason for re-opening should have been factually ascertained by legal evidence or conclusion before the re-opening of an assessment.

6.5 Any fresh information received by the AO. can entitle him to issue notice u/s.148, if on the basis of such information he has prima face reason to believe that income has escaped assessment. So much so that it was held by the Hon'ble Supreme Court in *Claggett Brachi Co. Ltd. vs CIT* 177 IT 409 (SC) that information obtained during assessment proceedings of a subsequent year can also validate the proceedings initiated u/s.147 for earlier year. Similarly, Hon'ble Bombay High Court in the case of *Anusandhan Investments Ltd. vs. M.R. Singh, DCIT*, 287 IT 482 held that a



notice issued u/s.148 based on assessment of subsequent assessment year is valid even if the appeal is pending for such assessment.

6.6 Further, it is the duty of the assessee to disclose full and true materials to the A.O. but for which the A.O. could initiate the reassessment proceedings. It has been held by the Hon'ble Supreme Court in Shri Krishna P. Ltd. 221 ITR538, 549 that every disclosure is not and cannot be treated to be a true and full disclosure. A disclosure may be a false one or a true one. It may be a full disclosure or it may not be. The Hon'ble Supreme Court held that a partial disclosure may very often be a misleading one. Therefore, what is required is a full and true disclosure of all material facts necessary for making assessment for that year.

6.7 The Hon'ble Supreme Court in the case of Raymond Woollen Mills Ltd. VS. ITO 236 IT 34, 35 (SC) has held that for determining whether initiation of reassessment proceedings was valid, it has only to be seen whether there was prima face some material on the basis of which the department could reopen the case. It further held that the sufficiency or correctness of the material is not a thing to be considered at this stage.

6.8 The present case is not one of change of opinion as alleged by the appellant. Question of change of opinion arises when the AO forms an opinion and decides not to make an addition and holds that the appellant was correct in his stand.

6.9 The Supreme Court in Malegaon Electricity Co. (P) Ltd. vs. CIT (1970) 78ITR 466 (SC) has observed, as under:

'It is true that if the ITO had made some investigation, particularly if he had looked into the previous assessment records, he would have been able to find out what the written down value of the assets sold was and consequently he would have been able to find out the price in excess of their written down value realized by the assessee. It can be said that the ITO if he had been diligent could have got all the necessary information from his records. But that is not the same thing as saying that the assessee had placed



before the ITO truly and fully all material facts necessary for the purpose of assessment. The law casts a duty on the assessee to 'disclose fully and truly all material facts necessary for his assessment for that year.'

6.10 When there is no discussion on the issue in the Assessment order and no details were called for by the AO or filed by the assessee on the issue, no finding either positive or negative can be said to have been arrived at during the course of original assessment proceedings. Hence, there is no question of change of opinion as held in the following judgments:

- 1. Kalyanji Mavji & Co. vs. CIT 102 ITR 287 (SC)*
- 2. Esskay Engineering P. Ltd. Vs. CIT 247 IT 818*
- 3. ITO vs. Purushottam Das Bangur & Anr. 224 IT 362 (SC)*

6.11 In Writ Petition. No.9036 of 2007, Honda Siel Power Products Ltd. vs. Dy CIT & Anr. Decision dated 14th Feb. 2011 (reported at (2011) 52 DTR (el)353 - Ed.) it was held:

"10 The term 'failure' on the part of the assessee is not restricted only to the IT return and the columns of the IT return or the tax audit report. This is the first stage. The said expression 'failure to fully and truly disclose material facts' also relate to the stage of the assessment proceeding, the second stage. There can be omission and failure on the part of the assessee to disclose fully and truly material facts during- the course of the assessment proceedings. This can happen when the assessee does not disclose or furnish to the AO complete and correct information and details it is required and under an obligation to disclose. Burden is on the assessee to make full and the true disclosure".

6.12 Further, in the case of Piaggio Vehicles P. Ltd. YS. DCIT 290 IT 377 (Bom), the Hon'ble Jurisdictional High Court held that in a case of reopening after 4 years subsequent to scrutiny assessments, contradiction was discovered between Tax Audit report and Return of income, it was a case of omission and/or failure on the part of the assessee to disclose fully and truly all facts for computation of its income. It is also held by Hon'ble Supreme Court in the following



cases that facts which could have been found by the ITO by further probing are covered under failure to disclose fully and truly all material facts.

6.13 In the case of Coca Cola India Vs. ACIT &Ors. (2009) 221 CTR 0225 :(2009) 17 DTR 0066 : (2009) 309 IT 0194 : (2009) 177 TAXMAN 0103, the Hon'ble Punjab & Haryana High Court has held that notice u/s 147 should be held as bad in law, only if extraneous or absurd reasons are recorded by the AO. It was further held by the Hon'ble Court that whether or not the material should be finally taken into account for reassessment is a separate matter, which has to be dealt with during the course of reassessment proceedings. The relevant portion of the judgment in this regard is reproduced as under: -

"Objection of counsel for petitioner is two fold :- (a) Reference to inapplicable provision of s. 92 as it stood prior to amendment w.e.f. 1st April, 2002 and (b) irrelevance of order of the TPO under Chanter X passed in respect of a subsequent assessment year. Applicability of s. 147 requires formation of opinion that income escaped assessment. The said provision is not in any manner controlled by s. 92 nor there is any limit to consideration of any material having nexus with the opinion on the issue of escapement of assessment of income. Interference with the notice for reassessment is called for only where extraneous or absurd reasons are made the basis for opinion proposing to reassess. Apart from the fact that the AO has given other reasons, it cannot be held that the material relied upon by the AO for proposing reassessment is irrelevant. Whether or not the said material should be finally taken into account for reassessment is a matter which has to be left open to be decided by the AO after considering the explanation of the assessee. It can only be mentioned that having regard to relationship of the petitioner to its associate company, it cannot be claimed that the price mentioned by it must be accepted as final and may not be looked at by the AO. There is no infirmity in the notice proposing reassessment. The AO will be at liberty to pass an appropriate order of assessment, subject to the rights and remedies of the assessee. Order of TPO can certainly have nexus for reaching the conclusion that income has been incorrectly assessed or has escaped



assessment. In the present case, the said material came to the notice of the AO subsequent to the assessment. There is no grievance that provisions of ss. 148 to 153 have not been followed. In such a situation, it cannot be held that the notice proposing reassessment is vitiated merely because one of the reasons referred to order of TPO.-Raymond Woollen Mills Ltd. vs. ITO &Ors. (1999) 152 CTR SC) 418 : (1999) 236 ITR 34 (SC) and Phool Chand Bairang Lal vs. ITO (1993) 113 CTR (SC) 436 : (1993) 203 IT 456 (SC) : AIR 1993SC 2390 relied on."

6.14 In similar facts and circumstances, in the case of Ankit Agrochem (P.)Ltd. Vs. Joint Commissioner of Income-tax, Range-1, Bikaner (2018] 89 taxmann.com 45 (Rajasthan), the Hon'ble Rajasthan High court has held that where the DIT has informed that the assessee-company had received share application money from several entities, which were only engaged in business of providing bogus accommodation entries to beneficiary concerns, reassessment on basis of said information was justified. In this case all the entities from which the assessee had received share application money were only engaged in the business of providing accommodation entries of bogus nature, which was further confirmed by the directors, dummy directors/key persons of the above entities in their respective statements. The relevant portion of the said judgment is reproduced hereunder:-

"14. In the instant case, a perusal of the reasons recorded by the 10 for issuing notice under Section 148 of the Act reveals that during the assessment proceedings for AY. 2014-15 it was noticed that the appellant assessee has received share application money to the tune of Rs. 2.2 crore from 9 entities which was utilised during the year and subsequently returned in Financial Year 2013-14. That apart, on further examination of certain information received from the Directorate of Investigation, Kolkata which had carried the investigation in the case of the 9 entities, details whereof has been set out in the reasons recorded, it was ascertained that those 9 entities are the companies with no real business and are only engaged in business of providing accommodation entries of bogus nature to beneficiary concerns which was further confirmed by the directors/dummy directors/key persons of the said entities in their respective statements.



Thus, on the basis of the material on record, AO opined that the appellant company has received and utilised the share application money received from bogus sources lacking genuineness, creditworthiness, genuine identity, which fall within the purview of Section 68 of the Act.

16. It is true that the reasons recorded or the material available on record must have nexus to the subjective opinion formed by the AO regarding the escapement of the income but then, while recording the reasons for belief formed, the AO is not required to finally ascertain the factum of escapement of the tax and it is sufficient that the AO had cause or justification to know or suppose that income had escaped assessment [vide Rajesh Jhaveri Stock Brokers (P.)Ltd.'s case (supra)]. It is also well settled the sufficiency and adequacy of the reasons which have led to formation of a belief by the Assessing Officer that the income has escaped the assessment cannot be examined by the court."

18.1 The Ld. CIT(A) has also relied on the decision of the Hon'ble Gujarat High Court in the case of 'Aaspas Multimedia Ltd. DCIT 83 taxmann.com 82 (Gujarat) and reproduced the relevant para of the said decision from page 16 to 26 of the impugned order, which is extracted as under:

"[7.2] From the reasons recorded and the affidavit in reply filed on behalf of the Revenue, it appears that after the assessment orders came to be passed, the AO received the information from the Principal Director of Income Tax (Investigation), Ahmedabad vide its Confidential Letter dated 16.06.2015 by which the Principal Director of Income Tax (Investigation), Ahmedabad forwarded the information that a search under Section 132 of the IT Act was conducted in the case of one Shri Pravin Kumar Jain and the search action resulted in collection of the evidence and other findings which conclusively proved that the said Shri Pravin Kumar Jain was engaged in providing accommodation entries of various natures like unsecured loans, bogus share application / capital and bogus sales and purchases to the



beneficiaries spread throughout India. From the information received and the material received from the Office of Principal Director of Income Tax (Investigation), Ahmedabad, it is found that the assessee is one of the beneficiaries of bogus share application from various bogus companies operated by the said Shri Pravin Kumar Jain. Thus, the information received from the Office of Principal Director of Income Tax (Investigation), Ahmedabad along with the evidence collected during the search action in case of said Shri Pravin Kumar Jain, the AO has reopened the assessments for AYs 2011-12 and 2012-13. Therefore, it cannot be said that there was no tangible material available with the AO to form an opinion that the income chargeable to tax has escaped assessment for the years under consideration.

[7.3] Additionally, we may notice that the expression reason to believe came up for consideration before the Supreme Court in case of Assistant Commissioner of Income Tax vs. Rajesh Jhaveri Stock Brokers P. Ltd. in which, it was held that such expression cannot be read to mean that the Assessing Officer should have finally ascertained the fact by legal evidence or conclusion. The term reason to believe would mean cause or justification. If the Assessing Officer has cause or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that an income has escaped assessment. It was observed as under:

“16. Section 147 authorises and permits the Assessing Officer to assess or reassess income chargeable to tax if he has reason to believe that income for any assessment year has escaped assessment. The word reason in the phrase reason to believe would mean cause or justification. If the Assessing Officer has cause or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the Assessing Officer should have finally ascertained the fact by legal evidence or conclusion. The function of the Assessing Officer is to administer the statute with solicitude for the public exchequer with an inbuilt idea of fairness to taxpayers. As observed by the Supreme Court in Central Provinces Manganese Ore Co. Ltd. v. ITO [1991 (191) ITR 662], for initiation of action under section 147(a) (as the



provision stood at the relevant time) fulfillment of the two requisite conditions in that regard is essential. At that stage, the final outcome of the proceeding is not relevant. In other words, at the initiation stage, what is required is reason to believe, but not the established fact of escapement of income. At the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief. Whether the materials would conclusively prove the escapement is not the concern at that stage. This is so because the formation of belief by the Assessing Officer is within the realm of subjective satisfaction (see ITO v. Selected Dalurband Coal Co. Pvt. Ltd. [1996 (217) ITR 597 (SC)] ; Raymond Woollen Mills Ltd. v. ITO [1999 (236) ITR 34 (SC)].

7.4 Now, so far as the challenge to the impugned notices on the ground that the same is on the borrowed information and that AO has not formed an independent opinion and/or belief that the income chargeable to tax has escaped assessment, it is required to be noted that on the basis of the information supplied by/from the office of Principal Director of Income Tax (Investigation), Ahmedabad, the AO has found that the petitioner - assessee is the beneficiary of accommodation entries provided by one Shri Pravin Kumar Jain. The AO was having with him findings of the Investigating Team based on the material recovered during the search conducted of Shri Pravin Kumar Jain Group. Under the circumstances, it cannot be said that there was no tangible material available with the AO to prima facie form an opinion/belief that the income chargeable to tax has escaped assessment. The transactions of the assessee are required to be verified in detail on the basis of the material/evidence collected during the search of Shri Pravin Kumar Jain Group. The petitioner - assessee is alleged to be the beneficiary of accommodation entries given by Shri Pravin Kumar Jain Group concerns, therefore, the same are required to be verified in detail. Under the circumstances and in the facts and circumstances of the case, it cannot be said that there is non-application of mind on the part of the AO that while issuing the impugned notices under Section 148 of the IT Act.

7.5 Now, so far as the submission on behalf of the petitioner that as the transactions with respect to share applications by



4 companies/shareholders named in the reasons recorded are concerned, the same were verified by the AO at the time of framing the original assessments and therefore, the reopening can be said to be on change of opinion by the subsequent AO is concerned, at the on as sunset it is required to be noted that as such there was no material lable with the AO at the time of framing original assessments, which are now available with the AO received from the office of principal Director of Income Tax (Investigation), Ahmedabad.

7.6 At this stage, decision of the Division Bench of this Court in the case of Yogendrakumar Gupta v. TO /2014] 46 taxmann.com 56 is required to be referred to and considered. In the case before the Division Bench on the basis of information from CBI that loans accepted as genuine in original assessment were bogus, when the Assessing Officer initiated reassessment proceedings under Section 147 of the IT Act beyond 4 years, the Division Bench has observed that assumption of jurisdiction on the part of the AO is based on fresh information, specific and reliable and otherwise sustainable under the law, challenge to reassessment proceedings warrant no interference and accordingly notice for reassessment was held to be valid. In the case before the Division Bench. it was the case on behalf of the assessee that at the time of original scrutiny assessment, specific query was raised with regard to unsecured loans and advances received from the company B and these being the transactions through the cheques and drafts, there would arise no question of the Assessing Officer not accepting such version of the assessee and not treating them as genuine loans and advances. The relevant observation of the Division Bench are in paras 6 to 18. In para 19, the Division Bench has further observed that sufficiency of the reasons recorded by the Assessing Officer need not be gone into by this Court. It is further observed that the AO when forms his belief on the basis of subsequent new and specific information that the income chargeable to tax has escaped assessment on account of omission on the part of the assessee to make full and true disclosure of primary facts, he may start reassessment proceedings as fresh facts revealed the non-disclosure full and true. Such facts were not previously disclosed or it can be said that if previously disclosed, they expose untruthfulness of facts revealed.



7.6.1 *The Apex Court in the case of Rajesh Jhaveri Stock Brokers (P.)Ltd. (supra) has held that at the stage of issuance of notice of reopening, the Assessing Officer must have a reason to believe and not the established fact of escapement of income in the following manner (headnote);*

"The expression reason to believe in section 147 would mean cause or justification. If the Assessing Officer has cause or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the Assessing Officer should have finally ascertained the fact by legal evidence or conclusion. What is required is reason to believe but not the established fact of escapement of income. At the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief. Whether the materials would conclusively prove the escapement is not the concern at that stage. This is so because the formation of belief is within the realm of subjective satisfaction of the Assessing Officer."

7.6.2 *In the case of Raymond Woollen Mills Ltd. v. ITO [1999] 236IT 34 (SC), the Court held that in determining whether commencement of reassessment proceedings was valid, it has only to be seen whether there was prima facie some material on the basis of which the Department could reopen the case. The sufficiency or correctness of the material is not a thing to be considered at such stage.*

7.7 *In the case of CIT v. Navodaya Castles (P.) Ltd. [2014] 367 ITR306/50 taxmann.com 110/226 Taxman 190 (Mag.) (Delhi), Delhi High Court observed as under:*

"13. As we perceive, there are two sets of judgments and cases, but these judgments and cases proceed on their own facts. In one set of cases, the assessee produced necessary documents/evidence to show and establish identity of the shareholders, bank account from which payment was made, the fact that payments were received thorough banking channels, filed necessary affidavits of the shareholders or confirmations of the directors of the shareholder companies,



but thereafter no further inquiries were conducted. The second set of cases are those where there was evidence and material to show that the shareholder company was only a paper company having no source of income, but had made substantial and huge investments in the form of share application money. The assessing officer has referred to the bank statement, financial position of the recipient aatia) and beneficiary assessee and surrounding circumstances. The primary requirements, which should be satisfied in such cases is, dentification of the creditors/shareholder, creditworthiness of creditors/shareholder and genuineness of the transaction. These three requirements have to be tested not superficially but in depth having regard to the human probabilities and normal course of human conduct.

18. Lovely Exports Pvt. Ltd. (supra) was also considered and distinguished in N.R. Portfolio Pvt. Ltd. (supra) and it was held that the entire evidence available on record has to be considered, after relying upon CIT v. Nipun Builders and Developers [20131 350 ITR 107 (Delhi), wherein it has been held that a reasonable approach has to be adopted and whether initial onus stands discharged would depend upon facts and circumstances of each case. In case of private limited companies, generally persons known to directors or shareholders, directly or indirectly, buy or subscribe to shares. Upon receipt of money, the share subscribers do not lose touch and become incommunicado. Call money, dividends, warrants, etc. have to be sent and the relationship remains a continuing one. Therefore, an assessee cannot simply furnish some details and remain quiet when summons issued to shareholders remain un-served and uncomplied. As a general proposition, it would be improper to universally hold that the assessee cannot plead that they had received money, but could do nothing more and it was for the Assessing Officer to enforce shareholders attendance in spite of the fact that the shareholders were missing and not available. Their reluctance and hiding may reflect on the genuineness of the transaction and creditworthiness of the creditor. It would be also incorrect to universally state that an Inspector must be sent to verify the shareholders/subscribers at the available addresses, though this might be required in some cases. Similarly, it would be incorrect to state that the Assessing Officer should ascertain



and get addresses from the Registrar of Companies website or search for the addresses of shareholders themselves. Creditworthiness is not proved by showing issue and receipt of a cheque or by furnishing a copy of statement of bank account, when circumstances requires that there should be some more evidence of positive nature to show that the subscribers had made genuine investment or had, acted as angel investors after due diligence or for personal reasons. The final conclusion must be pragmatic and practical, which takes into account holistic view of the entire evidence including the difficulties, which the assessee may face to unimpeachably establish creditworthiness of the shareholders."

7.8 Considering the aforesaid decisions of the Hon'ble Apex Court as well as decision of the Division Bench of this Court and Delhi High Court and applying the same to the facts of the case on hand, it cannot be said that there was no material before the AO to reopen the assessment. In the present case also the reassessment proceedings have been initiated by the AO on the basis of material provided by the Principal Director of Income Tax (Investigation), Ahmedabad. It is also required to be noted that the genuineness of the various companies who made share applications are doubted.

The assessee is alleged to have been engaged in bogus share applications from various bogus concerns operated by Shri Pravin Kumar Jain. The assessee is the beneficiary of the said transactions of share application by those bogus concerns. In the wake of information received by the AO, when AO formed a belief that the investment made from the funding of such companies which are bogus, the AO has rightly assumed the jurisdiction of initiating the reassessment proceedings. AO, on the basis of information subsequently having come to his knowledge, recognized untruthfulness of the facts furnished earlier. In the present case, since both the necessary conditions to reopen the assessment have been duly fulfilled, sufficiency of the reasons is not to be gone into by this Court. Information furnished at the time of original assessment, when by subsequent information received from the Principal Director of Income Tax (Investigation), Ahmedabad, itself found to be



controverted, the objection to the notice of reassessment under section 147 of the IT Act must fail. At this stage, para 20 of the decision in the case of Yogendrakumar Gupta (supra) is required to be referred to, which reads as under:

"20. This Court has examined the belief of the Assessing Officer to a limited extent to inquiry as to whether there was sufficient material available on record for the Assessing Officer to form a requisite belief whether there was a live link existing of the material and the income chargeable to tax that escaped assessment. This does not appear to be the case where the Assessing Officer on vague orbothering to form his own belief in respect of such material. We need to notice that the Joint Director, CBI, Mumbai, intimated to the DIT (Investigation), Mumbai. A case is registered against Mr.Arun Dalmia, Harsh Dalmia and during the search at their residence and office premises, the substantial material indicated that 20 dummy companies of Mr.Arun Dalmia were engaged in money laundering and the income-tax evasion. The said entities included Basant Marketing Pvt. Ltd. also.

From the analysis of details furnished and the beneficiaries reflected, which are spread across the country, the CIT, Kolkata, suspected the accommodation entry related to the assessment year 2006-07 as well, this information has been provided to Director General of Income-tax, Kolkata, who in turn, communicated to the Chief Commissioner of Income-tax, Ahmedabad. Further revelation of investigation as could be noticed from the record examined (file) deserves no reflection in this petition. Insistence on the part of the petitioner to provide any further material forming the part of investigation carried out against Dalmias also needs to meet with negation, as the law requires supply of information on which Assessing Officer recorded her satisfaction, without necessitating supply of any specific documents. The proceedings initiated under section 147 of the Act would not be rendered void on non-supply of such document for which confidentiality is claimed at this stage, following the decision of the Delhi High Court in case of Acorus Unitech Wireless (P.) Ltd. (supra). Assumption of jurisdiction on the part of the Assessing Officer is since based on fresh information, specific and reliable and otherwise sustainable under the



law, challenge to reassessment proceedings warrant no interference."

7.9 In view of the aforesaid facts and circumstances of the case, the decisions of the Hon'ble Supreme Court in the case of Lakhmani Mewal Das (supra); the decision of the Delhi High Court in the case of JSRS Udyog Ltd. (supra); Replika Press (P.) Ltd. (supra) and the decision of this Court in the case of Sarla Rajkumar Verma (supra) shall not be applicable to the facts of the case on hand. In the facts and circumstances of the case, it cannot be said that the reopening of the assessment is on change of opinion by the subsequent AO.

7.10 Now, so far as the submission on behalf of the assessee that the statement of Shri Pravin Kumar Jain, which was recorded at the time of search and which is the basis for reopening of the assessments in the years under consideration, was subsequently retracted and therefore, the reopening of the assessment on such a retracted statement cannot be sustained is concerned, at the outset it is required to be noted that from the reasons recorded it cannot be said that the reopening is solely based upon the statement of Shri Pravin Kumar Jain, which is subsequently retracted. From the reasons recorded it appears that the office of the Principal Director of Income Tax (Investigation), Ahmedabad sent the material/evidence collected during the search of Shri Pravin Kumar Jain and after considering and verifying the same and having been found that the petitioner - assessee is the beneficiary of the accommodation entries by way of share application from various bogus companies operated by Shri Pravin Kumar Jain, only thereafter the impugned notices under Section 148 of the IT Act are issued and the assessments for the AYs 2011-12 and 2012-13 are reopened.

Even otherwise what will be the effect of the retracted statement of Shri Pravin Kumar Jain is required to be decided and/or considered at the time of reassessment proceedings.

7.11 Now, so far as the reliance placed upon the decision of the Delhi High Court in the case of Signature Hotels (P) Ltd.



(supra) by the learned Counsel appearing on behalf of the assessee is concerned, on considering the facts in the said decision, we are of the opinion that the said decision shall not be applicable to the facts of the case on hand. In the present case on the basis of the information received from the office of Principal Director of Income Tax (Investigation), Ahmedabad along with the evidence collected during the search and other findings, the AO has considered the same and after verifying and considering the material on record it has been found by the AO that the present assessee is the beneficiary of the accommodation entries/bogus share application from various bogus companies operated by Shri Pravin Kumar Jain. In the affidavit in reply the Revenue has stated in para 3.8 as under:

The allegation of the assessee is not correct. The case of the assessee was reopened based on correct facts/law and procedural requirements of the Act were duly complied with. The information provided by The Pr. Director of Income Tax (Investigation), Ahmedabad vide confidential letter No.PDIT(Inv)/AHD/Pravin Jain/15-16 dated 16.06.2015, was thoroughly perused. The same has been summarized in the reasons for reopening recorded prior to issuance of section 148 notice. From the same, reason to believe that income has escaped assessment in concerned AY has been logically derived. Thus, only after deriving requisite satisfaction regarding escapement of income on basis of information/material supplied by the Pr. Director of Income Tax (Investigation), Ahmedabad, reopening was initiated. The same is evident from reasons provided for reopening. Information received from third party, more so the information collected by Investigation Wing as a consequence of search under section 132 of the Act constitutes sufficient material for reopening, if, Assessing Officer after perusing the said information arrives at conclusion that income has escaped assessment. This is precisely the case in present situation. Thus, all the allegations made by the petitioner are incorrect in this case. In this regard it is stated that the findings of the investigation wing are based on the material recovered during search conducted on Shri Pravin Kumar Jain group on 01.10.2013 in Mumbai. The same was sympathetically decoded and corroborated by evidence seized during the search. The details regarding modus of recording



transactions has been described in detail by the Investigation wing. The relevant part of the same with findings of Investigation Wing was summarized in reasons recorded. It was found by the Investigation wing that Pravin Kumar Jain group was engaged in business of providing accommodation entries through its concerns like Anchal Properties P. Ltd., Ansh Merchandise P. Ltd., Olive Overseas P. Ltd., Vanguard Jewels Ltd. etc. It was found that there are bogus transactions to/from account of Anchal Properties P. Ltd., Ansh Merchandise P. Ltd., Olive Overseas P. Ltd., Vanguard Jewels Ltd., to the account of the assessee company. On basis of corroborative evidence and systematic investigation, Investigation Wing has given a finding that all such transactions of accommodation entry given by certain Pravin Kumar Jain group concerns such as Anchal Properties P. Ltd., Ansh Merchandise P. Ltd., Olive Overseas P. Ltd., Vanguard Jewels Ltd. are accompanied with bogus transactions by the corresponding other party or the beneficiary i.e. Aaspaas Multimedia Ltd. in the present case. At this stage, information collected by Investigation Wing as a consequence of search us.132 of the Act constituted sufficient material for reopening. In CIT v. Rajesh Jhaveri Stock Brokers (P)Ltd. [2007] 161 Taxman 316 (SC), it has been held that "if the Assessing Officer has cause or jurisdiction to know or suppose that income has escaped assessment, it can be said to have "reasons to believe" that an income has escaped assessment. The said expression cannot be read to mean that the Assessing Officer should have finally ascertained the fact by legal evidence or inclusion. The function of the Assessing Officer is to administer the statute with solicitude for the public exchequer with an in-built idea of fairness to taxpayer". In view of these facts, it is most humbly submitted that the allegation or arguments raised by the petitioner are incorrect.' Considering the aforesaid facts and circumstances it cannot be said that the impugned notices under Section 148 of the IT Act and the impugned reassessment proceedings are bad in law.

7.12 At this stage it is required to be noted that with respect to another assessee - Ankit Financial Services Ltd.'s case (supra) in whose case also on the basis of such information received from the office of Principal Director of Income Tax



(Investigation), Ahmedabad and with similar allegation of beneficiary of the accommodation entries/share application from the bogus companies operated by Shri Pravin Kumar Jain when the assessment for AY2010-11 was sought to be reopened and when the same was challenged before this Court, the Division Bench of this Court vide judgment and order dated 29.12.2016 in Ankit Financial Services Ltd.'s case (supra) has dismissed the said petition.

8. In view of the above and for the reasons stated above, it cannot be said that the impugned notices under Section 148 of the IT Act are without jurisdiction and/or contrary to section 147 of the IT Act and/or bad in law. Under the circumstances, both the petitions deserve to be dismissed and are, accordingly, dismissed. Notice is discharged. Ad-interim relief, if any, stands vacated forthwith. No costs.”

18.2 The Ld. CIT(A) also relied on the decision of the Hon'ble Gujarat High Court in the case of Ankit Financial Services Ltd. v. 78 taxmann.com 58 (Gujarat), Piece Industrial Engineers Pvt. Ltd. v. DCIT 73 taxmann.com 185 and Bright Stars Pvt. Ltd. v. ITO 71 taxmann.com 64 (Bombay). The relevant para of the decisions reproduced is extracted as under:

“6.16 In the case of Ankit Financial Services Ltd. Vs. Deputy Commissioner of Income-tax, Circle 1(1)(2) [2017] 78 taxmann.com 58 (Gujarat), the Hon'ble Gujarat High Court has held that where material recovered in search of another person indicated that assessee had received bogus share applications through accommodation entries, since assessee was beneficiary, initiation of re-opening. was justified.

6.17 It has been held by the Hon'ble Gujarat High Court in the case of Peass industrial Engineers (P.) Ltd. Vs. Deputy Commissioner of Income-tax, [2016] 73 taxmann.com 185 (Gujarat) that where the Assessing Officer received information from Investigation wing that two well-known entry operators of country have provided bogus entries to



various beneficiaries, and assessee was one of such beneficiary, Assessing Officer was justified in reopening assessment.

6.18 In the case of Bright Star Syntex (P.) Ltd. Vs. Income-tax Officer 9(2)(1) in Writ Petition (L) No. 430 of 2016, [2016] 71 taxmann.com 64 (Bombay), the Hon'ble Bombay High Court has held that where on basis of evidences collected and statement recorded during course of search of entry provider, Assessing Officer had reason to believe that unsecured loans received by assessee from certain persons escaped assessment, it could not be said that there was change of opinion. The relevant head notes of the said judgment are as under:-

"Section 68, read with sections 147 and 143, of the Income-tax Act, 1961 - Cash credit (Loans by entry provider) - Assessment year 2012-13 - On the basis of search and seizure action of P Group, an entry provider, Assessing Officer opined that certain creditors of assessee were entities operated by P Group and, therefore, amount credited to assessee's account as unsecured loans was, in fact, income that had escaped assessment and, thus, had to be taxed under section 147 - He discarded assessee's contention that entities operated by P Group from whom assessee had received loans and advances was subject matter of inquiry during scrutiny assessment proceedings and assessment order was passed under section 143(3) on basis of evidences furnished by assessee, and that mere statement/confession by entry provider would not by itself establish that credits were being non-genuine - Whether on basis of evidences collected and statement recorded during course of search of entry provider, Assessing Officer had reason to believe that unsecured loans received from certain persons escaped assessment during original assessment under section 143(3) so as to initiate reassessment under section 147/148; it could not be said that there was change of opinion - Held, yes [In favour of revenue]"

6.19 In view of the above binding judicial precedents, I am of the considered view that the AC had valid reasons to initiate the reassessment proceedings, which were duly recorded and communicated to the appellant. Thus, the A.O. has



rightly assumed jurisdiction and correctly initiated proceedings W/s 148 of the Act. Accordingly, the Ground of Appeal No. 1 of the present appeal is dismissed.”

19. We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. In the case, the Assessing Officer has reopened the assessment after recording reasons to believe that income escaped assessment, which has been reproduced by the Assessing Officer in para 2 of the assessment order. For ready reference, the said reasons recorded are reproduced as under:

“2. The reason for reopening in the case was recorded as under:

"An information has been received from ITO Ward 32(3)(2), Mumbai vide letter No. ITO32(3)(2)/Information /2018-19 dated 14.02.2019 that the bank statement of M/s KalpanikVyapaar Pvt Ltd (AADCK3638E) with ICICI Bank Ltd. (A/c no 003505500471), Dahisar Branch for the F.Y 2013-14 reveals payment to Shri Narendra Shah on various dates for the 1.4.2013 to 18.02.2014 amounting to Rs.4,14,00,000/- M/s KalpanikVyapaar Pvt. Ltd having address 32, Ezra Street, 5thFloor, Kolkata has been declared a shell company by SEBI Enquiries have revealed that M/s KalpanikVyapar Pvt. Ltd. has been removed/ struck off from the register of Companies by the Registrar of Companies, Kolkata and the directors of the said company have also been declared as Disqualified Directors under section 164(2)(a) of the Companies Act. It is pertinent to mention that the assessee is one of the Directors of the said company declared disqualified director by ROC, Kolkata, On verification of the assessee's bank statement with ICICI Bank Ltd. (OD AC 0156), it is seen that the total credits from M/s KalpanikVyapaar Ltd during the F Y 2013: 14 amount to Rs,5,23,00,000/ As per the details available for A.Y 2015-16, a total amount of Rs.13,33,21,520/- appears as unsecured loan from MsKalpanikVyapaar Put. Ltd. of which



only an amount of R8.7,44,71,520/ was received during the F.Y. 2014-15 relevant to A.Y 20015-16. Hence, an amount in secured loan during F. Y 2013.14 relevant to A.YHence, an amount of Rs.5,23,00,000 has been received from M/s2014-15.It is therefore, evident that the unsecured loan of Rs.5,23,00,000/-received by the assessee from M/s KalpanikVyapaar Pvt. Ltd is not genuineIt is pertinent to mention here that in this case, the assessee has filed return of income for the year under consideration, and assessment was also made under section 143(3) of the IT Act, 1961. It is true that the assessee has filed a copy of audited P & L A/c and balance sheet along with the return of income, where various information / material was disclosed, the requisite material facts as noted above in the reasons for reopening were embedded in such a manner that material evidence could not be discovered by the AO and could not have been discovered with due diligence, accordingly attracting provisions of Explanation 1 of Section 147 of the Act".

Accordingly, the A.O. came to the conclusion that the income to the tune of Rs.5,23,00,000/- has been escaped assessment within the meaning of section 147 of the Act, which entailed into invoking of provisions of section 147 followed by issuance of notice u/s 148 of the Act after recording the reasons for such reopening of assessment as required under these provisions and obtaining approval u/s 151Notice us 148 of the Act dated 29.03.2019 has been issued electronically."

20. On perusal of the above reasons recorded, it is evident that only information available with the Assessing Officer was payment of Rs.4,14,00,000/- to the assessee from a company in which he was director. There is no other information whether this money was undisclosed income in the hands of the assessee or any kind of tax evasion or accommodation entry was involved. The Assessing Officer has merely invoked proceedings u/s 147 of the Act i.e. reassessment proceedings, on the basis of the information that said



company was struck off from the register of Registrar of companies (ROC) and the director was disqualified. In our opinion there should be live link of the information with the reason to believe recorded by the Assessing Officer. The Assessing Officer has mentioned the fact of unsecured loan from the company M/s KalpanicVyapar Pvt. Ltd. to the assessee in two financial years i.e. financial year 2013-14 and 2014-15 and formed belief that the unsecured loan received by the assessee from M/s KalpanicVyapar Pvt. Ltd. was not genuine. The said information of the loan was already available in the balance sheet and other documents filed along with return of income, which was further subjected to assessment u/s 143(3) of the Act. This fact has also been duly recorded by the Assessing Officer in the reasons recorded. The Assessing Officer however further noted that material evidence could not be discovered by the Assessing Officer with due diligence and therefore provisions of section 147 r.w. Explanation 1 are attracted. In our opinion, there is no failure on the part of the assessee in disclosing the material truly and fully. The reasons to belief are mere based on the presumption and there is no tangible material to form the belief that income escaped assessment. The facts and circumstances of the case relied upon the Ld. CIT(A) are distinguishable. In the case of **Raymond woolen mills Ltd Vs ITO (1999) 236 ITR 34 (SC)**, the Hon'ble Supreme Court has held *that there has to be a relevant material on which a reasonable person could have formed requisite*



belief. In the instant case the loan from KalpanicVyapar Pvt. Ltd. to the assessee was already part of the regular balance sheet filed by the assessee and in the information received from the investigation wing no new facts other than that said company has given loan to the assessee, has come out and therefore, there is no relevant material to form requisite belief that income escaped in the case of the assessee. In the case of **Raymond woolen Mills Ltd (supra)**, the Hon'ble Supreme Court has further held that *for determination whether reassessment proceedings are validly initiated, it should be seen that whether there was prima facie some material to form belief that income has escaped*. There is no such prima facie material or information in the case of assessee which could indicate that income has escaped assessment. The facts and circumstances in the other cases relied upon by the Ld. CIT(A) also are distinguishable. In the case there is no such information that assessee has received any accommodation entry from M/s KalpanicVyapar Pvt. Ltd. The assessee himself was the director of the said company along with his wife. In view of the above discussion, we set aside the finding of the Ld. CIT(A) and hold that there is no live link of the information with that of the reasons recorded and therefore reassessment proceedings initiated on the basis of the said reasons recorded are quashed ab initio. The ground No. 1 of the appeal is accordingly allowed. Since we have quashed the reassessment proceedings and therefore adjudication



of the ground No. 2 challenging the merit of the addition is rendered academic only, therefore, we are not adjudicating upon same and dismiss as infructuous, although identical ground No. 1 raised in appeal of the assessee for AY 2015-16 will be dealt in forthcoming paras.

20.1 The ground No. 3 raised by the assessee is in relation to initiation of penalty u/s 271(1)(c) of the Act. Since penalty has not been levied by way of this order by the Assessing Officer, the issue of levy of penalty being premature, the ground raised by the assessee is dismissed as infructuous.

21. Now, we take up the cross appeals of the assessee and the Revenue for assessment year 2015-16. The grounds raised by the assessee and the Revenue are reproduced as under:

Assessee's appeal

- 1. On the facts and in the circumstances of the case and in law, the Hon'ble CIT(A) erred in upholding the addition of Rs.7,50,71,520/- by wrongly treating unsecured loan availed from the company in which his wife is one of the directors by merely relying on the contention of the Ld AO that the name of the company has been struck off from the register of the companies without appreciating that the name has been removed for non-filing of financial statements and not because this is an accommodation providing company as held by the Ld AO as unexplained cash credit u/s 68 of the IT Act 1961 and the reason assigned for doing so are wrong and contrary to the Provisions of Income Tax Act and rules made there under.*



2. *On the facts and in the circumstances of the case and in law, the Hon'ble CIT(A) erred in upholding the addition of Rs.29,29,800/- made by the Ld AO u/s 43CA of the IT Act 1961 without appreciating that the said provisions are not applicable to the facts of the case and the reason assigned for doing so are wrong and contrary to the Provisions of Income Tax Act and rules made there under.*
3. *On the facts and in the circumstances of the case and in law, the Hon'ble CIT(A) erred in upholding the penalty initiated by the Ld AO u/s. 271 (1)(c) of the IT Act 1961 and the reason assigned for doing so are wrong and contrary to the provision of Income Tax Act and rules made there under.*

Revenue's appeal

1. *Whether the Ld. CIT(A) has erred both in law and on facts in deleting the addition Rs. 18.50.000/ towards unexplained expenditure u/s 69C of the IT Act.*
2. *Whether the Ld. CIT(A) has erred both in law and on facts in deleting 3,34,66,000/- the addition towards unexplained Sundry Creditor within the provision of the Section 41(1) of the IT Act.*

22. The ground No. 1 of the appeal of the assessee relates to addition of Rs.7,50,71,520/- held as unexplained cash credit which was received by the assessee as unsecured loan from M/s KalpanicVyapar Pvt. Ltd. which is a company in which assessee was a director during relevant period along with his wife. The Assessing Officer made the addition for the reason that the assessee filed only ledger confirmation of M/s KalpanicVyapar Pvt. Ltd. without accompanying income tax return and the bank statement of the said party. The Assessing Officer mentioned that notice u/s 133(6)



of the Act was not issued due to limited time available with him for passing of the assessment order. The Assessing Officer has also noted that said company M/s KalpanikVyapar Pvt. Ltd. was removed/strike off from the register maintained by Registrar of the companies (ROC) and the directors have been disqualified in terms of section 164(2)(A) of the Companies Act, 1956. The Assessing Officer further obtained information from the Income-tax Department, Kolkata to confirm whether said company had filed return of income. The relevant observations by the Assessing Officer are reproduced as under:

“5.13 It is seen from the images that M/s KalpanikVyapaar Pvt Ltd has filed its returns of income on 15.11.2017, whereas the commission u/s 131(1)(d) of the Act was issued on 27.10.2017. Thus, it is clear that M/s KalpanikVyapaar Pvt Ltd has filed its returns of income, after the AO of the said company, has started enquiries in response to commission us 131(1)(d) of the Act. Therefore, it is nothing but an after thought of the assessee to prove that M/s KalpanikVyapaar Pt Ltd has made its compliance. It is not out of place to mention here that the returns of M/s KalpanikVyapaar Pvt Ltd has been uploaded under the digital signature of NARENDRA SHAH from Mumbai itself. Thus, it cannot be said that he could not furnish IT acknowledgement for AY 2015-16 of M/s KalpanikVyapaar Pt Ltd due to disputes with the said party. It is also clear that the assessee Shri Narendra Shah is actively participated in day-to-day business activities of M/s KalpanikVyapaar Pt Ltd and he is controlling its business affairs. Even a perusal of the bank statement of M/s KalpanikVyapaar Pt Ltd, it is seen that all the amounts other than one or two, have been directly transferred to either the assessee or his relatives or the companies, where the assessee is one of the directors.”



5.14 As discussed in the above paragraphs, the company has been declared as strike off vide order dated 30.06.2017 by ROC, Kolkata. The so called returns for AY 2016-17 & 2017-18 are filed by the assessee under his digital signature on 15.11.2017, by the date of which, the company was legally not in existence as the same has been removed from the Registrar.”

23. On further appeal, the Ld. CIT(A) in his detailed finding upheld the addition made by the Assessing Officer observing as under:

“6.2 Appellate Decision: I have carefully considered the facts of the case, assessment order and material on record. The AO has discussed this issue vide para 5 in his assessment order. The assessee has shown loan of Rs. 13,33,21,520/- from M/s KalpanikVyapar Pvt Ltd in the balance sheet. During the course of assessment proceedings, the assessee was asked to furnish the ledger confirmations, IT and bank statements of the parties, from whom, the assessee has received the loans. In response to the same, the AR of the assessee vide letter dated 07.09.2017 filed ledger confirmation of M/s KalpanikVyapar Pvt Ltd duly signed by Mrs. Darshana Narendra Shah in the capacity of one of the directors of the said company. The appellant was requested to furnish the ledger confirmation for whole year along with IT and bank statement of the concerned party. However, the assessee did not file the requisite details.

6.3 The A.O. has reported that further, enquiries revealed that M/s KalpanikVyapaa Pvt. Ltd having address 32, Ezra Street, Sth Floor, Kolkata was declared a Shell company by SEBI and removed/struck off from the register of Companies by the Registrar of Companies, Kolkata and the directors of the said company also been declared as Disqualified Directors' under section 164(2)(a) of the Companies Act and that the appellant was one of the Directors of the said company declared as disqualified director by ROC Kolkata. The AO on verification of the assessee's bank statement with ICICI Bank Ltd., noticed that out of total amount of Rs.13,33,21,520/- appeared as



unsecured loan from M/s KalpanikVyapaar Pvt. Ltd. an amount of Rs.7,44,71,520/- was received during the F.Y 2014-15. Further, during the course of assessment proceedings, notices u/s 133(6) dated 14.11.2019 were sent to Kotak Mahindra Bank and ICICI Bank asking for bank statements of the appellant for the period 2013-14. The same was received and considered by AO.

6.4 The AO concluded from the bank statement of ICICI bank that the assessee received total credits amounting to Rs. 7,44,71,520/- from KalpanikVyapar Pvt.Ltd., which was declared a shell company by SEBI and whose name was struck off from the register of companies by the Registrar of Companies, Kolkata and the directors of the said company was also declared as Disqualified Directors u/ 164(2)(a) of the companies Act. The appellant was also found one of the directors of KalpanikVyapar Pvt. Ltd. which was declared as Disqualified Director by ROC,Kolkata. The assessee's explanation was considered but not accepted by AO.

6.5 Further, in response to the remand report of the AO, the appellant has submitted as under:

"That the loan providing company has not been declared as shell company as mentioned in the Remand Report. In support of that we have already submitted the list of 331 companies downloaded from the internet site declared as shell company by Hon'ble SEBT. Instead a show cause notice has been issued us. 248(1) of the companies act 2013 by the Hon'ble Registrar asking us to show as to why the name of the loan providing company should not be struck off from Register, the copy of the notice enclosed hereto as per Ex 'A: The relevant page where the name of the loan providing company is appearing is submitted herewith duly marked.

2. Since the loan providing company did not file reply to show cause notice issued u/s. 248(1), the Hon'ble Registrar of companies passed order u/S.248(5) striking off the name of the loan providing company from its Register. Copy of the order passed dated 30/06/2017 and the relevant page where the name of loan providing company is appearing is



submitted herewith duly marked as per Ex 'B' for your honour's perusal and consideration. In view of the above your honour will appreciate that the contention of the Ld AO that this is a shell company is without any cogent evidence hence the genuine loan given by Ms. KalpanikVyapar (P)Ltd should be treated as genuine and the ld AO be directed to delete the unwarranted addition made to the returned income and oblige."

6.6 From above reply, it appears that the appellant has tried to take unwanted benefits of the action of Hon'ble Registrar of companies, in issuing show cause notice to the appellant. As per section 248(1) of the companies act 2013 a notice should be sent to the Company and its directors to remove the name from Register of Companies with request to represent along with copies of relevant documents. However, facts remained same that since, the loan providing company did not file reply to show cause notice issued u/s. 248(1), the Hon'ble Registrar of companies passed order u/s. 248(5) striking off the name of the loan providing company fromter. The argument of the appellant that the loan providing company has declared as shell company as mentioned in the Remand Report, is baseless and cannot be entertained. Further, the claim made by appellant, that in support of this issue it has submitted the list of 331 companies downloaded from the internet site declared as shell company by Hon'ble SEB. This is out of knowledge that why the appellant is misleading the issue. When the fact is clear that the Hon'ble Registrar of companies passed order W/s. 248(5) striking off the name of the loan providing company from its Register i.e. M/s KalpanikVyaparPVt Ltd, why appellant provided list of companies declared as shell company by SEBI. The appellant has tried poor attempt to mislead the issue. The relevant page clearly showing name of M/s KalpanikVyapar Pvt Ltd, strike off at serial number 5030 reproduced as under for the sake of clarity:

6.7 The AO had made detailed analysis of this issue. Whereas, during the assessment proceedings the appellant has shown casual approach. The assessee was asked to furnish the ITR and bank statement of M/s KalpanikVyapar Put Ltd however, no reply was made and the proceedings



were pending long. The assessee claimed of non-cooperation of the said party for failure to the notice of the AO at stage of the assessment proceedings.

6.8 Besides, from the ledger confirmation fled by appellant the AO noticed that the ledger confirmation was signed by the assessee's wife Smt Darshana Narendra Shah in the capacity of Director / Authorized Signatory. Therefore, doubt was created that why IT and bank statement could not produced from a company, where she is one of the directors of the said company and had authority to sign on the ledger confirmations. Thus, it cannot be said that the assessee has dispute with the said company and he could not furnish relevant documents. The AO concluded it as an excuse taken by the appellant to drag the proceedings to hide the fact that M/s KalpanikVyapaar Pvt Lid has not filed its return of income for A.Y. 2015-16.

6.9 To further strengthen the observations with cemented evidences, a commission us 131(1)(d) of the Act was issued to Income Tax Officer, Ward 4(4), Kolkata, who had jurisdiction over the case of M/s KalpanikVyapaar Pvt Ltd. In response to the same, the AO reported that no business activities are carried on by M/s KalpanikVyapaar Pvt Ltd and it has not filed its return of income after A.Y.2014-15. Also reported that he has issued summons w/ 131 of the Act to the directors of M/s KalpanikVyapaar Pvt Ltd on 13.12.2017 for personal attendance, but none appeared before him

6.10 Further, in response to show cause issued by AO the appellant submitted that the company has filed its return of income, but the copies are not available, berefore, furnished the copies of acknowledgments of ITS for A.Y. 2016-17 & submitted that the transaction stands proved the test of genuineness. issions of the was considered, but not accepted by AO. to analyzed the issue AO issued commission W/s 131(1)(d) of the Act to the Assessing Officer, having territorial jurisdiction over the case of M/s KalpanikVyapaar Pvt Ltd, wherein he has reported that the company has not filed its return of income after AY 2014-15. However, the appellant further contended that M/s KalpanikVyapaar Pt Ltd filed its returns of income for A.



Yrs. 2016.17 and 2017-18 and the copies of acknowledgements of ITS were filed in support of claim from where, it was seen that M/s KalpanikVyapaar Pvt Ltd filed its returns of income on 15.11.2017. whereas the commission W/s 131)(d) of the Act was issued on 27.10.2017 by 10.

Thus, it was clearly construed that Ms. Kalpanik. Vyapaar Pvt Ltd filed its returns of income, after the AO of the said Company started enquiries in response to commission us. 131 of the Act. Therefore, it was nothing but after though of the assessee to prove that M/s KalpanikVyapaar Pt Ltd made its compliance. As well, the returns of M/s KalpanikVyapaar Pt Ltd was uploaded under the digital signature of NARENDRA SHAH from Mumbai itself. Therefore, the contention of the assessee that he cannot furnish IT acknowledgement for AY 2015-16 of M/s KalpanikVyapaar Pt Ltd due to disputes with the said party was found fake explanation. The assessee Shri Narendra Shah actively participated in day-to-day business activities of M/s KalpanikVyapaarvt Ltd and controlling its business affairs and on perusal of the bank statement of M/s KalpanikVyapaar Pvt Ltd, revealed that all the amounts directly transferred to either the assessee or his relatives or the companies, where the assessee was one of the directors.

6.11 In this case, the assessee has failed to discharge the initial onus casted upon him to prove the genuineness of the transactions. The assessee has failed to prove the primary ingredients to prove the transaction as a genuine. The assessee in this case has not filed the ITR of the concerned party, from whom, he has received such huge loans notwithstanding to the issuance of various reminders. Further, as per the findings of the jurisdictional AO also, M/s KalpanikVyapaar Pvt Ltd is not in existence and no business activities are carried on by the said company. Considering all these facts, an amount of Rs.7,44,71,520/- is hereby added to the total income of the assessee under section 68 of the Act as unexplained cash credits.



6.12 It is observed that the AO had placed on record the entire gamut of finding and there is no further requirement for elaboration. The fact cannot be denied that, that MsKalpanikVyapar Pvt. Ltd. has been removed/ struck off from the register of Companies by the Registrar of Companies, Kolkota and the directors of the said company have also been declared as Disqualified Directors and appellant was one of the Directors of the said company declared as disqualified director by ROC Kolkata. Filing returns of income on 15.11.2017, whereas the commission u/s 131(1)d) of the Act was issued on 27.10.2017 by AO, shows appellants meager efforts and further strengthens the bogus transaction of the appellant. Thus, it was clearly construed that Ms. Kalpank. Vyapaar Pt Ltd filed its returns of income, after the AO of the said Company started enquiries in response to commission u/s. 131 of the Act. In view of overall discussion, it can safely be concluded that the loan accepted by the appellant from M/s KalpanikVyapaar Put Ltd is not a genuine loan. The key ingredients of the transaction viz., identity, genuineness and creditworthiness of the transaction have remained unproved. The appellant has failed to submit any credible documents either before AO or before the undersigned. The appellant has shown casual approach towards appeal proceedings and failed to establish the genuineness of transaction. Thus, it is evident that the unsecured loan of Rs. 7,50,71,520/ received by the assessee from M/s KalpanikVyapaar Pvt. Ltd is not genuine. At appellate state, the appellant has failed to file any submission with credible evidence, only filing of appeal is not suffice to accept the claim of appellant. On the contrary AO has made analysis of the facts. The contention of the appellant as made during the assessment proceedings that Shri Narendra Shah and his wife Smt. Darshana Shah are the only directors of the said Company in which public holding is NIL, is found baseless. The fact remains the same that name was struck off from the register of(99611-4, by the Registrar of Companies, Kolkata and the directors of the said company was also declared as Disqualified Directors w/s 164(2)(a) of the companies Act. In view of the overall facts discussed as above addition made of Rs. 7,50,71,520/- on account loan accepted from M/s KalpanikVyapaar Pt Ltd Is upheld. Therefore, this ground of appeal no. 1 is Dismissed.”



24. We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. We find that the assessee has filed confirmation from the said company. However, no income tax return or bank statement was filed before the ld AO. Further, the said company was during relevant period stricken off or removed from the register of the registrar of the company. Before us, the Ld. Counsel of the assessee submitted that the said company has been revived by the National Company Law Tribunal (NCLT) vide order dated 14/01/2022 in CP No. 252/KB/2021. The relevant observation of the NCLT are reproduced as under:

“1) This Company Petition has been filed by Mr. Narendra Shah Suryakant, one of the shareholders of M/S KALPANIK VYAPAAR PRIVATE LIMITED, u/s. 252(3) of the Companies Act, 2013 for restoration of name of the struck off company in the register of companies, maintained in the office of the Registrar of Companies, West Bengal. It is stated that the name of the Company was struck off on 30.06.2017.

2) It is contended that the Company had not filed the Financial Statements and Annual Returns of the Company from the financial year ended 2013-14, 2014-15, 2015-16, 2016-17, 2017-18, 2018-19 and 2019-20 due to inadvertent mistake on part of the management and has produced copies of the said financial statements. Therefore, though the Company was running its business but the Company did not file its Financial Statements and Annual Returns with the Registrar of Companies, West Bengal, for the relevant financial years and has produced copies of the said financial statements. IT Acknowledgement and Bank statement has also been produced. Upon the said contentions, the Ld. Counsel for the petitioner prayed for passing of an order for restoration of the name of the appellant company.



3) Notice was issued to the Registrar of Companies, West Bengal. The Registrar of Companies, West Bengal has submitted its report at the Registry with copy to the petitioner. It was stated in the report that only after compliance of the requirements to be met under Section 248 of the Companies Act, 2013, Registrar of Companies, West Bengal has struck off the name of the petitioner company from the register maintained by the Registrar of Companies West Bengal.

4) ROC, West Bengal has not objected to this application for restoration of the name of the company. On perusal of the application, we are satisfied that the name of the company should be restored to the register. Therefore, this petition deserves sympathetic consideration. Accordingly, the present petition is allowed on the following terms:-

a) The Registrar of Companies, West Bengal, the respondent herein, is directed to restore the original status of the petitioner company as if the name of the Company had not been struck off from the register of Companies with the resultant and consequential actions like changing status of petitioner company from 'struck off' to 'Active'.

b) The Petitioner Company is directed to file all pending statutory documents) including Annual Accounts and Annual returns for the period 2013-14, 2014-15, 2015-16, 2016-17, 2017-18, 2018-19 and 2019-20 along with prescribed fees/additional fee/fine as decided by Registrar of Companies, West Bengal within 45 days from the date on which its name is restored on the register of companies maintained by the Registrar of Companies, West Bengal.

c) The restoration of the Company's name is also subject to the payment of cost of Rs. 70,000 /- (Rupees Seventy Thousand only) through online payment in www.mca.gov.in under miscellaneous fee by mentioning particulars as "Payment of cost for restoration of company pursuant to orders of NCLT in CP No. 252/KB/2021".

d) The petitioner is directed to deliver a certified copy of this order with Registrar of Companies, West Bengal within thirty days of the receipt of this order.



e) On such delivery and after due compliance with the above directions, the Registrar of Companies, West Bengal is directed to publish the order in the Official Gazette under his office name and seal;

f) This order is confined to the violations, which ultimately led to the impugned action of striking off the name of the Company, and it will not come in the way of Registrar of Companies, West Bengal to take appropriate action(s) in accordance with law, for any other violations / offences, if any, committed by the petitioner company prior to or during the period the name of the Company remained struck off.”

24.1 Thus, the said company is no more in the list of the companies removed or struck off from the register of the Registrar of the companies and it is being a live company. The basis of the Assessing officer and Id CIT(A) that assessee has been held to be shell company by the SEBI is thus unsubstantiated fact and can't be relied. The Assessing officer of the said company has duly verified the return of income filed by that company and in remand also the Assessing Officer could not point out any adverse fact other than allegation of being a shell company. The addition has been made mainly for the reason that assessee company was stricken off or removed from the register of the Registrar of the companies (ROC). Since, the company has now been revived by the National Company Law Tribunal on the prayer of the company, we set aside the finding of Id CIT(A) and delete the addition made. The ground No. 1 of the appeal of the assessee is accordingly allowed.

25. The ground No. 2 of the appeal of the assessee relates to addition of Rs.29,29,800/- made by the Ld. Assessing Officer u/s



43CA of the Act. The brief facts qua the issue in dispute are that the assessee was a trader of real estate properties during the relevant assessment year. The assessee sold certain units of real estate for consideration lower than the value adopted by the stamp duty valuation department. The list of relevant units is reproduced as under:

Unit No.	Market Value	Agreement Value	Difference
C-6	6357000	6350000	7000
D-6	4640000	3039000	1601000
D-5	4979000	4987200	291800
B-10	4015000	3500000	515000
B-11	4015000	3500000	515000
Total			2929800

25.1 The Assessing Officer noted that in view of deeming provisions u/s 43CA of the Act, *if the sale consideration reported by the assessee is less than the value as per the stamp valuation authority, then value as stamp valuation shall be deemed to be sale consideration received as a result of transfer of property by the assessee.* Accordingly, the Ld. Assessing Officer treated difference between the sale consideration reported by the assessee and the value of the properties assessed by the stamp duty valuation authority for addition u/s 43CA of the Act. On further appeal, the Ld. CIT(A) also upheld the addition observing as under:

“8.2 from above, it can be concluded that the entire approach of the Assessing Officer is correct. I do not find any force in appellants claim that request of referring the matter to Valuation officer was not opted by AO. Other than the bold assertion that the sale consideration shown



by the appellant was correct value, nothing has been brought on record either before 10 or before undersigned by way of documentary evidences to substantiate his claim with respect to the difference in stamp duty value and market value. Therefore, it cannot be said that the value adopted by the stamp valuation authority was higher than the fair market value, at which, the land was sold by the assessee. Further, the assessee has also not rebutted the adoption of sale value as per stamp valuation for the purpose of capital gain before the registering authorities.

8.3 As is well known, section SOC would enable the revenue to bring to tax by way of deemed capital gain difference between the stamp valuation and the sale price of a capital asset. For obvious reasons, this provision of section 50C would not apply in case of a builder for whom immovable property is in nature of stock-in-trade and not capital asset. To overcome this difficulty, the legislature had inserted section 43CA under Finance Act, 2013 with effect from 1-4-2014. This provision enables the revenue to tax the income arising out of sale of stock and stamp valuation of such stock would substitute the actual receipt thereof. The AO has rightly made the addition under section 43CA when the appellant has shown the sale consideration less than the Stamp duty valuation. It is observed that the AO had placed on record all facts of finding and there is no further requirement for elaboration. As well, appellant has failed on its part to place any credible documentary evidence before the undersigned during the appellate proceedings. Moreover, appellant has not turned around to contradict the view of undersigned and discharged its onus by filing only piece of paper which are not sufficient to change the mind of undersigned. In view of the above facts the claim of appellant cannot be allowed and addition made u/s.43CA of Income tax Act, is upheld.

26. We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. Before us, the Ld. Counsel of the assessee has made two submissions. **Firstly**, he



submitted that legislature w.e.f. 01.04.2019 inserted a proviso to sub-section 1 of section 50C which provides that where the value adopted or assessed by the stamp valuation authority does not exceed 105% of the consideration as a result of the transfer of property, then, consideration so received shall be deemed to be full value of consideration. This permitted limit of 5% difference has been further extended to 10% by the legislature w.e.f. 1/4/2021 by way of Finance Act, 2020. The said amendment in provisions of section 50C has been held to retrospective by the decision of coordinate bench in the case of Maria Fennandes Cheryl Vs ITO reported in (2021) 187 ITD 738 (Mum) and Tribunal, Kolkata Bench in the case of Chandra Prakash Jhunjhunwala Vs DCIT in ITA No. 2351/Kol/2017. Therefore, wherever difference in stamp duty valuation and transaction value of property is within limit of 10%, no addition is called for u/s 50C of the Act. This permissible limit of 10% is equally applicable to section 43CA of the Act in view being both the provisions are pari materia and evident from the second proviso to section 43CA of the Act, which has been introduced w.e.f. 1/4/2019. The assessee requested that this aspect of 10% difference has not been examined by the lower authorities, therefore matter might be restored to the ld AO for deciding afresh. **Secondly**, the Ld. Counsel of the assessee submitted that there was a prior agreement in respect of sale of units, which was entered in earlier years and substantial payment was already received by the



assessee. The Ld. Counsel referred to section 43CA(3) of the Act wherever prior agreement along with payment through banking channel has been entered before the date of the registration, then value as on the date of such agreement, should be considered as value for the purpose of stamp duty valuation. The Ld. Counsel submitted that in the case of the assessee accordingly the value for the purpose of stamp duty valuation should be taken as on the date the agreement entered into for the sale of the properties. In view of the above two prayers of the assessee, we feel it appropriate to restore this issue back to the file of the Assessing Officer for verifying the contention of the assessee and decide the issue in accordance with law. The ground No. 2 of the appeal of the assessee is accordingly allowed for statistical purposes.

27. The ground No. 3 of the appeal is related to initiation of penalty u/s 271(1)(c) of the Act, which being premature in nature, same is dismissed as infructuous.

28. The ground No. 1 of the appeal of the Revenue relates to deletion of addition of Rs.18,50,000/- which was made by the Assessing Officer u/s 69C of the Act. The relevant factual observations and finding of the Ld. CIT(A) on the issue in dispute is reproduced as under:

7.1 Appellate Decision: I have carefully considered the facts of the case, assessment order and material on record. The AO has discussed this issue vide para 7 of assessment



order. As per AIR information received by AD, the appellant has made cash deposits in the savings bank account maintained with Kotak Mahindra Bank. On being asked to explain the source of cash deposits, it was submitted by the assessee that the cash deposits so made are out of the cash withdrawals, in support of which, he filed extract of the cash book, as per which, the available cash balance in hand as on 28.02.2015 was Rs.38,32,528/-, whereas the cash balance shown in the balance sheet as on 31.03.2015 was R\$.2,93,004/-As the cash book for the month of March, 2015 was not available in the file, the appellant was requested to file the cash book for the month of March, 2015 and reconcile the difference. In response to the same, the appellant filed the cash book for the whole year. It was noticed from the cash book of March, 2015 that other than two or three entries, all the entries in respect of the cash payments were made on 31.03.2015, the last date of financial year which raised a suspicion in the mind of the A.O. about the genuineness of the expenditure incurred. The appellant claimed to have made salary payments in cash on 31.03.2015 but no documentary evidences were furnished before the A to prove the genuineness of the expenditure. The appellant was further requested to furnish the complete details of all the persons, to whom, he has paid salary. Further, in response to show cause the appellant submitted his explanation as under:

"As regards your query that cash payments have been made on 31.03.2015 towards salary, but not supported by any documentary evidences, hence raises a suspicion. In this regard, it is submitted that assessee's accountant has passed the entry on 31.03.2015 in respect of payments made to security guards for protecting various properties. Since the property has not been developed the expenses paid to security guard towards salary has been capitalized in respective property. In support of the same, please find herewith the copy of the ledger account of respective property, wherein the amount has been capitalized as per Ex F. A perusal of which your good offices will appreciate that since expenses has not been claimed as revenue, but has genuinely been incurred and capitalized to protect it from encroachment, no adverse view thereof should be taken and



*no addition as proposed be made to the returned income.
"Shri Narendra S. Shah, A.Y.2015-16."*

7.2 The explanation of the appellant was carefully considered by the A.O., but found to be not accepted by AO by observing as under:

"Assessee has claimed the said expenses have not been claimed as revenue. The submissions made by the AR of the assessee are on wrong footing, prima facie, it is clearly observed from the P & L A/C that the assessee has debited an amount of Rs.20,63,000/- as salary expenses. Thus, it cannot be said that the expenditure has not been claimed as revenue. The assessee has also failed to furnish the salary register and complete details of persone, to whom, he has paid salaries at the last-day of the financial year. Further, the assessee could not furnish any justifiable explanation on the situations led him to make the payment at the fag-end of the financial year. Thus, the genuineness of the expenses remained unproved.

7.3 Without prejudice to the above findings, it is further noticed that assessee has shown the plots of lands, in respect of which, he claimed to have paid the salary, have been shown in the balance sheet under the head "INVESTMENTS" and not the under the head "WORK IN PROGRESS O CLOSING WIP". The assessee is treating these assets as his personal assets only in the balance sheet and he has not converted these assets into stock in trade and thus the question of capitalizing the said expenditure does not arise.

7.4 On careful consideration, I donot find justification in the above action of the A.O. Once, the appellant has given an explanation regarding entries of cash payments (to the watchman of guarding various properties) as on 31.03.2015, the AO is required to examine the security guards or made further verification before coming to the conclusion that the salary expenses of Rs. 20,63,000/-debited in the P&L. A/c represent either cash expenses as claimed above or non-genuine/bogus in nature. There is no relevance of the issue that whether the plots/projects are represented as "Investment" or "work in progress", because what is



disallowed is the salary expenses already debited in the P&L A/c. Hence, the disallowance of Rs. 18,50,000/- deserved to be deleted. Thus, ground of appeal No. 2 is Allowed.”

29. We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. The issue in dispute is

regarding payment of salary expenses of Rs.18,50,000/- shown by the assessee as incurred through cash in the month of March 2015. The assessee has shown source of the said expenditure through cash book produced before the Assessing Officer. The Assessing Officer did not believe the expenditure for salary made in cash on 31.03.2015, particularly, in respect of security guard etc. and held that the salary expenses were unexplained. In our opinion, when the source of the said salary expenses is explained by way of cash book, there was no reason for the Assessing Officer, to make addition for unexplained expenditure. When source of the expenditure is explained through cash book, in our opinion, there is no error in the order of the Ld. CIT(A) on the issue in dispute and accordingly, we uphold same. The ground No. 1 of the appeal of the Revenue is accordingly dismissed.

30. The Ground No. 2 of the appeal of the Revenue relates to disallowance of sundry creditors amounting to Rs.3,34,66,000/- invoking section 41(1) of the Act. The factual observation and



finding of the Ld. CIT(A) on the issue in dispute is reproduced as under:

“9.1 Appellate Decision: I have carefully considered the facts of the case, assessment order and material on record. The issue raised is against the Non-Benuine Sundry Creditors. The 10 from the deals submitted by appellant observed that it has shown sundry creditors to the tune of Rs.3,34,66,000/- in the books of M/ Siddhivinayak Developers, one of his proprietary concerns. During the course of assessment proceedings, the assessee was asked to furnish the complete details and aging of sundry creditors. In response to the same, the assessee submitted the name, address and PAN of the parties, but failed to give the corresponding amount due to the parties. Further, close scrutiny of the details revealed that out of 9 parties 5 parties were operated from the same premises having address at B-208, Shantivan-II, Raheja Township, Malad(E), Mumbai.

- a) M/ s BloomdaleFinvest*
- b) M/ s Divy Dhwani Investment*
- c) M/ s Nayan Trade Resources*
- d) M/ s Tinal Pharmaceuticals*
- e) M/ s Lalita Exports*
- f) M/ s Plumeti Exports*

9.2 The AO found that the above entities were primarily engaged in the business of investments, pharmaceuticals and exports and the assessee being a builder by profession, no rationale between the nature of business of the assessee and the above entities, found the transactions to be suspicious. To further strengthen the case, the Inspector of charge was deputed to serve the notice us 133(6) of the Act personally wherein, he reported that he found the premises locked and the local enquiries with the watchmen of the building revealed that it was a pure residential complex of Raheja Township and no business activities being carried on from these



premises. Thus, the AO come to the conclusion that all the entities were non existing, not carrying out any business activities and all the sundry creditors were non-genuine and thus the assessee need not to repay the liabilities.

9.3 Upon careful verification of the section 41(1) of the Act, the find the action of the AO not only against the clear provisions of the statute but unjustified and lacks merit. For the sake of clarity, the said provision is reproduced as under-

"41. (1) Where an allowance or deduction has been made in the assessment for any year in respect of loss, expenditure or trading liability incurred by the assessee (hereinafter referred to as the first-mentioned person) and subsequently during any previous year

(a)the first-mentioned person has obtained, whether in cash or in any other manner whatsoever, any amount in respect of such¹⁹ loss or expenditure or some benefit in respect of such trading liability by way of remission or cessation thereof, the amount obtained by such person or the value of benefit accruing to him shall be deemed to be profits and gains of business or profession and accordingly chargeable to income-tax as the income of that previous year, whether the business or profession in respect of which the allowance or deduction has been made is in existence in that year or not; or

(b)the successor in business has obtained, whether in cash or in any other manner whatsoever, any amount in respect of which loss or expenditure was incurred by the first-mentioned person or some benefit in respect of the trading liability referred to in clause (a) by way of remission or cessation thereof, the amount obtained by the successor in business or the value of benefit accruing to the successor in business shall be deemed to be profits and gains of the business or profession, and accordingly chargeable to income-tax as the income of that previous year.

Explanation 1-For the purposes of this sub-section, the expression "loss or expenditure or some benefit in respect of any such trading liability by way of remission or cessation thereof" shall include the remission or cessation of any liability by a unilateral act by the first-mentioned person under clause



(a) or the successor in business under Clause (b) of that subsection by way of writing off such liability in his accounts."

9.4 As can be seen from the provisions that the benefit which an assessee obtains by way of remission or cessation of a trading liability in a later year, in respect of which he has obtained a deduction in an earlier year in computing business income, is governed by section 41) which is specific provision governing factual situation. Hon'ble Supreme Court in the case of Chief CIT v. Kesaria Tea Co. Lid12002] 122 Taxman 91 (SC), while examining the said provision has clearly held that in order to apply section 41(1), the following points are to be kept in view:

(1) in the course of assessment for an earlier year, allowance or deduction has been made in respect of trading liability incurred by the assessee;

(2) subsequently, a benefit is obtained in respect of such trading liability by way of remission or cessation thereof during the year in which such event occurred;

(3) in that situation the value of the benefit accruing to the assessee is deemed to be the profits and gains of business which otherwise would not be his income;

(4) such value of the benefit is made chargeable to income-tax as the income of the previous year in which such benefit was obtained.

9.5 Therefore, it has to be brought on record by the A0, before invoking provisions of sec. 41(1), that an allowance or deduction has been claimed in the in any previous year in respect of loss, expenditure or trading liability reflected therein. Hon'ble Apex Court in the case of Tirunelveli Motor Bus Service Co. (P.)Ltd. v. CIT [1970] 78 IT 55 (SC) has clearly held that it is not open to the Revenue to refer to section 41(1) for charging the tax on the receipt by the assessee by refund or otherwise of such expenditure in a subsequent year, unless it is proved that an allowance or deduction has been made in the assessment in any previous year in respect of loss, expenditure or trading liability. It is further seen that Hon'ble Gujarat High Court in the case of CIT. Bharat Iron & Steel



Industries [1993] 199 ITR 67 (Guj.) (FB) that Section 41(1) introduces a fiction. The fiction is an indivisible one. It cannot be enlarged by importing another fiction, namely, that if the amount was obtainable or receivable during the previous year, it must be deemed to have been obtained or received during that year. The only meaning that can be attached to the words 'obtained, whether in cash or in any other manner whatsoever, any amount in respect of such loss or expenditure' incurred in any previous year, clearly refers to the actual receiving of the cash of that amount. The amount may be actually received or it may be adjusted by way of an adjustment entry or a credit note or in any other form when the cash or the equivalent of the cash can be said to have been received by the assessee. But it must be obtaining the actual amount which is contemplated by the Legislature when it used the words has obtained, whether in cash or in any other manner whatsoever, any amount in respect of such loss or expenditure in the past.

9.6 There is nothing on record which suggest that the appellant, in the instant case, has claimed or availed any allowance or deduction to the extent of Rs.3,34,66,000/- as reflected in the accounts as outstanding credits from the five parties mentioned in the order, in any previous year in respect of loss, expenditure or trading liability reflected therein. Hon'ble Delhi High Court in the case of Steel & General Mills Co. Ltd. V. CIT [1974] 96 IT 438 (Delhi) has clearly held that the burden is on department to prove that allowance/deduction has been given earlier

"A refund obtained by the assessee will attract section 41(1) only if an allowance or deduction had been given for this amount in the earlier assessment years. The burden lies upon the department to prove that an allowance or deduction had been given for this amount to the assessee in the earlier assessment years."

9.7 Unless and until, the A records a finding of the fact that the appellant has claimed such benefits in the preceding years, no such disallowance of outstanding balance is possible. There is no requirement in the act for detailed enquiry. As held by Hon'ble Kerala High Court in CIT v. Ancherry Pavoo Kakku [1986] 160 IT 88 (Ker.) section 41(1) does



not warrant a detailed enquiry whereby an assessee can be nsalled upon to produce his books of account and other documents to establish his case, as in the case of a regular assessment; the allowance or deduction made inthat year.

the assessment for any year can be ascertained from the order of assessment for that year.

9.8Considering the totality of facts and circumstances of issue involved, in my considered opinion, the AO has incorrectly made disallowance of Rs. 3,34,66,000/-invoking the provisions of sec. 414) of the Act. Hence, the said disallowance/addition is directed to be deleted. Thus, ground of appeal no. 4 is allowed.”

31. We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. We find that the Assessing Officer has treated the sundry creditors appearing in the balance sheet as benefit arising due to the write off of the sundry creditors. The Assessing Officer issued notice u/s 133(6) of the Act and made local inquiries and found that those parties were not available at the said addresses, therefore those parties were not existing and hence were not genuine. In our opinion, section 41(1) of the Act cannot be invoked unilaterally and the Assessing Officer has to show as how the liability was no longer payable by the assessee and why assessee has not written off the sundry creditors in the books of accounts of the assessee. No such exercise has not carried out by the Assessing Officer, therefore, the requisite conditions of section 41(1) of the Act have not been met by the Assessing Officer. Accordingly, we do not find any error in the order



of the Ld. CIT(A) in deleting the addition. The ground No. 2 Revenue is accordingly dismissed.

32. Now we take up the appeal of the assessee for assessment year 2016-17 having ITA No. 2004/Mum/2022. The grounds raised by the assessee are reproduced as under:

1. *On the facts and in the circumstances of the case and in law, the Hon'ble CIT(A) erred in upholding the addition of Rs.8,53,000/- made by the Ld AO by wrongly applying the provisions of section 43CA of the IT Act 1961 without appreciating that the said provisions are not applicable to the facts of the case and the reason assigned for doing so are wrong and contrary to the Provisions of Income Tax Act and rules made there under.*
2. *On the facts and in the circumstances of the case and in law, the Hon'ble CIT(A) erred in upholding the addition of Rs.54,25,000/- made by the Ld AO by wrongly disallowing the legitimate deduction claimed u/s 35(ji) of the IT Act 1961 and the reason assigned for doing so are wrong and contrary to the Provisions of Income Tax Act and rules made there under.*
3. *On the facts and in the NIL circumstances of the case and in law, the Hon'ble CIT(A) erred in upholding the penalty initiated by the Ld AO u/s. 271(1)(c) of the IT Act 1961 and the reason assigned for doing so are wrong and contrary to the provision of Income Tax Act and rules made there under.*

33. The facts and circumstances in relation to ground No. 1 of the appeal of the assessee, are identical to ground No. 2 of appeal of the assessee for assessment year 2015-16, therefore, same is decided *mutatis mutandis*.



34. In ground No. 2, the Ld. CIT(A) has upheld the addition of Rs.54,24,000/- made by the Assessing Officer disallowing the deduction u/s 35(ii) of the Act. The facts qua the issue in dispute are that donation made by the assessee to two scientific research organization, firstly M/s Vivekanand Yoga Anusandhan Sansthan, amounting to Rs.21,00,000/- and secondly, Rural Development Society amounting to Rs.10,00,000/-. The Ld. CIT(A) has mainly sustained the disallowance to the reason that the assessee failed to furnish requisite evidence to establish approval of the society for the purpose of section 35(ii) of the Act. The relevant finding of the Ld. CIT(A) is reproduced as under:

7.2 Appellate Decision:-I have considered the facts of the case, assessment order and details filed by the appellant. This ground of appeal relates to disallowance of donation made to Scientific Research Organisation. The appellant has made donations to two different entities firstly, Vivekananda Yoga Anusandhana Semsthana, Hyderabad amounting to Rs.21,00,000/- and secondly, Rural Development Society, Hyderabad amounting to Rs. 10,00,000/-. Since appellant failed to submit all the details before AO the present addition was made. It is surprise to see that the appellant has returned a business income in negative figure at Rs.24,97,453/- and has claimed a deduction for donation of an amount of Rs. 31,00,000/- which is higher than the business income returned. Normally, the human tendency is to donate the amount less than its income.

7.3 It is worth mentioning here that in its rejoinder, in response to remand report the appellant has contradicted with the view taken by AO. AO has discussed that one of the employees misused his position and funds were returned to appellant in cash. In contradiction to the above the appellant has made plain statement that, during the year under consideration the appellant gave Rs.21,00,000/- to



Vivekanand Yoga AnusandhanaSamsthana, Hyderabad by way of a/c payee cheque donation and the appellant is not concerned as far as irregularities are concerned for the reason that he has given the donation by drawing a/c payee cheque in favour of Vivekanand Yoga AnusandhanaSamasthana and the assessee is not aware of misuse of the position by employee. Further contended that there is not an iota of evidence that the donation amount was returned in cash to assessee and as far as entries in the books of a/c of Trust and opening of bank a/c's by the employee are concerned assessee has no control hence having no implication as far as genuine donation is concerned. Hence no comments are offered on this count.

*7.4 From above it can be seen that, the appellant has replied in casual manner and no efforts are made to produce any material in the form of evidence at assessment stage as well at appellate proceedings. Therefore, I am not in position to accept the contention made by the appellant. Further, at assessment stage, in respect of Rural Development Society, Hyderabad the appellant was requested to produce proof of deduction claimed us 35(1) of the IT.Act, 1961. However, the assessee failed to produce any additional evidence that the said societies are approved for the purposes of sub-section () of Section 35 of the I.T. Act, 1961 for the F.Y.2015-16. During the appellate proceedings also no cogent, valid, reliable or credible evidence or material are produced before the undersigned. It is further observed that during the appellate proceedings, the appellant has relied upon certain judgements viz, Motilal Dayabhailhaveri& Sons VS ACIT lin ITA No.3453/M/2018 & 1584/Mum/20191, Vora Financial Series Pvt. Ltd.(ITA No.532/M/2019) and Kitchen Essentials VS ACIT (ITA No. 6672/M/2013). However, facts and ratio of these judgements are distinguishable. These judgements are related to withdraws of recognition of the institutions with retrospective effect.**However, the disallowance in the present case is on account of non-furnishing of requisite documents to establish approval of the societies for the purpose of sec. 35() of the Act. These documents are not produced before the assessment or appellate proceedings. Hence, the disallowance deserved to be sustained.** In view of the above facts the*



claim of appellant cannot be allowed and addition made u/s.35(ii) of Income tax Act, is upheld.”

35. Before us, the Ld. Counsel of the assessee submitted that the assessee is willing to produce the required documents and therefore, the matter may be restored to the file of the Ld. Assessing Officer. In view of the prayer of the assessee and in the interest of the substantial justice, we feel appropriate to restore the issue back to the file of the Ld. Assessing Officer for verification of the requisite approvals of the societies for the purpose of section 35(ii) of the Act and decide the issue in accordance with law. The ground No. 2 of the appeal of the assessee is accordingly allowed for statistical purposes.

36. The ground No. 3 is in relation to penalty u/s 271(1)(c) of the Act, which being premature at this stage, same is dismissed as infructuous.

38. In the result, respective appeals are disposed off finally as under:

ITA No.	Asst. Year	Appeal of the Assessee/Revenue	Result
2006/M/2022	2009-10	Assessee's Appeal	Allowed for statistical purpose
2005/M/2022	2009-10	Assessee's Appeal	Allowed partly
2566/M/2022	2013-14	Revenue's Appeal	dismissed
2007/M/2022	2014-15	Assessee's Appeal	allowed



2003/M/2022	2015-16	Assessee's Appeal	Allowed partly for statistical purpose
2315/M/2022	2015-16	Revenue's Appeal	dismissed
2004/M/2022	2016-17	Assessee's Appeal	Allowed for statistical purpose

Order pronounced in the open Court on 30/06/2023.

Sd/-
(VIKAS AWASTHY)
JUDICIAL MEMBER

Sd/-
(OM PRAKASH KANT)
ACCOUNTANT MEMBER

Mumbai;

Dated: 30/06/2023

Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai