IN THE INCOME TAX APPELLATE TRIBUNAL
[DELHI BENCH : "G" NEW DELHI]

BEFORE DR. B. R. R. KUMAR, ACCOUNTANT MEMBER

AND

SHRI YOGESH KUMAR U.S., JUDICIAL MEMBER

I.T.A. No. 6219/DEL/2015 (A.Y 2009-10)

DCIT, Central Circle : 18, New Delhi.	Vs.	M/s. SAM Portfolio Pvt. Ltd., 5/5761, Dev Nagar, Karol Bagh, Near YES Bank ATM, New Delhi – 110 005. **PAN No. AAHCS6810N**

AND

I.T.A. No. 6220/DEL/2015 (A.Y 2010-11)

DCIT, Central Circle : 18, New Delhi.	Vs.	M/s. SAM Portfolio Pvt. Ltd., 5/5761, Dev Nagar, Karol Bagh, Near YES Bank ATM, New Delhi – 110 005. **PAN No. AAHCS6810N**

AND

C. O. No. 404/Del/2015

[in I.T.A. No. 6219/DEL/2015 (A.Y. 2009-10)]

M/s. SAM Portfolio Pvt. Ltd., C/o. BRA TAXINDIA, D-28, South Extension, Part-I, New Delhi – 110 049. **PAN No. AAHCS6810N**	Vs.	DCIT, Central Circle : 18, New Delhi.

AND

C. O. No. 405/Del/2015

[in I.T.A. No. 6220/DEL/2015 (A.Y. 2010-11)]

M/s. SAM Portfolio Pvt. Ltd., C/o. BRA TAXINDIA, D-28, South Extension, Part-I, New Delhi – 110 049. **PAN No. AAHCS6810N** **(APPELLANTS)**	Vs.	DCIT, Central Circle : 18, New Delhi. **(RESPONDENTS)**

Assessee by : Dr. Rakesh Gupta, Advocate; &
Shri Somil Agarwal, Advocate;

Department by : Shri H. K. Chowdhary,
[CIT] – D. R.

Date of Hearing	**07.06.2023**
Date of Pronouncement	**08.08.2023**

ORDER

PER YOGESH KUMAR U.S., JM

These two appeals and two cross objections are filed by the Revenue and the assessee respectively against two separate orders of the ld. Commissioner of Income Tax (Appeals)-27 [hereinafter referred to CIT (Appeals)] New Delhi, both dated 28.09.2015 for assessment years 2009-10 and 2010-11. All the above Appeals were heard together and are being disposed of, for the sake of convenience, by this common order.

I.T.A. No. 6219/DEL/2015 (A.Y 2009-10) &
I.T.A. No. 6220/DEL/2015 (A.Y 2010-11) :

2. The Revenue has raised the following common grounds of appeal [except the amounts] in both the assessment years:-

"(1) That the commissioner of Income Tax (Appeals) has erred in law and on facts of the case in deleting Rs.14,50,66,141/-which was added to the income of the assessee on account of unexplained share application money.

(2) That the commissioner of Income Tax (Appeals) has erred in law and on facts of the case in not discussing the issue and facts of unexplained share application money raised by the AO in his assessment order on basis of which addition of Rs.14,50,66,141/- was made.

(3) That the commissioner of Income Tax (Appeals) has erred in law and on facts of the case in deleting Rs.16,45,11,241/- which was added to the income of the assessee on account of as unexplained deposits.

(4) That the commissioner of Income Tax (Appeals) has erred in law and on facts of the case in ignoring that the submissions made by the assessee during the assessment proceedings were incomplete and inadequate and that they were not authentic and weren't able to prove creditworthiness of the parties from which investments/deposits were made.

(5) That the commissioner of Income Tax (Appeals) has erred in law and in facts in relying on the submissions filed by the assessee which were inadequate, incomplete, not genuine, not reliable and already rejected by AO during assessment stage.

(6) That the commissioner of Income Tax (Appeals) has erred in law and on facts by neither conducting her own independent and effective inquiry nor giving a direction as per subsection 4 of section 250, Income Tax Act and ignoring Hon'ble Delhi High Court's judgment in the case of "The Commissioner of Income Tax - II Vs M/s Jansampark Advertising and Marketing (P) Ltd.

(7) (a) The order of the CIT(Appeals) is erroneous and not tenable in law and on facts.

(b) The appellant craves leave to add, alter or amend any/all of the grounds of appeal before or during the course of the hearing of the appeal."

C. O. No. 404/DEL/2015 &
C. O. No. 404/DEL/2015 :

3. The assessee in both the cross objections has raised the following common grounds of appeal :-

"1. That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. AO in framing impugned reassessment order and that too without assuming jurisdiction as per law and without complying the mandatory conditions of section 147 to 151 of the Act.

2. That in any case and in any view of the matter, action of Ld. CIT(A) in confirming the action of Ld. AO in framing impugned reassessment order u/s 147/143(3) is beyond jurisdiction, bad in law and against the facts and circumstances of the case.

3. In any view of the matter and in any case, impugned assessment order could not have been passed under the law, more so when original assessment was annulled.

4. That the cross objector craves the leave to add, amend, modify, delete any of the ground(s) of cross objection before or at the time of hearing."

4. Since the issue involved in the Appeals filed by the Revenue and the Cross Objections filed by the assessee are common in both the A.Y 2009-10 and 2010-11, brief the facts of the case in A.Y 2009-10 is considered, which are as under:- The return was filed on 25/09/2009 declaring income of Rs.11,722/- for A.Y 2009-10. Originally assessment in the case was completed on 23/12/2011 on an income of Rs.16,65,61,150/- which inter alia included protective addition in respect of unexplained share capital and share premium of Rs. 1,94,45,100/- and unexplained other deposits of Rs. 14,61,64,641/-.

5. Aggrieved by the said assessment order, the assessee filed an application under 264 of the Act before the Commissioner of Income Tax Central-2 New Delhi who vide order dated 20/03/2014 held as under:-

"Jurisdiction u/s 153C for assessing 6 years preceding the year in which search was initiated can be invoked only when impugned documents are seized u/s 132 or requisitioned u/s

133A. It cannot be invoked in the case of impounding of documents u/s 133A. The very foundation for instituting the proceedings u/s 153C is missing. It has been held by ITAT. Chennai in the case of ACIT vs. *M.N. Rajaramah (2010) 5 TTR (TRIB) 261 Chennaihand High Court of Gujarat in the case of CIT vs Meghmani Organics Ltd. (2014) 221 Taxman 25 (Guj.) that where the very foundation for instituting the proceedings by A.O. was missing, the consequential actions and orders must fail and that assessment made pursuant to such proceedings would have to be annulled. Since in the present cases there is no proper assumption of jurisdiction, the assessments made pursuant to such proceedings are annulled herewith. No submissions have been filed on other grounds. However, since the assessment is being treated as null and void, I do not find it necessary to examine other issues raised by the assessee as these grounds have become in-fructuous."*

6. Subsequently, the A.O recorded the reasons u/s 147 of the Act after receipt of the proposal of the CIT accorded on 26/03/2014 u/s 151 of the Act. The Ld. A.O. recording the satisfaction that income chargeable to tax has been escaped the assessment in following manners:-

"The assessment or the year under consideration was made u/s 143(3) r.w.s 153C on 23.12.2011 at a total income of Rs. 16,65,61,153/- as against returned income of Rs. 11,722/-.

Aggrieved by the above order, the assessee filed revision application u/s 264 of the Income Tax Act, 1961 before CIT, (Central)-ll, New Delhi. The assessee challenged assumption of jurisdiction u/s 153C on the grounds, that the satisfaction arrived by the A.O. is not based on documents found and seized from the premises of other person in whom action u/s 132 is initiated. The CIT, (Central) - II, New Delhi annulled the assessment order on the ground of incorrect assumption of jurisdiction u/s 153C.

However, the Ld. CIT (Central)-ll, has not adjudicated the ground on which the additions were made. Though, the assessee challenged the additions but no submissions were filed before the LD. CIT (Central)-ll, New Delhi as to why additions be deleted. In view of the fact, whereas no submission is made by the assessee in respect of the merits on which additions were made, it clearly shows that the assessee had nothing to say on these grounds.

However after perusal of the assessment records of the case following issues are found-

A) Expenditure of Rs. 9,37,690/- is required to be disallowed (except the statutory and obligatory expenses of ROC Filing Fee & Audit Fees) as the assessee hasn't submitted any evidences to support its claim of expenditures and establish its business purpose. Hence sum to the tune of Rs. 9,37,690/- has escaped assessment.

B) From the perusal of the bank statements it was noticed that there are some cash deposits in the bank accounts of the assessee for which no explanation and/or evidence has been filed to explain their source and to establish their source. Hence, sum to the tune of Rs. 2,000/- is required to be treated as unexplained cash deposit which has escaped assessment.

C) The assessee company had received Rs. 1,94,45,100/- as share application during the assessment year. The assessee hasn't filed any documentary evidence to establish the identity and capacity of the persons who have allegedly given Share application money or to establish the genuineness of these transactions. Hence, sum to the tune of Rs.1,94,45,100/- is required to be treated as unexplained other deposits, which has escaped assessment on protective basis in interest of revenue.

D) From perusal of the bank statements and other documents is its seen that there are unexplained deposits other than cash to the tune of Rs.14,61,64,641/-. These deposits are unexplained even after considering the unexplained other liabilities, share capital & share premium. Hence, sum to the tune of Rs. 14,61,64,641/- is required to be treated as unexplained other deposits which has escaped assessment on protective basis in interest of revenue.

It is further stated that assessee was one of the intermediary companies used by Shri Aseem Kumar Gupta for providing accommodation entries as admitted by Shri Aseem Gupta.

I, therefore, have reasons to believe that this amount of Rs.16,65,49,431/- represents income of the assessee chargeable to tax which has escaped assessment for Assessment Year 2009-10."

7. A notice u/s 148 of the Act dated 27/03/2014 was issued and further proceedings u/s 143(3) of the Act has been started by issuing notice u/s 143(2) and notice u/s 142(1) of the Act. The assessee participated in the assessment proceedings and produced documents and submissions. The assessment order came to be passed on 02/03/2015 by making addition of unexplained share capital of Rs. 14,50,66,141/- and unexplained bank deposits of Rs.16,45,11,241/- and computed the income of the Assessee at Rs. 30,95,89,154/- as against returned income of Rs.11,772/-.

8. Aggrieved by the assessment order dated 02/03/2015 for the A.Y 2009-10, the assessee preferred an appeal before the CIT(A). The CIT(A) vide order dated 28/09/2015 deleted the entire addition made by the A.O.

9. Similarly, in the case of A.Y 2010-11, the A.O. by way of assessment order dated 02/03/2015 passed u/s 147/143(3) of the Act disallowed the claim of loss of Rs. 1,01,33,791/- and made addition of Rs. 9,86,97,514/- on account of unexplained bank deposits. The assessee filed appeal before the

CIT(A) and in the Appeal filed by the assessee, vide order dated 28/09/2015 the CIT(A) deleted the entire addition.

10. Aggrieved by the order of the CIT(A) dated 28/09/2015 deleting of the entire addition for A.Y 2009-10 and 2010-11, the revenue preferred the appeals in ITA No. 6219/2015 A.Y (2009-10) and ITA No. 6220/Del/2015 (A.Y 2010-11). The assessee filed Co No. 404 /Del/2015 (A.Y 2009-10) and C.O No.405/Del/2015 (A.Y 2010-11) by challenging the reassessment order on the ground that framing of reassessment order is without assuming jurisdiction and without complying the mandatory conditions contemplated u/s 147 to 151 of the Act which is beyond the jurisdiction of the A.O.

11. The assessee has challenged the assumption of jurisdiction and contended that the assessment order is contrary to Section 147 to 151 of the Act and the same is beyond jurisdiction and without complying the mandatory conditions of Section 147 to 151 of the Act. Considering the fact that the Assessee has challenged on the legal issue in the Cos, we deem it fit to decide the Cross objection filed by the Assessee before deciding the Appeal filed by the Revenue.

12. The Ld. Counsel for the assessee canvassing on the Cross Objections find for Assessment Year 2009-10 and 2010-11, submitted that the CIT(A)

erred in law and on facts in confirming the action of the Ld. A.O. in framing impugned reassessment order without assuming jurisdiction as per law and without applying mandatory conditions of Section 147 to 151 of the Act and contended that since the Assessment was originally ccompledted u/s 143(3)/153C was annulled, hence, assessment u/s 147 could not have been done by the A.O. The Ld. Counsel for the assessee relied on several case laws in support of the contention and also the order passed by the coordinate Bench in the following cases:-

(i) DCIT vs. M/s Shrey Infradevelopers (P) Ltd. – ITA 6229/Del/2015,
(ii) DCIT vs. Shushree Securities Pvt. Ltd.- ITA No. 6225/Del/2015
(iii)DCIT vs. Chotti Leasing & Finance Pvt. Ltd.- ITA No. 6211/Del/2015 & other appeals, wherein the Coordinate Bench has relied on the order in Assessee's own case for the A.Y. 2008-09 in ITA No.6218/Del/2019 & CO No. 403/Del/2015. Thus, the Ld. AR submitted that the Assessee's Cross Objections deserves to be allowed.

13. Per contra the Ld. DR argued that, originally the AO passed an order u/s 143(3) r.w.s. 153C of the Act, the said order was challenged u/s 264 of the Act by the assessee before the Ld. CIT and the Ld. CIT had declared the assessment order as null and void, vide order dt. 20.03.2014, wherein it is specifically held that *'the concerned documents A-19, A-36 were impounded during survey u/s 133A and were not seized and therefore the order deserves to be annulled cancel as the provisions of section 153C would not applied to the*

facts of the case. The Ld. CIT has annulled the assessment on the technical grounds that the provisions of section 153C does not apply to the facts of the case and therefore has not decided the issues/additions on merit. Once the assessment has been annulled on technical grounds without going into the merits of the case, the order does not survive in the eye of the law and therefore there was no original assessment made in this case. Therefore there is no embargo to the Department to initiate proceedings under section 147/148 of the Act. The Ld. DR submitted that the said issue have been settled by Gujarat High Court in the case of Krishna Developers & Co. vs. DCIT in Special Civil Application No. 8352 of 2017 and the said judgment of the Hon'ble Jurisdictional High Court has been affirmed by Hon'ble Supreme Court of India reported in [2018] 91 taxmann.com 306 (SC). Thus, the Ld. DR submitted that the C.O. filed by the Assessee is devoid of merit.

14. We have heard the parties perused the material available on record. In the instant case, the Assessing Officer completed the proceedings u/s 153C on 23.12.2011, the assessee filed a petition u/s 264 of the Act before the CIT. The Ld. CIT allowed the petition filed by the Assessee u/s 264 of the Act and held that the assessment proceedings u/s 153C of the Act as invalid since it was carried out 'without material on record found during the search proceedings'. It is found that neither assessee has raised any grounds on merit of the case nor the CIT examined or decided issue on merits while deciding with the

petition filed by the assessee u/s 264 of the Act. Thus it is the assessment order has been annulled by the CIT u/s 264 of the Act only based on the technical reason without going into the merits of the case. Since period of four years had not passed from the end of relevant assessment year, the Assessing Officer issued the notice of 147 of the Act for reopening of the case. The Assessing Officer has observed that the notice was sent as per the provisions of law and fell within his exercising of his jurisdiction since period of four years had not passed from the end of relevant assessment year. Going through the reasons of the AO, it is seen that the AO was right in issuing note u/s 147 of the Act as there is no embargo to the A.O. since the period of 4 years had not passed from the end of the Assessment Year, as various judgments of the Hon'ble the Apex Court and High Courts have time and again held so.

15. The Hon'ble High Court of Gujarat in the case of In the case of Krishna Developers & Company Vs. Deputy Commissioner of Income-tax, Circle-7(2) in Special Civil Application No. 8352 of 2017, dated 25-07-2017, held that merely the reasons recorded by the Assessing Officer proceeded on same basis on which Assessing Officer initially desired to make additions but which failed on account of setting aside order of assessment, it would not preclude the Assessing Officer from carrying out exercise of reopening of assessment. It has been held that since the original assessment order was quashed on technical grounds, which means the original order does not survive in the eye of law.

Thus, there is no original assessment remained valid and therefore the later proceedings initiated u/s 147 of the Act was not any change in opinion, but the same being initiated following the due provisions of law. The relevant portion of the Judgment of the Hon'ble Gujarat High Court in the case of M/s Krishna Developers & Co. (supra) are reproduced as under:

> *"12. Facts of the case are simple, undisputed but somewhat peculiar. We may summarise such facts. The Assessing Officer wanted to scrutinise the return for the assessment year 2012-2013 for which notice under section 143(2) of the Act was issued on 23.9.2013 and dispatched for service on 24.9.2013. The position which is concluded by virtue of the order of the Appellate Commissioner is such notice was not served on the assessee before 30.9.2013. The assessee raised such contention before the Assessing Officer and also participated in the assessment. The Assessing Officer rejected the ground of non service of notice and taxed the proceeds out of sale of land as the business income. In the appeal, CIT (Appeals) held that the assessment was invalid since it was carried out without notice under section 143(2) of the Act. In that view of the matter, CIT (Appeals) did not examine the assessee's contention regarding the additions made by the Assessing Officer. This order of the CIT (Appeals) has become final. After this order was passed, the Assessing Officer issued the impugned notice for reopening which was done within a period of four years from the end of relevant assessment year.*
>
> *13. In light of such facts, we need to test the assessee's contentions. Regarding the nature of income having been scrutinised in the original assessment, we cannot accept the stand of the assessee. We may recall, counsel for the assessee had argued that the issues having been examined in the original assessment, the same cannot form the basis for reopening the assessment. Had the scrutiny assessment resulted into an opinion different from the one now propounded by the Assessing Officer in the reasons recorded, this would be a case of change of opinion. However, in the present case, the Assessing Officer proceeded*

to pass the order of assessment discarding the assessee's objection of non service of notice and in which he held that income generated from the sale of land was a business income. When such order was set aside on the ground of invalidity, having been passed without service of notice, the order does not survive in eye of law. There is thus no original assessment. There is no opinion of the Assessing Officer on record. There is no question of the assessee's return having been scrutinised. There is therefore, no change of opinion.

14. We may test the petitioner's contention regarding merger. Section 147 of the Act, as is wellknown, permits the Assessing Officer to assess or reassess the income chargeable to tax which has escaped assessment. The proviso to section 147 of the Act however provides that the Assessing Officer may assess or reassess such income, other than the income involving matters which are the subject matters of any appeal, reference or revision, which is chargeable to tax and has escaped assessment. The essence of this proviso is that the income involving the matters which are the subject matters of appeal, reference or revision, cannot be a subject matter of reopening of the assessment. In other words, on same subject matter, there cannot be parallel consideration by the Assessing Officer in the reopened assessment and by higher officer or authority in appeal, reference or revision. For applicability of this proviso and the principle of merger flowing from such proviso, what is necessary is that there has to be income involving the matter which is the subject matter of any appeal, reference or revision and in such a case, it would not be open for the Assessing Officer to make any assessment or reopening with respect to such income. The stress here is on the income involving the matters which are the subject matter of further proceedings.

15. In the case on hand, the assessee had raised two contentions before the Commissioner (Appeals). First was with respect to the validity of the assessment framed by the Assessing Officer without service of notice and second was with respect to merits of additions made by him in such order of assessment. The Commissioner (Appeals) confined his comments only to first of his contentions and declared that the assessment was invalid since it was framed without service of notice. In that view of the matter, he refused to comment on the assessee's

contention on merits of the additions. Essentially, therefore, the order of Commissioner (Appeals) dealt with only one part of the assessee's appeal and refused to enter into the other part. The order of Commissioner, therefore, was confined to the ground of invalidity of assessment per-se and not on the merits of the additions made. The reopening is based on the belief of the Assessing Officer that the sale proceeds should be taxed as the business income and not as capital gain. This subject matter was not a part of the order of the Commissioner (Appeals). The Commissioner (Appeals) having entertained only part of the assessee's appeal, the principle of merger as flowing from the proviso to section 147 of the Act would not apply.

16. In this context, we may refer to the decision of Supreme Court in case of Raja Mechanical Co. (P.) Ltd. (supra). It was a case where the assessee had challenged adjudication order passed by the authority. Such appeal was rejected on the ground that the appeal was filed beyond a period of delay which the appellate authority could not condone. Further appeal of the assessee was rejected by the Tribunal, upon which, the assessee preferred an application for rectification urging the Tribunal to decide the issues on merits and not only on limitation, which was rejected by the Tribunal. The assessee approached the High Court and sought a reference. High Court refused to call for a reference. Supreme Court confirmed the view rejecting the assessee's contention that the order of adjudicating authority having merged with that of the appellate authority, the Tribunal should have examined the issue on merits.

17. We may now refer to the decisions cited by the learned counsel for the petitioner of this Court in support of his contention regarding merger.

(a) Radhawami Salt Works case (supra) and connected matter, judgment dated 14.6.2017), was a case where an issue on which the Assessing Officer wanted to reopen the assessment was pending in appeal before the Commissioner. It was in this context, it was observed that there cannot be two separate considerations to the same subject matter relatable to the income, one by the appellate authority or forum and another by the Assessing Officer in fresh assessment.

(b) In case of United Phosphorus Ltd. (supra), the Court on facts held that in respect of items for which assessment is sought to be reopened

has merged with the order of Commissioner (Appeals) and as such there is no independent existence of the assessment, the assessment therefore could not be reopened in respect of such items.

(c) In case of National Dairy Development Board (supra), on facts, the Court applied the principle of merger to prevent the Assessing Officer from carrying out reassessment.

(d) In case of Doshi Printing Press (supra) and connected matters judgment dated 9.2.2015), the Court applied the principle of merger finding that against the order of assessment, the assessee had filed appeal and the appellate authority had modified the order of assessment.

18. This brings us to the last contention of the counsel for the assessee that the Assessing Officer could not have issued notice of reopening to bypass or circumvent the statutory period for issuance of notice under section 143(2) of the Act. The argument was that power of reopening the assessment cannot be exercised to overcome the situation where scrutiny assessment is not possible, for want of service of notice under section 143(2) of the Act within the statutory time period. As is well-known section 143 of the act pertains to assessment. Subsection (1) of section 143 provides the manner in which the Assessing Officer would process a return filed by the assessee. Sub-section(2) of section 143 provides that where a return has been filed and the Assessing Officer considered it necessary or expedient to ensure that the assessee has not understated the income or has not computed excessive loss or has not underpaid the tax, he shall serve on the assessee a notice requiring him on the specified date to attend his office or to produce or cause to be produced any evidence on which the assessee may rely in support of the return. This notice under sub-section(2) of section 143 of the Act before a scrutiny assessment can be undertaken and assessee's returned income can be questioned, is held to be mandatory in nature. Proviso to sub-section(2) of section 143 lays down the time limit within which such a notice can be issued.

19. On the other hand, section 147 of the Act pertains to income escaping assessment. Under the said provision, if the Assessing Officer has the reason to believe that any income chargeable to tax has escaped assessment, he may assess or reassess such an income and also any other income chargeable to tax which has escaped assessment and which

comes to his notice subsequently in the course of the assessment proceedings. Exercise of jurisdiction under section 147 of the Act for reopening of the assessment therefore requires a formation of belief on part of the Assessing Officer that income chargeable to tax has escaped assessment. Such belief should be formed bona fide and on the basis of tangible material on record. If these requirements are satisfied, it would be open for the Assessing Officer to assess or reassess the income of an assessee after issuing the notice under section 148 of the Act.

20. Nothing contained in the language of section 147 would permit us to hold that even if all the parameters to enable the Assessing Officer to assess or reassess the income by reopening the assessment are present, same may not be permitted in cases where the original assessment framed by the Assessing Officer has failed on any technical ground, such as in the present case i.e. want of service of notice under section 143(2) of the Act. Once the original assessment is declared as invalid as having been completed without the service of notice on the assessee within the statutory period, there would be thereafter no assessment in the eye of law. The situation therefore, be akin to where return of the assessee has been accepted without a scrutiny. Reopening of the assessment, if the Assessing Officer has the reason to believe that income chargeable to tax has escaped assessment, would be entirely permissible under section 147 of the Act. Merely on the ground that the reasons recorded by the Assessing Officer proceeded on the same basis on which the Assessing Officer initially desired to make additions but which failed on account of setting aside the order of assessment, would not preclude the Assessing Officer from carrying out the exercise of reopening of the assessment. In the present case, facts are peculiar. It is not as if the Assessing Officer after noticing certain discrepancies in the return of the assessee, slept over his right to undertake the scrutiny assessment. The scrutiny assessment was initiated by issuance of notice under section 143(2) of the Act on 23.9.2013. It was also dispatched for service to the assessee on 24.9.2013 by Speed Post on the last known address. The Commissioner (Appeals) however, held that there was no proof of service of notice and since section 143(2) requires service of notice, the assessment was framed without complying with the mandatory requirements.

21. We may refer to some of the decisions on the point. In case of A G Group Corpn. (supra), the Court noticed that at one point the Revenue had reopened the assessment of the assessee. However, such assessment failed on the ground that the reasons were not recorded by the Assessing Officer for issuing such a notice. On the same ground, the Revenue issued fresh notice of reopening which was challenged before the High Court. The High Court held that when the earlier order stood annulled on the ground of lack of fulfillment of the basic requirement under section 147 of the Act, there was no bar against reopening the assessment once again on the same grounds after following due procedure in accordance with law."

16. The above referred Judgment of the Hon'ble Gujarat High Court in the case of Krishna Developers & Co. (supra) was challenged before the Supreme Court in SLP (C) No. 23760 of 2017. The Hon'ble Supreme Court vide order dt. 08.02.2018 confirmed the order of the Gujarat High Court and dismissed the Special Leave Petition filed by the assessee as the same is devoid of merit. Therefore, the Hon'ble Supreme Court has settled the law that merely because reasons recorded by Assessing Officer proceeded on same basis on which it initially desired to make additions but which failed on account of setting aside order of assessment, it would not preclude Assessing Officer from carrying out exercise of reopening of assessment in accordance with law.

17. The Hon'ble Supreme court in the recent Judgment in Civil Appeal No. 6580 OF 2021 in the case of Abhisar buildwell Pvt. Ltd. Vs. Principal Commissioner Income tax, Central-3, while holding that, in respect of completed/unabated assessments, no addition can be made by the AO in the

absence of any incriminating material found during the course of search under Section 132 or requisition under Section 132A of the Act, 1961, however, observed that the completed/unabated assessments can be re-opened by the AO in exercise of powers under Sections 147/148 of the Act, subject to fulfilment of the conditions as envisaged/mentioned under sections 147/148 of the Act and those powers are saved. The portion of the said ratio laid down by the Hon'ble Supreme Court are as under:

> *" iv) in case no incriminating material is unearthed during the search, the AO cannot assess or reassess taking into consideration the other material in respect of completed assessments/unabated assessments. Meaning thereby, in respect of completed/unabated assessments, no addition can be made by the AO in absence of any incriminating material found during the course of search under Section 132 or requisition under Section 132A of the Act, 1961. However, the completed/unabated assessments can be re-opened by the AO in exercise of powers under Sections 147/148 of the Act, subject to fulfilment of the conditions as envisaged/mentioned under sections 147/148 of the Act and those powers are saved."*

18. The Ld. A.R relied on the orders of the Coordinate Bench of the Tribunals wherein the Tribunal has taken a view that, once the AO rightly or wrongly assumed jurisdiction in framing the assessment order u/s 143(3) r.w.s. 147 of the Act, in view of the fact that once the assessment order is subject matter of

the further appeal, reassessment cannot be framed on the same issue on issuing notice u/s 148 as the original assessment gets merged with the order of the Higher Appellate Authority. In my opinion, the ratio laid down by the Hon'ble Supreme Court in the case of Krishna Developers & Co. (supra) and Principal Commissioner Vs. Abhisar Buildwell P.Ltd (Supra), which are having effect of binding precedent, therefore by relying on the ration laid on in the case of Krishna Developers & Co. and Principal Commissioner Vs. Abhisar Buildwell P. Ltd (Supra), we find no merits in the Ground No. 1 to 4 of the C.O. Accordingly, Ground No. 1 to 4 of the C.O. No. 404/Del/2015 And 405/Del/2105 are is dismissed. In the result C.O. No. 404/Del/2015 & 405/Del/2015 are dismissed.

ITA No. 6219/Del/2015 (A.Y 2009-10)

19. Now we take up the appeal filed by the Revenue which are against deletion of addition of Rs. 14,50,66,141/- which was added to the income of the assessee on account of unexplained share application money and amount of Rs. 16,45,11,241/- which was added to the income of the assessee on account of unexplained deposits. During the assessment proceedings while making the above said additions the Ld. A.O. held as under:-

> *"Unexplained share capital, share premium and unexplained bank deposits 6. During the year the assessee has reflected increase in share capital and share premium at Rs 6,48,170/- and Rs.1,87,96,930/- respectively. Vide questionnaire dated 01.01.2015 the assessee was*

requested to furnish the following information regarding the introduction of share application money:-

1 Specify the purpose for which there was need for additional funds and date of AGM/EGM when decision to Increase share capital was approved by shareholder,

2. The offer letter, proposal (terms of issue) information/voucher/booklet/project report etc. which was providing by you to the prospective investors in order to justify the decision of investment.

3. Furnish copy of complete share application form submitted by each investor alongwith Annexure, if any.

4. Furnish of copy of the annual return filed with ROC giving intimation in change of shareholding of the company.

In reply the assessee company has accepted the increase but failed to give any explanation regarding the nature and source of the increase.. It is worthwhile to mention here. that no reply, whatsoever has been furnished by the assessee for the quarries raised vide this letter dated 01.01.2015 as specified in para above. Since, source of share application money and identity & creditworthiness of parties is not proved. The addition on account of share capital Rs.6,48,170/- and share premium Rs.1,87,96,930/- will be made as the assessee company as income from undisclosed sources.

Satisfaction is hereby recorded that assessee has concealed the particulars of income.

Penalty proceedings u/s 271(1)(c) read with section 274 are hereby initiated separately.

7. Unexplained deposits

The bank reconciliation statements has been filed showing credit entries at Rs.16,09,16,298/- from different parties whereas the credit entries as per bank statement obtained from bank are reflected at Rs.16,45,11,241/-. Since, the amount of Rs.16,45,11,241/- is routed through the bank account it is being considered the receipt of the assessee company and for assessee's failure to establish the genuineness of the creditors the entire amount is treated as unexplained deposits of the assessee company and will be added as income of the company. This addition of Rs.16,45,11,241/- will cover the increase shown under head issued ubscribed and paid-up capital amounting to Rs.6,48,170/- and Rs.1,87,91,930/- i.e. total addition on this issue Rs. 14,50,66,141/-.

8. Satisfaction is hereby recorded that assessee has concealed the particulars of income. Penalty proceedings u/s 271(1)(c) read with section 274 are hereby initiated separately.

9. After discussion total income of the company is computed as under:-

1	*Income as per return*		*Rs. Rs.11,772/-*
	Add:-		
(i)	*Unexplaiend share capital*		*Rs. 14,50,66,141/-*
(ii)	*Unexplained bank deposit as discussed above*		*Rs.16,45,11,241/-*
Total			*Rs. 30,95,89,154/-*

20. In the Appeal filed by the assessee the addition made by the A.O. has been deleted wherein the ld. CIT(A) has observed as under:-

> *"13. As it is evident from the above submissions that the Assessing Officer has not considered the financial statements and has erroneously made the addition. I have also considered the facts, and I find that The Ld AO has just copy pasted the order passed u/s 153C and made the additions.*
>
> *13.1 I have considered the facts of the case, written submissions of the appellant and the findings of the Assessing Officer. I find that the appellant had filed complete details of credit and debit entries of its bank account and also the details of loans paid and interest earned there from giving the name of the party, principal amount of loan, interest earned thereon during the year, tax deducted at source on the interest income, net interest due / received and the balance interest receivable. On perusal of the details of credit entries filed by the appellant during the course of assessment proceedings, I find that clear narration was given against the credit entries. If the Assessing Officer had any doubt about the credit entries, he could have asked for further clarification from the appellant or confirmation from the concerned party. On perusal of the detail of the credit entries, such an action of the Assessing Officer was not at all justified. In view of the above facts and considering the evidence on record, I see no justification for the Assessing Officer in holding that the above transactions remained unexplained and making the impugned addition. Accordingly, the addition of Rs. 30,95,89,154/- made by the Assessing Officer is deleted. Ground raised in Appeal is allowed."*

21. Aggrieved by the said deletion the Revenue preferred the present appeal on the grounds mentioned above. The Ld. Departmental Representative vehemently submitted that the CIT(A) has erred in law and on facts of the case ignoring the fact that the submission made by the assessee during the assessment proceedings which were incomplete and in-adequate and that they were not authentic and were not able to proved the creditworthiness of the parties from which investments/deposits were made, the CIT(A) erred in law and relying the very same submission filed by the assessee which were inadequate incomplete not genuine not reliable, which were already rejected by the A.O. during assessment stage, the CIT(A) has further erred in not conducting independent and effective enquiry nor giving any direction as sub Section 4 of Section 250 of the I.T Act by violating the principal laid down by the Jurisdiction High court in the case of Commissioner of Incomes Tax Vs. M/s Jansampark Advertising Land Marketing (P) Ltd. therefore, submitted that the order of the CIT(A) is liable to be set aside.

22. Per contra, the Ld. Assessee's Representative relied on the order of the CIT(A) and submitted that the assessee has substantially proved the creditworthiness of the parties from which investment/deposits were made, the CIT(A) after analyzing the documents on record rightly deleted the additions made by the A.O. which requires no interference at the hands of the Tribunal.

23. We have heard both the parties and perused the material available on record. The Ground No. 1 to 6 raised by the Revenue are inter related i.e. with regard to sustaining the addition of Rs. 14,50,141/- towards share application money and sum of Rs. 16,45,11,241/- towards unexplained deposit. However, we find that there was calculation mistake committed by the A.O. in respect of share capital and share premium the A.O. mentioned in the assessment order that share capital was Rs. 6,48,170/- and share premium was Rs. 1,87,96,930/- but while calculating the same, of the above two figures as Rs. 14,50,66,141/- instead of Rs. 1,94,45,100/-. The Ld. CIT(A) deleted the addition on going through the submission of the assessee without satisfying the preliminary requirement of provision of Section 68 of the Act which mandates the assessee to prove the identity of the parties and creditworthiness of the creditors and also the genuineness of the transaction. These requirements are required to be satisfied by the assessee before the CIT(A) to apply any ratio laid down by the Courts. The ld. CIT(A) instead of discussing the documents produced by the assessee to prove the creditworthiness of the parties from which investments/deposits were made, genuinenity of the transaction, dwelled upon judicial ratios in the various cases laws relied by the Ld. Assessee's Representative which is highly in appropriate. On going through the order of the CIT(A), we are not in a position to find out how the assessee had satisfied the ingredients of Section 68 of the Act. It is further observed

that the Ld. CIT(A) could have caused independent enquiry or could have called for Remand Report from the A.O., which the CIT(A) failed to do so, but proceeded to delete the addition made by the A.O. Hence, we are not in a position to uphold the order of the CIT(A) on the issue in hand and accordingly we vacate the order of the CIT(A) and remit the issues in dispute to the file of the A.O. with a direction to the assessee to proved the identity capacity of the parties and genuineness of the transaction as required u/s 68 of the Act.

24. In the result, the Appeal of the Revenue is partly allowed for statistical purpose.

ITA No. 6220/Del/2015 (A.Y 2010-11) (Revenue)

25. The present appeal the assessment order u/s 147/143(3) of the Act came to be passed on 02/03/2015 by disallowing Rs. 1,01,33,791/-claimed as a loss on sale of investment and also made addition of Rs. 9,86,97,514/- as unexplained bank deposit in following manners:-

> ***"Claim of loss and unexplained deposits***
>
> *During the course of scrutiny of the papers on record it is seen that a sum of Rs. 1,01.33.791/- is claimed as loss on sale of investment. The assessee was required to substantiate the claim of loss but instead of furnishing any explanation it remained sent on the issue. Therefore, I am of the view that assessee has nothing to substantiate/explain in the matter. Therefore, the sum of Rs.1,01.33.791/-is being disallowed and will be added back towards income of the assessee as unexplained claim of loss.*

Further, on perusal of the bank reconciliation statement for year under consideration it is seen that there has been credit of Rs.9.86.99,282/- But as per the statement account of the assessee received from bank shows the credit of Rs.9,86,97,514/- during the year under consideration. The difference in the bank account itself shows that the accounts prepared by the company are not correct and cannot be relied upon Moreover, assessee's failure to produce any books of account also leads the adverse inference. Therefore, they entire sum of Rs.9,86,97,514/- is treated as unexplained especially in view of the fact that the name of depositors shown by the assessee are not the working companies and no evidence, whatsoever has been adduced by the company to prove their existence and credit worthiness. This addition of Rs.9,86,97,514/- will also cover the addition warranted on account of unexplained cash deposits.

Satisfaction is hereby recorded that assessee has concealed the particulars of income. Penalty proceedings u/s 271(1)(c) read with section 274 are hereby initiated separately.

7. After discussion total income of the company is computed as under:-

1	*Income as per return*	*:*	*Rs.4.485/-*
	Add:		
(i)	*Claim of loss disallowed as discussed above*	*:*	*Rs.1,01.33.791/*
(ii)	*Unexplained bank deposits as discussed above Total*	*:*	*Rs.9,86,97,514/-*
TOTAL			***Rs.10,88,35,790/***

8. Assessed accordingly on Rs. 10,88,35,790/- Give credit of pre-paid taxes. Charge interest u/s 234A, 234B & 244A (Withdrawal). Issue requisite forms & challan."

26. The Ld. CIT(A) on an appeal filed by the assessee deleted the additions made by the A.O. in following manners:-

"9. Ground no. 3 of appeal relates to the addition of Rs. 1,01,33,7917-U/s 68 on account of alleged loss of Rs. 1,01,33,791/- . The appellant submits that the additions have been made by the Ld AO without application of mind and without making the proper verifications. The Ld AO without appreciating the correct facts of the case has simply copied paste the assessment order passed U/s 143(3) on 26/12/2011 whereby the same has been annulled by the CIT Central-II in the order passed U/s 264 of the act on 20.03.2014. In the order passed u/s 147/143(3) of the I.T.Act 1961, the Ld. AO has stated that, from the perusal of Balance sheet it is seen that assessee company has claimed loss on sale of investment/commodities amounting to Rs. 1,01,33,791/- during the previous year. The assessee had debit the loss in the P&L account. The assessee has not filed any documentary evidence to establish the sales & purchase of commodities/investments assessee in this regard. Hence, Rs. 1,01,33,791/- is required to be added to the income of the assessee as it has escaped assessment.

9.1 In this regard, it is humbly stated that there was no loss showing in the profit and loss account of the assessee. The Ld AO has just copied paste the order passed u/s 153C and made the bogus additions causing hardship on the assessee. It is also

submitted that the assessee has also filed the Rectification request u/s 154 vide letter dated 20.05.2015 to rectify the order passed by the Ld AO but the AO has not considered the rectification request made by the assessee and denied the rectification vide letter dated 30.06.2015 by stating that the case is under appeal so the rectification request cannot be accepted and hence disposed off.

Finding

10. As it is evident from the above submissions that the Assessing Officer has not considered the financial statements and has erroneously made the addition. During the submissions, the Asssessee has submitted that; there was no loss showing in the profit and loss account of the assessee. I have also consdiderd the facts, and I find that the Ld. A.O. has just copy pasted the order passed u/s 153C and made the additions.

10.1. Hence, I allow the above ground of appeal and hereby delete the addition of Rs. 10,01,33,791/- so made."

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"Finding

12. I have considered the facts of the case, written submissions of the appellant and the findings of the Assessing Officer. I find that the appellant had filed complete details of credit and debit entries of its bank account and also the details of loans paid and interest earned there from giving the name of the party, principal amount of loan, interest earned thereon during the year, tax deducted at source on the interest income, net interest due / received and the

balance interest receivable. On perusal of the details of credit entries filed by the appellant during the course of assessment proceedings, I find that clear narration was given against the credit entries. If the Assessing Officer had any doubt about the credit entries, he could have asked for further clarification from the appellant or confirmation from the concerned party. On perusal of the detail of the credit entries, such an action of the Assessing Officer was not at all justified. If the Assessing Officer had any doubt about these credit entries, he could have asked for further clarification from the appellant or confirmation from the concerned party. During the course of appeal proceedings, the appellant even filed the confirmations of these parties who have confirmed the transactions with the appellant that resulted in credit entries in the bank account of the appellant. Therefore, considering the facts of the case, I see no justification for the impugned addition made by the Assessing Officer. Accordingly, the addition of Rs. 9,86,97,514/- made by the Assessing Officer on account of explained deposits is deleted. Ground raised in appeal is allowed."

27. We have heard both the parties and perused the material available on record. The Ld. A.O. while making the assessment specifically asked to substantiate the claim of loss of Rs. 1,01,33,791/- but the assessee remained silent, therefore, without there being any material, the A.O. disallowed the loss claimed by the assessee. During the appellate proceedings the main reason for deleting the addition was the A.O. has not made proper verifications and the A.O. has just copied and pasted the order u/s 153C of the Act. The CIT(A)

have only considered the submission of the assessee and came to conclusion that the A.O. has made the addition erroneously. The CIT(A) failed to make either independent enquiry or examining the facts by calling remand report from the A.O. Further, the Ld. A.O. while making the addition of Rs. 9.86,97,514/- on account of unexplained cash deposits on perusal of the bank reconcile statement for the year under consideration, found that there has been credit of Rs. 9,86,99,282/- but as per the statement of account the assessee received from the bank shown the credit of Rs. 9,86,97,514/- during the year under consideration, Therefore, the Ld. A.O. found that the '*difference in the bank account itself shows that the account prepared by the Company are not correct and cannot be relied on'.* Further since the assessee failed to produce any books of accounts, drawn adverse inference. Accordingly, treated entire Rs. 9,86,97,514/- as unexplained considering the fact that name of depositors shown by the assessee are not the working companies and no evidence whatsoever has been adduced by the Company to prove their existence and creditworthiness. During the appellate proceedings the CIT(A) has deleted the addition without controverting the above findings of the A.O. there is no whisper made by the CIT(A) regarding the existences of the Companies and the creditworthiness of the Companies and genuineness of the transaction. The Ld. CIT(A) neither made independent enquiry nor called for remand report from the A.O. and in the absence of same, the CIT(A) came to an erroneous conclusion and deleted the addition which is unsustainable

under law. Hence, we are not in a position to uphold the order of the CIT(A) on the issue in hand and accordingly, we vacate the order of the CIT(A) and remit the issue in dispute to the file of A.O. for de-novo adjudication.

28. In the result, Appeal of the Revenue in ITA No.6220/Del/2015 is partly allowed for statistical purpose.

Order pronounced in the Open Court on : 08 .08.2023.

Sd/-	**Sd/-**
(B. R. R. KUMAR)	**(YOGESH KUMAR U.S.)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated : 08/08/2023
** R.N., Sr. PS**
Copy forwarded to :

1. Appellants
2. Respondents
3. CIT
4. CIT (Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI