

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI 'B' BENCH, MUMBAI

Before Shri B.R. Baskaran (AM) & Shri Rahul Chaudhary (JM)

I.T.A. Nos. 673 & 674/Mum/2021 (A.Ys. 2014-15 & 2015-16)

Sumatichand Tolamal Gouti 80/82, Dhanji Street, Zaveri Bazar, Mumbai 400 003. PAN : AACPG1529L	Vs.	Dy. Commissioner of Income Tax, Central Circle – 4(2), Mumbai.
(Appellant)		(Respondent)

I.T.A. Nos. 2370 & 2516/Mum/2021 (A.Ys. 2014-15 & 2015-16)

Dy. Commissioner of Income Tax, Central Circle – 4(2), Mumbai.	Vs.	Sumatichand Tolamal Gouti 80/82, Dhanji Street, Zaveri Bazar, Mumbai 400 003. PAN : AACPG1529L
(Appellant)		(Respondent)

Assessee by	Shri Mani Jain
Department by	Shri Ashok Kumar Ambastha
Date of Hearing	28.07.2023
Date of Pronouncement	20.10.2023

ORDER

Per BENCH :-

These cross appeals are directed against the orders passed by Ld CIT(A)-52, Mumbai and they relate to the assessment years 2014-15 and 2015-16. Since common issues are urged in these appeals, they are being disposed of by this common order, for the sake of convenience.

2. The facts relating to the cases are stated in brief. The assessee herein is engaged in the business of manufacture and sale/export of Gems and

jewellery. It belongs to Gauti Group. The assessee along with other group concerns/family members was subjected to search operations under section 132 of the Act on 09-03-2015 by the Investigation wing of the Income tax department. Consequent thereto, the assessments were completed in the hands of the assessee for the above said year under section 143(3) read with section 153A of the Act.

3. The Kolkata investigation wing of the department had reported that many paper companies are indulging in providing accommodation entries in the form of share capital/share premium to various beneficiaries. It was noticed by the department that the assessee's group has received share capital/share premium from such paper companies. Accordingly, during the years under consideration, the AO has made following additions:-

- (a) Addition towards Making charges.
- (b) Addition towards Wastage claims.
- (c) Addition towards Profit on unrecorded sales in AY 2014-15
- (d) Addition made u/s 68 of the Act in AY 2014-15
- (e) Addition u/s 14A of the Act in AY 2014-15 and 2015-16.

The Ld CIT(A)

- (i) Confirmed the addition relating to "making charges in both the years under consideration.
- (ii) Granted partial relief in respect of addition relating to 'Wastage claims in both the years under consideration.
- (iii) Deleted the addition relating to profit on unrecorded sales in AY 2014-15.
- (iv) Deleted the addition made u/s 68 of the Act in AY 2014-15.
- (v) Granted partial relief in respect of disallowance made u/s 14A of the Act in AY 2014-15 and 2015-16.

Hence the assessee is in appeal in respect of items (i) and (ii) of the above list. The revenue is in appeal in respect of items (ii), (iii), (iv) and (v) of the above list.

4. We shall deal with these appeals issue wise. We shall first deal with the addition relating to making charges and wastage claims. We noticed that the assessee is engaged in the business of manufacture and sale/export of gold jewellery. The search officials noticed that the assessee has maintained quantity records in an excel sheet, which was akin to parallel books. The AO made further enquiries with the labourers. The information contained in the above seized material differed from the entries made in the books of accounts. Accordingly, the AO took the view that the entries found in the seized document is the correct one and accordingly took the view that the jewellery making charges and wastage claim have been recorded in excess in the books of account. Accordingly, the AO made addition towards jewellery making charges and jewellery wastage claim. The details of additions made by the AO in the years under consideration are tabulated below:-

Asst. Year	Making charges	Wastage claim
2014-15	66,79,671	2,21,28,651
2015-16	81,93,882	2,45,37,008

5. The Ld CIT(A) confirmed the addition relating to jewellery making charges and gave partial relief relating to wastage claim. Hence the assessee is challenging the decision of Ld CIT(A) in confirming the addition relating to making charges. With regard to wastage claim, the Ld CIT(A) confirmed the additions to the extent of Rs.40,44,550/- and Rs.36,71,606/- respectively in AY 2014-15 and 2015-16 and deleted the remaining additions. The revenue is challenging the relief granted and the assessee is challenging the additions confirmed by Ld CIT(A).

6. We heard the parties on these issues and perused the record. We notice that identical additions were made in the assessee's group concern named M/s Saurav Jewellers Pvt Ltd and they have been deleted by the co-ordinate bench, vide its order dated 28-10-2022 passed in ITA Nos. 999 & 998/Mum/2021 and ITA Nos. 2504/Mum/2021 on a detailed reasoning. For the sake of convenience, we extract below the order passed by the co-ordinate bench in the above said case:-

“3. The ground Nos.2-4 raised by the assessee for the A.Y. 2014-15 are challenging the disallowance of making charges amounting to Rs.49,83,491/-.

3.1. We have heard rival submissions and perused the materials available on record. We find that assessee is engaged in the business of manufacturing and trading of gold bearings and export of gold jewellery. The assessee is deriving business income which has been offered to tax in the return of income and had filed its return of income for the A.Y.2014-15 on 31/10/2014 declaring total income of Rs.3,63,52,110/-. A search and seizure action was carried out u/s.132(1) of the Act along with other cases of Gauti Group on 09/03/2015. The parent company of Gauti group is M/s. Sumatichand Gauti Jewellers pvt ltd. Consequent upon search, assessee's case was centralised and the jurisdiction vested with the ld. AO stated hereinabove. It was found in the search action that Gauti group has been concealing its correct income by obtaining accommodation entries in the form of introduction of share capital from companies and inflating making charges and wastage so claimed in the books of accounts of various group entities. During the search operation, parallel books of accounts of Gauti group were found to have been placed at premises known as 17/3, S. N. Das Lane, Kolkata. Accordingly, soft copy in the form of hard disc containing the back up of soft data taken by the assessee in pen drive was also seized during the search action. During the course of search, Shri Kirti Kumar Gauti in his statement recorded u/s.132(4) of the Act on 11/03/2015 confirmed that the premises at 17/3, S.N.Das Lane, Kolkata-700 050 is the secret premises kept by the group for the specific purpose of maintaining parallel data of four entities of the group i.e. Sumati chand Gauti Jewellers Pvt. Ltd., Saurabh Jewellers Pvt. Ltd., (assessee herein), SEG Exports Pvt. Ltd., and M/s. Soorajmal Gauti, proprietary concern of Shri Sumati chand Gauti. Such data was maintained in MS Excel sheets. Year wise MS Excel sheets were prepared on the basis of issue and receipt vouchers handled by Shri Kirti Kumar Gauti with karigar working for the said entities of the group. The ld. AO concluded that data contained in such MS Excel Sheets reveal that the group had been indulging in claiming excess amount of making charges and wastage in regular books

of accounts of the said four entities of the group. Admittedly, the said excel sheets contained the data of raw gold received from various banks, the gold issued to the Karigars - Shri Lob Ghorai and Shri Golok Patra, among other karigars, jewellery received from them after the job work and the closing balance of gold lying with Karigar.

3.2.The search operations were also conducted in the premises of Karigars Shri Lob Ghorai and Shri Golok Patra on 09/03/2015. The seized papers impounded from residential premises of Shri Lob Ghorai on 09/03/2015 was marked as LKG/03. Similarly papers were seized from the residential premises of Shri Golok Patra during the course of search on 09/03/2015. These papers were confronted with Shri Kirit Kumar Gauti who admitted in his statement on oath recorded u/s.131 of the Act on 11/08/2015. Further commission u/s.131(1)(d) of the Act was issued on DDIT (Investigation), Unit 1(3) Kolkata requesting him to record a statement on oath u/s.131 of the Act from Shri Lob Ghorai. Accordingly statement on oath was recorded from Shri Lob Ghorai on 21/08/2015 wherein it was confirmed that the typed excel sheets found and seized contain the real transaction done which has issue of raw gold, purity, jewellery given back to M/s. Sumatichand Gauti Jewellers Pvt. Ltd., and its other concerns, closing balance etc. The Id. AO concluded that the excel sheets maintained is nothing but parallel books of accounts / parallel data maintained by the assessee containing real transactions.

3.3.The Gauti group is engaged in the business of manufacturing of gold jewellery and trading in jewellery. Bullion trading is carried out from both the places i.e. Mumbai and Kolkata. However, the jewellery manufacturing process is carried out and controlled only by the group entities based in Kolkata. The business operations of bullion trading takes place in the domestic market whereas the business operation in relation to jewellery manufacturing are mostly done in the export market. The jewellery is manufactured in Kolkata and the same is generally sold in the export market. In the domestic market, the group entities buy duty paid gold from banks and sell it to various jewellers in the local market. Apart from sale of bullion these entities also sell manufactured jewellery item in the domestic market. As regards exports of jewellery items manufactured by the group entities based in Kolkata, the following process is involved:-

- a) Receipt of orders
- b) Import / purchase of raw material / gold bars from banks on credit.
- c) **Giving Orders to Karigars for Bullion Manufacturing:-**

The gold purchase from banking channel is issued to various karigars along with specifications, item code etc. According to Id. AO, Karigars are paid making charges and are allowed to keep the gold wastage as part of their payment. At the time of issuance of gold to karigars, the issue voucher is prepared in the name of concerned karigar and the entry for the same is made in the stock register. Apart from getting the manufactured jewellery from

Karigar, the group entities also have a dedicated manufacturing unit in SEZ i.e. Mani Kanchan at Kolkata. These entities import gold duty free.

d) **Receipt of Finished Jewellery:-**

After the jewellery is manufactured, the same is received from Karigar and issued receipt vouchers and the corresponding entry is made in the stock register.

e) Export of finished jewellery.

3.4. The ld. AO observed that from 30-35 Kargiars working for the group entities which manufacture jewellery items and give it back to the group entities for which they charged certain rate / amount of making charges and / or wastage.

3.5. The statement of Karigars i.e. Shri Lob Ghorai and Shri Golok Patra were recorded during the course of search wherein they had stated that actual making charges received by them is Rs.2/- per gram whereas cheque they had received was for Rs.13/- to 18/- per gram and difference is given back in cash to the assessee. Shri Kirit Gauti incharge of Kolkata operations of the group, in his statement recorded during the course of search proceedings accepted to that actual making charges paid of Rs.3/- per gram. The excel sheets termed as alleged parallel books seized from the premises showed that actual making charges were lower than making charges debited in the books of the assessee. These excel sheets for the period 01/04/2009 to 09/03/2015 (A.Y.s 2010-11 to 2015-16) are enclosed in pages 107 to 126 of the paper book. The ld. AO based on the statement recorded from these karigars concluded that the making charges is accepted only at Rs.3/- per gram and proceeded to disallow the excess making charges for A.Yrs. 2014-15 in the sum of Rs.49,83,491/- and Rs.25,40,622/- for A.Y.2015-16 respectively. The ld. CIT(A) prima facie dismissed the findings of the ld. AO as the disallowance has been made based on the statements recorded during the search. He further held that the making charges of the karigar are included in the wastage of gold in jewellery making and therefore no separate payments are required to be made to them for labour charges.

3.6. We find that the primary basis of making the addition is the excel sheets found and seized during the course of search, contents of which were explained by karigars i.e. Shri Lob Ghorai and Shri Golok Patra in their respective sworn statements. But it is pertinent to note that the said karigars had retracted their statements immediately after the search on the ground that the original statements were recorded from them under pressure and that the karigars were made to sign a pre-typed statements by the search parties. The retraction is made in the form of an affidavit in a non-judicial stamp paper on 18/03/2015 by Shri Lob Ghorai and on 11/05/2015 by Shri Golok Patra. Both these affidavits are forming part of the paper book filed and placed on record before us. In the said affidavit, both the karigars had

affirmed that the concerned officer had given them a written statement and asked to sign under oath and did not even allow them to read the contents of the statement. Both the parties had even affirmed that the original statements were recorded under pressure from the Income Tax authorities and they were not having proper mental balance at the time of giving those statements. It was submitted by the Id. AR that the contents of the affidavit filed by the karigars gets further strengthened by the fact that Shri Lob Ghorai (karigar) is not even educated and does not know English, however, the entire statement has been recorded from him in English whereas the signature has been made by him in Bengali. This fact is evident from page 65 of the paper book containing the statement from Shri Lob Ghorai dated 09/03/2015. However, this is not the case with Shri Golok Patra in English. We find that Shri Golok Patra in his statement recorded on 09/03/2015 had replied vide reply to Question No.6 while explaining the modus operandi of the business, wherein he had stated that he would receive 24 carat gold bars from Gauti group, then he will mix alloy to make it 22 or 21 carat, thereafter, those gold bars along with alloy would be handed over by him to different karigars. During this process, little wastage would be incurred. After making jewellery, he would hand over the manufactured jewellery to Gauti group. The Id. AR submitted that this answer goes to prove that the making charges are to be paid to Mr. Golok Patra (karigar) and to other sub-karigars. Admittedly all those sub-karigars are engaged by the main karigar. The assessee is no way connected with the sub-karigars. The same is with the case of another Karigar Shri Lob Ghorai. The Id. AR submitted that statement given to Shri Lob Ghorai and Shri Golok Patra is that only Rs.2/- to 3/- per gram has been charged as making charges, had to be understood in a way that they would be getting only Rs.2/- to 3/- per gram and remaining payments of Rs.10 to Rs.11/- per gram would be passed to the sub-karigars who actually engage in the manufacturing of jewellery. The Id. AR also drew the attention to the statement of Shri Lob Ghorai wherein the word "assessee" has been mentioned in several places. He argued that a layman like Shri Lob Ghorai while making a statement would never mention the word "assessee" instead would only refer in person by name. This goes to the prove that it is only a pre-typed statement given by the search party to Shri Lob Ghorai and Shri Lob Ghorai signing the same. Further, in response to Question No.12 by Shri Lob Ghorai, it has been stated that TDS is deducted on making charges at Rs.2/- per gram only which is factually incorrect as the TDS was deducted on the entire amount of Rs. 12/- to 13/- per gram. The Id. AR in this regard drew our attention to the ledger account of Shri Lob Ghorai enclosed in page 127 of the paper book. The Id. AR accordingly submitted that the statements recorded from Shri Lob Ghorai and Shri Golok Patra could not be relied upon at all as it contains (i) pre-typed statement given by the search party (ii) factually incorrect statements regarding TDS (iii) the word "assessee" being mentioned regularly by layman like Shri Lob Ghorai and Shri Golok Patra. Accordingly, he argued that the said statements which is the sole basis of making addition cannot be relied upon. Further, the Id. AR argued that the

statements given by Shri Lob Ghorai and Shri Golok Patra that difference of Rs.10/- to Rs.11/- per gram towards making chares were withdrawn by them in cash and given back to the assessee is to be understood in the manner that the said cash payments were not given back to the assessee but instead paid to the small sub-karigars by them towards the work actually carried out by these sub-karigars in manufacturing of jewellery. In other words, the Id. AR submitted that the statements of Shri Lob Ghorai and Shri Golok Patra are to be understood in the following manner:-

- (a) Assessee will make Rs.12/- to Rs.13/- per gram to Shri Lob Ghorai and Shri Golok Patra towards making charges.
- (b) Shri Lob Ghorai and Shri Golok Patra being main karigars would retain Rs.2/- to Rs.3/- per gram as their making charges.
- (c) Shri Lob Ghorai and Shri Golok Patra will withdraw the cash i.e. Rs.10/- to Rs.11/- per gram and make payment to the sub-karigars engaged by them.
- (d) Shri Lob Ghorai had engaged 10 karigars and Shri Golok Patra had engaged 40 karigars.
- (e) No small sub-karigars would work without getting payment for their labour charges.

3.7. We find that there are certain factual inconsistencies in the statements recorded from both the karigars as detailed supra. In any event, it is a fact that both the karigars had duly retracted from their respective statements vide retraction affidavit already placed on record. Hence, no statements of the karigar could be relied upon for the purpose of making addition in the hands of the assessee. It is not in dispute that the assessee while making payments to karigars had deducted tax on the entire payment of Rs. 12/- to Rs.13/- per gram towards making charges. The main karigars i.e. Shri Lob Ghorai and Shri Golok Patra had duly accounted the same as their income in their books and had offered the net profit earned by them in their respective tax returns. In this regard, for A.Y.2014-15, we find from the audited financial statement of Shri Lob Kumar Ghorai, he had received total making charges of Rs. 48,15,373/- from Gauti group which includes assessee also and had inturn made making charges to Rs.33,08,138/- to sub-karigars. Thereafter, total net profit from business declared by Shri Lob Ghorai for A.Y.2014-15 is Rs.4,76,716/-. If the contention of the Revenue that only Rs.3/- per gram should be accepted as making charges, then these karigars i.e. Shri Lob Ghorai and Shri Golok Patra could not have reported the net profits as they are reflected in their respective income tax returns. This is evident from the table shown below:-

Name of Karigar	A.Y.	Receipts of making charges from Gauti group ranging from	Net profit from business shown in the return

		Rs.12/- to Rs.18/- per gram	
Shri Lob Ghorai	2012-13	50,86,852/-	4,42,048/-
	2013-14	31,76,043/-	4,27,113/-
	2014-15	37,31,598/-	4,76,716/-
Shri Golok Patra	2011-12	27,84,427/-	4,45,508/-
	2012-13	52,03,168/-	5,59,386/-
	2013-14	42,93,713/-	5,15,246/-
	2014-15	45,63,842/-	5,41,572/-
Shri Malay Kopat	2013-14	33,85,305/-	5,80,986/-
	2014-15	73,61,716/-	8,08,209/-
	2015-16	1,50,55,851/-	16,88,237/-
Shri Chinmay Kundu	2010-11	19,95,233/-	3,41,915/-
	2011-12	21,13,737/-	4,10,619/-
	2012-13	12,89,683/-	5,34,654/-
Shri Sankar Samanta	2012-13	17,04,184/-	4,55,568/-
	2013-14	25,47,699/-	5,76,830/-
	2014-15	58,03,158/-	7,10,400/-

3.8.If the making charges rate as determined by the Revenue at Rs.3/- per gram has to be considered, the aforesaid karigar's net profit declared by them from the business in their respective tax returns would be higher than the gross receipts of making charges at Rs.3/- per gram. This itself goes to prove that the making charges cannot be at Rs.3/- per gram. These facts and figures are staring on us to conclude that making charges paid by the assessee ranging from Rs.12/- to Rs.13/- per gram is acceptable and correspondingly the making charges determined by the Id. AO @Rs.3/- per gram is devoid of merits and baseless.

3.9.Hence, from the above facts and figures, it could be safely concluded that the disallowance of making charges made by the Id. AO by placing reliance on the statements recorded from two karigars is totally baseless.

3.10.Now what remains to be addressed is the corresponding statement given by Shri Kirit Kumar Gauti, the key person of the group. The Id. AO in his assessment order had stated that the statements of karigars were confronted with Shri Kirit Kumar Gauti who had also accepted that actual making charges is only Rs. 3/- per gram and that the difference is received back from the karigars in cash. In this regard, Shri Kirit Kumar Gauti had indeed filed police complaint on 13/03/2015 i.e. within four days from the date of search, making various allegations against the search team stating that he was brutally beaten up by the search team during the course of search and forced to record and sign a statement in the manner in which the search team wanted to record. The copy of the said police complaint is enclosed in page 62 of the paper book. However, no finding is given by the lower authorities with regard to this complaint, hence, we do not deem it fit to get into this

aspect of police complaint made by Shri Kirit Kumar Gauti, about the manner in which statements were recorded from him. However, we find that Shri Kirit Kumar Gauti had also retracted from his statement given on 09/03/2015 vide his retraction affidavit dated 18/03/2015 which is immediately after the search wherein he had affirmed that he was mentally put under pressure by the Income Tax authorities and he had lost his mental balance and accordingly, he had signed the statement without understanding the contents recorded thereon. He had also stated that under the threat from the department, he had no option but to agree on the dictated statement of the authority and signed on the said pre-written statement of the authority. It is pertinent to note that the said retraction affidavit was duly filed by the assessee before the Investigation Wing as well as before the Id. AO. Further, the promoter of the assessee group M/s. Sumatichand Gauti Jewellers had also categorically denied making payment of any excess making charges during the course of his statement on 12/03/2015 vide reply to Question No.62. Hence, the disallowance made based on statement from Shri Kirit Kumar Gauti also falls flat and deserved to be dismissed.

3.11. Even though the statements relied upon by the Revenue had been dismissed, the excel sheets were actually seized during the course of search. According to Income Tax department, the said excel sheets are parallel books maintained by the assessee. In this regard, we have gone through the said excel sheets which are enclosed in pages 107 of the paper book onwards. We find that these excel sheets are merely a quantitative tally meant for control purpose prepared by some employee of the assessee company to meet the track of flow of stock of gold / jewellery. The said excel sheet can never be construed as the books of the accounts or the parallel books of account. The Id. AR submitted that the standard wastage and standard making charges had been mentioned by the employee who had maintained this quantitative data. This is recorded by the employee just to have a control as to the quantity of jewellery received back from the karigar after reducing standard wastage thereon. In fact, in para 16.11 of the order of the Id. CIT(A), it has been categorically mentioned by Id. CIT(A) that the said excel sheets reveal entries concerning issue and receipt of gold to the karigars along with necessary weight of said issues / receipts. The Id. CIT(A) observed that however, the completeness of the data in the excel sheets are indeed in doubt as far as overall picture of gold quantity is concerned. The Id. CIT(A) further observed that although in the top of the sheet, making charges rate @Rs.3/- per gram was mentioned, karigar wise computations are not made in the said excel sheets. The Id. CIT(A) also observed that the most significant deficiency noted in such excel sheet is that no wastage has been shown in the cases where the semi-finished jewellery has been manufactured by the karigars. Similarly, no wastage has been shown in cases where coins have been manufactured by the karigars. The Id. CIT(A) also observed that if the Id. AO's argument that "making charges are in the form of wastage" is to be accepted, then the inference would be that the karigars are working for free in respect of such

semi-finished jewellery and coin manufacturing which would result in absurdity. The ld. CIT(A) also observed in para 16.12 of his order that the said excel sheet is not meant or used for making payment of making charges to various karigars or determining wastage. Further, the ld. CIT(A) in para 16.13 of his order had categorically stated that though the assessee had pointed out certain flaws with the maintenance of excel sheets, there is no doubt about the authenticity of transaction between the group and the karigars as far as the volume of gold is concerned. The ld. CIT(A) observed that **-to this extent, it is proposed to rely on the excel sheet. As noted above, it is possible to use the excel sheet for further computation if necessary corrections are introduced in the sheet to take care of some glaring omissions like non-computation of wastage on semi-finished jewellery and gold coins as well as the fact that there are evidences of making charges being made through allowing certain level of wastage of karigars.** These observations made by the ld. CIT(A) are not challenged by the revenue before us by bringing in any contrary evidences. Hence, we hold that excel sheets seized during the course of search cannot be construed as parallel books and they are merely controlling sheets maintained by employees for computation of jewellery after giving credit or deduction for standard quota of wastage. Hence, linking these excel sheets with the diaries marked as Annexure A-3 & A-7 would be incorrect. We find from the Annexure A-3 & A-7 notings contained in the diaries that they are merely rough jottings made by some employee and no way depict the cash receipt of the making charges from the karigars as alleged by the ld. DR herein. We find that the said diaries nowhere show that Rs.2/- per gram is retained with karigars and remaining amount is given back to the assessee in the form of cash. Hence, reliance placed on those diaries as corroborative evidence is grossly incorrect. Moreover, we also find that the notings found in those diaries were relating to cash transactions for a limited period of time. The ld. AO in the instant case had extrapolated the same for the remaining period and disallowed the entire making charges debited over and above Rs.2/- per gram.

3.12. We find that the assessee had submitted the comparable price from the market with various parties which goes to prove that the making charges prevailing in the market are ranging from Rs.13 – Rs.18/- per gram. The gold receipt vouchers issued by P C Chandra Jewellers, Kolkata show making charges @Rs.18/- per gram. Even going by this comparable data, the making charges debited by the assessee is much lesser than the market price. Hence, there cannot be any disallowance of making charges on the ground that it is paid in excess by the assessee.

3.13. To sum-up, the disallowance made by the Revenue on account of excess making charges deserve to be deleted due to-

(a) Statements of karigars Shri Lob Ghorai and Shri Golok Patra containing various factual inconsistencies;

- (b) Statements of Shri Lob Ghorai and Shri Golok Patra were retracted;
- (c) Statement of Shri Kirit Kumar Gauti which stood subsequently retracted;
- (d) Statement of promoter of the assessee group M/s. Sumatichand Gauti Jewellers wherein he had categorically denied making payment of any excess making charges during the course of his statement on 12/03/2015 vide reply to Question No.62;
- (e) Excel sheet wrongly construed as parallel books but actually the excel sheets are meant only for quantitative date of gold / jewellery after giving due credit for standard wastage;
- (f) The excel sheet did not contain any payment of making charges to the karigar which fact has been accepted by the Id. CIT(A) in his order;
- (g) Rough jottings made in the diaries Annexure A-3 & A-7 are meant only for limited period of time and the Id. AO erred in extrapolating the same for the remaining period of time;
- (h) Rough jottings made in the diaries did not contain any evidence or noting to prove that excess making charges paid by the assessee has been received back as cash from the karigars by the assessee;
- (i) Comparable market price of P C Chandra Jewellers prove the payment of making charges at Rs.18/- per gram which is far higher than the making charges debited by the assessee herein.

3.14. In view of the above, the disallowance made on account of making charges amounting to Rs.49,83,491/- for A.Y.2014-15 is hereby directed to be disallowed. Accordingly, the ground Nos.2 & 3 raised by the assessee are allowed.

4.The ground Nos. 5 & 6 raised by the assessee for the A.Y. 2014-15 and ground Nos. 1-5 raised by the revenue are with regard to the disallowance made on account of wastage charges.

4.1.We have heard rival submissions and perused the materials available on record. The assessee had claimed wastage charges on an average ranging from 3-3.5%. The Id. AO by placing reliance on the statements recorded from karigars Shri Lob Ghorai and Shri Golok Patra and statement of Shri Kirti Kumar Gauti and excel sheets containing standard wastage percentage, arrived at the allowable wastage to be at 2.5%. According to the Id. AO, data of wastage recorded in the excel sheet seized contain the actual details of wastage. In the assessment order, the Id. AO compared the wastage

appearing in the excel sheets with the wastage booked in the regular books of accounts and held that there is an excess reflected in the books and accordingly, proceeded to disallow the excess wastage for various assessment years as under:-

Particulars	AY 2013-14	AY 2014-15	AY 2015-16
Total wastage as per actual books (In Kgs.)	81.17	149.10	145.59
Total Wastage as per excel sheet (In Kgs.)	60.23	89.63	52.52
Difference (In Kgs.)	20.94	59.47	93.07
Proportionate addition in assessee	Nil*	82,42,155	98,81,191

* No business in assessee company in A.Y. 2013-14.

4.2. The Id. CIT(A) estimated the wastage at 3% to be reasonable on finished jewellery. Further, the Id. CIT(A) allowed wastage on semi-finished jewellery and coins on the ground that data contained in excel sheet had glaring omissions like non-computation of wastage of semi-finished jewellery and gold coins. Accordingly, the Id. CIT(A) granted relief to that extent and addition of Rs.15,06,455/- was confirmed by the Id. CIT(A) as against the addition made by the Id.AO in the sum of Rs.82,42,155/- made by the Id. AO. Aggrieved, both the assessee as well as the revenue are in appeal before us against their respective grievances.

4.3.As held by us hereinabove for wastage charges, the statement of karigars and Mr. Kirit Kumar Gauti could not be relied upon as they stood retracted immediately after the search. Further, we had already held that seized excel sheets are only meant for control purpose maintained by an employee to keep a track of flow of stock and that the said excel sheets cannot be construed as actual books or parallel books. From the perusal of the said excel sheets enclosed in page 107 of the paper book onwards, we find that the said sheets do not contain actual wastage. The employee who had maintained the said data had only mentioned the standard wastage percentage uniformly for all the years only to ensure that the quantity of raw material issued to the karigars and finished product received back from them are within the expected tolerance range of wastage. Hence it could be concluded that the excel sheet is meant for control for the purpose of quantitative tally of flow of stock. As stated at the cost of repetition, we would like to state that the receipt mentioned in the said excel sheet is only standard / fixed percentage of wastage allowed to the concerned karigar. This is evident from the excel

sheets wherein for the period 01/09/2014 to 09/03/2015 pure gold received from the karigars was 79589.58 and standard wastage of 2.25% worked out at 1790.77 grams is mentioned has been computed and the resultant figure of 81,380.34 gms (78689.58 gms representing pure gold + 1790.77 representing wastage worked out at 2.25% of pure gold received) is shown as gold received back from karigar. It is inconceivable that the wastage remains at the standard percentage of 2.25% per each quantity of gold issued to karigar. This itself goes to prove that the excel sheet data does not contain actual wastage. But the data is maintained by the employee to keep the track of manufacturing of gold. We find that in the jewellery industry, the wastage of each jewellery would be depending upon the shape, size, design of the jewellery etc., Therefore, the adoption of fixed percentage of wastage in excel sheet data maintained by an employee cannot be used by the Revenue for arriving at the acceptable wastage and disallowing the remaining portion as excess. From the perusal of the excel sheet maintained by the employee, forming part of the seized document, we find that the balance figure of gold lying with smith i.e. karigar is also derived figure and not actual figure. This itself proves the fact that excel sheet has been prepared purely for control purposes and not for recording the actual wastage. The Id. CIT(A) had already taken cognizance of various discrepancies that had crept in in the excel sheets maintained by the employee for which suitable credit has already been given to the assessee. Hence, the excel sheet data, in our considered opinion, is unreliable. Moreover, we find that the Id. AO had disallowed the wastage expenses as excess only for A.Y.2013-14, 2014-15 and 2015-16 by placing reliance on the excel sheet as sacrosanct. Whereas the same excel sheets contains data from A.Y.2010-11 onwards which was also seized during the course of search. For A.Yrs.2010-11, 2011-12 and 2012-13, the wastage reflected in excel sheet was much higher than the wastage reflected by the assessee in its books. Hence, the Id.AO had resorted to ignore those excel sheets for A.Yrs.2010-11, 2011-12 and 2012-13 as it is favouring assessee. The following tabulation would prove this fact:-

Financial Year	Assessment Year	Wastage claimed in books in Kgs (A)	Wastage as per excel sheets in Kgs (B)	Difference in Kgs (A-B)
FY 2009-10	AY 2010-11	53.70	81.75	-28.05
FY 2010-11	AY 2011-12	44.95	62.20	-17.25
FY 2011-12	AY 2012-13	48.81	58.40	-9.59
FY 2012-13	AY 2013-14	81.17	60.23	20.94
FY 2013-14	AY 2014-15	149.10	89.63	59.47

FY 2014-15	AY 2015-16	145.59	52.52	93.07
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4.3.1.No assessee would record lesser wastage in its books than what has been actually incurred by it since the same would lead to shortage in the gold quantity. This itself goes to prove that the excel sheet did not record the actual wastage incurred by the assessee and is meant purely for control purpose only and not otherwise.

4.4. Further, with respect of entries of wastage being received back from karigars to the appellant as alleged by AO, it is submitted that said notings are not receipt of wastage; rather the same are domestic purchase which are used in the manufacturing process in order to compensate the excess loss in the jewellery making. Moreover, such purchases are issued to karigars and not received from karigars which is duly reflected in the excel sheet. This fact has been duly considered and accepted by CIT(A) in para 16.31 at page no. 67 of the appellate order. Therefore, the said allegation of the Id. AO is incorrect.

4.5. It is pertinent to note that during the course of search, no discrepancy in physical stock was found by the search team. In fact physical verification of bullion was carried out by the search team and it had tallied with the book stock. Though some addition was made by the Id. AO in the sum of Rs.140,89,130/- towards unaccounted stock, the same was deleted by the Id. CIT(A), on the ground that the said addition has been made completely relying on the excel sheet seized during the course of search ignoring the factual deficiencies in those excel sheets. Against this deletion, the revenue had not preferred any appeal before us.

4.6. We find that Gems and Jewellery Council of Government of India had also accepted the normal standard wastage in respect of gold at 3.5%. The evidence in this regard was placed by the Id. AR in page 253 of the paper book. The wastage claimed by the assessee in the present case ranges from 3-3.5% which is in consonance with the Government approved standard of 3.5%. Moreover, the assessee had indeed given comparable cases of wastage from P C Chandra Jewellers, Kolkata wherein wastage is mentioned at 3.75%; Deys Guinea House, Kolkata at 4% ; Sremon Jewellers, Kolkata at 6% ; Sremon Jewellers at 5.5% on yet another date etc. This goes to prove that the wastage claimed by the assessee is much less than both the Government approved standard as well as the wastage claimed by the comparable cases. It is also pertinent to note that the aforesaid Government of India norms of allowing wastage at 3.5% has been followed and accepted by the Co-ordinate Bench of Kolkata Tribunal in the case of Anjali Jewellers Pvt. Ltd., vs. DCIT in ITA No.2252/Kol/2014 for A.Y.2010-11 dated 21/03/2016. In view of the aforesaid observations and respectfully following judicial precedents relied upon hereinabove, we hold that there is absolutely no case made out by the Revenue to disallow the wastage expenses on the ground that it is excess.

The Id. AO is hereby directed to delete the entire disallowance made on account of wastage. Accordingly, the ground Nos. 5 & 6 raised by the assessee are allowed and ground Nos. 1-5 raised by the Revenue are also hereby dismissed.”

It is pertinent to note that there was a typographical error in Paragraph 3.14 of the order, i.e., instead of mentioning that the addition is “directed to deleted”, it was erroneously mentioned as “directed to be disallowed”. The above said mistake was corrected by the co-ordinate bench, vide its corrigendum dated 03-01-2023.

7. We notice that the co-ordinate bench has accepted the contentions of the assessee that the Excel Sheets cannot be considered as parallel books of account and they are merely controlling sheets maintained by employees for computation of jewellery after giving credit or deduction for standard quota of wastage (paragraph 3.11). Since the facts and circumstances relating to both these additions are same in these cases also, following the above said decision of the co-ordinate bench, we modify the orders passed by Ld CIT(A) and direct the assessing officer to delete the additions relating to Making Charges and Wastage claims in all the years under consideration.

8. The next issue relates to the addition on account of profit on unrecorded sales made in AY 2014-15. Since the Ld CIT(A) has deleted above addition, the revenue is challenging the said decision. This addition has also been made on the basis of Excel Sheets found during the course of search. We noticed earlier that the data maintained in the Excel Sheet was considered to be parallel books by the AO and accordingly made additions. The quantity of gold shown in the Excel sheet was found to be lower than the quantity of gold disclosed in the books of accounts of the assessee. The AO treated the shortage in the gold stock as sale outside the books of accounts and accordingly estimated the profit on unrecorded sales @ 2% and added the same.

9. Before Ld CIT(A), the assessee demonstrated various discrepancies in the data recorded in the Excel Sheets and accordingly contended that the Excel Sheets cannot be taken as the correct one. The Ld CIT(A) was convinced with the contentions of the assessee and accordingly deleted this addition in various years in the hands of all group concerns. The decision rendered by Ld CIT(A) on this issue is extracted below:-

“12.5 The main submission of the appellant is that the ledger of receipt and issue of gold maintained in the excel sheet do not represent complete books of account but merely an account of the gold received from banks and the subsequent ledger of gold issued to the karigars for manufacturing and the subsequent receipt of jewellery from them. It is claimed that such ledger does not contain the entire transactions related to gold manufacturing. As an example, it has been claimed that the manufacturing of medallions and gold coins, which constitute significant component of the assessee's manufacturing and export activity do not form a part of the excel sheet and has been maintained separately through a different passbook. The wastage made on manufacturing of these items, although a matter of record, do not form a part of computation of stock with the karigars. The assessee has also cited instances where sales made have been reflected as amounts issued in the hands of karigars (basically indicating that the linkages created in the software are not correct).

12.6 The assessee has also submitted that the stock of the assessee has been elaborately taken at the time of search action and no difference in stock has been noted by the authorized officers at any of the premises, clearly indicating that the stock as per the regular books has been properly maintained and the excel sheets on their own do not reflect the true stock position of the companies. It is further claimed that the assessee purchases gold from authorized dealers for the purpose of export. There is no evidence of local unaccounted sale unearthed by the search party. The goods are duly exported in the quantity in which the purchases are made. As such, the allegation of unaccounted sale of accounted gold is presumptuous and incorrect. Pointing to the fact that the total closing stock of gold in the hands of the assessee comprises of gold with the karigars as well as gold lying in the premises of the assessee, it is claimed that the AO has presumed that total closing stock of gold in the hands of the assessee is the gold lying with the karigars as represented by the excel sheet.

12.7 It is noted that the AO has computed the stock difference based on the position of gold in the hands of karigars and closing stock position as reflected in the books of the appellant as on 31st March of the concerned financial years. The submission made by the assessee that the position of

gold with karigars as contained in the excel sheet does not represent the final position of gold stock lying with the assessee is found tenable looking at the following facts:

i. The excel sheet does not contain export details but merely the details of gold lying with the karigars. There is distinct possibility of gold lying with the assessee which has not been exported but has been received from the karigars. The regular books do not reveal the fact that all the gold forming a part of closing stock is lying with karigars. Hence, the total quantity of gold lying with the karigars at any point of time does not reflect the stock of gold lying with the assessee.

ii. As seen from manufacturing of medallions and coins, part of the manufacturing process is outside the excel sheet and needs to be incorporated to arrive at the final stock position.

iii. The physical stock position of the assessee as computed by the Department at the time of search and seizure action did not detect any variation between the physical stock position and the stock as per books of account. Also, the stock taken by the Department reveals that the gold stock was not only with the Karigars but part of the gold was also lying with the assessee itself.

iv. Evidence of sale of gold items outside the books has not been found from any of the premises during the search proceedings including the secret premises.

v. While dealing with the issue of wastage / payment of making charges, it has been held that the excel sheets are not sacrosanct and do not represent complete books of account and need to be corrected for various non-inclusions in order to arrive at the correct position of business of the various assessees.

vi. There is no breakup for earlier years with respect to gold with the assessee and gold with karigars and hence revisiting the stock position based on excel sheet is not accurate.

12.8 In light of the above facts, the action of the AO in relying completely on the excel sheet ignoring the above factual deficiencies in these sheets while computing the stock position of the appellant for earlier years is not found to be in order. It is also noted that while dealing with the issue of wastage claim of the appellant wherein it has been held that the assessee has indeed been charging excess wastage in its books, corrections were found necessary to decide the issue of quantum of wastage. The changes in stock on account of wastage also need to be factored while computing stock position. Merely taking the quantum of gold available at the karigar's place and comparing with the closing stock of the year, in my view, could not be

the correct way of computing stock difference. The AO has wrongly presumed that this differential amount represents correct of the stock of gold and the only explanation would be that this gold has been sold by the assessee outside books of account. Hence, the action of the AO in treating the difference between the stock of gold with karigars and the closing stock value shown in the books of different entities for different years is not found to be a reliable method to determine the stock difference and cannot be accepted. The AO is directed to delete the addition made by presuming that the shortage in stock represents unaccounted sales and estimating a profit of 2% on such sales.”

10 In the case of Saurav Jewellers Private Limited (supra), the co-ordinate bench has accepted the contentions of the assessee that the Excel Sheets cannot be considered as parallel books of account and they are merely controlling sheets maintained by employees for computation of jewellery after giving credit or deduction for standard quota of wastage (paragraph 3.11). We notice that the Ld CIT(A) has also noticed many discrepancies in the Excel Sheet. One of the main discrepancies is that the manufacture and sale of medallions and coins were not recorded in the Excel Sheets, which would make huge difference. Besides the above, the search officials did not find any discrepancy between book stock and physical stock. Accordingly, we are of the view that the order passed by Ld CIT(A) in deleting this addition is a well reasoned order and the same does not call for any interference. Accordingly, we uphold the order passed by Ld CIT(A) on this issue.

11. The next issue relates to the addition made u/s 68 of the Act. In assessment year 2014-15, the assessee had received share capital of Rs.2,20,00,000/- from M/s Anubhuti Suppliers P Ltd. The Ld CIT(A) deleted addition and hence the revenue is challenging his decision.

12. The facts relating to this addition are discussed in brief. During the course of search proceedings, Shri Sumati Chand Gauti, one of the key persons of the group submitted in the statement recorded u/s 132(4) of the Act that he could not trace out certain companies/directors of those companies who has subscribed to the shares of the assessee group

companies. Accordingly he expressed the view that he has no other option but to offer to tax the amount of share capital and share premium raised from certain companies. Another director Shri Sanjay Dugar also agreed in his statement taken u/s 132(4) of the Act that part of share premium received in certain group companies cannot be substantiated as it was received from Jamakarchi companies and agreed to offer the said amounts as undisclosed income.

13. The AO also issued commission to respective assessing officers of Kolkatta and the inspectors report furnished by them revealed that the officers of certain companies have been closed. The AO also noticed that these paper companies are reporting loss or meager profits in various years. The AO asked the assessee to produce these parties, but the assessee failed to do so. The summon issued to a company named M/s Zenstar marketing P Ltd remained unresponded. He further noticed that most of the share subscribers are having common addresses or common directors and auditors. He also noticed that these subscriber companies have not received any dividend. Their bank balances were also found to be low. They had received funds from some source before transferring the same to the assessee companies herein. Accordingly, the AO came to the conclusion that these subscriber companies lack credit worthiness. The AO also referred to the statements taken from directors of some of the companies, wherein they had admitted that they are only directors name sake and the operations of the company are being managed by some other person.

14. Accordingly, the AO took the view that the genuineness of transactions remained unexplained. Accordingly, the AO asked the assessee to prove the cash credit. It was also show caused as to why such share application money received should not be added to the total income of the assessee.

15. In response to the same, the assessee furnished various documents and submitted that it has proved the three ingredients, viz., Identity of the lender, Genuineness of transactions and Credit worthiness of the lender by

producing documents like Incorporation certificate, PAN card, bank statements and financial statements of the creditors. It was further submitted that these companies are engaged in the business of share trading and all the transactions related to the same may be verified from the financial statements of the said companies. It was also submitted that the Share premium is a capital receipt and it has been received as per the private negotiations made between the assessee and share subscribers. It was further submitted that the Companies Act has put in restrictions with regard to the usage of share premium amount. Accordingly, it was contended that the addition u/s 68 could not be made.

16. The assessing officer did not accept the contentions of the assessee. The AO, after referring to various case laws, held that the share application money received by the assessee is unexplained. Accordingly he assessed the same as unexplained cash credit u/s 68 of the Act.

17. Before Ld CIT(A), the assessee contended that the admissions were made by Shri Sumati Chand Gouti on pressure from search officials and further the relevant materials were not readily available. It was submitted that the assessee could contact the relevant share subscribers and could collect all details to prove the genuineness of share application money received. Accordingly, it was contended that the admission made during the course of search was incorrect and without any basis and hence, the same cannot be relied upon. With regard to the statement given by Shri Sanjay Dugar, it was submitted that he had resigned from directorship of various companies prior to the date of search and hence he could not have given any statement in respect of assessee group. It was submitted that he had also made admission only for want of relevant details. It was further submitted that both of them have retracted their statement. Accordingly, it was contended that the statements given both the persons should not be relied upon. The assessee also relied upon various case laws to support its contention that the statement given under duress should not be relied upon. Accordingly, it was contended that the addition could not have been

made u/s 68 of the Act, as the assessee has discharged the onus placed upon it.

18. The Ld CIT(A) held that the AO has not made the addition solely on the basis of Statement given by Shri Sumati Chand Gouti and Shri Sanjay Dugar. He also held that the retraction made by them is bald in nature and it did not elaborate as to how the earlier statement was false or contrary to the documents found. He noticed that M/s Anubhuthi Suppliers P Ltd is a group company of the assessee. He further noticed that the above said company has received funds from some of the related companies and the Ld CIT(A) had confirmed the addition in its hand. The Ld CIT(A) held that the amount so confirmed cannot be assessed again in the hands of the assessee. Accordingly, he deleted the addition of Rs.2.20 crores received from Anubhutti Suppliers P Ltd.

19. We heard rival contentions and perused the record. In the instant case, the addition has been made u/s 68 of the Act, wherein cash credits, which are essentially share capital/share premium money received by the assessee, have been added. Sec. 68 enables assessment of such types of cash credits, if the assessee fails to prove the nature and source of cash credits. "Nature of cash credit" would mean that the assessee is required to show that it is not of revenue nature. In order to prove the sources, the assessee should discharge initial burden to prove the cash credits placed upon his shoulders of the assessee u/s 68 of the Act, the assessee is required to prove three main ingredients, viz., the identity of the creditor, the genuineness of the transactions and the credit worthiness of the creditor. If the assessee discharges the initial burden, then the burden would shift to the shoulders of the assessing officer, i.e., it is the responsibility of the AO to disprove the claim of the assessee by bringing evidences on record.

20. We shall now examine the facts prevailing in the instant case. We noticed earlier that the Ld CIT(A) has granted relief on the reasoning that

the additions made in the hands of Anubhuthi Suppliers P Ltd had been confirmed by him. It is noticed in the instant case that it is not the case of the AO that the assessee did not discharge the initial burden placed upon it with regard to the share capital/share premium money received by it. The assessee has furnished all the details relating to the investors/loan in order to discharge the burden placed upon it u/s 68 of the Act. We noticed from the record that the assessee has filed following documents in order to discharge the burden placed upon it under section 68 of the Act :-

- a) Certificate of Incorporation of share subscribers.
- b) PAN number of share applicants.
- c) Balance Sheet of share subscribers
- d) Bank Statement of Share subscribers.
- e) Acknowledgement of Return of income filed by Share subscribers.
- f) Form 2 filed before ROC for allotment of shares.
- g) Valuation report of shares

From the details submitted it can be seen that the identity of share subscriber stands proved. Since it has made payments from its bank accounts through account payee cheques, these transactions cannot be treated as bogus. Since the payments have been made from of funds available with them, the credit worthiness would also stand proved. We notice that the AO has observed that this subscriber is either showing loss or meager profits and such meager profits are not commensurate with the investments made by them. However, there is no bar under the law that a person could not make investments out of borrowed funds. In the instant case, it is not the case of the AO that the applicant did not have funds available with them for making investments in the assessee company. In fact, the said investments have been routed through the bank accounts of the assessee as well as the subscribers. Further, these investments are duly reflected in their books of account.

21. We notice that the tax authorities have first relied upon the surrender made by Shri Sumati Chand Gouti and Shri Sanjay Dugar in the statement taken u/s 132(4) of the Act during the course of search. We noticed earlier that the assessee is contending that Shri Sanjay Dugar was not a director during the period in which the search has taken place and hence his statement will not bind the assessee. Be that as it may, we notice that both the parties have admitted during the course of search on the clear reasoning that they immediately did not have details with them. Accordingly, it was agreed to surrender the share capital received by them. After the conclusion of search, these persons have retracted the statements and furnished all the details relating to the share capital received by the assessee. It was also submitted that they have surrendered the income only under pressure. Thus, we notice that the evidences furnished by the assessee to prove the cash credits would outweigh the statements given by them and hence there is merit in the retraction made by them. Accordingly, in the facts and circumstances of the case, we are of the view that the tax authorities could not have relied upon the statements given by the above said two persons without bringing any material contrary to the evidences furnished by them.

22. We notice that the AO has mainly relied upon the report of investigation wing to come to the conclusion that the assessee has availed only accommodation entries. He has also referred to the non-reply of the notices issued by them and non-furnishing of details called for. But the fact would remain that the assessee has furnished the relevant details before the AO and all those details were earlier filed with either Income tax department or with Registrar of Companies, i.e., with Government authorities. Hence the authenticity of those documents could not be doubted with. When all the relevant details are available with the AO, it is the requirement that the AO should examine those documents and could reject them, only if he finds fault with those documents. We notice that the AO did not find any deficiency or fault with the evidences produced by the assessee.

23. With furnishing of all these documents, in our view, the assessee has discharged initial burden placed upon it under section 68 of the Act by furnishing above said documents. Hence the source as well as the source of source also stands proved by the subscribers.

24. The question that arises is whether the Assessing Officer could have made addition under section 68 of the Act by relying upon report of investigation wing or the statement given by the alleged accommodation entry providers. It is apposite to refer to the decision rendered by the Coordinate Bench in the case of M/s. Moraj Realty Pvt. Ltd. (ITA No.708 & 709/Mum/2019 dated 08-12-2020), wherein the decision was rendered by following the decisions rendered by Hon'ble Bombay High Court. It was held as under :-

“17. Moreover, except for relying on the statement of VVB the Assessing Officer has not done any inquiry himself except for referring to a notice issued under section 133(6) in A.Y. 2009-10 only. The learned counsel of the assessee has challenged the very veracity of this observation. He has submitted that assessee has asked for the copy of the said notice issued under RTI Act. In response it was replied that copies thereof are not available. Hence, this shows that even the so called inquiry by the Assessing Officer was done in case of only one party for A.Y. 2009-10 and the veracity of which is itself in doubt.

18. We find ourselves in agreement with the submissions of the assessee's counsel. We note that except for the statement of the entry operator which was also retracted the addition made by the authorities below is devoid of cogent material. In this regard we note that in similar circumstances honourable Bombay High Court in the case of CIT Vs. Orchid Industries Pvt. Ltd. (ITA No. 1433 of 2014 dated 5.7.2017)(397 ITR 136) held as under :-

“The Assessing Officer added Rs.95 lakhs as income under Section 68 of the Income Tax Act only on the ground that the parties to whom the share certificates were issued and who had paid the share money had not appeared before the Assessing Officer and the summons could not be served on the addresses given as they werenot traced and in respect of some of the parties who had appeared, it was observed that just before issuance of cheques, the amount was deposited in their account.

The Tribunal has considered that the Assessee has produced on record the documents to establish the genuineness of the party such as PAN of all the creditors along with the confirmation, their bank statements showing payment of share application money. It was also observed by the Tribunal that the Assessee has also produced the entire record regarding issuance of shares i.e. allotment of shares to these parties, their share application forms, allotment letters and share certificates, so also the books of account. The balance sheet and profit and loss account of these persons discloses that these persons had sufficient funds in their accounts for investing in the shares of the Assessee. In view of these voluminous documentary evidence, only because those persons had not appeared before the Assessing Officer would not negate the case of the Assessee. The judgment in case of Gagandeep Infrastructure (P.) Ltd. (supra) would be applicable in the facts and circumstances of the present case.”

19. Similarly honourable Bombay High Court in the case of Gagandeep Infrastructure Pvt. Ltd. (394 ITR 680) has held as under :-

.....

(ii) Further it was a submission on behalf of the Revenue that such large amount of share premium gives rise to suspicion on the genuineness (identity) of the shareholders i.e. they are bogus. The Apex Court in CIT v/s. Lovely Exports (P)Ltd. 317 ITR 218 in the context to the pre-amended Section 68 of the Act has held that where the Revenue urges that the amount of share application money has been received from bogus shareholders then it is for the Income Tax Officer to proceed by reopening the assessment of such shareholders and assessing them to tax in accordance with law. It does not entitle the Revenue to add the same to the assessee's income as unexplained cash credit.

20. Similarly Hon'ble Bombay High Court in the case of CIT Vs. Apeak Infotech (397 ITR 148) has held as under :-

“Amendment to Section 68 of the Act by the addition of proviso thereto took place with effect from 1st April, 2013. Therefore, it was not applicable for the subject Assessment year 2012-13, So for as the pre-amended Section 68 of the Act was concerned, the same cannot be invoked in this case, as evidence was led by the Respondents- Assessee before the Assessing Officer with regard to identity, capacity of the investor as well as the genuineness of the investment Therefore, admittedly, the Assessing Officer did not invoke Section 68 of the Act to bring the share premium to tax. Similarly, the CIT(A), on consideration of facts, found that Section

68 of the Act cannot be invoked, in view of the above, it was likely that the Revenue may have taken an informed decision not urge the issue of Section 68 of the Act before the Tribunal. High Court may also point out that decision of High Court in Major Metals Ltd. vs. Union of India, 359 ITR 450 proceeded on its own facts to uphold the invocation of Section 68 of the Act by the Settlement Commission. In the above case, the Settlement Commission arrived at a finding of fact that the subscribers re shares of the Assessee - Company were not creditworthy in as much as they did not have financial standing which would enable them to make an investment of Rs. 6,00,00,000/- at premium of Rs. 990 per share. It was this finding of the fact arrived at by the Settlement Commission which was not disturbed by High Court in its writ-jurisdiction. In the present case the person who have subscribed to the share and paid share premium have admittedly made statement on oath before the Assessing Officer as recorded by the Tribunal. Nofinding in this case has been given by the Authorities that shareholder/share applicants were unidentifiable or bogus.

High Court find that the impugned order of the Tribunal upheld the view of the CIT(A) to hold that share premium is capital receipt and therefore, cannot be taxed as Income. This conclusion was reached by the impugned order following the decision of this Court in Vodafone India Services Pvt. Ltd. (supra) and of the Apex Court in M/s G.S. Homes and Hotel P. Ltd. (supra). In both the above cases the Court has held that the amount received on issue of share capital including premium are on capital account and cannot be considered to be income. It was further pertinent to note that the definition of income as provided under Section 2(24) of the Act at the relevant time did not define as income any consideration received for issue of share in excess of its fair market value. This came into the statute only with effect from 1st April, 2013 and thus, would have, no application to the share premium received by the Respondent - Assesses in the previous year relevant to the assessment year 2012 - 2013. Similarly, the amendment to Section 68 of the Act by addition of proviso was made subsequent to previous year relevant to the subject Assessment year 2012-13 and cannot be invoked. It may be pointed out that High Court in Commissioner of Income Tax vs. M/s. Gangadeep Infrastructure (P) ltd (Income Tax Appeal No. 1613 of 2014 decided in 20 March 2017) has while refusing to entertain a question with regard to Section 68 of the Act has held that the proviso to Section 68 of the Act introduced with effect from 1 April 2013 will not have retrospective effect and would be effective only from Assessment year 2013-14. In view of the above, Question No .B as proposed also does not give rise any substantial question of law as it is an issue concluded by the decision of High Court in M/s Vodafone India Services Pvt. Ltd.

(Supra) and in the Apex Court in M/s G.S. Homes & Hotels P. Ltd. (supra). Thus not entertained. ”

21. Accordingly in the background of aforesaid discussion and precedent in our considered opinion assessee has given all the necessary details required for establishment of identity creditworthiness and genuineness under extant provisions of section 68 of the IT Act. The onus cast upon the assessee stands discharged. The addition by invoking amended provisions of section 68 of the Act which are not applicable for the assessment year is not sustainable.”

25. The Hon’ble Bombay High Court has held in the case of CIT vs. Orchid Industries (P) Ltd (397 ITR 136)(Bom) that the addition u/s 68 could not be made once the assessee had produced the documents to prove the cash credits. It was further held that non-appearance of the share subscriber before the AO will not change this position. It is also apt to refer to the decision rendered by Hon’ble Bombay High Court in the case of PCIT vs. Paradise Inland Shipping (P) Ltd (2017)(84 taxmann.com 58)(Bom). In this case, it was allegation of the revenue that the assessee has received share application money from fictitious companies. The Hon’ble jurisdictional High Court held as under:-

5. We have given our thoughtful considerations to the rival contentions of the learned Counsel and we have also gone through the records. The basic contention of the learned Counsel appearing for the Appellants revolves upon the stand taken by the Appellants whether the shareholders who have invested in the shares of the Respondents are fictitious or not. In this connection, the Respondents in support of their stand about the genuineness of the transaction entered into with such Companies has produced voluminous documents which, inter alia, have been noted at Para 3 of the Judgment of the CIT Appeals which reads thus :

"The assessment is completed without rebutting the 550 page documents which are unflinching records of the companies. The list of documents submitted on 09.03.2015 are as follows :

1. Sony Financial Services Ltd. - CIN U74899DL1995PLC068362-

Date of Registration 09/05/1995

(a)	Memorandum of Association and Article of Association
(b)	Certificate of Incorporation
(c)	Certificate of Commencement of Business

(d)	Acknowledgment of the Return of Income AY 08-09
(e)	Affidavit of the Director confirming the investment
(f)	Application for allotment of shares
(g)	Photocopy of the share certificate
(h)	Audited account and Directors report thereon including balance sheet, Profit and Loss Account and schedules for the year ended 31.03.2009.
(i)	Audited account and Directors report thereon including balance sheet, Profit and Loss Account and schedules for the year ended 31.03.2010
(j)	The Bank Statement highlighting receipt of the amount by way of RTGS.
(k)	Banks certificate certifying the receipt of the amount through Banking channels."

6. On going through the documents which have been produced which are basically from the public offices, which maintain the records of the Companies. The documents also include assessment Orders for last three preceding years of such Companies.

7. The Appellants have failed to explain as to how such Companies have been assessed though according to them such Companies are not existing and are fictitious companies. Besides the documents also included the registration of the Company which discloses the registered address of such Companies. There is no material on record produced by the Appellants which could rebut the documents produced by the Respondents herein. In such circumstances, the finding of fact arrived at by the authorities below which are based on documentary evidence on record cannot be said to be perverse. Learned Counsel appearing for the Appellants was unable to point out that any of such findings arrived at by the authorities below were on the basis of misleading of evidence or failure to examine any material documents whilst coming to such conclusions. Under the guise of the substantial question of law, this Court in an Appeal under Section 260A of the Income Tax Act cannot re-appreciate the evidence to come to any contrary evidence. Considering that the authorities have rendered the findings of facts based on documents which have not been disputed, we find that there are no substantial question of law which arises in the present Appeal for consideration.

8. The Apex Court in the case of *Orissa Corpn. (P.) Ltd. (supra)*, has observed at Para 13 thus :

"13. In this case the assessee had given the names and addresses of the alleged creditors. It was in the knowledge of the revenue that the said creditors were income- tax assesseees. Their index number was in the file of the revenue. The revenue, apart from issuing notices under S. 131 at the instance of the assessee, did not pursue the matter further. The revenue did not examine the source of income of the said alleged creditors to find out whether they were credit-worthy or were such who could advance the alleged loans. There was no effort made to pursue the so called alleged creditors. In those circumstances, the assessee could not do anything further. In the premises, if the Tribunal came to the conclusion that the assessee has discharged the burden that lay on him then it could not be said that such a conclusion was

unreasonable or perverse or based on no evidence. If the conclusion is based on some evidence on which a conclusion could be arrived at, no question of law as such arises."

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

10. We find no infirmity in the findings arrived at by the ITAT as well as CIT Appeals on the contentions raised by the Appellants-Revenue in the present case and, as such, the question of interference by this Court in the present proceedings under Section 260A of the Income Tax Act would not at all be justified."

26. In our view, the above said decisions rendered by the jurisdictional Hon'ble High Court and the co-ordinate bench supports the case of the assessee. Accordingly, following the above said decision, we hold that the addition made by the Assessing Officer under section 68 of the Act in AY 2014-15, in the facts and circumstances of the case, was not justified. Accordingly, we confirm the relief granted by Ld CIT(A) for the reasons discussed above and direct the AO to delete the addition made under section 68 of the Act in AY 2014-15.

27. The last issue urged by the revenue in AY 2014-15 and 2015-16 relates to the disallowance made u/s 14A of the Act. In both the years, the AO noticed that the assessee has held investments, whose income will be exempt. Since the assessee did not make any disallowance u/s 14A of the Act, the AO computed disallowance u/s 14A of the Act by applying provisions of Rule 8D(2)(iii) of I T Rules towards administrative expenses. The workings made by the AO in the above said two years are given below:-

AY 2014-15 – 0.50% of Rs.6.09 crores* = Rs.4,15,061/-
AY 2015-16 - 0.50% of Rs.10.93 crores* = Rs.7,81,440/-
(*Average value of investments)

28. The Ld CIT(A) directed the AO to restrict the disallowance to the amount of exempt income in both the years. The revenue is aggrieved by the decision so given by Ld CIT(A).

29. We heard the parties on this issue and perused the record. The Hon'ble Madras High Court has held in the case of M/s Marg Limited vs. CIT (Tax case Appeal No.41 to 43 & 220 of 2017 dated 30-09-2020) has held that the disallowance u/s 14A cannot exceed exempt income. We notice the decision rendered by Ld CIT(A) finds support from the above said decision of Hon'ble Madras High Court. Accordingly, we do not find any infirmity in the decision so rendered by Ld CIT(A) on this issue in AY 2014-15 and 2015-16.

30. In the result, both the appeals of the assessee are allowed and both the appeals of the revenue are dismissed.

Pronounced in the open court on 20/10/2023.

Sd/-
(RAHUL CHAUDHARY)
Judicial Member

Sd/-
(B.R. BASKARAN)
Accountant Member

Mumbai; Dated : 20/10/2023

SSL

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(Judicial)
4. PCIT
5. DR, ITAT, Mumbai
6. Guard File.

BY ORDER,

//True Copy//

(Assistant Registrar)
ITAT, Mumbai