आयकर अपीलीय अधिकरण, रायपुर न्यायपीठ, रायपुर

IN THE INCOME TAX APPELLATE TRIBUNAL RAIPUR BENCH, RAIPUR

श्री रविश सूद, न्यायिक सदस्य **एवं** श्री अरुण खोड़पिया, लेखा सदस्य के समक्ष ।

BEFORE SHRI RAVISH SOOD, JM & SHRI ARUN KHODPIA, AM

(**ITA No. 35 & 38/RPR/2023**)

(Assessment Year: 2014-15 & 2016-17)

Deputy Commissioner of Income Tax, Circle-1(1), Aayakar Bhawan, Civil Lines, Raipur	V s	S.P. Buildcon Private Limited FF-06, Shyam Plaza, Pandri Bus Stand, Raipur
		PAN: AAJCS0653H

(**अपीलार्थी /Applicant**)	:	(**प्रत्यर्थी / Respondent**)
निर्धारिती की ओर से /Assessee by	:	Shri Amit M. Jain, Adv.
राजस्व की ओर से /Revenue by	:	Shri Satya Prakash Sharma, Sr. DR
सुनवाई की तारीख / **Date of Hearing**	:	05-09-2023
घोषणा की तारीख/**Date of Pronouncement**	:	28-11-2023

आदेश / O R D E R

Per Arun Khodpia, Accountant Member:

The captioned two appeals are filed by the department pertains to same assessee against the different orders of Commissioner of Income Tax, Appeal, NFAC, Delhi, dated 07/12/2022 for AY 2014-15 & dated 15/12/2022 for AY 2016-17. Which in turn arose from the orders of ACIT-1(1), Raipur, u/s 143(3) dated 29/12/2016 & 18/12/2018, respectively.

The ground of appeal raised by the revenue are as under:

Grounds of Appeal for AY 2014-15

1. Whether on the facts and in the circumstances of the case the Ld. CIT(Appeals), NFAC is justified in deleting the addition of Rs.5,00,000/- made by the A.O by way of disallowance out of provision made under the head construction expenses.

2. Whether on the facts and in the circumstances of the case the Id. CIT(Appeals), NFAC is justified in deleting the addition made by the A.O by way of disallowance of Rs.1,34,83,176/-being non-deduction of tax on deemed dividend u/s 2(22)(e) of the Act.

3. Whether on the facts and in the circumstances of the case the Id. CIT(Appeals), justified in deleting the addition of Rs. 56,15,450/- made by the A.O by disallowing the loss shown to have been claimed from commodity transactions being speculative loss and from business activity of the assessee.

4. Any other ground which may be adduced at the time of hearing.

First, we are taking the appeal for the AY 2014-15:

2. Statement of facts culled out from records are that the appellant is a private limited company engaged in the business of building construction as a builder. Proper books of accounts have been kept and maintained, both as per the Companies Act as well as the Income Tax Act, which are audited. In this case, the return of income was filed by the assessee on 08-11-2014 declaring total income at Rs. 42,45,320/-. The case was selected for complete scrutiny through CASS. During the assessment proceedings, it was explained before the learned AO that provisions of Sec. 43CA were not applicable as the company had executed an Agreement for sale of shops in earlier year and also received part consideration through banking channel. The above submission was not considered by the learned AO, and he made addition of Rs. 13,71,900/-. It was also explained that the appellant executed Lease Agreement with M/S. Devyani International Limited for providing Shop No. G1 of 508 Sq. ft., on lease. Subsequently, the Lease Agreement was executed on 16/09/2014 for the area let-out to Devyani International Limited as per their terms. Accordingly, provisions of Rs. 5,00,000/- was made in subsequent year i.e., A.Y. 2015-16 and not

during the year under consideration. According to the assessee, the learned AO has disallowed Rs.5,00,000/- in this year though no such provisions were made in this year, therefore, disallowance is misconceived. Rs.1,96,000/- was paid on different dates to the Consultants / Advocates with regard to execution of sale deeds and for registration of properties. The Ld. AO, without appreciating the facts, disallowed the same. further, it is alleged by the assessee that, though no query was made by the learned AO with regard to Sec. 14A, the Ld. AO treated Rs.11,093/- as disallowable u/s 14A r/w Rule 8D, without appreciating the fact that, as against the capital of Rs.288/- lacs, the investment was only of Rs.7,60,000/-. Interest expenses incurred amounting to Rs.7,293/- only, but the Ld. AO has disallowed Rs. 11,093/-. The AO also added Rs.1,34,83,176/- for violation of Sec. 40(a)(ia) for non-deduction of tax on so-called deemed dividend for the amount paid to Shri Sanjay Raheja and Shri Deepak Raheja amounting to Rs. 66,32,406/- and Rs.68,50,770/- respectively, being the maximum amount, rejecting the explanation that provisions of Sec. 2(22)(e) are not applicable at all. It was explained by the assessee that no amount has given to Shri Dipak Raheja during the year, whereas the account of Shri Sanjay Raheja was in the nature of current account and not loan or advance as on majority dates there was credit balance in this account. It was also explained that provisions of Sec. 40(a)(ia) were not applicable on deemed dividend u/s 2(22)(e) for A.Y. 2014-15 which were made applicable w.e.f. A.Y. 2015-16 i.e., from 01.04.2015. The learned AO further considered loss on derivatives in currency in Future and Option at

Rs.56,15,450/- as speculative loss and did not allow set-off from the business income.

3. On the basis of aforesaid facts of the proceedings during the scrutiny assessment, assessment order u/s 143(3) of the Income Tax Act, 1961 was passed on 29-12-2016 determining total income at Rs.2,54,22,939/-. The following additions/disallowances have been made in the assessment order:

(i) Addition u/s 43CA of the Act: Rs.13,71,900/-
(ii) Addition on account of provision made under the head construction expenses Rs.5,00,000/-
(iii) Disallowance on account of advocate fees debited to P&L a/c: Rs.1,96,000/-
(iv) Addition u/s 14A read with Rule 8D of the Act: Rs.11,093/-
(v) Addition u/s 2(22)(e) of the Act: Rs.1,34,83,176/-
(vi) Addition on account of speculative loss: Rs.56,15,450/-

4. Aggrieved by the aforesaid disallowances by the Ld. AO, the assessee has preferred an appeal before the first appellate authority, wherein the contentions of the assessee were considered and deliberated upon, in conclusion the appeal was partly allowed.

5. Since the first appellate authority has partly allowed certain grounds of the assessee. Now the department is in appeal before us against the reliefs granted to the assessee.

6. **Ground No. 1:** The first ground of the appeal pertaining to deleting the addition of Rs.5/- Lac made by the AO on account of provision for constructions expenses.

7. Ld. Sr. DR representing the revenue has submitted that the addition of Rs.5/- lac has been made by the AO by disallowing the provision made under the head construction expenses on account of renovation job work. The facts on this issue were read and reiterated by the Ld. Sr. DR that the said amount pertains to an agreement between the assessee company and M/s Devyani International limited which was executed on 16/09/2014, however the provision was made at the fag end of the year on 31/03/2015 i.e., prior to the date of said agreement. It was alleged that, how the provision can be made without having an agreement on the date of making of such provident. It is submitted that the AO has rightly made the said addition after due verifications. Therefore, the decision of Ld. CIT(A), NFAC was contrary to the facts and circumstances of the issue, thus, the same is liable to be set aside and the addition made by Ld. AO deserves to be restored.

8. In response Ld. Authorised Representative (AR) of the assessee submitted that the assessee has not created any provision in respect of the expenses incurred on job work in the year 2013-14 relevant to AY 2014-15. As per the lease agreement it was the

responsibility of the lessor i.e., the assessee company to bear Rs.10/- lacs towards the interior and other finishing expenses and to provide the shop to Lessee in ready to use state. M/s Devyani international Ltd, the Lessee, was asked to design the restaurant as per their requirement and the cost towards interior and finishing expenses are to be borne by the assessee company. Accordingly, assessee company has made the payment of Rs.5/- lac on 16/09/2014 and made a provision of balance Rs.5/- lac on 31/03/2015. To substantiate such claim the assessee further submitted before us copies of ledger account of provision for construction expenses for the FY 2013-14 & 2014-15. Accordingly, Ld. AR of the assessee submitted that Ld. CIT(A) had rightly observed that the provision was made at the end of FY 2014-15 i.e., on 31/03/2015 and, therefore, the AO was directed to delete the addition. It was the request that since no provision in the year under reference was made, no addition is warranted, therefore, the same is liable to be vacated.

9. We have considered the rival submissions and perused the material available on record. Admittedly, the fact that the provision for construction expenses of Rs.5/- lac was made in the succeeding year i.e., in FY 2014-15, on 31/03/2015, whereas the same was misread by the Ld. AO that the provision was made on 31/03/2014.

This fact is evident from the ledger account of provision for construction expenses, which the Ld. CIT(A) has rightly read into and, therefore, has deleted the addition made by the AO against the actual facts on record. Under such facts and circumstances, we do not observe any infirmity in the order of Ld. CIT(A), consequently ground no. 1 of the revenue in ITA No. 35/RPR/2023 is dismissed.

10. **Ground No. 2:** Deleting the addition of Rs.1,34,83,176/- on account of non-deduction of tax on deemed dividend u/s 2(22)(e) of the Act.

11. At the outset, Ld. Sr. DR on the aforesaid issue has reiterated the facts on para 7 of the Assessment order according to which the observations of the Ld. AO while making such addition were as under:

> *7. During the course of scrutiny, verification reveals that Shri Sanjay Raheja and Shri Deepak Raheja are directors of the assessee company S.P. Buildcon Pvt. Ltd., 0Raipur and also holds more than 10% shares of the company. The ledger account of Shri Sanjay Raheja and Shri Deepak Raheja in the books of the company for the relevant F.Y.2013-14 shows overall transactions to the extent of Rs.2,46,07,406/- and Rs.1,87,50,770/- respectively. [vide Annex- 'A' as part of this Order] The peak credit balance in both the cases stands at Rs.66,32,406/- (as on 02/04/2013) and Rs. 68,50,770/-(as on 23/05/2013) respectively. Various transactions on regular intervals took place during the financial year 2013-14 in the form of advances to its director and repayment thereof. In this connection it is submitted in writing that "Old balance of loan account of Shri Sanjay Raheja as on 01/04/2013 was Rs.67.12/- Lacs. There was no opening distributable profit except Rs.1,35,467/-. The amount is not loans or advances, it is in the nature of current account. The amount given to Shri Sanjay Raheja is for business purpose. Shri Sanjay Raheja has been paid Rs.50,000/- per month Director remuneration. Sales during the year under consideration was to the tune of Ps.4.37Cr. Closing stock of shops and WIP was Rs.*

19.28 Cr. Shri Sanjay Raheja looks after the finance, sales, and site work, moreover, profit accrues at the end of the year.

Similarly, there was old balance of Rs.83/- Lacs as on 01/04/2013 in the case of Shri Deepak Raheja. No fresh loan given during the year. "

Verification reveals that these availabilities of funds do not have any apparent nexus with trade transactions with the company as no purchase of goods happened through Shri Sanjay Raheja and Shri Deepak Raheja Director. Except making Director's Remuneration, no other payments made by the company which are directly related with business affairs of the company. Thus, the maximum outstanding amount available in the hands of the Directors was Rs.66,32,406/- on 02/04/2013 and Rs.68,50,770/- on 23/05/2013 respectively. The said amount of Rs.1,34,83,176/- is not related with business transactions, rather distribution of accumulated profits by the assessee company to its shareholder in the form of loans/advance. Thus, the amount given as loan, a liability also arises in the hands the assessee company to deduct tax u/s 194 before making any payment of any sum deemed to be dividend u/s 2(22)(e) of the Act which the assessee company failed to comply. The company was obliged to deduct tax at source in respect of Deemed Dividend in terms of section 194 of the Act. Thus, the above payment be treated as deemed dividend and the amount of loan given will be disallowed u/s 40(a)(ia) of the I.T. Act, 1961 in the hands of the assessee company and will be added to the total income of the assessee.

12. With the aforesaid observations of Ld. AO, it was the submission of Ld. Sr. DR that the decision of Ld. CIT(A) was based on the observation that, for applicability to section 2(22)(e) of the Act, there must be a payment by the company by way of advance or loans if no loan or advance was given by the company provisions of section 2(22)(e) are not applicable. Such observation of Ld. CIT(A) has been strongly opposed by the revenue stating that the company has granted loan to Shri Sanjay Raheja and Shri Deepak Raheja, thus, the provisions of Section 2(22)(e) of the Act are clearly applicable in this case. It is submitted that even if there were frequent transactions between the company and its directors, but the AO in his Assessment order has clearly mentioned that the

availability of funds do not have any apparent nexus with trade transactions with the company for purchase of goods taken place through these two directors, except payment of directors remuneration there were no other payments made by the assessee which were directly linked with the business affairs of the assessee company. In this regard reliance was placed on the decision of Hon'ble Apex Court in the case of Smt. Tarulata Shyam and others vs. CIT, West Bengal (108 ITR 345), wherein it is held that:

> *"When loan or advance made to shareholder are repaid before the end of the accounting year, whether the loan or advance could be treated as being dividend? The provisions of Section 2(6A)(e) of 1992 Act, would be attracted at the time of advance of loan being made to the shareholder except or the specific provision in Sec. 12(IB) for the AY 1955-56, the legislature has deliberately not made the subsistence of the loan on the date of prevision year or prerequisite for raising or applying the statutory provision. Therefore, even though, the loan was not outstanding as of the year end, it should be treated as deemed dividend."*

13. Ld. Sr. DR submitted that the above decision is squarely applicable to the facts of the present case, therefore, the addition made by the AO should be sustained.

14. In rebuttal, Ld. AR of the assessee submitted that the account of the directors of the company Shri Sanjay Raheja and Shri

Deepak Raheja, the directors of the company are in the nature of current account, the amount given to the directors are for the business purpose. It is also mentioned that the distributable profit of the company when the loans given was only Rs.1,35,466/-. It is further submitted that no fresh loan was given during the relevant year to Mr. Deepak Raheja, whose account was squared off in the relevant AY 2014-15. It was also contended that sec. 40(a)(ia) was not applicable on dividend in the AY 2014-15. Ld. AR submitted that the provisions of Section 2(22)(e) are not applicable in case the amounts are given under the running current account. Reliance was placed on the following judgments:

Commissioner of Income Tax Vs. Gayatri Chakraborty [(2018) 102 CCH 0053 Kol HC]

> *If sum received by assessee formed part of running current account giving rise to mutual obligations or payment formed one-way traffic, assuming character of loan or advance out of accumulated profit then payment of sums to assessee cannot be treated as dividend out of profit.*

Commissioner of Income Tax Vs. Suraj Dev Dada, [(2014) 88 CCH 0393 PHHC]

> *Section 2(22)(e) was inserted to stop misuse by Assessee by taking funds out of the company by way of loan advances instead of dividends and thereby avoid tax.*

Exotica Housing & Infrastructure Company Pvt. Ltd. Vs. Income Tax Officer [(2020) 59 CCH 0141 Del Trib]

When current account is maintained between parties, provisions of Section 2(22)(e) would not apply.

Deputy Commissioner of Income Tax (OSD) & ORS. Vs. Dishman Pharmaceuticals & Chemicals Ltd. & ORS. [(2018) 53 CCH 0065 Ahd Trib]

> *Section 2(22)(e) does not apply to amounts which are merely adjustment entries and not in nature of loan or deposit.*

15. It is further stated by the LD. AR that if at all the amounts given to the directors of the company are considered as deemed dividend, in that case it should not be more than the accumulated profits. On this aspect following case laws are relied upon:

Hyderabad tribunal in the case of Amit Ahuja Vs. Assistant Commissioner of Income Tax [(2014) 41 CCH 0390 Hyd. Trib]

> *When the company which had advanced loan to assessee had declared accumulated profit and other conditions of section 2(22)(e) were also satisfied, the amount received by assessee was assessable as deemed dividend u/s 2(22)(e).*
>
> *Section 2(22)(e) does not make any distinction between real profit and notional profits.*
>
> According to aforesaid decision Loan to the extent of accumulated profits had to be treated as deemed dividend at the hands of assessee u/s 2(22)(e), who is not only a director but was also holding more than 10% shares.

Assistant Commissioner of Income Tax Vs. Ajay Jadeja [(2008) 27 CCH 0564 Del Trib]

> *Where the assessee had shown the amount received from a private limited company in which he held more than 10 per cent shares as loan in the balance sheet, his contention that the said amount was security deposit for the camera given on rent to the company cannot be accepted more particularly when the assessee had received the rent for his camera from the said company even in the earlier years which means that the camera was given on rent by the assessee to the said company*

even in the earlier years and if it is so, it is not understandable as to why the security deposit amount was given in the year under consideration; ***as the provisions of s. 2(22)(e) are attracted the amount was rightly treated as deemed dividend to the extent of accumulated profit of the company at the beginning of the year.***

CIT vs. M.B. Stockholding Pvt. Limited, Tax Appeal No. 772 of 2007, Date of order 23.04.2015, Gujrat High Court

*Having heard Mrs. Bhatt, learned advocate appearing on behalf of the Revenue and considering the provisions of Section 2(22)(e) of the Act, more particularly, Explanation 2 to Section 2(22)(e) of the Act****, it cannot be said that the learned Tribunal has committed any error in directing the Assessing Officer not to include the current profit to be part of accumulated profit while determining the amount of deemed dividend under Section 2(22)(e) of the Act.*** *While determining the amount of deemed dividend under Explanation 2 to Section 2(22)(e) of the Act, the current profit was not required to be included to be part of accumulated profit. As such, as observed by the learned Tribunal, the issue is already settled by the Hon'ble Supreme Court against the Revenue in the case of Associated Banking Corporation of Ind. Ltd. V/s. Commissioner of Income-Tax, Bombay reported in (1965) Vol.56 ITR I(SC) by which, the view taken that the profit accrues when the books of account are closed.*

5. *Under the circumstances and considering the Explanation 2 to Section 2(22)(e) of the Act, we confirm the view taken by the learned Tribunal and held the question No. 1 raised in the present appeal in favour of the assessee and against the Revenue. Consequently, the present appeal deserves to be dismissed and is accordingly dismissed. No order as to costs.*

Ramesh Premji Shah Vs. DCIT, ITA No. 1985/Mum/2022, Mumbai ITAT dated 19.01.2023.

"6. *In the gross receipts of a business day after day or from transaction to transaction lies embedded or dormant profit or loss; on such dormant profit or loss undoubtedly taxable profits, if any, of the business will be computed. But dormant profits cannot be equated with profits charged to tax under ss. 3 and 4 of the IT Act. The concept of accrual of profits of a business involves the determination by the method of accounting at the end of the accounting year or any shorter period determined by law. If profits accrue to the*

assessee directly from the business the question whether they accrue de die, in diem or at the close of the year of account has at best an academic significance, but when upon ascertainment of profits the right of a person to a share therein is determined, the question assumes practical importance, for it is only on the right to receive profits or income, profits accrue to that person. If there is no right, no profits will be deemed to have accrued....."

"CIT vs. M. B. Stockholding Pvt Ltd, 2015-TIOL1139-HC-AHM ++ while the amount of deemed dividend under Explanation 2 to Section 2(22)(e) of the Act, the current profit was not required to be included to be part of accumulated profit. As such, as observed by the Tribunal, the issue is already settled by the Supreme Court against the Revenue in the case of Associated Banking Corporation of Ind. Ltd. V Is. Commissioner of Income-Tax, Bombay reported in (1965) Vol.56 I (SC) by which, the view taken that the accrues the books of account are closed."

According to the Ld. AR, it is well-settled that the profit will accrue only when there is a right to receive the same. And since in this case, the right to receive the profits didn't accrue on 31.03.2012 when M/S. Sony Mony Developers Pvt. Ltd. determined the share of profit as on 31.03.2012, therefore, only after the 31.03.2012 the assessee / shareholder had a right to receive a profit accrued to M/S. Sony Mony Developers Pvt. Ltd. as on 31.03.2012. And therefore, the AO/Ld. CIT erred in looking into the balance-sheet of the assessee as on 31.03.2012 whereas the right to receive dividend in (AY. 2012-13/FY. 2011-12), the accumulated profit as on 31.03.2011 should only be looked into; and if the same was taken into consideration, then the assessee was having (-) Rs.74,80,633/-. (as on 31.03.2011). And since M/S. Sony Money Developers have loss in AY. 2011-12 i.e., as on 31.03.2011, there would be no accumulated profit for making any addition for the current/relevant AY. 2012-13. Therefore, no addition u/s 2(22) (e)/deemed dividend was warranted. Therefore, the Ld. AR pleads that the addition confirmed by the Ld. CIT(A) to the time of Rs.3.46 crores should be deleted.

16. *Thus, we note that the Hon'ble High Court has upheld the action of the Tribunal directing the Assessing Officer not*

> *to include the current year profit to be part of accumulated profit while determining the amount of deemed dividend under Section 2(22)(e) of the Act after considering Explanation-2 to Section (2(22)(e) of the Act (which defines the accumulated profit). And the Hon'ble High Court specifically observed that while determining the amount of deemed dividend under Explanation 2 to Section 2(22)(e) of the Act, the current profit was not required to be included to be part of accumulated profit. And their Lordship also took note that the issue was already settled by the Hon'ble Supreme Court against the revenue in the case of Associated Banking Corporation of India Ltd. Vs. CIT (1965) 56 ITR 1, wherein the view was taken that the profit accrues when the books of account are closed. In the light of the judicial precedent laid by Hon'ble Gujarat High Court in CIT Vs. M. B. Stockholding (P) Ltd.(supra), and since no decision of jurisdictional High Court was cited in support of impugned action of Ld. CIT(A),* ***we are of the considered opinion that in the present case, while determining the deemed dividend, the AO/Ld. CIT(A) ought to have taken into consideration the accumulated profit as on 31.03.2011 i.e. loss/(-) of Rs.74,80,633/- and not accumulated profit adopted as on 31.03.2012 (Rs.3.46 crores). Therefore, no addition was possible u/s 2(22)(e) of the Act in the facts of the case and thus the assessee succeeds.*** *And consequently, we direct the deletion ofRs.3,41,96,270/-.*

16. The next contention raised by the Ld. AR is that expense u/s 40(a)(ia) cannot be made in absence of any expenditure has been claimed by the assessee as deduction from taxable income, reliance placed on following judgment.

Commissioner of Income Tax Vs. Dedicated Healthcare Services (Tpa) India Pvt. Ltd. [2018) 103 CCH 0035 Mum HC]

> *Ther is no claim of expenses by the assessee, and which was disallowed. The issue would have been different if the amounts were paid and in terms of Section 194J.*

Assistant Commissioner of Income Tax Vs. Health India TPA

Services Pvt. Ltd. [(2014) 39 CCH 0335 Mum Trib]

> *Disallowance u/s 40A(a)(a) would not arise where assessee was only facilitating the payments by insurer to the insured for availing the medical facilities and assessee did not claim such expenditure in its P&L account*.

17. It is further submitted by Ld AR that provision of sec. 40(a)(ia) is not applicable on income recognised as deemed dividend in the year under consideration AY 2014-15 but are applicable from 01/04/2015 i.e., from AY 2015-16, wherein the words interests, commission, professional fees, rent, royalty has been replaced by "any sum".

18. With the aforesaid submissions, Ld. AR requested that the decision of Ld. CIT(A) was on correct interpretation of facts and law, therefore, the same deserves to be sustained.

19. We have considered the rival submissions, perused the material available on record and the case laws submitted before our consideration. For better appreciation / interpretation, the provisions of sec 2(22)(e) are culled out as under:

> *2(22)(e) any payment by a company, not being a company in which the public are substantially interested, of any sum (whether as representing a part of the assets of the company or otherwise) made after the 31st day of May, 1987, by way of advance or loan to a shareholder, being a person who is the beneficial owner of shares (not being shares entitled to a fixed rate of dividend whether with or without a right to participate in profits) holding not less than ten per cent of the voting power, or to any concern in which such shareholder is*

a member or a partner and in which he has a substantial interest (hereafter in this clause referred to as the said concern) or any payment by any such company on behalf, or for the individual benefit, of any such shareholder, to the extent to which the company in either case possesses accumulated profits ;

but "dividend" does not include—

(i) a distribution made in accordance with sub-clause (c) or sub-clause (d) in respect of any share issued for full cash consideration, where the holder of the share is not entitled in the event of liquidation to participate in the surplus assets;

(ia) a distribution made in accordance with sub-clause (c) or sub-clause (d) in so far as such distribution is attributable to the capitalised profits of the company representing bonus shares allotted to its equity shareholders after the 31st day of March 1964, and before the 1st day of April, 1965;

(ii) any advance or loan made to a shareholder or the said concern by a company in the ordinary course of its business, where the lending of money is a substantial part of the business of the company.

(iii) any dividend paid by a company which is set off by the company against the whole or any part of any sum previously paid by it and treated as a dividend within the meaning of sub-clause (e), to the extent to which it is so set off;

(iv) any payment made by a company on purchase of its own shares from a shareholder in accordance with the provisions of section 77A13 of the Companies Act, 1956 (1 of 1956);

(v) any distribution of shares pursuant to a demerger by the resulting company to the shareholders of the demerged company (whether or not there is a reduction of capital in the demerged company).

Explanation 1.—The expression "accumulated profits", wherever it occurs in this clause, shall not include capital gains arising before the 1st day of April, 1946, or after the 31st day of March, 1948, and before the 1st day of April, 1956.

Explanation 2.—The expression "accumulated profits" in sub-clauses (a), (b), (d) and (e), shall include all profits of the company up to the date of distribution or payment referred to in those sub-clauses, and in sub-clause (c) shall include all profits of the company up to the date of liquidation, but shall not, where the liquidation is consequent on the compulsory acquisition of its undertaking by the Government or a corporation owned or controlled by the Government under any law for the time being in force, include any profits of the company prior to three successive previous years immediately preceding the previous year in which such acquisition took place.

Explanation 2A.—In the case of an amalgamated company, the accumulated profits, whether capitalized or not, or loss, as the case may be, shall be increased by the accumulated profits, whether capitalized or not, of the amalgamating company on the date of amalgamation.

Explanation 3.—For the purposes of this clause,—

(a) "concern" means a Hindu undivided family, or a firm or an association of persons or a body of individuals or a company ;

(b) a person shall be deemed to have a substantial interest in a concern, other than a company, if he is, at any time during the previous year, beneficially entitled to not less than twenty per cent of the income of such concern ;

20. On careful perusal of the aforesaid facts in light of thoughtful consideration of the provisions of law as well as judicial pronouncements, the contentions of the assessee w.r.t. applicability of section 2(22)(e) on the amounts advanced or loans given to the directors of the company holding more than 10% of share capital in the company being the person who is beneficial owner of shares holding not less than 10% of the voting power, that in the present case the amounts given the directors are for the business purpose under the current account, therefore, the same cannot be categorized as loan moreover, the account in case of director Shri Deepak Raheja which has been squared up in the year under consideration therefore provisions of sec. 2(22)(e) are not applicable, cannot be amicably subscribed to, since the ledger account of the said directors does not reflect any transactions or details where from it can be perceived that the transactions are in the nature of normal business transactions, much less the said transactions were not

substantiated with any documentary evidence substantiating that these pertains to or have any nexus with the business of the assessee company, therefore, we are unable to accept such contentions of the assessee, which has been approved by the Ld. CIT(A).

21. Apropos, the next contention raised by the assessee that provisions of Sec. 40(ai)(a) cannot be invoked in absence of any expenditure, referring to the judgment in the case of CIT vs. Dedicated Healthcare Services (TPA) India ltd. (supra), wherein Hon'ble Mumbai High Court has held that if there is no claim of expenses by the assessee which is covered by the provisions of sec. 194J, disallowances u/s 40(a)(ia) is not attracted. Similarly, in the case of CIT Vs. Health India TPA services Pvt. Ltd. (supra) coordinate bench of the ITAT has held that disallowance u/s 40(a)(ia) would not arise where assessee was only facilitating the payments and did not claim such expenditure in its P&L account. Such contention raised by the assessee is worth consideration in the present case, having support of the judgments referred to supra, though the same has been dealt with in the context of sec. 194J, but the analogy drawn therein shall prevail and can be adopted for sec. 194 also, therefore, respectfully following the ratio of law accorded by Hon'ble Mumbai High Court, we are of the considered view that

that disallowance u/s 40(a)(ia) would not arise where assessee has not claim such expenditure in its P&L account, thus, addition made by the AO exercising the provisions of section 40(a)(ia) was beyond the mandate of the law and is liable to be deleted. Consequently, ground no. 2 of the revenue is dismissed.

22. Before parting with, the submission of the Ld. AR that applicability of provisions of section 40(a)(ia) on deemed dividend u/s 2(22)(e) is applicable w.e.f. 01/04/2015 i.e., from AY 2015-16, which is evident from the amendment in section 40(a)(ia) wherein word '***any sum***', has been substituted by removing words '***any interest, commission or brokerage, rent, royalty, fee for professional services or fee for technical services***', accordingly, applicability of sec 40(a)(ia) on deemed dividend u/s 2(22)(e) which was not in the list of expenditure incurred and claimed by the assessee, but included by widening the scope of section by placing word 'any sum', shall be applicable under the amended provision effective from 01/04/2015. On the basis of literal interpretation of the aforesaid amendment, it can be inferred that the provisions of section 40(a)(ia) cannot be invoked on deemed dividend u/s 2(22)(e) for the period before 01/04/2015. On this argument also the disallowance made u/s 40(a)(ia) in the AY 2014-15, cannot sustain. Resultantly ground 2 of the revenue's appeal stands rejected.

23. **Ground No. 3:** Regarding deleting the addition of Rs.56,15,450/- made by the AO by disallowing the loss shown which have been claimed from commodity transactions being speculative loss and not loss from business activity of the assessee.

24. While arguing on the Ground No. 03, Ld. Sr DR has submitted that there were certain transactions against which the assessee has claimed losses from trading of currency derivative in Future and Option (F & O) and debited the same in P&L account of the company treating the same as business loss. When the issue is raised by the Ld. AO during the assessment proceedings, assessee submitted that it had transacted in F&O through recognized stock exchange, therefore, the same should be considered as loss in the nature of loss from business activities and not from speculative transactions. Observations of the Ld. AO in this respect are read out, the same are as extracted as under:

> *8. The assessee has shown loss from trading of currency derivatives in Futures & Options (F&O) at Rs.56,15,450/- and debited in profit and loss account of the company. During the course of scrutiny, the assessee was asked to explain the fact that transactions made through United Exchange is of dubious nature as the transactions occurred within a few days at the fag end of the year against currency derivatives.*
>
> *9. In order to ascertain the veracity of facts whether only concocted loss has been claimed by the assessee company with the collusion of the Kolkata based broker, a letter u/s 133(6) of the I.T. Act, 1961 was issued to Kayan Securities Pvt. Ltd, Kolkata and United Stock Exchange, Mumbai. The letter is reproduced as under-*

1. *The Client TD/PTN of the assessee is 5M08. Give complete copy of orders du/y authenticated by you for the transactions of F& O entered into by the assessee for the F. Y.2013-14.*
2. *Details of bank account and margin money/security deposit paid with date of payment by the assessee for making F.W. transactions during the said period.*
3. *If there was no deposit of any margin money, how and why you have a//owed such huge transactions without keeping any margin money? Give details of clients where F.&O. transactions done without keeping any security/margin money.*
4. *If there is any change of Client's ID/PIN against each transaction of the assessee during the course of transactions, give details of person/party whose clients ID/PIN was used in p/ace of the transactions of the assessee.*
5. *Give complete ledger account and copy of contract note of the assessee as well as of the person whose client's ID has been used.*
6. *Give details and complete ledger accounts/contract notes of each of your clients who are kept in Broker's Pool A/c and if there is any change of client's ID with that of my assessee, give evidence thereof.*
7. *Account opening form and KYC details of the assessee*
8. *This letter was sent to the broker through registered post as well as served in it's e-mail address, but no reply received till the date of order. Even, the letter revert back from the mail address of the broker akayan@sify.com Simultaneously, the requisition letter u/s 133(6) of the I.T. Act was also sent to "United Stock Exchange," in its postal address as well as in the mail address of the company, but no reply received till the date of order.*
9. *In view of the above facts, it is clear that transactions through United Stock Exchange and related broker are nothing but accommodation transactions for the only purpose of claiming sham profit/loss in the books. Due to this reason, the broker as well as authority from NMC Exchange, Ahmedabad did not respond to the notices issued by this office. Hence, the veracity of such transactions is not ascertainable. In view of foregoing discussion, it is held that the loss shown to have been claimed at Rs.56,15,450/- from currency derivative transactions is bogus claim of expenditure and no actual business transactions done by the assessee, hence it will not be allowed as expenditure u/s 37(1) of the I.T.Act in computing taxable income of the assessee company. Penalty proceedings u/s 271(1)(c) of the I.T.Act are initiated separately for furnishing inaccurate particulars of income.*
10. *Further, it would be pertinent to mention that the assessee has shown loss from trading of currency derivative in Futures & Options (F&O) at Rs.56,15,450/and debited in profit and loss account of the company. Commodity transactions under F. & O. would be regarded as business transactions on account of the following factors:*

    1.The purpose behind entering into mostderivatives/commodity transactions is to profit from short-term fluctuations in market prices.

2. The period of any derivatives/commodity transaction cannot exceed 3 months and such transactions are invariably short-term transactions.

3. Often, the sheer volume of trades in derivatives/commodity transactions entered into by a person on an ongoing basis indicates that it amounts to a business.

4. Many people who trade in derivatives/commodity may be associated with the stock market in some way or the other - they may be stockbrokers or their employees, or regular day traders. For such people, derivatives/commodity trading are an extension of their normal business activities.

12.1 The above factors do not apply in the instant case of the assessee. The assessee company has ventured in Future & Option trading for the first time in the year 2013-14.

The assessee is in the line of real estate business and venturing suddenly in the field of commodity transactions definitely raises the eyebrow as the assessee is completely raw in this field but has experienced the accumulated loss of 2s.56,15,450/- that too without having any single profit on such purchase and sale of currency derivatives during the entire period of transactions. The traded items are not volatile as such intra-day transactions are not warranted in making transactions of these items. Apparently, the high and low prices are artificially escalated/managed by brokers and experts in the field which resulted in profit and loss as per requirement of the participants/subscribers. There appears a claim of structured loss with the connivance of respective broker in this field who are, as alleged, in the field of providing concocted profit/loss in lieu of hefty margin amount paid by the beneficiary. Thus, in order to minimize the tax liability by treating it as business loss in lieu of speculative loss, trading in F.&O. transaction was made. Following unusual features noted in F.&O. transactions done by the assessee -

(i) *Assessee company participated in limited number of transactions only i.e., from 25/09/2013 to 26/02/2014. Apparently, in order to minimize tax liability, the fictional business loss was claimed by the assessee instead of speculative one.*

(ii) *Despite having transactions of large volume within a short span of transaction period i.e., to the extent of payment of Rs.56.15 Lakh no initial margin money was kept by the broker "Kayan Securities Pvt. Ltd" Kolkata.*

The broker is bound to keep margin money in advance which is absent in the instant case of the assessee.

12.2 *By virtue of sec.73 of the I.T. Act, 'Speculation Business/transactions' [Explanation 2 to Section 28 and section 43(5)] means a transaction in which a contract for the purchase or sale of any commodity, including stocks and shares, is periodically and ultimately settled, otherwise than by the actual delivery or transfer of the commodity or scrips. If a contract for purchase/sale of shares, stock or commodity is ultimately settled otherwise than by actual delivery or transfer of commodity, it would be a speculative transaction, even if at the time of entering into the contract there was no intention to gamble. On the other hand, if actual delivery of commodity takes place, the transaction would be a nonspeculative transaction, even if it is highly speculative otherwise. In the case of the instant assessee, the contract is settled otherwise than actual delivery of commodity, hence it is a speculative transaction and does not come under the purview of business or trade. [Davenport Co. (P) Ltd. Vs. CIT (1975) 100 ITR 715 (SC)]. There is no delivery of goods in the case of the assessee, as the contract is settled by mutual consent to avoid delivery, hence it is a speculative transaction.*

12.3 *Speculative Business in the case of a company (Expl. To Section 731:*

This provision is applicable if the following conditions are satisfied-

1. *Taxpayer is a company*
2. *It is a company whose principal business is other than that of-*
    a. *Banking or granting loan or advance or,*
    b. *trading in shares or banking or granting loan or advance,*
3. *the business of the company consists (wholly or partly) of the purchases and sale of shares of other companies.*

If the above conditions are satisfied, such company shall be deemed to be carrying on a speculation business to the extent to which the business consists of purchase/sale of such shares. This rule is applicable even if there is no avoidance of tax by the assessee.

In view of foregoing discussion, it is held that the loss shown to have been claimed at Rs.56,15,450/- from commodity transactions is speculative loss and not loss from business activity of the assessee, hence it will be treated separately in computing taxable income of the assessee company.

13. Without prejudice to the above, if the loss shown to have been claimed is ascertained as "Business loss" at any stage of assessment/appellate proceedings, the alternative initial discussion regarding fraudulent commodity transactions done through United Stock Exchange (the ultimate beneficiary being the assessee company) may be considered in this case.

25. Ld. Sr. DR further drew other attention to the operative para from the order of Ld. CIT(A), the same is extracted as under:

12.5 Considering the totality of facts as mentioned above and position of law as explained by various courts above and respectfully following the decision of the Hon'ble Bombay High Court in the case of Souvenir Developers (I) (P.) Ltd. (supra), it is held that the AO is not justified in treating the derivative transaction as speculative transaction and not allowing to set-off of the losses arising from the transaction in derivatives from business income.

12.6 Further, the AO also disallowed it u/s 37(1) of the Act and added to the total income of the appellant company on the ground that the Notice u/s 133(6) of the Act issued to the United Stock Exchange and the broker (M/S. Kayan Securities Pvt. Ltd.) was remained unanswered. The appellant relied upon the decision of ITAT Delhi, in the case of Phool Singh vs ACIT [ITA No. 2901/ Del/ 2014] and ITAT Mumbai, in the case of Prabhat Gupta vs ITO [51 CCH 0713] and further submitted that the AO didn't point out any specific defects in the documents furnished by the assessee. Kayan Securities (P) Ltd is a registered broker in United Stock Exchange and an active company and is duly registered in MCA and provided the company's master data extracted from MCA website.

12.7 It is noted that the appellant traded in F&O through recognized stock exchanges which admittedly happens through electronic platform; and when the transactions are finalized the payments are made through banking channel/online. All the supporting documents to prove the F&O transactions were produced before the AO which has been discarded by them without assigning any reason. Other than the suspicion which has been raised by the AO on the strength of the non-response of notices issued u/s 133(6) of the Act to the broker "as well as United Stock Exchange, the AO has bought nothing on record. Other than that, there is no other material. Further, the AO has not summoned the directors of M/s Kayan Securities Pvt. Ltd. and himself questioned them. The AO had drawn adverse finding against the assessee just because the response of the Notice u/s 133(6) was not received by the AO. According to me, the assessee had discharged its primary onus in proving the transaction on F&O by producing the corroborating evidence before the AO. The AO could not find any infirmity on these documents. However, the AO discarded the primary documents

produced by the assessee to establish the veracity of the transaction in F&O, without assigning any reason. There are no other material against the assessee in respect of its transaction in F&O. In such a scenario, based on the supporting evidence produced by the assessee to validate its transaction of F&O in recognized stock exchange, the loss suffered in said transaction has t9.pe allowed accordingly. Grounds raised by the appellant regarding his Issue is allowed.

26. Opposed to the above decision of Ld. CIT(A), it was the submission of revenue that the order of Ld. CIT(A) on this issue found to be erroneous, since the proceedings initiated u/s 133(6) by the Ld. AO on the transactions with M/s Kayan securities Pvt. Ltd., Kolkata and M/s United stock exchange, Mumbai, through registered post as well as served in its E-mail ID. Looking to the line of business of the assessee i.e., Real Estate business, who have first time ventured suddenly in the field of commodity transactions shows that a claim of structured loss with the connivence of respective broker in the field who are alleged, in the field of providing concocted profit/loss in lieu of Hefty Margin amount paid by the beneficiary. On further verification of facts Ld. AO requested to explain that the assessee has claimed concocted loss in the garb of F&O transactions, in retort the assessee company has not responded during the course of assessment proceedings. The AO, therefore, observed that the veracity of transactions are not ascertainable and has held that the currency derivative transactions are bogus and does not pertain to actual business transactions effect by the

assessee. With these submissions, Ld. CIT DR has prayed that the AO has rightly disallowed the expenditure u/s 37(1) of the I.T. Act, 1961, therefore, the same should be sustained and the order of Ld. CIT(A) should be set aside.

27. In response to the submissions to the department Ld. AR of the assessee submitted that the Ld. CIT(A) has deleted the disallowance of Rs.56,15,450/- on two different grounds. *First*, the CIT has treated loss of currency derivatives has business loss excepted claim of the assessee and *secondly*, the CIT has treated the loss of currency derivative as genuine loss. It was the submissions of Ld. AR that from the ground no. 03 raised by the department, it is evident that department has not challenged the genuinity of the transactions rather they have sticked upon the issue that the transactions are not connected to the business but are from speculative activities. It is further submitted of Ld. AR that as per section 43(5)(e), the transactions undertaken by the assessee is an eligible transaction and shall not be deemed as speculative transactions and, therefore, the provisions of sec. 73 is not applicable. Ld. AR placed his reliance on following judgments:

Deputy Commissioner of Income Tax vs. Baljit Securities Pvt. Ltd. [(2021) 63 CCH 0038 Kol Trib], It is held that

> *"Income from derivatives, future and options and share trading carried on recognized stock exchange is not in the nature of speculation and it is business income.*

Assistant Commissioner of Income Tax vs Biswanath Poddar [(2020) 60 CCH 0078 Kol Trib], it is held that,

> *"Where the assessee's case is covered in explanation 1 to section 43(5)(d) and assessee's transactions is an eligible transaction, it cannot be termed as speculative transaction."*

Commissioner of Income Tax vs Vasavi Gold & Bullion Pvt. Ltd. [High Court of Madras] [(2018) 101 CCH 0380 Chen HC].

> "*If transaction carried out by assessee is non speculative transaction, then Section 43(5) shall not be attracted and if assessee is trading in derivatives and not in shares, then loss suffered by assessee in trading in derivatives shall be excluded from ambit of Explanation to Section 73".*

Income Tax Officer vs. Upkar Retail Pvt. Ltd. [(2018) 53 CCH 0521 Ahd Trib]

> *"If loss incurred on account of derivatives shall be deemed business loss under proviso to section 43(5) and not speculation loss and, then explanation to section 73 cannot be applied."*

28. It is further submitted that, Ld. CIT has correctly applied the decision of Hon'ble Mumbai High Court in the case of Souvenir Developers (I) Pvt. Ltd. Vs. Union of India(Income Tax Appeal No. 79 of 2018), wherein the Hon'ble High Court has specifically dealt with the similar issue, as that of in the present case and accordingly has held that the AO is not justified in treating derivative transactions as speculative transactions and not allowing to set off the losses arising from such transactions in derivatives from business income. According to Ld. AR, supported with such judicial precedence, Ld. CIT(A) has rightly decided the issue in favour of the assessee therefore, the same is justified on facts and in law, therefore, it was

the prayer, that the same deserves to be upheld.

29. Having heard the rival contentions, submissions, perused the material available on record and carefully considered the judicial pronouncements relied upon by the parties, the admitted facts of the issue are that the transactions of F&O carried out during the relevant year by the assessee company are through broker M/s Kayan Securities Pvt Ltd, who is authorized by United Stock Exchange of India Ltd which is a recognized stock exchange. According to the provisions of sec 43(5)(e), "*an eligible transaction in respect of trading in commodity derivatives carried out in a [recognized stock exchange] [which is chargeable to commodity transaction tax under chapter 7 of the Finance Act, 2013 (17 of 2013),]] shall not be deemed to be speculative transaction*." On perusal of copies of contract note issued by Kayan Securities Pvt Ltd, furnished before us at Page No. 62 to 70 of the paper book by the assessee, it is apparent that the transactions carried out are through recognized stock exchange, tax on transaction charges are also charged, therefore, the same, as rightly observed by the Ld. CIT(A) are in the nature of business transactions which shall not deemed to be speculative transactions as per provisions of section 43(5)(e). Our observations are duly supported with the various decisions relied upon by the Ld. AR, referred to supra. Respectfully following the

settled position of law, we are of the considered opinion that the decision of Ld. CIT(A) holding the transaction as business transaction is on right appreciation of facts and the law, which in absence of any adverse finding against the assessee by the AO or any cogent material or contrary decision to dislodge the claim of the assessee, are qualities to be concurred with, and we do so. Consequently, ground no. 3 in ITA no. 35/RPR/2023 of the revenue is rejected.

30. Ground No. 4 of the revenue in **ITA no. 35/RPR/2023** is general in nature, wherein no further contentions are adduced, or arguments are advanced at the time of hearing, thus, the rendered academic, requires no separate adjudication. In the result the appeal of the revenue in **ITA no. 35/RPR/2023,** stands dismissed.

ITA 38/RPR/2023, AY 2016-17

31. Grounds of Appeal for AY 2016-17:

1. Whether on the facts and in the circumstances of the case, the NFAC was justified in deleting the addition of Rs. 60,39,610/- made by the A.O. by adopting AS-7 i.e., “Percentage Completion Method”?

2. Whether on the facts and in the circumstances of the case, the NFAC was justified in deleting the addition of Rs.2,11,21,389/- made by the A.O u/s 68 of the Income-tax Act, 1961?

3. Any other ground which may be adduced at the time of hearing.

Ground No. 1: Deleting the addition of Rs.60,39,610/- adopting AS-7 i.e., "Percentage Completion Method".

32. At the outset, on the issue of applicability of percentage completion method Ld. Sr. DR reiterated facts from the assessment order wherein Ld. AO has observed that the assessee is continuing in the construction of building projects. According to financials of the assessee the assessee has received advances from prospective customer. It is further noticed by the AO that the assessee is following project completion method for computing its income. The AO was not convinced with the accounting practice of the assessee in determining the income assessable to tax, therefore, the profit element embedded in the advance of Rs.36.63/- Crore from customer with certain adjustments, estimating at Rs.33,61,22,561/- of which 10% is estimated as effective profit for the relevant year and an addition of Rs.3,36,12,256/- was made. Further upon verification of records the AO come to conclusion that the advance of Rs. 27,57,26,457/- was covered in the sale of subsequent year, therefore, he rectified this mistake, and the addition was scaled down to the Rs.60,39,790/-. However, the assessee was not satisfied with the addition in principle, therefore, has assailed the issue before the Ld. CIT(A), wherein Ld. CIT(A) has accepted the

contentions of the assessee and has deleted the entire addition.

33. Ld. Sr. DR vehemently supported the orders of Ld. AO and has requested that the decision of Ld. CIT(A), NFAC on this issue is not acceptable on merits. He argued that the accounting standard issued by ICAI are binding on the companies [as per proviso to clause 3C of Sec. 211 of Companies Act], which has made it mandatory to follow AS-7 i.e., Percentage Completion Method for recognizing revenue in the construction contract. It was, therefore, the prayer that the AO has rightly made the addition and the same deserves to be sustained.

34. Ld. AR before us responding to counter the submissions and arguments of the revenue, has submitted that the project of the assessee was started in year 2014-15 and the department has accepted the Project Completion Method adopted by it. Ld. AR further drew our attention to order of Ld. CIT(A), wherein the issue has been deliberated at length and has been decided under the guidance of various judgments by Hon'ble Apex Court and Hon'ble High Courts. The deliberations by the Ld. CIT(A) are extracted here under for the sake of completion of facts:

7. *Ground no. 2, 3, 4 & 5 of the both appeals are against the addition of 10% of the advances received from the buyers by applying provision of AS-7 (percentage of completion method). During assessment proceedings, the AO observed from the balance sheet that the WIP standing the balance sheet as on 31.03.2016 wasRs.45,32,13,510/- and the appellant had received advances from buyers amounting to the tune of During assessment proceedings, the AO observed that the booking of Rs.2,79,05,064/- was cancelled by the buyers and further payments were not received from buyers totaling to Rs.22,41 ,540/-. Hence, the AO excluded the amount aggregating to Rs.3,01 from the total advances of Rs.36,62,69,165. Thus, the advances of Rs.33,61,22,561/- was considered for calculating the estimated profit under Percentage of Completion Method as the AO was of the view that the substantial percentage of construction was completed, and the appellant company was required to apply Percentage of Completion Method. The AO estimated the profit of 10% of advances of Rs. 33,61,22,561/- and the amount of Rs.3,36,12,256/- added to the total income of the appellant company.*

Meanwhile the appellant filed a rectification application dated 18.01.2019 in respect of addition made at Rs.3,36,12,256/- on account of 10% of advances received from buyers and also in respect of addition of Rs.9,30,528/- u/s 43CA of the Act. The appellant in its rectification application stated that out of total advances of Rs.33,61,22,561/- received from buyers, revenue of Rs.28,35,67,611/- were recognized by executing sale agreement up to 31.12.2018. Upon verification of records, the AO came to the conclusion that the advances of Rs.27,57,26,457/- was covered in the sale for subsequent year, therefore, 10% of this amount i.e., Rs.2,75,72,466/- was excluded from the addition of Rs.3,36, 12,256/-. As the mistake was apparent from the record, the AO restricted the addition to the extent of Rs.60,39,790/- on this ground of addition.

7.1 The appellant has submitted in this matter as under: -

> *2.2 The appellant vehemently objects the addition of Rs.60,39,610/- made by the AO. The assessee is a real estate developer and is developing the project on the land owned by the appellant. The company has initiated the development and construction of the residential project on its own cost and continues to build the project irrelevant of fact whether any booking has been made or not by the customer. When an intended buyer approaches assess to purchase a flat/shop, he enters into an agreement mutually at an agreed price with description of flat/shop, method, and instalments of payment of agreed sales consideration. Assessee receives payment in different instalments and final payment is received only upon the completion of construction of flat/shop as per*
> *agreement. The amount received over the period of time is treated as advance in the*
> *books of the company. Also, expenditure incurred during development of the project is capitalized and treated as closing stock. When the construction of residential unit is completed and registered in the name of the buyer, advance amount is adjusted with final sales consideration and offered as income and taxes are paid thereon.*
>
> *2.3 That in the order passed, the AO, has discussed following sections of the I. T. Act, 1961 and methods of revenue recognition:*

- *Section 145 of the I. T. Act.*
- *Proviso of Sec. 211(3C) of Companies Act, 2013.*
- *Revenue Recognition as per AS-7 along with guidance note issued by the ICA/. (i.e., application of percentage completion method.)*

Section 145 of the I. T. Act states how income should be computed in accordance with either cash or mercantile system of accounting regularly employed by the assessee. Further, sub section (2) of 145 empowers the government to notify the accounting standard to be followed by any class of assesses and in respect of any class of income. In exercise to this power the Central government has notified Accounting Standard-I relating to disclosure of accounting policies. The appellant is following mercantile method of accounting in the year under consideration and has duly complied with all the disclosures mentioned in AS-I.

Proviso of Sec 211(3C) of the Companies Act states that the Accounting Standard that need to be complied for preparation of profit and loss account and balance sheet of the company shall be deemed to be the standards specified by the ICA/ until the accounting standards are prescribed by the Central Government. The appellant has duly followed the accounting standards issued by the ICAI while preparing the accounts of the company and the same has been duly audited and reported by the Chartered Accountant in the audited financial statement. Further, for the contention of the AO that since standards prescribed by ICAI is binding upon the company therefore it is mandatory for the appellant company to follow AS-7 i.e. percentage completion method, it is to submit that both the method of revenue recognition i.e. project completion method and percentage completion method have been recognized in the standards prescribed by the ICAI. Also, the appellant has regularly employed project completion method for recognition of revenue since the day it has entered in the business of real estate and has been duly accepted by the AO in the assessment proceedings till A. Y. 2015-16. There cannot be any dispute to the fact that every assessee being entitled to arrange its affairs and follow the method of accepted accounting policy, which the Department has earlier accepted. Under similar circumstances as obtained from the facts on hand, Hon'ble Apex Court in the case of Commissioner of Income Tax Vs Bilahari Investment Private Limited reported in (2008)299 ITR 1 (SC) has held "Recognition/identification of income under the 1961 Act is attainable by several methods of accounting. It may be noted that the same result could be attained by any one of the accounting methods. The completed contract method is one such method. Similarly, the percentage completion is another such method. Under the completed contract method, the revenue is not recognized until the contract is complete. Under the said method, costs are accumulated during the contract. The profit and loss is established in the last accounting period and transferred to the profit and loss account. The said method determines results only when the contract is completed. This method leads to objective assessment of the results of the contract. On the other hand, the percentage of completion method tries to attain periodic recognition of income in order to reflect current

performance. The amount of revenue recognized under this method is determined by reference to the stage of completion of the contract.

Also, in the case of Commissioner of Income Tax Vs. Principal Officer, Hill View Infrastructure (P) Ltd. [(2016) 384 ITR 0451 (P&H)] it was held that "Both methods of accounting i.e. project completion method and percentage completion method were accepted standards of accounting and either of methods could be applied by Assessee. Assessee had chosen to compute its income on basis of project completion method i.e. recognizing income on completion of project and not from year to year. Whereas case of revenue was that it should account for income as it was generated in hands of Assessee i.e. from year to year on basis of work completed being relatable to revenue generated from year to year. Assessee followed systematic method of accounting from year to year which was accepted by department and no defects were pointed out by department in method of accounting adopted by Assessee. It was prerogative of Assessee to arrange its affairs in such manner and follow any recognized method of accounting to compute its profits. No merit in order of AO in re-computing income in hands of Assessee. Assessee had been consistently following one of recognized methods of accountancy, i.e. project completion method, for computation of its income. "

2.4 Further, that the objective of AS-7 is "to prescribe the accounting treatment of revenue and costs associated with construction contracts. Because of the nature of the activity undertaken in construction contracts, the date at which the contract activity is entered into and the date when the activity is completed usually fall into different accounting periods. Therefore, the primary issue in accounting for construction contracts is the allocation of contract revenue and contract costs to the accounting periods in which construction work is performed". This Accounting Standard is specifically for contracts entered into for construction of an assets or group of interrelated assets. The main ingredient of the contract is construction service not sale of a completed unit. In case of a Construction Contract, contractor is working on the asset specified by the customer. Customer can cancel the construction contract and another contractor can be engaged for the purpose of completion of contract. Here significant risk and reward on asset created, though incomplete, remains with the customer and does not part away along with the departing contractor [E.g.: - Bridge or road construction or Government building contract].

2.5 Further, it is important to mention that in the present case of the appellant there is no contract between the customer's and the appellant company to construct the residential flats/shops unit on customer's behalf. The appellant is developing the project on its own land and is selling residential flats/shops after its completion. As long as the flat/shop is not sold, it is treated as closing stock in the books of the appellant as treated in case of goods and accordingly closing work in progress is calculated at cost at the end of the year. This results in high stock at the end of the respective financial year. In case of revise in method as per AS-7 then the opening stock of the project will also be required to be revalued. In the identical sets of facts in the case of Commissioner of Income Tax Vs. Prestige Estates Project Pvt. Ltd [(2020) 108 CCH 0001 Kar HC], Hon'ble court held that —It has been noticed by the appellate Tribunal that assessee was in the activity of

projects and was not a construction contract on Thus, the revised AS-7 would be applicable to an enterprise undertaking Construction activities on their own account as a venture of commercial nature. Whereas the assessee undertakes construction activities for those persons to whom it intends to sell super built area along with undivided share of land in a project which it is developing as a developer. "

Further, in the assessment order the AO has specified that as per the revised guidance note issued by the ICAI on accounting for Rea/ Estate Transactions, it is mandatory for real estate developers to follow AS-7 and adopt percentage completion method for revenue recognition. In this regard it is to submit that the guidance note issued by the ICA/ covers application of both the methods i.e. Project completion method and percentage completion method. In the said guidance note it is mentioned that if transactions of real estate are in substance similar to delivery of goods, then principles enunciated in AS-9 for Revenue recognition will be applied. Copy of AS-7 is enclosed herewith. Kindly refer Annexure 5. Further as per AS-9, revenue should be recognized when:-

- *The seller has transferred all the significant risks and rewards of the ownership to the buyer and the seller retains no effective control over the unit.*
- *The seller has effectively handed over possessions of the real estate unit to the buyer forming part of the transactions.*
- *No significant uncertainty exists regarding the amount of consideration that will be derived from the real estate's sale.*
- *It is not unreasonable to expect ultimate collection of revenue from buyers.*

Copy of AS-9 is also enclosed herewith. Kindly refer Annexure 6. In the case of the appellant, the assessee enters into an agreement with the customer for sale of unit on completion and receives periodic payment from the customer Though the assessee receives time to time payment in respect to the agreement entered but the significant risk has not been forwarded to the customer as no effective control over the asset has been transferred. Control over the property is transferred only on execution of conveyance deed before the registrar. Also, the customer has the right to cancel the agreement at any point of time and demand refund of the money advanced. For example, the appellant has refunded Rs.2,79,0,5064/- out of total advance received i.e., 7.60% approx. of total advance has been refunded. In such situation, irrespective of the degree of completion, asset remains with the builder and is again available for sale. Thus, there is no certainty of accrual of revenue in such scenario. Where transfer of legal title is a condition precedent to the buyer taking on the significant risks and rewards of ownership and accepting significant completion of the seller's obligation, revenue cannot be recognized till such time legal title is validly transferred to the buyer. Due to this peculiar nature of this trade of real estate business, it is practically not possible for the builder to recognize revenue as per percentage completion method prescribed in Accounting Standard-7 even though substantial advance is received from

customers. Hence, the addition made by the AO based on percentage completion method i.e., AS-7 should be deleted. The appellant places his reliance to following judgments: -

7.2 I have gone through the facts of the case and submission made by the appellant in this regard. The appellant is developer and developing the project on its own land. It is noted that the appellant company is running two projects namely Raheja Residency and Raheja Tower. During the year Raheja Residency was the only project under progress wherein considerable construction was completed and significant bookings were made. This project was started somewhere in FY 2013-14.

7.3 During assessment proceedings, the AO adopted the view that substantial percentage of project is completed, therefore, revenue has to be recognized according to Percentage of Completion Method. However, the appellant objected the action of the AO and stated that the company is following Project Completion Method for recognition of revenue till AY 2015-16 and percentage of completion method is not applicable in the case of the appellant.

All the facts and circumstances related to the impugned addition of Rs.60,39,790/- are duly considered. The AO in the assessment order stated that standard prescribed by ICAI is binding upon the companies therefore, the appellant company has to mandatorily follow the AS-7 i.e. Percentage of Completion Method for recognizing of revenue. Further, the AO stated that the appellant company received payments periodically from the customers and was utilized in development of projects to complete it within a time frame. Therefore, there is a contractual relationship between buyers and developer. The AO also emphasized that the project takes longer period to complete usually more than one financial year, therefore, in these sorts of contracts, the contractee as well as contractor obtains legally enforceable rights under the contract. As the appellant company agreed to a contract of long-term construction on behalf of the buyers. Thus the appellant has to follow Percentage of Completion Method for recognizing revenue and determining profit.

7.5 On the other hand, the appellant company stated that the appellant company is a developer and developing the project on the land owned by it and the construction of residential project continued regardless to any booking was made. The appellant company also stated that it is following mercantile system of account and complied the disclosures in accordance with AS-I. Further, the appellant company stated that accounting standards issued by ICAI is followed in preparing the accounts of the company. The appellant company pointed out that both the method of revenue recognition i.e. Project Completion Method and Percentage of Completion Method is recognized in the standards prescribed by the ICAI.

7.6 All the facts and circumstances related to the impugned addition are duly considered. Apropos to the adoption of project completion method of accounting by the assessee, the appellant IS consistently following project completion method of accounting since the inception of appellant company and project in question. The appellant company never deviated from such method of accounting since the inception of the business and that the revenue had also accepted project completion method and profit shown by the assessee during the assessment proceedings for AY 2015-16 in Assessee's own case. It is well settled that the project completion method is one of the recognized methods of accounting and as the assessee has consistently been followed such recognized method of accounting thus in the absence of any prohibition or restriction under the act for doing so, it can't be held that the Project completion method followed by the appellant company was erroneous in any manner. Further, over the period of project life, both the methods will yield same result and therefore, revenue neutral in nature. In the identical set of facts in the case of CIT & Anr. Vs. Varun Developers, (2021) 110 CCH 0394 Kar HC held as under:

"since assessee had not offered any income from said project in relevant assessment year 2006-07 on basis of project completion method but offered income from this project in assessment year 2007-08 and either method of accounting finally lead to same results in terms of profits and, therefore, revenue neutral for assessment year in question, assessee was to be allowed to adopt project completion method. "

7.7 This view is also supported by Hon'ble Punjab & Haryana High Court in case of CIT Vs. Principal Officer Hill View Infrastructure (P)Ltd. (2016) 384 IT R 451 has held as under:

"the assessee has been consistently following one of the recognized method of accountancy i.e. project completion method for computation of its income. In the absence of any prohibition or restriction under the Act for doing so, it cannot be held that approach of the CIT(A) and tribunal deleting addition made by AO by applying percentage completion method was erroneous or illegal in any manner so as to call for interference by this. "

7.8 Also the Hon'ble Gujarat High Court in case of CIT-IV Vs. Shivalik Buildwell (P) Ltd. (2013) 40 219 has held as under:

"if as per the accounting standard available, the assessee was entitled to claim the entire income on completion of the project and if such accounting standard was accepted by the revenue in the earlier years, in the present year, the Assessing Officer could not have taken a different stand."

7.9 In the case of CIT Vs. Prestige Estates projects Pvt. Ltd. [(2020) 108 CCH 0001 Kar HC] held as under:

"it has been noticed by the appellant tribunal that assessee was in activity of project and was not construction contractor, Thus, the revised AS-7 would be applicable to an enterprise undertaking construction activities on their own account as a venture of commercial nature. Whereas the assessee undertakes construction activities for those persons to whom it intends to sell super build area along with undivided share of land in a project which it is developing as a developer."

7.10 Under identical facts of the case Hon'ble Apex Court in the case of CIT Vs Bilahari Investment P Ltd. (2008) 299 ITR 1 (SC) held as under:

"15. Recognition/identification of income under the 1961 Act is attainable by several methods of accounting. It may be noted that the same result could be attained by any one of the accounting methods. Completed contract method is one such method. Similarly, percentage of completion method is another such method.

16. *Under completed contract method, the revenue is not recognized until the contract is complete. Under the said method, costs are accumulated during the course of the contract. The profit and loss is established in the last accounting period and transferred to P & L account. The said method determines results only when contract is completed. This method leads to objective assessment of the results of the contract.*

> 17. *On the other hand, percentage of completion method tries to attain periodic recognition of income in order to reflect current performance. The amount of revenue recognized under this method is determined by reference to the stage of completion of the contract. The stage of completion can be looked at under this method by taking into consideration the proportion that costs incurred to date bears to the estimated total costs of contract."*

7.11 Further, Hon'ble I TAT Mumbai Bench 'A' in case of Aditya Builders Vs. CIT (Admn) (2013) 39 178 has held as under:

> *"where assessee had been consistently following project completion method in respect of his two projects, Commissioner was not justified in directing AO to compute income of assessee from one project by applying percentage completion method."*

7.12 Hon'ble ITAT Ahmedabad Bench [N] D' in case of ACIT, Circle 2(2), Baroda Vs. National Builders (2012) 22 55 has held as under:

> *"in case of assessee, a contractor cum developer, revenue from development of a commercial complex has to be determined in terms of AS-9 guidelines. e) That the Hon'ble ITA T Chandigarh Bench in case of Hill View Infrastructure (P)Ltd. (2015) 55 356 has held that where assessee was following project completion method consistently from year to year which was accepted by department also and no defect was pointed out therein, same could not be rejected, "*

7.13 Notwithstanding the discussion made above, Othe method adopted by AO after rejecting the Project Completion Method of appellant company by disallowing 10% of advances received as on 31.03.2017 cannot be said [i] n accordance with percentage completion method. AO's findings are missing w.r.t. percentage of cost incurred out of total cost of construction of project, sale of saleable area and advances received from each unit. The addition of Rs.60,39,790/- was an estimation of income and not formulated with any certified method of accounting without applying rationale.

7.14 Considering the law explained by Hon'ble Courts (supra), the AO is not justified in changing of method of accounting standard for recognizing of revenue from AS-9 to AS-7. I am inclined to agree with the contention of the appellant company that the Project Completion Method employed for recognizing of revenue is valid accounting standard approved by ICAI. The appellant consistently followed Project Completion Method to compute the income and this method was accepted by the department in earlier years. Hence, the AO is directed to delete the addition of Rs.60,39,790/estimated by applying the Percentage of Completion Method. This ground of appeal is allowed.

35. In support of aforesaid contentions, Ld. AR furnished before us various case laws, out of which some of relevant judgments in support of their claim are as under:

PCIT Vs. Salarpuria Simplex Dwellings LLP, (2022) 289 Taxman 0264, Calcutta High Court:

The revenue has raised the following substantial questions of law for consideration:

(i) Whether on the facts and circumstances of the case the Tribunal was justified in law to accept the accounting method followed by the assessee as accounting standard-9 (AS9) instead of accounting standard-7 (AS-7) despite the fact that the assessing officer arrived at a conclusion finding that the assessee is a contractor and not a builder after analysing the various aspects of the business of the assessee?

(ii) Whether in the facts and circumstances of the case the Tribunal was justified in law in accepting the accounting method AS-9 (Project Completion Method) instead of accounting method AS-7 (Percentage Completion Method) since the assessee is a contractor which has been proved by the assessing officer in the Assessment Order?

The Court also took note of the decision of the Hon'ble Supreme Court in Bilahari Investment (P) Ltd. (supra) in Commissioner of Income-Tax Vs. Principal Officer, Hill View Infrastructure (P.) Ltd., reported in (2016) 384 ITR 451 (P & H). Similar question arose as to whether the percentage completion method ought to have been followed by the assessee therein. The Court after taking note of the decision of the Hon'ble supreme Court in Bilahari Investment (P) Ltd. (supra) and that of Manish Build Well (P) Ltd. (supra) held that the assessee has been consistently following one of the recognised methods of accounting that is project completion method for computation of income and in the absence of any prohibition or restriction under the provisions of the Income Tax Act. For doing so it cannot be held that approach of the CIT(A) and the tribunal was erroneous or illegal in any manner so as to call for interference by Court. Accordingly, the appeal filed by the revenue was dismissed.

COMMISSIONER OF INCOME TAX AND ANR. Vs. M/S VARUN DEVELOPERS

We have considered the submissions made by learned counsel for the parties and have perused the record. The first three substantial questions of law are answered in favor of the assessee for the reasons assigned by learned Senior counsel for the assessee in the judgments referred to supra. So far as fourth

substantial question of law is concerned, it is pertinent to note that under Section 145(1) of the Act, the income chargeable under the head 'Profits and Gains of Business' shall be computed in accordance with either cash or mercantile system of accounting regularly employed by the assessee. The general provision is subject to accounting standards that the Central Government may notify. The assessee is a builder and developer and not a construction contractor simplicitor. Accounting Standard- 7, titled construction contracts is applicable only in case of contractors and does not apply to the case of developers and builders which is evident from opinion rendered by expert advisory committee of ICAI. It is pertinent to note that the assessee had offered the income for Assessment Year 2007-08 and no income from the project was offered for the Assessment Year 2007-08 on the basis of project completion method and that either method of accounting finally lead to the same results in terms of profits and therefore, revenue neutral.

In view of preceding analysis, the fourth substantial question of law is also answered against the revenue and in favour of the assessee.
In the result, the appeal fails and is hereby dismissed.

Unique Builders & Developers (Reality), Vs The DCIT, Jaipur in ITA No. 464,465 &466/JP/2012 vide order dated 30.04.2015, identical issue was discussed, the finding of the ITAT are as follows:

39. *Apropos substituting the method of accounting from Project Completion to % Completion by the authorizes below is by observations that Assessee's have not followed Accounting Standards 9 & 7 which tantamount to not following Accounting Standard-I as prescribed under section 145(2) of the Act. It is admitted position that the appellant were regularly following project completion method from year to year and the assessments prior to the date of search were also framed by accepting project completion method. As per ICAI guidelines real estate developer has an option to choose from Project Completion method or the Percentage Completion method as both are recognized methods for revenue recognition in such cases. Once the option is exercised by assessee, it is not open to the*

Assessing Officer to substitute his own opinion to change the method of accounting because mid-way it is found that other method of accounting better suits the revenue. It is the accounting principle, consistent following of method and its earlier adoption which decides the issue and not the suitability or revenue.

40. *We have already mentioned that in any case assessee's are eligible for deduction u/s 80IB against their income, in this eventuality, take this method or that, the result is NIL taxable profits after deduction. Thus, in these cases the substitution of method to % Completion Method is based on surmises, unwarranted facts, irrelevant considerations, and a fruitless exercise. Except making some academic and theoretical rhetoric's, the revenue has not been able to demonstrate that the method of accounting adopted by assessee is not in conformity with set accounting guidelines, provisions of sec. 145. Hon'ble Delhi High Court in the case of CIT vs. Smt. V. Sikka & Another (1984) 149 ITR 73 (Del.) held that if the method of accounting is accepted in first year and regularly followed in subsequent year it cannot be substituted at the whims of AO. It is not mandatory for a real estate developer to follow percentage of completion method as prescribed by the Institute of Chartered Accountants of India under AS-7. AS-7 issued by the Institute of Chartered Accountants of India, recognizes the position that in the case of construction contracts the assessee can follow either the project completion method or the Percentage completion method. Neither the revised Guidance Notes 2012 issued by Institute of Chartered Accountants of India nor the Exposure Draft for Guidance Note on Recognition of Revenue issued by the Institute of Chartered Accounts of India in 2011 are mandatory or override the statutory provisions. Ld. CIT(A) has also taken contradictory stand; on one hand it is held that there can be no revenue recognition unless 25% project is complete, rightly so as no builder can earn from plinth or pillars on other hand it is held that the property in flats stands transferred by booking amount. This clearly implies completion of sale and revenue generation. We may hasten to add that the stubborn stand of authorities below has lead to unimaginable contradictions and anomalies. followed by the appellants, therefore, could not be faulted with by the revenue. The assumptions made by the authorities below that by not following AS-9 & 7 the same tantamount to not following prescribed AS-I under section*

145(2) of the Act is profoundly misplaced, unnecessary, and uncalled for besides being contrary to principles of accountancy and interpretation of the statutory provisions. The same, therefore, could not be taken a valid basis for change of method regularly employed by the appellant. Thus, we uphold the method of revenue recognition adopted by the assessee's as "Project Completion Method. The other judicial precedents cited by the assessee mentioned in ITAT orders as well as written submissions support our view.

36. backed with the aforesaid submissions, it was the contention of the Ld. AR that the assessee has rightly and consistently followed the project completion method, which is approved by the Ld. CIT(A), therefore, the decision of Ld. CIT(A) in favour of assessee cannot be held as unjustified so as to be rejected and set aside, accordingly, the same qualifies to be maintained.

37. We have considered the rival submissions, perused the material available on record and case laws relied upon by the opponent parties. AS-7(revised 2002) issued by the institute of Chartered Accountants of India, applicable for all the construction contracts entered into during the accounting periods commencing on or after 01.04.2003, is mandatory in nature. According to the AS-7, recognition of the contract revenue and expense can be done under the Percentage Completion Method or under Project Completion Methods. Further, in case of transaction of Real Estate which are similar to delivery of goods than guidance of AS-

9 can be taken. In this respect, Ld. CIT(A) has observed that in the present case the assessee company is developing the project on the land owned by it and the construction of residential project continued regardless to any booking was made, the appellant company has followed the mercantile system of accounting and complied the disclosure in accordance with AS-1, it is also mentioned that both the method i.e., Project Completion Method and Percentage Complete Method is recognized in the AS prescribed by ICAI. It is also observed by Ld. CIT(A) that the assessee has allotted Project Completion Method and has consistently followed the same, since the inception of the project in question. There was no deviation in method of accounting of the assessee company since the inception of the project and that the revenue had also accepted Project Completion Method and Profits shown by the assessee for the earlier AY 2015-16. It is held that the Project Completion Method followed by the appellant company cannot be termed as erroneous, since over the period of project life both the methods will yield same result and, therefore, revenue neutral. Reliance was placed in the case of Varun Developers (supra). Based on such observations Ld. CIT(A) has concluded that contention of the assessee company qua adopting the Project Completion Method is valid as per AS-7 of the ICAI. In backdrop of aforesaid observations in consonance with the verdict

granted under jurisprudence accorded by the Hon'ble Apex Court in the case of Bilahari Investment P. Ltd. 2008 (supra) and various Hon'ble High Courts (supra), Ld. CIT(A) has rightly decided the issue in favour of assessee, which in our considered opinion is not subject to any interference, consequently the same is approved. Resultantly, ground no. 1 of the revenue, without any material to dislodge the decision of Ld CIT(A), held as bereft of any merit, thus, stands dismissed.

Ground No. 02. Deleting addition of Rs. 2,11,21,389/- u/s 68 of the Income Tax Act.

38. Ld. Sr. DR vehemently supported the order of Ld. AO. It is submitted that the decision of Ld. CIT(A) is found to be erroneous wherein the observation of Ld. AO are disregarded that, it is evident from the bank statements provided by the assessee, the money comes in the bank account was from unexplained sources, since the same are transferred to the assessee on the same date or within a short period of time. Much less, Ld. AO did not find the behaviour of loan provider as creditworthy. Under such circumstances it was requested to set aside the order of Ld. CIT(A) and restored the addition made by Ld. AO.

39. Contradicting the aforesaid submissions of the Ld. CIT DR, Ld. AR of the assessee submitted that Ld. AO during the course of assessment proceedings had queried the assessee to furnish the details of unsecured loans received from M/s Pitambara Udyog Pvt. Ltd., in reply the assessee submitted ITR, Computation, Bank statement and confirmation of the loan creditor. Assessee also furnished details of unsecured loan received during the year a/w audited financial statement to discharge the onus cast upon it under the provisions of section 68 of the Act. Regarding nature and source of the unsecured loan received, before the Ld. AO, the assessee has explained that the funds were remitted out of overdraft account of the lender. The assessee also requested the Ld. AO to summon directly the lender, but Ld AO without properly appreciating the submissions of the assessee has added the unsecured loans including interest to the income of the assessee u/s 68 stating that the money comes in the bank account from unexplained sources and the same are transferred to the assessee's account on same date. There was a cash deposit of Rs. 20,00,000/- lacs, hence the creditworthiness and genuineness of the transaction could not be established. Aggrieved by such decision of the Ld. AO assessee preferred an appeal before the Ld. CIT(A), wherein the facts of the issue were discussed at length, deliberated lawfully and logically

under the guidance of various judicial pronouncements and accordingly the issue is decided in favour of the assessee. The observations of Ld. CIT(A) on the issue are reproduced as under:

> 8. *Ground No. 6 of the both the appeals are against addition of Rs.2,11 ,389/- u/s. 68 of the Act. During assessment proceedings, the AO also observed that the appellant had received unsecured loan of Rs.2,11,21,389/- from Pitambara Udyog Pvt. Ltd. The AO noted that the money came from unexplained sources to the creditor and the same were transferred to the appellant on the same date or within short span of time. The AO also noted that there was cash deposit of Rs. 20,00,000/-. Hence, the AO was of the view that the appellant failed to establish the creditworthiness of the creditor and genuineness of the transaction and added the unsecured loan at Rs.2,11,389/- to the total income of the appellant company.*
>
> *8.1 The appellant has submitted following submission in this matter: -*
>
> > 3.1 *The Assessing Officer during the course of assessment proceeding asked to furnish the detail of unsecured loan received during the year and asked to substantiate the same with ITR, Computation, Bank statement and Confirmation of account. Copy of questionnaire issued dated 07, 12.2018 is enclosed herewith. Kindly refer Annexure8. In response to this, the assessee submitted all the details of unsecured loan received during the year along with? their ITR, Computation, Bank statement, Confirmation of account and Audited financial statement to substantiate their identity, creditworthiness, and genuineness of the transactions in View of 68 of the I. T. Act, 1961 vide written submission dated 12.12.2018 and 25.12.2018. Copy of both the written submission is enclosed herewith. Kindly refer Annexure-9. Thereafter the Ld. A.O. issued notice dated 23.12.2018 stating therein that why unsecured loan of Rs.2,11,21,38/- received from Pitambara Udyog Pvt. Ltd should not be added to the total income as creditworthiness of the lender and genuineness of the transactions are not proved from the bank statements, balance sheet and its income produced in this office. Copy of notice dated 23.12.2018 is enclosed herewith. Kindly refer Annexure-10. In response to this the appellant submitted that the appellant has discharged his onus and also stated that the lender has filed return of income of Rs.30/- lacs approximately and also explained that all the funds were remitted out of overdraft account of the lender. Further the appellant requested to the A.O. to summon directly to the lender if any further detail required. Copy of written submission dated 25.12.2018 is enclosed herewith. Kindly refer Annexure-ll. However, the Ld. A.O. without properly appreciating the submission of the assessee, added the unsecured loan including interest of Rs.2,11,34,877/- received during the year from Pitambara Udyog Pvt. Ltd u/s 68 by stating that the money comes in the bank account from unexplained sources,*

same are transferred to the appellant on same date. The A.O. also stated that there is cash deposit of Rs.20,00,000/- Hence the creditworthiness and genuineness of the transaction could not establish.

3.2 *The appellant vehemently objects to the addition of Rs.2, 11,34,877/- made by the Ld. A.O. on account of unsecured loan received from M/S Pitambara Udyog Pvt. Ltd u/s 68 of the I. T. Act, 1961. During the course of assessment proceedings, in order to substantiate the transactions of unsecured loan received from Pitambara Udyog Pvt Ltd, the appellant has submitted the following documents: -*

- *ITR*
- *Computation*
- *Relevant Bank Statements*
- *Confirmation of Account*
- *Audited Financial statement.*

3.3 *Copy of above mention documents are enclosed herewith for your ready reference. Kindly refer Annexure-12. The unsecured loan of Rs.2, 10,00,000/- from Pitambara Udyog Pvt. Ltd were received through banking channels i.e. out of overdraft account of the lender company. On perusal of the bank statement of the lender companies, they are having sufficient fund to make the advance to the appellant company and there is no cash deposited in bank account prior to making the advance to the appellant company except a small amount of Rs.20,00,000/- deposited in overdraft account. Further, during the year under consideration the lender has declared total income at Rs.30,23,980/- and turnover of Rs.6.16/- Crore. On perusal of the bank statement and Audited Financial statement and ITR, it is evident that the lender was having sufficient funds for making the loan in the appellant company, therefore the creditworthiness and genuineness of the transactions are beyond doubt. The appellant further submits that by submitting the aforesaid documents, the appellant has duly discharged its primary onus as required under section 68 of the I. T Act, 1961. The said loans were received from the company, duly registered with the Ministry of Corporate Affairs and had their unique corporate identification numbers. Copy of Present MCA status of the company is enclosed. (Kindly refer Annexure-14.) The said company have maintained audited books of accounts and has filed their ITR regularly. Further the appellant has also explained the source of the said loan i.e out of overdraft account. However, the AO in his assessment order has not discussed these facts but stated that the source of loan is not clear and comes from unexplained sources. The said observation of the A iS not substantiated by any material evidence.*

3.4 *At this juncture it is also important to bring in notice of your honour that the said loans were duly repaid in succeeding years i.e., in A. Y 2017-18 and 2019-20 Copy of account evidencing the repayment of loan along with relevant bank statement is enclosed herewith. (Kindly refer Anexure-13.)*

3.5 *It is further to submit before your honour that the entire allegation have been framed on the basis of mere presumption and assumption. It is also a matter of fact that the funds were remitted out of overdraft account of the lender which has not been disproved by the A.O. It is also to important to bring in notice of your honour that even after specific submission by the appellant wherein it was stated that the party can be summoned for further verification, the AO has not conducted any enquiries. We would like to submit before your good self that the AO did not took into notice the said submissions made by the appellant during the course of assessment proceedings. In this regard reliance can be placed on the case of Niranjan/a/ Ramaballabh [29 ITR 4591, wherein it was observed that the treatment of deposits as income of the assessee without examining the patties concerned vitiates the assessment. Further, reliance can also be placed on judgment of Supreme Court in case of Cf. Food Corporation of India vs Provident Fund Commissioner [1 SCC 68, 71]: Wherein it was held that in a proper case, the AO should exercise all his powers to collect all evidence and collate all material before coming to proper conclusion. This is the legal duty of the Officer concerned who is vested under section 131 of the Act with certain powers in respect to certain matters.*

3.6 Further, we would like to state before your good self that the AO, during the course of assessment proceeding did not conduct any third-party verification. The AO did not take any measures to cross verify the facts submitted by the appellant with the third parties, nor did the AO issued any notice under section 133(6)/131 of the Act. We would like to submit before your good self that certain powers have been prescribed to the AO by the provisions of the Act and the AO has erred in not utilizing the same and making the addition merely on his surmises, believes and conjectures. The said contention of the appellant finds support from the decision of the Chhattisgarh High Court in the case of Pawan Kumar Agarwal vs ITO (copy of the said judgement is enclosed. Kindly refer Anenxure-15), wherein, it was held as follows:

". that having been done, the First appellate Authority was fully justified in taking the view that it was open to the department to take recourse of section 131 or section 133(6) of the Act if they were to father proceed. That not having done so, the First Appellate Authority was within its jurisdiction to conclude on facts and law, in favour of the assessee..."

3.7 Further, in the notice dated 23.12.2018, the Ld. A.O has simply stated that why the loan received from Pitambara Udyog Pvt. Ltd should not be added to the total income of the appellant as the credit Worthiness of the lender and genuineness of the transactions are not proved from the bank statement, balance sheet and its income produced in the office. From the said notice it is apparent that the Ld. A.O has proposed to make the addition without specifically pointing out the specific defects in the various documents submitted by the

appellant, The Ld. A.O has given the genera/ observation without mentioning the reason why the documents could not be accepted. The Ld. A.O. has mentioned certain observation directly in the assessment order only without stating the same during the assessment proceeding. The A.O. is duty bound to mention the reason why the documents furnished should pot be accepted or not sufficient to prove the identity, creditworthiness, and genuineness of the transactions. The entire addition have been proposed and made without any adverse material brought on record. The addition made by the Ld.AO is merely based on presumption and assumption and is not sustainable in the eyes of law.

3.8 That in para 23 of the assessment order, the Ld. A.O has mentioned that, it is visible from the bank a/c statement of the lender that as money comes in the bank account from unexplained sources, same are transferred to the assessee on the same date or within a short period. Further it is required to mention that there is cash deposit of Rs.20,00,000/-. Hence the genuineness of transaction could not be established by the assessee. The behavior of loan provider in this transaction is not creditworthy. Source of al/ four payments is out of amount from overdraft account of Bank of Baroda. In this regard it is to submit that, the said allegation has been framed on mere presumption and assumption without any material evidence brought on record. Further as regard to allegation of the A.O. that the money comes in the bank account from unexplained sources, the appellant objects to the said contention of the A.O. In this regard it is to submit that the said contention of the A.O. is without any basis. The appellant has submitted before the AO that the lender has advanced this money from the overdraft facility from his bank namely Bank of Baroda. Once the specific source of the lender has been explained by the AO then allegation of the AO that the source of source remained unexplained is highly arbitrary. The Ld. A.O. has not brought any evidence that or mention any reason for forming the said contention. Further depositing of 20,00, 000/- cannot be a ground for making addition where the assessee has declared total income at Rs.30/- lacs and having turnover of Rs.6.16/- crore. Further as regard to cash deposit, it is further to submit that the books of accounts are audited by the Chattered accountant. Further, on referring the bank statement of the lender company, the lender has withdrawn cash in the month of march itself of 0,000/-on various dates i.e. on 01.03.16, 08.03.16, 14.03.16, 21.03.16 and 22.03.16 which itself proved the availability of cash in hand in the hands of lender company to deposit on 30.03.2016. Therefore, making addition on the basis of said grounds are not according to law and deserves to be deleted. Further, it is to submit that, source of the lending is not required to be proved u/s 68 for unsecured loan is supported by judicial pronouncement is as under:-

In the case of Deputy Commissioner of Income Tax vs. Aarti Catalyst solutions P. Ltd, (2022) 64 CCH 0115 Ahd Trib, it was held that AO has doubted source of the creditors thereby the AO is inquiring source of source which is not permitted.

In the case of Joint Cit (Osd) Cc 7(4), Mumbai vs M/S Shalimar Housing & Finance, Mumbai Bench of ITA T (ITA. No. 4079/Mum/2019 (Assessment Year 2013-14) dated 01.06.2021 has held that "Source of Source as per Proviso to Section 68 is not applicable to the credits from Unsecured Loans/ Borrowings. "

3.9 That in para 23 of the assessment order, the Ld. A.O have relied upon one case law namely Novoday Castle Pvt. Ltd In this regard it is to submit here that the principal laid down in the said judgment of Delhi High Court is not applicable in the present case of the assessee since the factual conditions are totally different. "In the case law i.e. Navodaya Castles (P) Ltd was not able to produce the shareholders from whom share application money was received. Notice u/s 131 also remained unserved to the shareholders. But in the present case the no notice /s 133(6)/131 was issued or make any third-party enquiry. The fact of the case IS altogether different from the fact of present case of the assessee. Further no material brought on record that the loan has been received from a paper company.

3.10 That in para 23 of the assessment order, the Ld. A.O. have relied upon one more case law namely N Tarika Properties Pvt. Ltd Vs. CIT, 2014 [387 SCI. In this regard It is to submit here that the principal laid down in the said judgment of Apex Court is not applicable in the present case of the assessee since. "In the case law i.e. N Tarika Properties Pvt. Ltd, The appellant has furnished false documents and also almost all the funds were invested out of cash deposit in bank on same date. And the amount received again remitted. In the present case the appellant has furnish all the documents of the lender. Further the lender has declared a good, returned income as well as turnover. In the present case there is no cash deposit except one entry, the source of which has also been explained. Therefore, the fact is different from the fact of present case of the assessee.

3.11 The appellant further submits that the appellant has discharged its primary onus of explaining the nature and source of the credit being made in the books of accounts of the assessee on account of unsecured loans. The appellant has justified the source of such credit. The onus of thus denying the same to be sufficient and explanatory shifts towards the AO and the AO has not pointed out or provided any concrete evidence which may be suggestive of the fact, that such transaction entered into by the appellant was bogus in nature. We would like to submit before your goods/f that the suspicion of the highest degree cannot take place of the evidence and making an addition merely on the basis of suspicion may result into defying the natural justice that shall be afforded to the appellant. The AO cannot make the addition merely on the basis of his surmises and conjectures. With respect to the facts of the case of the appellant, there was no concrete evidence in view, that may suggest that the loan transaction entered into by the appellant was bogus in nature. However, based on the fact as explained above and the

contentions supported by the relevant case law, such theory is merely based on surmises and conjectures of the AO lack evidential support.

Chhattisgarh High Coud in case of CIT vs. Abdul Aziz (2012) 251 CTR 58 (Chhattisgarh),

The Jurisdiction High Court held that where AO had not made any independent enquiry to disprove creditworthiness of the creditors, as established by affidavits and statements of creditors ' '"disclosing source of income, addition made u/s 68 was rightly deleted. In this case also the rejection is based on no evidence and therefore raising of a presumption against the assessee does not arise. Explanation prima facie reasonable cannot be rejected on capricious or arbitrary grounds or on mere suspicion or on imaginary or irrelevant grounds. The AO pas arbitrarily disbelieved the identity/creditworthiness without substantiating by any evidence and therefore the addition deserves to be deleted.

Calcutta High Court in the case of Northern Bengal Jute Trading Co. Ltd vs CIT [70 ITR 407, 4151
"...the surrounding circumstances to be considered must however be objective facts, evidence adduced before the taxing authorities, presumptions of facts based on common human experience in life and reasonable conclusions. In holding a particular receipt as income from undisclosed source, the fate of the assessee cannot be decided by the Revenue on the basis of surmises, suspicions or probabilities...ll

In the case of RIDDHI SIDDHI DEVELOPERS PVT. LTD. vs. DEPUTY COMMISSIONER OF INCOME TAX, (2021) 63 CCH 0086 Mum Trib it was held that:
No additions can be made merely on the basis of presumption, conjectures and surmises.

In the case of NISARG LIFESPACE LLP vs. INCOME TAX OFFICER, (2021) 62 CCH 0203 Mum Trib it was held that "No addition could be made on mere presumption that the assessee routed its own cash in the form of unsecured loans without any concrete evidence to this effect. "

In the case of ASSISTANT COMMISSIONER OF INCOME TAX vs. GURDEEP SINGH, (2020) 59 CCH 0152 Chd Trib, it was held that To apply a deeming fiction, first set of facts is to be proved beyond doubt and deeming fiction cannot be applied on basis of assumption, presumption, or suspicion about first set of facts.

In the case of DOLPHIN GOODS (P) LTD. vs. INCOME TAX OFFICER, (2021) 62 CCH 0091 Koln Trib, it was held that "Addition could not have been sustained merely based on inferences drawn by circumstance/conjectures/surmises. "

In the case of Deepak Nagar vs. Assistant Commissioner of Income Tax , (2019) 56 CCH 0143 Del Trib, it was held that "Addition u/s 68 cannot be made where neither the Assessing Officer conducted any enquiry nor had brought any clinching evidence to disprove the evidences produced by the assessee. Further the additions made by the Assessing Officer and confirmed by the CIT(A) are heavily guided by surmises, conjectures and presumptions and therefore, has no legs to stand on."
In the case of BIN/ BUILDERS P. LTD. vs. DEPUTY COMMISSIONER OF INCOME TAX, (2021) 62 CCH 0085 Mum Trib, it was held that — No addition could be made merely on the basis of allegation, suspicion, conjectures or surmises. "

3.12 Furthermore, in view of provision of section 68 the appellant needs to prove the identity, credit worthiness and genuineness of the transactions where any sum has been credited during the year. Further The appellant has duly discharged it onus by submitting ITR and Computation to prove the identity, Bank statement to prove the credit worthiness and confirmation of account to prove the genuineness of the transaction. Since the appellant has duly discharged its onus of proving the source of credit, the burden to prove that the transaction is bogus shifts to A.O. The AO has never pointed out any specific defects in the documents submitted by the appellant in order to disprove the claim of the appellant. Further the transaction has been carried through banking channel and is evident from the bank statements of the lender and therefore genuineness of transactions beyond any doubt. Therefore, once the appellant has discharged its onus by submitting various documents, which was never contradicted by the AO on specific grounds, then in such circumstances the addition u/s 68 cannot be made. The above contention of the appellant also finds support from various judicial pronouncements as under: -

High court of Gujrat in the case of Principal Commissioner of Income Tax vs. Gopal Heritage Pvt. Ltd [20211 133 taxmann.com 173 (Gujarat)

The court held that "Section 68 of the Income-tax Act, 1961 - Cash credit (Unsecured loans) - Assessee-company had taken unsecured loans from some persons - As assessee was not in a position to establish capacity and creditworthiness of depositor, Assessing Officer made an addition under section 68 - On appeal, Commissioner (Appeals) thread bare examined entire material in case of each of these persons and entities and eventually held that identities of depositors had been proved and moreover, loans had been granted through banking channels and copy of bank statements also had been provided and deleted addition under section 68 –

Tribunal confirmed said order - Whether since all ingredients contemplated under section 68 had been duly satisfied on aspect of identity of creditors, genuineness of transactions and their

creditworthiness, concurrent findings of both authorities deserved no interference - Held, yes [Para 51 [In favour of assessee]"

High court of Delhi in the case of PRINCIPAL COMMISSIONER OF INCOME TAX & ORS vs. KRISHNA DEV/ & ORS. (2021) Ito CCH 0009 Del HC
The court held that "Reliance placed on the report of investigation wing, without further corroboration on the basis of cogent material, does not justify AO's conclusion that the transaction is bogus, sham and nothing other than a racket of accommodation entries. "

Mumbai High Court in the case of PRINCIPAL COMMISSIONER OF INCOME TAX vs. AMI INDUSTRIES (INDIA) LTD. (2020) 107 CCH 0294 Mum HC

The court held that "Income—Cash credit—Assessing Officer noted that assessee disclosed funds from three companies as share application money—Assessing Officer treated aforesaid amount as money from unexplained sources and added same to income of assessee as unexplained cash credit—Appellate authority set aside addition—Tribunal confirmed order passed by first appellate authority—Held, identity of creditors were not in doubt—Assessee had furnished PAN, copies of income tax returns of creditors as well as copy of bank accounts of three creditors in which share application money was deposited in order to prove genuineness of transactions—In so far credit worthiness of creditors were concerned, Tribunal recorded that bank accounts of creditors showed that creditors had funds to make payments for share application money and in this regard resolutions were also passed by Board of Directors of three creditors—Though assessee was not required to prove source of source Assessing Officer made inquiries through investigation wing and collected al/ materials which proved source of source—First appellate authority returned clear finding of fact that assessee had discharged its onus oi proving identity of creditors, genuineness of transactions and credit-worthiness of creditors which finding of fact stood affirmed by Tribunal—Appe/lant has not been able to show any perversity in aforesaid findings of fact by authorities below—Revenue's appeal dismissed. "

Mumbai High court in the case of THE PRINCIPAL COMMISSIONER OF INCOME TAX vs. PARTH ENTERPRISES held that "No addition can be made u/s 68 without making an enquiry in respect of creditors whose confirmations were filled by assessee. Il

HIGH COURT OF MADHYA PRADESH INDORE BENCH in the case of PRINCIPAL COMMISSIONER OF INCOME TAX & ORS. vs. CHAIN HOUSE INTERNATIONAL (P) LTD. & ORS. It was held as under: -

"Income—Cash Credits—issue of shares at premium—Genuineness of transaction—Search, seizure and survey operations u/s 132/133A were

conducted along with other concerns/group companies of assessee at various residential and business premises—Thereafter, a notice u/s 153A was issued to assessee, in response to which, assessee filed its returns declaring its total income of Rs.1.03/- crores—During course of search, it was found that assessee had received an unsecured loan of Rs.30/- crores from company 'BSPL' who shown to had got a bogus share application money and premium of Rs.55/- crones from 5 entry providing companies during FYs 2011-12 and 2012-13 in form of accommodation entries—It was also found that share capital share premium during FYs 2011-12 & 2012-13—1t was allegedly found that commission at rate of 5 % had been charged by such 5 entry providers companies for providing accommodation entries, therefore, commission of Rs.1.50/- crores for FY 2011-12 and Rs.1.25/- crores for FY 2012-13 was added to total income on assessee company for infusion of accommodation entries as unexplained expenditure—Thereafter, AO finally passed assessment order u/s 143(3), r/w/s 153C and did not agree with evidences filed and treated amount of Rs.55/- crore as income of assessee u/s 68 on basis of statement and evidence of various persons, which were recorded behind back of assessee—On appeal, CIT(A) deleted addition made by AO—Further, Tribunal also upheld decision of CIT(A)—Held, there was no dispute about receipt of funds through banking channel nor there was any dispute about identity, creditworthiness and genuineness of investors and, therefore, same had been established beyond any doubt and there should not had been any question or dispute about premium paid by investors—Unless there was a limitation put by law on amount of premium, transaction should not be questioned merely because assessing authority thinks that investor could had managed by paying a lesser amount as Share Premium as a prudent businessman—Test of prudence by substituting its own view in place of businessman's had not been approved by Supreme Court—It was well settled that if creditworthiness of investor company and genuineness of transaction was proved no addition u/s 68 could be made and no substantial question of law arises—Question raised by revenue in regard to issuing share at a premium was purely a question of fact—There was no reason to interfere with decision of lower authorities—Revenue's appeal dismissed. II

Delhi High Court in the of CIT & Anr Vs Russian Technology Centre Pvt Ltd & Anr. [300 CTR 501]

The Court held that "The preceding enumeration of the circumstances of the case
show that the assessee had Furnished all relevant data before the AO and the CIT(A), which, however, were not inquired into by the AO. Instead, he obdurately adhered to his first impression and/or initial understanding that the entire transaction was neither creditworthy nor genuine. The assessee relied upon the documents to prove that the monies had been received through banking channels from its principal and other related companies; it had submitted the FIPB Approval dated

10.12.2005 authorizing the assessee company to raise capital up to Rs.600/- crores, copy of certificates of incorporation of shareholders, copy of bank statement, copy of Form 2 filed before ROC, copies of Certificates of (i) Incorporation of RTCHL, (ii) Incumbency of RTCHL, (iii) Good Standing of RTCHL, (iv) Director Certificate of RTCHL as well as the Balance Sheet of RTCHL for the years 2004-05 and the confirmation given by the remitters towards remittance of share capital etc. This was all that the assessee could have furnished in the circumstances. It could not be expected to prove the negative that the monies received by it were suspicious or not genuine infusion of capital etc. The assessee had discharged its burden of proof in terms of the settled dicta in Divine Leasing (supra). It was only logical to expect that if the AO was not convinced about the genuineness of the said documents, he would have inquired into their veracity from the bank(s) to ascertain the truth of the Assessee's claims. Having not done so, he was not justified in disregarding the Assessee's contentions that the infusion of monies into its accounts was legitimate. Consequently, the AO was not justified in making additions of the various sum's u/s 68 of the Act…

Bombay High Court in the case of Orient Trading Company Ltd vs. CIT [49 ITR 723]

The Court held that "...where, however, the identity of the third patty and his capability is established, the initial burden which lies upon him can be said to have been discharge by him. It will not, thereafter, be for the assessee to explain further how or in what circumstances the third party obtained the money or how or why he came to make deposit of the same with the assessee. The burden will shift on to the Department to show why the Assessee's case cannot be accepted and why it must be held that entry, though purporting to be in the name of a third party still represents income of the assessee from a suppressed source. In order to arrive at such a conclusion, however, the Department has to be in possession of sufficient and adequate material. On the facts and circumstances of the case, Assessee's initial burden stood discharged and there being no material to show that Revenue discharged its burden, cash credit could not be treated Assessee's suppressed income..."

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

Hon'ble Supreme Court yin case of CIT VS Lovely Exports (P) Ltd. (2008) 216 CTR (SC) 195, held that "if the share application money received by the assessee company from alleged bogus shareholders,

whose names are given to the A.O. then the department is free to proceed to reopen their individual assessments in accordance with law, but it cannot be regarded as undisclosed income of the assessee company.„

In case of ACIT vs Venkateshwara [spat Pvt. Ltd., 319 ITR 393 (CG), the jurisdictional High Court Chhattisgarh has held that "in case of share application money the assessee has produce evidence regarding names, addresses etc. and the shareholders have confirmed the investment. The department is free to proceed to re-open shareholders individual assessment in accordance with law, but it cannot be regarded as undisclosed income of the assessee company. "

In case of CIT vs. Oasis Hospitalities Pvt. Ltd. 333 /TR 119 (Del), it was held that

"Assessee company has filed copies of PAN, acknowledgment of returns of the lenders and their bank accounts and statements of the relevant period, thus the primary onus was discharged by the assessee. The appellant contends that now it is for the AO to disprove the credits by bringing adverse material. In holding a particular receipt as income from undisclosed sources, the fate of the assessee cannot be decided by the revenue on the basis of surmises, suspicion or probabilities. "

In the case of K.P. MANISH GLOBAL INGREDIENTS PVT. LTD. vs. ASSISTANT COMMISSIONER OF INCOME TAX, (2021) 62 CCH 0195 Chen Trib, it was held that "Once the assessee discharged its burden u/s 68, then burden shifts to Assessing Officer to prove otherwise that the transaction was nothing but undisclosed income of assessee. "

In the case of NAMDHARI INDUSTRIAL TRADERS PVT LTD. vs. ASSISTANT COMMISSIONER OF INCOME TAX, (2021) 62 CCH 0216 Chd Trib, it was held that "Addition u/s 68 is not sustainable where the. Assessee has prima facie discharged the onus of establishing identity and creditworthiness of the aforesaid three companies and further in establishing the genuineness of the transaction—

In the cases of DCIT (Central), Raipur Vs. R.K. Transport & Constructions (P) Ltd ITA No. 236 to 242/RPR/2014 wherein the Return of Income of the lenders were vet)/ low or nil but the net worth were sufficient to make the investments and was established by the various documents like bank statements, balance sheets etc., it was held by the Jurisdictional Raipur Bench of Tribunal that —addition cannot be made only on the basis of suspicion or surmises and without controverting the statements of the assessee by bringing any cogent material on record.

Bombay ITAT in the case of Sanghvi Realty Pvt Ltd vs DC/T [60 ITR 150]

The ITAT held that "... When the assessee has furnished al/ relevant details in order to discharge burden of proof placed upon it u/s 68, addition made u/s 68 not justified.

Agra [TAT in the case of B. R. Oil Industries vs DC/T [53 CCH 301

The ITAT held that Addition u/s 68 cannot be made where assessee discharges his onus by producing evidence

Agra ITA T in the case of Kayan Memorial & Charitable Trust vs ACIT [27 DTR 152]

The ITAT held that "Assessee having filed confirmations of creditors, their bank accounts and acknowledgements of IT returns with PAN, initial burden stood discharged and the AO having never asked the assessee to produce the creditors, evidence filed by assessee remained unrebutted and addition under s. 68 was not called for.

Delhi ITAT in the case of Topline Buildtech Pvt Ltd vs DC/T[52 CCH 318]

The ITAT held that "...Thus, the sole basis left for consideration is that Revenue doubted the creditworthiness of the creditors because of the low income reflected in their return of income and that they have no fixed assets or debtors or creditors. However, A.O. has not undertaken any investigation of the veracity of the documents submitted by the assessee company. The bank statement of the creditors shows that both creditors were having sufficient amounts in their bank accounts for giving loans to the assessee-company. The A.O. have not made any investigation and nothing has been brought on record if the amount of loan given by both the creditors actually received from the coffers of the assessee company so as to enable it to be treated as undisclosed income of the assessee-company.. .11

Bombay ITA Tin the case of Vim/a P Katria vs ITO [49 CCH 502]

The [TAT held that —...having heard both the sides and considered material on the record, assessee has furnished confirmation letters in respect of al/ loan creditors. Court further observed that the assessee has filed income tax returns along with bank statements of al/ loan creditors. Al/ the loan creditors are assessed to Income tax and loans have been given by cheque. Court further observed that the A.O has summoned trustees of the trust who had appeared before the A.O and given a statement u/s 131, wherein they have clearly admitted that they have advanced loan to the assessee. In respect of remaining three patties, though they are not appeared before the A.O, the assessee has filed necessary details that these loans have been repaid by cheque in the next financial year Therefore, assessee has discharged his initial burden cast upon him by filing identity, genuineness, and creditworthiness of the parties. Once, three aspects have been proved, then the onus shifts to the A.O to prove otherwise. In this case, the A.O ignoring all evidence filed by the assessee, simply made additions on the simple reason that creditors are not having sufficient source of income to explain loan given to the assessee. If at all, the A.O having any doubt on the capacity of the loan creditors, he is free to proceed

against the loan creditors as per the law, but he cannot make additions towards, loan creditors' u/s. 68 of the Act once the assessee has discharged his initial burden.

In this case, on perusal of the facts available on record, assessee has filed necessary evidence to prove the identity, genuineness of the transaction and creditworthiness of the parties. Therefore, A.O was erred in making additions towards unsecured loans u/s. 68 of the Act. The CIT(A), without appreciating the facts, simply confirmed additions made by the A.O. Therefore, court directs the A.O to delete additions made towards unsecured loans u/s 68 of the Act

3.13 In view of above facts, circumstances and case laws relied upon by the appellant, the addition made by the AO u/s 68 deserves to be deleted.

8.2 I have carefully gone through the assessment order as well as the written submission filed. The AO has made addition by treating the loans taken by the assessee company as unexplained credit u/s section 66 of the Act However, a loan, which is otherwise a capital receipt, can be added as income only by a deeming provision of section 68 of the Act. It is thus, important to understand the position of law u/s 68 of the Act which has evolved from a catena of judgments delivered by the Courts and Tribunals on this issue. The Hon'ble ITAT Mumbai in the case of ITO vs Anant Shelters Pvt. Ltd. (2012) 20 Taxmann.com 153 has enumerated certain principles which would be extremely useful in understanding the issue in hand. It has been stated in the said judgment that over the years, law regarding cash credits has evolved and taken a definite shape. A few aspects of law u/s 68 can be enumerated.

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

The opinion of the AO for not accepting the explanation offered by the assessee as not satisfactory is required to be formed objectively with reference to the material on record.

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

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

5. *The identity of creditors can be established by furnishing their PANs or assessment orders. The genuineness of the transaction can be proved if it was shown that the money was received through banking channels by A/c payee cheque/online/digital transfer. Creditworthiness of the lender can be established by attending circumstances by filing the documents.*

8.3 It is seen that during the course of assessment proceedings, the following details were filed before the AO.

1. *PAN, Acknowledgement of Income Tax Return of Pitambara Udyog for A. Y.2016-17.*
2. *Ledger a/c duly confirmed by Pitambara Udyog p Ltd.*
3. *Bank statement of Pitambara Udyog P Ltd showing the loan advanced.*
4. *Bank statement of appellant showing the loan returned.*
5. *Ledger a/c for the interest paid and tax deducted (TDS) by the appellant.*

8.4 *If the above referred principles are applied to the facts of the case under consideration it can be seen that the identity of the creditors has been established as they are having PAN and they are filing return of income. The genuineness of the transaction is established form the fact that the acceptance and repayment of loan has been through banking channels, proof of which is filed. The creditworthiness of the lenders is established from the bank statements and Balance sheet of the lenders which were filed before the AO.*

8.5 *The reason behind making addition by the AO that the money came in the bank account of the lender from unexplained sources and transferred to the appellant's account within short span of time/period. Further, the AO also stated that the cash of Rs.20,00,000/- also deposited to the account of lender. The moot point before the AO was to examine the appttcättöfi-öf-s-éä18R68 in the case of the appellant. Instead of establishing that the explanation offered on the nature and source of credit in the books of the appellant is not satisfactory, the AO went on to discuss the case laws on section 68. The AO didn't start primary investigation in the form of calling for information u/s 133(6) of the Act from lender and drew adverse inference that the money transferred to the appellant's account are from unexplained sources. The assessee in whose books the credits are found has explained the entries with regard to the identity, genuineness and creditworthiness through the documents and the confirmation and affidavits filed by the lenders. According to me, the assessee had discharged its primary onus in proving the identity, genuineness, and creditworthiness through the documents by producing the corroborating evidence before the AO. The AO could not find any infirmity on these documents.*

8.6 *It is an established rule of law that whoever alleges has to prove it. Here in this case, the AO alleged that the source of unsecured loans of Rs.2,11,21,389/- taken by the appellant company are received from unexplained sources. It is for the AO to prove by corroborative evidence that the money taken as loan belong to the assessee by other evidence. Something more from the books of accounts maintained in the regular course of business of records of the lender or the borrower is required as corroborative evidence. The AO failed to bring any corroborative evidence and not even bothered to examine the lender once.*

8.7 *The Hon. Supreme Court in the case of CIT v. Orissa Corporation P. Ltd. 159 ITR 78 had held, as under:-*

"Held, that in this case the respondent & given the names and addresses of the alleged creditors, lives in the knowledge of the Revenue that the said predators were income tax assessee. Their index numbers were in the file of the Revenue. The Revenue, apart from issuing notices u/s 131 at the instance of the respondent, 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 creditworthy. There was no effort made to pursue the so-called alleged creditors. In those circumstances, the respondent could not do anything further. In the premises, if the Tribunal came to the conclusion that the respondent had discharged the burden that lay on it, then it could not be said that such a conclusion was unreasonable or perverse or based on no evidence. If the conclusion was based on some evidence on which a conclusion can be arrived at, no question of law as such arose. The High Court was right in refusing to state a case. "

8.8 *In* ***Nemi Chand Kothari vs*** *CIT* ***[20031 264 ITR 254 (Gau), the Gauhati High Court held that*** *it is not the business of the assessee to find out the source of money of his creditor or of the genuineness of the transaction, which took place between the creditor and sub creditor and/or creditworthiness of the sub-creditors.*

8.9 Reliance is placed on Asst. CIT Vs. Katrina Rosemary Turcotte 87 Taxmann.com 116 (I TAT Mum) Addl. CIT Vs. Miss Lata Mangeshkar 97 ITR 696 (Bom). Again, it is important to note here that the appellant had paid back the entire amount of loan taken from the said parties within a short period of time and much before the reassessment proceedings was even initiated as per the documents filed. It is obvious that the AO brushed aside the evidence produced by the appellant in a casual manner. On the other hand, the appellant was able to establish the identity and the creditworthiness of the creditors as well as the genuineness of transaction.

8.10 Hon'ble Bombay High Court had an occasion in WP no. 167 of 2015 dated 15.04.2015 in the case of M/S Rushabh Enterprises Vs ACIT 24(3) and Ors to examine similar case. In the case, the assessee had taken loan from concerns related with Bhanwarlal Jain group of cases. In its order the Hon'ble Bombay High Court in addition to deciding the legal validity of reopening of assessment also discussed the facts of the case. The Hon'ble Bombay Court in para 8 of its order stated" according to her (AO) the revenue 'has received information from the DGIT(Inv) that the assessee has taken unsecured loans from the above parties by way of unaccounted cash/accommodation entries. We are unable to agree since the

petitioner has clearly stated that all the payment were made by a/c payee cheques which were encashed in the bank account of the petitioner in the regular course of

business. We find that the Petitioner has also paid interest on this loan after

deduction of tax at source and VTDS _returns are also accordingly filed. There is no
dispute in regard to the above We find nothing to support the said contentions of the revenue. The revenue's contention in the affidavit in reply has no merit. On the other hand, the loans appear to be taken in the regular course of business….."

8.11 After considering the totality of facts, the rival submissions, applicable law and on the basis of discussions mentioned above I have come to a conclusion that nature and source of credit in the books of accounts of the appellant stands explained by the assessee and the explanation is not apparently false looking into the documents filed. Consequently, addition on account of unexplained credit cannot be sustained. This ground of appeal is accordingly allowed and addition of Rs.2,11,21,389/- is ***deleted.***

40. Ld. AR, further submitted that in the present case since the source of unsecured loans have been duly explained by the assessee, but the AO without any corroborative evidence to prove that the money taken as loan actually belongs to the assessee, have imposed the addition. The AO squarely failed to dislodge the explanations of the assessee, have made the disallowance under preconceived mind set on his own presumptions, therefore, the additions was rightly deleted by the Ld. CIT(A) and accordingly the decision of Ld. CIT(A) deserves to be upheld.

41. We have considered the rival submissions, perused the material available on record and case laws referred to pertaining to the issue. In the present case, admittedly the primary onus was discharged by the assessee in producing the documents to substantiate the transactions of unsecured loans. The document submitted are ITR, Computation, relevant bank statements, confirmation of account and audited financials. On perusal of the order of Ld. AO, it is apparent that the

explanations offered by the assessee supported with documentary evidence have been summarily rejected by the Ld. AO with the observation that the money comes in the bank account of the lender are from unexplained sources, same are transferred to the assessee on same date or within a short period, cash deposit of Rs.20,00,000/- Lac was not explained by the assessee, the behavior of Loan provider in this transaction is not creditworthy. Ld. AO also mentioned that the source of all four payments is out of amount from overdraft account of bank of baroda. Ld. AO placed his reliance on the judgment in the case of **Navodaya Castle Pvt. Ltd. Vs. CIT[268 (SC)],** wherein Hon'ble Supreme Court has held that *"the certificate of incorporation, PAN etc., are not sufficient for purpose of identification of subscriber company when there is material to show that subscriber was a paper company and not a genuine investor."* Ld. AO, further took guidance from the judgment in the case of N Tarika Properties Investment Pvt. Ltd. Vs. CIT, 2014 [387 SC], wherein Hon'ble Supreme Court has observed that "*the AO found that subscribes bank account statements were forged and fabricated as there were corresponding cash deposits in the bank account before issue of share applications cheque and that deposit were through cash and transfer entries from the same bank of entry operators-High Court by impugned order held that since falls evidence had been adduced by assessee to give colour of genuineness to Bogus entries through bank accounts and deposits which were mostly by cash, assessing officer was justified in making addition."*. We have carefully read through the aforesaid observations of the Ld. AO, but are unable to

comprehend as to how the narratives of the case laws relied upon by the Ld. AO are applicable in the present case, since the facts in the present case are nowhere identical to the cases referred by the Ld. AO on the foundation of which the case against the assessee has been build-up. Ld. AO failed to bring on any material so as to establish that the lender was a paper company and not a genuine investor and to prove that the transactions under considerations are bogus, wherein the assessee has produced any forged or fabricated document. Ld. CIT(A) has observed that the opinion of AO for not accepting the explanation offered by the assessee should be objectively w.r.t. material on record, the assessee has offered explanations about the nature and source of the funds so received during the relevant AY, the evidences produced by the assessee cannot be brushed aside in a casual manner, the assessee has adduced requisite documents to substantiate the identity, creditworthiness of the loan creditor and genuineness of the transactions. The AO instead of examining the application of section 68, has harped upon to discuss the case laws. No preliminary investigation u/s 133(6) of the Act from the lenders was initiated by the AO. Ld. CIT(A) also observed that according to him the assessee has discharged its primary onus when documents, confirmations and affidavits pertaining to the lender were filed and no infirmity in such documents could point out by the Ld. AO. Ld. CIT(A) placed his reliance on the judgment in the case of CIT vs Orissa Corporation Pvt. Ltd. 159 ITR 78, wherein Hon'ble Supreme Court (supra) and other case laws by Hon'ble High Court.

42. In view of aforesaid observations, considering overall facts and circumstances of the present case. The assessee has submitted all the required information also has requested the AO to summon the loan creditor so as to examine the facts for satisfaction of the Ld. AO that the impugned transactions are genuine and not liable to be disallowed under the provisions of section 68. Ld. AO reached to a premature opinion, without pursuing the inquiries, on the basis of certain case laws which are distinguishable on the facts with the case of the assessee. Under such circumstances we observed that the assessee has discharged the obligation lay upon it when the preliminary documents were submitted before the Assessing Officer. In backdrop of such observations respectfully following the judgments referred to supra the addition made by invoking provisions of section 68 based on assumptions and presumptions by the Ld. AO is liable to be deleted and the decision of Ld. CIT(A) found be maintained. In the result Ground No. 02 of the revenue in ITA 38/RPR/2023 is dismissed.

43. Ground No. 03 of the revenue in **ITA no. 38/RPR/2023** is general in nature, wherein no further contentions are adduced, or arguments are advanced at the time of hearing, thus, the rendered academic, requires no separate adjudication.

44. In the result the appeal of the revenue in **ITA no. 38/RPR/2023,** stands dismissed.

45. In combined result both the aforesaid appeals of the revenue are dismissed in terms of our observations here in above.

Order pronounced in the open court on 28/11/2023.

Sd/-	**Sd/-**
(RAVISH SOOD)	**(ARUN KHODPIA)**
न्यायिक सदस्य / JUDICIAL MEMBER	**लेखा सदस्य / ACCOUNTANT MEMBER**

रायपुर/Raipur; दिनांक Dated 28/11/2023

Vaibhav Shrivastav

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

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

// सत्यापित प्रति True Copy //

आदेशानुसार/ BY ORDER,

(Assistant Registrar)
आयकर अपीलीय अधिकरण, रायपुर/ITAT, Raipur