आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर

IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE

BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER
AND
SHRI B.M. BIYANI, ACCOUNTANT MEMBER

ITA No.794/Ind/2018
(Assessment Year: 2010-11)
&
IT(SS)ANo.14/Ind/2022
(Assesssment Year 2011-12

ACIT, Circle -1 Indore	Vs.	Ritesh Jain 31, Jeevandeep Colony, Indore
(Appellant / Assessee)		(Respondent/ Revenue)
PAN: ADSPJ6423H		

CO No.36/Ind/2019
(Arising out of ITANo.794/Ind/2018)
(Assessment Year: 2010-11)

Ritesh Jain 31, Jeevandeep Colony, Indore	Vs.	ACIT, Circle -1 Indore
(Appellant / Assessee)		(Respondent/ Revenue)
PAN: ADSPJ6423H		

IT(SS)A No.07/Ind/2022
(Assessment Year: 2011-12)

ACIT, Circle -1 Indore	Vs.	M/s. M.P. Agro Nutri Foods Ltd. 31, Jeevandeep Colony Indore
(Appellant / Assessee)		(Respondent/ Revenue)
PAN: AAGCM0143F		

Assessee by	S/Shri Rakesh Gupta, Harsh Vijawargiya & Durgesh Khandelwal, ARs
Revenue by	Ms. Simran Bhullar, CIT-DR
Date of Hearing	23.11.2023
Date of Pronouncement	12 .01.2024

O R D E R

Per Bench:

These appeals by the Revenue and cross objection of the assessee are directed against the order dated 02.07.2018 of Commissioner of Income Tax (Appeal)-II, Indore arising from reassessment for A.Y.2010-11 & 2011-12.

2. In the cross objection the assesse has raised legal grounds challenging the validity of the order passed by the AO u/s 147 for non-fulfillment of jurisdictional conditions of issuing notice u/s 143(2) as well as passing reassessment order without giving a reasonable period to the assessee to challenge the order of the AO dated 15.12.2017 disposing of the objections of the assessee against the notice u/s 148 of the Act in view of the judgment of Hon'ble Bombay High Court in case of *Aroni Commercial Ltd. vs. DCIT 362 ITR 403.* Since the issue raised in the cross objection goes to the root of the matter therefore, we first take up the CO for hearing and adjudication. The assessee in the C.O. has raised following grounds:

"1. That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in not quashing the assessment order despite non fulfillment of jurisdictional conditions as prescribed u/s 147 to 151 of the Act.

2. That having regard to the facts and circumstances of the case, the Ld. CIT(A) has erred in law and on facts in not quashing the assessment order despite non fulfillment of jurisdictional conditions of section 143(2) read with decision of Delhi High Court.

3.That in any case and in any view of the matter, reassessment order ought to have been held as nullity by Hon'ble CIT(A).

4. That the cross objector craves the leave to add, amend, modify deleted any of the grounds of cross objection before or at the time of hearing."

3. Ld. Counsel for the assesse has submitted that the AO has issued notice u/s 143(2) on 4th September 2017 without considering return of income filed by the assessee on the same date. He has relied upon a judgment of Hon'ble Delhi Court in case of **DIT vs.** ***Society for Worldwide Interbank Financial Telecommunications (2010) 323 ITR 249 (Del.)*** as well as decision of Delhi Benches of the Tribunal in case of ***Ajay Sharma vs. DCIT, ITANo.3555/Del/2015.*** Thus the Ld. AR has submitted that the notice u/s 143(2) was issued by the AO without even considering return of income filed by the assessee on the same date which clearly shows that the notice was ready even prior to file the return of income and therefore, the assessment framed by the AO in the absence of valid notice u/s 143(2) is invalid and void ab initio liable to be quashed.

4. On the other hand, ld. DR has submitted that it is not the case of return of income filed by the assessee first time in response to the notice u/s 148 of the Act but the assessee has filed the reply wherein it is stated that the return of income already filed u/s 139 of the Act may be considered as return of income in response to notice u/s 148 of the Act. Thus, Ld. DR has submitted that the return of income filed u/s 139 was already with the AO at the time of reopening of the assessment and therefore, it cannot be said that without verifying the said return the AO has issued notice u/s 143(2) of the Act. Therefore, there is no infirmity or illegality in the notice issued by the AO u/s 143(2) and consequently the assessment order passed by the AO is valid and proper.

4. We have considered rival submissions as well as relevant material on record. The AO has recorded the relevant facts regarding the notice issued u/s 148 and reply of the assesse as well as the notice issued u/s 143(2) in para 3 & 4 of the assessment order as under:

> *"3. Accordingly, on the basis of above mentioned seized documents the case was reopened after recording the reason of belief for scrutiny for A.Y. 2010-11. Therefore, notice u/s. 148 was issued on 31/3 / 2017 . In response, the assessee has filed his reply on 4/9 / 2017 stating that the return filed u/s 139 of IT Act on 17/3 / 2011 may be treated as return filed in response of notice u / s 148 and requested to provide copy of reason.*
>
> *4. The Copy of reasons has been supplied to the assessee and asked to make compliance to the notice. Further, due to change in incumbency notices u/s 143(2) r.w.s. 129 was issued on 4/9*

/ 2017 and duly served through speed post. Thereafter, notice u/s 142(1) alongwith questionnaire was issued on 5/9 / 20 17 and duly served upon assessee. Further, the assessee filed objection on 10/10 / 2017 for issue of notice u / s 148 based on reasons recorded."

5. There is no dispute about these facts recorded by the AO that in response to the notice u/s 148 the assessee vide reply dated 4th September 2017 stated that the return filed u/s 139 on 17.03.2011 may be treated as return filed in response of notice u/s 148 of the Act. The AO issued notice u/s 143(2) on 4th September 2017 which clearly shows that the said notice was already prepared by the AO without even considering reply and the return of income filed by the assessee on 4th September 2017 itself. The Hon'ble Delhi High Court in case of **DIT vs. S*ociety for Worldwide Interbank Financial Telecommunications(supra)*** have considered the validity of notice u/s 143(2) issued without examination of the return of income in para 4 to 9 as under:

"4. We have examined the assessment order, the order passed by the CIT(A) as well as impugned order passed by the Tribunal and have heard the submissions made by the learned counsel for the appellant/Revenue.

5. We are of the view that the impugned order does not call for any interference. Both the CIT(A) and the Tribunal have returned a concurrent and clear finding of fact that the notice under s. 143(2) was issued on 23rd March, 2000 and since the return was filed on 27th March, 2000, the notice was not a valid one and. therefore, the assessment completed on the basis of the notice was also invalid and was consequently set aside. It is for the first time before us that the learned counsel for the appellant contends that the notice, in fact, was issued on 27th March, 2000 and not on 23rd March, 2000, the date which

is recorded on the notice itself. No such contention was raised before the lower appellate authorities. Consequently, the said contention cannot be raised before us for the first time.

6. However, even if we accept what the learned counsel for the appellant/Revenue submits, it does not make the case any better for him. In para 3.4 of the memorandum of appeal, the appellant has stated that the return was filed by the assessee on 27th March, 2000 and the notice under s. 143(2) was served upon the Authorized Representative of the assessee by hand when the Authorized Representative of the assessee came and filed return. However, the date of the notice was mistakenly mentioned as 23rd March, 2000.

7. Assuming the aforesaid to be true, the notice was served on the Authorized Representative simultaneously on his filing the return which clearly indicates that the notice was ready even prior to the filing of the return. Sec. 143(2) of the said Act clearly indicates that where a return has been furnished under s. 139, or in response to a notice under s. 142(1) the AO shall :

*"(i) where he has reason to believe that any claim of loss, exemption, deduction, allowance or relief made in the return is inadmissible, serve on the assessee a notice specifying particulars of such claim of loss, exemption, deduction, allowance or relief and require him, on a date to be specified therein to produce, or cause to be produced, any evidence or particulars specified therein or on which the assessee may rel*y_{r} in support of such claim.*

(ii) notwithstanding the aforesaid, if the AO considers it necessary or expedient to ensure that the assessee has not understated the income or has not computed excessive loss or has not underpaid the tax in any manner, he may serve the assessee a notice requiring him, on a date to be specified therein, either to attend his office or to produce, or cause to be produced, any evidence on which the assessee may rely in support of the return."

8. The provisions of s. 143(2) make it clear that the notice can only be served after the AO has examined the return filed by the assessee. Whereas what para 3.4 indicates is that when the assessee came to file the return, the notice under s. 143 (2) was served upon the Authorized Representative by hand. Thus, even if we take the statement of the AO at face value, it would amount to gross violation of the scheme of s. 143(2) of the said Act.

9. In any event, we do not agree with the contentions raised by the learned counsel for the appellant that the notice was issued on 27th March, 2000 ir as much as the Tribunal has already returned a finding that the notice was issued on 23rd March, 2000. That being the case, no interference with the impugned order is called for.

No substantial question of law arises for our consideration."

5.1 Following the judgment of Hon'ble Delhi High Court the Delhi Benches of the Tribunal in case of ***Ajay Sharma vs. DCIT, (supra)*** vide order dated 05.03.2019 has held in para 6 to 6.3 as under:

"6. We have considered the rival submissions and perused the material on record. The additional ground is legal in nature and goes to the root of the matter. It is well settled Law that taxability of the income should be in accordance with law. All the material facts are available on record. Therefore, it being the legal issue, we admit the additional ground of appeal for the purpose of disposal of the appeal. We rely upon decision of Honble Supreme Court in the case of ***NTPC 229 ITR 383 (SC****). We also rely upon the decision of Honble Gauhati High Court in the case of Assam Company India Limited* ***256 ITR 423 (Gau****.) in which it was held that the Tribunal may consider any new ground if facts are available on record. The additional ground is, therefore, admitted for deciding the appeal.*

6.1. It is not in dispute that search was conducted in the case of the assessee and others on 11th October, 2010, therefore, the assessment year under appeal i.e., A.Y. 2011- 2012 is the year of search. It is not in

dispute that assessee filed return of income on 14th March, 2013 and on the same day, notice under section 143(2) have been issued. This fact is mentioned in the assessment order. The assessee also filed copy of the notice under section 143(2) and copy of the order sheet on record, which also supports the same fact that notice under section 143(2) have been issued on the date of filing of the return of income itself.

6.2. Learned D.R. referred to page-22 of the Ld. CIT(A) Order. The A.O. in the assessment order has mentioned that notice under section 142(1) have been issued on 18th September, 2012. The Ld. CIT(A) noted in para 6.4 of the appellate order, as referred to by the Ld. D.R. that this notice issued under section 142(1) on 18th September, 2012 was received un-served. Another notice under section 142(1) with questionnaire is issued on 14th December, 2012 for compliance on 3rd January, 2013 but, there were no compliance. Summons under section 131 and show cause notice under section 276CC was issued on 6th June, 2012 but, there was no compliance. The A.O. as well as the Ld. CIT(A) have nowhere mentioned in the impugned orders, if any of the above notices have been served upon the assessee ? Therefore, there is no question of any non-compliance or non cooperation on the part of the assessee as is contended by the Ld. D.R. The contention of the Ld. D.R. is, therefore, rejected. It, therefore, stands established that the A.O. issued notice under section 143(2) on the same day when the return of income was filed by the assessee. Thus, there was no application of mind on the part of the A.O. The entire assessment proceedings are vitiated and are bad in the eye of Law. The issue is covered in favour of the assessee by order of the ITAT, Delhi Bench in the case of Ashtec Industries Pvt. Ltd., Delhi vs. DCIT, Circle-3(2), New Delhi (supra) which is reproduced as under.

IN THE INCOME TAX APPELLATE TRIBUNAL

DELHI BENCH: A NEW DELHI BEFORE SHRI H. S. SIDHU, JUDICIAL MEMBER SHRI L.P. SAHU, ACCOUNTANT MEMBER
ITA.No.3555/Del./2015 Shri Ajay Sharma, Ghaziabad.

I.T.A. No. 2332/Del/2018 Assessment Year: 2009-10

ASHTECH INDUSTRIES PVT. LTD., VS. DCIT, CIRCLE 3(2), D-49, MANSAROVAR PARK, NEW DELHI SHAHDARA, DELHI 110 032 (PAN: AAECA0120G) (ASSESSEE) (RESPONDENT) Assessee by: SH. KAPIL GOEL, ADVOCATE Revenue by: SH. SRIDHAR DORA, SR. DR. ORDER PER H.S. SIDHU, JM This appeal is filed by assessee against the Order dated 08.3.2018 passed by the Ld. CIT(A), New Delhi relating to Assessment Year 2009-10 on the following grounds:-

1. The initiation of proceedings u/s 148 is without jurisdiction.

2. The initiation of action u/s 148 is bad in law, being based on bald allegations equating the same with tangible material.

3. The initiation of action u/s 147 on the basis of search material found during search of third party i.e. Jain brothers, is contrary to law in view of non-obstante clause in S. 153A/153C, specifically prohibiting action u/s. 147, inter alia.

4. Even otherwise, the initiation of proceedings u/s 148 and the consequent assessment u/s 147 is contrary to law in the absence of any incriminating material to form reason to believe, as per the report of Investigation Wing & AO relied on, which only directs the AO to examine the details and after this examination only to determine whether there could be any justification for initiation of action u/s 147. Thus, the issue of notice u/s. 148 and the consequent assessment u/s 147 is without the authority of law and do not provide jurisdiction to the AO to make re-assessment u/s 147.

5. That the assessment u/s 147 is unlawful, arbitrary and without jurisdiction on account of lack of application of mind and lack of approval u/s.151 from competent authority.

6. That the assessment u/s 147 is contrary to law laid down by the Hon'ble Supreme Court in GKN Driveshaft case, without following the procedure laid down by the Hon'ble Supreme Court.

7. That the assessment is bad in law being made without following the principles of equity and justice and denying the assessee of proper opportunity to defend, without supplying the copies of material relied on and cross examination of the witnesses whose statements have been relied upon to initiate action and complete assessment.

8. That the Id. AO has erred on facts and in law in making the addition of Rs. 1,85,00,000/- on account of alleged accommodation entry, merely following the investigation report, ignoring the voluminous evidence to the contrary brought on record by the assessee. The addition is made on the basis of conjectures and surmises.

9. That the Id. CIT(A) has erred in law and on facts in confirming the order of Id. AO both on legal grounds and on merits.

10. That the Id. CIT(A) has erred in law in treating the vague and general information of investigation wing and of the AO of the searched party M/s Jain Brothers as sacrosanct without examination with reference to the seized material and the facts of the assessee's case.

11. That the Id CIT(A) has erred in importing approval of the higher authorities u/s 151 on assumptions without existence of the actual correspondence regarding approval and without confronting the assessee with the same..

12. The appellant craves leave and sanction of the Hon'ble ITAT to file additional evidence, if so required for proper prosecution of the case, based on facts and circumstances, which has not been or could not be adduced or filed before lower authorities either because proper and sufficient opportunity was not provided or because it was not solicited or its need was not appreciated.

13. The appellant craves leave to and permission of the Hon'ble ITAT to add to or alter any of the grounds of appeal at any time up to the final decision of the appeal.

14. The assessment may please be set aside as null and void and addition of Rs. 1,85,00,000/- be deleted or such other relief as your Honors may deem fit under the circumstances of the case, be allowed.

2. The assessee has also filed the following additional ground under Rule 11 of the ITAT Rules. That impugned assessment order passed by the AO u/s. 147/143(3) of the Act is invalid and void abnitio for want of valid notice u/s. 143(2) as per law as evident from fact that when return in response to notice u/s. 148 was admittedly filed on 27.4.2016 notice u/s. 143(2) is issued on very same day that is 27.4.2016 which shows

non application of mind in issuing notice u/s. 143(2) and thereafter in framing the assessment and accordingly all proceedings are nullity.

3. The brief facts of the case are that assessee filed its return of income on 29.9.2009 declaring an income of Rs. 3,39,85,750/-. The assessment u/s. 143(3)/147 of the ***Income Tax Act, 1961 (in short Act)*** *was made on 24.11.2016 at a total income of Rs. 5,24,85,750/-. In the assessment order, AO added Rs. 1,85,00,000/- on account of accommodation entries u/s. 68 of the I.T. Act. Aggrieved with the addition, the assessee appealed before the Ld. CIT(A), who vide its impugned order dated 8.3.2016 dismissed the appeal of the assessee. Now against the impugned order, assessee is in appeal before us.*

4. Ld. Counsel for the assessee has submitted that the additional ground in identical facts has been accepted and assessment u/s. 143(3) of the Act was passed without proper issue and service of notice u/s. 143(2) of the Act, which was later quashed by the ITAT and the Honble High Court in the following cases:-

i) Honble Delhi ITAT in case of ***Micron Enterprises Pvt. Ltd. Vs. ITO*** *in I.T.A .No. 901/DEL/2016 (A.Y .2006-07) order dated* ***14/05/2018***

ii) Honble Delhi ITAT in Harsh Bhatia case ITA Nos. 1262/& 1263/DEL/2017 [A.Ys. 2008-09 & 2009-10] order dated 17.10.2017.

iii) Honble Delhi High Court in the case of ***Director of Income Tax Vs. Society for Worldwide Inter Bank Financial****, Telecommunications in ITA No. 441/2010, reported at* ***323 ITR 249***

iv) Delhi High Court decision in the case of Silver Line reported at ***383 ITR 455****.*

5. On the merits of the case, Ld. Counsel for the assessee stated that the addition made u/s 68 of the Act is for mere reason of non production of directors in person of share holder companies same cannot be a justified ground to draw adverse inference u/s 68 of the Act where those share holders are found to be existing and identified in detail as summons have been duly served on them. Mere non production of share holder companies director is argued to be no valid reason for making addition u/s 68 of the Act dehors voluminous evidences filed which has

*not been objectively and lawfully controverted in manner known to law, in view of following coordinate benches decisions, where similar argument in identical circumstances of additions based on S.K.Jain group search has been deleted u/s 68 of the Act. Kautilya Monetary Services Pvt ltd ITA 5975/Del/2014 D bench (**30/11/2018) ITAT Delhi***

Moti Adhesives P Ltd ITA: 3133/Del/2018 SMC 25/06/2018 ITAT Delhi
Heat Flex Cables P Ltd ITA: 2376/Del/2018 SMC 1/8/2018 ITAT Delhi

Alok Fintrade P Ltd ITA: 180/JP/2015 ITAT JAIPUR BENCH

*Signature Buildwell Pvt Ltd ITAT Delhi D Bench ITA: **4249/Del/2015 12/12/2018***

***SRM** Securities Pvt Ltd ITAT G bench ITA 7825/Del/2017 11/12/2018*

6. On the contrary, Ld. Sr. DR vehemently opposed the request of Ld. counsel for the assessee and prayed for dismissal of additional ground application. However, on the merit of the case, he argued that without production of director of share holder companies, addition u/s 68 may please be confirmed and accordingly, he relied upon the orders of the authorities below.

7. We have heard both the parties and perused the records, especially the impugned order and the case laws cited by the Ld. Counsel for the assessee. We note that Assessee filed its return of income for the assessment year 2009-2010 on 29.09.2009 declaring income of Rs. 339,85,750/- and the same was processed u/s 143(1) of the Act on 19.02.2011. Later on, certain information as mentioned in assessment order was received from Investigation Wing regarding search and survey action of Surender Kumar Jain and his brother Virendra Jain and it was reported by Investigation Wing to the AO that they were engaged in business of providing accommodation entries allegedly through certain companies. On the basis of said Investigation Wing information, reopening was made u/s 148 of the Act by the AO vide notice u/s 148 of the Act dated 28.03.2016. In response to the same, admittedly return was filed by letter dated 27.04.2016 which is specifically acknowledged by AO in assessment order at Para 2 of the assessment order. Notably, said return is expressly accepted by AO as valid return for purposes of assessment u/s 148 of the Act. As

mentioned in assessment order itself, when the said return was taken on order sheet by AO vide order sheet entry dated 27.04.2016, at same time, notice u/s 143(2) of the Act was issued on very same date that is 27.04.2016 which is one of the major issue on which validity of the assessment is challenged before us. Copy of this return and notice u/s 143(2) of the Act dated 27.04.2016 are placed on records before us. We further note that AO supplied the reasons recorded (without approval) to assessee (as placed in paper book before us) which were objected before the AO in detailed manner vide objection letter dated 27.04.2016 in which note worthy aspect is assessee specifically sought from AO copies of back material referred in reasons including investigation wing report/letter, seized documents etc referred therein, AO without confronting any back material as evident from objection disposal order dated 17.05.2016 rejected. assessees objection challenging reopening action. In various letters placed in paper book and referred in written submission before us, it was specifically asked to AO during assessment proceedings to confront the back material as referred in reasons recorded namely in letters dated 07/06/2016, 20/10/2016 which request of assessee has not been adverted to by the AO is patent from objection disposal order dated 17/05/2016 and further notices dated 09/08/2016 u/s 142(1) and show cause notice dated 13/10/2016. In none of these notices as placed in paper book, we could find the back material being confronted to assessee as specifically requested by assessee. We note here that the Tribunal in various decisions specially one which is referred by Ld counsel for the assessee extensively in case of Moti Adhesives (ITA 3133/Del/2018) in order dated 25/06/2018 copy placed before us, has been consistently holding while taking support from Honble Apex court leading decision in Andaman Timber Industries case (Civil Appeal No. ***4228 OF 2006)*** ***reported at 127 DTR 241*** *that violation of principle of natural justice (here withholding of back material referred in reasons which is specifically requested for repeatedly) is a serious flaw and results in nullity of the order so passed, which is squarely applicable to present case. Be that as it may, even on merits, for the companies from where assessee recd. share capital assessee placed before Ld AO in its reply dated 07/06/2016 all evidences like share application form, board resolution confirming investment made, confirmation of share capital*

raised, Share certificate, income tax particulars of share holders, bank statement of share holders and form 2 for allotment of shares along with their audited final a/c thus discharging its primary burden u/s 68 on three ingredients of identity, creditworthiness and genuineness of share holders. AO unimpressed by the same in the only show cause notice which is placed in paper book is dated 13/10/2016 where only thing asked by AO is to produce the directors of those share holder companies. For mere non production of said shareholders without anything more, as evident from pages 6 & 12 even though summon issued u/s 131 have been accepted to be served on them in the assessment order adverse inference u/s 68 of the Act is drawn by AO to make addition of Rs 185,00,000 which is impugned here before us. In first appeal, before Ld CIT(A) confirmed the order of the AO has rejected assessees detailed submissions challenging reopening action u/s 148 of the Act and while confirming the addition made by AO it is very glaring from ld CIT(A)s order page 16 that primary reason which has weighed on him to confirm said addition is mere non production of share holder companies directors in person. In this background, the assessee is before us challenging the orders of the authorities below.

7.1 At the outset Ld counsel for the assessee has drawn our attention to the additional ground application filed before us in terms of Rule 11 of ITAT rules. In said additional ground application it is stated as under: Quote Additional ground of Appeal That impugned assessment order passed by Ld. Assessing officer u/s 147/143(3) of the Act is invalid and void ab initio for want of valid notice u/s 143(2) as per law as evident from fact that when return in response to notice u/s 148 was admittedly filed on 27/04/2016 notice u/s143(2) is issued on very same day that is 27/04/2016 which shows non application of mind in issuing notice u/s 143(2) and thereafter in framing the assessment and accordingly all proceedings are nullity

7.2 We note that the aforesaid additional ground in identical facts is accepted and assessment u/s 143(3) of the Act was quashed by the ITAT and Honble High Court, are mentioned herein below:

i) Honble Delhi ITAT in case of ***Micron Enterprises Pvt. Ltd. Vs. ITO*** *in I.T.A .No. 901/DEL/2016 (A.Y .2006- 07) order dated 14/05/2018*

ii) Honble Delhi ITAT in Harsh Bhatia case ITA Nos. 1262/& 1263/DEL/2017 [A.Ys. 2008-09 & 2009-10] Order dated ***17.10.2017***

iii) Honble Delhi High Court in the case of ***Director of Income Tax Vs. Society for Worldwide Inter Bank Financial****, Telecommunications in ITA No. 441/2010, reported at* ***323 ITR 249***

iv) Section 292BB & Section 143(2) are both dealt succinctly in Delhi High Court decision in case of Silver Line reported at ***383 ITR 455*** *wherein it has been held as under:-*

12. The Court first proposes to consider the question as to whether in terms of the proviso to Section 292BB of the Act, the Assessee was precluded, at the stage of the proceedings before the ITAT, from raising a contention regarding failure of the AO to issue a notice under Section 143(2) of the Act. The legal position appears to be fairly well settled that Section 292BB of the Act talks of the drawing of a presumption of service of notice on an Assessee and is basically a rule of evidence. In ***Commissioner of Income Tax v. Parikalpana Estate Development (P.) Ltd.*** *(supra) in answering a similar question, the Court referred to its earlier decision in Commissioner ITA No. 578 of 2015 & connected matters Page 10 of 15 of Income Tax v. Mukesh Kumar Agrawal (2012) 345 ITR 29 (All.) and pointed out that Section 292BB of the Act was a rule of evidence which validated service of notice in certain circumstances. It introduces a deeming fiction that once the Assessee appears in any proceeding or has cooperated in any enquiry relating to assessment or reassessment it shall be deemed that any notice under any provision of the Act that is required to be served has been duly served upon him in accordance with the provisions of the Act and the Assessee in those circumstances would be precluded from objecting that a notice that was required to be served upon him under the Act was not served upon him or not served in time or was served in an improper manner. It was held that Section 292BB of the Act is a rule of evidence and it has nothing to do with the mandatory requirement of giving a notice and especially a notice under Section 143(2) of the Act which is a notice giving jurisdiction to the AO to frame an assessment. The decision of the Allahabad High Court in Manish Prakash Gupta v. Commissioner Of Income Tax (supra) is also to the same effect.*

7.3 While arguing on above additional ground application, Ld. counsel for the assessee has drawn our attention to written submission filed in paper book of 218 pages (from page 1 to 27) that as noted in impugned assessment order at pages 5&6 that notice u/s 143(2) of the Act was issued on 27/04/2016 on return submitted u/s 148 of the Act vide order sheet entry dated 27/04/2016, (copy of return u/s 148 letter dated 27.04.2016 and notice u/s 143(2) dated 27/04/2016 are at pages 5&6 with additional ground application), in view of Jurisdictional Delhi High Court decision in case of Society for worldwide reported at 323 ITR 249 followed in identical set of facts by Delhi ITAT in case of Micron ITA.No.3555/Del./2015 ***Shri Ajay Sharma, Ghaziabad. Enterprises Pvt Ltd vs ITO*** *in ITA 901/Del/2016 dated 14/05/2018 (copies enclosed in additional ground application at pages 12 to 24) and in view of no contrary jurisdictional High Court decision, we request that extant orders of AO and Ld CIT(A) may be quashed on this short count itself. The logic behind this proposition is patent non application of mind and undue haste on part of AO in issuing notice at same time when return u/s 143(2) of the Act is filed as admitted in order itself, which is sine qua non u/s 143(2) of the Act which uses the phrase if considers it necessary or expedient, and on expression considers it necessary we draw our kind attention to Honble Apex Court decision in case of* ***Bhikubhai Patel vs State of Gujarat*** *(****4 SCC 144****) relevant extract of which is reproduced below for sake of ready reference (which directly fits in extant facts to support proposition put forth):*

24. Proviso opens with the words where the State Government is of opinion that substantial modifications in the draft development plan and regulations are necessary ..These words are indicative of the satisfaction being subjective one but there must exist circumstances stated in the proviso which are conditions precedent for the formation of the opinion. Opinion to be formed by the State Government cannot be on imaginary grounds, wishful thinking, however, laudable that may be. Such a course is impermissible in law. The formation of the opinion, though subjective, must be based on the material disclosing that a necessity had arisen to make substantial modifications in the draft development plan.

25. The formation of the opinion by the State Government is with reference to the necessity that may have had arisen to make substantial modifications in the draft development plan. The expression: so considered necessary is again of crucial importance. The term consider means to think over; it connotes that there should be active application of the mind. In other words the term consider postulates consideration of all the relevant aspects of the matter. A plain reading of the relevant provision suggests that the State Government may publish the modifications only after consideration that such modifications have become necessary. The word necessary means indispensable, requisite; indispensably requisite, useful, incidental or conducive; essential; unavoidable; impossible to be otherwise; not to be avoided; inevitable. The word necessarymust be construed in the connection in which it is used. (See-Advanced Law Lexicon, 3rd Edition, 2005; P. Ramanatha Aiyar)

26. The formation of the opinion by the State Government should reflect intense application of mind with reference to the material available on record that it had become necessary to propose substantial modifications to the draft development plan.

7.4 Ld. Counsel for the assessee also stated that there is no application of mind in present case what to speak of intense application of mind where notice u/s 143(2) is ostensibly prepared before hand or hand in hand at same time when return u/s 148 is filed on 27/04/2016, hence, he requested to quash the assessment.

7.5 On careful consideration of the entire conspectus of the case, as per Honble Supreme court ruling in case of National Thermal Power Corporation Ltd Vs CIT [(1998) 229 ITR 383 SC)], we admit the additional ground raised above by the assessee being purely legal in nature on basis of material on records. Once the decks are clear from admission of purely legal additional ground , we now turn our attention to the adjudication of the same which should not detain us for long in view of Delhi ITAT decision in case of Micron Enterprises Pvt. Ltd.(supra) which has decided the identical issue in favour of assessee by relying on Honble Delhi High Court in the case Society for Worldwide Inter Bank Financial, Telecommunications supra. We are reproducing the reasoning from ITAT decision in case of Micron

Enterprises Pvt. Ltd.(supra) on which no contrary decision is brought to our attention: Learned Counsel for the Assessee submitted that assessee filed reply to the notice under section 148 of the I.T. Act on dated 26.11.2013 which is noted in the assessment order, copy of which, is filed at page-11 of the paper book, in which, assessee explained that the return already filed under section 139(1) may be treated as return filed in response to notice under section 148 of the I.T. Act. He has submitted that on the same day A.O. issued notice under section 143(2) i.e., on 26.11.2013, copy of which, is filed at page-12 of the paper book. He has, therefore, submitted that the A.O. has not validly assumed jurisdiction under ***section 147 and 143(3) of the I.T. Act*** *to pass the assessment order against the assessee. He has submitted that the issue is covered in favour of the assessee by the judgment of the Honble Delhi High Court in the case of* ***Director of Income Tax vs. Society for Worldwide Interbank Financial*** *Telecommunications (2010)* ***323 ITR 249*** *(Del.) in which it was held as under : Both the CIT(A) and the Tribunal have returned a concurrent and clear finding of fact that the notice under s. 143(2) was issued on 23rd March, 2000 and since the return was filed on 27th March, 2000, the notice was not a valid one and, therefore, the assessment completed on the basis of the notice was also invalid and was consequently set aside. It is for the first time that the counsel for the appellant contends that the notice, in fact, was issued on 27th March, 2000 and not on 23rd March, 2000, the date which is recorded on the notice itself. No such contention was raised before the lower appellate authorities. Consequently, the said contention cannot be raised before the Court for the first time. The appellant has stated that the return was filed by the assessee on 27th March, 2000 and the notice under s. 143(2) was served upon the Authorized Representative of the assessee by hand when the Authorized Representative of the assessee came and filed return. However, the date of the notice was mistakenly mentioned as 23rd March, 2000. Assuming the aforesaid to be true, the notice was served on the Authorized Representative simultaneously on his filing the return which clearly indicates that the notice was ready even prior to the filing of the return. The provisions of s. 143(2) make it dear that the notice can only be served after the AO has examined the return filed by the assessee. Whereas it is dear that when the assessee*

came to file the return, the notice under s. 143(2) was served upon the Authorized Representative by hand. Thus, it would amount to gross violation of the scheme of s. 143(2). 5.1. And the conclusion is as under : Assessment made in pursuance of a notice under section 143(2) issued on 23rd March, 2000 when the return was filed on 27th March, 2000 is invalid. 6. He has submitted that the same order have been followed by ITAT, Delhi Bench, in the case of Shri Harsh Bhatia, ***New Delhi vs. ITO****, Ward-50(3), New Delhi in ITA.No.1262 and 1263/Del./2017 dated 17.10.2017 in which the Tribunal held as under : 10. It was further argued by the ld. counsel for the assessee Dr. Rakesh Gupta that notice u/s 143(2) of the Act, was issued on 17.09.2014 and which is the same date on which return was filed. This is apparent from the Assessing Officers order in para 3 at page 1. Therefore, the Assessing Officer has not applied his mind independently while issuing notice u/s 148 of the Act. On this count also, the assessment deserves to be quashed. Accordingly, under the facts and circumstances of the case, the legal grounds of the assessee are allowed. 7. On the other hand, Ld. D.R. submitted that assessee did not file return under section 148 within the specified period. Therefore, this ground of appeal of assessee may be dismissed. 8. After considering the rival submissions, I am of the view that the issue is covered in favour of the assessee by the Judgment of Honble Delhi High Court in the case of* ***Director of Income Tax vs. Society for Worldwide Interbank Financial*** *Telecommunications (supra) and Order of ITAT, Delhi Bench in the case of Shri Harsh Bhatia,* ***New Delhi vs. ITO****, Ward-50(3), New Delhi (supra). It is an admitted fact that assessee filed reply in response to the notice under section 148 of the I.T. Act on 26.11.2013 and submitted before A.O. that original return filed before him may be treated as return filed in response to the notice under section 148 of the I.T. Act. The A.O. on the same day served notice under section 143(2) upon assessee-company whose signature tally on the said notice. Therefore, notice issued under section 143(2) is invalid and resultantly, the assessment is vitiated and is liable to be quashed. I, accordingly, set aside the orders of the authorities below and quash the re- assessment proceedings in the matter. Resultantly, all additions stands deleted. In view of the above, there is no need to decide other*

contentions raised by Learned Counsel for the Assessee. 9. In the result, appeal of assessee is allowed

7.6 Further we also find force in argument of Ld counsel for the assessee that language of section 143(2) of the Act in so far as it uses the phrase if considers it necessary or expedient presupposes application of mind on part of Ld AO before notice u/s 143(2) of the Act is issued which words have been explained by Honble Apex court in case of ***Bhikubhai Patel vs State of Gujarat*** *(**4 SCC 144**) relevant extract of which is reproduced above where it is observed by Honble Apex court that The expression: so considered necessary is again of crucial importance. The term consider means to think over; it connotes that there should be active application of the mind. In other words the term consider postulates consideration of all the relevant aspects of the matter. A plain reading of the relevant provision suggests that the State Government may publish the modifications only after consideration that such modifications have become necessary. The word necessary means indispensable, requisite; indispensably requisite, useful, incidental or conducive; essential; unavoidable; impossible to be otherwise; not to be avoided; inevitable. The word necessarymust be construed in the connection in which it is used. (See-Advanced Law Lexicon, 3rd Edition, 2005; P. Ramanatha Aiyar).. which fits in present case fully. Guided by these felicitous observation of Honble Supreme court we have no hesitation in our mind in accepting the legal plea raised by Ld AR before us and thus holding that notice u/s 143(2) issued at same time and date of return filing u/s 148 (vide order sheet entry dated 27/04/2016) vitiates the entire exercise and accordingly all subsequent proceedings are held to be invalid in eyes of law and therefore we quash the orders passed by AO and Ld CIT(A) and allow additional ground raised by assessee.*

7.7 Even otherwise, on the merit of the case i.e. addition made u/s 68 that for mere reason of non production of directors in person of share holder companies same cannot be a justified ground to draw adverse inference u/s 68 of the Act where those share holders are found to be existing and identified in detail as summons have been duly served on them. Mere non production of share holder companies director is argued to be no valid reason for making addition u/s 68 of the Act

dehors voluminous evidences filed which has not been objectively and lawfully controverted in manner known to law. For this Ld counsel for the assessee placed before us during the course of hearing a comprehensive chart of case laws from coordinate benches of ITAT where similar argument in identical circumstances of additions based on S.K.Jain group search has been deleted u/s 68 of the Act. Our view is fortified by the following decisions:

Kautilya Monetary Services Pvt ltd ITA 5975/Del/2014 D bench (30/11/2018) ITAT Delhi (held in crux that ..The Assessing Officer, after going through the evidences furnished by the assessee sat with folded hands and did not make any effort and not made any independent enquiry and made the addition only by relying on the report of the Investigation Wing) Moti Adhesives P Ltd ITA: 3133/Del/2018 SMC 25/06/2018 ITAT Delhi (authored by one of us Honble JM) (held in crux that Whether once assessee places before Ld AO all the relevant and best documents in its possession to establish its burden u/s 68 of the Act qua cash credit (here share capital received) , can simply because there is no personal appearance from director of said cash creditor (share holder) as called for by Ld AO, adverse inference u/s 68 can be drawn by Ld AO without discharging secondary burden lying on Ld AO u/s 68 of the Act? In my view the answer to this issue as framed, can only be in negative as once all important and crucial documents are filed by assessee to prove its case qua share capital received u/s 68 of the Act, then simply harping on non production of director in person before the AO cannot be justified ground to draw adverse inference without adequate discharge of secondary burden lying on AO u/s ***68 of*** *the Act. Burden u/s 68 of the Act as it is settled law keeps shifting. Also held that Even if there was any doubt if any regarding the creditworthiness of the share applicants was still subsisting, then AO should have made enquiries from the AO of the share subscribers as held by Honble High Court in CIT vs DATAWARE (supra) which has not been done, so no adverse view could have been drawn.) Heat Flex Cables P Ltd ITA: 2376/Del/2018 SMC 1/8/2018 ITAT Delhi (Held in crux that Since the investor companies have confirmed the transaction with the assessee-company which were conducted through banking channel and entire evidence*

were brought on record, thereafter, if the A.O. was not satisfied with the documents on record and explanation of the assessee- company and the Investors, the A.O. should have made further enquiry on the same. However, it is a case where the A.O. has failed to conduct necessary enquiry, verification and deal with the matter in depth. Therefore, the explanation of the assessee- company should not have been disbelieved by the authorities below.) Alok Fintrade P Ltd ITA: 180/JP/2015 ITAT JAIPUR BENCH (Held that ..It is thus a case where the AO was in receipt of material information from the Investigation Wing, Delhi that the assessee company has received accommodation entries in form of share application/investment from two companies as divulged during the course of search and seizure operations in case of S K Jain group. In these situations, the Courts have held that the Assessing Officer cannot sit back with folded hands and then come forward to merely reject the explanation so made, without carrying out any verification or enquiry into the material placed before him by the assessee. If the Assessing Officer harbours any doubts of the legitimacy of any subscription he is empowered, nay duty-bound, to carry out thorough investigations. But if the Assessing Officer fails to unearth any wrong or illegal dealings, he cannot obdurately adhere to his suspicions and treat the subscribed capital as the undisclosed income of the Company. 22. Further, being the reassessment proceedings, where the AO is ceased of certain information and documents, it is incumbent upon him to confront the same to the assessee and allow the latter to file its objections and rebuttal. The additions made, merely relying on these information and documentation, without confronting the assessee cannot be accepted. Besides furnishing the reasons for reopening the assessment to the assessee company, there is nothing on record that such information/documentation was confronted to the assessee. Further, the AO has relied upon the statement of third parties namely, shri S.K. Jain, shri V.K. Jain, shri Assem Kumar Gupta and shri Rajesh Agarwal, the assessee again deserves an opportunity to cross examine such persons as held by the Hon'ble Supreme Court in case of Andaman Timber Industries (supra)) Signature Buildwell Pvt Ltd ITAT Delhi D Bench ITA: 4249/Del/2015 12/12/2018 (Held in crux that There is no dispute that the information received from the office of the DIT [INV], New Delhi triggered the proceedings and the Assessing

Officer, taking a leaf out of the said INV report, proceeded to verify the transactions entered into by the assessee with the five companies mentioned elsewhere. It is not the case of the Revenue that cash was found to be deposited in the accounts of five companies prior to subscribing the shares of the appellant company. It is also not the case of the Revenue that the assessee has produced cheques from the five companies by giving cash. No doubt there is a contradiction in the statement of Shri Waseem Gupta, but that alone cannot be a deciding factor once the corroborative evidences in the form of bank statements have been filed by the assessee. The Assessing Officer did not make any effort to examine the bank statement furnished by the assessee.)

SRM Securities Pvt Ltd ITAT G bench ITA 7825/Del/2017 11/12/2018 (Held in crux that When assessee has discharged its initial burden of proving the identity, creditworthiness of the parties and genuineness of the transactions. Ld AO must reach to the submission of the assessee by conducting exhaustive inquires to throw back the onus on the assessee. Further non receipt of the details u/s 133 (6) should be the trigger point to make further inquires; it is not the resting point. In the present case, the fact shows that the assessing officer has merely relied upon the enquiries conducted by the investigation wing of the department and has not confronted the assessee with material that he has received from the investigation wing to the assessee to rebut the same. Unless the initial onus discharged by the assessee is thrown back to the assessee by AO by carrying out systematic investigation/ inquiry, addition u/s 68 cannot be upheld)

7.8 We find that assessee has filed all evidences like share application form, board resolution confirming investment made, confirmation of share capital raised, Share certificate, income tax particulars of share holders, bank statement of share holders and form 2 for allotment of shares along with their audited final a/c in support of share capital recd. to establish its case as stated in reply to Ld AO dated 07/06/2016 (paper book pages 47 to 50). We further find that no where any shareholder company was found to be fictitious or non existing rather all share holder companies are duly found to be existing as summons have been served on them. ITA.No.3555/Del./2015 Shri Ajay Sharma, Ghaziabad. (Refer Honble Supreme court in Orissa Corporation

*case **159 ITR 78**). We further find that no cogent material is brought on records in assessment order by Ld AO to demolish the copious evidences furnished by assessee. We furtehr find that Ld AO has no where confronted any back material to assessee as stated in facts above. We find that Ld AO nowhere made any independent enquiry from concerned and competent AO of share holder companies etc. We find that only on basis of investigation wing report (unconfronted to assessee) acting purely on borrowed satisfaction without any independent application of mind addition has been made u/s 68 by Ld AO. We find that no where in entire assessment order Ld AO framed his own independent objective and rational opinion on basis of material placed on record within the meaning of provision of section 68 of the Act. Further Ld CIT-A has also simply and easily endorsed finding of Ld AO without making any independent efforts on enquiry on his part , which finding of Ld CIT-A also do not objectively consider the various submissions and arguments of assessee. So we have no hesitation in accepting Ld ARs argument that for mere reason of non production of directors in person of share holder companies same cannot be a justified ground to draw adverse inference u/s 68 of the Act. We are supported by decisions relied by Ld AR as mentioned above. Moreover, our stated decision is supported by decision of honourable Delhi High Court against which the SLP has been dismissed by the honourable Supreme Court recently in [2018] 99 taxmann.com 45 (SC) in **Principal Commissioner of Income Tax, Central-1 v. Adamine Construction (P.) Ltd**; honourable Supreme Court has also dismissed the Special Leave Petition of the revenue in [2018] 98 taxmann.com 173 (**SC**) **Principal Commissioner of Income Tax v. Himachal Fibers Ltd.**; Hon'ble Delhi High Court in the case of Oriental International Company Pvt. Ltd **401 ITR 83** which decisions are relied in decisions mentioned above in arguments of Ld AR. We thus reverse the finding of Ld AO as confirmed by Ld CIT(A) in this regard. On basis of this discussion we find no merit in addition of Rs 1,85,00,000 made u/s 68 of the Act, hence, we delete the same and allow the appeal of the assessee accordingly.*

8. In the result, the appeal of the Assessee is allowed.

6.3. Similar view have been taken by ITAT, SMC Bench in the case of Shri Satish Kumar, Delhi vs. ITO, Ward-2(3), Faridabad (supra). Following the above orders, we set aside the orders of the authorities below and quash the assessment order. Resultantly, all additions, stand deleted. In the result, additional ground of appeal of assessee is allowed. In this view of the matter, there is no need to decide remaining ITA.No.3555/Del./2015 Shri Ajay Sharma, Ghaziabad. grounds on merit as the same are left with academic discussion only."

6. No contrary decision has been brought to our notice therefore, in view of the undisputed fact that the notice u/s 143(2) was issued on the same date when the assessee filed the return of income cannot be held as a valid notice issued by the AO after verification and examination of the return of income and framing a view that the assessee has made excessive claim or stated or understated income. Hence the reassessment framed by the AO u/s 147 r.w. section 143(3) without a valid notice u/s 143(2) is not valid and liable to be quashed as held by the Hon'ble Supreme Court in case of *ACIT vs. Hotel Blue Moon 321 ITR 362.*

7. The next objection of the assessee is against the validity of the order passed by the AO without giving four weeks to the assessee after disposing of the objections against the notice u/s 148 of the Act. Ld. AR of the assessee has submitted that the assessee filed objections against notice u/s 148 on 10.10.2017 which were disposed of by the AO on 15.12.2017 and thereafter the AO has passed the impugned order on 26.12.2017 which is in volation of principles of natural justice as the assessee was not even given an

opportunity to challenge the said order of the AO disposing of the objections of the assessee. In support of his contention he has relied upon the decision of Bombay High Court in case of ***Aroni Commercial Ltd. vs. DCIT (supra).*** He has also relied upon the following decisions:

1. Bharat Jayantilal Pate vs. UOI & Ors. 122 DTR 321

2. Asian Paints Ltd. vs. DCIT & Anr. 296 ITR 90

7.1. Thus, Ld. AR has submitted that when the AO has passed the impugned order without giving four weeks to the assessee after disposing of the objections against notice u/s 148 thus the same is invalid and liable to be quashed.

8. On the other hand, Ld. DR has submitted that the AO has passed the impugned order being a time barring assessment and therefore, it was not possible to wait for four weeks after disposing of the objections against notice u/s 148 of the Act.

9. We have considered rival submissions as well as relevant material on record. There is no dispute so far as the facts regarding disposing of the objections raised by the assessee against notice u/s 148 by the AO vide order dated 15.12.2017 as recorded in para 5 of the assessment order as under:

> *"5. The objection filed by the assessee was disposed of through order dated 15/12/2017 and the assessee was asked to make compliance of the notices. In compliance to the notices so issued, AR of the assessee Shri Durgesh Khandelwal CA*

appeared and filed written submissions and the same were placed on records after examination.

Xxxxxxxxx"

9.1. The impugned order was passed by the AO on 26.12.2017 therefore, the only 10 days after the order of disposing of the objections AO has passed the impugned order. The Hon'ble Bombay High Court in case of *Asian Paints Ltd. vs. DCIT & Anrs (supra)* has held in para 3 to 6 as under:

"3. The learned senior counsel for the petitioners pointed out that in some of the cases as soon as the objections were rejected by the concerned ITO, even the assessment order has been passed within a very short time whereby the assessees are left without any remedy to challenge such an order of rejection.

4. Hence we make it clear that if the AO does not accept the objections so filed, he shall not proceed further in the matter within a period of four weeks from the date of receipt of service of the said order on objections, on the assessee.

5. Accordingly, rule is made absolute.

6. We also direct that the ITO concerned shall follow the above procedure strictly in all such cases of reopening of assessment."

9.2. The Hon'ble High Court has specifically observed that if the AO does not accept the objection filed by the assessee he shall not proceed further in the matter within a period of four weeks from the date of receipt/service of the said order on the assessee. The ITO was directed to follow the procedure strictly in all such cases of reopening of assessment. In a subsequent decision in case of *Aroni*

Commercial Ltd. vs. DCIT (supra) the Hon'ble Bombay High Court has again considered this issue in para 6 & 7 as under:

> *"6) It is axiomatic that the law declared by this Court is binding on all authorities functioning within the jurisdiction of this Court. It is not open to the Assessing Officer to feign ignorance of the law declared by this Court and pass orders in defiance of the law laid down by this Court. We do not accept this submission made on behalf of the revenue that the Assessing Officer was not aware of the decision o this Court in Asian Paints (supra). On the contrary, it appears that the order dated 09 December 2013 was passed only to make the entire proceeding pending before this Court redundant and to present the Court with a fait accompli. This is particularly so as the petitioner had on 18 December 2013 informed the Commissioner of Income Tax that a writ petition has been filed challenging the order dated 20 November 2013 in respect of A. Y. 200809 and is posted for admission on 23 December 2013. It is averred in the petition that the Assessing Officer was informed at the hearing held on 10 December 2013, that it is preparing a petition to challenge the reopening for A. Y. 200809 on identical grounds as done in earlier Assessment Year namely A. Y. 200708 which is pending in this Court and ad interim relief has also been granted, restraining the revenue from proceeding with the assessment for A. Y. 200708. The passing of an order on 19 December 2013 by the Assessing Officer in undue haste and thereafter contending that in view of alternative remedy, the writ petition should not be entertained, does not appear bonafide. This undue haste in passing the impugned order dated 19 December 2013 is an attempt to overreach the Court and to thwart the petitioner's challenge to the Impugned order dated 20 November 2013 pending before this Court.*
>
> *7) In the above circumstances, we set aside the order dated 19 December 2013 passed by the Assessing Officer under Section 143(3) read with Section 147 of the Act for A. Y. 200809."*

9.3. Thus, it was held that passing order by the AO without allowing four weeks as directed by the High Court in case of *Asaian Paints Ltd. vs. DCIT* (supra) as an attempt to over reach the Court and to thwart the assesse's challenge to the order and consequently the order passed by the AO was set aside. In case in hand the AO has passed order u/s 143(3) r.w. section 147 within a period of 10 days from the date of disposing of the objections of the assessee against the notice u/ 148 which is contrary to the procedure to be followed by the AO as directed by the Hon'ble High Court and consequently the impugned order is liable to be set aside. We order accordingly.

ITANo.794/Ind/2018

10. The revenue has raised following grounds of appeal for A.Y.2010-11:

> *"1. On the facts and circumstances of the case, the Ld. CIT(Appeals) erred in deleting the addition of Rs.3,40,00,000/- and Rs.30,60,000/- made by the Assessing Officer on account of unsecured loan being accommodation entry taken in the company M/s MP Agro Nutri Foods Ltd. and undisclosed interest income on the amount of unsecured loan respectively without appreciating the fact that the additions were made on the basis of page no.23 to 41 of LPS-2 seized from the premise 7/1, Y.N. Road, Indore and were solely not based on the disclosure made by the assessee.*
>
> *2. On the facts and in the circumstances of the case, the Ld. CIT(Appeals) erred in lending credence to the retraction of statements made by the assessee without appreciating the facts that the assessee filed retraction letter DDIT(Inv.)-1, Indore*

almost after one year from the date of search and that such retraction is nothing more than an afterthought of the assessee.

3. On the facts and in the circumstances of the case, the Ld. CIT(Appeals) erred in not appreciating the dictum of law pronounced by the Hon'ble Gujrat High Court in the case of Sudarshan P.min v. ACIT [Tax Appeal No.386 of 2012] holding that "the assessee had stopped the investigating authority from probing further into the investment made by the assessee on account of his admission in his statement under section 132(4) of the Income Tax Act, 1961."

4. On the facts and in the circumstances of the case, the Ld. CIT(Appeals) erred in analysing the ruling of the Hon'ble Supreme Court in the case of Vinod Solanki vs. Union of India, 2009 AIR 23, 2008(16)SCC 537, dt. 18.12.2008 wherein the Hon'ble Court has held that "no adverse inference can be drawn on the basis of recorded statements in the absence of any corroborating material" in the wake of the fact that the admission of undisclosed income u/s 131(1A) on oath by Sh. Ritesh Jain was duly corroborated by the incriminating documents gathered during the search."

11. The solitary issue raised in the revenue's appeal is regarding the addition made by the AO on account of unsecured loans and undisclosed interest income on unsecured loans deleted by the CIT(A).

12. Ld. DR has submitted that there was a search and seizure action u/s 132 of the Act in case of Jain & Dixit Group on 12.07.2016. During the search certain documents were found and seized as LPS-2 from the promises 7/1, YN, Road, Indore. The seized material reveals that M/s. M.P. Agro Nutri Foods Ltd. has taken accommodation entries of Rs.3.40 crores through various

companies namely Jayant Security & finance Ltd., Purvi Finvest Ltd, East West Finvest India Ltd, K.K. Patel Finance Ltd. and Trimurti Finvest Ltd. managed by entry provider Shri Sharad Kumar Darak. During the search statement of the assessee was recorded u/s 131(1A) on 15.07.2016. Ld. DR has bumitted that the assessee is one of the shareholders of M.P. Agro Nutri Foods Ltd. and has accepted that these entries are merely accommodation entries for which he had already paid corresponding amounts in cash and also surrendered the same as undisclosed income in his hand. Thus, Ld. DR has submitted that the assessee himself has admitted the bogus accommodation entries in the shape of unsecured loans provided to M.P. Agro Nutri Foods Ltd. through various companies controlled by the Sharak Kumar Darak, the entry provider. The assessee in the statement though surrendered the said income however, he has retracted his statement and not offered the said income to tax. Therefore, as per the statement of the assesse the entries of unsecured loans in the books of M.P. Nutri Foods Ltd. are nothing but accommodation entries for which he has already paid corresponding amount in cash. The assessee has retracted his statement however, the AO has referred and relied upon the decisions including the decision of the Hon'ble Supreme Court on the point that retraction made by the assesse without specifying the mistake in the earlier statement is not valid. Ld. DR has relied upon the order of the AO.

13. On the other hand ld. AR has submitted that there was no tangible material or incriminating material to show that the

assessee has availed the alleged accommodation entries which are recorded in the books of M/s. M.P. Nutri Foods Ltd. The AO has made addition on the basis of the ledger account seized as LPS-2 from the residential premises of Shri Narendra Jain one of the directors of M/s. M.P. Nutri Foods Ltd. During the search the department has obtained a surrender from the assesse without any supporting evidence. The transactions of the loan are duly recorded in the books of M/s. M.P. Nutri Foods Ltd. as well as in the books of lender companies namely Jayant Security & finance Ltd., Purvi Finvest Ltd, East West Finvest India Ltd, K.K. Patel Finance Ltd. and Trimurti Finvest Ltd. He has pointed out that the assessee is holding only 7500/- shares of M/s. M.P. Nutri Foods Ltd. which is merely 1% of the total share capital. The assesse was not director of the said company nor holding any position in the management and therefore, recording of the statement of assessee u/s 132(4) is not valid when nothing was found incriminating against the assessee during the search and seizure proceedings. Therefore, extracting the surrender from the assessee was even against instructions of the CBDT issued from time to time to advise the tax authorities not to obtain surrender of income without supporting evidence.

13.1 Ld. AR has relied upon the judgment of Hon'ble Andhra Pradesh High Court in case of *CIT vs. Naresh Kumar Agarwal 369 ITR 171* as well as decision of Third Member of Ahmedabad Benches of the Tribunal in case of *DCIT vs. Pramukh Builders 112 ITD 179* and submitted that the Hon'ble Andhra Pradesh High Court has observed that when the Managing Director or any other

person were found to be not in possession of any incriminating material, the question of examining them by the authorized officer during the course of search and recording any statement from them by invoking the powers under section 132(4) of the Act does not arise. Hence the Hon'ble High Court has held that the statement of the assesse recorded u/s 132(4) of the Act does not have any evidentiary value. Mere confessional statement without there being any documentary proof shall not be used against the person who has made such statement. Therefore, the subsequent retraction of the statement by the assessee is in order and to explain the circumstances that confession was taken by the authorized officer during the search is not based on the correct facts or any incriminating material. He has also relied upon the CBDT Instruction F.No. 286/2/2003-IT (Inv.-II), 10.03.2003 and submitted that the CBDT has made it clear that reliance shall not be solely placed on statements recorded in search/survey. The board has expressed its concern that instances have come to the notice of the Board that the assessee have been forced to confess the undisclosed income during the course of the search and seizure and survey operations without any credible evidence and later on retracted by the concerned assessee while filing returns of income. In these circumstances such confessions during the course of search and seizure and survey operation do not serve any useful purpose. Thus, the board has advised tax authorities that there should be focus and concentration on collection of evidence of income which leads to information on what has not been disclosed

or is not likely to be disclosed before the Income Tax Department and no attempt should be made to obtain confession as to the undisclosed income while recording the statement during the course of search and seizure and survey operations. Ld. AR has also relied upon the decision of Hon'ble Gujarat High Court in case of *Kailashben Manharlal Chokshi vs. CIT 328 ITR 411*. Ld. AR has submitted that in the absence of any corroborative evidence the statement recorded which was subsequently retracted cannot be used against the assessee as a piece of evidence.

13.2 Ld. AR has further submitted that without prejudice to the above contentions even the transactions of loan between M/s. M.P. Nutri Foods Ltd. and the lending companies are genuine as transactions are through banking channels and all the relevant evidence in the shape of confirmation of the lenders/loan creditors, their final statements showing the availability of the funds to lend these loans were produced before the AO to establish that the loan creditors were having sufficient funds and capacity to give the loan to M/s. M.P. Nutri Foods Ltd. which were also repaid by the M/s. M.P. Nutri Foods Ltd. Therefore, these loan transactions are in the nature of inter corporate loans which were duly reflected in the books of account of the representative parties supported by the evidences proving identity and genuineness with the PAN, UIN, registered address, assessment records and final statements. Even the assessee produced copy of the certificate of registration with RBI as NBFC of the loan creditor companies as well as the record of subsequent repayment of these loans. Therefore, the loans

transactions as found in the books of these parties are genuine transactions and nothing adverse has been brought by the AO to disprove evidence produced by the assessee and to show that these transactions are not genuine transaction but accommodation bogus entries. Ld. AR has further submitted that during the assessment proceeding the assesse requested the AO for supply of the copies of the alleged statement of Shri Sharad Kumar Darak and Dinesh Kumar Agrawal and also allowed the assessee to cross examine them as the AO has held that the unsecured loans were taken by M/s. M.P. Nutri Foods Ltd. from certain companies which is controlled/operated by Shri Sharad Kumar Dharak who is well known entry provider of Indore and this fact came into light during the assessment proceedings, search and seizure actions and survey action of the department. Ld. AO has also referred the statement of Shri Dinesh Agrawal recorded during the survey by Raipur Investigation Wing on 22.01.2014. Therefore, in absence of alleged statement provided to the assessee and an opportunity to cross examine these persons whose statements were relied upon by the AO the addition made by the AO in the hands of the assessee is not sustainable. He has relied upon the judgment of Hon'ble Supreme Court in case of *Andaman Timber Industries vs. CCE 62 taxmann.com 3(SC)*. Ld. AR has further submitted that an identical issue has been considered by this tribunal in case of *ACIT vs. Shri Krishna Devcom Ltd. IT(SS)ANo.8 to 10/Ind/2022 & IT(SS)ANo.03/Ind/2022* vide order dated 21.08.2023 wherein addition made by the AO in respect of unsecured loan taken by the

said company from same set of lender companies was deleted by the Tribunal.

14. We have considered rival submissions as well as relevant material on record. The revenue has challenged the impugned order of the CIT(A) on the ground that addition was made by the AO on the basis of the seized material and not solely on the basis of the disclosure/confession made by the assessee in the statement recorded u/s 131(1A) of the Act. At the outset, we note that the AO has given the details of the seized documents LPS-2 in para 6.1 as under:

> *"6.1 During the Search & Seizure Proceedings carried out in group cases of Jain & Dixit Group certain incriminating document consisting details of accommodation entries amounting to Rs.3,40,00,000/- taken in the company M/s M.P Agro Nutri Foods Ltd. through various companies managed by entry provider Shri Sharad Kumar Darak during F.Y 2009-10 is found and seized as LPS-2. The details of the same are as under:*

S.No.	*Name of Company*	*F.Y.*	*Amount received as unsecured loan*
1	*Jayant Security and Finance ltd.*	*2009-10*	*7500000*
2	*East West Finvest India ltd.*	*2009-10*	*8500000*
3	*Purvi Finvest Ltd.*	*2009-10*	*5000000*

4	*K.K. Patel Finance Ltd.*	*2009-10*	*7500000*
5	*Trimurthi Finvest Ltd.*	*2009-10*	*5500000*
Total			*34000000*

14.1 There is no dispute that the LPS-2 is a ledger account in the books of M/s M.P Agro Nutri Foods Ltd. wherein the transactions of unsecured loan taken from these five lender companies are recorded. It is also undisputed fact that these transactions are duly recorded in the books of lender companies therefore, the seized material which is a ledger account in the books of M/s M.P Agro Nutri Foods Ltd. is not a new record disclosing any new fact not recorded in the books of account of M/s M.P Agro Nutri Foods Ltd. Further the said seized documents LPS-2 is showing the loan transactions between M/s M.P Agro Nutri Foods Ltd. and the lender companies and therefore, these are credit entries shown in the books of M/s M.P Agro Nutri Foods Ltd. Hence, there is nothing incriminating in the seized material to disclose that any undisclosed income escaped assessment in the hands of the assessee individual. The seized document itself does not disclose any undisclosed income in the hands of the assessee therefore, the same cannot be regarded as incriminating material either for the assesse or for M/s M.P Agro Nutri Foods Ltd. as this is part of the books of account of the said company. The confession of the

assessee as extracted during the statement recorded u/s 131(1A) is rather contrary to the seized document LPS-2 and therefore, the said statement of the assessee in the absence of any corroborating evidence or material cannot be held as incriminating material and moreover the same was retracted by the assessee. Thus, it is clear that the seized document LPS-2 contains the entries in the books of M/s M.P Agro Nutri Foods Ltd. and there is nothing either found during the search or recorded in the books of account of the assesse showing any cash credit in the nature of unsecured loans or in relation to the unsecured loans in the books or other record maintain by the assesee. Therefore, when there is no cash credit entries either found in the books of the assessee or recorded in the LPS-2 pertaining to the assessee then the addition on account of unexplained investment u/s 69 of the Act cannot be made. The AO has made this addition purely on the basis of the statement of the assessee recorded u/s 132(4) wherein the assessee has confessed undisclosed income on account of unsecured loan taken by M/s M.P Agro Nutri Foods Ltd. from the lender companies. The said statement was retracted by the assesse giving reasons that he has never been a director of the M/s M.P Agro Nutri Foods Ltd. or in controlling position of M/s M.P Agro Nutri Foods Ltd. and therefore he cannot be in a position to provide accommodation entries to M/s M.P Agro Nutri Foods Ltd. The CIT(A) has deleted this addition in para 5 to 5.16 as under:

> *"5.0 These grounds of appeal are with regard to addition of unsecured loans of Rs. 3, 40 ,00,000/- and interest of Rs. 30*

,60,000/- on the same treating unsecured loans of Rs. 3, 40 ,00,000/- as undisclosed income in the hands of the appellant. I have gone through the assessment order as well as the submission of the appellant and have carefully analyzed the facts of the case and the surrounding circumstances.

5.1 The appellant is an individual having PAN ADSPJ6423H. During the year under consideration he has derived his income from house property, profits & gains of business and profession, income from share in profits of firm and income from other sources. The return for the AY 2010-11 was filed by appellant on 17.03.2011 declaring total income of Rs. 4,49,440/-.

On 12.07.2016, a search and seizure operation u/s 132 of the Act was conducted on Jain & Dixit Group. Certain documents were found and seized from the premise 7/1 Y.N. Road, Indore. During the post search investigations, a statement u/s 131(1A) of the appellant was recorded on oath on 15.07.2016.On the basis of the above mentioned seized documents and statement recorded on oath, the case of the appellant was reopened by issuing notice u / s 148 of the Act on 31.03.2017, by which the appellant was asked to furnish the return of income.

The appellant vide his reply dated 04.09.2017 furnished that the appellant had already filed his income tax return for the AY 2010-11 on 17.03.2011 vide receipt no. 0025400559 and the same return be treated as return in response to notice issued u/s 148 of the Act.

AO while passing assessment order has assessed the income of the appellant at Rs. 3, 75 ,09,440/- as against the returned income of Rs. 4,49,440/-. The difference in the assessed income and the returned income is on account of the following two additions:

S.No.	*Disallowances/ Additions*	*Amount (in Rs.)*

1	*Addition on account of unsecured loan being accommodation entry taken in the company M/s. M.P. Agro Nutri Foods Ltd.*	*3,40,00,000/-*
2	*Addition on account of undisclosed interest income being 9% of the amount of unsecured loan*	*30,60,000/-*
Total		*3,70,60,000/-*

5.2 Additional grounds of appeal No. 5 to 10 raised by the appellant are purely on technical and legal issues and no separate adjudication is required for these grounds of appeal but consideration of the same will be necessary to adjudicate Ground No. 1 & 2 raise by the appellant challenging addition of unsecured loans of Rs. 3,40,00,000/- and interest of Rs. 30,60,000/- on the same. My observations and findings after carefully going through the assessment order, remand report of Ld. AO on additional grounds of appeal and written submissions made by the appellant during the course of appellate proceedings are discussed as under.

5.3 I have gone through the appellant contentions and the assessment order. The appellant through these grounds has challenged the action of the A.O. on account of "no independent application of mind" and had solely relied on the statement recorded during the course of search and no belief of the AO was recorded in the reasons so provided and AO has not mentioned anywhere in the impugned assessment order that apart from the statement recorded of the appellant which was subsequently retracted also, on what basis such addition has been arrived. I find sufficient merit in the contention of the

appellant which is supported by the ruling of Hon'ble Delhi High Court in the case of Sabh Infrastructure Vs ACIT [2017] 398 ITR 198 wherein court would like the revenue to adhere to the prescribed guidelines in matters of reopening of assessments.

5.4 The appellant through these grounds has challenged the action of the A.O. on account of assessment order being passed in violation of the principal of natural justice without affording appellant a reasonable opportunity for rebuttal of any document and opportunity of cross examination, if statement of some person has been relied on. I find sufficient merit in the contention of the appellant which is supported by the ruling of Hon'ble Supreme Court in the case of Andaman Timber Industries Vs CCE (Civil Appeal No. 4228 of 2006 dated 02.09.2015) wherein it was held that in the absence of opportunity of rebuttal and cross examination to the appellant, whole assessment may fall.

5.5 The appellant through these grounds has challenged the action of the A.O. on account of addition in the hands of the appellant where the amounts of unsecured loans were in the books of the company in which appellant is not the director and holding only insignificant shares of 0.58% of the total shareholding of the company. The allegation as made by the AO that the appellant had paid cash for receiving the entry in the books of M/s. M.P. Agro Nutri Foods Ltd. in which the appellant had no control of affairs, appellant further submitted that even if cash was given to the so called entry provider then it would be on behalf of the company. M/s. M.P. Agro Nutri Foods Ltd. and not for taking entry in the books of the appellant. Also, it is pertinent to mention here that if some amount of cash was given by the appellant then it must show some outflow from the books of the appellant and since there was no outflow of cash from the appellant's accounts, therefore, the allegation on the appellant proves to be wrong.

5.6 Appellant further submitted that in the present case of the appellant, it is very important to find out whether the Assessing Officer has made any further investigation or has obtained any further evidence apart from the statement recorded in order to

substantiate his allegation that the appellant had taken accommodation entries. From perusal of the assessment order, it is quite clear that no further evidence has been collected by the Assessing Officer to substantiate his allegation.

5.7 The appellant through grounds of appeal has raised the question that the A.O. has just referred to the statement recorded during the course of search. In this regard, it was submitted that the AC had verbatim quoted the statement which was recorded under pressure. In this regard, it was further submitted that the appellant, during the course of assessment proceedings, had furnished various replies vide which a reference was made to the letter filed before DDIT (Investigation -1, Indore) retracting the statement recorded on oath u/s 131(1A), wherein the appellant had categorically explained the reasons for giving such statement during the course of search. It was pleaded by the appellant that the Assessing Officer had indifferently ignored the said letter. It was claimed by the appellant that it was also a matter of record that the appellant had also raised objections in response to the reopening proceedings. The appellant further submitted, "The said objections were disposed off by the AO by passing an order dated 15.12.2017 reiterating the allegations as mentioned in the reasons recorded. The Ld. AO has not given any credence to the various replies filed as well as the retraction letter. Thus, the assessing officer has gone by ignoring the explanations filed by the appellant and evaluated the statement on his own whims and fancies."

5.8 I find sufficient merit in the contention of the appellant which is supported by the ruling of Hon'ble Supreme Court in the case of Vinod Solanki vs. Union of India, 2009 AIR 23, 2008 (16) SCC 537, dt. 18.12.2008, where the Hon'ble Court has held that no adverse inference can be drawn on the basis of a statement in the absence of any corroboration. The relevant extract is reproduced below:

"22. It is a trite law that evidences brought on record by way of confession which stood retracted must be substantially corroborated by other independent and cogent evidences, which

would lend adequate assurance to the court that it may seek to rely thereupon. We are not oblivious of some decisions of this Court wherein reliance has been placed for supporting such contention but we must also notice that in some of the cases retracted confession has been used as a piece of corroborative evidence and not as the evidence on the basis whereof alone a judgment of conviction and sentence has been recorded."

5.9 The same view has been reiterated by the Hon'ble Supreme Court in the case of CIT Vs. S. Khader Khan Son, 352 ITR 480 (SC).

5.10 I also find sufficient merit in the contention of the appellant which is supported by a CBDT circular which is issued dated 10.03.2003 with regard to the confession of additional income during the course of search and seizure and survey operations in which it was clarified that no addition can be made simply on the basis of statement recorded during search as the statements during search and seizure operations do not serve any useful purpose.

5.11 The appellant through these grounds has challenged the action of the A.O. on account of plea of the appellant that the impugned assessment order was illegal and bad in law for this reason and also that in the given facts of the case there was no law under which impugned addition could have been made. It was submitted by the appellant, "It can be noted from this fact that in the entire assessment order Ld. AO has made huge addition exceeding Rs. 3,70,60,000/- without even mentioning the section of the I.T. Act under which it is made. Presuming but without accepting that even if Ld. AO would have made addition U/s 68, such addition would also be bad in law because of the accepted fact that the said unsecured loans were not found credited in appellant's books of account maintained for the impugned assessment year, but were stated to be found credited in the books of account of the company wherein appellant was a miniscule shareholder. For making addition U/s 68, it is a mandatory pre-condition that the sum must be found credited in the books of accounts of the appellant maintained by

5.12 The relevant provision of Section 68 of the Income Tax Act, 1961 are:

"Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year".

5.13 I also find sufficient merit in the contention of the appellant which is supported by the facts and circumstances of the case along with the perusal and careful consideration of impugned assessment order in this case.

5.14 The appellant through these grounds has challenged the action of the A.O. on account of plea of the appellant that the impugned assessment order was illegal and bad in law for this reason also that in a similar set of facts where even the unsecured loan creditors namely Jay Jyoti India Pvt. Ltd., Trimurti Finvest P. Ltd., Purvi Finvest Ltd., K.K. Patel Finance Ltd., Jayant Security & Finance Ltd., East West Finvest India Ltd. were also the same or belonged to the same group, Hon'ble ITAT Indore bench in the matter of ACIT vs. Girish Kumar Sharda (2014) 23 ITJ 701 (Trib.-Indore) held in the favor of respondent that addition U/s 68 of Income Tax Act, 1961 of such unsecured loans was not called for in the hands of respondent. Head note of this Judgment is reproduced below:

"Cash Credits-U/s 68 of Income Tax Act, 1961- Assessee had taken loan from one group "L"- AO asked assessee to prove the identity, genuineness and creditworthiness of the loan- Assessee filed confirmation letter, audited accounts, Copy of return and PAN and bank accounts-AO still doubted the transaction and made addition U/s 68- Addition was also made in the case of " group on the basis that they were unable to establish the source of investment - CIT(A) deleted the addition holding that addition should be made in the hands of the lenders and not in the hands of the assessee; double

addition was not warranted - Department contended that that merely because addition is made the hands of "L" Group, assessee could not be left as held in ACIT Vs Narmada Extrusions Ltd. (2012) 19 ITJ 202 (Trib.-Indore) that addition is to be made in the hands of beneficiaries and merely if the wrong person, lender, has been taxed, the right person cannot be left- HELD- On the merits of addition, assessee has been able to prove the identity, genuineness and credit-wortininess-AO has not been able to bring any material to establish that the credits are not genuine-The Loan from these parties were repaid much prior to the date of search- No addition is called for.

5.15 I also find sufficient merit in the contention of the appellant which is supported by the facts and circumstances of the case along with the perusal and careful consideration of impugned assessment order in this case.

5.16 In view of the careful consideration of above facts and circumstances of the case and careful consideration of assessment order, the following facts emerge out clearly that not only the addition has been made solely on the statement of the appellant which was subsequently retracted also but that the appellant was a minuscule share holder in the company M/s M.P. Agro Nutri Food Ltd. where the alleged cash credit of Rs. 3,40,00,000/- was stated to be routed and not in the books of the appellant and the AO had summarily failed to bring any corroborative evidence on record to show or prove that the appellant had paid this amount in cash for getting an entry in a company where his stake in terms of shareholding was only 0.58%. Thus, keeping into account all the facts of the case and the various case laws so discussed above, the addition made by Ld. AO on account of unsecured loans of Rs. 3,40,00,000/- and interest of Rs. 30,70,000 /- is hereby deleted."

14.2 This finding of the CIT(A) is also supported by CBDT instruction F.N.286/2/2003-IT (Inv.-II) dated 10.03.2003. The relevant extracts of the same are as under:

"Instances have come to the notice of the Board where assessees have claimed that they have been forced to confess the undisclosed income during the course of the search & seizure and survey operations. Such confessions, if not based upon credible evidence, are later retracted by the concerned assessees while filing returns of income. In these circumstances, such confessions during the course of search & seizure and survey operations do not serve any useful purpose. It is, therefore, advised that there should be focus and concentration on collection of evidence of income which leads to information on what has not been disclosed or is not likely to be disclosed before the Income-tax Department. Similarly, while recording statement during the course of search & seizure and survey operations no attempt should he made to obtain confession as to the undisclosed income. Any action on the contrary shall be viewed adversely."

14.3 Therefore, in absence of any credible evidence such confession has no evidentiary value. We further note that even on the merits an identical issue of unsecured loans from same set of lender companies has been considered by this Tribunal in case of case of ACIT vs. Shri Krishna Devcom Ltd. IT(SS)ANo.8 to 10/Ind/2022 & IT(SS)ANo.03/Ind/2022 order dated 21.08.2023 in para 4 to 4.10 as under:

"4. Ground no. 5 regarding the merits of the addition made by the AO on account of unexplained unsecure loan u/s 68 of the Act. The assessing officer has given the finding in para 8.9 to 8.10 as under:

"8.9 The contentions of the assessee are perused. From the detailed discussion in the preceding paragraphs it has been vehemently brought out that these companies from which unsecured loan entries are seen in the books of the assessee are controlled by the entry provider Sharad Darak. These companies have been proven beyond doubt to be bogus/shell companies with no business activity/staff or even books of accounts. The assessee has only managed such entries in the guise of unsecured loans. These companies also find place in the bogus LTCG scam report sent by the

department to SEBI. Hence the question of providing further evidences to the assessee in this matter does not arise.

The contention that no accommodation entries as alleged have been taken in the books of Shri Krishna Devcon Ltd. as these are bank transactions and subjected to TDS deduction is also not acceptable. The transactions being done through banking channels and reflected in books of accounts of transacting parties does not legitimize the source of unsecured loans Le. shell companies. Two of the Sharad Darak Controlled companies namely Jayant Securities & Finance Ltd. and East West Finvest India Ltd. also feature in the Investigation Report of the Directorate of Income Tax (Inv.). Kolkata as bogus loss booking paper companies (Exit providers) in the racket of providing bogus exempt LTCG u/s 10(38).

8.10 The disparities in figures of Interest expenses etc pointed out by the assessee will be ironed out since the actual amounts of loans and interest from/to such entities as reflected in the books of accounts will be considered for each of the assessment years.

8.11. The unsecured loan of Rs.1,99,95,000/- taken in the books of A & A Shelters (partnership firm of the assessee) in the name of Purvi Finvest Ltd, during FY 2015-16 (AY 2016-17), has also been disclosed as unaccounted income of Shri Krishna Devcon Lld. (assessee) by Shri Naveen Jain (Director) in the above statement [as can be seen Ir the Annexure to the statement u/s 132(4)]. The ultimate source of this loan is thus the unaccounted Income of the assessee itself irrespective of the entity In whose books such an entry is reflected. However this sum will be treated as unexplained investment u/s 69 In the hands of the assessee instead of unexplained cash credit u/s 68."

4.1 Thus, it is clear from the finding of the AO that apart from show cause notice issued to the assesse dated 31.10.2018 no other material or evidence is referred in the above finding of the AO. The AO has assumed that the entries of unsecured loans in the books of the assesse as well as in the books of lender companies are bogus accommodation entries based on some personal knowledge of the AO of investigation report of DIT (Investigation, Kolkata) as well as survey proceedings in respect of third party which are not brought on record by the AO. The AO then referred various case laws on the issue of addition made u/s 68 of the Act and also relied upon the statement of Shri Naveen Jain director of the assesse company recorded u/s 132(4) of the Act in support of his decision to make the addition on account of unsecured loans. The Assessing officer has not even considered and examined the documentary evidence filed by the assesse consisting of financial statements of lender company, confirmation of the lender companies, return of income filed by the lender companies and then the assessment orders framed u/s 143(3) in some of the lender companies. The

assessing officer has even not pointed out any flaw or defect or abnormality in the financial statements of the lender companies produced by the assesse. The statement of Shri Naveen Jain recorded u/s 132(4) does not disclose any new fact or leading to any material not already recorded in the books of account and therefore, the addition cannot be made solely on the basis of the statement which was subsequently retracted by giving reasons therein. Though the AO has made wague reference to the investigation report DIT, Kolkata as well as survey conducted in the other cases however, except the personal knowledge of the AO, there is nothing on record as what actually the outcome of this investigation referred by the AO. Therefore, in absence of any record and evidence substantiating the said knowledge or assumption of the AO cannot be basis of the addition. Further the assesse produced the record to show that part of the unsecured loan was already repaid before the search and seizure action carried in the case of the assesse and therefore, the said transactions of repayment through banking channel cannot be doubted as bogus transaction when it was duly recorded in the books of account prior to the date of search. The assesse has produced the ledger account which is otherwise part of the regular books of account of the assessee duly audited wherein all the transactions of loan received from lender companies are duly recorded. The assessee has paid interest @ 9% and also deducted TDS @ 10%. The AO has not disputed the TDS on payment of interest on these loans. The repayment of loan of Rs.1,00,00,000/- on 26.03.2014 is also reflected in the ledger account and thereafter apart from the payment of interest after deducting TDS the assesse has also repaid a sum of Rs.4,07,37,377/- on 6th May 2015. Therefore, this amount was repaid prior to the date of search and the AO has completely ignored and overlooked the documentary evidences filed by the assesse. The assesse has also filed the ledger account in the books of M/s Jayant Securities and Finance Ltd. as confirmation of loan transactions from the said company. The ledger account duly reflected the transactions of loan as well as interest paid by the assesse after deduction of TDS on these transactions through banking channel. Even the bank account of the M/s Jayant Securities and Finance ltd. was also produced by the assesse to show that the said company was having sufficient funds to lend the amounts to the assessee and there was no cash deposit in the bank account of the lender company. The assesse officer has not doubted the identity of the lender company as all are filing regular return of income and also subjected to assessments. Even otherwise the assessee filed the acknowledgment of return of income of the lender company. We further note that the assessee has filed the return of income not for one year but for all the assessment years of lender company. The acknowledgments of return of income of the lender company have been filed and available in the paper book at page no.486 to 499 (Jayant Securities & finance ltd.) and page no.564 to 581 (Jay Jyoti India Pvt. Ltd.) The Annual report as well as tax audit report of the lender companies were also produced before the AO. The

assessee also produced the certificate of registration as non-banking financial institutions of the lender companies.

i. Similarly in case of M/s Rajwadi (Rajyeshwar) Retail Traders Systems Pvt. Ltd. the assesse has produced copy of ledger account in the books of the lender company, copy of the ledger account in the books of the assessee, copy of bank statement of the lender company, copy of acknowledgement of return along with computation of income, copy of annual report. All these documents are available at page no.648 to 679 of the paper book. The assessee officer has not taken any step to verify the correctness of the documentary evidences filed by the assessee but proceeded on the assumption that these transactions are accommodation entries.

ii. In case of M/s East West Finvest India Ltd. the assessee has produced a copy of ledger account in the books of the lender company, copy of bank statement of the assessee for relevant year, copy of certificate of registration of the lender company as NBFC, copy of annual report and acknowledgment of return of income with computation of income of the lender company placed at page no.680 to 717 of paper book.

iii. In case of M/s Zyka Merchandise Pvt. Ltd. the assesse has produced a copy of ledger account in the books of the lender company, copy of confirmation of account, copy of bank statement, copy of ledger account in the books of the assesse company, copy of affidavit of Shri Sharad Darak, copy of acknowledgment of return and copy of annual report for A.Y.2012-13 placed at page no.718 to 735 of the paper book.

iv. In case of M/s Purvi Finvest Ltd. the assessee has produced copy of ledger account in the books of the M/s Purvi Finvest Ltd., copy of bank statement, copy of acknowledgment of return along with computation of income for A.Y.2014-15 and 2016-17, copy of annual report and copy of certificate of registration as NBFC issued by RBI placed at page no.736 to 806 of the paper book.

v. In case of M/s. A and A Shelters the assesse has produced copy of ledger account of M/s Purvi Finvest Ltd. in the books of M/s A and A Shelters, copy of bank account statement placed at page no.807 to 810 P.B., copy of affidavit of Sharad Darak, copy of ITR, Computation of income audit report, audited financial statements with tax audit report for A.Y.2013-14 of M/s. East West Finvest India ltd. placed at page no.807 to 829 of the paper book.

4.2 Thus the assesse has produced voluminous record and documentary evidence to prove that transactions are genuine and lender companies are active existing entities subjected to audit and tax audit and regularly filing the return of income, all these records are otherwise available with the

department as these lender companies are regularly filing the return of income and also subjected to scrutiny assessment in some of the years. It is pertinent to note that the issue of accommodation entries from M/s Purvi Finvest India ltd. and M/s East West Finvest Ltd. has been considered by this Tribunal in case ITO vs. K.K. Patel Finance Ltd. vide order date 28th April 2023 in ITANo. 988/Ind/2019 as under:

"9. We have considered the submissions of Ld. DR and perused the orders of lower-authorities. Firstly, we observe from Para No. 9.4.c / Page No. 39 of the order of Ld. CIT(A) that the assessee has claimed to have filed following documents to Ld. AO during assessment-proceeding:

i. Share Application Forms

ii. Copy of Bank accounts

iii. Affidavit of Shareholder company

iv. Form No. 32 filed by share Applicant Co.

v. Certificate of Incorporation of Business

vi. ITR acknowledgments for A.Y. 2009-10

vil. Relevant portion of audited Balance Sheet

viii. Ledger account of shareholder in the books of Appellant Co.

ix. IT assessment order of the shareholder companies u/s 143(3) for AY 2009-10

We find that the revenue has not raised any ground to negate or contradict this fact claimed by assessee and also accepted by Ld. CIT(A). On a careful reading of assessment-order, we find that the AO has also talked at least about these documents having been filed by assessee, namely (i) affidavits of the directors of investor-companies; (ii) bank statements of the investor-companies; (iii) share application forms, etc. In fact, at one place the AO has made a heighted remark also "The type of documents furnished by assessee are self-serving and can be made by anyone". This shows that the assessee has filed document to AO. Being so, we do not find any merit in the contention of Ld. DR that the assessee has not filed any evidence to AO.

10. Having said so, we now go to the vital findings made by Ld. CIT(A) wherein he has dealt with the findings of AO as under:

(i) Ld. CIT(A) has observed that in the course of assessment-proceeding, the assessee produced books of account, filed copies of audited accounts, filed full details of the investors who had subscribed to the share capital. The AO has not raised any dispute or question on the receipt of money from those investors. (Para 9.7 of CIT(A)'s order).

(ii) Ld. CIT(A) observed that the AO has not disputed the fact that the money is received from investor-companies but has raised question as to whether it is a loan or not. (Para 9.8 of CIT(A)'s order).

(iii) Ld. CIT(A) observed that the share applicants are registered under the Companies Act, 1956 and are in the records of the Registrar of the Companies functioning under Ministry of Corporate Affairs, Government of India and they are having Permanent Account Numbers along with the acknowledgment of submissions of their return of income and furnished audited balance sheet and financial statements which proves identity. The share applicants have maintained bank accounts and copies of their bank accounts from which they made payments to the assessee for subscribing to the shares issued to them have been filed. The share applicants have not denied to have subscribed to the shares of the assessee and that such transactions were duly recorded in their books of accounts as well as their audited balance sheet. These facts clearly prove the genuineness of the transactions. It is further observed that the sources of the funds of the share applicants are explained as well as their sources were also explained. The facts furnished on record by the assessee-company clearly proved their sources of funds, and their capacity for making such payments and accordingly, the criteria of their creditworthiness is proved. The AO has not found any defect and/or deficiency in the sources of fund explained by the share applicants. It is also observed that the return of allotment as well as the annual return of the three share applicant companies for the A.Y. 2009-10 filed by the Appellant with the Registrar of the Companies, Ministry of Corporate Affairs, further categorically proves the fact of allotment of shares. The assessee has filed the Assessment order of all the three share applicant companies for the A.Y. 2009-10 completed u/s 143(3) of the Act and there is no addition in regard to share application. (Para 9.9 of CIT(A)'s order).

(iv) Ld. CIT(A) has finally observed that the burden which lay on the assessee u/s 68 has been duly discharged by it and nothing further remains to be proved by it on the issue. There is no evidence on record to show that the identities of the share applicants are not proved and / or that the introduction of share capitals are not proved and /or that the introduction of share capital by them was not genuine and/or the source of investment was not fully explained to the satisfaction of the AO. (Para 9.10 of CIT(A)'s order).

11. Clearly, therefore, it is discernible that the Ld. CIT(A) has dealt with each and every aspect of the issue and concluded that the assessee has discharged the burden cast upon it u/s 68. The Ld. DR could not show us any reason to interfere with these findings. Therefore, we are inclined to hold that in such a situation, the Ld. CIT(A) has rightly reversed the action of AO and deleted the addition. We subscribe to his view and uphold the deletion. The revenue fails in this appeal."

4.3 That was a case of share application money received by the assessee from these companies where the Ld. CIT(A) deleted the addition made by the AO u/s 68 of the Act. On further appeal this Tribunal after considering the documentary evidences and the finding of the Ld. CIT(A) has reached to the conclusion that the Ld. CIT(A) has rightly deleted the addition based on the documentary evidences. Similarly in case of ACIT vs. Pramod Kumar Sethi in ITANo.382-383/Ind/2014 dated 06.11.2018 has considered the transactions between the assesse and inter alia M/s. Purvi Finvest Pvt. Ltd. and M/s East West Finvest India Ltd. in para 16 & 17 as under:

"16. Examining the fact of instant appeal for Assessment Year 2006-07 and 2007-08 in the light of the above judgment of the Co-ordinate Bench in the case of ACIT V/S Shri Girish Kumar Sharda (Supra), we find that the same set of companies i.e. M/s. K.K. Patel Finance Limited, Indore, M/s. East West Finvest India Limited, Indore, M/s. Purvi Finvest Ltd, Indore and M/s. Trimurti Finvest Ltd, Indore are in question before the Tribunal in the instant two appeals before us. It has been clearly held by the Hon'ble Tribunal that all the alleged four companies are genuine and unsecured loans from these companies cannot be held to be unexplained cash credit u/s 68 of the Act. Even the linking of the assessee's case to the Lunkard Group was there in the case of ACIT V/S Girish Kumar Sharda (supra) and detailed finding has been given by the Tribunal in its order dated 30.1.2014. It is also evident from the perusal of the record that all the four companies are regularly assessed to tax and their assessment u/s 143(3) of the Act have been framed for Assessment Year 2006-07 and copies of the same are placed at page 66-73 of the paper book. They carry regular business activities and have sufficient funds for giving on credit towards interest. Identity of four companies are well established. Genuineness is duly proved by the transactions which are made through account payee cheque. All necessary details including bank statement/ financial statements, confirmation of account, PAN detail have been filed with these four companies and are placed on record at all proceedings are sufficient to prove the creditworthiness. The alleged unsecured loan of Rs.1,02,00,000/- and Rs.1,25,00,000/- were accepted during the year and were repaid also during the year which supports the contention of the assessee that the alleged loans were taken for business needs and were repaid back when the funds were available.

17. We therefore in the given facts and circumstances of the case and respectfully following the decision of Hon'ble Tribunal in the case of ACIT V/S Girish Kumar Sharda (supra) as well as detailed finding of fact by Ld.CIT(A) which is unconverted by the Ld. Departmental Representative as no material evidence has been placed to prove anything contrary. Therefore we find no infirmity in the finding of Ld.CIT(A) deleting the addition of Rs.

1,02,00,000/- and Rs. 1,25,00,000/- for alleged unsecured loans and also deletion of disallowance of interest on such loans at Rs.6,14,855/- andRs.5,55,815/- and also deleting the addition for undisclosed expenditure of Rs.5,25,000/- and Rs.6,25,000/-. We accordingly dismiss Revenue's Ground No.1, 2 &3 for Assessment Year 2006-07 and 2007-08 respectively.

4.4 Thus, the tribunal has taken as consistent view based on the documentary evidences showing that these companies are having financial capacity to advance amounts or invest the money which are genuine transactions as the transactions are carried out through banking channel and there is no material brought on record to show that the assesse's on money has routed back through these companies in the garb of these transactions. In case of ACIT vs. Radheshwari Developers Pvt. Ltd. in ITANo.493/Ind/2018 the Tribunal has again considered this issue vide order dated 28th July 2021 in para 43 as under:

"43. Even one of the alleged cash creditor namely M/s. Jayant Securities & Finance Ltd. which Ld. Pr. CIT has referred as an accommodation entry provider, it is revealed that this company is regularly assessed to tax for last many years and scrutiny proceeding u/s 143(3) of the Act were completed in case of this company. Observation of the Ld. Pr. CIT about letter issued to M/s. Jayant Security & Finance Limited received back unsecured and then stating that somebody filed information on behalf of the M/s. Jayant Security & Finance Ltd. does not find any merit as this company is regularly filing appeal before the judicial forums including Tribunal at Ahmedabad Benches and before Hon'ble High Court of Gujarat, copy of which is placed at paper book No.4 of page 10 to 23 which shows that this company is not a dummy company.

4.5 We further note that in case of M/s Global Realcon Pvt. Ltd. vs. ACIT in IT(SS)A No. 170 to 174/Ind/2020 vide order dated 26.04.2022 this tribunal again considered the genuineness of the transactions between the assesse and M/s Jayant Securities & Finvest Ltd. as well as Jay Jyoti India Ltd. in para 11.4.1 as under:

"11.4.1 We find that out of the various additions made by the AO in respect of the loan transactions claimed to have been carried out by the assessee with the above named eight creditors, in respect of loan taken by the assessee from two companies namely M/s. Jayant Security and Finance Ltd. and M/s. Jay Jyoti India Pvt. Ltd. respectively of a sum of Rs.75,00,000/- and Rs.75,00,000/- during the A.Y. 2012-13 and interest payments of Rs.40,685/- and Rs. 14,178/- respectively to such companies during A.Y. 2012-13 and further, in respect of loan from four companies

namely, M/s. Octagon Media Matrix Pvt. Ltd., M/s. Rajwadi Retails Trade Systems Pvt. Ltd., M/s. Ranjit Securities Ltd. and M/s. Suzlon Securities Pvt. Ltd. respectively of a sum of Rs.50,00,000/-, Rs.50,00,000/-, Rs.35,00,000/- and Rs.50,00,000/- during the A.Y. 2014-15 and interest payments of Rs.1,12,500/- Rs. 1,12,500/-, Rs.1,44,375/- and Rs.1,12,500/- respectively to such companies during A.Y. 2014-15, the AO has made additions of Rs. 1,50,00,000/- for A.Y. 2012-13 and Rs.1,85,00,000/- for A.Y. 2014-15 u/s. 68 of the Act and has also made additions amounting to Rs.54,863/- and Rs.4,81,875/- respectively for A.Y. 2012-13 and A.Y. 2014-15 on account of unexplained interest payment u/s. 69C of the Act to such loan creditors. Although, in respect of such additions, on the legal ground as discussed in para (11.3) supra, that the assessment years 2012-13& A.Y. 2014-15 were complete assessment years and therefore, for such assessment years, no addition could have been made without having recourse to any incriminating material found during the course of the search. But, even on merits, we find no substance in the additions so made by the AO in respect of all the above named six loan creditors.

4.6 This issue has been repeatedly considered by this Tribunal in a series of decisions and in case of Shri Sanjay Shukla vs. ACIT in ITANo.33/Ind/2020 order dated 15.03.2022 has considered this issue in para 12.3 to 12.6 as under:

"12.3 We have heard rival contentions, perused the records placed before us. Through ground No.1 revenue has challenged the finding of Ld. CIT(A) deleting the addition of Rs. 3,86,23,218/- made for unexplained unsecured loan and interest paid thereon taken from following parties:

S. No	*Name of Party*	*Loan Received during the yea*	*Interest paid on the loan amount*
1	*Jayant Securities and Finance Ltd Vadodara*	*Rs.1,25,00,000*	*Rs.8,79,041/-*
2	*Jay Jyoti India Pvt. Ltd. Mumbai*	*Rs.1,25,00,000*	*Rs.8,69,794/-*
3	*Manas Realtors Pvt. Ltd. New Delhi*	*Rs.50,00,000*	*Rs.3,41,507/-*
4	*Shri Sushil Kumar Ratan La*	*Rs.50,00,000*	*Rs.3,32,876/-*

	Khowal, Akola		
5	*Chandumal Govindram,* *Indore*	*Rs.12,00,000*	----
	Total	*Rs.3,62,00,000*	*Rs.24,23,218/*

12.4 We find that Ld. CIT(A) has dealt with this issue elaborately taking note of all the relevant documents filed by the assessee and the settled judicial precedence on the issue of unexplained unsecured loan of Rs.445 laksh and interest paid thereon Rs.29,82,575/- and Ld. CIT(A) has partly allowed assessee's ground by sustaining the addition only with regard to loan taken from M/s KCL Infra Projects Private Limited at Rs.83 laks and interest paid thereon at Rs.5,59,357/- and deleting the remaining addition as observed in the finding given in para 4 to 11 at page no.13 to 56 of the impugned order.

12.5. As regards the loan taken from Jayant Security and Finance Ltd. Badodara at Rs. 1.25 crores and interest paid thereon at Rs.8,79,041/-, we find that the alleged cash creditor is a limited company, Permanent Account No. and address has been provided. Loan taken through proper banking channel Confirmation of account is on record. Jayant Security and Finance Ltd. is a non-banking financial company having experience of 26 years. This company is regularly assessed to tax and has also been subjected to scrutiny assessment and the additions made thereon have traveled before Coordinate Bench Ahmedabad in the case of M/s. Jayant Security and Finance Ltd. in ITANo.753/Ahd/2012. We also find that the loan taken from alleged company has been treated as genuine and the additions made in the hands of other loan receivers have been deleted by this Tribunal in the case of M/s Tirupati Construction ITANo.533/Ind/2014 and M/s K.K. Patel Finance Ltd. ITANo.440/Ind/2010. We, therefore, find no reason to doubt the genuineness and creditworthiness of Jayant Security and Finance Ltd. and identity is well proved which has been rightly appreciated by Ld. CIT(A) in order to delete the addition made u/s 68 of the Act at Rs.1.25 cr and interest disallowance at Rs.8,79,041/-.

12.6. As regards the cash creditor namely M/s Jay Jyoti India Pvt. Ltd. Mumbai we find that this company was incorporated in 1999. As on 31.03.2013 it had share capital of Rs. 6,33,50,500/- and net reserves and surplus of Rs.1,08,62,25,646/-. Bank statement, confirmation of account, ledger statement, audited financial statement, Memorandum of Association and tax deducted at source certificate are placed on record which in totality are sufficient to prove identity of this company, genuineness of the

transaction and creditworthiness of this company It is further proved with the fact that it had merely advanced 0.75% of the funds which it was capable of i.e. it had financial capacity of advancing 133 times more than the loan given to the assessee company. Thus, Ld. CIT(A) has rightly appreciated these facts for deleting addition for made u/s 68 of the Act as well as the interest disallowance."

12.7xxxxxxx

12.8 xxxxxxx

12.9. We also find merit in the finding of Ld. CIT(A) referring to various decisions including decision of this Tribunal in the case of Sumati Kumar KasliwaL & OTHERS ITANo.181, 472/Ind/2017 and others. Judgment of Hon'ble jurisdictional High Court in the case of Pr. CIT vs. M/s Chain House International (P) Ltd. ITANo.111/2018 dated 07.08.2018 and also decision of this Tribunal in the case of M/s Tirupati Consturction (supra) and M/s K.K. Patel Finance Ltd. (supra) wherein similar issue and almost identical facts has been examined and decided in favour of the assessee and additions made u/s 68 of the Act were deleted. We, therefore, find no infirmity in the finding of Ld. CIT(A) deleting the addition for unexplained loan and interest paid thereon at Rs.3,86,23,218/-. Thus ground no.1 raised by the revenue is dismissed.

4.7 The Mumbai Bench of this tribunal in case of JCIT vs. M/s Shalimar Housing & Finance Ltd. (supra) has also considered the issue of addition made by the AO u/s 68 in respect of the unsecured loan transactions inter alia from M/s East West Finvest India Ltd, Jayant Securities & Finvest Ltd. and Jay Jyoti India Ltd. in para 14 to 20 as under:

"14. We have carefully considered the submissions. We note that assessing in this case has submitted the following documents.

1. Confirmation from the lenders

2. Bank statement of lenders

3. Financial statement of lenders 4 Copy of acknowledgement of Return of Income.

5. Download of company master data from the MCA website.

6. Statement of loan repayment.

15. The Assessing Officer has duly issued notice u/s 133(6) to the above said parties. All the necessary confirmation and compliances have been made. The assessing officer thereafter has not brought on record result of any further enquiry made. The AO's observation from the financials of lenders submitted are in the nature of AOs surmise, devoid of any cogent enquiry.

9 Sh a l i m a r H o us i n g & F i n a n c e L t d.

16. The documents mentioned above with regard to all the lenders are also submitted before us, by way of paper book. We note that the identity of the lenders is duly proved. They have duly responded to assessing officers notice issued u/s 133(6) and have made due compliances. It is not even the case of the assessing officer that these parties are non-existent. The lending companies are also active companies as evident from the documents furnished from the website of Ministry of Corporate Affairs. The bank statement of the lending companies have also been furnished. Loan is granted through bank. No adverse inference has been noted by the assessing officer from the bank statement.

17. The grievance of the assessing officer is that these companies do not have substantial income and hence are not capable of giving loans. He has also expressed doubt about the position of reserves and fund position without brining on record any cogent material from any further enquiry made by bench. We find that the funds position of the companies as noted by the ld.CIT(A) is quite capable of granting loans. The adverse inference drawn from the financial statement of lending companies is only a surmise by the assessing officer without making any enquiry. In this regard, we note that honorable jurisdictional High Court in the case of Pr.CIT vs Veedhata Tower Pvt.Ltd, order dated 21.04.2018 has held that when all the necessary details of the fund provider was available with the assessing officer, he was free to make the necessary enquiry and addition under section 68 in the hands of the recipient were unjustified. Furthermore, assessee has also paid interest to the lenders. It has also deducted tax at source. Loan have been duly repaid, some part has been repaid even in the present assessment year. In these circumstances, in our considered opinion assessee has discharged the onus. The assessing officer has not brought on record any cogent material to make the addition as unproved cash credit. Hence, the addition made by the assessing officer is not sustainable.

10 Sh a l i m a r H o us i n g & F i n a n c e L t d.

18. The case laws relied upon by the Ld. Departmental Representative are not at all applicable on the facts of the present case. In the case of Precision

Finance(P.) Ltd (supra), the parties were found to be non-existent. In the case, we are dealing with it is nobody's case that the parties are non-existent. In Navodaya Castles(P.) Ltd (supra), share subscribers were found to be paper company. This is not at all the case here. In E.Ummer Bava (supra), the issue was gift from NRI where the creditworthiness of the donor was not proved. In Shantananda Steels(P.) Ltd (supra), the issue was share capital and huge share premium from entry providers from Kolkatta. In NRA Iron & Steel(P.) Ltd (supra), the issue was non-existent share applicants. In Synergy Finlease(P.) Ltd(supra), the issue was share capital and improbable share premium from accommodation entry providers. In Blessings Commercial(p.) Ltd(supra), the issue was share capital and huge share premium, where the providers had minimum balance in their bank account. Accordingly, we note these case laws do not help the case of the revenue.

19. Accordingly, in the background of aforesaid discussion and precedents, we do not find any infirmity in the order of Ld.CIT(A) regarding deletion of addition on account of loan. Accordingly, we are uphold the same.

20. As regard, the issue of interest on unsecured loan, the addition was made by the AO by holding that since the loan have been held by him to be unexplained the interest, thereon cannot be said to be for business purpose. Since, we have already held that addition of loan as unexplained credit is not sustainable, the disallowances of interest thereon, on the same reasoning is liable to be deleted. Hence, we uphold the order of the Ld.CIT(A) on the issue also."

4.8 As it is manifest from the series of decisions referred above that this tribunal has examined the issue of genuineness of transactions between the assessee and these lender companies and found that when the assesse has produced relevant evidence to prove the identity of the lender companies, the capacity of the lender companies and genuineness of the transactions that in absence of any contrary material to disprove the claim of the assesse or to show that the evidence produced by the assesse is not reflecting true fact, the addition made by the AO is not sustainable. The ld. CIT(A) has also considered this issue in para 3.3.2 to 3.3.4 as under:

"3.3.2 *I have duly considered the above and found that the Ld. AO has concluded that the above unsecured loans had been received from the Companies controlled by Shri Sharad Darak who is a well known accommodation entry provider of Indore. The Ld. AO on the basis of findings of past actions of the various officers held that Shri Sharad Darak runs dummy companies through which he provides entries to needy persons. The Ld. AO has also relied upon various judgments. On perusal of assessment order, it has been found that the Ld. AO has not made any independent enquiry to disprove the identity, creditworthiness, genuineness of transaction. The Ld. AO has also not enquired into the nature and source of*

unsecured loans. The Ld. AO has only given emphasis on some enquiries conducted in the past and given a general findings and made additions. No specific finding about the companies proving them bogus has been given in the assessment order. The Ld. AO has also relied upon the statement of Shri Navin Jain which is not based upon any incriminating material. This statement cannot be sole reason for the addition in the total income of the appellant. The appellant has filed ample information and documents to discharge its onus as envisaged in section 68 of the Act. It has been found that all loans had been received by the appellant from the companies under consideration through proper banking channel and the appellant has paid interest thereon after deducting TDS. In the case of M/s. Jay Jyoti India Pvt. Ltd., the entire outstanding amount as on 01.04.2014 i.e. of Rs.3,79,02,377/- which includes sum of Rs.1,00,00,000/- received in AY 2014-15 and interest paid of Rs.32,24,863/- has been fully repaid on 06.05.2015 and 07.05.2015. Interest of Rs.32,24,863/- has been paid after deducting TDS of Rs.3,22,486/-. In the case of M/s Rajwadi (Rajyeshwar) Retail Traders Systems Pvt Ltd the appellant has received loan of Rs. 15,00,000/- on 07.03.2014 and the same was repaid on 26.03.2014 after paying interest of Rs. 9,247/-. In the case of M/s Purvi Finvest Ltd, the appellant had made partial repayment of Rs. 90,00,000/- on 18.05.2015. All transactions are done through banking channel. No investigation has been conducted to discredit such information or documents. The position of Share Capital, reserve and surplus and cash and balances of these companies as per audited balance sheet is as under:-

Name of the Company	***F.Y.***	***Share capital as on 31ST March***	***Reserve and surplus/Share application money pending for allotment as on 31ST March***	***Cash and cash equivalent/Bank as on 31ST March***
Jayant Security And Finance Ltd.	*2010-11*	*2,84,18,000/-*	*86,83,63,460/-*	*73,73,454/-*
Jayant Security And Finance Ltd.	*2013-14*	*2,84,18,000/-*	*218,46,08,700/-*	*44,90,256/-*
M/s. Jay Jyoti India Pvt. Ltd.	*2011-12*	*6,25,95,500/-*	*109,80,86,962/-*	*92,49,886/-*
M/s. Jay Jyoti India Pvt. Ltd.	*2013-14*	*6,33,50,500/-*	*83,62,86,980/-*	*23,84,013/-*
M/s Rajwadi Retail Trade Systems Pvt Ltd	*2013-14*	*29,27,000/-*	*1,95,28,995/-*	*7,07,085/-*
M/s East West Finvest India Ltd	*2012-13*	*8,08,39,500/-*	*33,35,07,347/-*	*66,81,404/-*
M/s Zyka Merchandise Pvt Ltd	*2011-12*	*29,10,000/-*	*6,68,07,972/-*	*14,91,320/-*

Puvi Finvest Ltd.	*2013-14*	*15,84,66,500/-*	*186,24,03,524/-*	*7,25,386/-*
Puvi Finvest Ltd.	*2015-16*	*15,84,66,500/-*	*179,31,56,944/-*	*11,01,361/-*

On perusal of the above, it is evident that the lender company had substantial funds available with it to advance money to the appellant. The appellant has also filed necessary documents to prove its identity, creditworthiness of these companies and also filed bank statement reflecting the transactions. In my opinion, nothing in form of cogent evidences has been brought on record by the ld. AO in support of his findings. The ld. A.O should have acted on the details furnished by the appellant, but he did not do so. Hon'ble Delhi High Court in the case of ***Oasis Hospitalities P. Ltd.*** *reported in 333 ITR 119(2011) has held as under:*

"11. It is clear from the above that the initial burden is upon the assessee to explain the nature and source of the share application money received by the assessee. In order to discharge this burden, the assessee is required to prove : (a) Identity of shareholder; (b) Genuineness of transaction; and (c) Creditworthiness of shareholders.

12. In case the investor/shareholder is an individual, some documents will have to be filed or the said shareholder will have to be produced before the AO to prove his identity. ***If the creditor/subscriber is a company, then the details in the form of registered address or PAN identity, etc. can be furnished.***

13. Genuineness of the transaction is to be demonstrated by showing that the assessee had, in fact, received money from the said shareholder and it came from the coffers from that very shareholder. The Division Bench held that when the money is received by cheque and is ***transmitted through banking or other indisputable channels****, genuineness of transaction would be proved. Other documents showing the genuineness of transaction could be the copies of the shareholders register, share application forms, share transfer register, etc.*

14. As far as creditworthiness or financial strength of the creditor/ subscriber is concerned, that can be proved ***by producing the bank statements*** *of the creditors/subscribers showing that it had sufficient balance in its accounts to enable it to subscribe to the share capital.* ***This judgment further holds that once these documents are produced, the assessee would have satisfactorily discharged the onus cast upon him. Thereafter, it is for the AO to scrutinize the same and in case he nurtures any doubt about the veracity of these documents to probe the matter further. However, to discredit the documents produced by the assessee on the aforesaid aspects, there has to be***

***some cogent reasons and materials for the AO and he cannot go into the realm of suspicion**."*

Considering the above decision, the appellant had discharged its onus by producing ample evidences. Without any investigation and cogent material, ld. AO treated the same as unexplained which is not sustainable in view of following judgments:

(i). ***Divine Leasing & Finane Ltd.*** *(2008) 299 ITR 268(Delhi). wherein it was held that :*

"16. In this analysis, a distillation of the precedents yields the following propositions of law in the context of s. 68 of the IT Act. The assessee has to prima facie prove (1) the identity of the creditor/subscriber; (2) the genuineness of the transaction, namely, whether it has been transmitted through banking or other indisputable channels; (3) the creditworthiness or financial strength of the creditor/subscriber; (4) if relevant details of the address or PAN identity of the creditor/subscriber are furnished to the Department along with copies of the shareholders register, share application forms, share transfer register, etc. it would constitute acceptable proof or acceptable explanation by the assessee; (5) the Department would not be justified in drawing an adverse inference only because the creditor/subscriber fails or neglects to respond to its notices; (6) the onus would not stand discharged if the creditor/subscriber denies or repudiates the transaction set up by the assessee nor should the AO take such repudiation at face value and construe it, without more, against the assessee; ***(7) the AO is duty bound to investigate the creditworthiness of the creditor/ subscriber, the genuineness of the transaction and the veracity of the repudiation.***

(ii). ***CIT v. Kamdhenu Steel & Alloys Limited*** *and Other (2014) 361 ITR 220(Delhi) wherein it is held that :*

"38. Even in that instant case, it is projected by the Revenue that the Directorate of Income Tax (Investigation) had purportedly found such a racket of floating bogus companies with sole purpose of lending entries. But, it is unfortunate that all this exercise if going in vain as few more steps which should have been taken by the Revenue in order to find out causal connection between the case deposited in the bank accounts of the applicant banks and the assessee were not taken. It is necessary to link the assessee with the source when that link is missing, it is difficult to fasten the assessee with such a liability."

(iii). Following the decision in the case of ***Oasis Hospitalities P. Ltd.*** *(supra) and the decision of Hon'ble Apex Court in the case of* ***NRA Iron & Steel Pvt. Ltd.*** *(Arising out of SLP (Civil) No. 29855 of 2018) order dated 05.03.2019, I reject the contentions of the appellant in respect of above*

creditors. Relevant paras of the decision of Hon'ble Apex Court are reproduced hereunder:

"9. The Judgments cited hold that the Assessing Officer ought to conduct an independent enquiry to verify the genuineness of the credit entries.

In the present case, the Assessing Officer made an independent and detailed enquiry, including survey of the so-called investor companies from Mumbai, Kolkata and Guwahati to verify the credit-worthiness of the parties, the source of funds invested, and the genuineness of the transactions. The field reports revealed that the share-holders were either non-existent, or lacked credit-worthiness."

.....

11. The principles which emerge where sums of money are credited as Share Capital/Premium are :

i. The assessee is under a legal obligation to prove the genuineness of the transaction, the identity of the creditors, and credit-worthiness of the investors who should have the financial capacity to make the investment in question, to the satisfaction of the AO, so as to discharge the primary onus.

ii. The Assessing Officer is duty bound to investigate the credit-worthiness of the creditor/ subscriber, verify the identity of the subscribers, and ascertain whether the transaction is genuine, or these are bogus entries of name-lenders.

iii. If the enquiries and investigations reveal that the identity of the creditors to be dubious or doubtful, or lack credit-worthiness, then the genuineness of the transaction would not be established.

In such a case, the assessee would not have discharged the primary onus contemplated by Section 68 of the Act.

12. In the present case, the A.O. had conducted detailed enquiry which revealed that :

i. There was no material on record to prove, or even remotely suggest, that the share application money was received from independent legal entities. The survey revealed that some of the investor companies were non-existent, and had no office at the address mentioned by the assessee....."

In view of the above judicial pronouncements, the AO is duty bound to investigate the issue once the assessee discharges its onus as per section 68 of the Act. Here, such efforts are absent. Further, the appellant has brought on record the decision of Hon'ble ITAT Indore in the case of ***Shri Pramod Kumar Sethi*** *(ITA NO. 382 and 383/Ind/2014, dated 06.11.2018) wherein various companies of Sharad Darak Group held as genuine companies which also includes* ***Purvi Finvest Ltd.*** *from whom the appellant has taken unsecured loan of Rs.5,50,00,000/-. In another decision in the case of* ***M/s. Radhishwari Developers Pvt. Ltd.*** *(ITA No. 493/Ind/2018 dated 20.07.2021) Hon'ble ITAT Indore has held that* ***M/s. Jayant Securities and Finance Ltd.*** *is regularly assessed to tax for last many years and scrutiny proceedings u/s.143(3) of the Act were completed in this company. This company is regularly filing appeal before the judicial forums which show that this company is not a dummy company. Considering the above findings of the Hon'ble ITAT, above companies cannot be declared as dummy company.*

3.3.3 *In view of the above discussion, it is not justified to held the lender companies as dummy entities and the loans given to the appellant by these companies are non-genuine. Therefore, the additions made by the ld. AO are not sustainable.*

3.3.4 *In view of discussion made in para 3.2 to 3.3.3 above, addition of Rs. 23,00,000/- in AY 2011-12, Rs. 5,00,00,000/- in AY 2012-13, Rs.1,00,00,000/- in A.Y. 2013-14, Rs.2,60,00,000/- in A.Y. 2014-15 and Rs.4,90,00,000/- in A.Y. 2016-17 on account of unexplained cash credit u/s. 68 of the Act are hereby* ***deleted****. Therefore, appeal on these grounds is* ***allowed."***

4.9 The Ld. CIT(A) has considered the evidence produced by the assesse as well as the facts that the AO has not conducted any inquiry in respect of the transactions and the evidence produced by the assesse but made the addition only on the presumption that the companies controlled and run by Shri Sharad Darak are providing accommodation bogus entries. The Ld. CIT(A) has followed various decisions including the decision of this Tribunal in case of Shri Pramod Kumar Setthi (supra) and M/s Radheshwari Developers Pvt. Ltd. (supra) while deleting the addition on merits.

4.10 In view of the fact and circumstances of the case as well as having considered the documentary evidence produced by the assesse and analyzing the transactions recorded in the documentary evidences we find that the assesse has duly discharged its onus to prove the identity of the loan creditors, the capacity of the loan creditors and the genuineness of the transactions. So far as the identity of the loan creditors is concerned the department has not disputed the same and the capacity of the loan creditor

has been duly established by producing audited financial statements, tax audit report, bank account statements, return of income of the lender companies and no defect was pointed out by the AO in the documentary evidence produced by the assesse. The transactions are through banking channel and the assessee produced the bank account statement of the assesse as well as the loan creditor companies to show that there is nothing in the bank account statement as well as ledger account to reflect that assesse's own money has routed back through these lender companies. Rather the assesse has repaid part of the loans prior to the search and seizure action in this case. Therefore, all these facts and record go to prove that the transactions are genuine and nothing has been brought on record except reference to certain investigation reports to doubt the transactions duly recorded in the books of account as well as in the bank account statement. Accordingly in these circumstances we do not find any error or illegality in the impugned order of the Ld. CIT(A) qua this issue of addition made by the AO u/s 68 of the Act on account of unsecured loan."

14.4 Therefore, the transactions of alleged accommodation entries from the same set of five companies were considered by this Tribunal in a series of decisions as referred in the above quoted decision. Accordingly in view of the consistent finding of the Tribunal in respect of the transactions of alleged accommodation entries from these five concerns, we do not find any error or illegality in the impugned order of the CIT(A) qua this issue.

IT(SS)No.14/Ind/2022

For Assessment year 2011-12 the Revenue has raised following Grounds:

"1.Whether on the fact and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition of Rs. 1,65,00,000/- made u/s 69 of Income Tax on account of unexplained investment and interest thereon, terming it non-abated assessment year, while the addition was made on the basis of incriminating material found and statement recorded during the search and seizure action u/s 132(4) of IT Act.

2. Whether on the facts and in the circumstances of the case and in law, Ld. CIT(A) erred in ignoring decision of Hon'ble High Court of Kerala in the case of E.N gopakumar Vs CIT [2016 75 taxmann.com 215 (Kerala)], where in it is held that assessment proceedings can be concluded against interest of assessee including making addition even without any incriminating material being available against assessee. Further, Hon'ble Supreme court admitted SLP filed against order of high court in case of PCIT vs Gahoi Feeds (P) Ltd [2020] 117 taxmann.com 118(SC)], wherein High court upheld the tribunal order deleting addition made u / s 153A by taking view that no incriminating documents were found during course of search.

3.Whether on the facts and in the circumstances of the case and in law, the CIT(A) erred in holding that the statement of Shri Narendra Jain and Shri Ritesh Jain recorded u/s 132(4) of IT Act are not based on incriminating documents and in ignoring that the assessee when confronted himself admitted that these unsecured loans are mere accommodation entries. In holding this, the learned CIT is not justified in law in ignoring that the documents seized as well as statement recorded u/s 132 of IT Act, are important piece of evidence and comes within purview of evidence under the Income Tax Act read with section 3 of Evidence Act.

4.Whether on the facts and in the circumstances of the case and in law, Ld. CIT(A) has erred in accepting retraction made by the assessee made after more than a year as genuine even though there was strong evidence on record about accommodation entries provided by companies controlled by Sharad Darak, a known entry provider; and whether CIT(A) has erred in accepting the retraction of assessee as genuine ignoring the decision of Hon'ble SC in the case of Bannalal Jat constructions Pvt Ltd Vs ACIT [2019] 106 Taxmann.com 128(SC).

5.Whether on the facts and in the circumstances of the case and in law, Ld. CIT(A) has erred in holding that the assessee has discharged its onus of cash credits u/s 68 of IT Act especially when it was on record that accommodation entries were

received from the companies controlled by Sharad Darak, a known entry provider.

6.Whether on the fact and in the Circumstances of the case and in law, the Ld. CIT(A) has erred in ignoring the findings of non existence of alleged lender companies at their reported address, during survey action u/s 133A conducted by the department on 22.01.2014.

7.Whether on the fact and in the Circumstances of the case and in law, the Ld. CIT(A) has erred in holding that creditworthiness and genuineness of transaction by lender companies is proved when the source of capital itself is only huge premium and share capital from similar type of companies/entities without actual business activities. Further, the Ld. CIT(A) failed to take a note that SEBI has declared some of the companies as suspected companies and the said companies also feature in list of exit providers in the bogus LTCG scam unearthed by Kolkata Investigation Wing.

8.Whether on the fact and in the Circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition of Rs. 1,65,00,000/- made u/s 69 of Income Tax Act on account of unexplained investment.

9.Whether on the fact and in the Circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition amounting to Rs. 38,24,137/- made by the AO on account of undisclosed interest income."

15. Ld. DR has submitted that there was a search and seizure action u/s 132 of the Act in the Jain & Dixit Group on 12.07.2016 and assessee was covered under the said search operation. The statement of assessee was recorded u/s 131(4) of the Act was recorded wherein the assessee has admitted the unsecured loan entries recorded in the seized material LPS-2 are accommodation

provided by him to M/s M.P. Agro Nutri Foods Ltd. through various entities managed and controlled by Shri Sharad Kumar Darak. The assessee has also surrendered the said income at the time of statement recorded u/s 1312(4) however, in the return of income the assessee has not offered said surrendered income to tax and took the plea that the assessee has retracted the earlier statement vide his retraction statement dated 29.08.2017 before DDIT (Investigation-I, Indore). Ld. DR has submitted that the said retraction cannot be accepted as it is only an afterthought and there was no allegation of the assessee of any pressure or coercion at the time of recording the statement u/s 132(4) of the Act. Further the retraction statement is filed only after more than one year for recording the original statement u/s 132(4) therefore, the same cannot be accepted. Ld. DR has referred to the assessment order wherein the AO has relied upon various decisions on this point. She has relied upon the order of the AO and submitted that when the assessee has specifically admitted the transactions recorded in the seized documents as bogus accommodation entries provided by him through various entries controlled and managed by Shri Sharad Kumar Darak who is a well-known entry provider then the addition made by the AO is justified.

16. On the other hand Ld. AR has submitted that there is no incriminating material found during the course of search to disclose any undisclosed income in the hands of assesse. The seized material is nothing but ledger account in the books of M/s M.P. Agro Nutri Foods Ltd. shown the transactions of unsecured loan

taken by the said company from the lender companies therefore, statement of the assessee recorded u/s 132(4) for extracting confession and surrender of income cannot be a basis of addition as the transactions are actually between M/s M.P. Agro Nutri Foods Ltd. and the lender companies. He has further submitted that statement without any corroborated evidence cannot be treated as incriminating material and basis for addition in the proceedings u/s 153A of the Act. Ld. AR has pointed out that the assessment year under consideration was not pending as on the date of search and therefore, no addition can be made in the absence of any incriminating material. Apart from the statement of the assessee the AO has not referred any incriminating material reflecting any undisclosed income in the hands of the assessee. The AO has only referred the investigation carried out by the department in some other cases and statement of Shri Sharad Darak recorded in the survey proceedings. Therefore, in the absence of any incriminating material no addition can be made by the AO and the same liable to be deleted. In support of his contention he has relied upon following decisions:

(i) CIT vs. Kabul Chawla 380 ITR 573

(ii) Pr. CIT vs. Meeta Gutgutia *395 ITR 526 (Delhi)*

(iii) *CIT vs. Harjeev Aggarwal 290 CTR 263 (Delhi)*

(iv)Pr. CIT vs. Best Infrastructure (India) P. Ltd. 397 ITR 82 (Delhi)

(v) *Pr. CIT vs. Anand Kumar Jain 432 ITR 384*

(vi) *Pr. CIT vs. Pr. CIT vs. Abhisar Buildwell Pvt. Ltd. 149 taxman 499(SC)*

16.1 He has submitted that the issue is now settled by Hon'ble Supreme Court in case of *Pr. CIT vs. Abhisar Buildwell Pvt. Ltd.* (supra) whereby the judgment of Hon'ble Delhi High Court in case of *CIT vs. Kabul Chawla (supra)* has been upheld and hence, the addition made by the AO without any incriminating material is not sustainable and liable to be deleted. Ld. AR has further submitted that even on the merits this issue is now covered by the decision of this Tribunal in case of ACIT vs. Shri Krishna Devcon Ltd. (supra).

17. We have considered rival submissions as well as relevant material on record. The relevant facts in respect of this issue of addition made by the AO on account of unsecured loan transactions recorded in the books of account of M/s M.P. Agro Nutri Foods Ltd. has been discussed by us in the appeal & CO for A.Y.2010-11 and therefore, for sake of brevity and convenience we do not repeat the same. There is no dispute that LPS-2 is a ledger account in the books of M/s M.P. Agro Nutri Foods Ltd. showing the loan transactions between the said company and five lender companies. From bare reading of the LPS-2 do not reflect or disclose any undisclosed income on account of those entries in the hand of the assessee. The AO has made the addition on the basis of the statement of the assessee recorded u/s 132(4) of the Act and thereby treated these transactions as accommodation entries provided by the assessee through entities of Shri Sharad Darak against the cash payment by the assesse treated as unexplained

investment. It is pertinent to note that there is no material on record to show that the assessee has paid any cash for taking accommodation entries from these lender companies in the name of M/s M.P. Agro Nutri Foods Ltd. The transactions are duly recorded in the books of the borrower company as well as the lender companies. All these transactions were through banking channels and the identity of the lender companies are not disputed even by the AO. The AO has questioned the genuineness of the transaction but there is nothing on record to suggest that these transactions are bogus transactions except the statement of the assessee and some past investigation carried out by the department in the cases of Sharad Darak. The CIT(A) has considered this issue of addition in the proceedings u/s 153A in the absence of any incriminating material in para 3.2.2 & 3.3.2 as under:

> *"3.2.2 I have considered the facts of the case, plea raised by the appellant and findings of the Id AO. On perusal of the impugned seized ledger LPS 2, page no. 23 to 41, it has been found that these pages are ledger accounts of M/s. Trimurti Finvest Ltd., M/s. K K Patel Finance Ltd., M/s Purvi Finvest Ltd., M/s Jay Jyoti India Pvt. Ltd., M/s Jayant Security and Finance Ltd., M/s. East West Finvest India Ltd. in the books of the M/s MP Agro Nutri Foods Ltd. These are part of books of account of M/s MP Agro Nutri Foods Ltd as it also mentioned by the Id. AO in the assessment order of M/s MP Agro Nutri Foods Ltd. Therefore, such document cannot be termed as incriminating document. Thus, the statement of Shri Narendra Jain and appellant recorded u/s.132(4) of the Act cannot be treated as recorded on the basis of incriminating document seized as a result of search and seizure proceedings. Such statement forming basis of addition that too in absence of supporting incriminating document, cannot be constitute*

information found as a result of search and seizure proceedings. In the case of appellant also the ld AO has made addition of amount of loans taken by appellant from the alleged briefcase companies of Shri Sharad Darak. The entire addition has been made on conjecture and without having reference of any incriminating document on record. There are various judicial pronouncements wherein it has been held that no addition can be made in non-abated assessments in absence of incriminating material. The two moot question which arises here are that (i) whether the year are abated or non-abated assessment years and (ii) whether the Id AO can made addition in search assessment proceedings without having any incriminating material on record and that too in non-abated assessment years. In the instant case, search and seizure operations u/s 132 of the Act was carried out on 12.07.2016 and return of income for AY 2011-12 was filed on 28.03.2012 and time limit for issuing notice u/s 143(2) expired on 30.09.2012, return of income for AY 2012-13 was filed on 31.08.2012 time limit for issuing notice u/s 143(2) expired on 30.09.2013, return of income for AY 2013-14 was filed on 27.03.2014 and time limit for issuing notice - u/s 143(2) expired on 30.09.2014, return of income for AY 2014-15 was filed on 20.12.2014 and time limit for issuing notice u/s 143(2) expired on 30.09.2015 and return of income for AY 2015-16 was filed on 16.12.2015 and time limit for issuing notice u/s 143(2) expired on 30.09.2016. However, as per record no notice u/s 143(2) of the Act was issued for AY 2015-16. Therefore, no assessment or reassessment proceedings were pending as on date of search and therefore, AYs 2011-12 to 2015-16 are non-abated assessment years or completed assessment years. However, the (ii) issue has already been dealt with in depth by Hon'ble Apex court, various High courts and tribunal and it is now settled legal pronouncement that no addition can be made in absence of any incriminating material in non-abated assessment year. This proposition find support from the decision of Hon'ble Apex court in the case of Meeta Gutgutia (2018) 96 taxmann.com 468 (SC) dt.2-7-18 affirming the decision of Hon'ble Delhi High Court in the same case reported in 82 taxmann.com 287. Hon'ble Delhi High Court

alongwith various judgments followed the legal view taken by the Hon'ble Court in the case of Kabul Chawla (2016) 380 ITR 573 (Del HC). Hon'ble ITAT Indore in the case of Omprakash Gupta (2019) IT(SS)A Nos.277 to 281/Ind/2017 (Indore-Trib) dt.28-2-19, after following judgments in the case of Meeta Gututia (supra), Kabul Chawala (supra) and many others judgments held that:

13. In the case of Commissioner of Income Tax (Central)-3 Kabul Chawla (2015) 61 Taxman.com 412 (Del.), the Hon'ble Delhi High Court has considered the scope of section 132 of the Act and 153A(1) observed as under:

i. Once a search takes place under Section 132 of the Act, notice under Section 153 A(1) will have to be mandatorily issued to the person searched requiring him to file returns for six AYS immediately preceding the previous year relevant to the AY in which the search takes place.

ii. Assessments and reassessments pending on the date of the search shall abate. The total income for such AY's will have to be computed by the AOs as a fresh exercise.

iii. The AO will exercise normal assessment powers in respect of the six years previous to the relevant AY in which the search takes place. The AO has the power to assess and reassess the total income of the aforementioned six years in separate assessment orders for each of the six years. In other words there will be only one assessment order in respect of each of the six AYs "in which both the disclosed and the undisclosed income would be brought to tax".

iv. Although Section 153 A does not say that additions should be strictly made on the basis of evidence found in the course of the search, or other post-search material or information available with the AO which can be related to the evidence found, it does not mean that the assessment "can be arbitrary or made without any relevance or nexus with the seized material. Obviously an assessment has to be made under this Section only on the basis of seized material."

v. In absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made. The word 'assess' in Section 153 A is relatable to abated proceedings (ie. those pending on the date of search) and the word 'reassess' to completed assessment proceedings.

vi. Insofar as pending assessments are concerned, the jurisdiction to make the original assessment and the assessment under Section 153A merges into one. Only one assessment shall be made separately for each AY on the basis of the findings of the search and any other material existing or brought on the record of the AO.

vii. Completed assessments can be interfered with by the AO while making the assessment under Section 153 A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment.

14. From the above decision, it is very clear that in respect of concluded assessments additions cannot made without incriminating material.

15. The Hon'ble Delhi High Court in the case of PCIT Vs. Meeta Gutgutia 395 ITR 296 (Delhi) has held that it was only if during the course of the search ws 132 of the Act incriminating material justifying the reopening of the assessment years for 6 previous years was found that invocation of section 153A of the Act qua each of the assessment year would justify.

16. In the case of Principal CIT Vs. Soumya Constructions 387 ITR 529 (Guj.) the Hon'ble Gujarat High Court has observed that the addition was based on statement of the third person and not based on any incriminating material found during the course of search, therefore the addition deleted by the Tribunal was upheld.

17. In the case of PCIT Vs. Lata Jain 384 ITR 543 (Del) (supra), the Hon'ble Delhi High Court has held that the Tribunal was right in holding that there had to be incriminating material recovered during the course of search qua the assessee in each year for the purpose of framing an assessment u/s 153A of the Act.

18. From the above all the decisions, it is very clear that the A.O. to make an addition /s 1534 of the Act and there must be incriminating material available to the A.O. during the course of the search. incriminating material, the Unless there is an concluded/non abated assessments cannot be disturbed again u/s 153A of the Act.

22. In the interest of justice, the decision of the Hon'ble Supreme Court in the case of Vegetable Products (supra) has to he followed. Therefore, we respectively following the decision of Hon'ble Delhi High Court in the case of Kabul Chawla (supra), Hon'ble Bombay High Court in the case Corporation (supra) of Continental Warehousing and also Hon'ble Gujarat High Court in the case of PCIT Vs. Meeta Gutgutia (supra), we hold that no addition can be mude in respect of concluded assessments /s 153A of the Act unless there is any incriminating material found during the course of search. We would like to make it clear that where the assessment is completed u/s 143(1) or 143(3) of the Act unless A.O. has a time to issue notice u/s 143(2) of the Act, A.O. cannot make an addition u/s 153A of the Act, unless there is an incriminating material found during the course of the search.

23. The coordinate bench of the Tribunal in the case of Sainath Colonisers Vs. ACIT (Central)-II Bhopal in IT (SS)A Nos. 289 to 291/Ind/2017 dated 28.2.2019 has considered the similar issue and has held that if there is no incriminating material found during the course of search and the time limit for issue of notice /s 143(2) of the Act expires, no addition can be made u/s 153A of the Act. For the sake of convenience relevant portion of the order is extracted hereunder:

*"8. We observe that the assessee has filed regular return of income u/s 139 of the Act for Assessment Year 2008-09 to 2010-11 on 30.9.08, 31.3.2010 and 12.10.2010 after claiming deduction w/s 80IB(10) at Rs.8,92,452/- Rs * 0.2 ,66,948/- and Rs.2,44,417/ respectively. The time limit for issuance of notices u/s 143(2) of the Act stood expired in relation to the assessment year 2008-09 to 2010-11 much before the date of conducting the search i.e. 29.1.2014 and therefore these three assessment years falls under the category of unabated/non abated assessments. Now in the given facts Ld. Counsel for the assessee has relied few judgments and Ld. Departmental Representative has relied to few judgments in its favour. However, the Hon'ble Apex Court in the case of CIT V/s Vegetable Products Ltd 88 ITR 192 has "held that if two reasonable construction of a taxing provisions are possible, then that construction which favours the assessee must be adopted". In the light of above judgment of Hon'ble Apex Court we have gone through the judgments referred and relied by both the parties and are inclined to follow the view taken by Hon ble courts on the issue in question before us favouring the assessee.*

9. The Hon'ble High Court of Gujarat in the case of PCIT Vs. Desai Construction (supra) confirmed the view taken by the Tribunal upholding the contention of the assessee that as no incriminating material was found during the course of search which could have enabled the Assessing Officer to re-examine its claim for deduction u/s 801B which was part of the assessment prior to the search and such assessment unabated. Bombay in the case of Continental Hon'ble High Court of Warehousing Corporation and All Cargo Global Logistics Ltd (Supra) confirmed the view taken by the Special Bench of IT.A.T. Mumbai Bench decided in favour of assessee dismissing the revenue's appeal holding that there was no incriminating material found during the course of search, the Tribunal was right in holding the power conferred ws 153A being not expected to be exercised routinely, should be exercised if the search revealed any incriminating material. If that was not found then in relation to the second phase of three

years, there was no warrant for making an order within the meaning of this provision".

10. Similar view was also taken by the Hon'ble High Court of Delhi in the case of Kabul Chawla (2015) 61 taxmann 412.

11. We therefore in the given facts and circumstances of the case and respectfully following the judgments referred and relied by the Ld. Counsel for the assessee are of the considered view that no addition/disallowance was called for Assessment Year 2008-09 10 2010-11 as no incriminating material was found during the course of search at the premises of the assessee as the time limit of issuance of notice u/s 143(2) of the Act stood expired much before the date of conducting search is 132 of the Act. Accordingly all the three appeals of the assessee are allowed."

24. In so far as the arguments of the Ld. D.R. in respect of following the ratio of the Hon'ble Supreme Court in the case of Vegetable Products (supra), the Ld. D.R. by relying on the decision in the case of CCV Dilip Kumar (supra) has submitted that the ratio laid down in the case of Vegetable Products (supra) cannot be applied. We find that in the case of CCV Dilip Kumar (supra) has considered the exemption provisions and held that exemption provisions has to be considered strictly and in a case of ambiguity view which favours the revenue must be adopted. Therefore, the above decision relied by the Ld. D.R. has no application to the ratio laid down by the Hon'ble Supreme Court in the case of Vegetable Products (supra). Therefore, argument of the Ld. D.R. is rejected

25. In view of the above, the order passed by Ld. CIT(A) is reversed and the appeals filed by the assessee are allowed.

In the light of above judicial pronouncement of Hon'ble ITAT, the Id AO was not justified in making additions in non-abated assessment year i.e. AYs 2011-12 to 2015-16 and that too in absence of any incriminating material. Further, in the assessment order the Id AO has not correlated the additions made with the incriminating seized material. Therefore, the

additions made in the AYs 2011-12 to 2015-16 on various accounts are not sustainable. Therefore, appeal on these grounds is allowed.

3.3.2 I have duly considered the above and found that the Ld. AO has concluded that the above unsecured loans had been received from the Companies controlled by Shri Sharad Darak who is a well known accommodation entry provider of Indore. The Ld. AO on the basis of findings of past actions of the various officers held that Shri Sharad Darak runs dummy companies through which he provides entries to needy persons. The Ld. AO has also relied upon various judgments. On perusal of assessment order, it has been found that the Ld. AO has not made any independent inuiry to disprove the identity, creditworthiness, genuineness of transaction. The Ld. AO has also not enquired into the nature and source of unsecured loans. The Ld. AO has only given emphasis on some enquiries conducted in the past and given a general findings and made additions. No specific finding about the companies proving them bogus has been given in the assessment order. The Ld. AO has also relied upon the statement of Shri Narendra Jain and appellant which are not based upon any incriminating material. The appellant had also retracted the statement. The statements cannot be sole reason for the addition in the total income of the appellant. The appellant has filed ample information and documents to discharge its onus as envisaged in section 68 of the Act. It has been found that all loans had been received by M/s MP Agro Nutri Foods Limited and appellant from the companies under consideration through proper banking channel and M/s MP Agro Nutri Foods Limited and appellant has paid interest thereon after deducting TDS. Repayment of loans have been done and interest thereon has been paid and due TDS has also been made. All transactions are done through banking channel. No investigation has been conducted to discredit such information or documents. The position of Share Capital, reserve and surplus and cash and balances of these companies as per audited balance sheet is as under:

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On perusal of the above, it is evident that the lender companies had substantial funds available with it to advance money to the appellant. The appellant has also filed necessary documents to prove its identity, creditworthiness of these companies and also filed bank statement reflecting the transactions. In my opinion, nothing in form of cogent evidences has been brought on record by the Id. AO in support of his findings. The ld. A.O should have acted on the details furnished by the appellant, but he did not do so. Hon'ble Delhi High Court in the case of Oasis Hospitalities P. Ltd. reported in 333 ITR 119(2011) has held as under:

"11. It is clear from the above that the initial burden is upon the assessee to explain the nature and source of the share application money received by the assessee. In order to discharge this burden, the assessee is required to prove : (a) Identity of shareholder; (b) Genuineness of transaction; and (c) Creditworthiness of shareholders.

12. In case the investor/shareholder is an individual, some documents will have to be filed or the said shareholder will have to be produced before the AO to prove his identity. If the creditor/subscriber is a company, then the details in the form of registered address or PAN identity, etc. can be furnished.

13. Genuineness of the transaction is to be demonstrated by showing that the assessee had, in fact, received money from the said shareholder and it came from the coffers from that very shareholder. The Division Bench held that when the money is received by cheque and is transmitted through banking or other indisputable channels, genuineness of transaction would be proved. Other documents showing the genuineness of transaction could be the copies of the shareholders register, share application forms, share transfer register, etc.

14. As far as creditworthiness or financial strength of the creditor/ subscriber is concerned, that can be proved by

producing the bank statements of the creditors/subscribers showing that it had sufficient balance in its accounts to enable it to subscribe to the share capital. This judgment further holds that once these documents are produced, the assessee would have satisfactorily discharged the onus cast upon him. Thereafter, it is for the AO to scrutinize the same and in case he nurtures any doubt about the veracity of these documents to probe the matter further. However, to discredit the documents produced by the assessee on the aforesaid aspects, there has to be some cogent reasons and materials for the AO and he cannot go into the realm of suspicion."

Considering the above decision, the appellant had discharged its onus by producing ample evidences. Without any investigation and cogent material, ld. AO treated the same as unexplained which is not sustainable in view of following judgments:

(i). Divine Leasing & Finane Ltd. (2008) 299 ITR 268 (Delhi). wherein it was held that:

"16. In this analysis, a distillation of the precedents yields the following propositions of law in the context of s. 68 of the IT Act. The assessee has to prima facie prove (1) the identity of the creditor/subscriber; (2) the genuineness of the transaction, namely, whether it has been transmitted through banking or other indisputable channels; (3) the creditworthiness or financial strength of the creditor/subscriber; (4) if relevant details of the address or PAN identity of the creditor/subscriber are furnished to the Department along with copies of the shareholders register, share application forms, share transfer register, etc. it would constitute acceptable proof or acceptable explanation by the assessee; (5) the Department would not be justified in drawing an adverse inference only because the creditor/subscriber fails or neglects to respond to its notices: (6) the onus would not stand discharged if the creditor/subscriber denies or repudiates the transaction set up by the assessee nor should the AO take such repudiation at face value and construe it, without more, against the assessee; (7) the AO is duty bound to investigate the creditworthiness of the creditor/

subscriber, the genuineness of the transaction and the veracity of the repudiation

(ii). CIT v. Kamdhenu Steel & Alloys Limited and Other (2014) 361 ITR 220(Delhi) wherein it is held that:

"38. Even in that instant case, it is projected by the Revenue that the Directorate of Income Tax (Investigation) had purportedly found such a racket of floating bogus companies with sole purpose of lending entries. But, it is unfortunate that all this exercise if going in vain as few more steps which should have been taken by the Revenue in order to find out causal connection between the case deposited in the bank accounts of the applicant banks and the assessee were not taken. It is necessary to link the assessee with the source when that link is missing, it is difficult to fasten the assessee with such a liability."

(iii). The decision of Hon'ble Apex Court in the case of NRA Iron & Steel Pvt. Ltd. (Arising out of SLP (Civil) No. 29855 of 2018) order dated 05.03.2019, the relevant paras of which are reproduced hereunder:

"9. The Judgments cited hold that the Assessing Officer ought to conduct an independent enquiry to verify the genuineness of the credit entries In the present case, the Assessing Officer made an independent and detailed enquiry, including survey of the so-called investor companies from Mumbai, Kolkata and Guwahati to verify the credit-worthiness of the parties, the source of funds invested, and the genuineness of the transactions. The field reports revealed that the share-holders were either non-existent, or lacked credit- worthiness."

11. The principles which emerge where sums of money are credited as Share Capital/Premium are:

i. The assessee is under a legal obligation to prove the genuineness of the transaction, the identity of the creditors, and credit-worthiness of the investors who should have the

financial capacity to make the investment in question, to the satisfaction of the AO, so as to discharge the primary onus

ii. The Assessing Officer is duty bound to investigate the credit-worthiness of the creditor/ subscriber, verify the identity of the subscribers, and ascertain whether the transaction is genuine, or these are bogus entries of name- lenders.

iii. If the enquiries and investigations reveal that the identity of the creditors to be dubious or doubtful, or lack credit-worthiness, then the genuineness of the transaction would not be established.In such a case, the assessee would not have discharged the primary onus contemplated by Section 68 of the Act. 12. In the present case, the A.O. had conducted detailed enquiry which revealed that:

i. There was no material on record to prove, or even remotely suggest, that the share application money was received from independent legal entities. The survey revealed that some of the investor companies were non-existent, and had no office at the address mentioned by the assessee....."

ii. In view of the above judicial pronouncements, the AO is duty bound to investigate the issue once the assessee discharges its onus as per section 68 of the Act. Here, such efforts are absent. Further, the appellant has brought on record the decision of Hon'ble ITAT Indore in the case of Shri Pramod Kumar Sethi (ITA NO. 382 and 383/Ind/2014, dated 06.11.2018) wherein various companies of Sharad Darak Group held as genuine companies which also include East West Finvest India Ltd., K K Patel Finance Ltd., Puvi Finvest Ltd., Trimurthi Finvest Ltd. from whom the appellant has taken unsecured loan in the years under consideration. In another decision in the case of M/s. Radhishwari Developers Pvt. Ltd. (ITA No. 493/Ind/2018 dated 20.07.2021) Hon'ble ITAT Indore has held that M/s. Jayant Securities and Finance Ltd. is regularly assessed to tax for last many years and scrutiny proceedings u/s.143(3) of the Act were completed in this company. This company is regularly filing appeal before the judicial forums which show that this company is not a dummy

company. Considering the above findings of the Hon'ble ITAT, above companies cannot be declared as dummy company."

17.1 Finally the CIT(A) has deleted the addition in para 3.3.3 & 3.3.4 as under:

"3.3.3 In view of the above discussion, it is not justified to held the lender companies as dummy entities and the loans given to the appellant by these companies are non-genuine. Therefore, the additions made by the Id. AO are not sustainable.

3.3.4 In view of discussion made in para 3.2 to 3.3.3 above, addition of Rs.1,65,00,000/- in A.Y. 2011-12, Rs.1,00,00,000/- in A.Y. 2012-13, Rs. 50,81,370/- in AY 2013-14 and Rs. 55,91,164/- in AY 2014-15 on account of unexplained cash credit u/s. 68 of the Act are hereby deleted. Therefore, appeal on these grounds is allowed."

17.2 We further note that an identical issue has been considered by this Tribunal in case of *ACIT vs. Shri Krishna Devcon Ltd. (supra)* on the point of addition made by the AO in the absence of any incriminating material in the proceedings u/s 153A of the Act which was not pending at the time of search in para 3 to 3.12 as under:

"3. We have considered the rival submission as well as relevant material on record. First objection raised by the revenue is regarding the acceptance of additional evidence by the Ld. CIT(A) in-complete disregard to the remand report submitted by the AO. The AO made addition in respect of unsecured loan taken by the assesse from the companies, the details which are given in para 8 of the assessment order as under:

S. No.	Name of Company	F.Y.	Amount
1.	Jayant Security And Finance Ltd.	2010-11 2013-14	23,00,000/- 85,00,000/-

2.	Jay Jyoti India Pvt. Ltd.	2011-12 2013-14	3,50,00,000/- 1,00,00,000/-
3.	Rajwadi (Rajyeshwar) Retail Traders Systems Pvt Ltd	2013-14	15,00,000/-
4.	East West Finvest India Ltd	2012-13	1,00,00,000/-
5.	Zyka (Ziya) merchandise Pvt Ltd	2011-12	1,50,00,000/-
3.	Puvi Finvest Ltd.	2013-14 2015-16	60,00,000/- 4,90,00,000/-
	-do-(Aand A Shelters)	2015-16	1,99,95,000/-

3.1 For assessment year 2012-13 the assesse has shown unsecured loan of Rs.3.50 cr. from M/s Jay Jyoti India Pvt. Ltd. and Rs.1.50 cr. from M/s. Zyka Merchandise Pvt. Ltd. The AO has treated these companies as paper company controlled and managed by one Shri Sharad Darak who was in view of the AO a well-known accommodation entry provider. Before the Ld. CIT(A) assesse furnished additional evidence with the application under Rule 46A of the Income Tax Rules. The assesse proposed to produce the affidavit of Shri Sharad Darak, MOU signed between the assesse and M/s Jayant Security And Finance ltd., East West Finvest India Ltd. and Purvi Finvest Ltd. Copy of termination letter for MOU dated 01.04.2019 and 08.04.2019, copy of letter dated 23.04.2019 and 09.05.2019 for appointment of arbitrator. The ld. CIT(A) has considered and decided this issue of admission of additional evidences in para 2.1 as under:

"2.1 The appellant during the course of appellate proceedings has furnished the additional evidence u/r 46A of the IT Rules by way of Affidavit of Shri Sharad Kumar Darak, MOU signed between appellant and M/s Jayant Security and Finance Ltd, M/s East West Finvest India Ltd & M/s Purvi Finvest Ltd, Copy of termination letter for MOU dated 01.04.2019 & 08.04.2019, Copy of letter dated 23.04.2019 & 09.05.2019 for appointing Hon'ble Justice RS Garg and copy of arbitration order. It was submitted by the appellant that the additional evidences further proves genuineness of the transactions and were collected after the assessment proceedings. The additional evidences have been forwarded to the AO for his comments. The AO submitted the remand report dated 14.09.2020 which is placed on record and have been perused. The Ld. AO raised objection to admission of additional evidences, but did not submitted anything on veracity of additional evidences filed by the appellant. Since, the additional evidences had been obtained after the completion of assessment proceedings, there was no occasion to file such evidences in the course of assessment proceedings. Therefore, there was sufficient cause for not producing the evidences during assessment proceedings. Therefore, the appellant's case is falling under rule 46A(1)(b) of Income Tax Rules. Therefore, additional evidences produced during the

course of appellate proceedings have been admitted for the sake of natural justice."

3.2 Thus, it is clear that the additional evidence submitted by the assesse in support of its claim was forwarded to the AO for his comments. The AO submitted the remand report dated 14.09.2020 and raised objections to the admission of the additional evidences. It is pertinent to note that the AO has not taken any step to verify correctness of the additional evidence filed by the assessee and even no comments were submitted in the remand report except raising the objections against the admission of the additional evidence. The ld. CIT(A) after considering remand report as well as reasons explained by the assessee for not producing the evidence during the course of assessment proceedings admitted the additional evidence.

3.3 We find that there is nothing in the proposes additional evidence filed by the assesse before the Ld. CIT(A) which could suggest that the same was prepared or manufactured by the assesse as an afterthought. Some of the evidences are part of some business MOUs between the parties and subsequent dispute which was referred for resolution thorough arbitration and therefore, the said additional evidence was independent evidence and assesse was having no control or say to manipulate with the same. The affidavit of Shri Sharad Darak was filed by the assessee to counter the AO's finding that these companies are controlled and managed by Shri Sharad Darak who is providing bogus accommodation entries. Therefore, in our considered view the Ld. CIT(A) was justified in admitting the additional evidence after calling for a remand report from the AO.

3.4 The next grievance of the revenue is regarding the finding of the Ld. CIT(A) in respect of the assessment years 2012-13 & 2014-15 holding that the addition made by the AO in absence of any incriminating material is not valid. Ld. DR has referred to the assessment order and submitted that the AO has referred to various reports of the departments and the statements of Shri Naveen Jain and asserted that it constitutes incriminating material. We find that the AO in the assessment order has referred to only the ledger account and entries in the books of accounts of the assesse company as well as in the books of the lender companies. Except the entries in the books of account and particularly in the ledger accounts of the parties the AO has not referred to any material either found or seized during the course of search and seizure action carried out on 12th July 2016 which could disclose any fact to indicate that the unsecured loan shown by the assesse in the books of account are bogus. Therefore, once the transactions of the loan are duly recorded in the books of account of the assesse as well as in the books of account of the lender companies then the addition made by the AO treating these transactions as bogus entry provided by the lender companies cannot be said to be

based on any incriminating material found or seized during the course of search and seizure proceedings carried out on 12th July 2016 in case of the assesse. The assessing officer has referred to the investigation report of the department u/s 133A on 22.01.2014 along with statement of Shri Dinesh Agrawal dated 22.01.2014 and statement of Shri Sharad Darak dated 21.02.2014. All these statements were recorded in the survey proceedings carried out in the month of January 2014 or February 2014 and therefore, have no connection with search and seizure proceedings in the case of the assesse carried out on 12th July 2016. Further the AO has made only reference to these survey and statements but nothing was brought on record as what exactly revealed in those statements recorded on 22.01.2014 and 21.02.2014. Therefore, it can at the best be considered as the personal knowledge of the AO of some events or investigation not related to the assesse but no record or evidence was referred by the AO in the assessment order to substantiate to the said person knowledge therefore, the same cannot be a basis of addition. Secondly the statement of Shri Naveen Jain recorded u/s 132(4) does not disclosed any new fact or leading to discovery of any material or transaction which is not already recorded in the books of account of the assesse as well as lender companies. All the facts and records were available with the AO in respect of the loan transactions at the time of search and seizure action as return of income for assessment year 2012-13 & 2014-15 filed long before the search and seizure action. Therefore, the said statement of Shri Naveen Jain in absence of any incriminating material would not constitute an incriminating material disclosed any undisclosed income.

3.5 The Hon'ble Delhi High Court in case of CIT vs. Harjeev Aggarwal 290 CTR 263 while considering the issue of statement recorded u/s 132(4) of the Act would itself be sufficient to assess the income held in para 19 to 25 as under:

"19. In view of the settled legal position, the first and foremost issue to be addressed is whether a statement recorded under Section 132 (4) of the Act would by itself be sufficient to assess the income, as disclosed by the Assessee in its statement, under the Provisions of Chapter XIV-B of the Act.

20. In our view, a plain reading of Section 158BB(1) of the Act does not contemplate computing of undisclosed income solely on the basis of a statement recorded during the search. The words "evidence found as a result of search" would not take within its sweep statements recorded during search and seizure operations. However, the statements recorded would certainly constitute information and if such information is relatable to the evidence or material found during search, the same could certainly be used in evidence in any proceedings under the Act as expressly mandated by virtue of the explanation to Section 132(4) of the Act.

However, such statements on a standalone basis without reference to any other material discovered during search and seizure operations would not empower the AO to make a block assessment merely because any admission was made by the Assessee during search operation.

21. A plain reading of Section 132 (4) of the Act indicates that the authorized officer is empowered to examine on oath any person who is found in possession or control of any books of accounts, documents, money, bullion, jewellery or any other valuable article or thing. The explanation to Section 132 (4), which was inserted by the Direct Tax Laws (Amendment) Act, 1987 w.e.f. 1st April, 1989, further clarifies that a person may be examined not only in respect of the books of accounts or other documents found as a result of search but also in respect of all matters relevant for the purposes of any investigation connected with any proceeding under the Act. However, as stated earlier, a statement on oath can only be recorded of a person who is found in possession of books of accounts, documents, assets, etc. Plainly, the intention of the Parliament is to permit such examination only where the books of accounts, documents and assets possessed by a person are relevant for the purposes of the investigation being undertaken. Now, if the provisions of Section 132(4) of the Act are read in the context of Section 158BB(1) read with Section 158B(b) of the Act, it is at once clear that a statement recorded under Section 132(4) of the Act can be used in evidence for making a block assessment only if the said statement is made in the context of other evidence or material discovered during the search. A statement of a person, which is not relatable to any incriminating document or material found during search and seizure operation cannot, by itself, trigger a block assessment. The undisclosed income of an Assessee has to be computed on the basis of evidence and material found during search. The statement recorded under Section 132(4) of the Act may also be used for making the assessment, but only to the extent it is relatable to the incriminating evidence/material unearthed or found during search. In other words, there must be a nexus between the statement recorded and the evidence/material found during search in order to for an assessment to be based on the statement recorded.

22. In CIT v. Sri Ramdas Motor Transport Ltd.: (1999) 238 ITR 177 (AP), a Division Bench of Andhra Pradesh High Court, reading the provision of Section 132(4) of the Act in the context of discovering undisclosed income, explained that in cases where no unaccounted documents or incriminating material is found, the powers under Section 132(4) of the Act cannot be invoked. The relevant passage from the aforesaid judgment is quoted below:

"A plain reading of sub-section (4) shows that the authorised officer during the course of raid is empowered to examine any person if he is found to be in possession or control of any undisclosed books of account, documents, money or other valuable articles or things, elicit information from such person with regard to such account books or money which are in his possession and can record a statement to that effect. Under this provision, such statements can be used in evidence in any subsequent proceeding initiated against such per son under the Act. Thus, the question of examining any person by the authorised officer arises only when he found such person to be in possession of any undisclosed money or books of account. But, in this case, it is admitted by the Revenue that on the dates of search, the Department was not able to find any unaccounted money, unaccounted bullion nor any other valuable articles or things, nor any unaccounted documents nor any such incriminating material either from the premises of the company or from the residential houses of the managing director and other directors. In such a case, when the managing director or any other persons were found to be not in possession of any incriminating material, the question of examining them by the authorised officer during the course of search and recording any statement from them by invoking the powers under section 132(4) of the Act, does not arise. Therefore, the statement of the managing director of the assessee, recorded patently under section 132(4) of the Act, does not have any evidentiary value. This provision embedded in sub- section (4) is obviously based on the well established rule of evidence that mere confessional statement without there being any documentary proof shall not be used in evidence against the person who made such statement. The finding of the Tribunal was based on the above well settled principle."

23. It is also necessary to mention that the aforesaid interpretation of Section 132(4) of the Act must be read with the explanation to Section 132(4) of the Act which expressly provides that the scope of examination under Section 132(4) of the Act is not limited only to the books of accounts or other assets or material found during the search. However, in the context of Section 158BB(1) of the Act which expressly restricts the computation of undisclosed income to the evidence found during search, the statement recorded under Section 132(4) of the Act can form a basis for a block assessment only if such statement relates to any incriminating evidence of undisclosed income unearthed during search and cannot be the sole basis for making a block assessment.

24. If the Revenue's contention that the block assessment can be framed only on the basis of a statement recorded under Section 132(4) is accepted, it would result in ignoring an important check on the power of the AO and would expose assessees to arbitrary assessments based only on the statements, which we are conscious are sometimes extracted by

exerting undue influence or by coercion. Sometimes statements are recorded by officers in circumstances which can most charitably be described as oppressive and in most such cases, are subsequently retracted. Therefore, it is necessary to ensure that such statements, which are retracted subsequently, do not form the sole basis for computing undisclosed income of an assessee.

25. In Commissioner of Income Tax v. Naresh Kumar Aggarwal: (2014) 3699 ITR 171 (T & AP), a Division Bench of Telangana and Andhra Pradesh High Court held that a statement recorded under Section 132(4) of the Act which is retracted cannot constitute a basis for an order under Section 158BC of the Act. The relevant extract from the said judgement is quoted below:

"17. The circumstances under which a statement is recorded from an assessee, in the course of search and seizure, are not difficult to imagine. He is virtually put under pressure and is denied of access to external advice or opportunity to think independently. A battalion of officers, who hardly feel any limits on their power, pounce upon the assessee, as though he is a hardcore criminal. The nature of steps, taken during the course of search are sometimes frightening. Locks are broken, seats of sofas are mercilessly cut and opened. Every possible item is forcibly dissected. Even the pillows are not spared and their acts are backed by the powers of an investigating officer under section 94 of the Code of Criminal Procedure by operation of sub-section (13) of section 132 of the Act. The objective may be genuine, and the exercise may be legal. However, the freedom of a citizen that transcends, even the Constitution cannot be treated as non- existent."

"18. It is not without reason that Parliament insisted that the recording of statement must be in relation to the seized and recovered material, which is in the form of documents, cash, gold, etc. It is, obviously to know the source thereof, on the spot. Beyond that, it is not a limited licence, to an authority, to script the financial obituary of an assessee." "19. At the cost of repetition, we observe that if the statement made during the course of search remains the same, it can constitute the basis for proceeding further under the Act even if there is no other material. If, on the other hand, the statement is retracted, the Assessing Officer has to establish his own case. The statement that too, which is retracted from the assessee cannot constitute the basis for an order under section 158BC of the Act."

3.6 Thus, the Hon'ble High Court was of the view that the statement recorded u/s 132(4) would certainly constitutes information and if such information is relatable to the evidence or material found during search,

the same could be used as evidence in any proceedings under the Act. However, such statements on a standalone basis without reference to any other material discovered during search and seizure operations would not empower the AO to make a block assessment merely because any admission was made by the Assessee during search operation. In the Instruction No. E.No.286/2/2003 dated 10.03.2003, the C.B.D.T. have issued the guidelines to the tax authorities that during the investigation they should focus to discover the material and evidence revealing the undisclosed income instead of merely recording the statements. The Hon'ble Delhi High Court in case of Pr. CIT vs. Anand Kumar Jain (HUF) & Ors. 432 ITR 384 has reiterated this view in para 8 to 10 as under:

"8. Next, we find that, the assessment has been framed under section 153A, consequent to the search action. The scope and ambit of section 153A is well defined. This court, in CIT v. Kabul Chawla,[1] concerning the scope of assessment under Section 153A, has laid out and summarized the legal position after taking into account the earlier decisions of this court as well as the decisions of other High Courts and Tribunals. In the said case, it was held that the existence of incriminating material found during the course of the search is a sine qua non for making additions pursuant to a search and seizure operation. In the event no incriminating material is found during search, no addition could be made in respect of the assessments that had become final. Revenue's case is hinged on the statement of Mr. Jindal, which according to them is the incriminating material discovered during the search action. This statement certainly has the evidentiary value and relevance as contemplated under the explanation to section 132(4) of the Act. However, this statement cannot, on a standalone basis, without reference to any other material discovered during search and seizure operations, empower the AO to frame the block assessment. This court in Principal Commissioner of Income Tax, Delhi v. Best Infrastructure (India) P. Ltd.,[2] has inter-alia held that:

"38. Fifthly, statements recorded under Section 132(4) of the Act do not by themselves constitute incriminating material as has been explained by this Court in Harjeev Aggarwal,,[3]"

9. In Commissioner of Income Tax v. Harjeev Aggarwal,4 this Court had held as follows:

"23. In view of the settled legal position, the first and foremost issue to be addressed is whether a statement recorded under Section 132(4) of the Act would by itself be sufficient to assess the income, as disclosed by the Assessee in its statement, under the Provisions of Chapter XIV-B of the Act.

24. In our view, a plain reading of Section 15888(1) of the Act does not contemplate computing of undisclosed income solely on the basis of a

statement recorded during the search. The words "evidence found as a result of search" would not take within its sweep statements recorded during search and seizure operations. However, the statements recorded would certainly constitute Information and if such information is relatable to the evidence or material found during search, the same could certainly be used in evidence in any proceedings under the Act as expressly mandated by virtue of the explanation to Section 132(4) of the Act. However, such statements on a standalone basis without reference to any other material discovered during search and seizure operations would not empower the AO to make a block assessment merely because any admission was made by the Assessee during search operation.

25. (...) However, as stated earlier, a statement on oath can only be recorded of a person who is found in possession of books of accounts, documents, assets, etc. Plainly, the intention of the Parliament is to permit such examination only where the books of accounts, documents and assets possessed by a person are relevant for the purposes of the investigation being undertaken. Now, if the provisions of Section 132(4) of the Act are read in the context of Section 158BB(1) read with Section 1588(b) of the Act, it is at once clear that a statement recorded under Section 132(4) of the Act can be used in evidence for making a block assessment only if the said statement is made in the context of other evidence or material discovered during the search. A statement of a person, which is not relatable to any incriminating document or material found during search and seizure operation cannot, by itself, trigger a block assessment. The undisclosed income of an Assessee has to be computed on the basis of evidence and material found during search. The statement recorded under Section 132(4) of the Act may also be used for making the assessment, but only to the extent it is relatable to the incriminating evidence/material unearthed or found during search. In other words, there must be a nexus between the statement recorded and the evidence/material found during search in order to for an assessment to be based on the statement recorded.

26. In CIT v. Sri Ramdas Motor Transport Ltd., (1999) 238 ITR 177 (AP), a Division Bench of Andhra Pradesh High Court, reading the provision of Section 132(4) of the Act in the context of discovering undisclosed income, explained that in cases where no unaccounted documents or incriminating material is found, the powers under Section 132(4) of the Act cannot be invoked. (...)

27. It is also necessary to mention that the aforesaid interpretation of Section 132(4) of the Act must be read with the explanation to Section 132(4) of the Act which expressly provides that the scope of examination under Section 132(4) of the Act is not limited only to the books of accounts or other assets or material found during the search. However, in the

context of Section 158BB(1) of the Act which expressly restricts the computation of undisclosed income to the evidence found during search, the statement recorded under Section 132(4) of the Act can form a basis for a block assessment only if such statement relates to any incriminating evidence of undisclosed income unearthed during search and cannot be the sole basis for making a block assessment.

28. If the Revenue's contention that the block assessment can be framed only on the basis of a statement recorded under Section 132(4) is accepted, it would result in ignoring an important check on the power of the AO and would expose assessees to arbitrary assessments based only on the statements, which we are conscious are sometimes extracted by exerting undue influence or by coercion. Sometimes statements are recorded by officers in circumstances which can most charitably be described as oppressive and in most such cases, are subsequently retracted. Therefore, it is necessary to ensure that such statements, which are retracted subsequently, do not form the sole basis for computing undisclosed income of an assessee.

29. In Commissioner of Income Tax v. Naresh Kumar Aggarwal: (2014) 3699 ITR 171 (T&AP), a Division Bench of Telangana and Andhra Pradesh High Court held that a statement recorded under Section 132(4) of the Act which is retracted cannot constitute a basis for an order under Section 158BC of the Act. (...)"

10. Now, coming to the aspect viz the invocation of section 153A on the basis of the statement recorded in search action against a third person. We may note that the AO has used this statement on oath recorded in the course of search conducted in the case of a third party (l.e., search of Pradeep Kumar Jindal) for making the additions in the hands of the assessee. As per the mandate of Section 153C, if this statement was to be construed as an incriminating material belonging to or pertaining to a person other than person searched (as referred to in Section 153A), then the only legal recourse available to the department was to proceed in terms of Section 153C of the Act by handing over the same to the AO who has jurisdiction over such person. Here, the assessment has been framed under section 153A on the basis of alleged incriminating material (being the statement recorded under 132(4) of the Act). As noted above, the Assessee had no opportunity to cross-examine the said witness, but that apart, the mandatory procedure under section 153C has not been followed. On this count alone, we find no perversity in the view taken by the ITAT. Therefore, we do not find any substantial question of law that requires our consideration.

3.7 The Hon'ble High Court has observed that the statement recorded during the course of search conducted in case of third person cannot be used without handing over the said statement and giving opportunity of cross examination to the assesse. Even in this case the statement of Shri Naveen Jain recorded u/s 132(4) was subsequently retracted. The reasons were also explained for retraction of the statement that he was only a non-executive director of the assesse company and did not look after the day to day activities of the assesse company and therefore, were not well versed with all the transactions recorded in the books of account. It is pertinent to note that when there was no incriminating material found or seized during the course of the search and seizure action and statement of Shri Naveen Jain also does not relate to discovery of any new evidence or material revealing any undisclosed income not already recorded in the books of account then the possibility on extracting the statement at the time of search proceedings by exerting undue influence cannot be ruled out and therefore, the retraction made subsequently cannot be said to be without basis. Once it is found that the additions were made by the AO based on the transactions recorded in the books of account and not on the basis of any incriminating material found or seized during the course of search proceedings then the addition so made in the proceedings u/s 153A for assessment years which are not abated due to search and seizure action is not sustainable as held in a series of the decisions of Hon'ble High Courts including the decision of Hon'ble Delhi High Court in case of CIT vs. Kabul Chawla (supra) in para 37 & 38 as under:

"37. On a conspectus of Section 153A(1) of the Act, read with the provisos thereto, and in the light of the law explained in the aforementioned decisions, the legal position that emerges is as under:

i. Once a search takes place under Section 132 of the Act, notice under Section 153 A (1) will have to be mandatorily issued to the person searched requiring him to file returns for six AYs immediately preceding the previous year relevant to the AY in which the search takes place.

ii. Assessments and reassessments pending on the date of the search shall abate. The total income for such AYs will have to be computed by the AOs as a fresh exercise.

iii. The AO will exercise normal assessment powers in respect of the six years previous to the relevant AY in which the search takes place. The AO has the power to assess and reassess the 'total income' of the aforementioned six years in separate assessment orders for each of the six years. In other words there will be only one assessment order in respect of each of the six AYs "in which both the disclosed and the undisclosed income would be brought to tax".

iv. Although Section 153 A does not say that additions should be strictly made on the basis of evidence found in the course of the search, or other post-search material or information available with the AO which can be related to the evidence found, it does not mean that the assessment "can be arbitrary or made without any relevance or nexus with the seized material. Obviously an assessment has to be made under this Section only on the basis of seized material."

v. In absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made. The word 'assess' in Section 153 A is relatable to abated proceedings (i.e. those pending on the date of search) and the word 'reassess' to completed assessment proceedings.

vi. Insofar as pending assessments are concerned, the jurisdiction to make the original assessment and the assessment under Section 153A merges into one. Only one assessment shall be made separately for each AY on the basis of the findings of the search and any other material existing or brought on the record of the AO.

vii. Completed assessments can be interfered with by the AO while making the assessment under Section 153 A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment.

Conclusion

38. The present appeals concern AYs, 2002-03, 2005-06 and 2006-07.On the date of the search the said assessments already stood completed. Since no incriminating material was unearthed during the search, no additions could have been made to the income already assessed.

3.8 This view has been reiterated by the subsequent judgment of Hon'ble Delhi High Court as well as other High Courts including the Hon'ble jurisdictional High Court dated 02.02.2023 in case of Pr. CIT vs. M/s Great Galleon Ventures ltd. Income Tax Appeal No.222 of 2022 wherein it has been held as under:

This appeal u/S 260A of the Income Tax Act 1961(for short, the Act of 1961 hereinafter) is directed against the order dated 23.12.2021 passed by the Income Tax Appellate Tribunal, Bench Indore in ITA No. 67/Ind/2021(Revenue's Appeal) for the Assessment Year 2015-16.

The substantial question of law which has been raised by the appellant in this appeal is "whether in absence of any incriminating documents seized during the course of search, the Assessing Officer is justified in making the addition in non-abated assessment orders u/S 153-A r/W Sec 143(3) of the Act of 1961."

The assessment is u/S 153A r/W Sec 143(3) of the Act of 1961 for the assessment year 2015-16.

Learned Tribunal was in seisin with the appellant and cross appeals arising from respective orders passed by the Commissioner Income Tax(Appeals). The appeal before the CIT(Appeals) was directed against the addition of income by the Assessing Officer taking production on presumptive basis and working out estimated income. ADVERTISEMENT The factum of addition not being based on any incriminating material found during the search is not disputed.

Exactly identical substantial question of law came up for consideration before the Division Bench of this Court at Gwalior Bench in ITA No. 21/2019, ITA No. 31/2019 and ITA No. 32/2019(Principal Commissioner of Income Tax Vs. Gahoi Foods Private Ltd). Vide order dated 12.07.2019, these appeals were disposed of holding that in the given facts of the present case, as no incriminating documents during the course of search were found, the order in appeal cannot be said to have suffered any illegality as would give rise to proposed substantial question of law. Consequently, the appeals were dismissed. In view of the fact that the aforesaid question of law was dealt by the Division Bench of this Court in the aforesaid cases, no different view can be taken in this appeal. Accordingly, finding no substantial question of law, this appeal fails and is hereby dismissed.

3.9 The Hon'ble jurisdictional High Court in case of Pr. CIT vs. Gahoi & Oil Mills and Ors. 272 Taxman 522 (MP) has reiterated its view in para 7 to 10 as under:

7. In view of the facts discussed above in clause No. (i) to (ix) of para No.6, I am of the considered opinion that the addition in respect of unaccounted production/sale and profit on such production/sale has been made by the A.O in a mechanical manner without any basis. The income has been estimated merely on the basis of imagination, presumption and suspicion. The addition based on imagination, presumption and suspicion. Cannot be sustained. I am of the considered opinion that THE HIGH COURT OF MADHYA PRADESH I.T.A.No.21/2019 (Pr. Commissioner of Income Tax Vs. Gahoi Dal & Oil Mills) I.T.A.No.31/2019 (Pr. Commissioner of Income Tax Vs. Gahoi Foods Pvt. Ltd.) I.T.A.No.32/2019 (Pr. Commissioner of Income

Tax Vs. Gahoi Foods Pvt. Ltd.) the addition made by A.O is uncalled for any unwarranted, hence the addition made by the A.O is hereby deleted."

7. Section 153 A (1) of the Act stipulates :

"(1) Assessment in case of search or requisition.-- Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, in the case of a person where a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A after the 31st day of May, 2003, the Assessing Officer shall -

(a) issue notice to such person requiring him to furnish within such period, as may be specified in the notice, the return of income in respect of each assessment year falling within six assessment years referred to in clause (b), in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139;

(b) assess or reassess the total income of six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made :

Provided that the Assessing Officer shall assess or reassess the total income in respect of each assessment THE HIGH COURT OF MADHYA PRADESH I.T.A.No.21/2019 (Pr. Commissioner of Income Tax Vs. Gahoi Dal & Oil Mills) I.T.A.No.31/2019 (Pr. Commissioner of Income Tax Vs. Gahoi Foods Pvt. Ltd.) I.T.A.No.32/2019 (Pr. Commissioner of Income Tax Vs. Gahoi Foods Pvt. Ltd.) year falling within such six assessment years.

Provided further that assessment or reassessment, if any, relating to any assessment year falling within the period of six assessment years referred to in this section pending on the date of initiation of the search under section 132 or making of requisition under section 132A, as the case may be, shall abate.

Provided also that the Central Government may by rules made by it and published in the Official Gazette (except in cases where any assessment or reassessment has abated under the second proviso), specify the class or classes of cases in which the assessing Officer shall not be required to issue notice for assessing or reassessing the total income for six assessment years immediately preceding the assessment year relevant to the previous year in which search is conducted or requisition is made.

Provided also that no notice for assessment or reassessment shall be issued by the Assessing Officer for the relevant assessment year or years unless -

(a) the Assessing Officer has in his possession books of account or other documents or evidence which reveal that the income, represented in the form of asset, which has escaped assessment amounts to or is likely to amount to fifty lakh rupees or more in the relevant assessment year or in aggregate in the relevant assessment years ;

(b) the income referred to in clause (a) or part thereof has escaped assessment for such year or years ; and

(c) the search under section 132 is initiated or requisition under section 132A is made on or after the 1 st day of April, 2017."

THE HIGH COURT OF MADHYA PRADESH I.T.A.No.21/2019 (Pr. Commissioner of Income Tax Vs. Gahoi Dal & Oil Mills) I.T.A.No.31/2019 (Pr. Commissioner of Income Tax Vs. Gahoi Foods Pvt. Ltd.) I.T.A.No.32/2019 (Pr. Commissioner of Income Tax Vs. Gahoi Foods Pvt. Ltd.)

8. Dwelling on the scope of Sub-section (1) of Section 153 A of the Act, a Division Bench of Delhi High Court in CIT Vs. Kabul Chawla; (2016) 380 ITR 573 observed:

"37. On a conspectus of Section 153A(1) of the Act, read with the provisos thereto, and in the light of the law explained in the aforementioned decisions, the legal position that emerges is as under:

(i) Once a search takes place under Section 132 of the Act, notice under Section 153 A (1) will have to be mandatorily issued to the person searched requiring him to file returns for six AYs immediately preceding the previous year relevant to the AY in which the search takes place.

(ii) Assessments and reassessments pending on the date of the search shall abate. The total income for such AYs will have to be computed by the AOs as a fresh exercise.

(iii) The AO will exercise normal assessment powers in respect of the six years previous to the relevant AY in which the search takes place. The AO has the power to assess and reassess the 'total income' of the aforementioned six years in separate assessment orders for each of the six years. In other words there will be only one assessment order in respect of each of the six AYs 'in which both the disclosed and the undisclosed income would be brought to tax'.

(iv) Although Section 153 A does not say THE HIGH COURT OF MADHYA PRADESH I.T.A.No.21/2019 (Pr. Commissioner of Income Tax Vs. Gahoi Dal & Oil Mills) I.T.A.No.31/2019 (Pr. Commissioner of Income Tax Vs. Gahoi Foods Pvt. Ltd.) I.T.A.No.32/2019 (Pr. Commissioner of Income Tax Vs. Gahoi Foods Pvt. Ltd.) that additions should be strictly made on the basis of evidence found in the course of the search, or other post-search material or information available with the AO which can be related to the evidence found, it does not mean that the assessment 'can be arbitrary or made without any relevance or nexus with the seized material. Obviously an assessment has to be made under this Section only on the basis of seized material.'

(v) In absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made. The word 'assess' in Section 153 A is relatable to abated proceedings (i.e.

those pending on the date of search) and the word 'reassess' to completed assessment proceedings.

(vi) Insofar as pending assessments are concerned, the jurisdiction to make the original assessment and the assessment under Section 153A merges into one. Only one assessment shall be made separately for each AY on the basis of the findings of the search and any other material existing or brought on the record of the AO.

(vii) Completed assessments can be interfered with by the AO while making the assessment under Section 153 A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the THE HIGH COURT OF MADHYA PRADESH I.T.A.No.21/2019 (Pr. Commissioner of Income Tax Vs. Gahoi Dal & Oil Mills) I.T.A.No.31/2019 (Pr. Commissioner of Income Tax Vs. Gahoi Foods Pvt. Ltd.) I.T.A.No.32/2019 (Pr. Commissioner of Income Tax Vs. Gahoi Foods Pvt. Ltd.) course of original assessment."

9. We are in respectful agreement with the view expressed.

10. In the given facts of present case as no incriminating documents during course of search are found, the order in appeal cannot be said to have suffered the illegality as would give rise to the proposed substantial question of law.

3.10. The issue is now finally settled by the Hon'ble Supreme Court in case of Pr. CIT vs. Abhisar Buildwell Pvt. Ltd. (supra) as under:

9. While considering the issue involved, one has to consider the object and purpose of insertion of Section 153A in the Act, 1961 and when there shall be a block assessment under Section 153A of the Act, 1961.

9.1 That prior to insertion of Section 153A in the statute, the relevant provision for block assessment was under Section 158BA of the Act, 1961. The erstwhile scheme of block assessment under Section 158BA envisaged assessment of 'undisclosed income' for two reasons, firstly that there were two parallel assessments envisaged under the erstwhile regime, i.e., (i) block assessment under section 158BA to assess the 'undisclosed income' and (ii) regular assessment in accordance with the provisions of the Act to make assessment qua income other than undisclosed income. Secondly, that the 'undisclosed income' was chargeable to tax at a special rate of 60% under section 113 whereas income other than 'undisclosed income' was required to be assessed under regular assessment procedure and was taxable at normal rate. Therefore, section 153A came to be inserted and brought on the statute. Under Section 153A regime, the intention of the legislation was to do away with the scheme of two parallel assessments and tax the 'undisclosed' income too at the normal rate of tax as against any special rate. Thus, after introduction of Section 153A and in case of search, there shall be block assessment for six years. Search assessments/block assessments under Section 153A are triggered by conducting of a valid search under Section 132 of the Act, 1961. The very purpose of search, which is a prerequisite/trigger for invoking the provisions of sections 153A/153C is detection of undisclosed income by undertaking extraordinary power of search and seizure, i.e., the income which cannot be detected in ordinary course of regular assessment. Thus, the foundation for making search assessments under Sections 153A/153C can be said to be the existence of incriminating material showing undisclosed income detected as a result of search.

10. On a plain reading of Section 153A of the Act, 1961, it is evident that once search or requisition is made, a mandate is cast upon the AO to issue notice under Section 153 of the Act to the person, requiring him to furnish the return of income in respect of each assessment year falling within six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made and assess or reassess the same. Section 153A of the Act reads as under:

"153A. Assessment in case of search or requisition - (1) Notwithstanding anything contained in Section 139, Section 147, Section 148, Section 149, Section 151 and Section 153, in the case of a person where a search is

initiated under Section 132 or books of account, other documents or any assets are requisitioned under Section 132-A after the 31st day of May, 2003, the Assessing Officer shall— (a) issue notice to such person requiring him to furnish within such period, as may be specified in the notice, the return of income in respect of each assessment year falling within six assessment years referred to in clause (b), in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under Section 139; (b) assess or reassess the total income of six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made: Provided that the Assessing Officer shall assess or reassess the total income in respect of each assessment year falling within such six assessment years:

Provided further that assessment or reassessment, if any, relating to any assessment year falling within the period of six assessment years referred to in this sub-section pending on the date of initiation of the search under Section 132 or making of requisition under Section 132-A, as the case may be, shall abate. (2) If any proceeding initiated or any order of assessment or reassessment made under sub-section (1) has been annulled in appeal or any other legal proceeding, then, notwithstanding anything contained in sub-section (1) or Section 153, the assessment or reassessment relating to any assessment year which has abated under the second proviso to sub-section (1), shall stand revived with effect from the date of receipt of the order of such annulment by the Commissioner: Provided that such revival shall cease to have effect, if such order of annulment is set aside Explanation.—For the removal of doubts, it is hereby declared that,— (i) save as otherwise provided in this section, Section 153- B and Section 153-C, all other provisions of this Act shall apply to the assessment made under this section; (ii) in an assessment or reassessment made in respect of an assessment year under this section, the tax shall be chargeable at the rate or rates as applicable to such assessment year."

11. As per the provisions of Section 153A, in case of a search under Section 132 or requisition under Section 132A, the AO gets the jurisdiction to assess or reassess the 'total income' in respect of each assessment year falling within six assessment years. However, it is required to be noted that as per the second proviso to Section 153A, the assessment or re-assessment, if any, relating to any assessment year falling within the period of six assessment years pending on the date of initiation of the search under Section 132 or making of requisition under Section 132A, as the case may be, shall abate. As per sub-section (2) of Section 153A, if any proceeding initiated or any order of assessment or reassessment made under sub-section (1) has been annulled in appeal or any other legal

proceeding, then, notwithstanding anything contained in sub-section (1) or section 153, the assessment or reassessment relating to any assessment year which has abated under the second proviso to subsection (1), shall stand revived with effect from the date of receipt of the order of such annulment by the Commissioner. Therefore, the intention of the legislation seems to be that in case of search only the pending assessment/reassessment proceedings shall abate and the AO would assume the jurisdiction to assess or reassess the 'total income' for the entire six years period/block assessment period. The intention does not seem to be to re-open the completed/unabated assessments, unless any incriminating material is found with respect to concerned assessment year falling within last six years preceding the search. Therefore, on true interpretation of Section 153A of the Act, 1961, in case of a search under Section 132 or requisition under Section 132A and during the search any incriminating material is found, even in case of unabated/completed assessment, the AO would have the jurisdiction to assess or reassess the 'total income' taking into consideration the incriminating material collected during the search and other material which would include income declared in the returns, if any, furnished by the assessee as well as the undisclosed income. However, in case during the search no incriminating material is found, in case of completed/unabated assessment, the only remedy available to the Revenue would be to initiate the reassessment proceedings under sections 147/48 of the Act, subject to fulfilment of the conditions mentioned in sections 147/148, as in such a situation, the Revenue cannot be left with no remedy. Therefore, even in case of block assessment under section 153A and in case of unabated/completed assessment and in case no incriminating material is found during the search, the power of the Revenue to have the reassessment under sections 147/148 of the Act has to be saved, otherwise the Revenue would be left without remedy.

12. If the submission on behalf of the Revenue that in case of search even where no incriminating material is found during the course of search, even in case of unabated/completed assessment, the AO can assess or reassess the income/total income taking into consideration the other material is accepted, in that case, there will be two assessment orders, which shall not be permissible under the law. At the cost of repetition, it is observed that the assessment under Section 153A of the Act is linked with the search and requisition under Sections 132 and 132A of the Act. The object of Section 153A is to bring under tax the undisclosed income which is found during the course of search or pursuant to search or requisition. Therefore, only in a case where the undisclosed income is found on the basis of incriminating material, the AO would assume the jurisdiction to assess or reassess the total income for the entire six years block assessment period even in case of completed/unabated assessment. As

per the second proviso to Section 153A, only pending assessment/reassessment shall stand abated and the AO would assume the jurisdiction with respect to such abated assessments. It does not provide that all completed/unabated assessments shall abate. If the submission on behalf of the Revenue is accepted, in that case, second proviso to section 153A and subsection (2) of Section 153A would be redundant and/or rewriting the said provisions, which is not permissible under the law.

13. For the reasons stated hereinabove, we are in complete agreement with the view taken by the Delhi High Court in the case of Kabul Chawla (supra) and the Gujarat High Court in the case of Saumya Construction (supra) and the decisions of the other High Courts taking the view that no addition can be made in respect of the completed assessments in absence of any incriminating material.

14. In view of the above and for the reasons stated above, it is concluded as under: i) that in case of search under Section 132 or requisition under Section 132A, the AO assumes the jurisdiction for block assessment under section 153A;

ii) all pending assessments/reassessments shall stand abated;

iii) in case any incriminating material is found/unearthed, even, in case of unabated/completed assessments, the AO would assume the jurisdiction to assess or reassess the 'total income' taking into consideration the incriminating material unearthed during the search and the other material available with the AO including the income declared in the returns; and

iv) in case no incriminating material is unearthed during the search, the AO cannot assess or reassess taking into consideration the other material in respect of completed assessments/unabated assessments. Meaning thereby, in respect of completed/unabated assessments, no addition can be made by the AO in absence of any incriminating material found during the course of search under Section 132 or requisition under Section 132A of the Act, 1961. However, the completed/unabated assessments can be re-opened by the AO in exercise of powers under Sections 147/148 of the Act, subject to fulfilment of the conditions as envisaged/mentioned under sections 147/148 of the Act and those powers are saved. The question involved in the present set of appeals and review petition is answered accordingly in terms of the above and the appeals and review petition preferred by the Revenue are hereby dismissed. No costs.

3.11 Thus the Hon'ble Supreme Court has upheld the view taken by the Hon'ble Delhi High Court in case of CIT vs. Kabul Chawla (Supra) as well as Hon'ble Jurisdictional High Court in case of Pr. CIT vs. Gahoi & Oil Mills

and Ors. and in the case of Pr. CIT vs. M/s Great Galleon Ventures ltd (supra). The Ld. CIT(A) has decided this issue in para 3.2.2 as under:

"3.2.2 *I have considered the facts of the case, plea raised by the appellant and findings of the ld AO. On perusal of the assessment order, it has been found that the AO has not made reference of any incriminating document except the ledger account furnished by Shri Naveen Jain during statement recorded on oath. The impunged ledger account furnished by Shri Naveen Jain has also been reproduced by the ld AO on page no 10 of the assessment order. The transactions mentioned in the said ledger accounts of M/s East West Finvest India Limited, M/s Purvi Finvest Ltd, M/s Jay Jyoti India Pvt. Ltd., M/s Jayant Security and Finance Ltd. (Mumbai & Indore) are fully recorded in books of the appellant. These are the part of books of account of the appellant. Such document cannot be termed as incriminating document. Thus, the statement of Shri Navin Jain recorded u/s.132(4) of the Act cannot be treated as recorded on the basis of incriminating document seized as a result of search and seizure proceedings. Such statement forming basis of addition that too in absence of supporting incriminating document, cannot be constitute information found as a result of search and seizure proceedings. There are various judicial pronouncements wherein it has been held that no addition can be made in non-abated assessments in absence of incriminating material. The two moot question which arises here are that (i) whether the year are abated or non-abated assessment years and (ii) whether the ld AO can made addition in search assessment proceedings without having any incriminating material on record and that too in non-abated assessment years. In the instant case, search and seizure operations u/s 132 of the Act was carried out on 12.07.2016 and return of income for AY 2011-12 was filed on 23.09.2011 and time limit for issuing notice u/s 143(2) expired on 30.09.2012, return of income for AY 2012-13 was filed on 25.09.2012 and time limit for issuing notice u/s 143(2) expired on 30.09.2013, return of income for AY 2013-14 was filed on 29.09.2013 and time limit for issuing notice u/s 143(2) expired on 30.09.2014, return of income for AY 2014-15 was filed on 30.11.2014 and time limit for issuing notice u/s 143(2) expired on 30.09.2015, return of income for AY 2015-16 was filed on 30.09.2015 and time limit for issuing notice u/s 143(2) expired on 30.09.2016. Therefore, no assessment or reassessment proceedings were pending as on date of search and therefore, AYs 2011-12 to 2015-16 are non-abated assessment years or completed assessment years. However, the (ii) issue has already been dealt with in depth by Hon'ble Apex court, various High courts and tribunal and it is now settled legal pronouncement that no addition can be made in absence of any incriminating material in non-abated assessment year. This proposition find support from the decision of Hon'ble Apex court in the case of* ***Meeta Gutgutia*** *(2018) 96 taxmann.com 468 (SC) dt.2-7-18 affirming the decision of Hon'ble Delhi High Court in the same case reported in 82*

taxmann.com 287. Hon'ble Delhi High Court alongwith various judgments followed the legal view taken by the Hon'ble Court in the case of ***Kabul Chawla*** *(2016) 380 ITR 573 (Del HC). Hon'ble ITAT Indore in the case of* ***Omprakash Gupta*** *(2019) IT(SS)A Nos.277 to 281/Ind/2017 (Indore-Trib) dt.28-2-19, after following judgments in the case of Meeta Gututia (supra), Kabul Chawala (supra) and many others judgments held that:*

13. In the case of Commissioner of Income Tax (Central)-3 Kabul Chawla (2015) 61 Taxman.com 412 (Del.), the Hon'ble Delhi High Court has considered the scope of section 132 of the Act and 153A(1) observed as under:

i. Once a search takes place under Section 132 of the Act, notice under Section 153 A(1) will have to be mandatorily issued to the person searched requiring him to file returns for six AYS immediately preceding the previous year relevant to the AY in which the search takes place.

ii. Assessments and reassessments pending on the date of the search shall abate. The total income for such AY's will have to be computed by the AOs as a fresh exercise.

iii. The AO will exercise normal assessment powers in respect of the six years previous to the relevant AY in which the search takes place. The AO has the power to assess and reassess the total income of the aforementioned six years in separate assessment orders for each of the six years. In other words there will be only one assessment order in respect of each of the six AYs "in which both the disclosed and the undisclosed income would be brought to tax".

iv. Although Section 153 A does not say that additions should be strictly made on the basis of evidence found in the course of the search, or other post-search material or information available with the AO which can be related to the evidence found, it does not mean that the assessment "can be arbitrary or made without any relevance or nexus with the seized material. Obviously an assessment has to be made under this Section only on the basis of seized material."

v. In absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made. The word 'assess' in Section 153 A is relatable to abated proceedings (i.e. those pending on the date of search) and the word 'reassess' to completed assessment proceedings.

vi. Insofar as pending assessments are concerned, the jurisdiction to make the original assessment and the assessment under Section 153A merges into one. Only one assessment shall be made separately for each AY on the basis of the findings of the search and any other material existing or brought on the record of the AO.

vii. Completed assessments can be interfered with by the AO while making the assessment under Section 153 A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment.

14. From the above decision, it is very clear that in respect of concluded assessments additions cannot made without incriminating material.

15. The Hon'ble Delhi High Court in the case of PCIT Vs. Meeta Gutgutia 395 ITR 296 (Delhi) has held that it was only if during the course of the search u/s 132 of the Act incriminating material justifying the reopening of the assessment years for 6 previous years was found that invocation of section 153A of the Act qua each of the assessment year would justify.

16. In the case of Principal CIT Vs. Soumya Constructions 387 ITR 529 (Guj.) the Hon'ble Gujarat High Court has observed that the addition was based on statement of the third person and not based on any incriminating material found during the course of search, therefore the addition deleted by the Tribunal was upheld.

17. In the case of PCIT Vs. Lata Jain 384 ITR 543 (Del) (supra), the Hon'ble Delhi High Court has held that the Tribunal was right in holding that there had to be incriminating material recovered during the course of search qua the assessee in each year for the purpose of framing an assessment u/s 153A of the Act.

18. From the above all the decisions, it is very clear that the A.O. to make an addition u/s 153A of the Act and there must be incriminating material available to the A.O. during the course of the search. incriminating material, the Unless there is an concluded/non abated assessments cannot be disturbed again u/s 153A of the Act.

.....

22. In the interest of justice, the decision of the Hon'ble Supreme Court in the case of Vegetable Products (supra) has to be followed. Therefore, we respectively following the decision of Hon'ble Delhi High Court in the case of Kabul Chawla (supra), Hon'ble Bombay High Court in the case Corporation (supra) of Continental Warehousing and also Hon'ble Gujarat High Court in the case of PCIT Vs. Meeta Gutgutia (supra), we hold that no addition can be made in respect of concluded assessments u/s 153A of the Act unless there is any incriminating material found during the course of search. We would like to make it clear that where the assessment is completed u/s 143(1) or 143(3) of the Act unless A.O. has a time to issue notice u/s 143(2) of the Act, A.O. cannot make an addition u/s 153A of the

Act, unless there is an incriminating material found during the course of the search.

23. The coordinate bench of the Tribunal in the case of Sainath Colonisers Vs. ACIT (Central)-II Bhopal in IT (SS)A Nos.289 to 291/Ind/2017 dated 28.2.2019 has considered the similar issue and has held that if there is no incriminating material found during the course of search and the time limit for issue of notice u/s 143(2) of the Act expires, no addition can be made u/s 153A of the Act. For the sake of convenience relevant portion of the order is extracted hereunder:

"8. We observe that the assessee has filed regular return of income u/s 139 of the Act for Assessment Year 2008-09 to 2010-11 on 30.9.08, 31.3.2010 and 12.10.2010 after claiming deduction u/s 80IB(10) at Rs.8,92,452/- Rs.2,66,948/- and Rs.2,44,417/ respectively. The time limit for issuance of notices u/s 143(2) of the Act stood expired in relation to the assessment year 2008-09 to 2010-11 much before the date of conducting the search i.e. 29.1.2014 and therefore these three assessment years falls under the category of unabated/non abated assessments. Now in the given facts Ld. Counsel for the assessee has relied few judgments and Ld. Departmental Representative has relied to few judgments in its favour. However, the Hon'ble Apex Court in the case of CIT V/s Vegetable Products Ltd 88 ITR 192 has "held that if two reasonable construction of a taxing provisions are possible, then that construction which favours the assessee must be adopted". In the light of above judgment of Hon'ble Apex Court we have gone through the judgments referred and relied by both the parties and are inclined to follow the view taken by Hon ble courts on the issue in question before us favouring the assessee.

9. The Hon'ble High Court of Gujarat in the case of PCIT Vs. Desai Construction (supra) confirmed the view taken by the Tribunal upholding the contention of the assessee that as no incriminating material was found during the course of search which could have enabled the Assessing Officer to re-examine its claim for deduction u/s 801B which was part of the assessment prior to the search and such assessment unabated. Bombay in the case of Continental Hon'ble High Court of Warehousing Corporation and All Cargo Global Logistics Ltd (Supra) confirmed the view taken by the Special Bench of IT.A.T. Mumbai Bench decided in favour of assessee dismissing the revenue's appeal holding that there was no incriminating material found during the course of search, the Tribunal was right in holding the power conferred u/s 153A being not expected to be exercised routinely, should be exercised if the search revealed any incriminating material. If that was not found then in relation to the second phase of three years, there was no warrant for making an order within the meaning of this provision".

10. Similar view was also taken by the Hon'ble High Court of Delhi in the case of Kabul Chawla (2015) 61 taxmann 412.

11. We therefore in the given facts and circumstances of the case and respectfully following the judgments referred and relied by the Ld. Counsel for the assessee are of the considered view that no addition/disallowance was called for Assessment Year 2008-09 to 2010-11 as no incriminating material was found during the course of search at the premises of the assessee as the time limit of issuance of notice u/s 143(2) of the Act stood expired much before the date of conducting search u/s 132 of the Act. Accordingly all the three appeals of the assessee are allowed."

24. In so far as the arguments of the Ld. D.R. in respect of following the ratio of the Hon'ble Supreme Court in the case of Vegetable Products (supra), the Ld. D.R. by relying on the decision in the case of CCV Dilip Kumar (supra) has submitted that the ratio laid down in the case of Vegetable Products (supra) cannot be applied. We find that in the case of CCV Dilip Kumar (supra) has considered the exemption provisions and held that exemption provisions has to be considered strictly and in a case of ambiguity view which favours the revenue must be adopted. Therefore, the above decision relied by the Ld. D.R. has no application to the ratio laid down by the Hon'ble Supreme Court in the case of Vegetable Products (supra). Therefore, argument of the Ld. D.R. is rejected.

25. In view of the above, the order passed by Ld. CIT(A) is reversed and the appeals filed by the assessee are allowed.

In the light of above judicial pronouncement of Hon'ble ITAT, the ld AO was not justified in making additions in non-abated assessment year i.e. AYs 2011-12 to 2015-16 and that too in absence of any incriminating material. Further, in the assessment order the ld AO has not correlated the additions made with the incriminating seized material. Therefore, the additions made in the AYs 2011-12 to 2015-16 on various accounts are not sustainable. Therefore, appeal on these grounds is ***allowed.***

3.12 The Ld. CIT(A) has recorded the fact that the AO has not made reference to any incriminating material and documents except ledger account furnished by Shri Naveen Jain during the statement recorded u/s 132(4). Further the assessment for A.Ys.2012-13 & 2014-15 were not pending as on the date of search and therefore, the assessment for these two assessment years were not got abated due to the search and seizure action carried out on 12th July 2016. The Ld. CIT(A) has referred and relied upon various judgments including the judgment of Hon'ble Delhi High Court in case of CIT vs. Kabul Chawla (Supra) and decision of this tribunal in case of Omprakash Gupta IT(SS)A Nos.277 to 281/Ind/2017 dated 28.02.2019. The view taken by the Hon'ble Delhi High Court in case

of Kabul Chawla (supra) as well as this Tribunal in case of Omprakash Gupta(supra) has not been confirmed by the Hon'ble Supreme Court in case of Pr. CIT vs. Abhisar Buildwell Pvt. Ltd. (supra), therefore, we do not find any error or illegality in the impugned order of the Ld. CIT(A) qua this issue."

17.3 Further the issue on the merits of addition was also considered by this Tribunal in case of *ACIT vs. Shri Krishna Devcon Ltd.*(supra) in para no.4 to 4.10 already reproduced in forgoing part of this order. Accordingly in view of earlier order of the tribunal in case of ACIT vs. Krishna Devcon Ltd. (supra) wherein the Tribunal has decided this issue by following various judgments including the judgment of Hon'ble Supreme Court in case of *Pr. CIT vs. Abhisar Buildwell Pvt. ltd. (supra)* as well as in view of finding on the merits of addition for A.Y.2010-11 we do not find any error or illegality in the impugned order of CIT(A) same is upheld.

IT(SS)ANo. 07/Ind/2022 in Case of M.P. Agro Nutri Food Ltd. for A.Y.2011-12

18. This appeal by the revenue is directed against order dated 15.11.2021 of CIT(A) for A.Y.2011-12. The revenue has raised following grounds of appeal:

"1.Whether on the facts and in the circumstances of the case and in law, Ld. CIT(A) has erred in accepting additional evidence u/s 46A in complete disregard to the remand report submitted by AO which was received in the 0/0 CIT(A) on 16.09.2020. The CIT(A) has not discussed the issues raised in remand report in his order.

2.Whether on the facts and in the circumstances of the case and in law, Ld. CIT(A) has erred in accepting additional evidence

u/s 46A even through conditions mentioned in clauses (a) - (d) of 46ACD were not satisfied.

3.Whether on the facts and in the circumstances of the case and in law, Ld. CIT(A) has erred in accepting retraction made by the assessee made after more than a year as genuine eventhough there was strong evidence on record about accommodation entries provided by companies controlled by Sharad Darak, a known entry provider; and whether CIT(A) has erred in accepting the retraction of assessee as genuine ignoring the decision of Hon'ble SC in the case of Bannalal Jat constructions Pvt Ltd Vs ACIT [2019] 106 Taxmann.com 128(SC).

4.Whether on the facts and in the circumstances of the case and in law, Ld. CIT(A) has erred in holding that the assessee has discharged its onus of cash credits u / s 68 of IT Act especially when it was on record that accommodation entries were received from the companies controlled by Sharad Darak, a known entry provider.

5.Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition after finding it non-abated assessment year, while the addition was made on the basis of incriminating document found and statement recorded u/s 132(4) during the course of search and seizure proceedings.

6.Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting addition of Rs. 16500000/- made by the AO u/s 68 of IT Act, 1961 on account of bogus unsecured loans made by the AO.

7.Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs. 38,24,137/- made by the Assessing Officer on account of interest expense on bogus unsecured loans."

19. Ground No.1 & 2 are regarding acceptance of additional evidence by the CIT(A) in violation of provision of Rules 46A of

Income Tax Rules. Ld. DR has submitted that while passing impugned order the CIT(A) has accepted the additional evidence filed by the assessee incomplete disregard of the remand report submitted by the AO and therefore, the impugned order is liable to be set aside.

20. On the other hand, ld. AR has submitted that there is no additional evidence filed by the assessee and ground no.1 & 2 of the revenue's appeal and this issue raised in ground no.1 & 2 are not arising from the impugned order. He has referred to the impugned order of the CIT(A) and submitted that there is no mentioning of any additional evidence produced by the assessee before the CIT(A) and therefore, question of accepting the same does not arise.

21. We have careful perused impugned order of the CIT(A) and noted that there is no such fact recorded by the CIT(A) about the production of additional evidence by the assessee or acceptance of the same by the CIT(A). Therefore, ground no.1 & 2 of the revenue's appeal are not emanating from impugned order of the CIT(A) and liable to be dismissed being no-nest issue.

22. Ground no.3 to 7 are regarding the addition made by the AO u/s 68 of the Act on account of unsecured loans as well as on account of disallowing interest expenditure on those unsecured loans on protective basis.

23. We have heard Ld. DR as well as Ld. AR and considered the relevant material on record. The AO has made the addition in the

hands of the assessee company on protective basis as a substantive addition was made in the hands of Shri Ritesh Jain. The CIT(A) has deleted the addition in para 3.3.2 to 3.3.4 as under:

> *"3.3.2 I have duly considered the above and found that the Ld. AO has concluded that the above unsecured loans had been received from the Companies controlled by Shri Sharad Darak who is a well known accommodation entry provider of Indore. The Ld. AO on the basis of findings of past actions of the various officers held that Shri Sharad Darak runs dummy companies through which he provides entries to needy persons. The Ld. AO has also relied upon various judgments. On perusal of assessment order, it has been found that the Ld. AO has not made any independent inuiry to disprove the identity, creditworthiness, genuineness of transaction. The Ld. AO has also not enquired into the nature and source of unsecured loans. The Ld. AO has only given emphasis on some enquiries conducted in the past and given a general findings and made additions. No specific finding about the companies proving them bogus has been given in the assessment order. The Ld. AO has also relied upon the statement of Shri Narendra Jain and appellant which are not based upon any incriminating material. The appellant had also retracted the statement. The statements cannot be sole reason for the addition in the total income of the appellant. The appellant has filed ample information and documents to discharge its onus as envisaged in section 68 of the Act. It has been found that all loans had been received by M/s MP Agro Nutri Foods Limited and appellant from the companies under consideration through proper banking channel and M/s MP Agro Nutri Foods Limited and appellant has paid interest thereon after deducting TDS. Repayment of loans have been done and interest thereon has been paid and due TDS has also been made. All transactions are done through banking channel. No investigation has been conducted to discredit such information or documents. The position of Share Capital, reserve and surplus and cash and balances of these companies as per audited balance sheet is as under:*

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On perusal of the above, it is evident that the lender companies had substantial funds available with it to advance money to the appellant. The appellant has also filed necessary documents to prove its identity, creditworthiness of these companies and also filed bank statement reflecting the transactions. In my opinion, nothing in form of cogent evidences has been brought on record by the Id. AO in support of his findings. The ld. A.O should have acted on the details furnished by the appellant, but he did not do so. Hon'ble Delhi High Court in the case of Oasis Hospitalities P. Ltd. reported in 333 ITR 119(2011) has held as under:

"11. It is clear from the above that the initial burden is upon the assessee to explain the nature and source of the share application money received by the assessee. In order to discharge this burden, the assessee is required to prove : (a) Identity of shareholder; (b) Genuineness of transaction; and (c) Creditworthiness of shareholders.

12. In case the investor/shareholder is an individual, some documents will have to be filed or the said shareholder will have to be produced before the AO to prove his identity. If the creditor/subscriber is a company, then the details in the form of registered address or PAN identity, etc. can be furnished.

13. Genuineness of the transaction is to be demonstrated by showing that the assessee had, in fact, received money from the said shareholder and it came from the coffers from that very shareholder. The Division Bench held that when the money is received by cheque and is transmitted through banking or other indisputable channels, genuineness of transaction would be proved. Other documents showing the genuineness of transaction could be the copies of the shareholders register, share application forms, share transfer register, etc.

14. As far as creditworthiness or financial strength of the creditor/ subscriber is concerned, that can be proved by

producing the bank statements of the creditors/subscribers showing that it had sufficient balance in its accounts to enable it to subscribe to the share capital. This judgment further holds that once these documents are produced, the assessee would have satisfactorily discharged the onus cast upon him. Thereafter, it is for the AO to scrutinize the same and in case he nurtures any doubt about the veracity of these documents to probe the matter further. However, to discredit the documents produced by the assessee on the aforesaid aspects, there has to be some cogent reasons and materials for the AO and he cannot go into the realm of suspicion."

Considering the above decision, the appellant had discharged its onus by producing ample evidences. Without any investigation and cogent material, ld. AO treated the same as unexplained which is not sustainable in view of following judgments:

(i). Divine Leasing & Finane Ltd. (2008) 299 ITR 268 (Delhi). wherein it was held that:

"16. In this analysis, a distillation of the precedents yields the following propositions of law in the context of s. 68 of the IT Act. The assessee has to prima facie prove (1) the identity of the creditor/subscriber; (2) the genuineness of the transaction, namely, whether it has been transmitted through banking or other indisputable channels; (3) the creditworthiness or financial strength of the creditor/subscriber; (4) if relevant details of the address or PAN identity of the creditor/subscriber are furnished to the Department along with copies of the shareholders register, share application forms, share transfer register, etc. it would constitute acceptable proof or acceptable explanation by the assessee; (5) the Department would not be justified in drawing an adverse inference only because the creditor/subscriber fails or neglects to respond to its notices: (6) the onus would not stand discharged if the creditor/subscriber denies or repudiates the transaction set up by the assessee nor should the AO take such repudiation at face value and construe it, without more, against the assessee; (7) the AO is duty bound to investigate the creditworthiness of the creditor/

subscriber, the genuineness of the transaction and the veracity of the repudiation

(ii). CIT v. Kamdhenu Steel & Alloys Limited and Other (2014) 361 ITR 220(Delhi) wherein it is held that:

"38. Even in that instant case, it is projected by the Revenue that the Directorate of Income Tax (Investigation) had purportedly found such a racket of floating bogus companies with sole purpose of lending entries. But, it is unfortunate that all this exercise if going in vain as few more steps which should have been taken by the Revenue in order to find out causal connection between the case deposited in the bank accounts of the applicant banks and the assessee were not taken. It is necessary to link the assessee with the source when that link is missing, it is difficult to fasten the assessee with such a liability."

(iii). The decision of Hon'ble Apex Court in the case of NRA Iron & Steel Pvt. Ltd. (Arising out of SLP (Civil) No. 29855 of 2018) order dated 05.03.2019, the relevant paras of which are reproduced hereunder:

"9. The Judgments cited hold that the Assessing Officer ought to conduct an independent enquiry to verify the genuineness of the credit entries In the present case, the Assessing Officer made an independent and detailed enquiry, including survey of the so-called investor companies from Mumbai, Kolkata and Guwahati to verify the credit-worthiness of the parties, the source of funds invested, and the genuineness of the transactions. The field reports revealed that the share-holders were either non-existent, or lacked credit- worthiness."

11. The principles which emerge where sums of money are credited as Share Capital/Premium are:

i. The assessee is under a legal obligation to prove the genuineness of the transaction, the identity of the creditors, and credit-worthiness of the investors who should have the

financial capacity to make the investment in question, to the satisfaction of the AO, so as to discharge the primary onus

ii. The Assessing Officer is duty bound to investigate the credit-worthiness of the creditor/ subscriber, verify the identity of the subscribers, and ascertain whether the transaction is genuine, or these are bogus entries of name- lenders.

iii. If the enquiries and investigations reveal that the identity of the creditors to be dubious or doubtful, or lack credit-worthiness, then the genuineness of the transaction would not be established.In such a case, the assessee would not have discharged the primary onus contemplated by Section 68 of the Act. 12. In the present case, the A.O. had conducted detailed enquiry which revealed that:

iii. There was no material on record to prove, or even remotely suggest, that the share application money was received from independent legal entities. The survey revealed that some of the investor companies were non-existent, and had no office at the address mentioned by the assessee....."

iv. In view of the above judicial pronouncements, the AO is duty bound to investigate the issue once the assessee discharges its onus as per section 68 of the Act. Here, such efforts are absent. Further, the appellant has brought on record the decision of Hon'ble ITAT Indore in the case of Shri Pramod Kumar Sethi (ITA NO. 382 and 383/Ind/2014, dated 06.11.2018) wherein various companies of Sharad Darak Group held as genuine companies which also include East West Finvest India Ltd., K K Patel Finance Ltd., Puvi Finvest Ltd., Trimurthi Finvest Ltd. from whom the appellant has taken unsecured loan in the years under consideration. In another decision in the case of M/s. Radhishwari Developers Pvt. Ltd. (ITA No. 493/Ind/2018 dated 20.07.2021) Hon'ble ITAT Indore has held that M/s. Jayant Securities and Finance Ltd. is regularly assessed to tax for last many years and scrutiny proceedings u/s.143(3) of the Act were completed in this company. This company is regularly filing appeal before the judicial forums which show that this company is not a dummy

company. Considering the above findings of the Hon'ble ITAT, above companies cannot be declared as dummy company."

"3.3.3 In view of the above discussion, it is not justified to held the lender companies as dummy entities and the loans given to the appellant by these companies are non-genuine. Therefore, the additions made by the Id. AO are not sustainable.

3.3.4 In view of discussion made in para 3.2 to 3.3.3 above, addition of // Rs.1,65,00,000/- in A.Y. 2011-12 and Rs.1,00,00,000/- in A.Y. 2012-13 on account of unexplained cash credit u/s. 68 of the Act are hereby deleted."

23.1 We further note that while deciding the appeals in case of Shri Ritesh Jain for A.Y.2010-11 & 2011-12 we have consider this issue on the merits and deleted the addition made on substantive basis. Therefore, in view of our finding on this issue in case of Shri Ritesh Jain the protective additions made by the AO on account of unsecured loan as well as disallowance of interest would not survive. Accordingly we do not find any error or illegality in the impugned order of the CIT(A).

24. In the result, both appeals of the revenue in case of Ritesh Jain for Assessment Years 2010-11 and 2011-12 and appeal in case of M.P. Agro Nutri Foods Ltd. for A.Y. 2011-12 are dismissed and CO of the assessee in case of Ritesh Jain for A.Y.2010-11 is allowed

Order pronounced in the open court on 12 .01.2024.

Sd/-	**Sd/-**
(B.M. BIYANI)	**(VIJAY PAL RAO)**
Accountant Member	Judicial Member

Indore,_ 12.01.2024
Patel/Sr. PS

Copies to: *(1)* *The appellant*
(2) *The respondent*
(3) *CIT*
(4) *CIT(A)*
(5) *Departmental Representative*
(6) *Guard File*

By order

Sr. Private Secretary
Income Tax Appellate Tribunal
Indore Bench, Indore